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THE CONSTITUTIONALIZATION OF DEMOCRATIC POLITICS

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This is the Age of Democracy — and the time of terror.¹ In the last generation, more new democracies, all constitutional ones, have been forged than in any comparable period. In regions ranging from South Africa, to the states born in the collapse of the former Soviet Union, to Latin America in which countries have emerged from totalitarian periods, to Afghanistan and parts of the Middle East whose political future remains uncertain,² the renewed rise of democratic institutions has been a defining political development of the era. In this wave of democratization, the number of recognized democracies has remarkably doubled between 1985 and 2002.³ In addition, the unique arrangements of pooled sovereignty in

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¹ In a sweeping synthetic vision of European history over a series of books, the English historian Eric J. Hobsbawm characterized modern European history as moving from *THE AGE OF REVOLUTION: 1789–1848* (1962); to *THE AGE OF EMPIRE: 1875–1914* (1987); *THE AGE OF CAPITAL: 1848–1875* (1975); and *THE AGE OF EXTREMES: 1914–1991* (1994). The end of the Soviet Union surely marks a new era of still unknowable character.

² See generally *DEMOCRATIZATION IN THE MIDDLE EAST: EXPERIENCES, STRUGGLES, CHALLENGES* (Amin Saikal & Albrecht Schnabel eds., 2003) (describing degrees of democratization in the Middle East).

³ For an attempt to periodize the formation of democracies into three distinct eras, see generally, SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* 13–26 (1991). Huntington's first wave of democratization begins in the year 1828 with the extension of the franchise in the United States and continues until around 1926. *Id.* at 26. During this period, some 29 democracies came into being. *Id.* at 17. The reversal of the first wave began in 1922 with the accession of Mussolini to power in Italy and lasted until about 1942, when the number of democracies in the world had been reduced to 12. See *id.* at 16–18, 26. Huntington's second wave begins during World War II and reaches its peak in the early 1960s when the number of democracies had risen to 36. See *id.* at 18–19, 36. The reversal of the second wave between approximately 1958 and

a developing European Union have spawned novel questions about the possibilities and limits of the institutional forms for self-governance.⁴ As the Nobel Prize winning economist Amartya Sen asserts, or perhaps hopes, “[i]n the domain of political ideas perhaps the most important change to occur [in the twentieth century] has been the recognition of democracy as an acceptable form of government that can serve any nation — whether in Europe or America, or in Asia or Africa.”⁵

Constructing democratic institutions in these diverse political, cultural, religious, and material contexts requires confronting anew the enduring questions in democratic institutional design and theory. The design of fair representative institutions in societies fragmented by potentially incendiary group identities; the search for institutional solutions that increase prospects for political stability; the kinds of political parties around which democratic politics ought to be organized; the mechanisms of political competition by which those in power can effectively be held accountable; the capacity of democratic institutions to be revised as new disaffections arise or other circumstances change — all these and similar foundational questions in democratic institutional design have been pried open once again for reexamination.

At the same time, the last generation has also witnessed a dramatic, but largely unappreciated, transformation in constitutional law. This transformation is most acute in the United States Supreme Court, but it is visible in other constitutional courts as well. I call this transformation “the constitutionalization of democratic politics.” Over the last generation, issues concerning the design of democratic institutions and the central processes of democracy have increasingly become questions of constitutional law

1975 brought the number back down to 30. *See id.* at 16, 19 – 21, 26. In Huntington’s analysis, a third wave of democratization began in 1974 in Portugal and spread through southern Europe during the 1970s, Latin America and Asia during the late 1970s and early 1980s, and eastern Europe beginning in 1988. *See id.* at 21 – 24. More than 30 new democracies have been added in this recent period. *See id.* at 26. For a description of global trends in democracy, see MONTY G. MARSHALL & TED ROBERT GURR, PEACE AND CONFLICT 2003: A GLOBAL SURVEY OF ARMED CONFLICTS, SELF-DETERMINATION MOVEMENTS, AND DEMOCRACY 17–25 (2003), available at <http://www.cidem.umd.edu/inser/PC03web.pdf>. Some scholars have taken issue with Huntington’s periodization and argued that it rests on a poorly specified definition of democracy and fails adequately to take into account changes in the number of independent countries. *See* Renske Doorenspleet, *Reassessing the Three Waves of Democratization*, 52 WORLD POL. 384 (2000). After refinements in the data analysis to take these considerations into account, Doorenspleet concludes that only Huntington’s “third wave” is accurately supported by the data.

⁴ *See generally* Joshua Cohen & Charles F. Sabel, *Sovereignty and Solidarity: EU and U.S., in GOVERNING WORK AND WELFARE IN A NEW ECONOMY: EUROPEAN AND AMERICAN EXPERIMENTS* 345 (Jonathan Zeitlin & David Trubek eds. 2003).

⁵ Amartya Sen, *What’s the Point of Democracy?*, AMERICAN ACADEMY OF ARTS & SCIENCES BULLETIN, Spring 2004, at 8, 8, available at <http://www.amacad.org/publications/bulletin/spring2004/sen.pdf>. *See also* Amartya Sen, *Democracy and its Global Roots*, THE NEW REPUBLIC, Oct. 6, 2003, at 28 (arguing that democracy is not only a western idea and that many other nations have contributed to its emergence and development).

throughout the world.⁶ In American constitutional law, political parties now have broader associational autonomy rights than ever before.⁷ Constitutional law also now shapes the contours of fair political representation and political equality, as well as the role of group identities in the design of democratic institutions.⁸ The financing of all elections, federal and state, and the role of corporations, unions, and parties in elections are now substantially constrained by constitutional law.⁹ Supreme Court decisions have transformed the nature of direct democracy.¹⁰ States can no longer structure direct democracy in line with their own vision of participatory democracy; decisions of the Court have helped turn direct democracy into the modern paid signature-gathering industry.¹¹ Term limits or other state-imposed qualifications for officeholding on members of Congress are unconstitutional;¹² nor can states use ballot notations to inform voters of positions that candidates for Congress take on specific issues.¹³ Constitutional law has also altered the longstanding nature of judicial elections.¹⁴ Similarly, issues of voting technology and vote counting procedures might now be matters of constitutional law.¹⁵ And of course, constitutional law governs the resolution of disputed presidential and other elections.¹⁶

⁶ See Ran Hirschl, *Resituating the Judicialization of Politics: Bush v. Gore as a Global Trend*, 15 CAN. J. L. & JURIS. 191, 217 (2002) (“[I]t would be more accurate to consider the election judgment as symptomatic of a global trend whereby national high courts and supranational tribunals have become crucial political decision makers. As we have seen, *Bush v. Gore* — a quintessential example of judicialized politics — illustrates merely one of four emerging areas of judicialization of ‘mega’ politics worldwide.”). See also RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 169–211 (2004) (chronicling emerging constitutional oversight of design of democratic institutions and processes).

⁷ See *Cal. Democratic Party v. Jones*, 530 U.S. 567, 569–71, 586 (2000).

⁸ See *Shaw v. Reno*, 509 U.S. 630, 642, 649 (1993).

⁹ See *McConnell v. FEC*, 124 S. Ct. 619, 643, 686, 712, 719 (2003) (upholding significant portions of the Bipartisan Campaign Reform Act of 2002); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) (Colorado II) (upholding spending limits on coordinated expenditures); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 381–82 (2000) (applying *Buckley* to state campaign contribution limits); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 608 (1996) (Colorado I) (holding that the First Amendment precluded limitations on political party independent election expenditures).

¹⁰ See *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 186–87 (1999) (striking down state requirement that signature gatherers be registered voters); *Meyer v. Grant*, 486 U.S. 414, 415–16 (1988) (striking down state prohibition on the use of paid signature gatherers in the initiative process).

¹¹ See RICHARD J. ELLIS, *DEMOCRATIC DELUSIONS: THE INITIATIVE PROCESS IN AMERICA* 47–49, 62–76 (2002) (describing effects of Courts’ decisions on the initiative process).

¹² See *U.S. Term Limits Inc. v. Thornton*, 514 U.S. 779, 782–83 (1995).

¹³ See *Cook v. Gralike*, 531 U.S. 510, 513–17, 527 (2001).

¹⁴ See *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002) (“The Minnesota Supreme Court’s canon of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violates the First Amendment.”).

¹⁵ See *Bush v. Gore*, 531 U.S. 98, 100–05 (2000).

¹⁶ *Id.* at 100–03.

Even when the Court has rejected particular claims, constitutional law is credibly invoked, and generates divided Court decisions, over other central aspects of elections, governance, and politics. The Court has been in conflict concerning the role of third parties in American politics;¹⁷ the place of write-in candidacies;¹⁸ the structure of campaign debates;¹⁹ and the role of partisanship in the design of election districts.²⁰ Taken as a whole, the stakes for the practice of democracy, and the role of constitutional law, are dramatic.

The constitutional courts of other countries, including those in new constitutional democracies, show similar if less developed inclinations. In Ireland, political equality, as construed by the Irish Supreme Court, now precludes the government from seeking to influence voters on proposed constitutional amendments during referendum campaigns — in this particular case, on divorce laws, an explosive topic in Ireland.²¹ Australia's High Court, despite not operating under a bill of rights, nonetheless managed to infer from the governance structures in the constitution that federal legislation banning paid broadcast advertising during election campaigns was unconstitutional.²² Constitutional courts or high courts in Spain,²³

¹⁷ See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 353 – 54, 370, 382 (1997).

¹⁸ See *Burdick v. Takushi*, 504 U.S. 428, 429 – 30, 442 (1992).

¹⁹ See *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 668 – 69, 683 (1998).

²⁰ See *Vieth v. Jubelirer*, 124 S. Ct. 1769, 1772 –73, 1799, 1815, 1822 (2004).

²¹ See *McKenna v. An Taoiseach (No. 2)* [1995] 2 I.R. 10, 42 (holding that “[t]he use by the Government of public funds to fund a campaign designed to influence the voters in favour of a ‘Yes’ vote is an interference with the democratic process and the constitutional process for the amendment of the Constitution and infringes the concept of equality which is fundamental to the democratic nature of the State.”). *But see Hanafin v. Minister for the Environment*, [1996] 2 I.R. 321 (upholding results of the divorce referendum despite the government’s “constitutional wrong” in spending public funds to advocate a position, since such a wrong is not an “electoral wrongdoing”); *Coughlan v. Broadcasting Complaints Commission*, [2000] 3 I.R. 1 (holding that state-owned media company had acted unconstitutionally when it devoted more time to supporters than opponents of divorce measure). In response to these decisions, Ireland established the Referendum Commission, an independent body responsible for disseminating information regarding referenda to amend the Constitution. See Editorial, *Preparing for Fair Debate*, IRISH TIMES, Jan. 28, 1998, at 17, 1998 WL 20484318. But there have been many calls to overturn *McKenna*, given views that the Referendum Commission has been ineffective, as well as the fact that Ireland has put several divisive social issues, such as abortion, to popular referenda. See *Move Under Way to Undermine Sound Principles Behind McKenna Judgment*, IRISH TIMES, July 2, 1999, at 16, 1999 WL 20484318.

²² *Australian Capital Television Pty., Ltd. v. Commonwealth*, (1992) 177 C.L.R. 106 (Austl.); see also *Nationwide News Party Ltd. v. Wills* (1992) 177 C.L.R. 1, 48 (Austl.) (holding that “[f]reedom of public discussion of government (including the institutions and agencies of government) is not merely a desirable political privilege; it is inherent in the idea of a representative democracy”).

²³ Spain passed the Law of Political Parties with the support of 95% of the Congress on June 4, 2002. See Katherine A. Sawyer, Comment, *Rejection of Weimarian Politics or Betrayal of Democracy?: Spain’s Proscription of Batasuna Under the European Convention on Human Rights*, 52 AM. U. L. REV. 1531, 1543 (2003). See *Ley Orgánica 6/2002, de 27 de junio, de Partidos Políticos*, (B.O.E., 2002, 12756) (providing procedures to dissolve a political party that fails to respect democratic principles and human rights), available at <http://civil.udg.es/normacivil/estatl/persona/pj/L6-02.htm>. See also

Turkey,²⁴ India,²⁵ Israel,²⁶ and the European Court of Human Rights have been asked to resolve whether the state can ban certain political parties, despite European constitutions that, unlike the Constitution of the United States, expressly guarantee the rights of political parties. In Canada, the Supreme Court of Canada addressed in advance, for the first time in a democratic country, the legal terms on which a democratic polity could dissolve itself.²⁷ Taking on the other side of this question, the German Federal Constitutional Court, faced with the claim that Germany's entry into the Maastricht agreement diluted the individual right to vote of German citizens, rejected the claim — but asserted its power to determine whether future German entry into supranational political structures did indeed violate the individual right to vote of German citizens.²⁸ And the South Afri-

S.T.C., Mar. 12, 2003 (48/2003), <http://www.tribunalconstitucional.es/JC.htm> (upholding the constitutionality of the law).

²⁴ Turkey attempted to ban the People's Labour Party on the grounds that it sought to divide the Turkish nation in two, with Turks on one side and Kurds on the other, with the aim of establishing separate States, and on the grounds that the party sought to destroy national and territorial integrity. *Yazar v. Turkey*, 2002 – II Eur. Ct. H.R. 397, 399, 402. The European Court held that although the People's Labour Party had severely criticized certain actions of the Turkish armed forces in its campaign against pro-Kurdish terrorist organizations, such comments did not constitute evidence that the party was equated with the terrorist groups. *See id.* at 410. Consequently, it overturned the Turkish Courts ruling as violative of Article 11 of the European Convention on Human Rights. *See id.* at 414 – 15. Turkey's ban of the Refah Partisi (The Welfare Party), however, was upheld by the European Court of Human Rights. *Refah Partisi (Welfare Party) v. Turkey*, 37 Eur. H.R. Rep. 1 (2003). The Turkish government charged that the party was a center of activities contrary to the principles of secularism. *Id.* at 63. At the time, the party was the largest party in Parliament and was advocating that each religious community in Turkey should follow its own law, with Islamic law applying exclusively to the Muslim community. *Id.* Party leaders also made reference to violent means of achieving their goals. *See id.* at 64. Examining all the evidence, the European Court of Human Rights upheld the ban of the Welfare Party. *See id.* at 92. The European Court of Human Rights did so despite having recently overturned Turkey's attempt to ban the United Communist Political Party. *See United Communist Party v. Turkey*, 1998–I Eur. Ct. H.R. 1, 38–39 (holding that the Turkish Constitutional Court's ban of the party violated Article 11 of the Convention as the party was merely seeking to debate a controversial national issue). The European Court of Human Rights concluded that Turkey's ban on the Welfare Party was necessary in a democratic society, the standard under Article II of the Convention. *Refah*, [XX] Eur. Ct. H.R. at 76, 91.

²⁵ The Indian Supreme Court upheld the Electoral Commission's disqualification of a victorious Hindu politician on the ground that he had incited ethnic animosity during his campaign. *See Prabhoo v. Kunte*, 1996 1 S.C.C. 130 (upholding the decision of the Electoral Commission disqualifying a victorious Hindu nationalist politician for inciting ethnic animosity during his campaign).

²⁶ The Israeli Central Elections Committee barred two candidates and a party from running in national elections, on the ground that they incited racism, rejected the principles that Israel was a democratic and Jewish state, and supported terrorism against Israel. *See Dan Izenberg, High Court overturns CEC disqualifications of Tibi, Bishara*, JERUSALEM POST, Jan. 10, 2003, at 01A. The Israeli High Court of Justice overturned this ban. *See id.*

²⁷ Reference re Secession of Quebec, [1998] 2 S.C.R. 217; *see also* Re: Resolution to Amend the Constitution, [1981] 1 S.C.R. 753; Re: Objection by Quebec to Resolution to Amend the Constitution, [1982] 2 S.C.R. 793; Attorney General of Quebec v. Quebec Association of Protestant School Boards, [1984] 2 S.C.R. 66.

²⁸ 89 BVerfGE 155 (1993). An edited version of the decision appears in D. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 182–86 (2nd ed.

can Constitutional Court, in one of the most unique and politically significant roles yet, became a central institutional actor in the emergence of democracy by managing the transition from an intermediate South African constitution to a permanent one.²⁹ These are but a few instances of the extent to which issues concerning the foundations of democratic practice are becoming, in courts throughout the world, issues of constitutional adjudication.

This judicial constitutionalization of democratic politics is among the most intriguing developments in constitutional law over the last generation. Nor in the United States Supreme Court is this development merely the continuing waves coming ashore from the sea-change that was *Baker v. Carr*.³⁰ For, as we shall see, the justifications for Court intervention and the nature of the issues now subject to constitutional oversight have changed markedly since *Baker* first opened the field of democracy to judicial oversight.³¹

This Term of the Supreme Court was as momentous as any in at least a decade. And issues concerning democratic governance structures continued to be among the most important the Court confronted. The Term began with a dramatic theatrical display of the now central role of constitutional law in structuring democracy. With the financing of every federal election in the country on the line, the Court convened an extraordinary special hearing, the first since the Nixon tapes case in 1974,³² to hear four hours of oral argument on the constitutionality of the Bipartisan Campaign Finance Reform Act of 2002 (BCRA, known as the McCain-Feingold law). Later in the Term, as the ramifications of the once-a-decade census and redistricting reached the Court, the design of every local, state, and federal election district in the country was potentially at issue. For the first time in nearly twenty years, the Court chose to confront whether the Constitution constrains the uniquely American practice of self-interested legislative redistricting. And in a decision that prompted more attention than all but a handful of the Court's cases, a lower court postponed an internationally visible election, California's gubernatorial recall, based on the risk of purported constitutional violations that would become meaningful, if ever,

1997). The Federal Constitutional Court has become a forum in recent decades for resolving generalized controversies over democratic processes previously considered central issues of political organization. See, e.g., *The National Unity Election Case*, BcerfGE 82, 322 (addressing post-unification merger of electoral systems of former East and West Germany).

²⁹ For a sophisticated account of this process, including the Court's role, see HEINZ KLUG, *CONSTITUTING DEMOCRACY: LAW GLOBALISM, AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION* 114–16 (2000). See also Samuel Issacharoff, *Constitutionalizing Democracy in Fractured Societies* 82 TEX. L. REV. 1861, 1863–65, 1870–83 (2004) (analyzing the emerging role of courts in "securing legitimacy for the exercise of political power in fractured societies").

³⁰ 369 U.S. 186 (1962).

³¹ See *id.* at 187–95.

³² *United States v. Nixon*, 418 U.S. 683 (1974).

only after the election had been run (an injunction the en banc Court of Appeals quickly overturned).³³ The year confirmed that hardly any issue concerning the institutions of governance or the conduct of elections is outside the reach of contemporary constitutional law.³⁴

Other major decisions of the Term did not directly involve structures of governance, yet addressed central aspects of democracy. Carving out a narrow exception to its federalism jurisprudence, a 5–4 majority held that Congress had the power to force states to modify their courthouses to make them accessible to the disabled.³⁵ Legally cast as upholding Congress’s unique power to enforce due process rights, even against state governments, the decision might also be viewed as affirming the expressive dimensions of democratic citizenship: equal access to the courthouse, like equal access to the ballot box, is virtually constitutive of the very idea of citizenship (an intriguing question: how much did striking vivid imagery, of the disabled crawling up courthouse steps, of the degradation at Abu Ghraib, influence decisions this Term?). Perhaps recognizing its earlier political naiveté about the likely use of litigation as an instrument of partisan politics, a solid majority of the Court in *Cheney v. District Court*³⁶ took back some of the ground it had given away in *Clinton v. Jones*;³⁷ lower courts were instructed to provide greater protection to internal executive branch deliberations against litigation, but to permit legitimate legal challenges to go forward.³⁸ This, too, will alter the means and forums in which politics is contested.

The Court also began the construction of the legal framework for dealing with terrorism.³⁹ Weaving the issues of democratic process and terrorism together into passages that captured the dominant issues of this Term, Justice Stevens wrote that “the method of selecting the people’s rulers and their successors” and “the character of the constraints imposed on the Executive by the rule of law”⁴⁰ were the two issues that defined “the essence

³³ See *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 882, 888 (2003), *rev’d en banc*, 344 F.3d 914 (2003) (per curiam).

³⁴ Between 1991 and 2000, 6.3% of the Court’s written opinions on average each year involved election law issues, a higher percentage than ever before. The data are summarized in RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE 3* (2003). The decade of the 1960s when the Court first held that claims involving “political rights” would be justiciable, averaged 6.2% election law decisions a year, nearly the same as the last decade, but the figure dropped off during the intervening two decades to 5.6% in the 1970s and then 3.2% in the 1980s.

³⁵ *Tennessee v. Lane*, 124 S. Ct. 1978, 1982–83, 1994 (2004).

³⁶ *Cheney v. District Court*, 124 S. Ct. 2576 (2004).

³⁷ 520 U.S. 681 (1997).

³⁸ See *Cheney*, 124 S. Ct. at 2593.

³⁹ See, e.g., *Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2715–17, 2727 (2004); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2639–52 (2004); *Rasul v. Bush*, 124 S. Ct. 2686, 2690, 2698 (2004).

⁴⁰ *Padilla*, 124 S. Ct. at 2735 (Stevens, J., dissenting).

of a free society.”⁴¹ From the perspective of democratic politics, the terrorism cases arose against a disappointing backdrop. The questions posed are novel, the need to work out appropriate institutional structures urgent, and the stakes for security, liberty, and international relations high. Yet the executive branch did not seek to force Congress to share responsibility for these difficult judgments, nor did Congress show any interest in asserting such responsibility itself. Faced with this vacuum, the Court concluded that executive power of coercive detention must be subject to some form of minimal external accountability. But the Court left room for the political branches, if they are willing to act jointly, to determine the precise forms such accountability must take.

The failure of the political branches to take shared responsibility for difficult policy choices concerning terrorism,⁴² perhaps exemplifies the reasons that concerns about political accountability and responsiveness have become pronounced in mature democracies. For paradoxically, as the idea and practice of democracy is spreading worldwide, the long-established democracies are experiencing disaffection, distrust, and disillusionment with the institutions of democracy. Membership in political parties in Europe has been declining dramatically.⁴³ Voter turnout across most of these countries has similarly declined.⁴⁴ In the United States, turnout has long been thought to be similarly falling, certainly since the late nine-

⁴¹ *Id.*

⁴² Congress did take two major actions in the immediate aftermath of September 11. On September 21, Congress passed Public Law 107-40, which authorized “the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.” Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). On October 26, Congress passed the USA PATRIOT Act “to deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes.” USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001). But the Executive Branch did not seek congressional involvement, nor did Congress assert such a role for itself, for momentous issues such as detention policies in the various contexts that ultimately came before the Court in *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004), *Rasul v. Bush*, 124 S. Ct. 2686 (2004), and *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004).

⁴³ See Peter Mair & Ingrid van Biezen, *Party Membership in Twenty European Democracies, 1980–2000*, 7 PARTY POLITICS 5, 10–14 (2001). See generally PARTIES WITHOUT PARTISANS: POLITICAL CHANGE IN ADVANCED INDUSTRIAL DEMOCRACIES (Russell J. Dalton & Martin P. Wattenberg eds., 2000) (collecting essays that analyze the decline of party membership in various democracies). The decline in membership in traditional political parties in Europe has prompted a surge in the role of organized social movements and the emergence of new parties organized more around cultural issues, both on the left (such as environmental organizations and parties) and on the right (such as anti-immigrant parties), than around the economic issues that conventionally had organized and defined European political parties. This shift from material to cultural issues as an important basis for European politics was first identified in the late 1970s. See Ronald Inglehart, *The Silent Revolution in Europe: Intergenerational Changes in Post-Industrial Societies*, 66 AM. POL. SCI. REV. 991 (1979). Since then, it has been documented extensively. See, e.g., Herbert Kitschelt, *Left-Libertarian Parties: Explaining Innovation in Competitive Party Systems*, 40 WORLD POL. 194 (1988); Vander Brug et al., *Protest or Mainstream? How European Anti-Immigrant Parties Developed Into Two Separate Groups By 1999*, 42 EUROPEAN J. POL. RESEARCH 55 (2003).

⁴⁴ INT’L INST. FOR DEMOCRACY AND ELECTORAL ASSISTANCE, *VOTER TURNOUT IN WESTERN EUROPE SINCE 1945*, 78–89 (2004).

teenth century, but also in relative terms over the last thirty years⁴⁵ (the latter claim, though, is now a subject of lively debate⁴⁶). However these turnout figures are ultimately interpreted, other unmistakable manifestations of demand for structural changes in American democracy abound. One is the recent flourishing of voter initiatives designed to restructure the forms in which politics is practiced.⁴⁷ Much of the rise in direct democracy can be traced to voter-initiated efforts to change the terms of democratic politics; reform of the campaign finance system, restructuring of political primaries, and imposition of term limits on national, state, and local officials are just a few examples.⁴⁸ Initiatives that seek to restructure the political process have passed at the highest rate of any type of initiative in recent years.⁴⁹ Similarly, the last three decades have seen a rise in support for third parties and independent candidates,⁵⁰ reflecting disaffection with

⁴⁵ See, e.g., THOMAS E. PATTERSON, *THE VANISHING VOTER: PUBLIC INVOLVEMENT IN AN AGE OF UNCERTAINTY* 3–23 (2002) (collecting data to support the claim of significant decline in voter turnout between 1960 and 2000). Increasing disaffection with democracy has been documented in other ways. For example, the public opinion literature reports that the proportion of Americans who said that they trusted government “about always or most of the time” peaked at seventy percent in 1964, but has ranged between twenty percent and forty percent since the Watergate era of the early 1970s. Nathaniel Persily, *The Right To Be Counted*, 53 *STAN. L. REV.* 1077, 1100 (2001) (book review). See also SEYMOUR MARTIN LIPSET & WILLIAM SCHNEIDER, *THE CONFIDENCE GAP: BUSINESS, LABOR, AND GOVERNMENT IN THE PUBLIC MIND* 14 – 19 (revised ed. The Johns Hopkins University Press 1987) (1983).

⁴⁶ Michael P. McDonald & Samuel L. Popkin, *The Myth of the Vanishing Voter* 95 *AM. POL. SCI. REV.* 963 (2001) (“[A]lthough the turnout rate outside the South is lower than in the 1950s and early 1960s, there has been no downward trend during the last 50 years.”).

⁴⁷ Beginning in the mid-1970s, there has been “a tremendous upsurge in usage” of voter initiatives. Howard R. Ernst, *The Historical Role of Narrow-Material Interests in Initiative Politics, in DANGEROUS DEMOCRACY? THE BATTLE OVER BALLOT INITIATIVES IN AMERICA* 1, 22 (Larry J. Sabato et al. eds., 2001). Between 1977 and 1996, there was a 164 percent increase in use of the initiative compared to the period between 1941 and 1976. *Id.* at 21. In addition, analysis of voting patterns concludes that major-party elites and strong partisans opposed many of these voter-initiated proposals, while weak partisans and independents supported them. “If a common thread exists in these patterns, it is that proposals striking at the power of established parties receive support from citizens who might be (or perceive themselves to be) disadvantaged by rules that give power to such parties.” Shaun Bowler & Todd Donovan, *Political Reform Via the Initiative Process: What Voters Think About When They Change the Rules*, in *VOTING AT THE POLITICAL FAULT LINE: CALIFORNIA’S EXPERIMENT WITH THE BLANKET PRIMARY* 36, 53 (Bruce E. Cain & Elisabeth R. Gerber eds., 2002).

⁴⁸ In California, for example, voters before 1980 faced an “institutional reform” initiative — meaning one dealing with campaigns, elected officials, term limits, elections, or reapportionment — once every four years; since 1980, it has been six such initiatives every four years. Bowler & Donovan, *supra* note 47, at 40.

⁴⁹ See ELISABETH R. GERBER, *THE POPULIST PARADOX: INTEREST GROUP INFLUENCE AND THE PROMISE OF DIRECT LEGISLATION* 118 (1999) (noting that 23% of initiatives and referenda dealing with “government and political process issues” pass, a higher rate than for other initiatives and referenda).

⁵⁰ In the hundred years from 1864–1964, only three presidential elections resulted in a minor party candidate receiving more than five percent of the vote. See STEVEN J. ROSENSTONE ET AL., *THIRD PARTIES IN AMERICA: CITIZEN RESPONSE TO MAJOR PARTY FAILURE* App. A (1984) (providing data on third-party share of Presidential vote in elections from 1840 – 1992). Since then, that five percent threshold has been eclipsed by George Wallace, by John Anderson, and by Ross Perot in two

the dominant parties and the conventional forms of politics.⁵¹ That Europe and the United States are jointly experiencing such disaffection suggests that large structural forces will generate continuing challenges to the forms of democracy.

Constitutional law in the coming years will thus be shaped, in part, by the collision of these two developments: a Supreme Court increasingly constitutionalizing the structures of democracy, and political circumstances that spawn recurring challenges to existing democratic structures. This Term's confrontations with campaign financing and gerrymandering exemplify the issues that will confront constitutional law, in the United States and elsewhere, in the coming years. But constitutional law currently lacks a general structure that would properly organize the emerging "law of politics." That lack of a unified vision was also vividly displayed this Term. In *Vieth*, which addressed partisan gerrymandering, the Court failed to make any mention of its decision, just a few months earlier, in *McConnell*,

straight elections. MARTIN P. WATTENBERG, *THE DECLINE OF AMERICAN POLITICAL PARTIES, 1952-1996*, at 170, 180, 196, 233 (1998). Perot's candidacy resulted in a third-party candidate receiving more than five percent of the vote in two consecutive elections for the first time in the long history of two-party competition between Democrats and Republicans: 19% in 1992 (the largest third party popular vote since the Civil War aside from Theodore Roosevelt's Bull Moose Party run in 1912) and 8% in 1996. *Id.* at 170, 233. See generally Christian Collet, *Taking the Abnormal Route: Backgrounds, Beliefs, and Political Activities of Minor Party Candidates*, in *MULTIPARTY POLITICS IN AMERICA* 103 (Paul S. Herrnson & John C. Green eds. 1997) (exploring characteristics of minor party candidates).

In the 2000 presidential election, two significant minor party presidential candidates achieved ballot status in virtually all fifty states. Patrick Buchanan was on the ballot everywhere but Michigan and D.C.; Ralph Nader qualified to be on the ballot everywhere except Georgia, Idaho, Indiana, North Carolina, Oklahoma, South Dakota, and Wyoming. See *Minor Presidential Vote Percentages*, *BALLOT ACCESS NEWS*, Nov. 16, 2000, <http://www.ballot-access.org/2000/1116.html>. At the non-presidential level, the 1996 election was one of the most significant in the twentieth century for minor parties, with nearly six hundred minor party candidates for both houses of Congress, a figure almost three times greater than in the watershed 1968 election and nearly twice as many as in 1980. Christian Collet & Martin P. Wattenberg, *Strategically Unambitious: Minor Party and Independent Candidates in the 1996 Congressional Elections*, in *THE STATE OF THE PARTIES: THE CHANGING ROLE OF CONTEMPORARY AMERICAN PARTIES* 229, 229 (John C. Green & Daniel M. Shea eds., 3d. ed. 1999). The 2000 Congressional elections featured 587 third party candidates from 31 different parties. Richard H. Pildes, *Constitutionalizing Democratic Politics*, in *A BADLY FLAWED ELECTION: DEBATING BUSH V. GORE, THE SUPREME COURT, AND AMERICAN DEMOCRACY* 155, 158 (Ronald Dworkin ed., 2002).

⁵¹ This recent upsurge in minor party activity is striking because, unlike earlier swells in third-party activity, this one emerged during the 1990s at a time not characterized by divisive, burning issues nor by economic decline. Traditionally, minor parties rise during times of social or economic crisis; minor parties typically address, albeit narrowly, a single momentous issue the major parties are felt to be neglecting. See SAMUEL J. ELDESVELD, *POLITICAL PARTIES IN AMERICAN SOCIETY* 387-88 (1982); V. O. KEY, JR., *POLITICS, PARTIES, AND PRESSURE GROUPS* 183-218 (4th ed. 1958). Yet while survey data had shown strong support for the two-party system from the 1940s until the early 1980s, during the 1990s, for the first time, only a minority of voters thought the two parties were doing "an adequate job;" a majority thought there should "be a major third party." Christian Collet, *Third Parties and the Two-Party System*, 60 *PUB. OPINION Q.* 431, 433 (1996).

which addressed campaign-finance reform.⁵² Gerrymandering was cubbyholed as an Equal Protection problem; campaign finance, as a First Amendment problem. Had the Court issued a major Equal Protection decision at the start of the Term, an equally momentous Equal Protection decision later the same Term would surely have engaged the earlier decision at length. As yet there is thus little sense of organizing principle to “the law of politics.”

The aims of this Foreword are to make visible this emerging domain of constitutional law and to suggest thematic considerations that should unify constitutional oversight in this new domain. Constitutional lawyers are trained to think in terms of rights and equality and to elaborate legal the conceptual structure, legal and moral, of these core constitutional commitments.⁵³ But politics involves, at its core, material questions concerning the organization of power. A central dimension is the effective mobilization of political power through organizations, such as political parties and political coalitions. Understandings of rights or equality worked out in other domains of constitutional law often badly fit the sphere of democratic politics; indeed, the unreflective analogical transfer of rights and equality frameworks from other domains can seriously damage and distort the processes of politics. The kinds of harms that constitutional law recognizes, the tools of doctrinal analysis, and the remedial options ought to be viewed distinctly in the domain of democratic institutions. Justice Breyer suggested as much this Term when he characterized the constitutional injury of partisan gerrymandering, not as a violation of rights or equal protection, but as one involving a judicially-cognizable “democratic

⁵² It was left to two dissenting Justices to notice this connection. See *Vieth*, 124 S. Ct. at 1806 n.20 (Stevens, J., dissenting); *id.* at 1823 (Breyer, J., dissenting). Justice Kennedy called for a First Amendment approach to partisan gerrymandering in *Vieth*, and urged strong First Amendment protections for political parties in *McConnell*. See *Vieth*, 124 S. Ct. at 1797 (Kennedy, J., concurring in the judgment); *McConnell*, 124 S. Ct. at 743–43 (Kennedy, J., dissenting). As Parts II A and C argue, however, seeking to ground or unify constitutional oversight of democratic processes on the conventional understandings of the First Amendment that Justice Kennedy invokes should be rejected for substantive reasons described in those Parts.

⁵³ Recent years have seen renewed interest in democratic theory, in law schools and elsewhere, but much of that interest has involved theories of deliberative democracy. These theories primarily elaborate the moral qualities of acceptable forms of “public reason” and focus less attention to the grounded, institutional structures of actual democratic practice. For a review of approaches to democratic theory, see Richard H. Pildes, *Competitive, Deliberative, and Rights-Oriented Democracy*, ELECTION L.J. (forthcoming) (book review), <http://ssrn.com/abstract=559741>. The most prominent exception, John Hart Ely’s *DEMOCRACY AND DISTRUST* (1980), might be thought to confirm the point. Ely’s work, which made issues of governance structures central to his constitutional theory, was immediately met with criticism that insisted questions of substantive rights necessarily took priority over those concerning political process. See, e.g., Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980). See also ROBERTO MANGABEIRA UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?* 72 (1996) (calling “discomfort with democracy” one of “the dirty little secrets of contemporary jurisprudence”).

harm.”⁵⁴ A central question is whether avoidance of harms conceived in such broad, systemic terms should be one of the “tacit postulates”⁵⁵ that “limit and control”⁵⁶ the overall structure of the constitutional order.

This Foreword will argue that understandings of individual rights, associational rights, and conceptions of equality must be modified to develop an appropriate constitutional framework for the increasingly important task of judicial oversight of democratic politics. Part IIA will analyze *Vieth* and partisan gerrymandering to illustrate how familiar models of individual rights and equality are inadequate to address constitutional harms presented by the tendency of existing legislators to entrench themselves in power. Part IIB will explore *Georgia v. Ashcroft* to portray how traditional conceptions of equality can be self-undermining when applied to the problem of fair political representation. Part IIC will examine the Court’s treatment of political parties to show why conventional conceptions of constitutionally-protected associational rights, tied to groups like the Mormons or the Boy Scouts, are ill-suited to addressing legal regulation of political parties. Part IID will then assess *McConnell* to show how courts can strike the proper balance between permitting legitimate experimentation in the design of democratic processes while policing against self-entrenching laws that inappropriately diminish the electoral accountability of officeholders. The general argument that emerges is that current constitutional law does both too much — by inappropriately extending rights doctrines into the design of democratic institutions — and too little — by declining to address self-entrenching laws aggressively enough. Finally, the conclusion reverses direction: it asks whether the vision of constitutional law developed here for the oversight of democratic institutions might reflect back on constitutional law and theory more generally — including in the context of terrorism.

I.

I view constitutional oversight of democratic politics as a functional problem in institutional design. Constitutional scholarship, more than most fields today, remains more often about the interpretation of words and concepts, or about general theoretical reconciliations of self-government with judicial review, than about the systemic consequences for political practice

⁵⁴ *Vieth v. Jubelirer*, 124 S. Ct. 1769, 1822, 1825 (2004) (Breyer, J., dissenting).

⁵⁵ This characterization of the source of the Constitution’s commitment to federalism was offered many years ago by then-Justice Rehnquist. See *Nevada v. Hall*, 440 U.S. 410, 433 (1979) (Rehnquist, J., dissenting). Since then, the Court has relied many times on such “tacit postulates” to construe the constitutional dimensions of state sovereign immunity and in interpreting the Eleventh Amendment. See, e.g., *Alden v. Maine*, 527 U.S. 706, 728–33 (1999); *Seminole Tribe v. Florida*, 517 U.S. 44, 67–68 (1996).

⁵⁶ *Seminole Tribe*, 517 U.S. at 68 (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934)).

of institutional structures and legal rules. As an issue in institutional design, the relationship of courts to the processes of democracy requires understanding the interlocking relationships of the institutions and structures that organize the democratic system: political parties, territorial election districts, voting rules, representative institutions, election financing regimes, and the like. Such an understanding is necessary both because thoughtful judicial review requires insight into the effects of constitutional rules on this integrated system and because not all constitutional thought takes place inside courts. In addition, the role that courts should play is best derived from functional analysis of the strengths and limitations of this overall institutional system.

With respect to judicial review, two sets of broad considerations suggest that constitutional law has a qualitatively distinct role to play in the sphere of democracy (elections and the design of democratic institutions). One set of considerations, involving structural flaws in democracy and design defects in the Constitution, argues for the existence of an ineliminable task that judicial review must sometimes perform. Whatever the merits of taking the Constitution away from the courts in other areas,⁵⁷ constitutional law will continue to be necessary in this arena. But another set of considerations, involving the way judicial enforcement of rights and equality can distort democratic politics, suggests that, in many contexts, judicial review should have little to say. These two sets of considerations therefore point in different directions. Together they suggest a distinct judicial role in the oversight of democracy, against which the new constitutionalization of democracy can be assessed.

A. *Structural considerations*

Democratic systems are typically justified by their ability to realize a variety of aims: to secure political stability; to express the equal moral status of all citizens; to ensure that the exercise of coercive political power is accountable through elections which select and reject those who hold power; to enhance (some would say maximize) the welfare of citizens by making policies responsive to their interests; to enable sound decisionmaking through the generation of necessary information;⁵⁸ and to unleash indi-

⁵⁷ See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999) (arguing that constitutional interpretation should be largely left to popular decisionmaking). Tushnet does acknowledge that judicial review to secure the preconditions of democratic government would “surely be a good thing,” *id.* at 158, but he expresses skepticism that courts would properly limit themselves to this role. *Id.*

⁵⁸ This is one of Sen’s central justifications for democracy, developed in his famous example concerning the absence of famines in democratic states. AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 178, 180–82 (1999) (noting that “there has never been a famine in a functioning multiparty democracy”).

vidual energy in other spheres as a result of the sense of efficacy that participation in self-government generates.⁵⁹

Conceptions of democracy vary widely. Minimalist theories view democracy as little more than selection of rulers by competitive elections.⁶⁰ Participatory theories conceive democracy as requiring direct engagement of citizens in substantive decisionmaking. Deliberative theories emphasize the quality of “public reasons” that justify collective choices.⁶¹ Substantive visions build in to the very idea of democracy the liberal commitments to individual liberty and non-discrimination.⁶² Some even justify democracy as the unique means of arriving at objectively rational collective outcomes.⁶³

Democratic polities should have substantial leeway to experiment with the design of democratic institutions and to endorse different priorities, at different times, among these aims. But on all these views, democratic systems are inevitably prone to one recurring pathology. All theories of representative democracy require, as a minimum, that those who exercise power be regularly accountable through elections to those they represent; accountability is a necessary, even if not sufficient, condition of democracy.⁶⁴ And just as meaningful personal autonomy requires a range of options from which to choose,⁶⁵ electoral accountability can exist only when effective political competition generates genuine political choices. Yet the

⁵⁹ This is one of de Toqueville’s central justifications for democracy. See e.g., ALEXIS DE TOQUEVILLE, *DEMOCRACY IN AMERICA* 231–35 (Harvey C. Mansfield & Delba Winthrop eds., Univ. of Chi. Press 2000) (1840).

⁶⁰ See JOSEPH SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 250–52 (6th ed. 1987). For modern versions and defenses of this minimalist account, see Adam Przeworski, *Minimalist Conception of Democracy: A Defense*, in *DEMOCRACY’S VALUE* 23 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999); RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 178–84 (2003); IAN SHAPIRO, *THE STATE OF DEMOCRATIC THEORY* 55–64 (2003). For a review of the differences between deliberative and competitive theories of democracy, see Pildes, *supra* note 53. For a good analysis of deliberative versus aggregative theories of democracy, see Jack Knight & James Johnson, *Aggregation and Deliberation: On the Possibility of Democratic Legitimacy*, 22 *POL. THEORY* 277 (1994).

⁶¹ See JURGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 287–302 (William Rehg trans. 1996) (1992); JOHN RAWLS, *POLITICAL LIBERALISM*, Lecture VI, § 8.5, 252–54 (1993); JOHN RAWLS, *THE LAW OF PEOPLES* 129–80 (1999).

⁶² See RONALD DWORKIN, *SOVEREIGN VIRTUE* [swat page #–pildes will get it] (2000).

⁶³ See, e.g., David Estlund, *Beyond Fairness and Deliberation: The Epistemic Dimension of Democratic Authority*, in *DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS* 173, 183–84 (James Bohman & William Rehg eds., 1997).

⁶⁴ Political scientists debate whether elections retrospectively reward (or sanction) past performance, or prospectively select “good types” of officeholders. See, e.g., James D. Fearon, *Electoral Accountability and the Control of Politicians: Selecting Good Types Versus Sanctioning Poor Performance*, in *DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION* 55, 82–84 (Adam Przeworski et al. eds., 1999).

⁶⁵ See generally JOSEPH RAZ, *THE MORALITY OF FREEDOM* 373–77 (1986) (discussing criteria for adequate moral conception of personal autonomy).

power to design and revise the ground rules of democracy itself must reside somewhere. As long as some of that power rests with self-interested political actors, as it almost inevitably will, electoral accountability will be fragile. As Justice Scalia aptly wrote this Term, “the first instinct of power is the retention of power.”⁶⁶ That instinct will ensure that democracy’s essential minimal condition, accountability, will always be at risk.

This constantly looming pathology of democratic systems, identified so elegantly by John Hart Ely,⁶⁷ means that the vitality of democracy depends upon external institutions that can contain this disease. These institutions need not be courts; viable alternatives, such as independent electoral commissions, exist in many democracies.⁶⁸ But the American system generally lacks these intermediate institutions and constitutional law, almost by default, has come to fill this role. Malapportionment, where the American courts first entered the political thicket, represents the paradigmatic instance of justified judicial oversight.⁶⁹

The justification for judicial review in contexts such as malapportionment is to address the structural risk of political self-entrenchment. For this reason, the Court does something different in kind in this area than enforce conventional individual rights or anti-discrimination principles. The justification for judicial review itself entails, in this area, that courts must address structural problems and enforce structural values concerning the democratic order as a whole.

Though this is a less familiar judicial role, the Constitution includes several provisions that can be viewed as constraints against the structural cancer of political self-entrenchment. Both Congress and the states receive their enumerated power to regulate national elections through the Elections Clause. This is one of the few areas where, as the Court conceives the constitutional structure, the states have no reserved power but only that which is affirmatively and specifically delegated through this clause.⁷⁰

⁶⁶ *McConnell v. Fed. Election Comm’n*, 124 S. Ct. 619, 729 (2003) (Scalia, J., concurring in part and dissenting in part).

⁶⁷ See ELY, *supra* note 53, at 103. In his democratic sensibility, intellectual honesty, analytical rigor, and delightful wit, John Hart Ely, who passed away this year, was a treasured figure. In many ways, this Foreword is a testament to the enduring power of his work.

⁶⁸ See *infra* note 204 and accompanying text.

⁶⁹ As Dan Farber nicely notes, the malapportionment problem is to the constitutional law of democracy as *Brown v. Board of Education* is to the law of equal protection and race: “A vision of electoral law that questions the legitimacy of [*Baker v. Carr*] is as unsettling as a vision of discrimination law that rejects the legitimacy of *Brown*.” Daniel A. Farber, *Implementing Equality*, 3 ELECTION L.J. 371, 383 (2004) (book review).

⁷⁰ See *United States v. Morrison*, 529 U.S. 598, 601–02, 617, 627 (2000) (holding 5–4 that the Violence Against Women Act exceeded Congress’s Commerce Clause and Section 5 powers); *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (holding 5–4 that the Religious Freedom Restoration Act exceeded Congress’s powers under Section 5 of the Fourteenth Amendment); *United States v. Lopez*, 514 U.S. 549, 551 (1995) (holding 5–4 that the Gun-Free School Zones Act exceeded Congress’s Commerce Clause powers).

And just as the Court has enforced limits on other enumerated powers in recent years, the Court has had much wider consensus in enforcing limits on the scope of the power the Election Clause delegates to the States.⁷¹ The Court has seen the Elections Clause as “a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.”⁷² That legislative self-entrenchment, of at least certain forms, is beyond the permissible purposes for which this enumerated power has been granted is not difficult to conclude. The Court has already invalidated state efforts to regulate national elections when the state’s purposes were outside those the Election Clause permits.⁷³ In other contexts, the Equal Protection Clause, the First Amendment, the Fifteenth Amendment, and Article I, Section 2, have been, or might justifiably be, understood to invalidate self-entrenching laws. Even without reviving the Republican Form of Government Clause,⁷⁴ as some scholars have argued,⁷⁵ there are textual commitments that can be understood to bar certain forms of anti-competitive and self-entrenching laws.

But more deeply, in the domain of democratic governance, the Court has not confined itself to textual or originalist grounds. Indeed, the Court has acted not in the face of silence or ambiguity in these sources, but in outright defiance of them. That is the only fair characterization of the Court’s recognition of the right to vote as a fundamental equal-protection right under the Fourteenth Amendment⁷⁶ — and of an entire jurisprudence built upon that recognition. The justification for doing so is perhaps the most widely known application of functional, pragmatic interpretation in constitutional law (so well known that most law students can probably recite the logic): that legitimate structures of self-governance are the premise underwriting the constitutional order; that the right to vote, “preservative

⁷¹ In *Cook v. Gralike*, 531 U.S. 510 (2001), six Justices agreed that a state law requiring a candidate’s position on term limits to be noted on the ballot exceeded the powers delegated to states under Article I, Section 4, *id.* at 522–24, and only one Justice expressly rejected that position. *Id.* at 530 (Thomas, J., concurring in part and concurring in the judgment).

⁷² *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833–34 (1995).

⁷³ See *id.* at 837–38 (invalidating state attempt to impose term limits on federal representatives); *Cook*, 531 U.S. at 525–26 (invalidating state-required ballot notations for congressional elections).

⁷⁴ U.S. CONST. art. IV, § 4.

⁷⁵ See Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL’Y 103, 113–16 (2000).

⁷⁶ Even the right to vote itself is not a conventional, substantive entitlement; no individual has an affirmative right to vote in any particular election. Instead, the right to vote has been understood to be a comparative right; once the vote is extended to some individuals, the classifications involved (other than age, residency, and ex-felon status) become subject to strict scrutiny except in the context of more specialized elections. For discussion of the doctrinal structure implementing the right to vote, see SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 16–140 (rev. 2d ed. 2002).

of all [other] rights,⁷⁷ is essential to those structures; and that potentially self-interested political actors cannot have the sole power to allocate the vote.⁷⁸ Thus the Court, invoking structural inferences, has asserted the warrant to enforce “the ‘fundamental principle of our representative democracy,’ embodied in the Constitution, that ‘the people should choose whom they please to govern them.’”⁷⁹ The same underlying functional justification for judicial review is present whenever self-interested political actors employ political power to insulate themselves from the political competition required to make electoral accountability meaningful.

In practice, the actions of courts in this domain reveal that they are enforcing structural values concerning the democratic order as a whole, albeit erratically and not always self-consciously, rather than conventional individual rights alone. Doctrines regarding standing afford one example. In the racial redistricting cases, voters of any race in a challenged district have standing and need not show any direct personal injury; this is a tell-tale sign that the harms at stake are not individuated in any conventional sense.⁸⁰ In any other area of affirmative-action litigation, it is unlikely that black plaintiffs would have standing to challenge an affirmative-action plan under which they purportedly benefit. Standing in the malapportionment cases is similarly broad.⁸¹ In the election context, courts readily, and

⁷⁷ *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

⁷⁸ *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627–28 (1969); *Reynolds*, 377 U.S. at 555, 562; see also ELY, *supra* note 53, at 117.

⁷⁹ *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 783 (1995) (quoting *Powell v. McCormack*, 395 U.S. 486, 547 (1969) (internal quotation mark omitted)). In the term limits case, Justice Thomas authored a thoughtful dissent arguing that, because the term limit at issue had been imposed through a voter initiative, *id.* at 845 (Thomas, J., dissenting), the Court misapplied “the fundamental principle” of self-government. *Id.* at 851.

⁸⁰ See *United States v. Hays*, 515 U.S. 737, 739 (1995) (denying standing to individuals who were not residents of the district challenged as a racial gerrymander); *Sinkfield v. Kelley*, 531 U.S. 28, 30 (2000) (per curiam) (same); see also David M. Driesen, *Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication*, 89 CORNELL L. REV. 808, 866 (2004) (“Surely a requirement of individual injury does nothing to improve the concreteness of these abstract cases.”). The Court has said that all voters in an unconstitutionally racial-gerrymandered district suffer special “representational harms.” *Hays*, 515 U.S. at 745. Note that this “limits” the class of potential plaintiffs in cases involving congressional districts to 646,952, the average size of a congressional district as of the 2000 U.S. Census. Karen M. Mills, *Census 2000 Brief: Congressional Apportionment* (July 2001), <http://www.census.gov/prod/2001pubs/c2kbr01-7.pdf>. The plaintiffs in the original challenge to racial redistricting, *Shaw v. Reno*, 509 U.S. 630 (1993) intentionally refused to specify their race in the complaint. See Robinson O. Everett, *Redistricting in North Carolina — A Personal Perspective*, 79 N.C. L. REV. 1301, 1311 (2001). Nor have courts been concerned with the race of claimants in these cases. On the standing issues generally for these claims, see Samuel Issacharoff and Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276 (1998); John Hart Ely, *Standing to Challenge Pro-Minority Gerrymanders*, 111 HARV. L. REV. 576 (1997).

⁸¹ The Court does not appear to have directly addressed standing issues in the malapportionment context, or to have dismissed any plaintiffs for lack of standing. The way in which the Court has let voters in one or a few counties stand in for voters in the rest of the state makes clear, at a minimum, that voters in any overpopulated district have standing to challenge a districting plan as a whole, not

rightly, grant third-party standing, without much detailed consideration, to ensure that the integrity of elections is protected.⁸² The degree of federal court deference to state court interpretation of state law offers a second example of the courts' concern with enforcing structural values. The federal courts are less deferential to state judicial interpretations of state election laws, even in state elections, than the federal courts are in other areas.⁸³

Another signal that courts do not vindicate conventional individual rights in this domain is judicial characterization of the constitutionally cognizable injuries at stake. Justice Breyer, as noted above, casts the constitutional injuries in this domain as “democratic harms.” Both the majority and dissents in the racial-redistricting cases describe the injuries involved as “expressive harms.”⁸⁴ They involve the structures of governance and the principles of democratic citizenship those structures express.⁸⁵ These are not the kinds of injuries recognized in most other domains of constitutional law. In several ways, then, constitutional practice recognizes a distinct conception of judicial review and the nature of the constitutional values at stake in the oversight of democratic institutions and elections.⁸⁶

B. Rights and Equality

If these considerations justify a specific and more active judicial role to address certain problems in the domain of politics, others suggest a more minimal judicial role with regard to other claims. The rights of politics — the right to vote, the right of association, the right of free speech, the right to political equality — are of vast potential sweep, for most features of

just the district in which they reside. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 565 (1964) (“With respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live.”).

⁸² *See, e.g., Daniel P. Tokaji, First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2491–92 (2003). *See also infra*, TAN 89–99 (discussing standing issues in *Bush v. Gore*).

⁸³ *See* Richard H. Pildes, *Judging “New Law” in Election Disputes*, 29 FLA. ST. U. L. REV. 691, 702–06 (2001).

⁸⁴ *See* Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearance After Shaw v. Reno*, 92 MICH. L. REV. 483, 486–527 (1993). On the more general role of expressive considerations in constitutional law, see Elizabeth S. Anderson and Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1531–64 (2000).

⁸⁵ Both supporters and critics of the decisions recognize this point. *See* Charles Fried, *SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT* 233–35 (2004) (discussing *Shaw v. Reno*); Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from Shaw v. Reno to Bush v. Gore*, 79 N.C. L. REV. 1345, 1351 (2001) (characterizing the claims in *Shaw* cases as “meta-governance” claims about “the rules by which the democratic political processes are structured.”).

⁸⁶ A similar focus on structural or systemic considerations, rather than conventional individuated rights and harms, arises with respect to juries and the First Amendment — both domains integral to democracy or expressive of it. *See, e.g., Tokaji, supra* note 82, at 2430–523; Abner S. Greene, *Is There a First Amendment Defense for Bush v. Gore?* 80 NOTRE DAME L. REV. (forthcoming) (on file with Harvard Law School Library).

democratic institutions and elections could, at some level of abstraction, be viewed as implicating one of these rights. The German Constitutional Court's suggestion that judicial enforcement of the individual right to vote could constitutionally limit Germany's entrance into European institutions of shared sovereignty⁸⁷ is a frightening example of a general point. Historically, democratic institutions and processes have been constantly revised (for better or worse) as changing contexts generate demands to make democracy more responsive, or more legitimate, or better adapted to new circumstances. Yet as courts find more aspects of politics to be matters of constitutional law, they risk inappropriately curtailing this process of self-revision. Given how expansive rights of political participation potentially are, the risk, already realized to some extent, is that courts will Lochnerize the very design of democratic institutions.

Moreover, as courts move into this less familiar terrain, they look to more developed bodies of constitutional law. For many years now, for both courts and scholars, the most fully elaborated doctrinal frameworks concern individual rights and equal protection. But these frameworks of rights and equality are often ill-suited to the problems courts actually address.

At the risk of opening old wounds, *Bush v. Gore* exemplifies the tension between rights and structural analysis as well as the ease with which courts invoke familiar frameworks of rights.⁸⁸ On the most common reading, *Bush v. Gore* rests on an individual right to an equally-weighted vote in a statewide election. This individual right reflects what the Court calls the "equal dignity owed to each voter."⁸⁹ Cast in these individual rights terms, that principle requires that various stages of the voting process, such as the technology of voting machines, the standards and methods of voting recounts, and perhaps even the design of ballots, must ensure (individually or cumulatively) that the same weight be given statewide to each vote cast (or validly attempted to be cast). That is a principle of exceptional breadth and administrative expense, but language in *Bush v. Gore* supports it.⁹⁰

On a second reading, perhaps more likely to become the way the decision is absorbed, Florida's recount process created an unconstitutional risk of partisan manipulation of the recount and hence the election itself. This risk was related to elements seven Justices of the Court singled out as procedurally problematic: the lack of sufficiently precise, relatively objec-

⁸⁷ See *supra* note 28.

⁸⁸ These alternative readings of the opinion were apparent at the time and are explored more fully in SAMUEL ISSACHAROFF, PAMELA S. KARLAN, & RICHARD H. PILDES, *WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000 85–87* (rev. ed. 2001).

⁸⁹ *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam).

⁹⁰ The Court's central reliance on cases of quantifiable vote dilution suggests the view that "the equal weight accorded to each vote," *id.*, by the Equal Protection Clause is the foundation for the decision. See also *id.* at 104, 105, 107 (citing *Gray v. Sanders*, 372 U.S. 368 (1963), *Reynolds v. Sims*, 377 U.S. 533, 555 (1964), and *Moore v. Ogilvie*, 394 U.S. 814 (1969)).

tive standards specified in advance; the fact that each county was free to devise and then apply its own post-hoc standards in a context in which the risks of opportunism were apparent; and the absence of any credible process for ensuring uniformity after the fact.⁹¹ All this in a system to be applied by partisan, elected canvassing boards across 67 counties.⁹² These concerns are structural, not matters of individual rights. On this second reading, the constitutional obligation is to design recount processes, and perhaps voting or democratic processes more generally, that sufficiently cabin the risk of partisan, self-interested manipulation. As others have noted, the central elements in *Bush v. Gore* are more consistent with this structural concern for partisan capture of election processes than with any individual right to an equally-weighted vote.⁹³ The stakes in the choice are considerable. If the individual right to equal dignity requires voting technology that yields similar statewide error rates, courts will enjoin or overturn elections more frequently; if the Constitution requires that voting systems be designed to minimize the risk of partisan capture, judicial oversight will be differently and more narrowly targeted.⁹⁴

None of this is to conclude that the Court was the institution to end the dispute (recall that Justices Souter and Breyer agreed on the substantive constitutional issues, but would have remanded⁹⁵). But the text of *Bush v. Gore* illustrates the tension embedded within a single decision be-

⁹¹ See *Bush*, 531 U.S. at 106, 109–10; *id.* at 134 (Souter, J., dissenting); *id.* at 145 (Breyer, J., dissenting).

⁹² The Court expressly took note that one county was recovering votes at three times the rate of another county through the use of a “more forgiving standard.” See *id.* at 107.

⁹³ The scholarship that most fully develops this reading of *Bush* is Tokaji, *supra* note 82; Greene, *supra* note 86; Einer Elhauge, *The Lessons of Florida 2000*, 110 POL’Y REV. 15, 20–21 (2001–02). The Court’s treatment of the case as essentially a facial challenge to Florida’s statutes, rather than an as-applied challenge, tracks structural rather than individual-rights concern. So too does the ease with which all actors, litigants as well as courts, raised no questions about whether a candidate had third-party standing to assert the rights of voters. If those rights are conceived as individual rights to an equally weighted vote, a candidate’s third-party standing might be questioned. See Pamela S. Karlan, *Exit Strategies in Constitutional Law: Lessons for Getting the Least Dangerous Branch Out of the Political Thicket*, 82 B.U. L. REV. 667, 672–73 (2002). Professor Tribe dismisses any concern for standing issues in *Bush v. Gore* as “surreal,” Laurence H. Tribe, *eroG .v hsuB and Its Disguises: Freeing Bush v. Gore from Its Hall of Mirrors*, 115 HARV. L. REV. 170, 231 n.239 (2001), but that is most obviously so if the decision reflects structural concerns rather than the individual right to an equally-weighted vote. In other cases involving rights of political participation, the Court has recognized that third parties can readily bring constitutional challenges to laws that “delegate[] overly broad discretion to the decisionmaker,” particularly if those decisionmakers are likely to have partisan or other biased interests. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129 (1992); see also *Freedman v. Maryland*, 380 U.S. 51, 56 (1965). Note that the additional view that Article II of the Constitution was violated by certain state court interpretations of state election law also entails a structural conception of the constitutional harm. See *Bush*, 531 U.S. at 113–14 (Rehnquist, C.J., concurring).

⁹⁴ As Professor Tokaji concludes, it might be in areas of voter registration and other areas involving “decentralized electoral systems that confer broad discretion upon local officials, where the nature of that discretion makes it difficult to determine whether particular groups are disadvantaged,” that *Bush v. Gore* might have the most effect on litigation. See Tokaji, *supra* note 82, at 2515.

⁹⁵ *Bush*, 531 U.S. at 134 (Souter, J., dissenting); *id.* at 145–46 (Breyer, J., dissenting).

tween structural and rights approaches. It also exhibits the way in which courts are more comfortable drawing on individual rights frameworks — the equal dignity owed to each voter — even when structural considerations regarding risks of self-interested partisan manipulation better rationalize what courts actually do.

Moreover, for three reasons, the conventional understanding of individual rights and equality cannot readily be transferred to the domain of democracy. First, state action that would be impermissible viewpoint discrimination in other domains is inevitable in the construction of democratic institutions. States must choose the forms through which representation will occur; states can adopt districted elections, for example, for the purpose of enhancing voices and interests otherwise drowned out in at-large election structures.⁹⁶ States can choose first-past-the-post election systems (FPTP) rather than proportional representation (PR) because the former will result in more centrist political parties. But the state cannot regulate public discourse in general to ensure larger voices do not drown out smaller ones,⁹⁷ nor can it regulate ordinary civil-society associations to ensure their politics gravitates toward the center.⁹⁸ In designing democratic institutions, states must inevitably act on the basis of substantive visions of the kind of democratic politics they seek to encourage.

Consider, for example, state laws that ban the use of paid workers to gather signatures to qualify voter initiatives to appear on the ballot.⁹⁹

⁹⁶ Historically, the very point of districted congressional elections was to ensure that local interests had, in modern terms, “voice” that would otherwise be denied them in at-large elections. See Richard H. Pildes, *Diffusion of Political Power and the Voting Rights Act*, 24 HARV. J.L. & PUB. POL’Y 119, 124 (2000).

⁹⁷ See *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) (per curiam) (stating that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment”).

⁹⁸ See, e.g., *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). Justice Scalia gestures toward this point in *Vieth*:

The Constitution also does not share appellants’ alarm at the asserted tendency of partisan gerrymandering to create more partisan representatives. Assuming that assertion to be true, the Constitution does not answer the question whether it is better for Democratic voters to have their State’s congressional delegation include 10 wishy-washy Democrats (because Democratic voters are ‘effectively’ distributed so as to constitute bare majorities in many districts), or 5 hardcore Democrats (because Democratic voters are tightly packed in a few districts). Choosing the former ‘dilutes’ the vote of the radical Democrat; choosing the latter does the same to the moderate. Neither Article I, § 2, nor the Equal Protection Clause takes sides in this dispute.

Vieth v. Jubelirer, 124 S. Ct. 1769, 1782 n.9 (2004).

With respect to partisan gerrymandering, this point is right but does not lead to the conclusion that partisan gerrymandering is non-justiciable or not a constitutional violation. An effect of bipartisan gerrymandering today is indeed greater polarization of elected officials, but such gerrymandering is not unconstitutional for this reason. If gerrymandering is unconstitutional, it is because legislative self-entrenchment, in purpose and effect, is constitutionally impermissible. Justice Scalia is correct that self-entrenchment, if unconstitutional, would be so whether it produced all moderate legislators or extreme partisans.

⁹⁹ See cases cited *supra* note 10.

These laws give priority to a vision of direct democracy that privileges grassroots, volunteer participation over hired labor (much like federal campaign laws permit unlimited contributions of volunteer time to campaigns but impose caps on financial contributions¹⁰⁰). Seen as a choice about how democratic processes should be designed, such laws reflect reasonable substantive views about the preferred nature of direct democracy. Seen in individual rights terms, such laws might unconstitutionally limit initiative proponents from spreading their views (the conclusion the Court overwhelmingly reached¹⁰¹). To take another example, should state-mandated primary elections be viewed as a legitimate choice of democratic institutional design or a violation of the rights of political parties? A boundary must exist between questions treated as matters of institutional design and those treated as matters of individual rights; otherwise, mechanical application of rights doctrines to democratic processes will consume institutional design options states legitimately ought to have.

Second, elections and related democratic processes are pervasively regulated (far more so than the general realm of public debate). In the more visible foreground, states print ballots, determine the conditions under which candidates and parties attain ballot access, and organize and structure the process of voting. In the background, prior decisions have been made about the underlying structure of elections and representative institutions. Because the “rights” at stake in political cases are already structured and conditioned by these prior institutional-design choices, these rights cannot be understood as general, intrinsic liberties. The content of political rights must instead derive from the purposes of the institutional structures within which those rights exist.¹⁰² Even if such reasoning is implicit or hidden from a judge, the content of such rights will necessarily depend upon judgments concerning which aims to attribute to a country’s

¹⁰⁰ See 2 U.S.C. § 431(8)(A)(i)-(ii) (2000) (defining regulated “contribution[s]”); *id.* § 431 (8)(B)(i) (excluding “the value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee”).

¹⁰¹ See cases cited *supra* note 10. *Meyer v. Grant*, 486 U.S. 414 (1988), was a unanimous decision, and *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 604 (1999), was a 6–3 decision.

¹⁰² Perhaps at a deep level all rights have this structure. We might simply have more widely shared understandings about the background principles from which the content of other rights derive that enables those background understandings to be taken for granted and therefore remain less visible. Thus what we view as intrinsic rights, of conscience or speech in public discourse, might also better be understood as instrumental rights that help to realize the aims of constructing various distinct normative spheres, such as that of civil society or religion or public discourse or elections. See generally ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* (1995); Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725 (1998); Frederick Schauer, *The Supreme Court, 1997 Term — Comment: Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84 (1998); Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803 (1999); Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711 (1994).

democratic institutional structures. Democracy is a “heavily regulated industry,” and just as individual Contracts Clause rights are specially conditioned in such industries,¹⁰³ so too the rights of democracy are inevitably conditioned by the entire institutional structure within which these rights exist.

Thus, at least in mature democracies, cases concerning democratic processes today do not often implicate what might be considered intrinsic political liberties (leaving aside in the American context, perhaps, the few remaining access to the ballot box issues, such as voter-registration or felon-disfranchisement laws). A general right to freedom of individual conscience, with much the same meaning across democracies, can be imagined and understood. But beyond a minimal core of political rights, the rights of democracy are not as intrinsic as freedom of conscience. Hence, methods of political representation, the financing of elections, and the regulation of political parties vary more across countries considered democratic than do rights of conscience or general free speech. The legal conception of all but the most intrinsic of “political rights” should reflect the specific purposes of the institutions within which those claims of right arise; thus, principles and doctrines transplanted from other domains of constitutional law, organized to realize different purposes from the domain of elections, do not easily fit. Yet as cases involving political parties will show, the Court nonetheless often reverts to rights analysis imported from other spheres to address issues involving democratic institutions.

Third, politics involves, at its core, the organization and mobilization of groups and coalitions for effective concerted action. In the context of democratic governance, individual interests can frequently be realized effectively only through these organizations, coalitions, and intermediaries. Yet American political culture resists the essentially collective nature of politics. Indeed, a myth of romantic individualism has long had a distinct and powerful hold over American conceptions of democracy: an illusion that the ideal politics is one in which individuals are the key agents in democratic life. That vision is manifest in the exceptional hostility American culture and law has shown to the central organizational entities of politics, the parties. As a leading historical study puts it, “[n]owhere else in the western democratic world did parties look so evil, at least to middle-class citizens, as they did in the United States.”¹⁰⁴ Political parties, uniquely in

¹⁰³ See generally, e.g., *Energy Reserves Group v. Kan. Power & Light Co.*, 459 U.S. 400, 413 (1983).

¹⁰⁴ LEON D. EPSTEIN, *POLITICAL PARTIES IN THE AMERICAN MOLD* 159 (1986); see generally *id.* at 158–74. See also Stephen E. Gottlieb, *Election Reform and Democratic Objectives—Match or Mismatch?* 9 *YALE L. & POL’Y REV.* 205, 215–16 (1991) (stating that “reforms have presupposed that the parties, when stronger, ignore their constituents, became far too self-protective, avoid issues in pursuit of victory, and hide private manipulations that serve the party professionals at the expense of the electorate.”).

America, have often been seen as “perverters of the democratic spirit.”¹⁰⁵ The result is that the United States has more thoroughly regulated its parties, since the late nineteenth century, than any other Western democracy.¹⁰⁶ More generally, from the Jacksonian era on, American reforms have regularly been demanded and justified in the name of restoring the role of the individual citizen — only to find that reforms premised on such a quixotic ideal prompted new organizational structures to arise, or were most easily exploited by large organizational entities.¹⁰⁷ The central fact of democratic politics in modern societies is that effective individual participation depends upon collective organizational forms, such as political parties, interest groups, and coalitions.¹⁰⁸ Emasculating these organizations, in the name of empowering individuals or isolated groups, is confused at best, political suicide at worst. Yet some participatory democrats continue to wish for a “real democracy” that would eliminate parties altogether.¹⁰⁹

These same considerations apply when courts face rights and equality claims concerning politics. Indeed, the American judicial system, so oriented toward rights and equality, faces the same risk of romanticism that has long shaped the broader American political culture: absent judicial appreciation of how recognizing these claims will affect the system of organizations and coalitions central to political success, judicial decisions can undermine the very interests courts believe themselves to be securing. Rights and equality doctrines can focus too readily on atomized individuals or disaggregated groups in isolation from the overall organizational and

¹⁰⁵ Frank J. Sorauf, *Extra-Legal Political Parties in Wisconsin*, 48 AM. POL. SCI. REV. 692, 692 (1954) (stating that “American political parties have long been the victims of a peculiarly ambivalent public attitude — an attitude which on the one hand views them as perverters of the democratic spirit while on the other hand it gives them a vital role in the democratic process.”)

¹⁰⁶ See EPSTEIN, *supra* note 104, at 155–58.

¹⁰⁷ This is a central theme of Hofstadter’s classic, if contentious, work on the Progressive Era. See RICHARD HOFSTADTER, *THE AGE OF REFORM 6–7* (1955) (“One of the ironic problems confronting reformers around the turn of the century was that the very activities they pursued in attempting to defend or restore the individualistic values they admired brought them closer to the techniques of organization they feared.”).

¹⁰⁸ The centrality of organizations to modern politics is explored in Samuel Issacharoff and Daniel R. Ortiz, *Governing Through Intermediaries*, 85 VA. L. REV. 1627 (1999). On the role of interest groups, see SIDNEY VERBA ET AL., *VOICE AND EQUALITY: CIVIL VOLUNTEERISM IN AMERICAN POLITICS* (1995); JACK L. WALKER, *MOBILIZING INTEREST GROUPS IN AMERICA* (1991); KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, *ORGANIZED INTERESTS AND AMERICAN DEMOCRACY* (1986).

¹⁰⁹ Benjamin R. Barber, *The Undemocratic Party System: Citizenship in an Elite/Mass Society*, in *POLITICAL PARTIES IN THE EIGHTIES* 34 (Robert A. Goldwin ed., 1980) (“The simple fact is that party government and the representative system to which it belongs are both deeply inimical to real democracy and have evolved from the outset, to no small degree by design of the Founders and early practioners of our political system, in a fashion that has consistently diminished rather than enhanced self-government.”).

coalitional matrix that determines actual political power.¹¹⁰ By instead invalidating self-entrenching, anti-competitive laws, courts might do more to secure the relevant interests of individuals and groups than by issuing first-order judicial decisions about rights or equality. The discussion of *Georgia v. Ashcroft* will illustrate this problematic aspect of equality claims in the domain of politics.¹¹¹

This general discussion is meant to establish two points central to assessing the emerging constitutional law of democracy. The first is that courts have a distinct calling, recognized already on occasion, to address the structural problem of self-entrenching laws that govern the political domain. Yet as Part II will show, the Court thus far has wavered in this calling, despite the expansion of constitutional oversight of democracy. Not recognizing serious threats to political competition at times, unable to imagine effective remedies at other times, the Court has let current officeholders artificially limit their accountability by manipulating the design of democratic institutions. The second point is that the relationship between rights and equality, on the one hand, and the systemic organization of effective democratic politics, on the other, makes overly formal and abstract transplantation of rights and equality frameworks from other constitutional domains a danger for the practice of democracy. Yet as other sections of Part II will show, the Court recognizes this threat on some occasions but not others. Insufficiently attentive at times to the differences between politics and other domains, the Court has reflexively applied to politics understandings of rights inappropriately borrowed from other domains. The result has been constraints on what should be acceptable experimentation in the design of democracy. The current constitutional law of democracy thus does both too much — by formally and analogically relying on individual and associational rights from other domains, without a functional analysis that would diminish the role of such rights in the context of democratic politics — and too little — by not applying constitutional law aggressively enough to address the structural dangers of incumbent and partisan self-entrenchment. Before this emerging body of law gets set in stone, it should be recast on a better, more justifiable foundation. The following sections seek to illustrate these points through exploring paradigmatic cases, from this Term and recent ones, of this new frontier.

¹¹⁰ See DENNIS F. THOMPSON, JUST ELECTIONS 5 (2002) (“By emphasizing the independent actions and discrete claims of individual voters, the [rights] approach neglects the interactive effects and structural patterns of the institutions in which elections take place. It is in this institutional dimension that some of the most significant problems of electoral justice arise.”); see generally Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663 (2001) (discussing the inadequacy of traditional conceptions of individual rights in the context of vote dilution claims).

¹¹¹ 123 S. Ct. 2498 (2003). See TAN 201–249.

II.

Four central institutions or aspects of democracy have recently come before the Court: the design of democratic institutions, the nature of equal political representation, the role of political parties, and the structure of election financing. Each is significant in its own right, with profound effects on the way democracy is practiced. Even more importantly, each judicial confrontation with these subjects also illustrates essential general themes in the constitutional law of politics.

A. Threats to Political Competition: Doctrinal and Institutional Responses

Partisan gerrymandering is a paradigmatic instance of the structural pathology all democratic systems face. At the start of the Term, in the campaign-finance context, Justice Scalia rightly admonished that the “first instinct of power is the retention of power.” Nowhere would that lesson seem more apt than in the context of partisan gerrymandering. Indeed, his full statement is worth quoting: “The first instinct of power is the retention of power, and, under a Constitution that requires periodic elections, that is best achieved by the suppression of election-time speech.”¹¹² Not quite. It is best achieved even more directly by the suppression of elections themselves. That is in effect what gerrymandering currently does. The technological and informational tools now available, combined with more consistent and predictable partisan voting patterns today,¹¹³ enhance the capacity of existing officeholders to entrench themselves through the self-interested design of democratic institutions. Yet here was Justice Scalia later this Term, for a four-Justice plurality in *Vieth v. Jubelirer*,¹¹⁴ dismissing any judicial role in dealing with the most direct manifestation of the instinct to retain power. His plurality opinion is an odd combination of penetrating insight into the difficulty of judicial remedies and seeming complacency about the nature of the problem.

Vieth was a moment of exceptional importance. It was only the Court’s second full confrontation with this issue, the first since its initial decision, nearly twenty years earlier, to hold partisan gerrymandering claims justiciable.¹¹⁵ *Vieth* brought a central pathology of modern American democratic institutions before the Court. Commentators, judges, and editorialists across the domestic political spectrum had urged the Court to address the problem.¹¹⁶ International essayists continued to express amazement or

¹¹² *McConnell v. Fed. Election Comm’n*, 124 S. Ct. 619, 729 (2003) (Scalia, J., concurring in part and dissenting in part).

¹¹³ See, e.g., Gary C. Jacobson, *Terror, Terrain, and Turnout: Explaining the 2002 Midterm Elections*, 118 POL. SCI. Q. 1, 13–16 (2003).

¹¹⁴ 124 S. Ct. 1769 (2004).

¹¹⁵ See *Davis v. Bandemer*, 478 U.S. 109, 113 (1986).

¹¹⁶ See, e.g., *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1353 (S.D. Fla. 2002) (per curiam) (Jordan, J., concurring) (“I urge the Supreme Court to note probable jurisdiction in this case or one of the other

contempt for the uniquely American practice of self-interested districting — an international perspective on American institutions to which some Justices are increasingly attentive.¹¹⁷

So the Court did take the problem on, only to emerge even more divided. A plurality of four would have abandoned the venture entirely and held such claims non-justiciable.¹¹⁸ Four dissenting Justices, on the other hand, would have constitutionally constrained at least extreme forms of partisan gerrymandering.¹¹⁹ These dissenters generated three different remedial approaches, which exposed them to the plurality's charge that their internal divide only confirmed the unmanageability of the entire problem.¹²⁰ The dissenters might have done better to dissent jointly in a single opinion and present a united front perhaps more likely to encourage lower-court experimentation. For reasons not obvious, the Court's 4–4 divide mapped onto conventional ideological characterizations of the Court; in both public commentary and lower court opinions, the demand for more aggressive judicial constraints on gerrymandering had come from ideologically and philosophically diverse quarters.

Astride this 4–4 polarization stood Justice Kennedy. He viewed partisan gerrymandering as a serious harm to “representational rights,”¹²¹ but could not yet endorse any judicial remedy. He thus joined the plurality for the moment, but concluded that if workable standards were brought before the courts (perhaps from legislatures, commissions, academic analysis, or

political gerrymandering cases arising from this electoral cycle and hear oral argument.”); RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 244 (2003) (“It is surprising, therefore, but illustrative of legal professionals’ neglect of democratic theory, that except for a few specialists in election law, constitutional scholars pay little attention to partisan gerrymandering in comparison to the attention they lavish on malapportionment, campaign-finance reform, term limits, and racial gerrymandering.”); John Hart Ely, *Gerrymanders: The Good, the Bad, and the Ugly*, 50 *STAN. L. REV.* 607, 621 (1998); Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 *HARV. J.L. & PUB. POL’Y* 103, 115–16 (2000); Paul V. Niemeyer, *The Gerrymander: A Journalistic Catch-Word or Constitutional Principle? The Case in Maryland*, 54 *MD. L. REV.* 242, 258–59 (1995); Editorial, *Broken Democracy*, *WASH. POST*, Nov. 10, 2002, at B6; Editorial, *The Gerrymandered Democrats*, *WALL ST. J.*, Nov. 5, 2002, at A22 (commenting that the House, which was “designed to be the body of government most responsive to the public. . . . is now far more insulated from public opinion than is the Senate, because no one has yet found a way to gerrymander a state”); *How to Rig an Election*, *THE ECONOMIST*, Apr. 27, 2002, at 29–30; Editorial, *Incumbent Protection Racket*, *WALL ST. J.*, Aug. 15, 2003, at A8; Editorial, *Rigged Voting Districts Rob Public of Choice*, *USA TODAY*, Aug. 28, 2002, at 13A; George F. Will, Editorial, *Careless People in Power*, *WASH. POST*, Aug. 3, 2003, at B7.

¹¹⁷ Justice Kennedy, obviously attentive in other contexts to international law and perspectives, noted about partisan gerrymandering: “Nor should it be thought to serve our interest in demonstrating to the world how democracy works.” *Vieth*, 124 S. Ct. at 1798 (Kennedy, J., concurring).

¹¹⁸ See *Vieth*, 124 S. Ct. at 1792.

¹¹⁹ See *id.* at 1813 (Stevens, J., dissenting); *id.* at 1822 (Souter, J., dissenting); *id.* at 1829 (Breyer, J., dissenting).

¹²⁰ *Vieth*, 124 S. Ct. at 1784 (“[T]he mere fact that these four dissenters come up with three different standards . . . goes a long way to establishing that there is no constitutionally discernible standard.”).

¹²¹ *Id.* at 1799 (Kennedy, J., concurring).

lower court experimentation), “courts should be prepared to order relief.”¹²² In two respects, his opinion in this critical case revealed the deepest instincts of his judicial philosophy. First, foreshadowing his votes in the terrorism cases later this Term, he wrote: “It is not in our tradition to foreclose the judicial process from the attempt to define standards and remedies where it is alleged that a constitutional right is burdened or denied.”¹²³ That was a telling statement in a Term that also tested the role of judicial review of executive detentions.

Equally telling, however, was Justice Kennedy’s urging that partisan gerrymandering be recast into the framework of First Amendment analysis. Nothing better exemplifies the mistaken impulse to view structural issues of governance as matters of individual rights (and among individual rights, to turn so many rights claims into First Amendment ones¹²⁴). First Amendment cases banning patronage hiring, firing, and contracting, Justice Kennedy suggested, might provide a model for how courts should address partisan gerrymandering.¹²⁵ But the patronage cases involve the classic framework of individual-rights claims; they test whether a partisan purpose is a constitutionally permissible one at all for denying specific individuals a government job or contract.¹²⁶ If the Court were prepared to hold partisan motives impermissible *per se* in designing election districts — not an implausible view, to be sure — these cases might suggest a relevant broad principle (though even so, no one in a gerrymandered state has the individuated injury involved in the loss of a job or contract). But the problem of partisan gerrymandering arises precisely because the Court has never taken the view that partisan motives in districting are, *per se*, unconstitutional. The Court has considered that untenable and undesirable — and

¹²² *Id.*

¹²³ *Id.* at 1794; *see also id.* at 1796 (“Where important rights are involved, the impossibility of full analytical satisfaction is reason to err on the side of caution [in keeping the possibility of judicial relief available].”).

¹²⁴ *See* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004).

¹²⁵ *Vieth*, 124 S. Ct. at 1797 (2004) (Kennedy, J., concurring) (citing *Elrod v. Burns*, 427 U.S. 347 (1976)). For an elaboration of the Court’s anti-patronage principle, *see Rutan v. Republican Party of Illinois*, 497 U.S. 62, 64–65 (1990), which extended the constitutional prohibition on patronage to decisions regarding hiring and promotion. *See also Board of County Comm’rs v. Umbehr*, 518 U.S. 668, 674, 686 (1996) (extending the rule to decisions regarding firing government contractors); *O’Hare Truck Serv. v. City of Northlake*, 518 U.S. 712, 716 (1996) (same). Professor Karlan has rightly noted a fundamental tension in the Court’s jurisprudence of politics: “Political patronage is constitutionally suspect because it may ‘retard’ the democratic process by ‘entrench[ing] . . . one or a few parties to the exclusion of others’ . . . but the state’s ‘strong interest’ in a ‘healthy two-party system’ can justify ‘election regulations that may, in practice, favor the traditional two-party system.’” Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 STAN. L. REV. 731, 732 (1998) (quoting *Elrod*, 427 U.S. at 369, and *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 366–67 (1997)).

¹²⁶ *See* Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711 (1994) (exploring the role of exclusionary reasons, which define certain purposes as impermissible ones, in constitutional law).

Justice Kennedy agrees.¹²⁷ Instead, then, the Court grapples with identifying the point at which partisan gerrymandering becomes excessive. That becomes a matter of defining the proper distribution of political representation — or at least, the improper extremes of distorted representation — among groups defined in terms of political party affiliation. The difficulty for courts addressing gerrymandering has long been thought to be defining a baseline for what constitutes a party’s “proper” share of political representation, given the distribution of votes; any answer requires an assessment of the distribution of representation between relevant groups, such as Republicans and Democrats.

“[R]epresentational rights,”¹²⁸ as Justice Kennedy called the claims at stake, are not individual ones. Judgments about the fair distribution of seats among groups, given the distribution of votes cast, are unavoidable. And the First Amendment is utterly unsuited for that kind of judgment. — The instinct to turn to the First Amendment reflects a recurring search for grounding in familiar and conventional models of individual rights.¹²⁹ But those models will provide no solace in addressing structural problems concerning the proper allocation of political representation.

The Court’s engagement with the problem of partisan gerrymandering this Term offers two more general insights into the law’s relationship to democratic institutional design. The first involves what it means for judicial remedies to be effective and manageable in addressing structural pathologies in democratic institutions. The second involves the broader institutional backdrop against which courts are asked to address these problems.

1. Vague Law, Stable Politics. — Gerrymandering entails two forms of self-entrenchment, one more well-known than the other. First, in states politically controlled by one party at the time of districting, that dominant party will seek to perpetuate and enhance its dominance. Gerrymandering and other manipulations of electoral laws enable small, transient majorities to leverage themselves into more enduring ones. For example, the Democratic Party destroyed its political competitors in the South through manipulation of election structures, including gerrymandering, and thereby created the one-party monopoly that ruled the entire region from the early twentieth century until the Voting Rights Act of 1965. Only outside institutional

¹²⁷ *Vieth*, 124 S. Ct. at 1793 (Kennedy, J., concurring) (characterizing racial classifications as impermissible ones, while commenting that “[p]olitics is quite a different matter”); *see also id.* at 1798 (noting that the inquiry in partisan gerrymandering cases “is whether a generally permissible classification has been used for an impermissible purpose”); *id.* (“Excessiveness is not easily determined.”).

¹²⁸ *Id.* at 1797.

¹²⁹ *See id.* at 1793 (“Because there are yet no agreed upon substantive principles of fairness in districting, we have no basis on which to define clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights.”), 1797–98 (characterizing the First Amendment as offering “a sounder and more prudential basis” for addressing partisan gerrymandering).

intervention, in the form of the Act, began to restore political competition.¹³⁰ In newly emerging democracies in which one party is likely to be a strong majority, this tendency to multiply power into yet more dominant and enduring forms is an inevitable risk. It is one mechanism by which democratic systems can lapse into authoritarian ones.¹³¹ In such countries, institutional structures must be found, including courts or other intermediate bodies, that can effectively check these predictable efforts. Nothing as dramatic as one-party control of national government has been at issue in the cases before the Court in recent years. But cases such as *Vieth* do involve a dominant state party seeking to insulate itself from partisan political competition.

The second type of entrenchment is less familiar, but might be even more corrosive of democratic accountability. When neither party controls the legislative process, incumbents of both parties sometimes agree on a bipartisan or “sweetheart” gerrymander. These agreements reflect a non-aggression pact between the two parties and their incumbents. In the perfect bipartisan gerrymander, every incumbent is placed in a safe district; the “ideal” would be no competitive elections on general election day. “Sweetheart” gerrymanders make for a peaceful life for incumbents — though sometimes legislators must make cash payments to guarantee themselves sufficiently safe districts¹³² — but do much less for electoral accountability, often thought of as the minimum requirement of representative government. Although *Vieth* did not implicate this second form of gerrymandering, the bipartisan gerrymander, the need for constitutional

¹³⁰ The best historical account of this process is the still magisterial work: J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1910* (1974). See also MICHAEL PERMAN, *STRUGGLE FOR MASTERY: DISFRANCHISEMENT IN THE SOUTH, 1888–1908* (2001). For the relationship between the Supreme Court and this process, see Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT 295 (2000); Richard H. Pildes, *Keeping Legal History Meaningful*, 19 CONST. COMMENT 645 (2002).

¹³¹ See Richard H. Pildes, *The Inherent Authoritarianism in Democratic Regimes*, in *OUT OF AND INTO AUTHORITARIAN LAW* 125, 126 (András Sajó ed., 2003).

¹³² One account of how the system works comes from California, which might have designed the most perfect bipartisan gerrymander in the nation. Despite having 53 congressional seats, not one involved a competitive general election in 2002. Consider the following comments from Rep. Loretta Sanchez, a Democratic member of Congress from California, regarding Michael Berman, the consultant (and brother of a Democratic member of Congress) whom the Democratic Party hired to advise it for California’s 2000 redistricting:

So Rep. Loretta Sanchez of Santa Ana said she and the rest of the Democratic congressional delegation went to Berman and made their own deal. Thirty of the 32 Democratic incumbents have paid Berman \$20,000 each, she said, for an “incumbent-protection plan.”

“Twenty thousand is nothing to keep your seat,” Sanchez said. “I spend \$2 million (campaigning) every election. If my colleagues are smart, they’ll pay their \$20,000, and Michael will draw the district they can win in. Those who have refused to pay? God help them.”

Hanh Kim Quach & Dena Bunis, *All Bow to Redistrict Architect: Politics’ Secretive, Single-Minded Michael Berman Holds All the Crucial Cards*, ORANGE COUNTY REGISTER, Aug. 26, 2001, at A1, 2001 WL 9682070.

checks on self-entrenching practices, and the form that such oversight should take, must also take the emerging prevalence of bipartisan gerrymandering, as well as partisan gerrymandering, into account.

Both forms of gerrymandering are shaped by the larger national political context. When the United States House is precariously balanced between the two parties, as over the last decade, the incentive to gerrymander in both forms increases. National politics and state districting practices become enmeshed; national party leaders, particularly in the House, demand that state counterparts use districting to tilt the balance of national power. In the late nineteenth century, when partisan control of the House similarly hung in the balance over many years, practices of vote fraud, intimidation, gerrymandering, and the like predictably flourished.¹³³ Today some of these practices are less tolerated, but partisan gerrymandering thrives as a means to seize control of a closely-divided House. In states controlled by one party, the aim becomes seizing every last inch of potential partisan gain; one more seat might mean little internally but could tip the partisan balance in the House. In states in which power is divided, “sweetheart” gerrymanders become more common. With control of one branch of the national government at stake, maintenance of the status quo is jointly preferred to the risk of losing any existing seats in a finely poised United States House.

(a) *The Context.* — *Vieth* involved the partisan gerrymander. Partisan gerrymandering might well be worse this decade than in previous ones, though comparative data is not available.¹³⁴ But given that voters today vote in more predictably partisan patterns than at any time in the last fifty years,¹³⁵ and that technology allows legislators to exploit these patterns more effectively than ever, the ability to gerrymander effectively is greater than in previous decades. Additionally, in light of the closely divided House, the motivation to gerrymander is at its height. Certain novel practices that have emerged recently confirm the extremes to which partisans now go; in both Texas and Colorado, Republican-controlled political bodies engaged in a second round of districting, after the 2002 elections, for the first “re-redistrictings” in the twentieth century. Some of the largest

¹³³ See J. Morgan Kousser, *The Voting Rights Act and the Two Reconstructions*, in *CONTROVERSIES IN MINORITY VOTING* 135, 141–52 (Bernard Grofman & Chandler Davidson eds., 1992).

¹³⁴ One expert concludes that Democratic control of the House from the 1950s to 1994 was not affected by partisan gerrymandering in the states. Instead, the House’s composition accurately reflected the distribution of actual votes cast for the parties. Only in 1994 did the Republican party win a majority of votes cast in House elections (53.6% of the two-party vote) for the first time since 1952. Gary C. Jacobson, *Reversal of Fortune: The Transformation of U.S. House Elections in the 1990s*, in *CONTINUITY AND CHANGE IN HOUSE ELECTIONS* 10, 24 (David W. Brady et al. eds., 2000). Of course, individual states might have been aggressively gerrymandered, even if the effects in different states cancelled one another out and showed no net effect on the House as a whole.

¹³⁵ This trend is consistently documented in many studies. See, e.g., Jacobson, *supra* note 113, at 12, 16 (2003); Jacobson, *supra* note 134, at 21 (2000).

states in the country, under unified party control, produced aggressive partisan gerrymanders.¹³⁶ Partisan gerrymandering is as old as the Republic, but there are reasons to believe it is more of a problem today than ever.

Bipartisan gerrymandering is emerging as a new, equally serious but different kind of threat to American democracy.¹³⁷ Congressional elections in the wake of the 2000 round of redistricting were the least competitive of any general election in United States history, with redistricting a central reason.¹³⁸ In 2002, after the latest Census, reapportionment, and redistricting — the moment at which the past decade's incumbents and districts should be most destabilized — only four Congressional incumbents lost general elections.¹³⁹ Only forty-three incumbents won by less than a landslide (by less, that is, than 60% of the vote).¹⁴⁰ In over one-third of the

¹³⁶ Such as in Ohio, Florida, Pennsylvania, Texas, and Michigan (all Republican gerrymanders; the most significant Democratic gerrymanders were Georgia and Maryland). See Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 ELECTION L. J. 179, 188, 196, 201, 213 (2003).

¹³⁷ For a debate on the nature and severity of this threat, see Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002); Samuel Issacharoff, *Surreply: Why Elections?*, 116 HARV. L. REV. 684 (2002); Nathaniel Persily, *Reply: In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649 (2002).

¹³⁸ See Gary C. Jacobson, *Terror, Terrain, and Turnout: Explaining the 2002 Midterm Elections*, 118 POL. SCI. Q. 1, 10–11 (2003) (“Redistricting patterns are a major reason for the dearth of competitive races in 2002 and help to explain why 2002 produced the smallest number of successful House challenges (four) of any general election in U.S. history.”).

¹³⁹ See Hirsch, *supra* note 136, at 182. The following table, from *id.* at 183, provides a comprehensive summary of competitive House elections over recent decades: [SWAT—Needs guidance on interpreting spreadsheet]

TABLE 1. COMPARISON OF THE 2002 ELECTION WITH ELECTIONS FROM 1972 TO 2000

Category Election Reapportionment Election (1974–1980) Election (1984–1900) (1972, 1982, 1992) 1994–2000)	Avg. “Normal”	Avg. Post -	2002
Incumbents reelected	375	348	381
By >20 points	297	261	338
By <20 points	78	87	43
Incumbents defeated	21	35	16
In the primary	3	13	8
In the general	18	22	8
Incumbent retirements	37	48	35
New members	60	87	54

¹⁴⁰ See Federal Election Commission, *Federal Elections 2002: Election Results for the U.S. Senate and the U.S. House of Representatives*, at <http://www.fec.gov/pubrec/fe2002/2002fedresults.xls> (June

states, congressional delegations experienced no change at all;¹⁴¹ approximately 20% of congressional seats were uncontested in the general election.¹⁴² If competitive districts are defined, as is common, as those won with less than 55% of the vote,¹⁴³ only 38 congressional districts nationwide (less than 10%) were competitive in 2002.¹⁴⁴ Moreover, of those few competitive districts, several came from Iowa, where districting is done by officials instructed to disregard incumbent and other political considerations¹⁴⁵ (three of five districts there were competitive).¹⁴⁶ For the most part, redistricting appears to be done by barons dividing up fiefdoms, not by democratically accountable representatives. California is the *reductio ad absurdum*: in the 2002 congressional elections, redistricting ensured that every single incumbent who ran for reelection won by a landslide.¹⁴⁷ This is what the “sweetheart” gerrymander is designed to achieve. The gerrymandered House contrasts with elections the same day for non-gerrymandered Senate seats and governorships.¹⁴⁸ About half of all gubernatorial and U.S. Senate elections were competitive in 2002, compared with fewer than 10% for the House.¹⁴⁹ At the other end of the spectrum

2003) (presenting margin of victory results for 2002 House elections). *See also* Daniel R. Ortiz, *Got Theory?*, <volume number> U. PA. L. REV. at 20, <http://www.law.upenn.edu/journals/lrev/Issues/152/Symp/Ortiz.pdf> (forthcoming <month> 2004).

¹⁴¹ Hirsch, *supra* note 139, at 182.

¹⁴² *See* Center for Voting and Democracy, *Dubious Democracy 2003-2004*, at <http://www.fairvote.org/dubdem/usa.htm>; *see also* MICHAEL BARONE WITH RICHARD E. COHEN, *THE ALMANAC OF AMERICAN POLITICS 2004* (Charles Mahtesian ed., 2003) (collecting data on individual House races). As a result, despite reapportionment and redistricting, only 54 of the 435 members of the 107th Congress did not return to the 108th, a mere 12%. *See* Hirsch, *supra* note 139, at 183 n.16.

¹⁴³ *See* David R. Mayhew, *Congressional Elections: The Case of the Vanishing Marginals*, 6 *POLITY* 295, 304 (1974) (defining as “reasonably safe” elections in which the winning candidate captures 55% or 60% of the vote); *see also* GARY C. JACOBSON, *THE ELECTORAL ORIGINS OF DIVIDED GOVERNMENT: COMPETITION IN U.S. HOUSE ELECTIONS, 1946 – 1988* 26 (“The two thresholds or marginality commonly found in the literature are 55% and 60% of the vote. Winning candidates who fall short of the threshold are considered to hold marginal seats; those who exceed it are considered safe from electoral threats.”).

¹⁴⁴ *See* Center for Voting and Democracy, *Dubious Democracy 2003-2004*, at <http://www.fairvote.org/dubdem/usa.htm>.

¹⁴⁵ *See* IOWA CODE § 42.4(5) (2001).

¹⁴⁶ *See* BARONE WITH COHEN, *supra* note 142, at 630 – 42. In a fourth district, Rep. Jim Nussle (IA – 1st) received 57.2% of the vote. *See* *CQ’S POLITICS IN AMERICA 2004: THE 108TH CONGRESS* 385 (David Hawkins & Brian Nutting eds., 2003). This can be considered competitive under some definitions.

¹⁴⁷ One incumbent (Condit) lost in the primary. *Id.* at 182. *See also* Gary C. Jacobson, *All Quiet on the Western Front: Redistricting and Party Competition in California House Elections, in REDISTRICTING IN THE NEW MILLENNIUM* (Peter Galderise ed., forthcoming 2005). The sole incumbent defeated in an election was scandal-ridden Gary Condit, who lost in the Democratic primary. *See id.* (manuscript at 10, 29).

¹⁴⁸ *See* Hirsch, *supra* note 139, at 183 (documenting how nationwide, an extremely large percentage of incumbents won reelection).

¹⁴⁹ *Id.* at 183. On the other hand, recent work suggests that the advantage of incumbency is just as strong for executive officials elected in non-gerrymandered statewide races. *See* Stephen Ansolabehere

are state legislative districts, which are also gerrymandered. There a pattern is emerging similar to the one seen with congressional districts: nearly all safe seats and no competitive elections.¹⁵⁰ With most incumbents ensconced in thoroughly safe districts, even a significant shift in popular preferences would have little effect on who gets elected.¹⁵¹ Bipartisan gerrymanders increasingly make election day for representative bodies an empty ritual. Unlike partisan gerrymandering, bipartisan gerrymandering does not present a problem of skewed representation; if Democratic registrants and voters are 60% of a state, 60% of the seats will be controlled by Democratically-dominated election districts. The concern about bipartisan gerrymandering is that it achieves representational parity at the cost of eliminating competitive elections. Whether constitutional law should address one or both of these forms of gerrymandering, and if so how, form the backdrop to *Vieth*.

(b) *The Court's Response.* — Given this context, the most surprising aspect of *Vieth* is the plurality's seeming indifference to the harm of gerrymandering. Thus, Justice Scalia begins with the long history of partisan gerrymandering, dating to before the Constitution's adoption,¹⁵² as if to suggest that judicial intervention is no more needed now than earlier. But unlike the dissents, he does not refer to any of the modern evidence, available in amicus briefs and elsewhere, documenting the increased effectiveness of partisan gerrymandering today.¹⁵³ More revealingly, the plurality asserts that the effects of partisan gerrymandering are "impossible to assess," because political affiliations are purportedly not "readily discernible" and may vary from election to election.¹⁵⁴ These are debater's points,

& James M. Snyder, Jr., *The Incumbency Advantage in U.S. Elections: An Analysis of State and Federal Offices, 1942–2000*, 1 ELECTION L.J. 315, 328 (2002). The precise causal contribution of "sweetheart" gerrymandering and other incumbent protective features of American politics has not yet been fully sorted out, but incumbents invest considerable resources based on the view that districting is critical to holding their seats.

¹⁵⁰ In Florida, for example, presidential elections reveal a nearly evenly divided, intensely competitive state, but 14 of the 22 state senators up for reelection in 2004 face no major-party challenger. See Samuel Issacharoff & Pamela S. Karlan, *Where To Draw the Line?: Vieth v. Jubelirer, Cox v. Larios, And Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. (forthcoming <month> 2004) (manuscript at 37); John Kennedy, *Incumbent Power Chills Challengers*, ORLANDO SENTINEL, July 17, 2004, at B1.

¹⁵¹ Dan Ortiz has observed the following:

A national swing of five percent in voter opinion — a sea change in most elections — will change very few seats in the current House of Representatives. Gerrymandering thus creates a kind of inertia arresting the House's dynamic process. It makes it less certain that votes in the chamber will reflect shifts in popular opinion and thus frustrates change and creates undemocratic slippage between the people and their government.

Ortiz, *supra* note 140 (manuscript at 31).

¹⁵² See *Vieth v. Jubelirer*, 124 S. Ct. 1769, 1774–76 (2004).

¹⁵³ See, e.g., Amicus Brief of Public Citizen, et al. at 8–9, 16–18, *Vieth v. Jubelirer*, 124 S. Ct. 1769 (2004) (No. 02–1580); Brief of Amici Curiae The Reform Institute, et al. at 3–5, 16–17; *Vieth v. Jubelirer*, 124 S. Ct. 1769 (2004) (No. 02–1580); Hirsch, *supra* note 128, at 179–89.

¹⁵⁴ *Vieth v. Jubelirer*, 124 S. Ct. 1769, 1782 (2004).

not a thoughtful engagement with a troubling but difficult problem. Nothing attracts more legislative time and money, nor involves more divisive partisan and other conflicts, than the process of districting. Though surprises arise, politicians would have to be poor calculators of self-interest if the design of districts did not tend to yield predictable results.¹⁵⁵ Indeed, in *McConnell*, Justice Scalia himself notes that the effects of political practices should be gauged on the assumption that political behavior is rationally self-interested; there he argues that voters must be persuaded by negative election advertisements because otherwise these ads “would not be so routinely used by sophisticated politicians of all parties.”¹⁵⁶ That sophisticated politicians would devote extraordinary resources to gerrymandering, if its effectiveness is impossible to assess, is apparently a mystery. Social scientists hardly conclude that the effects of partisan gerrymandering are impossible to predict.¹⁵⁷ But the conflict between the Justice Scalia of *McConnell* and of *Vieth* is still more profound. For Justice Scalia condemns BCRA as nothing more than an incumbent protection scheme, on the almost a priori view that politicians would only enact campaign finance laws in their self interest.¹⁵⁸ But the real incumbent protection scheme today is partisan gerrymandering. Well before BCRA’s enactment, gerrymandering had ensured that few incumbents would be at risk, at least in House elections.¹⁵⁹ One almost wonders what a regime of campaign finance regulation is needed to protect incumbents against.¹⁶⁰ If constitutional law has a specific role to play in addressing self-interested electoral regulation, partisan gerrymandering is the place where that self-interest manifests itself most profoundly.

Nevertheless, the remedial problem is genuinely difficult.¹⁶¹ The judicial options include purpose-based constraints, outcome-based constraints, or process-based constraints, including extrinsic constraints on the design of districts — such as whether districts respect preexisting political sub-

¹⁵⁵ Justice Stevens quietly makes this point. *See id.* at 1811–12 n.32 (Stevens, J., dissenting) (“[T]he architects of political gerrymanders seem to have no difficulty in discerning the voters’ political affiliation.”).

¹⁵⁶ *McConnell v. Fed. Election Comm’n*, 124 S. Ct. 619, 728 (2003) (Scalia, J., concurring in part and dissenting in part).

¹⁵⁷ [SWAT – Pildes is searching for the right citations here]

¹⁵⁸ *See McConnell*, 124 S. Ct. at 720 – 21 (Scalia, J., concurring in part and dissenting in part).

¹⁵⁹ Only 3.7% lost either a primary or general election and only 12% were not re-elected for any reason. *See Hirsch, supra* note 139, at 183.

¹⁶⁰ Nor are primary elections much more competitive. As of 2002, only 3.2% of sitting representatives had won initial election by defeating an incumbent in a primary. NORMAN J. ORNSTEIN ET AL., VITAL STATISTICS ON CONGRESS, 2001–2002 77 (2002).

¹⁶¹ For early warnings that courts should not address partisan gerrymandering claims, see Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325 (1987) and Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. REV. 1 (1985). Both of these articles are cited in *Vieth*. *See Vieth*, 124 S. Ct. at 1780, 1783 (plurality opinion).

units (for example, cities, towns, and counties) or employ exceptionally contorted lines. But any approach will inevitably produce doctrinal boundaries that remain vague. No doctrine courts are likely to adopt in this area can be made mathematically precise; there is no one person, one vote formula waiting in the wings. If the problem is “excessive gerrymandering,” critics will charge any judicial remedy with a lack of sufficient precision.

Problems like gerrymandering require a shift in the way manageable judicial remedies are conceived. We must more carefully consider the sources of precision and stability in law. Academics typically demand that legal doctrines achieve stability through clear, necessary-and-sufficient criteria of doctrinal application. The alleged failure of various doctrines to do so might be the most characteristic form of doctrinal critique. But critiques of this sort assume that the only sources of stability and precision in law are internal to legal doctrine itself. Thus, if the Court cannot specify clear criteria for identifying boundaries on Congress’s Commerce Clause powers, for example, the Court should not enforce any boundary at all — even if in principle the Constitution establishes a boundary at some difficult-to-define point. A related critique is the claim that courts cannot properly or coherently find certain practices excessive unless courts can first identify and articulate a full-blown affirmative account of the optimal baseline. In the gerrymandering context, these critiques translate to the view that if the Court is going to rule excessive partisan gerrymandering unconstitutional, it must first be able to specify a fair partisan distribution of districts instead. That, it is said, is a matter of both principle and practicality; otherwise, doctrine will be ad hoc, litigation constant, and outcomes unpredictable.

But vague constitutional constraints can produce stable political or social practices. If regulated actors face the proper incentives, constitutional constraints can become self-enforcing. Ironically, the best example comes from the most analogous problem to partisan gerrymandering: the problem of racial gerrymandering. In one of the most controversial decisions of the 1990s, the Court in *Shaw v. Reno*¹⁶² imposed critical, but vague, constitutional constraints on the use of race in election district design.¹⁶³ The *Shaw* doctrine sought to define a constitutional boundary between the “unjustified and excessive” use of race and the “appropriate and reasonably necessary uses of race.”¹⁶⁴ Just as the Court has refused to treat the use of political considerations in districting as per se impermissible, *Shaw* did not treat the use of racial classifications or considerations in districting as per

¹⁶² 509 U.S. 630 (1993).

¹⁶³ See *id.* at 658.

¹⁶⁴ *Bush v. Vera*, 517 U.S. 952, 995 (1996) (O’Connor, J., concurring) (noting that *Shaw* doctrine seeks to distinguish “appropriate and reasonably necessary uses of race from its unjustified and excessive uses.”).

se impermissible. Instead, the Court sought to define a point at which the use of a permissible consideration (race) became “excessive.”¹⁶⁵ The structure of the *Shaw* doctrine is thus similar to the general structure that any constitutional constraint over partisan gerrymandering is likely to have.

Commentators, myself included, predicted that this amorphous doctrine would lead to frequent *Shaw* litigation after the 2000 redistricting.¹⁶⁶ The possibility of litigation was further enhanced by the requirements of the Voting Rights Act (VRA), which affirmatively requires states to take race into account in designing districts.¹⁶⁷ There are no comparable affirmative legal obligations that require states to take partisanship into account. With *Shaw* pressing from one side and the VRA from the other, courts seemed likely to be repeatedly drawn into districting contests over the explosive mix of race and politics.

Yet the predicted disorder did not occur.¹⁶⁸ States continued to draw safe minority districts; *Shaw* had almost no effect on the number of African-Americans elected to Congress.¹⁶⁹ At the same time, states did not use the exceptionally contorted districts that had been created in the 1990s to enhance minority representation. And rather than a deluge of *Shaw* litigation, there has been almost no such litigation at all.

Instead, state legislators and other actors internalized the vague legal constraints of *Shaw* in ways that generated a stable equilibrium. Though the law itself could not generate that stability *ex ante* by establishing necessary and sufficient criteria for the application of *Shaw*, political practice nonetheless became stable. Risk-averse politicians otherwise in control of districting turned out to have strong incentives to avoid districting plans being challenged in litigation; courts might impose their own remedial districts or the political landscape might have shifted by the time that a judicially invalidated plan came back for legislative revision.¹⁷⁰ In the 2000

¹⁶⁵ For fuller analysis and documentation of the structure of the *Shaw* cases, see Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L. J. 2505, 2509–2512 (1997).

¹⁶⁶ See, e.g., *id.* at 2507–08; Karlan, *supra* note 125, at 741–42.

¹⁶⁷ See Karlan, *supra* note 125, at 741–42.

¹⁶⁸ The absence of *Shaw* litigation is all the more notable because the overall degree of post-redistricting litigation remained high. The Redistricting Task Force for the National Conference of State Legislatures, a major clearinghouse for redistricting-related information, indicated that at least 38 states experienced litigation involving congressional or state legislative redistricting. See Redistricting Task Force for the National Conference of State Legislatures, *Redistricting Cases: The 2000s*, at <http://www.senate.leg.state.mn.us/departments/scr/redist/redsum2000/redsum2000.htm> (last modified July 30, 2004).

¹⁶⁹ See CONGRESS A TO Z 526 – 527 (David R. Tarr & Ann O’Connor eds., 4th ed. 2003) (37 African-American members of Congress after 2002 elections, as compared to 38 after 1992 elections).

¹⁷⁰ See Daniel R. Ortiz, *Federalism, Reapportionment, and Incumbency: Leading the Legislature to Police Itself*, 4 J.L. & POL. 653, 687–93 (1988) (arguing that the prospect of politically neutral federal court reapportionment creates pressure on redistricting authorities to reach political solutions). For one recent example of the effects of judicial intervention on political control of districting, see *Peterson v.*

round of districting, legislators and their counsels recognized the obligation to comply with the VRA, but they also internalized a sense of constraint from *Shaw*; the prevailing view was that minority districts were required when they could be created in a manner consistent with the design of other districts, but that exceptionally contorted minority districts were neither required nor constitutional. Thus, legislators correctly internalized *Shaw*, not as barring them from intentionally creating minority districts, but as imposing extrinsic limits on the compactness or design of districts. That interpretation, in my view, had been the meaning of *Shaw* from the start,¹⁷¹ and that is the way the political process internalized *Shaw*. The result was political accommodation and compromise that led to stable outcomes. Predictions notwithstanding, vague law was transformed into settled practice.¹⁷²

Borst, 786 N.E.2d 668 (Ind. 2003). The Indiana Supreme Court held that state courts could not consider partisan consequences when they drew districting plans. *See id.* at 672. As the Court concluded, “the Superior Court’s adoption of a plan that has been uniformly supported by one major political party and uniformly opposed by the other is incompatible with applicable principles of both the appearance and fact of judicial independence and neutrality.” *Id.* at 669. Courts often disregard political considerations when they or their agents draw redistricting plans. For a recent example, see *In re Legislative Districting of the State*, 805 A.2d 292, 298 (Md. 2002).

¹⁷¹ *See* Pildes & Niemi, *supra* note 84, at 484. *Shaw* had seemingly made the constitutionality of pro-minority gerrymanders turn on whether a district was “bizarre” in shape, but *Miller v. Johnson*, 515 U.S. 900, 913 (1995), appeared to shift the inquiry to whether race had been the “dominant purpose” for the design of a district. In my view, such a “dominant purpose” test could not intelligibly be applied and hence it could not in practice become the operative legal standard. *See* Pildes, *supra* note 165, at 2545. Thus, in practice *Shaw*’s bizarre shape test would inevitably the constitutionality of race-conscious districting. As John Hart Ely recognized, that is in fact what happened over the course of the 1990s. John Hart Ely, *Gerrymanders: The Good, the Bad, and the Ugly*, 50 STAN. L. REV. 607, 615 (1998) (“The current official constitutional test [of *Miller v. Johnson*] being ultimately devoid of content, it is hardly a surprise to find its predecessor [of *Shaw v. Reno*] being reprised to fill the vacuum.”).

¹⁷² There are, to be sure, other factors that might have played a role, but these were probably not dominant. The Department of Justice did not demand the maximization of minority districts, as it had come close to doing in the 1990s, but that diminished federal pressure was itself partly a product of *Shaw* and other Court decisions. *See, e.g., Miller v. Johnson*, 515 U.S. 900, 915–27 (1995) (holding that the Department of Justice’s “black-maximization” policy was based on an incorrect interpretation of the Voting Rights Act, and striking down a districting plan created pursuant to that policy as invalid under *Shaw*). The DOJ denied preclearance to no congressional plans in the 2000 round. Similarly, the NAACP Legal Defense Fund, which had been a major player in the 1990 round, did not play a major role or press for majority-minority districts in 2000, but that too reflected the effects of *Shaw*. To the extent that post-2000 majority-minority districts simply reproduced the contours of prior districts, plaintiffs might have thought it difficult to challenge the post-2000 districts. On the eve of the 2000 redistricting, *Easley v. Cromartie*, 532 U.S. 234, 248 (2001), indicated that protecting incumbents might be a “legitimate political goal” that disproved an inference of predominant racial purpose, even if the districts had originally been drawn for racial reasons. And the 1990 round had generated most of the safe African-American districts that could be constructed. Justice Thomas pointed to this possibility in a footnote in his *Easley* dissent:

I assume, because the District Court did, that the goal of protecting incumbents is legitimate, even where, as here, individuals are incumbents by virtue of their election in an unconstitutional racially gerrymandered district. No doubt this assumption is a questionable proposi-

For partisan gerrymandering, as for so much else, no answer might be what the wrong question begets. Whether partisan gerrymandering should be justiciable if the Court cannot craft clear, necessary, and sufficient doctrinal constraints might be the wrong question.¹⁷³ Given politicians' interests in certainty and control, judicial creation of general but necessarily vague constraints, with a credible threat of application,¹⁷⁴ might generate a process much like the internalization of *Shaw*. And unlike in the *Shaw* context, partisan gerrymandering raises no concern about over-enforcement costs. There is no affirmative statutory commitment, akin to the VRA, that requires the pursuit of partisanship in districting. There is no cost associated with a legislature that is too cautious about avoiding partisan gerrymandering. Constitutional constraints on excessive partisan gerrymandering might, therefore, be "politically manageable" even if not judicially manageable. And the shadow of the law, particularly vague law, might

tion. Because the issue was not presented in this action, however, I do not read the Court's opinion as addressing it.

Easley, 532 U.S. at 262 n.3 (Thomas, J., dissenting). But the Court's tolerance for incumbent protection as a justification could have been a function of the end-of-the decade moment at which *Easley* arose: rejecting incumbent protection in *Easley* would have been immensely destabilizing, while the benefits of the rejection would have lasted only until the impending redistricting. Cases arising at the start of the 2000 redistricting cycle might present different questions about the legitimacy of incumbent protection in *Shaw* cases, but no cases have yet tested this possibility. Another possible factor was that in the 2000 round of redistricting, unlike in the 1990 round, Republicans controlled districting in many Southern states with significant minority populations. If minority voters tend to be heavily Democratic (as is true of blacks and many, but not all, Latino groups), then Democrats and Republicans faced different districting incentives. Democrats would have been tempted to draw less compact minority districts than Republicans would have been, for Democrats would have wanted to spread black voters among several districts while Republicans would have had an interest in "packing" such voters. *Shaw* claims therefore might have been less likely to be raised or to succeed when Republicans were drawing the districts because district lines might have been drawn less irregularly. As a final possible factor, Democrats of both races had come to recognize that in competitive political contexts, the creation of safe minority districts might cost Democrats seats. This would have given Democrats less of a need to resort to bizarrely shaped districts in order to gather the "right" number of minority voters. But this shows that Republican incentives could still cause *Shaw* claims: Republicans could use highly contorted districts to concentrate black voters in areas where they had not been concentrated. Surprisingly, the primary effect of *Shaw* might have been to limit Republican gerrymandering that would otherwise have been defended as required by the VRA.

¹⁷³ Justice Souter made a point much like this: "To devise a judicial remedy for [the] harm [of excessive partisan gerrymandering], however, it is not necessary to adopt a full-blown theory of fairness, furnishing a precise measure of harm caused by divergence from the ideal in each case." *Vieth v. Jubelirer*, 124 S. Ct. 1769, 1821 (2004) (Souter, J., dissenting).

¹⁷⁴ *Davis v. Bandemer*, 478 U.S. 109 (1986), did not provide this credible threat because the Court did not invalidate any plan under *Bandemer's* standard, and by the time of the next redistricting, the lower courts had made clear that they understood *Bandemer* to have no teeth at all. The critical case here involved one of the most notorious gerrymanders of the 1990s, the Democratic gerrymander of California. In *Badham v. Eu*, 694 F. Supp. 664 (N.D. Cal. 1988), *aff'd mem.* 488 U.S. 1024 (1989), decided on the eve of the 1990 redistricting, the three-judge court dismissed the challenge on grounds that made it clear that no major party would virtually ever be able to prevail on a partisan gerrymandering claim.

lead to greater practical brakes on gerrymandering than any that constitutional law formally requires.

This is not the place to assess the competing remedial approaches of the dissents, nor to offer an alternative. But it is worth examining the *Vieth* dissents to see how judges conceive of structural problems in democratic institutional design. Justice Souter, joined by Justice Ginsburg, views partisan gerrymandering through the lens of equal protection models from the race context; he frames partisan gerrymandering as a vote-dilution problem, akin to racial-vote dilution and remediable through similar doctrines.¹⁷⁵ This is an outcome-oriented approach geared to the “discriminatory” partisan effects of districting. Justice Stevens views partisan gerrymandering as a *Shaw v. Reno* problem, analogous to the problem of racial gerrymandering.¹⁷⁶ This is also an effort to assimilate partisan gerrymandering to constitutional equality models from the race context, but with a radically different structure. For *Shaw* itself is not about racial discrimination, nor is it addressed to discriminatory effects and outcomes of districting. *Shaw* views racial classification itself as a constitutional problem in the design of democratic institutions. Justice Stevens would therefore impose extrinsic constraints on the extent to which districts can be manipulated for partisan purposes,¹⁷⁷ much as Justice Powell would have done,¹⁷⁸ and as *Shaw* did for race. Those constraints would include respect for the boundaries of pre-existing political units, such as counties, towns, and cities, and the use of relatively compact and contiguous designs for districts.¹⁷⁹ That approach would unify the Court’s approaches to racial and partisan gerrymandering, which also would diminish the current incentives that exist to mask partisan claims in the guise of racial ones to which doctrine has been more receptive.¹⁸⁰

Justice Breyer’s dissent treads less familiar ground. He treats partisan gerrymandering more on its own terms, as revealed in his characterization of the constitutional injury as “[t]he democratic harm of unjustified entrenchment,” whose unconstitutionality he considers “obvious.”¹⁸¹ He thus casts the problem as one not readily assimilated to pre-existing models of

¹⁷⁵ See *Vieth*, 124 S. Ct. at 1818–19 (2004) (Souter, J., dissenting).

¹⁷⁶ See *id.* at 1804 (Stevens, J., dissenting).

¹⁷⁷ See *id.* at 1809–10.

¹⁷⁸ See *Karcher v. Daggett*, 462 U.S. 725, 787–88 (1983) (Powell, J., dissenting).

¹⁷⁹ See *Vieth*, 124 S. Ct. at 1809 – 10 (Stevens, J., dissenting).

¹⁸⁰ Justice Stevens purports to continue to believe that *Shaw* was wrongly decided. See *Vieth*, 124 S. Ct. at 1805 n.16 (Stevens, J., dissenting). This is a difficult position to reconcile with his other views and his opinion in *Vieth*. He has long argued both that partisan gerrymandering is unconstitutional and that racial and partisan gerrymandering claims must be treated the same way. See *City of Mobile v. Bolden*, 446 U.S. 55, 88–89 (1980). His opinion in *Vieth* reflects his conviction that *Shaw*-like claims in the partisan context involve serious individual and structural injuries. For these reasons, his rejection of *Shaw* claims in the race context fits uneasily with the general structure of his views in this field.

¹⁸¹ *Vieth*, 124 S. Ct. at 1825 (Breyer, J., dissenting).

rights or equality. He also considers it justified for courts to reason directly in structural terms. This reasoning justifies judicial enforcement of systemic aims properly attributable to the democratic order (or at least judicial policing of actions inconsistent with those aims, such as the aim of meaningful electoral accountability). There is no need for an individual rights-bearer in such cases, nor should the courts conceive of themselves as enforcing individual rights. The language of his dissent resonates with structural values, not claims of individual rights; his concern is with forms of gerrymandering that “violate[] basic democratic norms,”¹⁸² with enforcement of “constitutionally mandated democratic requirements,”¹⁸³ with preservation of effective means “for transforming the will of the majority into effective government,”¹⁸⁴ and with meaningful electoral accountability. These are all principles and values he is also willing to ascribe to the Equal Protection clause. As much as any opinion in the Court’s democracy cases, Justice Breyer’s dissent breaks free of the Court’s modes of reasoning in more familiar constitutional arenas and offers an unashamed functional approach keyed to judicial enforcement of structural democratic principles.¹⁸⁵

Perhaps for pragmatic reasons, Justice Breyer views these democratic principles as implicated, for now, only when gerrymandering is used to thwart majority will. This occurs when a party that receives a minority of statewide votes is nonetheless able to retain a legislative majority as a result of gerrymandered districts.¹⁸⁶ The structural democratic value Justice Breyer ascribes to the Equal Protection Clause is thus majoritarianism; judicial review becomes a means for securing majority rule. If this seems an unfamiliar position to those trained to view the Equal Protection Clause as protecting “discrete and insular” minorities, it is nonetheless the same value the Court enforced in the original malapportionment cases. In those

¹⁸² *Id.*

¹⁸³ *Id.* at 1822.

¹⁸⁴ *Id.* at 1822–23.

¹⁸⁵ This structural emphasis is consistent with Justice Breyer’s opinions in other areas of the law of democracy, such as campaign finance regulation. In *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 401–03 (2000) (Breyer, J., concurring), for instance, Justice Breyer emphasized the structural values of “public participation and open discussion” as constitutional values relevant to the Court’s assessment of state campaign-finance laws, *id.* at 401, he recast the analysis as one involving the protection of democratic structures and institutions, “the means through which a free society democratically translates political speech into concrete governmental action,” *id.* at 401, and urged the Court to respect legislative assessments of such systemic concerns as “electoral integrity” and “the need for democratization.” *Id.* at 403. See also Richard L. Hasen, *Buckley is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 152 U. PA. L. REV. (forthcoming 2004) (manuscript at 1–3, 12) (developing this view of Justice Breyer’s opinions).

¹⁸⁶ As Professors Issacharoff and Karlan point out, the plans before the Court in *Larios*, *Vieth*, and *Bandemer* are arguably all illustrations of this phenomenon. Issacharoff & Karlan, *supra* note 150 at 6 n.23. See *Cox v. Larios*, 124 S. Ct. 2806, 2808 n.* (2004) (Stevens, J., concurring) (stating that “although Republicans won a majority of votes statewide (991,108 Republican votes to 814,641 Democrat votes), Democrats won a majority of the state senate seats (30 to 26)” in the 2002 elections).

cases, the Court concluded that judicial review was necessary to ensure majoritarianism because no effective alternative to doing so was, practically speaking, available.¹⁸⁷

But functionally and in principle, it is not clear why Justice Breyer's "democratic harms" should stop at the point of majority control. First, the threat that majority parties will use their power over redistricting to further entrench themselves is at least as serious a threat as that a partisan minority will capture legislative control; resisting the threat of majority self-entrenchment is also more difficult for political minorities than resisting the threat of minority self-entrenchment is for political majorities. Even if a functional case exists for judicial enforcement of majoritarianism, it does not detract from the conventional case for judicial involvement when majorities are structurally able to exploit minorities. Second, as seen in *Vieth*, the unique force of "majority control" in congressional districts might seem intuitive, but is elusive. A state congressional delegation is not itself a governing unit. Unlike a state house or senate, where majority control of representation translates into majority control of governance, majority control of a congressional delegation translates into no value other than that of fair representation itself. At that point it becomes unclear why fair representation is compromised more when 40% of the voters control 51% of the seats than when 60% control 80% of the seats. These are further issues a structural approach will have to address, but Justice Breyer's dissent at least opens the door to such questions.

Justice Breyer's general approach is right in a social-scientific sense: the baseline for measuring whether unfair partisan gerrymandering has occurred, and to what extent, must be statewide. The concept of an unfair partisan gerrymander of an individual district is not intelligible; fairness in this context requires a comparison statewide between the number of seats a party receives and the partisan preferences of voters. But if courts are to address partisan gerrymandering, Justice Stevens's approach is the one courts are most likely to adopt. By viewing the Constitution as imposing extrinsic constraints on the way districts are designed — respect for preexisting towns, cities, and counties, respect for requirements that districts be relatively compact, and the like — Justice Stevens would attack gerrymandering indirectly through tools courts are more likely to find manageable. This approach would not eliminate gerrymandering; within these con-

¹⁸⁷ See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 565 (1964) ("Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators. To conclude differently, and to sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result. Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will."), quoted in *Vieth*, 124 S. Ct. at 1825 (Breyer, J., dissenting).

straints, redistricters still would be able to pursue partisan ends. But the more tightly these extrinsic constraints are construed, in conjunction with the already existing equal population requirement, the more they would cabin partisan gerrymandering. Justice Breyer's approach is outcome oriented and would require courts both to gauge the likely electoral outcomes of districting plans and to judge when those outcomes are substantively "unfair" to one party; other judges might believe this role brings them dangerously close (in appearance or in fact) to deciding how much power a party ought to have. Justice Stevens's process-oriented approach is more consistent with familiar judicial practices and is already embodied in *Shaw v. Reno* itself.

In addition, neither Justice Breyer's nor Justice Souter's approach would reach bipartisan gerrymandering. That issue was not presented by *Vieth* but Justices Souter and Breyer, at least, both conceive gerrymandering as a problem of discrimination, with the constitutional harm residing in skewed representation. If bipartisan gerrymandering is a constitutional concern, the harm involved would not be distorted representation, but the absence of competitive elections. A bipartisan gerrymander need not "discriminate" against voters of either major party; in a state where 40% of the voters regularly vote for Democratic candidates, the legislature might agree to make 40% of the districts overwhelmingly Democratic and 60% overwhelmingly Republican. There would be no distorting or skewing of representation, for representation would accurately reflect the partisan preference distribution of voters, but there would also be no competitive general elections. All districts would be designed to be safe seats for either Democrats or Republicans. Concerns about the elimination of competitive elections in this way cannot be addressed through doctrines based on individual rights or discrimination because there cannot be an individual right to vote in a competitive election district (some geographic areas, for example, are overwhelmingly populated by voters loyal to one party). Therefore, if bipartisan gerrymandering is a concern, it is because a systemic and structural interest exists in preventing the destruction of electoral competition through bipartisan gerrymanders that "artificially" create safe seats in "areas" that would otherwise be competitive. Justice Stevens's approach would also constrain bipartisan gerrymanders. If the Constitution is viewed as imposing extrinsic constraints on the manipulation of district designs for the purposes of protecting incumbents and ensuring bipartisan security, just as much as for partisan gain, the capacity to engage in bipartisan gerrymandering would also be cabined — though, again, not wholly eliminated.¹⁸⁸

¹⁸⁸ If *Shaw* extended to manipulations of boundaries for partisan reasons, including bipartisan incumbent protection plans, then the extrinsic constraints *Shaw* in effect imposes could extend to bipartisan gerrymandering. At some points, Justice Stevens's dissenting opinion in *Vieth* is written broadly enough to include bipartisan gerrymanders; thus, his concern that gerrymandering distorts "representa-

Even were the Court to forge consensus regarding limitations on partisan gerrymandering, constitutional doctrine would likely address only extreme instances. The larger problem is that the same criteria in designing districts can be desirable, when used for the right reasons, such as ensuring politically fair representation, and undesirable, when used as instruments of partisan or bipartisan advantage.¹⁸⁹ As long as districting is done by self-interested actors, the risk that legitimate factors are being used for self-interested ends will always be present. But courts will find it difficult to construct tests that screen out one use from the other.¹⁹⁰ Courts should therefore not be considered a panacea for the problem of self-interested districting; at best, courts are likely to be able to check only extreme instances of partisan manipulation. The only full solution to gerrymandering will require institutional filters other than courts.¹⁹¹ But in the absence of other institutions to check legislative self-entrenchment, courts should use the legitimate constitutional resources available to address this serious risk to the core constitutional value of democratic accountability.

tional norms” because “the winner of an election in a gerrymandered district inevitably will infer that her success is primarily attributable to the architect of the district rather than to a constituency defined by neutral principles,” could be read to include bipartisan gerrymanders. *See Vieth*, 124 S. Ct. at 1806 (2004) (Stevens, J., dissenting). But at other points, Justice Stevens describes gerrymandering as a form of harmful discrimination; if so, that would preclude bipartisan gerrymandering from being included, given that the harm involved does not involve a form of discrimination. *See id.* at 1808 (political considerations cannot “disadvantage members of a minority group — whether the minority is defined by its members’ race, religion, or political affiliation,” unless they rest on a neutral predicate).

¹⁸⁹ As the Court itself has long recognized, in principle districting is necessarily and appropriately ends oriented: “[t]he very essence of districting is to produce a different — a more ‘politically fair’ — result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats.” *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). Thus, there are appropriate principled reasons to take the effects of districting plans into account in designing districts, and yet licensing self-interested district designers to do so creates a system of wantonly partisan districting.

¹⁹⁰ Courts are also institutionally best suited to ruling certain purposes permissible or not, as a *per se* matter. For the argument that much of constitutional law can best be understood as judicial articulation of the reasons upon which government can and cannot act in different spheres, see Pildes, *Avoiding Balancing*, *supra* note 102, at 712–14. *See also* Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 14–33 (1998) (arguing that constitutional law largely operates through defining rule-based constraints on the reasons behind governmental actions).

¹⁹¹ Professor Issacharoff has suggested that courts in effect order the use of such commissions by holding that self-interested districting violates the Constitution. *See Issacharoff, Gerrymandering and Political Cartels*, *supra* note 137, at 643–45 (“[T]he Court should forbid ex ante the participation of self-interested insiders in the redistricting process, instead of trying to police redistricting outcomes ex post.”). That creative suggestion might have taxed the institutional limits of even the Warren Court. But even were a court inclined to this remedy, the remedy itself might be self-defeating; given how easily politicians can design purportedly independent institutions that still enable politicians to have indirect influence or control, externally forced creation of independent institutions might be easily circumvented. Perhaps the imperative for independence cannot be forced from the outside; the values of independence must be internalized by those who will design these institutions if genuine independence is to result.

2. *Is Incumbent and Partisan Self-Entrenchment Unconstitutional In Purpose?* — When manageable judicial remedies are readily at hand, courts have indeed held unconstitutional laws that entrench incumbents with insufficient countervailing justification. Laws that require ballots to list incumbent candidates first are an example.¹⁹² As incumbents, social scientists, and menu designers know, being listed first increases the odds of being selected.¹⁹³ In statewide contests, the judicial remedy has been random rotation across counties of ballot-order listings. The intriguing general issue such examples raise is whether laws whose sole or predominant purpose is political self-entrenchment, of incumbents or parties, should be unconstitutional in principle. That issue, not yet fully developed, lies beneath the surface of many constitutional conflicts in this field.

A tantalizing summary affirmance by the Court, the last day of the Term, sharpens the issue.¹⁹⁴ Under the one-vote, one-person doctrine, state legislative districts are presumptively constitutional if the departure from equally-populated districts is minimal.¹⁹⁵ The state needs only a legitimate interest, not a compelling one, to justify such deviations. Nonetheless, a three-judge federal court concluded that purely partisan purposes cannot provide even that minimal justification.¹⁹⁶ The Court summarily affirmed in *Cox v. Larios*¹⁹⁷.

That affirmance suggests the Court remains in flux on both *Vieth* itself and, more generally, on the permissible role of partisan purposes.¹⁹⁸ Even the plurality in *Vieth* acknowledged that “severe partisan gerrymanders,” if identifiable, are incompatible with “democratic principles.”¹⁹⁹ Perhaps,

¹⁹² See, e.g., *Gould v. Grubb*, 536 P.2d 1337, 1338 (Cal. 1975). Some jurisdictions do still list incumbents first. See, e.g., Mass. Gen. Laws Ann. ch. 54, §42 (1990).

¹⁹³ For literature on the effect of ballot order, see Jonathan GS Koppell & Jennifer A. Steen, *The Effects of Ballot Position on Election Outcomes*, 66 J. POL. 267 (2004); Joanne M. Miller & Jon A. Krosnick, *The Impact of Candidate Name Order on Election Outcomes*, 62 PUB. OPINION Q. 291 (1998); W. James Scott, Jr., *California Ballot Position Statutes: An Unconstitutional Advantage to Incumbents*, 45 S. CAL. L. REV. 365 (1972).

¹⁹⁴ See *Cox v. Larios*, 124 S. Ct. 2806 (2004).

¹⁹⁵ See, e.g., *Brown v. Thomson*, 462 U.S. 835, 842 (1983) (holding that for state plans, “an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations” that are insufficient to make out a prima facie case of discrimination under the Fourteenth Amendment (citing in support *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973); *Connor v. Finch*, 431 U.S. 407, 418 (1977); *White v. Regester*, 412 U.S. 755, 764 (1973))); *Larios v. Cox*, 300 F. Supp. 2d 1320, 1340–41 (N.D. Ga. 2004) (summarizing case law as establishing that “the state is entitled to a presumption . . . of an ‘honest and good faith effort to construct districts’” when deviations are less than 10%) (citation omitted).

¹⁹⁶ *Larios v. Cox*, 300 F. Supp. 2d at 1357.

¹⁹⁷ 124 S. Ct. 2806 (2004).

¹⁹⁸ Summary affirmances must of course be interpreted cautiously. The three-judge court decision rested on alternative holdings, one on partisan gerrymandering, the other on geographic or regional favoritism, as illegitimate justifications for deviations from equipopulous districts, even when the population deviations are less than ten percent. 300 F. Supp. 2d at 1342. Thus, the Justices who did not write could have voted to affirm on different grounds.

¹⁹⁹ *Veith v. Jubelirer*, 124 S. Ct. 1769, 1785 (2004).

then, *Vieth* might come to mean that, when manageable remedies exist, as in *Larios*,²⁰⁰ courts will hold unconstitutional the severe partisan manipulation of election rules and structures.²⁰¹

This summary affirmance might remain confined to the narrow question of whether partisan ends can justify marginal population deviations in election districts.²⁰² More expansively, though, *Larios* might signal the vitality of a broader principle against state action whose sole or predominant purpose is self-entrenchment, of incumbents or parties, and that courts will invalidate such actions when effective judicial remedies exist. *Larios* reveals, at the least, considerable instability on the central issues presented in *Vieth* itself. Justice Stevens seized the moment to signal exactly that: “I remain convinced that in time the present ‘failure of judicial will,’” as he characterized the plurality in *Vieth*, “will be replaced by stern condemnation of partisan gerrymandering that does not even pretend to be justified

²⁰⁰ In *Larios*, a manageable remedy consisted of districts with no deviations at all from equipopulous districts other than those justified by reasons other than partisanship. Returning late in his life to the theme of his great work DEMOCRACY AND DISTRUST, John Hart Ely argued that partisan purposes and incumbent-protecting purposes were unconstitutional, and laws that rested on such purposes should be judicially invalidated. See John Hart Ely, *supra* note 171, at 621; John Hart Ely, *Confounded by Cromartie: Are Racial Stereotypes Now Acceptable Across the Board or Only When Used in Support of Partisan Gerrymanders?*, 56 U. MIAMI L. REV. 489, 500–01 (2002).

²⁰¹ See generally, Ely, *supra* note 171, at 621 (“A central theme of our Constitution and critical function of our judiciary is the preclusion, not the privileging, of self-dealing maneuvers on the part of incumbents seeking to perpetuate their incumbency or otherwise promote the fortunes of their party.”). Three Justices saw the stakes in *Larios* as significant for these broad issues. In dissent, Justice Scalia argued that *Larios* was in considerable tension — perhaps unreconcilable tension — with *Vieth* itself. He took *Vieth* to hold that partisanship was permissible in districting, at least if not done to excess. *Cox v. Larios*, 124 S. Ct. at 2809–10 (Scalia, J., dissenting). Concurring in the summary affirmance, Justices Stevens and Breyer, the Court’s strongest proponents for judicial constraints on partisan gerrymandering, agreed that the stakes in *Larios* were high. *Id.* at 2808–09. They construed the Court’s affirmance to establish both that partisan gerrymandering can be judicially identified and that pursuit of partisan advantage is not a constitutional justification for state action. Before *Vieth*, Justices Stevens and Breyer had pressed the Court to take on partisan gerrymandering. See *O’Lear v. Miller*, 537 U.S. 997 (2002) (Stevens and Breyer, J.J., dissenting from Court’s summary affirmance). Justice Breyer is perhaps the most vocal advocate on the current Court of the view that the central role of constitutional law is to ensure the openness and integrity of the democratic process. See Stephen Breyer, *Madison Lecture: Our Democratic Constitution*, 77 N.Y.U. L. REV. 245 (2002).

²⁰² If the decision in *Larios* remains limited to constraining partisan gerrymandering only in plans where districts vary by less than 10%, it might do little good and even conceivably some harm. Limiting gerrymandering within this narrow domain will not sharply curtail the serious harms of gerrymandering; the net effect on legislative composition from such marginal manipulation of population figures is likely to be small. And if front-line actors read *Larios* more broadly than its actual holding, as a zero-tolerance policy for any deviations from perfect population equality, it could actually facilitate partisan gerrymandering by eliminating those few constraints, such as keeping pre-existing political units together (such as counties and towns and cities) that currently impose at least some constraints on partisan gerrymandering. That has been the counterproductive effect of the Court’s misguided zero-tolerance approach to congressional districting. If courts are to constrain partisan gerrymandering, they must do so directly, not by indirect means such as the requirement of exact population equality among districts. See Pildes, *supra* note 165, at 2552–55 (discussing counterproductive effects of *Karcher*).

by neutral principles.”²⁰³ Thus, whether self-entrenchment for its own sake is unconstitutional in principle, when manageable remedies exist, remains an open question.

3. *The Absence of Intermediate Institutions.* — The peculiar absence in the United States of intermediate institutions creates much of the pressure to constitutionalize issues concerning the oversight of democracy. Those concerned with the pathological tendency of democracies toward political self-entrenchment often turn to courts for want of other institutions effective at countering this tendency. But this practical necessity should not obscure the fact that constitutional law is often, as with gerrymandering, an awkward and limited means to remedy problems of political self-entrenchment. Gerrymandering manifests a more general problem in the institutional design of democracy, particularly in the United States, for dealing with the inevitable tendency toward self-entrenchment. Recognizing the limits of courts and constitutional law in countering this tendency should motivate attention toward other institutional solutions.

The United States is the only country that places the power to draw election districts — and the power to regulate much else concerning elections — in the hands of self-interested political actors. This is the political equivalent of the economic trusts of 100 years ago, which claimed to manage their sectors of the economy wisely, before the Sherman Act and the trust-busting era created the modern market system. Other longstanding democracies that use or recently used the same election structure as the United States, such as Great Britain, Australia, Canada, and New Zealand, have all found a political analogue to the Sherman Act in nonpartisan commissions that perform redistricting and oversee elections.²⁰⁴ These dif-

²⁰³ Cox v. Larios, 124 S. Ct. 2806, 2809 (2004) (Stevens, J., concurring).

²⁰⁴ There are several sources that describe and evaluate these commissions in other countries. See, e.g., DAVID BUTLER AND BRUCE CAIN, CONGRESSIONAL REDISTRICTING: COMPARATIVE AND THEORETICAL PERSPECTIVES, 117–139 (1992); JOHN C. COURTNEY, COMMISSIONED RIDINGS: DESIGNING CANADA’S ELECTORAL DISTRICTS (2001); John C. Courtney, *Drawing Electoral Boundaries*, in CANADIAN PARTIES IN TRANSITION 328 (A. Brian Tanguay & Alain-G. Gagnon eds., 1996); John C. Courtney, *Electoral Boundary Redistributions: Contrasting Approaches to Parliamentary Representation*, in COMPARATIVE POLITICAL STUDIES: AUSTRALIA AND CANADA 45 (Malcolm Alexander and Brian Galligan eds., 1992); R.J. Johnston, *Redistricting by Independent Commissions: A Perspective from Britain*, 72 ANNALS ASS’N AM. GEOGRAPHERS 457, 457–70 (1982); D.J. ROSSITER ET AL., THE BOUNDARY COMMISSIONS: REDRAWING THE UK’S MAP OF PARLIAMENTARY CONSTITUENCIES (1999). India, apparently, has always used independent boundary commissions with considerable success. See Chandra Pal Singh, *A Century of Constituency Delimitation in India*, 19 POL. GEOGRAPHY 517, 517–532 (2000). For useful case studies and other information about commissions, see Administration and Cost of Elections Project, available at <http://www.aceproject.org> (last modified May 27, 2004). Many of these commissions do not examine election data and do not take into account possible electoral consequences. Publications from Great Britain’s Boundary Commission, for example, state that the Commissions “emphasise very strongly that the results of previous elections do not and should not enter their considerations when they are deciding their recommendations. Nor do the Commission[s] consider the effects of their recommendations on future voting patterns.” RON JOHNSTON ET AL., FROM VOTES TO SEATS: THE OPERATION OF THE

ferences cannot be traced to deep historical differences, for these nonpartisan commissions are relatively recent innovations in these countries. In 1944, around the time the United States Supreme Court first confronted malapportionment claims and held them non-justiciable,²⁰⁵ Great Britain pioneered the independent commission approach.²⁰⁶ This recent English legislation was well known to some Justices, such as Justice Frankfurter,²⁰⁷ and perhaps the English experience had suggested to the pre-*Baker* Court that the Court could stay its hand until a similar institutional solution was forthcoming in the United States.

But more than any other Western democracy, the United States continues to lack intermediate institutions that oversee democracy. There are several reasons for this failure. First, the Constitution, unlike more recently formed constitutional systems, failed to anticipate the need for independent electoral commissions or similar institutions.²⁰⁸ The longevity of the Constitution, paradoxically, partly accounts for the absence of institutions to counter democracy's pathologies. Second, some institutions designed to oversee democracy became democratically controlled in the nineteenth century; once institutions are based on direct democratic control in the United States, however, it becomes difficult to replace them with institutions staffed in other ways, such as through appointment, as the unique American experience of elected state judiciaries confirms.²⁰⁹ Nor do exist-

UK ELECTORAL SYSTEM SINCE 1945, 93 (2001). This most extensive study of the English Boundary Commission concludes that "[n]o political party has control, or even direct influence, over the Commissions in the way that occurred in the nineteenth century, and hence there has been no gerrymandering, drawing of boundaries by politically motivated groups in order to promote their electoral interests." *Id.* at 129. The study goes on to show that the effect, if not the intent, of the Commission's districting has been to advantage one party, relative to its support, because its supporters are more geographically concentrated. *Id.*

In these independent commission systems, politicians typically have no role. They can submit objections to proposed plans, as can other citizens, but they cannot draw the districts, vote on the adoption of a plan, or challenge a plan in court. The plans constructed by these commissions typically cannot be overturned by the legislature or challenged in court except in exceptional circumstances.

Studies and popular commentary on the commissions in these countries report good results, far better than when self-interested political actors were in charge. States in the United States that have shifted to commission processes for districting similarly seem to produce good results. See Jeffrey C. Kubin, Note, *The Case for Redistricting Commissions*, 75 TEX. L. REV. 837, 862–63 (1997).

²⁰⁵ See *Colegrove v. Green*, 328 U.S. 549, 552–56 (1946).

²⁰⁶ For some of the history of the United Kingdom's experience with districting, see JOHNSTON ET AL. *supra* note 204, at 53–67.

²⁰⁷ In *Baker v. Carr*, Justice Frankfurter addressed at great length the English experience with districting, including the 1944 creation of the Boundary Commission and subsequent actions of that Commission. See *Baker v. Carr*, 369 U.S. 186, 302–07 (1962) (Frankfurter, J., dissenting).

²⁰⁸ The South African Constitution is one example. See Vijay Padmanabhan, Note, *Democracy's Baby Blocks: South Africa's Electoral Commissions*, 77 N.Y.U.L. REV. 1157, 1176 (2002).

²⁰⁹ See Robert W. Lee, *The Florida Election Canvassing System*, 26 NOVA L. REV. 851, 863–64, 882 (2002) (discussing how the composition of Florida's canvassing boards has gone unchanged since 1895).

ing officeholders, who benefit from the existing rules of the game, have incentives to address these issues.

But it is too easy to attribute the problem to elected officials alone. Officials in other democracies have similar self-interests, yet these countries have adopted independent electoral bodies. More important, then, is the widespread skepticism in American political culture, across the political spectrum, about whether it is actually possible to fashion sufficiently independent and nonpartisan institutions to deal with elections (or other issues). The modern distrust of independence or expertise is distinctively American. In the United States, to raise the possibility of such entities is considered technocratic delusion or political naiveté. This skepticism has become an almost a priori belief not subject to disproof based on the actual experience of independent electoral bodies elsewhere or in the states in the United States that use them.

That value and ideological judgments are often inextricably bound up with even seemingly objective determinations concerning matters of fact is undoubtedly true.²¹⁰ But questions of institutional design should be viewed pragmatically and comparatively. The question is not whether some neutral means or purely technocratic skills can be brought to bear on the design of districts or other aspects of elections. The question is whether intermediate institutions, designed in particular ways, are likely to handle these tasks better than self-interested partisan actors inevitably seeking entrenchment of both themselves and their parties. The oversight of monetary policy through the relatively independent Federal Reserve Board does not guarantee that the Board's policies will be immune from political considerations or have no political consequences. But an independent central banking system has come to be widely viewed, on balance, as beneficial in democratic countries.

In *Vieth*, the plurality did point to alternative institutional structures to address gerrymandering: the plurality noted that Congress has the power under Article I, Section 4, to regulate state design of districts for federal elections. Congress has done so on a few occasions (most notably, to require single member districts). But to appeal to a political-process resolution through Congress, as the Court did in *Vieth*, is to undermine the functional analysis that, beginning with *Baker*, made political rights justiciable in the first place. *Baker* constituted a rejection, based on experience, of the view that the modern Congress was an effective forum for addressing problems such as malapportioned election districts.²¹¹ The point is not to

²¹⁰ Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 61–63 (1995).

²¹¹ The Court in *Colgrove* held “that 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.” *Colgrove v. Green*, 328 U.S. 549, 554 (1946). In support of this conclusion, Justice Clark wrote in his concurring opinion:

take the Court to task for inconsistency, but to remember that a functional analysis of the constitutional architecture had earlier provided reasons that Congress's theoretical role was not an adequate practical mechanism.

But there are additional reasons for this inadequacy that stem from a broader functional understanding of the evolution of American institutions. At the time the Article I, Section 4 power was framed, Congress might have been credibly envisioned as distant from state legislative practices and able to provide a check on state regulation of federal elections. But the Constitution did not contemplate the rise of political parties — indeed, it was designed to discourage their emergence — let alone the modern era's highly integrated national and state parties. Far from being a detached check on the self-interested behavior of state politicians, party leaders in Congress are often the very catalysts who incite party affiliates in the states to aggressive partisan gerrymandering.²¹² In an era when partisan control of the U.S. House of Representatives hangs in the balance, partisans in the House are only more likely to press state party leaders to maximize partisan districting in the states. The interlocking partisan connections between national and state legislatures may well be an effective mechanism for ensuring that legitimate state interests are taken into account in Congress.²¹³ But those very interlocking relationships have made members of Congress self-interested actors in these institutional design issues. It is wistful, though hardly a realistic basis for assessing modern institutional behavior, to read in *Vieth* that Congress was originally projected to be “without the influence of our commotions and factions [in the States], who will hear impartially” and guard against self-interested gerrymandering.²¹⁴ The development of the party system precludes Congress

It is said that there is recourse in Congress and perhaps that may be, but from a practical standpoint this is without substance. To date Congress has never undertaken such a task in any State. We therefore must conclude that the people of Tennessee are stymied and without judicial intervention will be saddled with the present discrimination in the affairs of their state government.

Baker v. Carr, 369 U.S. 186, 259 (1962) (Clark, J., concurring).

²¹² With respect to the novel practice of re-redistricting that emerged in the 2000s, national party leaders were reported to have played a central role in the partisan re-redistrictings and gerrymanderings in Texas, Colorado, and Pennsylvania. See David M. Halbfinger, *Across U.S., Redistricting as a Never-Ending Battle*, N.Y. TIMES, July 1, 2003, at A1 (noting the central involvement of partisan leaders of the U.S. House in the strategy of redistricting in Texas); Juliet Eilperin, *GOP's New Push on Redistricting: House Gains Are at Stake in Colo., Tex.*, WASHINGTON POST, May 9, 2003, at A4 (describing contact between the White House and Colorado state GOP during redistricting debate); *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532, 535 (M.D. Pa. 2002), *aff'd sub nom. Vieth v. Jubelirer*, 124 S. Ct. 1769 (2004) (noting extensive involvement of Republican party leaders in Pennsylvania redistricting process).

²¹³ See Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 285 (2000) (arguing that the “intricate web” of entanglement between state and federal party officials ensures that “states remain a powerful locus of political and lawmaking authority”).

²¹⁴ *Vieth v. Jubelirer*, 124 S. Ct. 1769, 1775 (2004) (citation omitted).

from playing this constitutionally envisioned “impartial” role. But the functional need for an outside institution able to control state manipulation of national elections remains. If by staying its hand the Court would make the creation of independent commissions more likely, that might justify judicial abstention. There is, however, no empirical reason for thinking that so — other than the revolutionary’s view that things always have to get worse before they can get better. Independent commissions are surely the most comprehensive solution. But short of that, courts and constitutional law will be pressed to address — and should address — the design defect in American democracy that enables self-interested actors to design democratic institutions to serve their own interests.

The hyperdemocratic culture and history of the United States, and the concomitant absence of intermediate institutions, play an often unappreciated role in fueling the emerging constitutional law of democracy. The background institutional context to *Bush v. Gore*, remember, involved partisan elected county canvassing boards and elected state officials who chaired the presidential campaigns for each party. Such a partisan and decentralized structure is a peculiarly American means to resolve disputed elections.²¹⁵ Unless the United States creates other intermediate institutions to check the role of partisan self-interest in the design of democratic processes, it is inevitable that courts and constitutional law will be asked to play that role, however ill-suited judicial tools are for the task.²¹⁶ Of course, if the risk of partisan gerrymandering of election recounts is a constitutional problem, the reality of partisan gerrymandering of the very design of democratic institutions might be thought at least as much a concern.²¹⁷

²¹⁵ For examples concerning France and Israel, see Noëlle Lenoir, *Constitutional Council Review of Presidential Elections in France and a French Judicial Perspective on Bush v. Gore*, in *THE LONGEST NIGHT: POLEMICS AND PERSPECTIVES ON ELECTION 2000* 295, 298 (Arthur J. Jacobson & Michel Rosenfeld eds., 2002), and Shlomo Avineri, *A Flawed Yet Resilient System: A View from Jerusalem*, in *THE LONGEST NIGHT*, *supra* at 279, 288–89.

²¹⁶ Notably, when the Florida legislature overhauled its electoral system in the wake of the 2000 election, the one major recommendation not adopted was that the position of county election supervisor should be a nonpartisan one. See Abby Goodnough, *Election Troubles Already Descending on Florida*, *N.Y. TIMES*, July 15, 2004, at A1.

²¹⁷ *Bush v. Gore* remains so explosive that none of the parties, nor any of the Justices, have been willing to suggest any connection between the case and partisan gerrymandering. In a written dissent from the Court’s denial of certiorari in a redistricting case from Colorado, Chief Justice Rehnquist, joined by Justices Scalia and Thomas, argued that the Court should grant certiorari to decide whether the word “Legislature” in Article I, section 4, permitted state courts to impose a permanent Congressional districting plan. *Colorado General Assembly v. Salazar*, 124 S. Ct. 2228, 2230 (2004). That question bears an obvious affinity to the question whether the word “legislature” in Article II, section 1 precludes certain state court interpretations of state election laws that regulate the selection of presidential electors. Chief Justice Rehnquist and Justices Scalia and Thomas concluded in *Bush v. Gore* that Article II *did* limit the role of state courts, but they did not cite that concurrence in their dissenting opinion in *Salazar*. Yet they did not cite that earlier concurrence.

Partisan gerrymandering represents just one manifestation of the deeper structural problem of self-entrenchment that all democracies face. In principle, judicial review finds one of its quintessential justifications in checking such self-entrenchment. In practice, judicial tools are limited (in this area as in many others), and courts should not be idealized as institutional guarantees against inevitable democratic pathologies. But lacking other intermediate institutions to check self-entrenchment, courts in democratic systems must address this central structural problem. The seriousness of this problem requires courts to adopt a less legalistic view of the relationship between judicial remedies and political responses than the Court invoked in *Vieth*.

B. The Limits of Equality Models: Courts and Political Representation

A central problem at the moment that new democratic institutions or states are being formed, particularly in societies deeply fragmented by cleavages of religion, race, ethnicity, or culture, is to provide credible commitments that political majorities will not exploit vulnerable minorities. These commitments can take the form of independent courts empowered to enforce bill of rights guarantees of equality and liberty. But courts are primarily reactive, *ex post* institutions better at vetoing exercises of governmental power than at mobilizing power affirmatively. Institutional design mechanisms that build guarantees for minority representation directly into the structure of political institutions are stronger credible commitment devices than judicial review. Particularly for groups long excluded from political power, guaranteed representation is an expressively important sign of equal political standing and citizenship, as well as a functional means of securing participation in power. At the moment of institutional formation, concerns for stability and legitimacy, along with risk aversion, often dominate and ensure that representative structures with guaranteed minority representation will be forged. The United States Senate is one example.

At the same time, the institutions that result can become problematic for at least three reasons. The first is the paradox of success: if these institutional strategies succeed in creating stable democratic institutions accepted among majorities and minorities, these institutional configurations become less necessary over time. The success of democracy may temper previously deep cleavages and transform them into routine interest-group struggles. A pluralist regime of “normal politics” may thus become possible. But democratic institutional designers rarely consider or build in the capacity for representative institutions to be readily redesigned as circumstances change. The static considerations of power and vulnerability at the moment of formation overwhelm any capacity to create ready mechanisms for later institutional self-revision. To make matters worse, one of the iron laws of democratic institutions is that institutional structures, once created, become refractory to change. Identities and interests coalesce around ex-

isting institutional arrangements. That the Electoral College or United States Senate, in which 500,000 Wyominians have equal political power with 34 million Californians,²¹⁸ would be structured along precisely the same representational basis today is questionable, even if some form of regional or state-based representation would still be used (the disparity today between the most and least populous states is 68:1 compared with a ratio of 13:1 in 1790²¹⁹). Yet though cleavages based on state identities have diminished since the Framing, the Senate and Electoral College seem securely entrenched.²²⁰

Second, and related, by building these cleavages into the structure of political institutions, those differences risk becoming more deeply entrenched. Studies across many countries show that when political power is allocated based on group identities, political entrepreneurs have incentives to mobilize these identities and harden them in the pursuit of political power.²²¹ The identities are often fluid and contingent, rather than primordial and fixed. Embedding group differences in the structure of democratic institutions might be necessary at the moment of institutional creation, but absent institutional permeability to changed identities over time, institutional entrenchment will more firmly lock these identities into place. Though minority representation can be achieved through an array of devices and institutional-design options, some more responsive than others to the possibility of changed group identities over time,²²² the framers of de-

²¹⁸ See MICHAEL BARONE & RICHARD E. COHEN, *THE ALMANAC OF AMERICAN POLITICS* 2004 154, 1761 (Charles Mahtesian ed., 2003).

²¹⁹ The first official census was in 1790. According to the census, the largest state was Virginia, with 747,610 people. The smallest was Delaware, with 59,094. See <http://www2.census.gov/prod2/decennial/documents/1790a-02.pdf>.

²²⁰ For the argument that a design defect in the Constitution is not the Electoral College itself, but the document's failure to build in any ready capacity to modify that structure over time through national political processes, particular in light of the material disincentives that individual states have to change their own allocation rules for electors, see Pildes, (forthcoming ___) (SWAT).

²²¹ See, e.g., DONALD L. HOROWITZ, *ETHNIC GROUPS IN CONFLICT* [151 – 96] (rev. ed. 2000); DAVID LAITIN, *IDENTITY IN FORMATION* (1998); James D. Fearon and David D. Laitin, *Explaining Interethnic Cooperation*, 90 *AM. POL. SCI. REV.* 715 (1996); David D. Laitin, *Marginality: A Microerspective*, 7 *RATIONALITY AND SOCIETY* 31, 38–42 (1995). In Iraq today, for example, observers report that Shi'ite and Sunni identities became more firmly entrenched in response to material incentives created by the instability of post-War Iraq and the need for organizational forms of self-protection to emerge in the absence of a centralized authority with a monopoly on violence. See NOAH FELDMAN, *WHAT WE OWE IRAQ: WAR AND THE ETHICS OF NATION BUILDING* 79 (2004) (“[T]he Coalition, specifically the United States, played a major role in the rapid emergence of denominational identities in the immediate postwar period. The United States did not invent those identities, nor did it intentionally reify them; but it produced an environment in which it was necessary for Iraqis to invent them.”).

²²² For analysis of different institutional structures and instruments for taking group differences into account in design of democratic institutions, with an assessment of the advantages and disadvantages of each, see Richard H. Pildes, *Democracia Y Representación De Intereses Minoritarios*, in 3 *FUNDAMENTOS: LA REPRESENTACIÓN POLÍTICA* (Cuadernos monográficos de Teoría del Estado, Derecho Público e Historia Constitucional) (2004). As one example, Constitutions can directly allocate

mocratic institutions (constituent assemblies, ordinary legislators, or referendum voters) rarely recognize this range of options, or choose among them with these dynamic considerations in mind. Finally, at this initial moment of formation, representation often serves a protective and expressive role for vulnerable groups. But politics also involves the mobilization of group coalitions to exercise effective affirmative power. Initial institutional-design strategies focused on representation can undermine the capacity of the groups thereby protected later to forge the coalitions necessary and possible to exercise effective political power.

These considerations form a backdrop to America's experience with the Voting Rights Act (VRA). The VRA can be viewed as America's institutional-design mechanism for building in commitments to fair representation and political equality with respect to the cleavage of race. Last year, a sharply divided 5–4 Supreme Court, in *Georgia v. Ashcroft*,²²³ had its most important confrontation in a generation with the Act and its animating concerns of race, representation, and political equality. That decision exposes the difficulties of transporting models of equality from other domains into the unique structural context of democratic politics.

The VRA was first enacted in 1965 and last significantly amended a generation ago in 1982. Key portions of the Act sunset in 2007. As is well known, in 1965, when blacks were massively disenfranchised throughout the South, the Act initiated the full democratization of American politics.²²⁴ Less appreciated is the fact that, though most barriers to the franchise had been removed by 1982, two structural features of Southern politics remained in place. Congressional and judicial understandings of political equality and fair political representation necessarily took shape within these structural conditions.²²⁵ First, few black officials held elected

executive or legislative power along identified group bases, as in consociational structures. This approach allows little change, other than through constitutional amendment itself, if identities shift over time. Another approach is districted-election systems, where election districts can be assigned once a decade on the basis of empirical facts regarding whether voting behavior in recent periods reveals strong group-based identities. Yet another approach is voting systems, like cumulative voting, where voters choose election by election with which group identities they prefer to affiliate. Federalism has one underappreciated advantage as a tool for institutionalizing group differences that might be powerful at the moment of state formation; if mobility is free, federalism need not as strongly embed group identities, which can be eroded from within over time if mobility is exercised.

²²³ 132 S. Ct. 2498 (2003).

²²⁴ These facts are described in Court decisions upholding extraordinary remedial provisions of the VRA, for as the Court concluded, “[t]he constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects.” *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966); see also *Oregon v. Mitchell*, 400 U.S. 112, 131–34 (1970) (upholding nationwide ban on literacy tests).

²²⁵ For further elaboration of these points, see Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517 (2002). For data, see QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990 (Chandler Davidson & Bernard Grofman eds., 1994); Richard H. Pildes, *The Politics of Race*, 108 HARV. L. REV. 1359 (1995) (reviewing QUIET REVOLUTION IN THE SOUTH).

office throughout the South.²²⁶ Though black voters had access to the ballot box, levels of white polarized voting were so high that few blacks were able to get elected. Overwhelmingly, whites would not vote for black candidates and black majorities were too rare to ensure election of black candidates. Blacks were no longer formally excluded from political participation, but were virtually excluded from officeholding. Second, in 1982 the South remained the one-party political monopoly it had been throughout the era of Jim Crow.²²⁷ Though passage of the VRA in 1965 began the process of normalizing the region's politics, that process remained in its first generation. Because the Democratic Party at that time faced no external competition from a strong alternative party, it had little incentive to respond to claims pressed by recently enfranchised black voters. The Democratic Party remained free to use its monopoly power over state legislatures to retain office while indulging, at no competitive cost, any preferences its leaders might have had to minimize the influence of black voters.

By 1982 the VRA served as a rough but effective tool to destabilize this system of polarization and political monopoly. To similar effect as consociational structures of democracy that directly compel assigned levels of representation for specific groups,²²⁸ the VRA indirectly compelled state institutions to incorporate representation of black officials.²²⁹ An exceptional provision of the Act, Section 5, applies only to selected jurisdictions, many of them in the South.²³⁰ In the 1970s, the Court had construed this provision to preclude any diminishment or "retrogression" in minority voting power.²³¹ Entering the 2000s, the question was whether this understanding of the Act precluded new institutional arrangements that reflected changes in the background circumstances of race and political representation.

²²⁶ See Pildes, *The Politics of Race*, *supra* note 225, at 1367–69. As leading researchers put it in 1992, "[u]npalatable as it may be, the simple truth is that at the congressional and state legislative level, at least in the South, blacks are very unlikely to be elected from any districts that are not majority minority, and most majority-black legislative districts and all majority-black congressional districts now elect black officeholders." BERNARD GROFMAN ET AL., *MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY* 134 (1992) (citing Bernard Grofman & Lisa Handley, *The Impact of the Voting Rights Act on Black Representation in Southern State Legislatures*, 16 *LEGIS. STUD. Q.* 111, 112–18 (1991) (showing no decline in racially polarized voting in the South between 1965 and 1985)).

²²⁷ On the partisan structure of Southern politics in the early 1980s, see *infra* note 235.

²²⁸ For discussion of consociational democratic countries and structures, see SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 1168–72 (2d ed., rev. 2002).

²²⁹ See *Thornburg v. Gingles*, 478 U.S. 30, 46–51 (1986).

²³⁰ See ISSACHAROFF, KARLAN & PILDES, *supra* note 228, at 556–57. The seven states originally covered by the 1965 Act's triggering formula for special-coverage provisions were Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia; twenty-six counties in North Carolina were also covered originally, as well as three in Arizona, one in Hawaii, and one in Idaho. See *id.*

²³¹ See *Beer v. United States*, 425 U.S. 130, 140–41 (1976).

Several changes in the larger structural context of democratic politics test whether principles of political equality and fair representation should be understood as general ideals or contingent functions of certain background structural conditions. First, due in part to the VRA itself, a substantial contingent of black elected officials, particularly in the South, now have a seat at the legislative table.²³² These black elected officials participate directly in legislative bargaining, including bargaining over issues concerning the design of representative institutions themselves. In the South, black Democrats are a key component of the Democratic Party. Black state legislators range from thirty-one to forty-five percent of all Democratic state legislators in the deep South states of Alabama, Florida, Georgia, Louisiana, Mississippi, and South Carolina.²³³ The Southern state political process now cannot avoid engaging black political aspirations and claims; the Democratic Party cannot act without black Democrats playing a central role. Second, white voters are more willing to vote for black candidates than a generation ago; though this change should not be exaggerated and voting is still racially polarized, the level of polarization has diminished.²³⁴ Third, the last generation has finally witnessed the full emergence of a genuine, two-party political system in the South, as the effects of the VRA and other changes have worked their way through two generations of elected officials. The South now has a robust Republican Party, not strong enough to constitute the inverse of the old, solid Democratic South, but vital enough that a nationalized, competitive two-party system exists for the first time since the Democrats and Whigs battled before the Civil War.²³⁵ In contrast to its days as a lazy monopolist, the Democratic Party is now engaged in an intensely competitive partisan struggle for every inch of political terrain.

These circumstances came together to create a perfect storm in Georgia in 2001 and then to test the meaning of political equality two years later in *Georgia v. Ashcroft*. The contrast with redistricting a generation ago, in 1980, marks the difference. In the 1980s, both the Department of Justice and the federal courts had found Georgia's redistricting to violate the

²³² See DAVID LUBLIN, THE PARADOX OF REPRESENTATION: RACIAL GERRYMANDERING AND MINORITY INTERESTS IN CONGRESS 21–28 (1997); Pildes, *Is Voting-Rights Law Now at War with Itself?*, *supra* note 225, at 1523–39 (chronicling the rise of safe minority districts in the 1990s).

²³³ This data is based on composition of state legislatures in 2000 and is taken from J. Morgan Kousser, *Whatever Happened to Shaw v. Reno*, 30 (unpublished paper on file with author).

²³⁴ See, e.g., Charles S. Bullock, III & Richard E. Dunn, *The Demise of Racial Districting and the Future of Black Representation*, 48 EMORY L.J. 1209, 1237–53 (1999); Bernard Grofman et al., *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383, 1407–09 (2001); Pildes, *Is Voting-Rights Law Now at War with Itself?*, *supra* note 225, at 1534–39 (summarizing studies).

²³⁵ See EARL BLACK & MERLE BLACK, THE RISE OF SOUTHERN REPUBLICANS 2 (2002) (documenting rise of two-party competition in South during 1990s). See generally DAVID LUBLIN, THE REPUBLICAN SOUTH: DEMOCRATIZATION AND PARTISAN CHANGE (2004) (same).

VRA.²³⁶ In invalidating that attempt, the federal court had made the following extraordinary finding of fact regarding the Chairman of the Georgia House Reapportionment Committee:

Representative Joe Mack Wilson is a racist. Wilson uses the term “nigger” to refer to black persons. He stated to one Republican member of the Reapportionment Committee that “there are some things worse than niggers and that’s Republicans.” Wilson opposes legislation of benefit to blacks, which he refers to as “nigger legislation.” His views on blacks are well known to members of the General Assembly. From the House reapportionment committee to the Conference committee, Wilson played the instrumental role in 1981 Congressional reapportionment and he was guided by the same racial attitudes throughout the reapportionment process that guided his other legislative work.²³⁷

By 2001, Georgia typified the structure of Southern politics, even in the deep South. The first element in the perfect storm there was the now sizable contingent of black elected officials: about twenty percent of Georgia’s state legislators were black, including about one third of Democratic legislators.²³⁸ The majority leader of the senate was black, as was the chair of the senate subcommittee that created the redistricting plan at issue.²³⁹ The second element was that, as in other Southern states, Georgia’s Democratic Party now faced intense and burgeoning Republican pressure. Democrats were still in control of the state’s political institutions (house, senate, governorship) as redistricting began, but the state was now precariously balanced between the two parties. The state senate teetered on the verge of shifting to Republican control. Because districting is generally still in the hands of existing officeholders largely free to pursue their own partisan ends, the Democrats sought to design districts that increased the likelihood of retaining their majority in the senate. Their aim was to preserve the number of minority legislators, while increasing the number of Democratic senate seats.²⁴⁰ Not a single Republican legislator voted for the districting plan adopted.²⁴¹ The third element, then, was that critical

²³⁶ See *Busbee v. Smith*, 549 F. Supp. 494, 517 (D.D.C. 1982), *aff’d* 459 U.S. 1166 (1983). For general discussion of the history of Georgia’s redistricting, see LAUGHLIN McDONALD, *A VOTING RIGHTS ODYSSEY: BLACK ENFRANCHISEMENT IN GEORGIA* 167 – 73 (2003); Pamela S. Karlan, *Georgia v. Ashcroft and the Retrogression of Retrogression*, 3 *ELECTION L.J.* 21, 22–24 (2004). *Georgia v. Ashcroft*, 123 S. Ct. 2498, 2506 (2003).

²³⁷ *Busbee*, 549 F. Supp. at 500 (internal citations omitted).

²³⁸ See *Georgia v. Ashcroft*, 123 S. Ct. 2498, 2506 (2003).

²³⁹ *Id.*

²⁴⁰ See *id.* at 2505. Indeed, the plan was such an aggressive partisan gerrymander that the federal courts later held it unconstitutional, in a decision the Supreme Court affirmed this Term. See *supra* TAN 194–203.

²⁴¹ *Georgia*, 123 S. Ct. at 2506 (stating that “[n]o Republican in either the House or the Senate voted for the plan”).

leverage in passing the plan was held by Georgia's black legislators, who almost unanimously joined white Democrats to support the plan.²⁴²

The key strategic move involved reducing the black populations of some districts, including some represented by black legislators. That might put the seats of one or two black Democrats slightly more at risk, but would increase the prospects that critical surrounding districts, now bolstered with additional black voters, would elect Democrats. Nearly all of Georgia's black legislators agreed that the risk was worth running, for the tradeoff involved maintaining partisan control of one institution of government. Moreover, the reductions involved were small: both before and after the new plan, thirteen districts had majority-black populations, though three fewer districts had a black registered majority.²⁴³ Diminished polarized voting by whites was thought to make this strategy even less risky.²⁴⁴ This approach reflected judgments about the tradeoffs between descriptive and substantive representation;²⁴⁵ the question was whether the VRA precluded black and white legislators from agreeing to slightly increase the risk to descriptive representation for the prize of the substantive representation that follows from being part of a winning coalition that controls one of the state's two representative institutions.

The political judgment in Georgia to accept this tradeoff, a tradeoff made in other states as well,²⁴⁶ was driven by the experience of the 1990s. During that decade, there had been fractious debates about whether safe minority districts, compelled by the Court's 1986 interpretation of the

²⁴² *Id.* (noting that “[t]en of the eleven black Senators voted for the plan” and “[t]hirty-three of the thirty-four black Representatives voted for the plan”).

²⁴³ In the three districts at issue, the black voting-age population dropped from 60.58% to 50.31%; from 55.43% to 50.66%; and from 62.45% to 50.80%. In all three, “the percentage of black registered voters dropped to just under 50%.” *Georgia*, 123 S. Ct. at 2507–08. These are marginal decreases because testimony indicated they were likely to affect only marginally the candidates elected. *Id.* at 2515.

²⁴⁴ See *Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 94 (D.D.C. 2002) (three-judge court) (recognizing that “African American candidates may garner sufficient white crossover votes in some contexts to win elections”), *vacated and remanded* by 123 S. Ct. 2498 (2003); see also Karlan, *supra* note 236, at 27 (explaining that “in communities where white voters were willing to support the black community’s candidates of choice, it might be possible for black voters to elect more representatives” under a plan similar to that proposed in Georgia). In addition, the plan reduced large black voting-age populations of over 60% in four districts while maintaining them as majority-minority districts. *Georgia*, 123 S. Ct. at 2506. Compared to the earlier 1997 plan that formed the actual benchmark for retrogression analysis, the new plan *increased* the number of districts with a majority black voting-age population by three and increased by five the number of districts with a black voting-age population of between 30% and 50%. *Id.* For information on Georgia’s state senators, see Georgia General Assembly, Legislator List Page, at http://www.legis.state.ga.us/cgi-bin/gl_peo_list.pl?List=tsenatedl.

²⁴⁵ The terms trace to HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 60–91, 112–43 (1967). Descriptive representation is that in which the representative personally mirrors the relevant characteristics of those represented; substantive representation refers to whether the substantive political and policy preferences of those represented are effectively realized.

²⁴⁶ See, e.g., (*Page v. Bartels*, 144 F. Supp. 2d 346, 353–54 (D. N.J. 2001) (describing New Jersey state legislators’ attempt to reduce “wasted” excess minority populations in majority-minority districts in order to bolster party support in other districts).

VRA, also had caused a net increase in Republican seats. Though the suggestion of such a tradeoff between black and Democratic representation had been met with hostility early in the decade,²⁴⁷ many social scientists soon agreed that such tension existed.²⁴⁸ Political actors involved in local politics also often agreed.²⁴⁹ Thus, black-white Democratic coalitions formed in a number of places to make the safe minority districts of the 1990s somewhat less safe.²⁵⁰ In Northern states, the VRA did not preclude white-black coalitions of Democratic officeholders from somewhat reducing black populations in the safe districts that had been created in the 1990s.²⁵¹ The question that Georgia tested was whether the South would be permitted to do the same. The “no retrogression” regime, still applicable almost everywhere initially covered in 1965, appeared to stand in the way.²⁵² Reducing black populations, even marginally in a few districts, and even as part of an effort to maintain partisan control of the senate, constituted impermissible “backsliding”²⁵³ under existing Court decisions. That black legislators almost universally supported the plan, and that the justification for the tradeoff was to maintain partisan control of the senate in a southern state, were factors neither within the contemplation of Congress in 1982 nor the Court when its critical interpretations of the VRA had been developed. Treating these considerations as legally irrelevant, the Department of Justice and the lower, three-judge federal court had concluded in finding that Georgia’s efforts violated the VRA.²⁵⁴

What a perversion of the VRA that would have been in Georgia. Here were black and white legislators, willing to make their seats more depend-

²⁴⁷ See, e.g., Pildes, *supra* note 225, at 1379.

²⁴⁸ See, e.g., LUBLIN, *supra* note 235, at 23 (2004) (“[T]he concentration of minority Democrats, especially African Americans, in majority-minority districts undercut the Democratic base in adjoining districts and aided the Republicans. Moreover, it provided an incentive for whites to run as Republicans as the number of districts favorable to white Democrats declined.”); see also *id.* at 104–06.

²⁴⁹ See, e.g., *Page*, 144 F. Supp. 2d at 353, 369 (D. N.J. 2001) (upholding New Jersey redistricting plan that reduced black voting-age populations in certain districts from 53% to 28%; 57% to 48%; and 48% to 39%). For a comparison of the New Jersey and Georgia redistrictings, see Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?* (forthcoming COLUM. L. REV. 2004).

²⁵⁰ Ironically, as more large states with sizable minority populations came under Republican control in the 2000s, *Shaw v. Reno* might have benefited the partisan interests of the Democratic Party; *Shaw* constrains the extent to which the redistricters can concentrate minority voters into election districts regardless of the design of those districts. See, e.g., LUBLIN, *supra* note 235, at 23 (“Over the long term, this shift [caused by *Shaw*] will probably aid Democrats [in the South].”); *id.* at 109 (“The Supreme Court has aided the Democrats, though not necessarily black and Latino Democrats, by striking down many majority-minority districts as racial gerrymanders.”).

²⁵¹ See, e.g., *Page*, 144 F. Supp. 2d at 362–66 (holding that the VRA allowed New Jersey to reduce black populations in safe districts).

²⁵² The VRA creates a mechanism for jurisdictions to “bail out” from having once been included as a covered jurisdiction, but the criteria that must be met, particularly as interpreted by Court decisions, are so stringent that only a few have done so since 1965. On the criteria, see *City of Rome v. United States*, 446 U.S. 156, 162–69 (1980); *Gaston County v. United States*, 395 U.S. 285, 293–96 (1969).

²⁵³ *Reno v. Bossier Parish School Bd.*, 528 U.S. 320, 335 (2000).

²⁵⁴ *Georgia v. Ashcroft*, 123 S. Ct. 2498, 2515 (2003).

ent upon interracial voting coalitions, and yet the Act would have imposed on them more racially homogenous constituencies. Here was a large contingent of black legislators who, now that they had entered the halls of legislative power, determined that they and their constituents would have more effective power as part of a Democratic senate; yet the Act would have required them to become the minority in the senate, for the sake of a marginal potential gain in formal black representation. Here was Congressman John Lewis, his life risked in the Selma march to help get the VRA enacted, his seat not at stake, testifying after nearly twenty years in Congress that “giving real power to black voters comes from the kind of redistricting efforts the State of Georgia has made”²⁵⁵ and that the South has “come a great distance” since a generation ago.²⁵⁶ And here were black legislators, not demanding safer sinecures for themselves, as office-holders typically do, but taking risks to forge a winning coalition and exercising political agency; yet the Act would have denied these politicians the autonomy to make the hard choices at issue, even with partisan control of government at stake.

In a 5–4 decision, the Court permitted the concepts of political equality and fair representation in the VRA to reflect these changed circumstances. Reversing the lower court, the Court concluded that Georgia (and similar jurisdictions) had latitude to make at least marginal tradeoffs between the safety of black seats and the aim of marshaling political power effectively to control state political institutions.²⁵⁷ The Act, in the changed context of today, did not require institutional designers to blind themselves to the coalitional mobilization of political power in order to meet the single goal of maximizing electoral prospects of black legislators. Southern states, at least where black legislators play a decisive role, have some of the flexibility other states have to modify, at the margins, the safe districting regime of the 1990s.²⁵⁸ While some might question how much discretion the Court ought to have to take such considerations into account when interpreting a statute, the reality is that, given the relatively open-textured terms of the VRA and the generality of Congress’s original purposes, much of the content of the VRA has always emerged through judicial implementation of the Act.

The Court did unanimously agree on one new principle that reflected modestly revised understandings of political equality. Academics had argued that the Act should recognize a new form of election district, a “coalitional district,” in which black voters might not form a numerical major-

²⁵⁵ *Id.* at 2516 (quoting testimony of Congressman John Lewis) (internal quotation marks omitted).

²⁵⁶ Pildes, *Is Voting-Rights Law Now at War with Itself?*, *supra* note 225, at 1563 (quoting testimony of Congressman John Lewis) (internal quotation marks omitted).

²⁵⁷ *See Georgia*, 123 S. Ct. at 2512.

²⁵⁸ *See id.* The Court, accepting these principles, remanded for a determination whether a full record permitted Georgia to act on this legal understanding of “retrogression.” *Id.* at 2517.

ity, but in which black and white coalitional voting would nonetheless give black candidates a realistic opportunity to be elected.²⁵⁹ As some commentators have put it, this principle is “emerging as the new ‘third way’ in racial redistricting.”²⁶⁰ The entire Court agreed that coalitional districts are now plausible substitutes for the safe districts of the 1990s when coalitional districts offer the same likelihood of black electoral success.²⁶¹

But the Court’s 5–4 divide on whether Georgia’s objectives were consistent with the VRA — a familiar, recurring, 5–4 divide in VRA and racial redistricting cases — was disappointing. In the perfect storm of Georgia, control of a political body was at stake, a virtually unified black-white Democratic legislative coalition was in charge, and marginal reductions in safe black districts were at issue. If that did not present a context justifying flexibility in prior understandings of the VRA, few contexts would.²⁶²

At the start of a new decade, it was particularly important that the Court signal that structural changes in partisan competition, black office-holding success, and white cross-over voting justified flexibility in legal principles developed in an earlier environment of black exclusion from of-

²⁵⁹ See Pildes, *Is Voting-Rights Law Now at War with Itself?*, *supra* note 225, at 1551–63.

²⁶⁰ Heather Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. (forthcoming 2004) (manuscript at note 5, on file with the Harvard Law School Library).

²⁶¹ See 123 S. Ct. at 2511–12; *id.* at 2518 (Souter, J., dissenting) (concluding that “[t]he prudential objective of § 5 is hardly betrayed” by allowing coalition districts).

²⁶² What was the net result of this saga when actual elections took place? First, Georgia Democrats were right to think that they were captaining a sinking ship. In 2002, a Republican was elected governor for the first time since 1868 (after the 2004 elections, the state is also widely expected to have two Republican senators). Second, the Senate gerrymandering plan worked largely as Democratic legislators, black and white, had intended. Despite the new statewide Republican majority in the governor’s race, the Democrats retained the Senate on general election day in 2002, winning a 30–26 majority. See Georgia General Assembly, Legislator List Page, at http://www.legis.state.ga.us/cgi-bin/gl_peo_list.pl?List=stsenatedl (on file with the Harvard Law School Library) (listing current office-holders). Of the five districts contested in *Georgia v. Ashcroft*, four performed as the plan’s Democratic designers had predicted; these four returned their Democratic incumbents, including three of the four black incumbents. See *id.*; 195 F. Supp. 2d at 56–64 (discussing the five contested districts). The fifth district at issue, however, had been represented by Charles Walker, the black majority leader of the State Senate. In the effort to maintain Democratic control of the Senate, Walker had cut his district’s margin a bit too fine and lost by less than 300 votes. See Theresa Minor & Haley A. Dunbar, *Hundreds Turn Out to Launch Walker Campaign*, AUGUSTA FOCUS, Jan. 22–28, 2004, vol. 23, no. 1141, <http://www.augustafocus.com/NEWSARCHIVE2004/frontpagenews012204.htm> (noting that Walker “lost his re-election bid in the 2002 election by a margin of less than 300 votes”). The plan had thus succeeded in maintaining Democratic control, at the cost of one black seat, a risk which had been accepted by one of the state’s most powerful legislative leaders. But then, in a state that now had a Republican governor and that was trending Republican, four Democratic senators shifted parties after the election. The Senate thus ended up with a 30–26 Republican majority. Yet the saga does not end there. In the next litigation after *Georgia v. Ashcroft*, the federal court held the plan violated the one person, one vote principle. See *Larios v. Cox*, 300 F. Supp. 2d 1320, 1357 (N.D. Ga. 2004). The Supreme Court affirmed. *Cox v. Larios*, 124 S. Ct. 2806, 2806 (2004) (summary affirmance). The results of this latest development await the 2004 election.

faceholding within a one-party system.²⁶³ Perhaps this Court, which has been together longer than any other, has itself become so polarized on issues of race and voting that it could not find unanimity even on the striking facts of *Georgia*. But the majority went further and embraced a more expansive, still ill-defined conception of other modes of “political influence” that might be attributed to minority voters. These more nebulous modes of influence might also substitute, the Court held, for safe minority-controlled election districts.²⁶⁴ The dissent was right to raise questions, both in principle and in practice, about whether this further flexibility in the VRA is appropriate.²⁶⁵

The VRA is a form of national, command-and-control regulation for the design of democratic institutions. In the last generation, it mandated an appropriate uniform remedial approach nationwide: safe minority districts for all elections, local, state, and federal, in which voting was racially polarized. That approach made sense when safe districts were essential to the election of black candidates; when the one-party South had no incentive to respond to black voters; and when there were virtually no black elected officials to participate in negotiation over the appropriate structures of democracy itself.²⁶⁶ Like all command-and-control legislation, the Act did not allow regulated actors latitude to make decisions about how most effectively, in their own diverse contexts, to realize the aims of the Act. Those actors were the object of the Act’s distrust. And like all regulatory statutes, the VRA must contend with the difficulty of statutory updating as political dynamics change. As in many regulatory arenas, Congress is unlikely to provide a consistent mechanism for responsive updating, for

²⁶³ In commenting on *Georgia v. Ashcroft*, Lani Guinier rightly notes that leaving districting in the hands of state legislatures “creates the dangerous moral hazard that those already privileged may seek only to reproduce themselves.” Lani Guinier, *Saving Affirmative Action: And a Process for Elites to Choose Elites*, VILLAGE VOICE, July 2–8, 2003, at 46. That argument, to which I am sympathetic, is an indictment of all districting done by self-interested elected officials, though not an indictment of the Court’s decision in *Georgia*. Although Guinier would prefer to make elections a product of “the voters’ freely given choice,” *id.*, that change would not resolve the issue in *Georgia* either way, nor does Guinier suggest it would. The choice in *Georgia* was whether the Georgia legislature, with decisive black participation, would draw the districts or whether the courts would do so through application of the centralized commands of the VRA. Neither option directly reflected the “freely given choice” of Georgia residents in 2001. Even were Georgia to adopt an independent districting commission, such a commission would still involve mediated citizen participation. Guinier might have cumulative voting systems in mind. I am supportive of cumulative voting systems for local elections, but more skeptical about whether they make sense for state or congressional elections. See generally Richard H. Pildes and Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. CHI. LEGAL F. 241 (1995). But even cumulative voting systems, which give voters a greater range of choice, must still be structured; they require prior decisions about how many votes and seats will be used in jurisdictions that must still somehow be defined. In general, a collective will must be organized before it can be expressed.

²⁶⁴ See *Georgia*, 123 S. Ct. at 2511–14.

²⁶⁵ See *id.* at 2518–20 (Souter, J., dissenting).

²⁶⁶ See Pildes, *Is Voting-Rights Law Now at War with Itself?*, *supra* note 225, at 1569–71 (defending safe minority districting interpretation of the VRA based on empirical facts).

Congress is likely to revisit the statute only episodically.²⁶⁷ Part of that mechanism is the unusual role that contemporary social science plays in the Act's application;²⁶⁸ combined with the redistricting mandated by each new decade and Census, the Act is more responsive than most. Nevertheless, facts must still be interpreted and normative judgments must still be made about the purposes of democratic representation in constantly changing contexts.

Georgia v. Ashcroft, the most important decision in a generation on race and political equality, can be seen as a form of “democratic experimentalism”²⁶⁹ in the design of democratic institutions themselves. The decision replaces a single, mandatory remedial regime with one that defines general objectives, but leaves representative bodies, with black participation, more flexibility in choosing the means to realize those aims in varied contexts.²⁷⁰ How much flexibility state and local political bodies should have, and in what circumstances, will be difficult future questions. In *Georgia*, the Court could rely on essentially a process-based approach to resolve these substantive uncertainties: given the nearly unanimous support of a large black political delegation, and the objective plausibility that black Georgians — who overwhelmingly are Democratic²⁷¹ — would be better served by a Democratically-controlled senate, *Georgia* presented a relatively easy case. It is true that the interests of black voters cannot necessarily be assumed to be reflected in the positions that black elected officials take; but the usual concern is that incumbents want to make their own districts overwhelmingly safe regardless of any other consequence. In *Georgia*, by contrast, black legislators were willing to make their districts

²⁶⁷ On the increasingly recognized problem of statutory obsolescence in the regulatory state, see generally GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982), and Donald C. Langevoort, *Statutory Obsolescence and the Judicial Process: The Revisionist Role of the Courts in Federal Banking Regulation*, 85 MICH. L. REV. 672 (1987).

²⁶⁸ For the role of social science in the Act's application, see Pildes, *Is Voting-Rights Law Now at War with Itself?*, *supra* note 225 and Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833 (1992).

²⁶⁹ See generally, Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998) (describing theory of “democratic experimentalism”).

²⁷⁰ The covered jurisdictions at issue must still comply with the Act's general, nationwide requirements. By its own terms, *Georgia* addresses Section 5 of the VRA and does not directly extend to the interpretation of the nationwide provisions of Section 2. The Court has repeatedly made clear, including in *Georgia* itself, that Sections 2 and 5 have different purposes and impose different duties. See *Georgia*, 123 S. Ct. at 2510–11. Functionally, reading more flexibility into Section 5 than into Section 2 could be justified, given that Section 5 is designed to be an extraordinary, temporary remedy. See *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 477–79 (1997) (describing the “limited purpose” of Section 5). But the central decisions on which the Court relies in *Georgia* involve separate concurring opinions in earlier Section 2 cases, which suggests the possibility that the Court will extend *Georgia* to Section 2 cases should that question arise. See *id.* at 2511–16 (citing thirteen times Justice O'Connor's concurring opinion in *Thornburg v. Gingles*, 478 U.S. 30, 83–105 (1986) (O'Connor, J., concurring in judgment)).

²⁷¹ The state's expert testified that approximately 90% of black voters in Georgia voted for Democratic candidates. See Karlan, *supra* note 236, at 25 n.38.

less safe for the purpose of being part of a willing coalition that would control the state senate. But if there is no substantial black participation in the process, or if a black legislative delegation is deeply divided, or if black legislators are at odds with organizations that genuinely represent large numbers of black voters, courts will face more ambiguous process-based signals that provide less clear proxies for substantive judgments. Congress, after a twenty-five year absence, will have to confront these issues when it is forced to decide whether to reauthorize and modify Section 5 in 2007.²⁷²

Georgia shows the dangers, in the domain of politics, of borrowing understandings of equality from other constitutional spheres, of regulating politics through deductive analysis of logical concepts of equality, and of viewing equality issues in the ideological terms they might be thought to present in other arenas. But legal academics and many judges (especially in an era when fewer federal judges have political experience) are better trained to think in terms of rights, participation, representation, and equality than in terms of material issues of political power. In politics, though, equality of groups cannot be effectively realized without recognizing the interdependence of multiple groups in the collective mobilization of material political power. Pragmatic, productive analyses of equality must recognize the distinct role that power plays in this arena. Issues of race-conscious policies in academic admissions, or in government contracting, pose different questions. For that reason, analyses of general principles that transcend these differences, such as “equal concern and respect,” can be misguided or even self-defeating.

Georgia also raises broader questions about the relationship between political competition and the legal understanding of equality. The VRA was a commitment to imposing first-order legal principles of equality on a political order that lacked meaningful partisan competition. With the emergence of such competition in the South, hard questions arise, not just about whether that first-order imposition remains necessary, but about whether that imposition becomes dysfunctional by frustrating formation of the coalitions and agreements that make success in a competitive two-party regime possible. As the biracial world of the original VRA fully gives way to a multiethnic political landscape, these issues will only become more difficult to manage through a national, command-and-control regime. In a mature political order that involves regular, two-party competition, the principle of representational equality, to be effective, might be largely derivative of whatever is necessary to mobilize winning coalitions. Because groups cannot realize their legislative objectives outside the context of affiliation with a winning political party (absent coalitions forged across party lines), the fates of groups and parties are unavoidably linked. Put in

²⁷² See 42 U.S.C. § 1973b(a)(8) (2000).

other terms, competition itself creates the incentives and provides the checks that most effectively realize representational equality. When the Democratic Party was a monopolist, it suffered no penalty from ignoring constituent groups. But in a competitive environment, both parties are disciplined to maximize partisan advantage through accommodations and tradeoffs among claims of constituent groups. Perhaps that competitive process ensures the regime of normal, pluralist, interest group politics to which the VRA aspired.

All this might suggest that the judicial role, in a mature regime of intense partisan competition, should shift from the first-order imposition of representational equality to the second-order task of securing the conditions of effective partisan competition itself. If that competition is an effective means of realizing representational equality, and if first-order mandates of equality can undermine competition and hence effective equality itself,²⁷³ courts would best ensure equality by policing the background conditions of competition. Consistent with the themes of this Foreword, courts would have a justified role in limiting the inevitable tendencies toward self-entrenchment and partisan manipulation of the institutional framework of competitive democracy. But if courts (and other institutions) minimize partisan gerrymandering and other anticompetitive practices, judicial deference to the outcomes of that competition, as in *Georgia*, might not only be justified, but might also be more effective at ensuring equality itself. Just as courts and legislatures no longer protect rights in the economic sphere through first-order imposition of “just price” principles, but through second-order securing of the competitive structure of the market itself, a functional analysis of democratic politics must consider the extent to which courts can best oversee political processes in similar ways. Democratic representation, of course, serves multiple aims, and effective competition might be better at realizing certain aims than others. But mobilizing effective legislative power to make law (or to resist law) surely must be a central aim of well-designed representative institutions, particularly for vulnerable minorities. This perspective is not meant to endorse

²⁷³ There might be some means of imposing norms of representational equality that affect different political parties the same way and thus impose no competitive disadvantage on any one party. Laws in some countries that impose obligations of gender equality on the parties, such as the French *parité* laws or Scandinavian requirements that party lists contain fixed percentages of women candidates, might be examples. See Mala Htun, *Is Gender Like Ethnicity? The Political Representation of Identity Groups*, 2 PERSPECTIVES ON POLITICS 439 (2004) (cataloguing ethnic and gender quota and reservation provisions across the world and discussing different remedies appropriate for the representation of different identity groups). These are legislatively imposed mandates. Any such mandates must be attentive to whether they disadvantage particular parties. Legislatures are more likely to make these calculations accurately than are judges, who are trained to think in terms of more abstract concepts of rights and equality.

specific solutions for future applications of the VRA.²⁷⁴ Instead, it is meant to offer a general framework for organizing analysis of the way legal ideas of rights and equality must be modified to account for the larger structural environment within which politics takes place.

Democratization in the world today often involves institutional design in the midst of group conflicts and differences even more explosive than the American experience with race. Democratic bodies must be designed at moments of extreme fragmentation and distrust, yet the original representational structures do not contemplate, and may actually impede, mechanisms of transition beyond that moment. Courts might play a role, far more controversial than that in *Georgia*, in destabilizing originally necessary representational arrangements that lock in group-based identities indefinitely. A recent decision of one emergent constitutional court might, as an astute commentator points out, “serve as a model for other ethnically-divided societies in transition around the world.”²⁷⁵

In the aftermath of ethnic cleansing in the former Yugoslavia, the Dayton Peace Agreement in 1995 sought to create representative democratic institutions stable enough to enable political existence to replace civil war in Bosnia and Herzegovina. The task of the Dayton process was to stabilize relations among Serbs, Croats, and Bosniaks by ensuring each group acceptable representation in political institutions while creating enough political authority to underwrite a government.²⁷⁶ The central institutional strategy, reflected in the post-war constitution adopted at Dayton, involved a weak central government and the devolution of major political power to two ethnically-based regional bodies known as the “Entities”: the Republika Srpska (“Republic of Serbs”) and the Federation of Bosnia and Herzegovina (composed mostly of Croats and Bosniaks).²⁷⁷ The resulting governance structures are strongly consociational, involving ethnically based representational guarantees.²⁷⁸ All major national governing structures, the “common institutions,” involve tripartite, identity-based membership: one

²⁷⁴ One of the questions a full analysis would have to consider is the extent to which the competitive context of politics today is a product of the VRA itself. The VRA has helped establish the large contingents of black legislators in Georgia. If § 5 were not re-authorized, or more dramatically, if § 2 were repealed, it is unclear how levels of black political representation or influence would be affected. Changes of this sort can certainly not be assumed to be likely to return Southern politics to the status quo that existed in 1982, when the current version of § 2 was adopted and the Act last amended. Today two-party competition exists and black citizens are a critical component of the Democratic Party. Those factors would continue to be true, even without § 5. But precisely how repeal of § 5 would affect political dynamics in the South remains uncertain.

²⁷⁵ Anna Morawiec Mansfield, Note, *Ethnic but Equal: The Quest for a New Democratic Order in Bosnia and Herzegovina*, 103 COLUM. L. REV. 2052, 2072 (2003). The account in the following paragraphs is drawn from this article and Issacharoff, *supra* note 29, at 20–27.

²⁷⁶ Mansfield, *supra* note 275, at 2056.

²⁷⁷ *Id.* at 2057.

²⁷⁸ *Id.* at 2057–58.

part Serb, one part Bosniak, one part Croat.²⁷⁹ The two Entities, with which most of the power lies, are nearly homogenous ethnically.²⁸⁰ The national constitution empowers them to define and regulate their own internal citizenship, while national institutions regulate national citizenship (and national citizenship does not confer Entity citizenship).²⁸¹ Each Entity's constitution defines citizenship ethnically: the Federation of Bosnia and Herzegovina was defined as an Entity of "Bosnia[k]s and Croats as constituent peoples," while the Republika Srpska was the "State of Serb people and all of its citizens."²⁸²

The Constitutional Court, also created by the Dayton Accords, is an exception to the pure ethnic organization of state institutions: it contains nine members, two from each of the three groups, but to escape the internal logic of ethnic conflict, the remaining three cannot be citizens of the state or of any neighboring state. They are selected by the President of the European Court of Human Rights "after consultation with the Presidency."²⁸³ A claim brought before the court by the then chair of the tripartite state presidency, the Bosniak member Alija Izetbegovic, asserted that numerous provisions of the constitutions for both Entities violated the national constitution. These challenges focused on the ethnically exclusive way the local constitutions defined their respective "constituent peoples" — a power that legally seemed to belong to the Entities as part of the original Dayton accommodations. But after obvious internal struggle and deliberation that lasted two years, the court, in a series of four momentous decisions, held that the Entities nonetheless could not define their own constituent peoples in ethnically exclusive terms.

The Court reasoned that the national constitution required all citizens of the national state to be accorded the rights and privileges of other citizens regardless of their residence or ethnicity. Even though the constitution created geographic entities that de facto would be demographically dominated by particular ethnic groups, "this territorial delimitation cannot serve as a constitutional legitima[tion] for ethnic domination, national homogeni[z]ation, or a right to uphold the effects of ethnic cleansing."²⁸⁴ The court also distinguished between ethnic power-sharing arrangements established in the structure of national institutions and the attempts of the Entities themselves to define their members in ethnically homogenous

²⁷⁹ Issacharoff, *supra* note 29, at 21. The presidency, for example, consists of three members, one from each group, who rotate as chair. Mansfield, *supra* note 275, at 2058.

²⁸⁰ Mansfield, *supra* note 275, at 2061.

²⁸¹ *Id.* at 2062.

²⁸² *Id.*

²⁸³ BOSN. & HERZ. CONST. art. VI(1)(a), at <http://www.ccbh.ba/?lang=en&page=texts/constitution/article06>.

²⁸⁴ Constitutional Court of Bosnia and Herzegovina, Partial Decision, para. 61 (July 1, 2000), <http://www.ccbh.ba/downloads/decisions/en/2000/07-01/U%2005-98%20Partial%20Decision%20III%20English.doc>. See Para. 61

terms. Thus, the Serb member of the presidency had to be elected by all citizens of Republika Srpska, not just those of Serbian ethnicity. The decisions were incremental; the Court left other actors to determine the appropriate modifications to the legislative and institutional structures required by the principle of a single national constituency. After two years, the relevant political parties committed in principle to implementing the decision and have taken a few steps in that direction.

Viewers should not try this at home: it takes an exquisitely astute political sensibility to judge correctly when undermining original commitments to group-based political structures will defuse rather than inflame a combustible context. That pragmatic judgment surely must inform any judicial decision on such explosive issues. Whether the entire Dayton process should be viewed as a success — because it helped end the ethnic slaughter, at least for a period — or a failure — because a reigniting of these conflicts is imminent — remains uncertain. But in the case of Bosnia and Herzegovina as well as *Georgia v. Ashcroft*, courts can be viewed as facing original political and legislative decisions to entrench particular forms of group identity in representative structures. In both contexts, courts moderated those structures. The justification in *Georgia* is easy to reconcile with the account of the judicial role developed in this Foreword: competitive political processes had generated new institutional solutions that arguably better advanced the goals of the VRA in changed circumstances. The constitutional court's decision in Bosnia and Herzegovina requires a different kind of justification: that courts can enforce substantive principles of liberal political equality even in contexts of ethnically divided governmental arrangements. But both cases raise the general question of whether courts can properly serve as transitional institutions through which representative institutions become less strongly rooted in initially profound group identities. Given that democratic institutional designers typically fail to create institutions responsive to the dynamics of group identities and democratic politics, courts are becoming a principle mechanism for managing such transitions.

C. The Limits of Individual and Associational Rights Models: Political Parties and Political Competition

Political parties are the central institutional form through which politics is organized and rationalized. The constitutional treatment of parties, in areas such as primary-election structures and campaign financing, therefore has important implications for the practice of elections as well as democratic governance.

This section argues that the current constitutional approach to parties is flawed in at least three ways. First, the Court assesses the rights of parties through individual-rights frameworks borrowed from other areas but that are ill-suited for determining the distinct role of political parties in democratic politics. Second, the Court cannot competently make certain func-

tional judgments that are required to override legitimate political determinations about how American parties ought to be structured. The central role that constitutional law can justifiably assume in this area is to ensure that laws do not inappropriately undermine robust competition between political parties. But the third current failing is that the Court has been insufficiently attentive to the requirements of this role.

States largely have been free to choose their preferred form of primary-election structure.²⁸⁵ But recently the Court established the broadest principle in constitutional history of the First Amendment associational rights of political parties. In *California Democratic Party v. Jones*,²⁸⁶ the Court, in a 7-2 decision, held unconstitutional the structure of political-primary elections in California and, by implication, perhaps in many other states.²⁸⁷ In the United States, political parties since the early twentieth century have been more heavily state regulated than parties in any other Western democracy.²⁸⁸ States began to mandate direct primary elections in 1903 in return

²⁸⁵ The one case in which the Court had struck down a state-primary structure before the developments described in the text was *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), which held unconstitutional a state's imposition of a closed primary on a party that preferred to compete in an open primary. The legacy of *Tashjian* had been unclear until *Jones*, because *Tashjian* arose in a context of obvious self-entrenchment; the party which controlled key political institutions refused to change the primary structure in a way that the outside party believed would make the latter more competitive. See *id.* at 224 ("Under these circumstances, the views of the State, which to some extent represent the views of the one political party transiently enjoying majority power, as to the optimum methods for preserving party integrity lose much of their force."). In addition, *Tashjian* was a 5-4 decision, with all four dissenters and no justices who were in the majority on the current Court. Those dissents took strong positions supporting state control of primary structures. See, e.g., *id.* at 237 (Scalia, J., dissenting) (noting that "the validity of the state-imposed primary requirement itself, which we have hitherto considered 'too plain for argument,' presupposes that the State has the right 'to protect the Party against the Party itself.' Connecticut may lawfully require that significant elements of the democratic election process be democratic — whether the Party wants that or not.") (citation omitted) (first quote *American Party of Texas v. White*, 415 U.S. 767, 781 (1974)). Thus, whether *Tashjian* barred only partisanly motivated, anti-competitive state primary choices; stood for a broad principle of constitutional party autonomy; or would even remain good law was uncertain before *California Democratic Party v. Jones*, 530 U.S. 567 (2000). In *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989), the Court struck down laws that barred official party endorsements in primaries and regulated internal governance structures of parties, but did not consider the structure of state primaries or access to the general election ballot. And in several cases, the Court has enforced the right of national parties to control their state units in conflicts regarding delegate selection to national conventions, but these conventional, federalism-like decisions asserting the power of national bodies over local units had no bearing on state choice of primary election structures. See *Democratic Party of United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 126 (1981); *Cousins v. Wigoda*, 419 U.S. 477, 491 (1975).

²⁸⁶ 530 U.S. at 567.

²⁸⁷ *Id.* at 586.

²⁸⁸ See EPSTEIN, *supra* note 104, at 155-58. In most other democracies, parties run their own candidate selection process and limit participation to an organized membership, often one for which dues must be paid. *Id.* at 144-46, 168.

for granting major-party nominees immediate access to the ballot.²⁸⁹ State laws, not party rules, determine who can become a party member and the conditions of membership.²⁹⁰ These conditions are sometimes minimal, as weak in many places as declaring party membership on primary-election day.²⁹¹ In addition to mandating primary elections, states have also long regulated eligibility to participate in these primaries.

In 1996, by a large margin among both Republican and Democratic voters, California chose to change its form of political-primary election. Through voter initiative, the state adopted the blanket primary, long in use in Washington and Alaska. In a blanket primary,²⁹² voters can choose of-
fice by office the political party primary in which they want to vote — the Republican primary for Governor, the Democratic primary for Attorney General, the Libertarian primary for Treasurer. California's blanket primary was a product of the forces described in this Foreword's introduction. California had maintained its closed primary system even as voters there increasingly came to consider themselves independent. The legislature, controlled by the two major parties, refused to change the closed primary system, which shut independents out of the primaries. Political entrepreneurs who stood to benefit from open primaries succeeded in getting onto the ballot a voter-initiated blanket primary proposal.²⁹³ Proponents asserted that, as with open primaries, the blanket primary would enhance voter participation and generate more centrist candidates (and thus elected officials) who better reflected median voter preferences.²⁹⁴

But the Court held that blanket primaries interfered with the constitutional autonomy of political parties. Though *Jones* went largely unnoticed

²⁸⁹ For the history of mandatory primary laws, see *id.* at 158–74. State laws also required that party nomination processes should be open to all identifiable party voters, rather than only to dues-paying members or fixed memberships of party activists. *Id.* at 169.

²⁹⁰ See Nathaniel Persily, *Toward a Functional Defense of Political Party Autonomy*, 76 N.Y.U. L. REV. 750, 765 (2001).

²⁹¹ Twenty-three states have requirements this lax. Kristin Kanthak & Rebecca Morton, *The Effects of Electoral Rules on Congressional Primaries*, in CONGRESSIONAL PRIMARIES AND THE POLITICS OF REPRESENTATION 116, 119 (Peter F. Galderisi et al. eds., 2001).

²⁹² After the California vote, four states would have used blanket or non-partisan primaries. See *California Democratic Party v. Jones*, 984 F. Supp. 1288, 1291–92 (E.D. Cal. 1997). According to purportedly reliable exit polls, 61 percent of Democrats, 57 percent of Republicans, and 69 percent of Independents supported the blanket primary in California's Proposition 198 contest. *Id.* at 1291.

²⁹³ See Michael S. Kang, *A Supralegal Theory of the Political Party* unpublished manuscript, on file with the Harvard Law School library.

²⁹⁴ Empirical studies of the two elections conducted under the blanket primary before the Court struck it down suggested that it had in fact produced more moderate candidates. See Elisabeth R. Gerber, *Strategic Voting and Candidate Policy Positions*, in VOTING AT THE POLITICAL FAULT LINE: CALIFORNIA'S EXPERIMENT WITH THE BLANKET PRIMARY, *supra* note 47, at 192, 210 (“[T]he evidence strongly suggests that the overall net effect of the blanket primary was to produce more moderate candidates.”); see also Elisabeth R. Gerber & Rebecca B. Morton, *Primary Election Systems and Representation*, 14 J.L. ECON. & ORG. 304, 318–21 (1998) (concluding that House representatives from closed primary states adopt policy positions furthest from their median voters' position and that those from semi-closed primary states take more moderate positions).

in general constitutional scholarship,²⁹⁵ the effect of *Jones* on democratic institutions is as sweeping as many landmark Warren Court decisions. Most narrowly, *Jones* holds that parties are constitutionally entitled to choose candidates through closed primaries involving only party members. More broadly, *Jones* might mean that parties are entitled to opt for whatever primary-election structure they prefer. At a minimum, *Jones* puts open primaries in question in all thirty-eight states that have some variation of them;²⁹⁶ indeed, it is hard to avoid concluding that these laws are unconstitutional, as soon as any political party challenges them.²⁹⁷ Even some closed primary laws might be constitutionally uncertain.²⁹⁸ The ramifications for both elections and governance will be significant.²⁹⁹

²⁹⁵ See, e.g., Akhil Reed Amar, *The Supreme Court, 1999 Term--Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000) (not discussing *Jones* in analysis of Court's Term).

²⁹⁶ See Persily, *supra* note 290, at 815.

²⁹⁷ Parties will challenge these laws when it is in their interest to use a different primary structure than the one currently required and when those benefits outweigh the political costs, such as the appearance of being less inclusive, of attacking such a law. Lower courts have held that only the party (not an individual party member) has standing to claim that party associational rights have been violated. See *Osburn v. Cox*, 369 F.3d 1283, 1287–88 (11th Cir. 2004). Note that the effect of standing doctrine and *Jones* is to give party organizational leaders, who control the litigation decision, control over what primary structure a party uses — a particularly ironic twist on the mandatory primary regime, the very purpose of which was to shift control of candidate choices from those party leaders to the party electorate.

²⁹⁸ State laws define membership requirements for participation in closed primaries. These laws determine how far in advance of the primary voters must declare their affiliation to be a party member; in some states, voters can do so quite close to the election, such as a week in advance. A party might consider such a thin affiliation requirement insufficient to constitute “true” party membership; the party's choice of candidate, the party might claim, could be diluted by latecomers lacking deeper commitment to the party. If *Jones* reflects a strong substantive view about party rights and identity, parties might challenge such thin-affiliation laws even in closed primaries. If instead states can simply define a party member to be anyone who so declares on primary day, *Jones* would constitute a more formal decision that states could circumvent by defining party membership in whatever way they prefer. Others have raised similar questions about closed-primary laws after *Jones*. Persily, *supra* note 290, at 787 (“Any system that requires party affiliation as a prerequisite for participation necessarily establishes legal criteria for party membership that can intrude on a party's rights if the party considers the criteria too lax or too stringent.”). The Court has held that *individuals* have a constitutional right against overly restrictive state membership restrictions. See *Kusper v. Pontikes*, 414 U.S. 51, 61 (1973) (holding unconstitutional a state law preventing a person from voting in a party primary if that person had voted in another party's primary within the previous 23 months). But see *Rosario v. Rockefeller*, 410 U.S. 752, 762 (1973) (upholding 11-month waiting period against *individual* rights challenge based on legitimate state interest in preventing party raiding). *Jones* presses on this from the other direction by recognizing a constitutional right of *parties* to define their own participation rules in primaries.

²⁹⁹ The Court could step back from this abyss by limiting *Jones* to blanket primaries. Open primaries differ from blanket primaries in that non-party members can vote only in the primary of one party. But there is no distinction in principle or empirical fact between blanket and open primaries. As commentators have recognized, if a constitutional principle of party autonomy limits state-mandated primary structures, it is difficult to see grounds that would distinguish applying that principle differently to open and blanket primaries. See, e.g., Richard L. Hasen, *Do the Parties or the People Own the Electoral Process?*, 149 U. PA. L. REV. 815, 830–31 & n.60 (2001); Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274, 284–85 (2001). Nonetheless, the Court might uphold open primaries precisely

1. *The Rights of Parties.* — Two aspects of *Jones* exemplify troubling features of the current way democracy has been constitutionalized. First, the Court based its analysis of political parties on conceptions of individual rights drawn from other domains. *Jones* borrowed strongly from cases involving expressive associations, such as the *Jaycees*³⁰⁰ and other civil-society organizations, as well as from cases involving parades and other “expressive endeavors.”³⁰¹ The Court concluded that just as expressive associations in civil society have the right not to associate with those antithetical to the organization’s identity, political parties have similar constitutional autonomy.³⁰² That autonomy constrains states from imposing primary-election structures that would permit non-members to vote in a party’s primary.³⁰³ As the Court put it, “the general rule of speaker’s autonomy forbids” states from requiring parties to permit non-members to vote in primary elections.³⁰⁴ That general rule arose in cases addressing whether parades must include all groups that seek to participate. There is nothing casual or accidental about reference to these principles. Justice Scalia, the author of *Jones*, took the same position in the same terms while still an academic. Regarding the constitutionality of legislation regulating the structure of primary elections, Professor Scalia wrote: “[a]s an original matter, I happen to think [any such legislation] should be [invalidated]. I see no reason why the government should be any more able to tell the Republican Party how to choose its leaders than to tell the Mormon Church how to select its elders.”³⁰⁵ *Jones* suggests that seven members of the Court agree.

It is important to understand the limits of individual rights analogies in this context.³⁰⁶ Although scholarship has traditionally debated whether political parties are best deemed to be “public” or “private,” that way of framing the issue involves a formal and sterile classification debate that

because they are more familiar and conventional. If so, that would suggest *Jones* reflects the Court’s reaction to novel election structures, not a general principle of constitutional party autonomy. See Richard H. Pildes, *Constitutionalizing Democratic Politics*, in *A BADLY FLAWED ELECTION* 155, 167 (Ronald Dworkin ed., 2002).

³⁰⁰ See *Jones*, 530 U.S. at 574–75 (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)).

³⁰¹ *Id.* at 583 (citing *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995)).

³⁰² *Id.* at 577.

³⁰³ *Id.*

³⁰⁴ *Id.* at 583 (quoting *Hurley*, 515 U.S. at 578) (internal quotation marks omitted).

³⁰⁵ Antonin Scalia, *The Legal Framework for Reform*, 4 *COMMONSENSE* 40, 49 (1981) (emphasis omitted).

³⁰⁶ For an excellent analysis of earlier party rights cases that also criticizes, though in somewhat different terms, the Court’s reliance on First Amendment rights, see generally Daniel Hays Lowenstein, *Associational Rights of Major Political Parties*, 71 *TEX. L. REV.* 1741 (1993).

can be advanced only by a more functional analysis.³⁰⁷ Specific functional reasons differentiate political parties from civil-society organizations. The constitutional rules that govern civil-society associations are framed against, and justified by, a specific social context, one in which a plurality of organizations can flourish as long as the state does not impose improper barriers to the formation of new groups. The general principle of expressive autonomy protects a civil-society sphere of pluralistic, diverse groups. The principle of speaker's autonomy reflects and serves the distinct structure and purposes of that sphere.

By contrast, the prior institutional framework of democracy already structures a domain organized differently, and for different purposes, than civil society. FPTP institutions ensure the existence of two, and only two, major political parties. The constitutional rights of association appropriate for a civil society sphere in which a plurality of associations flourish are not necessarily those apt for primary elections between candidates of two dominant organizations. Analysis of what rights parties ought to have depends upon functional judgments concerning the larger purposes of FPTP elections, state-mandated primaries, and the sphere of democratic politics itself. Only after those functional judgments are made can the appropriate content of rights of association be derived. If that is so, courts must engage in direct, functional analysis of the role of parties and primaries in American democracy. That analysis is not furthered by reasoning analogically from the Jaycees, the Boy Scouts, the Mormons, or similar religious or civil-society entities.³⁰⁸ Rights of association are not always intrinsic liberties that carry the same meaning in all domains.³⁰⁹

The mandatory primary itself is inconsistent with the view that political parties have associational rights that primary election laws violate. Man-

³⁰⁷ Even political scientists, attuned to the legal debates, invoke these classifications. See, e.g., AUSTIN RANNEY, *CURING THE MISCHIEFS OF FACTION* 74 (1975) ("Of all the rules affecting political parties, the most basic are those which determine their legal status as private associations or public agencies."). For an excellent synthesis of the public/private classification issues, see Lowenstein, *supra* note 306, at 1747–54. See also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1118–21 (2d ed. 1988) (discussing classification issues regarding parties).

³⁰⁸ Indeed, the "analogy" to state laws dictating the internal affairs and leadership selection mechanisms of civil-society organizations would be laws regulating internal party structure or the party's choice of organizational leaders, not laws regulating the conditions that must be met for immediate access to the ballot. The Court has struck down laws that regulate the internal governance structures of parties. See *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 233 (1989) (striking down a law that prohibited a political party from announcing its endorsement for primary candidates).

³⁰⁹ Dissenting in *Jones*, Justice Stevens, joined by Justice Ginsburg, did see the case in functional terms that implicated institutional design choices regarding the openness of primaries and the organization of democracy. Thus, he saw the case as involving "competing visions of what makes democracy work" — and for this very reason, "[t]hat choice belongs to the people." *California Democratic Party v. Jones*, 530 U.S. 567, 598–99 (2000) (Stevens, J., dissenting). As in the district court's opinion, the image of a resilient democratic system, not a fragile one, reappeared; Stevens wrote that states "should be free to experiment with reforms designed to make the democratic process more robust . . ." *Id.* at 601.

datory primary elections indicate that American law and practice recognize essential distinctions between parties and other associations.³¹⁰ When the pervasive and comparatively unique regulation of American parties, including the mandatory primary, initially developed between 1882 and World War I, political party leaders vigorously resisted this “democratizing” legislation.³¹¹ They asserted that such laws violated the associational rights of party members, but the state courts rejected these claims.³¹² In the same essay in which Justice Scalia (then Professor Scalia) noted that he would endorse the rights of parties to be free of state control as an original matter, he also wrote that

[C]onstitutional law is not an original matter. . . . We have an accepted governmental tradition of fairly extensive regulation in the latter field, dating from at least the days of La Follette (the *real* La Follette) in the 1900s. I doubt whether we are ready to repudiate such a long, significant, and not dishonorable portion of our political and constitutional history; or if we are, the Constitution has become a thing of the moment.³¹³

This history is at odds with any view that parties have intrinsic rights to free association that preclude state choice of primary-election structures.

The second troubling feature of current constitutional analysis is the way the Court treats the state’s functional justification for choosing one primary-election structure over another — and by extension, the state’s choice of one way to design the democratic process rather than another. A central reason offered by states for blanket or open primaries is that such primaries tend to select for more centrist nominees and therefore more centrist governing officials. Yet the Court treats this justification not just as

³¹⁰ Some defenders of *Jones* candidly concede that mandatory primaries are as unconstitutional in principle as mandated open primaries. See Persily, *supra* note 290, at 789–90. Persily goes on to conclude, however, that the Court would be reluctant to overturn mandatory primaries because of “pragmatic considerations and a fear of overturning the most significant of Progressive Era reforms.” *Id.* at 789.

³¹¹ For an engaging history of these reforms and the state judicial response to them, see the important article by Adam Winkler, *Voters’ Rights and Parties’ Wrongs: Early Political Party Regulation in the State Courts, 1886–1915*, 100 COLUM. L. REV. 873 (2000). Once the states began regulating ballot access and granting dominant parties automatic legal status, it was “an easy step” to require candidate nominations to comply with the processes and rules that state legislatures viewed as necessary — “in short, to prescribing in detail regulations governing the entire procedure of party primaries.” CHARLES EDWARD MERRIAM & LOUISE OVERACKER, *PRIMARY ELECTIONS* 25 (1928). EPSTEIN, *supra* note 104, at 168–70, also provides background on the state primary process in presidential elections. The classic article on mandatory primary laws is Floyd R. Mechem, *Constitutional Limitations on Primary Election Legislation*, 3 MICH. L. REV. 364 (1905). The first mandatory party regulations (other than antifraud laws) were enacted in 1882 in New York; these laws, like many of the early reforms, applied initially only in large cities. Winkler, *supra*, at 877 n.10. One of the leading contemporary studies of American parties develops the comparative perspective. See LEON D. EPSTEIN, *POLITICAL PARTIES IN THE AMERICAN MOLD* 156 (1986) (parties outside the United States are not “ordinarily subject to most of the other legal regulations imposed on the internal affairs of American parties.”).

³¹² Winkler, *supra* note 311, at 878. For various historical reasons, this litigation was overwhelmingly in state courts under state constitutional provisions.

³¹³ Scalia, *supra* note 305, at 49.

insufficient, but as virtually illegitimate *per se*. In the Court's view, this reason for selecting one form of primary over another is tantamount to the state engaging in impermissible viewpoint discrimination.³¹⁴

But viewpoint discrimination is inevitable in the design of democratic institutions: substantive judgments about desirable forms of democratic elections and governance must be made. To recognize this point, it is useful to situate the choice of primary-election structure within the larger architecture of a democratic system. That larger framework includes a number of individual units that together constitute the institutional structure of elections. In the design of these units, the same considerations often recur, two of which are worth emphasizing here.

First, institutional structures create incentives that affect the level at which the democratic experience of compromise, accommodation, and negotiation is most likely to take place. Institutions can create incentives that force that experience down to the level of citizens before elections, or can make that experience more likely to occur among elected leaders, after elections, who must then bargain for effective governing power. Second, the units of the democratic system can be structured so that each unit internally encourages a more centrist politics among heterogeneous participants or a polarized politics among more homogenous groups that begin with relatively shared political preferences.

These considerations are relevant at the highest and most discrete level of democratic electoral processes. At the most general level, these considerations lie behind the choice for the fundamental structure of elections. That choice, most commonly, is between Anglo-American FPTP and the PR elections characteristic of other democracies.³¹⁵ Few choices have greater ramifications. PR systems enable small groups to gain representation in proportion to their popular vote share. Democratic theorists often endorse PR as a fairer system of representation because representative institutions more accurately mirror the entire distribution of views and partisan preferences among voters.³¹⁶ The parties that result have a narrower base, enabling a more coherent party ideology.³¹⁷ Some deliberative de-

³¹⁴ See *Jones*, 530 U.S. at 584 (“[A]ssuring a range of candidates who are all more ‘centrist’ . . . is hardly a compelling state interest, if indeed it is even a legitimate one.”). See generally Richard H. Pildes, *Formalism and Functionalism in the Constitutional Law of Politics*, 35 CONN. L. REV. 1525 (2003) (critiquing the general role of legal formalism in Court cases involving democratic politics).

³¹⁵ There are a variety of intermediate forms of semi-proportional representation or hybrid forms that mix features of both these pure models. Important use of these semi-proportional forms, such as cumulative voting, has been quietly taking place at the local government level in the United States for nearly a generation. See Pildes & Donoghue, *supra* note 263, at 259–60. On hybrid systems, such as Germany's often imitated representative structures, see Citations [SWAT].

³¹⁶ See THOMAS CHRISTIANO, *THE RULE OF THE MANY: FUNDAMENTAL ISSUES IN DEMOCRATIC THEORY* 224–31 (1996).

³¹⁷ *Id.* at 231.

mocracy theorists assert that PR systems make for more properly deliberative politics, given the greater number of parties formally represented.³¹⁸

But a major consequence of PR systems is that deliberation primarily takes place among elected officials, not voters. PR essentially transfers conflicts within a polity to the level of representative institutions. Conflicts in society are mirrored as conflicts within the parliament. Differences are confronted and negotiated among elected political leaders as they seek coalitional partners. Without any electoral sanction, the pressure on voters to confront other voters of differing viewpoints and agree on compromise candidates and policies is reduced. The parties of PR systems are not the “big tent” parties of the American system. Moreover, the dynamics of group polarization, in which deliberation among like-minded actors drives groups to more extreme positions,³¹⁹ might be thought worse in these PR systems. Lacking incentives to confront others with divergent views, voters and parties in PR systems might miss out on the dampening effect of heterogeneous debate, leading to the confirmation and exacerbation of extreme views. Particularly for democratic theorists who view parties as critical sites that “shape the democratic dispositions and practices of citizens personally,” and as “the most important agenda-setting institution[s] for the public interests of society as a whole,” these self-segregating, self-reinforcing consequences of parties in PR systems should be troubling.³²⁰

The wholesale question of FPTP v. PR is not, of course, on the menu of democratic design choices likely to be revisited anytime soon in the United States. But similar considerations and tradeoffs behind that broad choice are reproduced on a smaller scale for other institutional components of American democracy. They arise, for example, in the design of election districts. Districts can be constructed to concentrate more like-minded voters with “common interests,” or to bring together more heterogeneous voters with diverse interests.³²¹ The choice of how states design primary

³¹⁸ See, e.g., Cass R. Sunstein, *Democracy and Shifting Preferences*, in *THE IDEA OF DEMOCRACY* 196, 223 (David Copp et al. eds., 1993) (“[P]roportional or group representation could be regarded as a kind of second-best solution for the real-world failures of Madisonian deliberation”).

³¹⁹ CASS R. SUNSTEIN, *WHY SOCIETIES NEED DISSENT* 112–13 (2003). Heather Gerken explores the alternative view that if there are many groups involved in decisionmaking, there might be deliberative and other value in having some of those groups reflect extreme views. Heather K. Gerken, *Second-Order Diversity and Democracy*, 118 *HARV. L. REV.* (forthcoming Feb. 2005).

³²⁰ Nancy L. Rosenblum, *Political Parties as Membership Groups*, 100 *COLUM. L. REV.* 813, 817, 823 (2000).

³²¹ Walter Bagehot identified this issue long ago in arguing in favor of geographical districts, mandated by law with heterogeneous constituencies, and against either proportional representation or districts that concentrated voters by type:

At present the member is free because the constituency is not in earnest: no constituency has an acute, accurate doctrinal creed in politics. The law made the constituencies by geographical divisions; and they are not bound together by close unity of belief. They have vague preferences for particular doctrines; and that is all. But a voluntary constituency would be a

elections should also be understood as an electoral institution choice that presents similar tradeoffs.

States can mandate closed primary elections, in which only party members can participate. Closed primaries, like districts that concentrate voters with “common interests” and like the parties that PR elections produce, concentrate participation among voters who begin with more shared interests or preferences. States can instead require open primaries, as around thirty-eight states do, in which independents, and sometimes voters registered with another party, can vote.³²² The design of primary elections influences the types of candidates and hence officeholders likely to be elected. Primaries tend to be dominated by the most intensely engaged voters, who typically have more extreme views than median party members. Closed primaries accentuate these effects and are therefore likely to reward candidates more at the extremes of the distribution of office seekers. Open primaries produce candidates closer to the median voter’s views, or in more common language, more moderate candidates (and officeholders).

All these institutional design choices — FPTP vs. PR, the configuration of election districts, the structure of primary elections — involve numerous considerations. But they all help determine whether voters, in choosing parties and candidates, will empower centrists or extremists. The choice of FPTP elections because they will generate more centrist parties and elected officials, relative to PR elections, or because they will force voters to compromise more among themselves, can hardly constitute impermissible viewpoint discrimination. Neither can the choice to design election districts that will foster one set of coalitions rather than another. Inevitably, the state must choose one electoral system or another, and must design districts in one way or another. For the same reasons, a state’s preference for closed, open, or blanket primaries also cannot constitute impermissible viewpoint discrimination. Despite *Jones*, there is no “natural kind” of primary-election form. The question instead is how to evaluate the kind of democracy functionally generated by one primary structure rather than another.

Two competing ways of answering that question are available. Understanding these general frameworks is necessary to judge the desirable role of political parties in the American system today. The first is associated with the “responsible party government” position.³²³ Tracing back to

church with tenets; it would make its representative the messenger of its mandates, and the delegate of its determinations.

WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* 115 (Miles Taylor ed., Oxford Univ. Press 2001) (1867).

³²² Kanthak & Morton, *supra* note 291, at 121 tbl.8.1 (data as of 1996).

³²³ See generally Comm. on Political Parties, Am. Political Sci. Ass’n, *Toward a More Responsible Two-Party System*, 44 *AM. POL. SCI. REV.* No. 3 (Supp. Sep. 1950).

Woodrow Wilson,³²⁴ advocated mid-century by leading political scientists, such as E.E. Schattschneider,³²⁵ and famously endorsed by the American Political Science Association Committee on Political Parties in 1950 (chaired by Schattschneider),³²⁶ this position asserts that strong parties, with coherent, sharply differentiated ideologies, are critical to a healthy democracy.³²⁷ On this view, strongly differentiated and coherent parties serve at least two central roles. First, they enable government to resist being carved up by rent-seeking interest groups; only the countervailing power of strong party organizations, capable of sanctioning and rewarding elected officials who adhere to party ideology, can withstand the organized power of economic interests.³²⁸ Second, only such parties enable democratic government to be meaningfully accountable to citizens. Contrasting American political structures to British parliamentary ones, responsible party government theorists view the diffuse organization of political power in the United States as diminishing electoral accountability.³²⁹ Separated executive and legislative powers, combined with federalism, already make voter judgments exceptionally difficult concerning which actors are responsible for the effects of collective public action.³³⁰ But to hold officials accountable at election time, voters depend centrally on the clarity and distinctiveness of party labels. Parties not only reduce the welter of issues to a few defining ones; party label is also the most important informational cue to enable coherent voter judgments among a range of officeholders.³³¹ The two parties must therefore stand for consistent, coherent, and sharply

³²⁴ See AUSTIN RANNEY, *THE DOCTRINE OF RESPONSIBLE PARTY GOVERNMENT* 25–47 (1962) (summarizing Wilson's views).

³²⁵ See generally E.E. SCHATTSCHNEIDER, *PARTY GOVERNMENT* (1942).

³²⁶ See *supra* note 323.

³²⁷ For two strong, more recent articulations of this view, see Morris P. Fiorina, *The Decline of Collective Responsibility in American Politics*, *DAEDALUS*, Summer 1980, at 25 (1980) and Gerald M. Pomper, *The Decline of the Party in American Elections*, 92 *POL. SCI. Q.* 21 (1977).

³²⁸ This view is most strongly associated with the work of Walter Dean Burnham. See, e.g., WALTER DEAN BURNHAM, *CRITICAL ELECTIONS AND THE MAINSPRINGS OF AMERICAN POLITICS* 133 (1970) (“[P]olitical parties . . . are the only devices . . . which with some effectiveness can generate countervailing collective power on behalf of the many individually powerless against the relatively few who are individually — or organizationally — powerful.”).

³²⁹ See Michael A. Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 *U. PA. L. REV.* 1567, 1603–04 (1988).

³³⁰ A related observation is that more informed voting occurs in parliamentary systems than in federal systems with separated powers as in the U.S. See Samuel L. Popkin & Michael A. Dimock, *Political Knowledge and Citizen Competence*, in *CITIZEN COMPETENCE AND DEMOCRATIC INSTITUTIONS* 117, 143 (Stephen L. Elkin & Karol Edward Soltan eds., 1999). That the Constitution should be construed to foster clear lines of governmental authority and accountability has been a theme of the current Court. See, e.g., *Alden v. Maine*, 527 U.S. 706, 751 (1999) (“The Constitution thus contemplates that a State’s government will represent and remain accountable to its own citizens.” (quoting *Printz v. United States*, 521 U.S. 898, 920 (1997))) (internal quotation marks omitted).

³³¹ See, e.g., Elizabeth Garrett, *Is the Party Over? Courts and the Political Process*, 2002 *SUP. CT. REV.* 95, 101–03; Fitts, *supra* note 329, at 1609; Elizabeth Garrett, *The Law and Economics of “Informed Voter” Ballot Notations*, 85 *VA. L. REV.* 1533, 1548–49 (1999).

differentiated general policy positions to ensure the party label is a meaningful cue that enables voters to make retrospective judgments about government performance.³³²

In the 1970s and 1980s, a refrain from many political scientists was that political parties were dangerously in decline and that responsible party government was threatened.³³³ A “party renewal” movement, led by political scientists, lawyers, and some party activists endorsed this view and began to pursue litigation,³³⁴ including the filing of Supreme Court amicus briefs.³³⁵ Supreme Court Justices frequently cite these views about the declining strength of parties.³³⁶ This movement argued that certain state regulations, such as open primaries, played a major role in the decline of parties.³³⁷ Open primaries, by permitting non-party member participation, were said to dilute party labels and interrupt formation of clear party cues.³³⁸ The responsible party government position could therefore provide a functional justification for closed primaries.³³⁹

But at least two realities challenge this view. First, American parties have historically proven exceptionally adaptable and resilient. And at the moment when parties were most recently being proclaimed dead, they ironically resurged. The parties are now considered stronger than at any period in decades.³⁴⁰ The manifestation of this renewed party strength in-

³³² The Court expressed skepticism about the responsible party government position in *Tashjian*: “We note that appellant’s direst predictions about destruction of the integrity of the election process and decay of responsible party government are not borne out by the experience of the 29 States which have chosen to permit more substantial openness in their primary systems than Connecticut has permitted heretofore.” *Tashjian v. Republican Party*, 479 U.S. 208, 223 n.12 (1986).

³³³ For a synthesis and critique of the party-in-decline literature, see Larry M. Bartels, *Partisanship and Voting Behavior, 1952–1996*, 44 AM. J. POL. SCI. 35 (2000).

³³⁴ See Lowenstein, *supra* note 306, at 1742–43.

³³⁵ *E.g.*, Brief of Amicus Curiae Northern California Committee for Party Renewal, et al., *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000) (No.99-401), 2000 WL 245536; Brief of Amicus Curiae Committee for Party Renewal, et al., *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm’n*, 518 U.S. 604 (1996) (No. 95-489), 1996 WL 75770; Brief of Amicus Curiae Committee for Party Renewal, *Norman v. Reed*, 502 U.S. 279 (1992) (No. 90-1126), LEXIS 1990 U.S. Briefs 1126; Brief of Amicus Curiae California Democratic Party, et al., *Renne v. Geary*, 501 U.S. 312 (1991)(No. 90-769), 1991 WL 11007889. In *Tashjian*, an amicus brief was filed by several individual amici who were professors of political science and listed themselves as active in the Committee. Leon D. Epstein, *Will American Political Parties Be Privatized?*, 5 J.L. & POL. 239, 255–56 (1989).

³³⁶ *E.g.*, *Fed. Election Comm’n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 472 n.4 (2001) (Thomas, J., dissenting); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 383–84 (1997) (Souter, J., dissenting); *Rutan v. Republican Party*, 497 U.S. 62, 74–75 (1990); *id.* at 88 n.4 (Stevens, J., concurring); *id.* at 105, 107 (Scalia, J., dissenting); *Branti v. Finkel*, 445 U.S. 507, 531–32 (1980) (Powell, J., dissenting).

³³⁷ See Epstein, *supra* note 335, at 254.

³³⁸ See Lowenstein, *supra* note 306, at 1766–67.

³³⁹ These functional terms are the ones in which Persily, *supra* note 290, at 793–815, defends *Jones*, even as he rejects its rights analysis.

³⁴⁰ See generally POLARIZED POLITICS: CONGRESS AND THE PRESIDENT IN A PARTISAN ERA (Jon R. Bond & Richard Fleisher eds., 2000); KEITH T. POOLE & HOWARD ROSENTHAL, CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING 58–85 (1997); Melissa P. Collie & John

cludes partisan voting patterns in Congress more coherent, cohesive, and differentiated than at any time in many years.³⁴¹ Though party strength can be assessed along different dimensions,³⁴² these clear partisan voting patterns are the ones that matter most for the responsible party government position. Highly polarized parties, distinguished on major policy issues, are precisely what this position seeks. The reasons for this resurgence are many, but if nothing else, it is a reminder that American parties are exceptionally fluid,³⁴³ and that predicting their vitality is hazardous.

We have also seen responsible party government, and it is ours. This experience provides the second reason to challenge the desirability of the responsible-party government view. The other side of “responsible parties” is partisan, polarized politics. And academic analysis confirms popular accounts that, in our intensely partisan era, the center has disappeared among elected officials — at least those in Congress.³⁴⁴ One possible reason is that voters themselves are more partisan, and it is true that voting patterns have become more consistently partisan in recent years.³⁴⁵

But a second cause, central to the concerns of this Foreword, focuses instead on the design of democratic institutions. The preferences voters exhibit reflect the design of these institutions. Current institutional structures generate *candidates* who are more extreme partisans; faced with extreme partisan choices, it is no surprise that voting manifests more consistently partisan patterns. Given other choices, voters might exhibit different preferences. In addition, more partisan candidates spawn campaigns focused more on mobilizing base voters than appealing to disappearing centrists (who in turn recede further in the face of extreme choices not responsive to their preferences).³⁴⁶ Indeed, some political scientists conclude that voters are neither more partisan in viewpoint than in previous decades nor nearly as partisan as the officials they elect.³⁴⁷

Lyman Mason, *The Electoral Connection Between Party and Constituency Reconsidered: Evidence from the U.S. House of Representatives, 1972–1994*, in *CONTINUITY AND CHANGE IN HOUSE ELECTIONS* 211 (David Brady et al. eds., 2000).

³⁴¹ Richard Fleisher & Jon R. Bond, *Congress and the President in a Partisan Era*, in *POLARIZED POLITICS*, *supra* note 340, at 2–6.

³⁴² See generally Nathaniel Persily, *Soft Parties and Strong Money*, 3 *ELECTION L.J.* 315 (2004) (distinguishing and analyzing data on party strength as measured by voting in legislatures, voting in the electorate, and ability to recruit and nominate candidates).

³⁴³ Not heeding that reminder, Justice Scalia, dissenting in the campaign-finance case, suggested the Court’s reasoning, and perhaps the law itself, “threatens the existence of all political parties.” *McConnell v. Fed. Election Comm’n*, 124 S. Ct. 619, 725 (2003) (Scalia, J., concurring in part and dissenting in part).

³⁴⁴ See, e.g., Richard Fleisher & Jon R. Bond, *The Shrinking Middle in the US Congress*, 34 *BRIT. J. POL. SCI.* 429 (2004).

³⁴⁵ See, e.g., Bartels, *supra* note 333, at 37–42.

³⁴⁶ [SWAT – PILDES WILL HAVE NEWSPAPER ARTICLES ON THIS SHORTLY]

³⁴⁷ See generally MORRIS P. FIORINA ET AL., *CULTURE WAR? THE MYTH OF A POLARIZED AMERICA* (forthcoming 2005).

According to this analysis, American democracy in recent years has instead been “hijacked” by extreme partisan candidates who have been produced by specific institutional structures.³⁴⁸ Two of these structures are exactly those that the Court has constitutionally assessed in recent years: closed primaries and partisan gerrymandered election districts. Gerrymandered election districts, which pack voters with similar preferences into safe districts, produce representatives who reflect more partisan extremes. Combined with closed primaries, gerrymandered districts reward candidates of the extremes; voters appear more divided because their only option is a choice among these extremes. From this point of view, open or blanket primaries reflect institutional-design efforts to enable centrist voters to retake control of democratic institutions and empower a disappearing center in American politics.³⁴⁹

From a functional perspective, then, the question comes down to whether democratic politics and governance is best when particular institutions, such as primaries, are designed to favor extremes or the center. That is a difficult and intriguing question.³⁵⁰ Institutional designers, including voters in initiatives, might embrace either alternative; the answer might depend on contingent considerations (including how related institutions are

³⁴⁸ See *id.* (manuscript at 99 – 102, on file with the Harvard Law School Library) (discussing how a small percentage of the population dominates policy debates).

³⁴⁹ Samuel Issacharoff argues that this is how California’s gubernatorial recall and the election of Arnold Schwarzenegger should be understood. Samuel Issacharoff, *Collateral Damage: The Endangered Center in American Politics*, 46 WM. & MARY L. REV. (forthcoming Nov. 2004) (manuscript at 2, on file with the Harvard Law School Library). A third cause offered for the decline of the center in American political institutions is that it is a byproduct of the maturation of the American party system, in which the end of the one-party monopoly in the South, through passage of the Voting Rights Act, eventually led to the maturation of the party system. See Fleisher & Bond, *supra* note 344, at 432. Democrat elected officials came to be more closely aligned in partisan terms, as did Republican elected officials. See *id.* at 432–33. Fleisher and Bond view this as a contributing cause to disappearing moderate legislators who sometimes vote across party lines. *Id.* at 432. Internal rules of party caucuses, made possible by this purification process, then also further contributed to party discipline and the loss of centrist figures. See *id.* at 431.

³⁵⁰ The district court heard extensive but conflicting expert testimony regarding the possible effects of blanket primaries on voter behavior and the strength of political parties. See *California Democratic Party v. Jones*, 984 F. Supp. 1288, 1292–93, 1297 – 99 (E.D. Cal. 1997). But at the same time, the court’s opinion celebrated “experiment[s] in democratic government,” *id.* at 1303, and viewed the blanket primary against that narrative background. As the district court told the story, “Proposition 198 is the latest development in a history of political reform measures that began in the Progressive Era.” *Id.* at 1301. The district judge emphasized the significance of longstanding and widespread popular support for blanket primaries in California. See *id.* at 1289, 1291, 1303. And because “[t]he history of election law is one of change and adaptation as the States have responded to the play of different political forces and circumstances,” the district court expressed confidence in a future in which, whether the blanket primary turned out well or not, democratic politics would be self-correcting enough to respond. *Id.* at 1303. The court of appeals panel unanimously adopted the district court’s opinion. *California Democratic Party v. Jones*, 169 F.3d 646, 647 (9th Cir. 1999).

designed), as well as substantive judgments about preferred outcomes.³⁵¹ But these cannot possibly be judgments for courts. Indeed, any view that constitutional law is necessary to preserve the parties would entail lack of trust in the resilience of parties and in the self-revising capacity of democratic politics itself to decide what kind of parties best serve democracy. Nor are abstract “party rights” appropriate tools for making institutional decisions that have substantial ramifications for whether democratic politics is pushed toward the center or the extremes.

The one proper judicial concern in this area is that state legislatures, composed of partisans, might choose or maintain particular primary-election structures as anticompetitive instruments of self-entrenchment.³⁵² If courts can identify when particular primary laws are designed with this aim and effect, through case-by-case decisions or categorical judgments about types of primaries, that would provide a justification for judicial intervention. But short of that, judicially created “party rights” should not stand in the way of the choice to design democratic institutions to favor centrist or extreme politics and candidates. That would restore the design of central institutions of democracy, such as parties and primaries, to the popular and political control they have long had in America. The irony of judicial decisions designed to strengthen the parties is that the demands of voters for more centrist politics might well take forms more intrusive on parties than blanket or open primaries, as has already begun to happen in the wake of *Jones*.³⁵³

³⁵¹ In *Tashjian*, the Court recognized that “[t]he relative merits of closed and open primaries have been the subject of substantial debate since the beginning of this century” *Tashjian v. Republican Party*, 479 U.S. 208, 222 (1986).

³⁵² See *supra* note 285 (discussing context of *Tashjian*).

³⁵³ According to *Jones*, states can constitutionally adopt non-partisan primaries if they want to encourage candidate selection closer to median voter preferences. See *Cal. Democratic Party v. Jones*, 530 U.S. 567, 585 – 586 (2000). In non-partisan primaries, currently used for statewide and congressional elections in Louisiana (that model of well-functioning politics) and most local elections, candidates qualify for the primary ballot through general signature or similar requirements. See, e.g., LA. REV. STAT ANN. § 18:481 (West 2004). All voters participate in the non-partisan primary and the top two vote getters advance to the general election. E.g., LA. REV. STAT ANN. § 18:481 (West 2004). Non-partisan primaries therefore destroy the substantive role of parties far more than open or blanket primaries by denying parties the right to select any candidates at all.

If constitutional law preserves only a nominal form of party autonomy while permitting, even encouraging, the substantive destruction of the parties’ role, something is surely amiss. Nor is this an idle concern: several states are moving toward the Court-identified safe harbor of non-partisan primaries. When *Jones* was decided, only two states in addition to California had blanket primaries. *Cal. Democratic Party v. Jones*, 984 F. Supp. 1288, 1291 (E.D. Cal. 1997). Those primary systems have since been declared unconstitutional. *Democratic Party v. Reed*, 343 F.3d 1198, 1201 (9th Cir. 2003) (declaring Washington’s blanket primary unconstitutional in light of *Jones*); *O’Callaghan v. State*, 6 P.3d 728, 730 (Alaska 2000) (finding Alaska’s blanket primary indistinguishable from *Jones* and hence unconstitutional). The territory of Guam was also using a blanket primary that has since been declared unconstitutional. See Steve Limtiaco, *Judge Rules Against Election Law*, PAC. DAILY NEWS (Hagatna, Guam), June 11, 2004, at 1A, LEXIS, News Library, Pacdly File. Currently, movements are underway in California, Washington, and Oregon to adopt Louisiana-type systems through ballot initiatives. The

2. *Political Stability Versus Political Competition: Third Parties.* — As *Jones* shows, the Court holds election structures unconstitutional based on abstract and broad definitions of individual rights even when those structures are not the product of incumbent or partisan self-entrenchment. Yet at the same time, the Court does not aggressively scrutinize laws that drain the democratic system of desirable competitive pressures on the dominant parties.³⁵⁴ The Court is indifferent to such anticompetitive laws even when, unlike partisan gerrymandering, no questions concerning manageable judicial remedies are present. To a functional understanding of judicial review that views constitutional law as most justified when it protects the ground rules of democracy against capture by self-interested power holders, this structure is perverse.

In recent years, the Court has confronted the most significant issues in its history concerning the role of third parties. The most important test of the Court involved the possibility of fusion candidacies. Fusion candidacies entail joint nomination by two parties, typically a minor and major party, of the same candidate. A fusion candidate appears on the ballot under both party lines; voters can select the candidate on either party line. Fusion candidacies flourished in the late nineteenth and early twentieth centuries.³⁵⁵ The ability to forge fusion candidacies was vital to the exis-

major parties are opposing these measures. See Jeff Mapes, *Primary System Getting a Second Look*, THE OREGONIAN (Portland), May 10, 2004, at A1, LEXIS, News Library, Oregon File; Clea Benson, *New Attack in Open-Primary Battle*, SACRAMENTO BEE, July 7, 2004, <http://www.sacbee.com/content/politics/ca/v-print/story9911859p-10834071c.html>.

In addition, at the time of *Jones*, eight states had semi-closed primary systems. *Jones*, 984 F. Supp. at 1291. In a semi-closed primary, independent and non-affiliated voters are permitted to participate. *Id.* Courts are still struggling with the application of *Jones* to these systems, as illustrated by recent litigation in Arizona and Oklahoma. In Arizona, the Libertarians sued to keep non-party members from participating, while in Oklahoma, they sued to allow for broader non-member participation. In both cases, the courts found that the Libertarian Party's associational rights had been violated. *Beaver v. Clingman*, 363 F.3d 1048, 1061 (10th Cir. 2004); *Ariz. Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277, 1281 (9th Cir. 2003). See also *Cool Moose Party v. Rhode Island*, 183 F.3d 80, 88 (1st Cir. 1999) (declaring unconstitutional a Rhode Island statute prohibiting non-members of a political party from voting in another party's primary, even though the party's bylaws permit outside participation); *Van Allen v. Democratic State Comm.*, 771 N.Y.S.2d 285, 291 (Sup. Ct. 2003) (declaring unconstitutional a New York statute prohibiting non-members of a political party from voting in the party's primary elections, even though the party wanted to permit unaffiliated voters to participate).

³⁵⁴ For a fuller discussion of the importance of third-party pressure in keeping the major parties accountable and responsive to the electorate, see Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 668–90 (1998). See also POSNER, *supra* note 60, at 170 (“[A] meaningful threat of entry by third parties may be necessary to the preservation of competition under conditions of political duopoly (the two-party system).”). On the costs of ballot access laws to third parties, see ROSENSTONE ET AL., *supra* note 50, at 15–47.

³⁵⁵ See generally Howard A. Scarrow, *Duverger's Law, Fusion, and the Decline of American "Third" Parties*, 39 W. POL. Q. 634 (1986); Peter H. Argersinger, “A Place on the Ballot”: *Fusion Politics and Antifusion Laws*, 85 AM. HIST. REV. 287 (1980). For greater context on the legal treatment of third parties, see Issacharoff & Pildes, *supra* note 354, at 683–87.

tence of active third-party politics in this earlier era of vibrant third parties.³⁵⁶

Cross-endorsement enables third parties to influence the positions that the two major parties adopt and gives organizational expression to dissenting voices within the major parties. Absent fusion, voters otherwise inclined to support a third party decline to do so because such a vote seems wasted; with fusion, voters can support both the party of their choice and a major-party candidate with a serious prospect of election. Moreover, stringent ballot-access rules in the United States require parties to achieve a high level of support to be automatically listed on the ballot in subsequent elections.³⁵⁷ Fusion enables serious third parties to endure across elections by obtaining enough votes to secure automatic ballot access. Otherwise, these parties must devote scarce resources just to attaining a place on the ballot.³⁵⁸

Precisely because fusion pressures the two major parties, many state legislatures banned the practice around the turn of the twentieth century.³⁵⁹ These bans, which apply even when both a major and a minor party jointly agree to run a fusion candidate, were adopted in conjunction with other regulations of that era, including secret ballots, ballot access laws, and voter registration requirements. Like many of these laws, fusion bans were justified as necessary to protect voters from being deceived and to prevent electoral fraud.³⁶⁰

These bans exemplify the extent to which institutional structures and legal regulations enduringly determine the ways democratic politics is experienced, organized, and expressed. Once these laws were adopted, along with related ones in the same era, the role of third parties in American politics was dramatically diminished.³⁶¹ As political activists and academ-

³⁵⁶ See Scarrow, *supra* note 355, at 635–36.

³⁵⁷ See, e.g., GA. CODE ANN. § 18:21-2-2(25) (2003) (requiring receipt of 20% of vote in previous gubernatorial or presidential election to obtain political party status).

³⁵⁸ See ROSENSTONE ET AL., *supra* note 354, at 20–24.

³⁵⁹ See Scarrow, *supra* note 355, at 639.

³⁶⁰ *Id.* Fusion peaked between 1910 and 1919, when it served as a vehicle for various “expressions of political ferment,” though by that time half of the states had already enacted fusion bans. *Id.* at 639–40. Before these bans, fusion candidacies were common at every level: in the 1896 presidential election, for example, William Jennings Bryan was a fusion candidate of the Democratic and Populist parties. But this was the last major presidential fusion candidacy. *Id.* at 635. Fusion politics played a role in the interracial political coalitions that existed for a substantial time in the late nineteenth century South, even after Reconstruction had formally ended. On these interracial coalitions in North Carolina, see Pildes, *Democracy, Anti-Democracy, and the Canon*, *supra* note 130, at 314–15. See generally GLENDA ELIZABETH GILMORE, *GENDER AND JIM CROW: WOMEN AND THE POLITICS OF WHITE SUPREMACY IN NORTH CAROLINA, 1896–1920* (1996).

³⁶¹ Mandatory primary laws, for example, further require that a candidate can only contest in one party primary. These laws also at times require that candidates pledge loyalty to that party and that a defeated primary candidate cannot compete in the general election as an independent or on behalf of another party. Scarrow, *supra* note 355, at 638. In 1974, a divided Supreme Court upheld the constitutionality of these “sore loser” provisions. *Storer v. Brown*, 415 U.S. 724, 728 (1974).

ics at the time recognized, and as scholars today confirm, fusion bans devastated sustained third-party politics.³⁶² Because third parties are not likely to win elections, their importance is often dismissed. But third parties can be important sources of pressure to force major parties to be more responsive to neglected voters; fusion bans and related laws diminish the already small space within which third parties can keep major parties more accountable to voters.³⁶³ For example, by the time Roosevelt ran for the presidency under the Progressive Party label in 1912, his campaign focused primarily on the presidency rather than on building an integrated new party at all electoral levels, as the Populist Party had done in the 1896 election. As Roosevelt recognized, state laws now banned fusion where Republican-Progressive coalitions might otherwise have enlisted large support.³⁶⁴ Most third-party presidential campaigns since have similarly limited themselves to the presidency.³⁶⁵

By way of contrast, in New York, a state where fusion was still permitted, Fiorella LaGuardia's initial mayoral victory in 1933 was the result of a fusion candidacy between the reformist Fusion Party and the Republican Party.³⁶⁶ From 1910–1912, New York's Court of Appeals held repeated legislative attempts to ban fusion a violation of state constitutional guarantees.³⁶⁷ The court concluded that fusion bans were “destructive of fair elections” because these laws artificially restrained political competition.³⁶⁸ Because the courts held these original fusion bans unconstitutional, New

³⁶² See, e.g., Scarrow, *supra* note 355, at 637–40; Argersinger, *supra* note 355, at 303–05; DANIEL A. MAZMANIAM, *THIRD PARTIES IN PRESIDENTIAL ELECTIONS* 152–53 (1974).

³⁶³ See, e.g., Arthur Ludington, *Present Status of Ballot Laws in the United States*, 3 AM. POL. SCI. REV. 252, 258–59 (1909) (noting that the effect of such laws and related ones is “greatly to hamper ‘fusion’ movements” and quoting New York Governor Hughes that anti-fusion calls constitute “a grave injustice”). Third parties and independent candidates are still not likely to be credible threats to displace existing parties, but these bans reduce the ability of third parties to pressure the major parties. If candidates have enough personal wealth, they can finance a vibrant third-party effort as Ross Perot did, although BCRA's new caps on individual contributions to parties would now preclude a single wealthy figure from directly funding a third party. See *McConnell v. FEC*, 124 S. Ct. 619, 742 (2003) (Kennedy, J., dissenting) (“BCRA would have imposed felony punishment on Ross Perot's 1996 efforts to build the Reform Party.”). If state laws facilitate challenges outside the major parties in other ways, such as opening debates to third-party candidates, making campaign financing available, or allowing same day voter registration, third-party candidates might be more likely to succeed. All of these factors were present in Minnesota when Jesse Ventura successfully won the governorship as a third-party candidate. See Richard H. Pildes, *A Theory of Political Competition*, 85 VA. L. REV. 1605, 1617–18 (1999).

³⁶⁴ See Scarrow, *supra* note 355, at 640.

³⁶⁵ See *id.*

³⁶⁶ LaGuardia received approximately 446,000 votes under the Republican Party label and approximately 419,000 votes under the Fusion Party label. *Id.* at 641.

³⁶⁷ *Hopper v. Britt*, 98 N.E. 86, 88 (N.Y. 1912); *Hopper v. Britt*, 96 N.E. 371, 375 (N.Y. 1911); *In re Callahan*, 93 N.E. 262, 262 (N.Y. 1910).

³⁶⁸ *Hopper*, 96 N.E. at 373, 375. In various opinions, the court offered a combination of structural and rights reasoning. See *Hopper*, 98 N.E. at 88; *Hopper*, 96 N.E. at 375; *Callahan*, 93 N.E. at 262.

York today continues to have fusion and regularly has five competitive parties.³⁶⁹

Growing dissatisfaction in recent years with the two major parties has revived attempts to organize third parties. The New Party, for example, was founded in 1992 by a coalition of labor, community groups, and others who felt the Democratic Party under President Clinton had moved too far to the political center.³⁷⁰ The New Party, by 1994, had built chapters in eleven states and backed candidates for city council, school boards, and state legislatures, but in approximately forty states, anti-fusion laws posed major obstacles.³⁷¹ When the party challenged the constitutionality of these laws, the modern era of third-party politics culminated in the Supreme Court decision, *Timmons v. Twin Cities Area New Party*.³⁷² In a 6–3 decision, the Supreme Court, reversing an unanimous Court of Appeals, concluded that fusion bans did not violate the Constitution.³⁷³ The decision reveals much about a set of shared, though mistaken, conceptions that infuse the Court’s vision of democracy and shape its view of the role of constitutional law.

To a Court strongly oriented toward the individual rights and constitutional autonomy of parties, fusion bans might easily have been understood to violate the parties’ associational rights. Both the major and minor party wanted to endorse the same candidate in *Timmons*. The same Court that, three years later in *California Democratic Party v. Jones*,³⁷⁴ could “think of no heavier burden on a political party’s associational freedom” than state interference in a party’s choice of its preferred candidate surely could have been receptive to the argument that fusion bans interfere with the associational autonomy of both major and minor parties.³⁷⁵ Even before *Timmons*, earlier decisions could have provided a basis for finding that fusion bans violate a party’s expressive and associational rights.³⁷⁶ Indeed,

³⁶⁹ Scarrow, *supra* note 355, at 643.

³⁷⁰ LISAJANE DISCH, THE TYRANNY OF THE TWO-PARTY SYSTEM 17 (2002).

³⁷¹ See *id.* at 17–20, 146 n.1. The Court in *Timmons v. Twin Cities Area New Party* indicated that around 40 states ban fusion. 520 U.S. 351, 357 n.6 (1997) (quoting *Twin Cities Area New Party v. McKenna*, 73 F.3d 196, 198 (8th Cir. 1996)). See also Steve Cobble & Sarah Siskind, *Fusion: Multiple Party Nomination in the United States*, New Majority Education Fund, at http://www.nmef.org/cobble_siskind.htm (last visited Sept. 16, 2004) (cataloguing state fusion laws).

³⁷² 520 U.S. 351, 354–56 (1997) (reciting case history).

³⁷³ *Id.* at 353, 356, 369–70. The Court of Appeals for the Seventh Circuit, had upheld Wisconsin’s fusion ban in *Swamp v. Kennedy*, 950 F.2d 383, 384 (7th Cir. 1991), *reh’g en banc denied*, 950 F.2d 388 (7th Cir. 1992), *cert. denied*, 505 U.S. 1204 (1992), with Judges Easterbrook, Posner, and Ripple dissenting from the en banc court’s refusal to review the case, and stating that “[a] state’s interest in political stability does not give it the right to frustrate freely made political alliances simply to protect artificially the political status quo.” *Swamp*, 950 F.2d at 388 – 89 (Ripple, J., dissenting from the denial of rehearing en banc).

³⁷⁴ 530 U.S. 567 (2000).

³⁷⁵ *Id.* at 582.

³⁷⁶ See, e.g., *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989) (stating that a political party’s freedom of association allows it to “select a standard bearer who best repre-

the *Jones* Court considered potentially devastating a state law that would deny a party, even in one election, its preferred choice of candidate.³⁷⁷ But in *Timmons*, the Court did not find the burden inflicted by a fusion ban on a party's choice of nominee severe enough even to trigger exacting scrutiny.³⁷⁸ The *Timmons* Court noted that parties could still freely form, organize, express views, and participate in the political process despite the fusion ban — but so they could in *Jones* despite the blanket primary there.³⁷⁹ I would not decide such cases based on formal analysis of a party's "associational rights." But for For Justices whose conviction about a party's right to choose its candidate was as strong as it was in *Jones*, the lack of any concern about whether fusion bans seriously infringed party rights is striking.

To understand this apparent incongruity in the Court's treatment of party "rights," contrast the Court's response in *Timmons* to that of the lower court. The Eighth Circuit viewed fusion candidacies as invigorating the democratic process "by fostering more competition, participation, and representation in American politics. As James Madison observed, when the variety and number of political parties increases, the chance for oppression, factionalism, and nonskeptical acceptance of ideas decreases."³⁸⁰ For empirical insight, the Eighth Circuit relied on historical experience and concluded that "minor parties have played a significant role in the electoral system where multiple party nomination is legal, but have no meaningful influence where multiple party nomination is banned."³⁸¹ The Eighth Circuit also envisioned self-correcting mechanisms internal to democratic competition itself if fusion made for bad politics; major parties could simply refuse to consent to fusion when it failed to serve their interests.³⁸²

sents the party's ideologies and preferences" (quoting *Ripon Soc'y, Inc. v. Nat'l Republican Party*, 525 F.2d 567, 601 (D.C. Cir. 1975) (Tamm, J., concurring), cert. denied, 424 U.S. 933 (1976)) (internal quotation marks omitted)); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 216 (1986) (noting that selecting a candidate is a basic function of a political party and represents the "crucial juncture at which the appeal to common principles may be translated into concerted action").

³⁷⁷ *Jones*, 530 U.S. at 579 (declaring that "a single election in which the party nominee is selected by nonparty members could be enough to destroy the party").

³⁷⁸ *Timmons*, 520 U.S. at 359 (finding that "[t]hat a particular individual may not appear on the ballot as a particular party's candidate does not severely burden that party's associational rights"). When assessing whether state election laws violate First and Fourteenth Amendment associational rights, a court weighs the "character and magnitude" of the burdens the state imposes on those rights against the state's asserted justifications. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). If the court concludes that the burden is severe, the law must advance a compelling interest and be narrowly tailored. *Id.* (citing *Norman v. Reed*, 502 U.S. 279, 289 (1992)). If the court concludes the law imposes lesser burdens, then a state's important regulatory interests will justify reasonable and non-discriminatory regulations. *Id.* (citing *Anderson*, 460 U.S. at 788).

³⁷⁹ See *Jones*, 530 U.S. at 581; *Timmons*, 520 U.S. at 363.

³⁸⁰ *Twin Cities Area New Party v. McKenna*, 73 F.3d 196, 199 (8th Cir. 1996).

³⁸¹ *Id.*

³⁸² See *id.*

The cultural images of democracy that the Supreme Court evokes in its decision are remarkably different. The central image brought to mind here is not a democracy invigorated through political competition, but a system whose “political stability” is precarious and easily threatened.³⁸³ Indeed, the word “stable” (and variations of it) appears a striking ten times in the brief majority opinion. The Court paints fusion and third parties as risks to political stability and insists that states must be able to “temper the destabilizing effects of party splintering and excessive factionalism” fusion threatens.³⁸⁴ Rather than viewing Federalist 10 as supportive of fusion candidacies, the Court saw such candidacies as the very embodiment of the factionalism Madison sought to avoid.³⁸⁵ Where the Court of Appeals saw the historically significant role of minor parties in American democracy, the Supreme Court worried about “campaign-related disorder.”³⁸⁶ The Court feared that, were fusion permitted, ballots might become “bill-board[s] for political advertising”;³⁸⁷ the Court speculated that nominal parties might emerge solely for the purpose of adopting “popular slogans and catchphrases” with which candidates of major parties might want to be associated.³⁸⁸ The Court did not, however, consult historical experience, nor contemporary practice in New York, to assess the likelihood of such far-fetched outcomes. Instead, the Court concluded it did not require “elaborate, empirical verification of the weightiness of the State’s asserted justifications” for banning fusion candidacies.³⁸⁹ Indeed, because the Court considered the risk of political instability so high, it expressly concluded — for the first time in American history — that the states’ interest in political stability justify, against a First Amendment challenge, electoral regulations that “favor the traditional two-party system.”³⁹⁰ While *Georgia v. Ashcroft* emphasized the role that robust partisan competition can play in realizing political equality, *Timmons* enthusiastically endorsed potentially self-interested partisan efforts to channel that competition into conventional and narrow forms.

³⁸³ See, e.g., *Timmons*, 520 U.S. at 366 (“States . . . have a strong interest in the stability of their political systems.”).

³⁸⁴ *Id.* at 367.

³⁸⁵ See generally THE FEDERALIST NO. 10 (James Madison).

³⁸⁶ *Timmons*, 520 U.S. at 358.

³⁸⁷ *Id.* at 365.

³⁸⁸ *Id.*

³⁸⁹ *Id.* at 364. In fairness, the Court did note studies suggesting that fusion in California had undermined the distinctiveness of the major parties, as when Earl Warren ran unopposed for governor in 1946 as the nominee of both major parties. *Id.* at 368 n.12. State laws banning fusion between the major parties might, however, be viewed differently from those involving minor parties.

³⁹⁰ *Id.* at 367. For the demonstration that the Court had never previously invoked such a justification, see Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331, 331 (1998).

In contrast, the unifying chord of Justice Stevens's dissent, joined by Justices Souter and Ginsburg,³⁹¹ was the need for "robust competition," not political stability.³⁹² Indeed, Justice Stevens called competition the "central theme" of the Court's democracy jurisprudence: "[T]hat the entire electorate, which necessarily includes the members of the major parties, will benefit from robust competition in ideas and governmental policies" is, in his view, the idea "at the core of our electoral process."³⁹³ Justice Stevens reviewed historical experience with fusion, in New York and elsewhere, and concluded that fears for political stability were not just ungrounded, but "fantastical."³⁹⁴ He observed that fusion, in fact, was "the best marriage" of the benefits of minor-party pressure on major parties with the political stability democracy requires; fusion enables minor parties to force major party responsiveness without splintering a legislature into multiple parties.³⁹⁵ The end of this tale is that the New Party disbanded its national organization as a result of *Timmons*.³⁹⁶

Timmons is not just of signal importance on the constitutional role of third parties in the American system. The decision also exemplifies essential general elements in the Court's jurisprudence of democracy. Put most narrowly, once we move beyond abstractions concerning the "rights" of political parties, *Timmons* is better cast as pitting two recurring functional considerations against each other. The first consideration is how the Court responds to the general risk that election laws are self-entrenching or anti-competitive. The second consideration is how the Court weighs this risk against the typical justifications states assert for all election laws, such as

³⁹¹ Justice Souter joined only Parts I and II of the dissent. *Id.* at 382 (Souter, J., dissenting). Justice Souter, citing academic studies, asserted that the two-party system is in "some jeopardy," but concluded that because the state had not raised preserving that system as a justification for outlawing fusion, he would reserve the question of whether such a justification, if empirically supported, would be sufficient. *Id.* at 383–84. Ironically, Justice Souter cited a 1992 New York Times essay by Professor Theodore J. Lowi, which asserted that 1992 would be viewed historically "as the beginning of the end of America's two-party system." *Id.* at 384 (quoting Theodore J. Lowi, *The Party Crasher*, N.Y. TIMES MAG., Aug. 23, 1992, at 28). But Lowi celebrated this purported fact because, in his view, this demise would enhance, not threaten, American democracy. See Theodore J. Lowi, *Toward a Responsible Three-Party System: Plan or Obituary?*, in *THE STATE OF THE PARTIES: THE CHANGING ROLE OF CONTEMPORARY AMERICAN PARTIES* 171, 171 (John C. Green and Daniel M. Shea eds., 1999 ("One of the best kept secrets in American politics is that the two-party system has long been brain-dead — kept alive by support systems such as state electoral laws that protect the established parties from rivals and by public subsidies and so-called campaign reform.")).

³⁹² *Timmons*, 520 U.S. at 382 (Stevens, J., dissenting).

³⁹³ *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 802 (1983) (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)) (internal quotation marks omitted)).

³⁹⁴ *Id.* at 375 n.3 (Stevens, J., dissenting).

³⁹⁵ *Id.* at 380–81 (Stevens, J., dissenting).

³⁹⁶ DISCH, *supra* note 370, at 146 n.1. State-level organizations have continued to run candidates in individual states. *Id.*

protecting the integrity of elections, preserving political stability, and avoiding voter confusion.³⁹⁷

With respect to both considerations, *Timmons* reveals an unfortunate tendency to analyze constitutional issues without proper appreciation of the effects that institutional structures have on the organization of democracy. For example, the Court addressed the State's structural interests in political stability, two-party politics, and avoiding excessively factionalized politics in a way that was divorced from sufficient recognition that the existing institutional structure of winner-take-all elections virtually ensures a two-party system. As Duverger's Law long ago recognized, FPTP electoral systems create powerful incentives that reliably generate two-party systems wherever FPTP is used.³⁹⁸ Yet *Timmons* reads as if fusion candidacies alone would overcome these incentives and create a factionalized multi-

³⁹⁷ See, e.g., *Timmons*, 520 U.S. at 364. A tantalizing aspect of *Timmons* is that the Court went out of its way, *id.* at 370 n.13, not to address whether a state interest in avoiding "voter confusion" can justify an anti-fusion law even though historically, avoiding voter confusion was a central justification for anti-fusion laws and the State had expressly relied on this justification, Brief for the Petitioners at 40–50, *Timmons* (No. 95–1608): the lower court addressed this justification, *Twin Cities Area New Party v. McKenna* 73 F.3d 196, 199–200 (8th Cir. 1996): and avoiding "voter confusion" is a frequent justification states offer for election regulations of various sorts. Perhaps the Court's bypassing of this claim reveals skepticism about how easily ungrounded appeals to "voter confusion" will be accepted by the Court in the future. See also Fed. Election Comm'n, 124 S. Ct. 619, 726 (2003) (Scalia, J., concurring in part and dissenting in part) ("The premise of the First Amendment is that the American people are neither sheep nor fools, and hence fully capable of considering both the substance of the speech presented to them and its proximate and ultimate source.")

³⁹⁸ See MAURICE DUVERGER, *POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE* 217–28 (Barbara and Robert North trans., 1954) (1951). Other political scientists had reached similar conclusions: "[S]ingle-member-district-system-plus-plurality-elections . . . discriminat[e] moderately against the second party but against the third, fourth, and fifth parties the force of this tendency is multiplied to the point of extinguishing their chances of winning seats altogether." SCHATTSCHEIDER, *supra* note 325, at 74–75. More modern studies essentially confirm this view. See generally DOUGLAS W. RAE, *THE POLITICAL CONSEQUENCES OF ELECTORAL LAWS* (1967) (finding a strong correlation between two-party systems and simple majority systems). There are debates about whether the primary cause of a two-party system is the territorial district, the winner-take-all voting rule, or the single, undivided office of the Presidency. JOHN H. ALDRICH, *WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA* 56, 303 n.24 (1995) (emphasizing the territorial district); EPSTEIN, *supra* note 104, at 242–43 (emphasizing the single, undivided office of the Presidency); GERALD M. POMPER WITH SUSAN S. LEDERMAN, *ELECTIONS IN AMERICA: CONTROL AND INFLUENCE IN DEMOCRATIC POLITICS* 38–39 (2d ed. 1980) (emphasizing the single, undivided office of the Presidency); REINTAAGEPERA & MATTHEW SOBERG SHUGART, *SEATS AND VOTES: THE EFFECTS AND DETERMINANTS OF ELECTORAL SYSTEMS* 19 (1989) (emphasizing the territorial district). The United States, of course, has all three institutional features. For a good survey of debates between institutionalist and more culturally-oriented explanations of politics, along with a sophisticated reevaluation of Duverger's Law, see GARY W. COX, *MAKING VOTES COUNT: STRATEGIC COORDINATION IN THE WORLD'S ELECTORAL SYSTEMS* (1997). For two interesting, recent, brief perspectives on Duverger's Law, see William H. Riker, *Duverger's Law Revisited*, in *ELECTORAL LAWS AND THEIR POLITICAL CONSEQUENCES* 19 (Bernard Grofman & Arend Lijphart eds., 1986); and Maurice Duverger, *Duverger's Law: Forty Years Later*, in *ELECTORAL LAWS AND THEIR POLITICAL CONSEQUENCES*, *supra*, at 69.

party system in the United States. But given the prior institutional structure of FPTP elections, the question is not whether American politics will continue to be organized around two dominant parties; it is whether, given that American elections *will* involve two dominant parties, those parties will face sufficient competitive pressures to keep them appropriately responsive to diverse interests. Had the Court adequately appreciated the overwhelming two-party incentives that FPTP elections are widely understood to generate, concerns for political stability and the vitality of two-party politics would probably not have weighed so heavily.

At the same time, the *Timmons* Court did not view as its central task safeguarding democratic processes against capture by self-interested officeholders. This is particularly odd for those Justices who, in other contexts, recognize that “[t]he first instinct of power is the retention of power.”³⁹⁹ The Court seemed indifferent to the risk that fusion bans might reflect self-interested collusion among major party legislators, rather than disinterested judgments about how best to organize political competition. Thus, the Court suggested that if support for third parties is indeed increasing today, there was still no need for judicial intervention because, in the Court’s view, a third party’s “arguments will carry the day in some States’ legislatures.”⁴⁰⁰ Yet, the amusingly protectionist actions of the Minnesota legislature belie such a sanguine view. Required to permit fusion candidacies when the lower court decision was in effect, the Minnesota legislature enacted a menagerie of bizarre laws designed to ensure that only the two major parties would derive any benefit if the Constitution required the state to permit fusion candidacies.⁴⁰¹

Beyond the lack of judicial skepticism, *Timmons* reveals a broader judicial sensibility about democracy itself. Most telling are the Court’s self-created anxiety about excessive factionalization and its continual concern for “political stability.” As I have shown in other work,⁴⁰² these con-

³⁹⁹ *McConnell v. Fed. Election Comm’n*, 124 S. Ct. 619, 729 (2003) (Scalia, J., concurring in part and dissenting in part).

⁴⁰⁰ *Timmons*, 520 U.S. at 370.

⁴⁰¹ The legislature passed laws that refused to create fusion ballots at all. The ballot therefore would not permit a voter to designate under which party’s line he was voting for a fusion candidate. Votes cast in a fusion candidacy would count only on behalf of a major party; no votes would count toward qualifying a third party for either major or minor party status in the next election. This stipulation meant that a minor party would be worse off in the next election than had it competed without fusion since it would be forced to reestablish itself as a minority party. Such a result would make fusion irrelevant and pointless. DISCH, *supra* note 370, at 24–25.

⁴⁰² See generally Richard H. Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695, 708 (2001) (noting “[t]he word ‘stable’ (and variations of it) appears a remarkable ten times in the brief majority opinion.”). Larry Kramer similarly argues that the same sensibility described in *Democracy and Disorder* explains the Court’s general conception of judicial supremacy since the 1950s, LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 221–26 (2004), and animates Kramer’s view that political responses are inadequate today to the Court’s decisions in cases enforcing the Constitution against national legislative action. *Id.* at 241–48.

cerns coruscate through a number of the Court's major, recent decisions concerning democratic institutions. In my view, they played a role in *Bush v. Gore*,⁴⁰³ the most dramatic crystallization of the extent to which the structural organization of democracy is now a matter of constitutional law.⁴⁰⁴ In cases involving democratic issues, momentous and mundane, the current Court has acted out of concern that judicial review is needed to ensure that democracy remains stable, orderly, and properly restrained.

These concerns are cultural more than analytical. They reflect the implicit visions of democracy with which all judges must necessarily work: visions that reflect empirical assumptions, historical interpretations, and inherited understandings of democracy. Cultural sensibilities of this sort inevitably inform and influence how judges approach any specific case. Deeply ingrained views about whether American democracy is fragile or secure, whether it functioned better or worse at some (partially imagined) past moment, whether at any moment democracy entails acceptable chaos and tumult or requires greater structure and order, unavoidably shape application of doctrine and interpretation of fact.

Such cultural orientations toward democracy transcend formal legal analysis or the stakes of particular cases. The experience of democracy in America has always been riven with a tension between two views.⁴⁰⁵ At some moments, for some actors, democracy has been thought to require, even to celebrate, unconstrained competition that may appear tumultuous, partisan, chaotic, or worse. At other moments, for other actors, democracy is felt to require greater measures of order, stability, and more constrained forms of engagement. Historically, the tension between these views has been one of the defining oppositions in arguments about the desirability of democracy itself. This tension has no general resolution: democracy inevitably requires a mix of both order (law, structure, and constraint) and openness (politics, fluidity, and receptivity to novel forms).

But whatever the analytical truth about the necessity of both order and openness to democracy, different actors, including judges, will inevitably perceive the greatest risks from different directions. Some of us, judges included, will implicitly view the democratic order as more fragile, easily destabilized, and thus in need of greater structure. Others will see the democratic order as threatened by undue rigidity, unresponsive parties and refractory institutions, and thus in need of more robust competition and challenge. Some will be confident that democratic politics contains within itself sufficient resources to be self-correcting. Others will conclude that

⁴⁰³ *Bush v. Gore*, 531 U.S. 98 (2000).

⁴⁰⁴ Pildes, *supra* note 402, at 713–18.

⁴⁰⁵ Republicans and Federalists divided along lines of just this sort in the aftermath of the Constitution's adoption. See, e.g., *Kramer*, *supra* note 402, at 128 – 44 (discussing Federalist resentment of Democratic-Republican debating Societies of the mid-1790s, because Federalists “hated disorder” in democratic politics).

legal institutions carefully oversee political processes to ensure their continued stability and endurance. Empirical facts go only so far in resolving these issues; the remaining distance must be carried by background sensibilities that, conscious or not, inform judgment in concrete cases.

For the post-World War II generation of Americans, concern for the stability of democratic institutions was the dominant issue in political thought and a constant preoccupation.⁴⁰⁶ The rise of fascism and totalitarianism in formerly democratic Europe had to be understood to forestall similar risks here.⁴⁰⁷ A common conclusion was that American political stability rested on America's unique institutional structures, in particular, the two-party system and the rejection of European-style proportional representation systems.⁴⁰⁸ Widespread acceptance of this view manifested itself in the "responsible party government" movement among the era's political scientists, described earlier, and in smaller ways, such as the end of local government experiments with proportional representation.⁴⁰⁹ Some exceptionally influential works argued that proportional representation was "an essential factor" in the death of German democracy and that American-style winner-take-all election structures had prevented the rise of fascist governments in countries like France; these works included chapters with titles like "Proportional Representation and the Triumph of Hitler."⁴¹⁰

⁴⁰⁶ This concern is the theme of Hannah Arendt's *THE ORIGINS OF TOTALITARIANISM* (1951), which some have called "the political masterpiece of the postwar era." RICHARD H. PELLIS, *THE LIBERAL MIND IN A CONSERVATIVE AGE: AMERICAN INTELLECTUALS IN THE 1940S AND 1950S* 85 (1985). Several sources discuss the fixation in this era with the need for order and constrained political competition. See DANIEL BELL, *THE END OF IDEOLOGY* 94 (1960) (arguing that the two-party system is "one of the sources of flux yet stability in American life"); SEYMOUR MARTIN LIPSET, *POLITICAL MAN: THE SOCIAL BASES OF POLITICS* 83 (1960) ("Inherent in all democratic systems is the constant threat that the group conflicts which are democracy's lifeblood may solidify to the point where they threaten to disintegrate the society. Hence conditions which serve to moderate the intensity of partisan battle are among the key requisites of democratic government."); *id.* at 90 (arguing as a consequence that "two-party systems are better than multi-party systems, that the election of officials on a territorial basis is preferable to proportional representation, and federalism is superior to a unitary state"). The sociologist David Riesman diagnosed this 1950's intellectual sensibility: "they are frightened by the ideal of a pluralistic, somewhat disorderly, and highly competitive society . . ." DAVID RIESMAN, *INDIVIDUALISM RECONSIDERED AND OTHER ESSAYS* 423 (1954). As Pellis puts it, these characteristic arguments "revealed how loyal to established procedures these intellectuals had themselves become" in the aftermath of World War II. Pellis, *supra*, at 145.

⁴⁰⁷ For an excellent account of this intellectual history, see the analysis in EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* 117-38 (1973).

⁴⁰⁸ See generally AUSTIN RANNEY, *THE DOCTRINE OF RESPONSIBLE PARTY GOVERNMENT: ITS ORIGINS AND PRESENT STATE* 8-9 (1954) (presenting the responsible-party government position).

⁴⁰⁹ See, e.g., ALFRED DE GRAZIA, *PUBLIC AND REPUBLIC: POLITICAL REPRESENTATION IN AMERICA*, at vii (1951) ("The City of New York has abandoned recently its system of proportional representation, alleging that the system had given aid and comfort to the Communist Party."). For the history of experiments in proportional representation and their abandonment, see ISSACHAROFF, KARLAN & PILDES, *supra* note 228, at 1096-99, 1160-67.

⁴¹⁰ See F. A. HERMENS, *DEMOCRACY OR ANARCHY? A STUDY OF PROPORTIONAL REPRESENTATION* 214 (1941). Professor Hermens states: "Nowhere have the consequences of P.R. so

The influence of these works on some judges today is directly acknowledged.⁴¹¹ On the Court, some Justices not only accept patronage hiring, but consider it necessary to ensure stable political parties and the avoidance of unrestrained factionalism.⁴¹² Other Justices view partisan gerrymandering as critical to the vitality of the two-party system and, in their own words, to the “preservation and health” of democracy itself.⁴¹³ For Justices whose formative educational experiences occurred during the era in which American political thought viewed democracy as precarious, a jurisprudence in which much weight is given to concerns for political stability might not be unexpected.⁴¹⁴

Sensibilities of judges and others concerning democracy can be put in a broader historical context. Two great foundational crises confronted American democracy in the twentieth Century. The first was the challenge

demonstrated the utter senselessness of the system as in Germany.” *Id.* Hermens went on to purport to show, through detailed election analyses, that the Nazis’ rise to power could be attributed to Weimar Germany’s PR system. *Id.* at 214–300. Hermens further argued that fascism had failed in France but succeeded in Italy because the former used majoritarian election systems, while the latter used PR. *Id.* at 121–213. *See also* F.A. Hermens, *Proportional Representation — A Help or a Hindrance*, 16 SOC. SCI. 245, 248 (1941) (arguing that if proportional representation is used again after World War II in the formerly democratic countries of Europe, “this would amount to an invitation for new Hitlers and Mussolinis to take the place of the old ones as soon as an opportunity would present itself”). This view has been reflected in major studies on representation and on political parties in the 1950s and 1960s. *See, e.g.*, DE GRAZIA, *supra* note 409, at 201 (“To paraphrase the charge: proportional representation makes everyone potent; then it makes everyone impotent; and finally, it makes one man omnipotent.”); FRANK J. SORAUF, *POLITICAL PARTIES: IN THE AMERICAN SYSTEM* 29 (1964) (“Indeed, Weimar perfected the most equitable system of proportional representation known to the practice of government while engaging in one of the most awesomely unsuccessful experiments in constitutional democracy.”). In later years, the accuracy of these claims came to be disputed; a number of scholars have instead argued that proportional representation “best guarantees the stability of democratic policy.” Ronald Rogowski, *Trade and the Variety of Democratic Institutions*, 41 INT’L ORG. 203, 209–210 (1987) (noting that between the wars, proportional representation was also used by the “extremely stable Swiss, Swedes, Norwegians, Danes, Belgians, and Dutch (who frequently attributed their ‘low-voltage politics’ to the proportional system).”). *See also id.* at 210 (agreeing with Douglas Rae “that it is ‘clearly silly’ to conclude that PR encourages insurgent parties and destabilization of regimes”); VERNON BOGDANOR, *WHAT IS PROPORTIONAL REPRESENTATION: A GUIDE TO THE ISSUES* 123 (1984) (rejecting Hermens’s argument that the electoral system was to blame for the rise of Mussolini and Hitler).

⁴¹¹ *See, e.g.*, POSNER, *supra* note 60, at 176 (citing Hermens for the view that a “two-party system tends to make people more moderate, more centrist,” and will “lower the temperature of political debate”).

⁴¹² *See* *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 106–07 (1990) (Scalia, J., dissenting) (describing the stabilizing effects of patronage on the two-party system); *Branti v. Finkel*, 445 U.S. 507, 527–28 (1980) (Powell, J., dissenting) (noting that “[p]atronage appointments help build stable political parties by offering rewards to persons who assume the tasks necessary to the continued functioning of political organizations”).

⁴¹³ *Davis v. Bandemer*, 478 U.S. 109, 144–45 (1986) (O’Connor, J., concurring).

⁴¹⁴ A different judicial sensibility was expressed by an earlier Court in *Williams v. Rhodes*, involving third-party challenges to ballot-access laws during a presidential campaign: “[t]here is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them. Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms.” 393 U.S. 23, 32 (1968).

to the economic order posed by the worldwide Depression of the 1920s and 1930s. If capitalism were to endure, the question was how the economic system could be structured to avoid recurrences of similar catastrophes. The second was the challenge to the democratic order posed by the rise of fascism and totalitarianism in formerly democratic Europe. If democracy were to endure, the question was how the political order could be structured to avoid similar nightmares here. In both contexts, the initial diagnosis and remedy were similar. The Great Depression had been caused by a disordered, tumultuous, economic system — in the classic phrase, by “ruinous competition” — that lacked structure, order, and stability. Thus, the early New Deal sought to constrain competition through cartel-like legislation, such as the National Industrial Recovery Act, that would bring necessary regularity, order, and stability to the economic system. Post-World War II political thought similarly located the causes of totalitarianism in an overly competitive, chaotic, and fragmented political system. To ensure “political stability” and avoid “ruinous competition,” American democracy required a highly structured two-party system, limits on competition outside that system, and extensive legal regulation to channel and contain political conflict through conventional and familiar forms.

In the economic realm, we have come to abandon the Depression-era view that aggressive state control is necessary to ensure stability and order. Competition, apparent disorder, and tumult came to be seen as signs of vigor and robustness, not paths to anarchic instability. Yet in the political realm, judges and others cling more tenaciously to the fear that too much politics, or too competitive a political system, will bring instability, fragmentation, and disorder. In my view, constitutional law should be oriented more toward the dangers of legislative and partisan self-entrenchment and less toward a perceived judicial need to ensure a democratic stability adequately secured in more fundamental ways.

D. Democracy or Distrust? Redesign of Democratic Institutions v. Incumbent Self-Entrenchment

Campaign financing and the Court’s response to BCRA this Term raise several issues central to this Foreword. The most general is how courts should distinguish between democracy-regulating laws that are vehicles for incumbent or partisan self-entrenchment and those that reflect permissible choices (wise or not) about how to structure democracy. Campaign finance laws, like other electoral laws, can obviously be a vehicle for political self-entrenchment and partisan advantage-seeking. If a central focus of judicial review should be to interpret various constitutional doctrines as resisting legislative capture of this sort, as this Foreword has argued, the courts must be able to distinguish laws that realize this risk from laws that might, but do not. Ultimately, that was the central issue behind most of the more specific issues the Court addressed in the nearly 300-page set of opinions in *McConnell*, in which a 5–4 Court upheld the central provisions

of BCRA.⁴¹⁵ *McConnell* also reveals how a functionally oriented constitutional analysis might inform the way associational rights and concerns for political equality are understood in the context of elections.

Campaign finance can quickly become a tedious regulatory maze, but reduced to its essentials, BCRA had three centerpieces.⁴¹⁶ First, it sought to cut off the flow of soft money to the political parties, a form of financing that expanded during the late 1980s and early 1990s, burgeoned in 1996, and accounted for forty percent of total party funding by 2000.⁴¹⁷ Corporations and unions, otherwise prohibited from contributing to candidates, had learned that they could make large, unregulated contributions — soft money — to the political parties. From a rights perspective, the issue here was whether cutting off sources of money to the parties, and regulating their political participation in other ways, violated the party autonomy rights recognized in *Jones*. From a functional perspective, the issue was whether eliminating these sources of funds to parties would dramatically weaken them and elevate the importance of other actors, such as nonparty organizations. Second, BCRA regulated what had come to be called issue advocacy — most significantly, by banning it altogether for corporations and unions.⁴¹⁸ The Court had earlier approved, in *Buckley v. Valeo*,⁴¹⁹ various regulations on advertisements aimed at influencing elections, but had limited its approval to advertisements using certain “magic words” that expressly advocated the defeat or election of candidates; by simply avoiding these words, players could run so-called issue ads that nominally did not expressly seek to elect or defeat candidates, but that, to reformers, had exactly the same effect as ads that did use the magic words. These so-called issue ads had also exploded with the 1996 elections.⁴²⁰ Third, in

⁴¹⁵ *McConnell v. Fed. Election Comm'n*, 124 S. Ct. 619, 712 (2003).

⁴¹⁶ For an excellent summary and analysis of the various features of BCRA, see Richard Briffault, *McConnell v. FEC and the Transformation of Campaign Finance Law*, 3 ELECTION L.J. 147 (2004).

⁴¹⁷ Soft money was money that had not been regulated by the 1974 Federal Election Campaign Act (FECA), which reached only what came to be called “hard money.” The hard money reached under FECA included individual and PAC contributions to federal candidates and to political parties. Soft money entailed other contributions to political parties that were used to help elect federal candidates. These other uses included building up party structures; voter registration, identification, and get-out-the-vote drives that supported slates of federal, state, and local candidates; generic party activities; and ads that promoted or opposed federal candidates but did not use words of express electoral advocacy. Briffault, *supra* note 416, at 150. In 1992, all the national party committees of the two parties together raised around \$86 million in soft money; in 2000, the figure was around \$495 million. For full data on soft and hard money contributions to the parties from 1992 through 2002, see Michael J. Malbin, *Political Parties Under the Post-McConnell Bipartisan Campaign Reform Act*, 3 ELECTION L.J. 177, 181 (2004).

⁴¹⁸ See 2 U.S.C.A. § 441 b(a) (2002).

⁴¹⁹ 424 U.S. 1, 79 (1976). For full discussion of the prior law and the structure of BCRA's provisions on issue advocacy, see Briffault, *supra* note 416, at 155–56.

⁴²⁰ See Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEX. L. REV. 1751, 1760 (1999) (providing data chronicling explosion of spending on so-called issue advocacy starting with 1996 elections).

provisions too easily ignored, BCRA made it easier for candidates, parties, and campaigns to raise money directly from individuals (hard money contributions) by raising contribution caps first enacted in 1974 and unchanged since then.⁴²¹

To BCRA proponents, the rise of soft money and issue ads had eviscerated the post-Watergate 1974 laws at issue in *Buckley v. Valeo*;⁴²² in the reformer's view, BCRA largely restored the status quo of the 1970s and 1980s.⁴²³ To BCRA critics, this evisceration was inevitable, just as BCRA, too, will quickly be undermined by other circumvention strategies; and to these critics, BCRA also goes well beyond prior law in ways that both interfere with speech rights and will distort politics in unhealthy directions. Indeed, some have already compared this Term's *McConnell* decision to *Korematsu*,⁴²⁴ *Plessy*,⁴²⁵ *Buck v. Bell*,⁴²⁶ or the speech-suppressing decisions of the early twentieth century;⁴²⁷ others go back further and suggest that aspects of BCRA resonate with the notorious Alien and Sedition Acts.⁴²⁸

At the outset, BCRA should be put in some perspective. As Dan Lowenstein has wryly noted, supporters of BCRA claim that modest restrictions, which “only the paranoid and the insincere” could view as interfering with speech or association, will nonetheless staunch the flood of corrupting money into politics.⁴²⁹ At the same time, critics argue that the most draconian repression of speech in years will be easily circumvented and thus largely ineffectual.⁴³⁰ Other paradoxes abound. American elec-

⁴²¹ The new caps still remain below the old in inflation-adjusted terms. The 1974 FECA Amendments limited individual contributions to \$1000 per candidate per election. BCRA raised this to \$2000 and inflation-indexed the caps for the future. Individuals can now contribute \$25,000 to a national party committee (the old limit was \$20,000) and \$95,000 per two-year election cycle to all candidates, parties, and political action committees (the old limit was \$50,000). See 2 U.S.C.A. § 441a(1)(2002). According to one FEC commissioner, a strong opponent of BCRA, the caps on individual contributions to candidates would have to have been raised to \$3752 to have the same “purchasing power” as the \$1000 caps in 1974. See Bradley A. Smith, *McConnell v. Federal Election Commission: Ideology Trumps Reality, Pragmatism*, 3 ELECTION L.J. 345, 346 (2004). For further analysis of the various contribution caps in BCRA and the argument that they do not come close to restoring the purchasing power of the analogous caps in the 1974 law, see *id.* at 346–47. For a good summary of the pre-BCRA regime, see generally CAMPAIGN FINANCE REFORM: A SOURCEBOOK (Anthony Corrado et al. eds., 1997).

⁴²² 424 U.S. 1 (1976).

⁴²³ Thomas E. Mann & Norman J. Ornstein, *Separating Myth from Reality in McConnell v. FEC*, 3 ELECTION L.J. 291, 291 (2004).

⁴²⁴ *Korematsu v. United States*, 323 U.S. 214 (1944).

⁴²⁵ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁴²⁶ 274 U.S. 200 (1927).

⁴²⁷ See Smith, *supra* note 421, at 345.

⁴²⁸ See Lillian R. BeVier, *McConnell v. FEC: Not Senator Buckley's First Amendment*, 3 ELECTION L.J. 127, 143 (2004).

⁴²⁹ Daniel H. Lowenstein, *BCRA and McConnell in Perspective*, 3 ELECTION L.J. 277, 278 (2004).

⁴³⁰ See Samuel Issacharff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1705 (1999).

tions in recent years might well have involved the most widespread individual participation in campaign financing in American history.⁴³¹ In the 2000 elections, 21 million people (10% of Americans over 18) gave, on average, \$115 to candidates, parties, or political-action committees (PACs).⁴³² These individual contributions amount to nearly 80% of the money spent in national elections in the 1999-2000 cycle; only around 22% of total contributions came from “special interests.”⁴³³ Yet even as election financing has involved more widespread individual participation, perceptions that the system has become more special-interest dominated seem to have increased.⁴³⁴ This paradox might suggest that the public perceives almost any association of politicians with the raising of money to be unseemly, triggering the appearance of corruption, even though in a privately-financed electoral system, politicians inevitably must raise money in large quantities. If so, skepticism might be appropriate about whether any regulatory changes to a privately-financed campaign system are likely to reduce perceptions that candidates and officeholders are corruptly beholden, whether or not that is so in fact.⁴³⁵ These paradoxes are worth bearing in mind in assessing the reform debate and the Court’s response.

1. *Distinguishing Change from Entrenchment.* — Dissenting in *McConnell*, Justice Scalia rightly focused on the plausible risk that BCRA involves incumbents rewriting the rules of political debate to entrench themselves more securely. Justice Scalia also asserted, consistent with this Foreword, that constitutional doctrine should be construed to “resist” laws that constitute forms of self-entrenchment. Having framed the issues this way, Justice Scalia then concluded that, in fact, BCRA was little more than

⁴³¹ These figures do not take into account contributions of labor, which might vary more significantly over time than have contributions of dollars.

⁴³² Stephen Ansolabehere, John M. de Figueiredo, & James M. Snyder, Jr., *Why is There So Little Money in U.S. Politics?*, 17 J. ECON. PERSP. 105, 108 (2003).

⁴³³ John de Figueiredo & Elizabeth Garrett, *Paying for Politics* at 9 (Aug. 2004) (unpublished manuscript on file with the Harvard Law School Library). “Special interests” here includes spending by corporations, unions, other associations, and contributions and spending by PACs. *Id.*

⁴³⁴ See, e.g., AM. POLITICAL SCI. ASS’N TASK FORCE ON INEQUALITY AND AM. DEMOCRACY, *AMERICAN DEMOCRACY IN AN AGE OF RISING INEQUALITY* 5 (2004), available at <http://www.apsanet.org/inequality/taskforcereport.pdf> (reporting increased concerns about “disparities of participation, voice, and government responsiveness” and arguing that this concern is justified due to “disturbing inequalities” in political participation).

⁴³⁵ Similarly, Congress and the Court have relied on the “appearance of corruption” as a central justification for regulation. Yet emerging empirical analysis suggests that changes in election financing might not affect views about whether government is corrupt. Views about governmental corruption appear more deeply based on other factors than election financing, and stark differences in election financing across countries are not reflected in similar differences regarding the appearance of corruption. Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Law*, [volume number] U. PENN. L. REV. (forthcoming [month] 2004).

an incumbent-protection scheme.⁴³⁶ Largely as a result of this conclusion, he would have held the law unconstitutional. Some partisans, for both parties, view BCRA the same way.⁴³⁷ Even academics who support the result in *McConnell* complain that the Court did not apply sufficiently demanding scrutiny, and was overly deferential to Congress, in judging whether BCRA was properly tailored to preventing the corruption or appearance of corruption claimed to justify the law.⁴³⁸

These issues go to the heart of the *McConnell* decision and constitutional oversight of politics more generally. Moreover, the difficulties in reaching conclusions about BCRA in this regard are especially acute. In many contexts, the Court might test whether stated purposes are pretextual masks for impermissible ones by examining how well a law's means fit its asserted purposes. But the central justification for campaign finance regulation had been limited, since *Buckley*, to regulating campaign contributions for the purpose of avoiding corruption or, more nebulously, the appearance of corruption.⁴³⁹ Determining whether BCRA is, in fact, designed to address corruption — as opposed to diminish competitive challenges to incumbents — posed several problems. For one, the concept of corruption itself had remained elusive. Corruption meant more than the explicit exchange of money for votes, which was already a form of recognized bribery. But what corruption meant beyond that, in the context of campaign contributions, had remained unclear. Corruption might mean that legislators had shifted their votes in response to contributions, or that the legislative agenda had been altered as a result of such contributions, or that the judgment of policymakers had been altered in some other way.

⁴³⁶ See, e.g., *McConnell*, 124 S. Ct. at 721 (Scalia, J., dissenting) (“is it mere happenstance, do you estimate, that national-party funding, which is severely limited by the Act, is more likely to assist cash-strapped challengers than flush-with-hard-money incumbents?”).

⁴³⁷ See Robert Bauer, *When “the Pols Make the Calls”: McConnell’s Theory of Judicial Deference in the Twilight of Buckley*, [swat volume] U. PA. L. REV. (forthcoming 2004) (judicial deference neglects the role of officeholder self-interest in BCRA) (general counsel for Kerry presidential campaign); Charles J. Cooper & Derek L. Shaffter, *What Congress “Shall Make” the Court Will Take: How McConnell v. FEC Betrays the First Amendment in Upholding Incumbency Protection under the Banner of “Campaign Finance Reform”*, 3 ELECTION L.J. 223, 227 (2004) (“In truth, Title II [banning corporate and union electioneering communications] is obviously, and openly, a spectacular exemplar of politicians pursuing the very self-interest in federal office that supposedly justified the law.”) (counsel for National Rifle Association plaintiffs in challenge to Title II); Bruce E. Cain, *Reasoning to Desired Outcomes: Making Sense of McConnell v. FEC*, 3 ELECTION L.J. 217, 218 (2004) (“Like Justices Kennedy and Scalia, I am skeptical both of that prediction [that BCRA will lessen perceptions of corruption and undue influence] and of the true Congressional motive.”); Troy A. Schotland, *Act I: BCRA Wins in Congress. Act II: BCRA Wins Big at the Court. Act III: BCRA Loses to Reality*, 3 ELECTION L.J. 335, 336 (2004), at 336 (“One of *McConnell*’s most striking features is the credulity of the joint majority opinion.”).

⁴³⁸ See, e.g., Hasen, *supra* note 185 (arguing that Court was overly deferential to Congress despite reaching correct result).

⁴³⁹ See *FEC v. Nat’l Conservative PAC*, 470 U.S. 480, 496–97 (1985) (noting that corruption and appearance of corruption are “the only legitimate and compelling government interests thus far identified for restricting campaign finances”).

But even with a clear concept of corruption in mind, the empirical proof regarding whether contributions were, in fact, corrupting, still remained elusive. The most concrete rendering of corruption would be that legislative votes had shifted as a result of campaign contributions (whether or not any quid pro quo promise were actually involved). But while it is possible to show that contributions correlate with votes, determining causation is more difficult; contributions might cause votes to shift or contributions might go to legislators precisely because they already support a contributor's causes. Many quantitative analyses comparing contributions and voting patterns therefore cannot go beyond correlation to resolve the causation question. But qualitative evidence is also difficult to come by; politicians are willing to testify that others seemed to have been swayed by contributions, particularly those who vote against the politician testifying — losing because the opposition is corrupt is more tolerable than because the opposition is right, or more persuasive, or even more powerful — but few officials are prepared to admit their own votes have been bought.

At the specific level, then, of judging the particular policies in BCRA — such as bans on corporate and union contributions to parties — the claim that large contributions corrupt legislators is difficult empirically to confirm or falsify. Yet though social science cannot definitively establish the empirical effects of campaign contributions on political behavior, that does not mean there are no such effects. Important public-policy judgments must often be made in the absence of firm empirical foundations. Indeed, it might be that the more significant the issue, the more difficult the empirical proof, precisely because the causal interactions are more complex. Some problems of policy do not lend themselves to clear Popperian tests of falsification. At the same time, constitutional law cannot sensibly preclude democracies from acting on judgments about harms, including harms to democratic processes themselves, until strong social-scientific proof of cause and effect is available.

In addition, courts are also unlikely to be able either to judge reliably whether a law like BCRA is anticompetitive in effect, or to infer from the law's effects credible conclusions about whether the law is anticompetitive in purpose. BCRA's interactive effects on the diverse players in elections — candidates, parties, corporations, unions, PACs, and other tertiary groups — are complex. Before BCRA's enactment, experts had widely varying predictions about the law's likely cumulative effects: whether the law would strengthen or weaken political parties as compared to candidates or to interest and ideological groups; whether it would favor Democrats or Republicans; whether it would help or hurt incumbents. Certain initial predictions, such as those concerning BCRA's effects on the parties in general and on the competition between Democrats and Republicans in particular, have already been proven wrong or called into question in the

first presidential election under BCRA.⁴⁴⁰ That these predictions now turn out to have been wrong, or substantially overstated, reveals the difficulty of accurate predictions about BCRA's effects.

If immediate short-term effects have been inaccurately projected, long-term effects are even more uncertain. BCRA might eventually turn out to strengthen incumbents (or not), to weaken parties (or not), or to differentially benefit one party. Central actors in elections, such as parties, have shown themselves over time to be extremely adaptable. In *McConnell*, the Court was asked to hold the central provisions of BCRA unconstitutional on their face. To do so on the basis of confident judicial predictions that the law, in practice, would entrench incumbents would have been irresponsible.

If courts lack an empirical anchor on which they can base conventional means-ends scrutiny and also cannot credibly predict the likely effects on political competition of a law like BCRA, how can they judge whether campaign finance laws (or other electoral laws) are pretexts for self-entrenchment? General presumptions are also unavailing: presumptions of legitimacy associated with ordinary laws are not appropriate, given Congress's obvious self-interest in this context, but presumptions against legitimacy, in light of the risk of self-entrenchment, are also inappropriate, given that Congress should be able to regulate democratic processes when pursuing legitimate ends and not violating rights.

In these circumstances courts can do little but rely on process-based assessments to judge the risk of impermissible self-entrenchment. Though academics regularly belittle process-based analysis, in many contexts involving democratic institutional design, such as *Georgia v. Ashcroft* and *McConnell*, the pragmatic constraints of judging make process-based reasoning almost inevitable.

McCain-Feingold did not sneak through Congress on an unsuspecting public. Few legislative proposals in recent years have received as much sustained public commentary, editorials, or news coverage. Political scientists and academic experts on election financing were on both sides, but many, with no self-interest in incumbent protection, were central figures in pressing the case for BCRA. Far from anxious to protect itself through passage of such a law, Congress manifested little desire to act. The political entrepreneurship of legislators with national support, like Senator McCain, was critical. The law required bipartisan support, including the signature of a Republican President not committed in advance to adoption of such a law. Many predicted that the ban on soft money would hurt the

⁴⁴⁰ Justice Scalia, for example, implied that the ban on soft money was disguised to protect incumbents and would have that effect. *See, e.g., McConnell*, 124 S. Ct. at 721 (Scalia, J., dissenting) ("is it mere happenstance, do you estimate, that national-party funding, which is severely limited by the Act, is more likely to assist cash-strapped challengers than flush-with-hard-money incumbents?"). *But see* TAN [swat]– [swat] (describing financial vitality of parties post-BCRA).

Democratic Party relative to the Republican Party, yet Democratic support was central to the law's passage. (that this prediction now turns out to have been wrong, or substantially overstated, reveals the difficulty of accurate predictions of any sort).

None of this is to say BCRA will do more good than harm. Herding behavior, symbolic politics, and misguided reformist impulses might all account for BCRA's passage.⁴⁴¹ But the process behind BCRA's enactment should raise the burden of proof substantially for those who assert that the law's central provisions, on their face, are designed to entrench incumbents. Some have expressed surprise that a Court that has demanded strong evidentiary support for congressional legislation in other areas was deferential to Congress's judgments in *McConnell*. But that view reflects a conventional, yet unexamined, formalism about democracy itself. Perhaps a serious commitment to democratic processes itself should recognize a moral fact that legal doctrine does not expressly acknowledge: not all statutes are created equal. That all national laws have the same formal democratic pedigree does not mean that they all reflect equally meaningful democratic processes. The depth, breadth, and public scrutiny of the Gun-Free School Zones Act invalidated in *Lopez*,⁴⁴² for example, has little in common with that involved in BCRA's enactment. Whatever the wisdom of BCRA, it embodies as visible and deliberative a legislative and public process as American politics currently produces. Perhaps the evidentiary demands and degree of skepticism the Court brings to cases such as *McConnell*, as compared to *Lopez*, implicitly reflect those differences in the substantive quality, as opposed to the formal character, of the democratic processes involved. That constitutional law should turn on these differences will be controversial, but to pragmatic theories of law, as well as pragmatic judges, such differences might be central.

No doubt it is discomfiting to conclude that judgments on the constitutionality of major national legislation might turn in part on soft judgments, such as whether the process generating BCRA suggests strong reason for skeptical review, rather than more analytically rigorous analysis of

⁴⁴¹ Corporate and union donors, no longer able to give soft money to parties, are now giving large amounts of unrestricted contributions to support the presidential conventions of each party. Combined, the two host committees for the 2004 conventions raised over \$100 million in corporate, union, and individual funds. The Campaign Finance Institute, *The \$100 Million Exemption: Soft Money and the 2004 National Conventions* 3 (July 2004), available at <http://www.cfinst.org/eguide/partyconventions/financing/pdf/full-partyconventions.pdf>. Even though federal election laws provide public financing for the conventions, that public money is now dwarfed by private money; over 60% of the combined funding for the two conventions in 2004 came from private sources, compared to 14% in 1992. *Id.* at 5. Many of these donors formally gave large soft-money contributions to the parties and are not located in the host city. *Id.* at 22 – 34. For a detailed analysis of these issues, see The Campaign Finance Institute, *supra*.

⁴⁴² *United States v. Lopez*, 514 U.S. 549, 562 – 63 (1995) (holding Act unconstitutional because, in part, Congress had not provided sufficient findings to justify exercise of its enumerated powers).

the means-ends fit of such laws. Indeed, some commentators who endorse the outcome in *McConnell* nonetheless criticize the Court for deferring to Congress's conclusions without subjecting them to sufficiently exacting scrutiny.⁴⁴³ But those criticisms miss the deeper point. They seek to preserve the illusion of a form of judicial review that in all likelihood cannot realistically be given substantive effect in this context. Those criticisms assume that courts could determine whether BCRA's means are properly tailored to the end of preventing political corruption. Yet if the end of corruption itself cannot be readily assessed empirically, courts do much to judge whether any particular means are closely adapted to those ends. The issue of deference and judicial scrutiny of the evidentiary support for Congress' judgments is thus misleading. The only real judicial judgment, inevitably, is the more global one of whether the underlying legislative judgments are animated by permissible or invalid aims.⁴⁴⁴

In the face of the political process behind BCRA, the argument that the critical provisions of BCRA should be constitutionally condemned as incumbent-protection devices is not sufficient. Justice Scalia's essential argument is that *any* legislation that caps the flow of money into politics is necessarily anti-competitive: "If *all* electioneering were evenhandedly prohibited, incumbents would have an enormous advantage. Likewise, if incumbents and challengers are limited to the same quantity of electioneering, incumbents are favored."⁴⁴⁵ That incumbents start with numerous advantages is certainly true. That equal funding or spending would make challengers worse off is not. The most important question is whether challengers are able to reach a certain threshold level of financing, which enables them to be competitive.⁴⁴⁶ On the eve of BCRA, moreover, incumbents in competitive House races were spending 70% more than

⁴⁴³ See, e.g., Hasen, *supra* note 185; Richard A. Epstein, *McConnell v. Federal Election Commission: A Deadly Dose of Double Deference*, 3 ELECTION L.J. 231 (2004).

⁴⁴⁴ The Canadian constitutional court, in a campaign-finance case, recently recognized this point: The legislature is not required to provide scientific proof based on concrete evidence of the problem it seeks to address in every case. Where the court is faced with inconclusive or competing social science evidence relating the harm to the Legislature's measures, the court may rely on a reasoned apprehension of that harm. *Harper v. Canada (Attorney General)*, [2004] S.C.R. 33, ¶ 77 [SWAT—we can't get the hard copy, and I accessed on Westlaw and on <http://www.lexum.umontreal.ca/csc-scc/en/rec/html/2004.scc033.wpd.html>—where should we cite?]

⁴⁴⁵ *McConnell*, 124 S. Ct. at 720–21 (Scalia, J., dissenting with respect to BCRA Titles I and V).

⁴⁴⁶ Multiple studies suggest that what is most important is a certain threshold level of financing; above that level, there are significant diminishing marginal returns to money. GARY C. JACOBSEN, *MONEY IN CONGRESSIONAL ELECTIONS* 41–43 (1980). One major study of 663 congressional elections from 1972 to 1990, concluded that an extra \$100,000 in campaign spending (in 1990 dollars) correlated with an increase of only 0.33 percent of the vote in House elections (during this period, on average incumbents spent \$293,000; challengers spent \$136,000; and open-seat candidates spent \$409,000). Steven D. Levitt, *Using Repeat Challengers to Estimate the Effect of Campaign Spending on Election Outcomes in the U.S. House*, 102 J. POL. ECON. 777, 780 (1994).

challengers.⁴⁴⁷ If candidate campaign spending somehow became equalized, challengers would still face an uphill battle but would be more competitive, not less. On Justice Scalia's view, even public-financing would be an incumbent-protection scheme; not only is this troubling in principle, but the few states that have adopted public financing appear thus far to have generated more competitive elections.⁴⁴⁸ Given the risk-averseness of sitting legislators, preserving the pre-BCRA legal regime under which they were elected might be presumed to best serve their interests. To be sure, isolated provisions in BCRA, particularly low-visibility ones, might be incumbent protecting.⁴⁴⁹ In a proper context, courts might justifiably hold these provisions unconstitutional.⁴⁵⁰ But these marginal provisions do not make the central, long-debated provisions of BCRA, as a whole, incumbent entrenching. On the important general question, *McConnell* reflects the right judicial resolution of the tension between whether laws like BCRA entail impermissible self-entrenchment or permissible expression of

⁴⁴⁷ ORNSTEIN ET AL., *supra* note 160, at 89 Table 3–3.

⁴⁴⁸ Maine and Arizona are in the midst of significant experiments involving the most comprehensive public-financing systems in the country — recently enacted “Clean Elections” laws. Kenneth R. Mayer et al., *Do Public Funding Programs Enhance Electoral Competition?* 2 (unpublished draft). For two election cycles now, both have used complete public funding for statewide and state legislative races. *Id.* Hawaii changed its public financing law in 1995 by substantially increasing funding; New York City enhanced its generally successful public financing system; and Wisconsin and Minnesota continued their programs that had been created in the 1970s. *Id.* at 2–3. Early, tentative academic studies conclude that public financing has increased the competitiveness of elections in some states. *See id.* at 19–20 (finding “no merit in the argument that public funding programs amount to an incumbent protection act”). On BCRA as a return to the 1970s and 1980s, see Mann & Ornstein, *supra* note 423, at 297.

⁴⁴⁹ A likely candidate is the “millionaire’s amendment,” which increases the amount of contributions a candidate can raise when faced with a wealthy opponent who spends more than a triggering amount of personal funds. BCRA §§ 304, 316, 319 codified at 2 U.S.C.A. §§ 441a(i), 441a-1(a) (Supp. 2003). Self-financed opponents are today’s incumbents’ nightmares. Presumably assuming a sympathetic response, Senator John McCain, a leader in the BCRA effort, lamented that “everyone is scared to death of waking up one morning and reading in the newspaper that some Fortune 500 CEO or heir or heiress is going to run against them and spend \$15 million of their own money.” Jill Zuckerman, *Senate Votes to Level Election Playing Fields*, CHI. TRIB., Mar. 21, 2001, at 10. The few successful challenges to incumbents often involve self-financed opponents. In 2000, two of six successful challengers in Senate races substantially self-financed, as did two of the three successful challengers to House incumbents in 1998. Roy Schotland, *Shrink Missouri: How Sham Reform Fooled the Voters and the Court and What It Means for BCRA*, (Sept. 2003) at <http://www.bna.com/moneyandpolitics/shrink.htm> (last visited August 29, 2004). While Congress justified the amendment as leveling the playing field, the amendment does so by permitting what, on the logic of BCRA, is the fact or appearance of corrupt contributions. Zuckerman, *supra*. If large contributions permit “undue influence,” it is not clear why they, any more than bribes, should be a permissible way to “level the field” — unless incumbency is to be protected at any cost.

Similarly suspect provisions now prohibit more than \$250,000 in candidate lending to be paid back after the election. In House races in 2002, 0.53% of incumbents’ funds but 24% of challenger’s funds came from self-funding loans (and incumbents had never been higher than 1.36% in recent years while challengers had never been lower than 18%). Schotland, *supra*.

⁴⁵⁰ The Court dismissed challenges to these provisions for lack of standing. *McConnell*, 124 S. Ct. at 710.

democratic disaffection through ongoing experimentation with the design of democratic institutions.

2. *Revisiting Associational Rights.* — In light of the strong party associational rights *Jones* had recognized, *McConnell* had to address the extent to which the Constitution constrains Congress's ability to regulate the role of political parties in elections. Any decision on that question would require revisiting the issue of how the constitutional rights of parties and their members should be understood. BCRA pervasively sought to eliminate the role of national, state, and even local parties in raising or spending soft money to aid federal candidates. The justification was that such money, most of it from corporations and unions, was a form of corruption, in fact or appearance. On doctrinal grounds, some commentators and dissenting Justices argued that eliminating soft money violated the constitutional rights of parties *Jones* had recognized.⁴⁵¹ On more functional grounds, many worried that, because soft money had become, in recent years, an important source of party funding, eliminating soft money would weaken parties, and therefore undermine electoral accountability, competitive elections, and effective governance.⁴⁵²

Weaker parties could translate into a number of more specific functional concerns. Weaker parties would be less able to fund and support challengers, and because party funding is the most significant source of challenger funding, eliminating soft money might make elections even less competitive. In addition, proponents of the “responsible party government” view would argue that any regulations that weaken parties would also undermine electoral accountability. Cutting off soft money to parties might be feared to weaken them in either absolute terms — parties would have less money to spend on elections than before — or in relative terms compared to election spending from sources other than parties. If BCRA denied donors the right to make soft money donations to parties, those donors might send their funds through other, legal channels to groups other

⁴⁵¹ See, e.g., Bauer, *supra* note 437 (bemoaning that *McConnell* makes clear that political party “rights have little place in the constitutional law of campaign finance”). See *McConnell v. FEC*, 124 S. Ct. 619, 778 (2003) (Rehnquist, C.J., dissenting with respect to BCRA Titles I and V). See *McConnell*, 124 S. Ct. at 743–44 (Kennedy, J., dissenting). Justice Kennedy has frequently endorsed the need for strong constitutional protections of political parties. See, e.g., *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 627–30 (1996) (Kennedy, J., concurring) (arguing that parties should have unique First Amendment protections from contribution limitations: “The greater difficulty posed by the statute is its stifling effect on the ability of the party to do what it exists to do.”).

⁴⁵² See, e.g., Roy A. Schotland, *supra* note 437, at 339 (arguing that BCRA will lead to “weakening the nation’s only entities [political parties] whose whole purpose is to build consensus. Suppressing parties means elevating single-interest, single-issue groups.”); see also Raymond J. La Raja, *Breaking Up the Party: How McConnell Downsizes Partisan Campaigns*, 3 *ELECTION L.J.* 271, 271 (2004) (arguing that campaign-finance laws like BCRA “do nothing less than fragment the nation’s politics and raise the bar to citizen participation by weakening political parties and empowering a campaign finance elite”); Sidney M. Milkis, *Parties Versus Interest Groups*, in *CORRADO ET AL.*, *supra* note 421, at 40 (predicting that BCRA will tend to decline in party mobilization efforts).

than parties; if soft-money donations are driven by donors seeking to influence elections, votes, or legislative agendas, donors might pursue those aims through routes other than parties. The obvious route would be “tertiary groups,” such as the organizations now known as 527 entities.⁴⁵³ The rise of such groups was one of the frequently and accurately predicted effects of BCRA.⁴⁵⁴

Laws that shifted campaign contributions away from parties and to such “shadow groups” might be thought to have two damaging effects. Parties and candidates would be less able to frame coherent, focused campaigns. This diminished party coherence and control over election campaigns would make governing more difficult — any “mandate” might be diluted — and voters would find it harder to hold elected officials accountable through voters’ reliance on party labels at election time. Tertiary groups might emphasize their own, single-issue concerns, regardless of whether candidates or parties wanted the campaign agenda centered on those concerns. In addition, shifting spending to tertiary groups would make politics less accountable and thus might lead to more vicious, personalized, smear campaigns. If parties control spending, voters can hold them and their candidates responsible for the kinds of ads they run. But voters cannot directly hold tertiary groups accountable.

But to hold BCRA unconstitutional based on these possible functional effects on parties would have been misguided. Legal scholarship, which had long ignored parties, discovered them in recent years and then, as legal scholarship often does, quickly began to advocate that constitutional protection was needed to ensure the continued vitality of parties.⁴⁵⁵ But American political parties have historically been extraordinarily adaptable,⁴⁵⁶ and initial experience under BCRA continues that trend. Cut off from easy soft money from large corporate and union contributions, the national parties invested in new technology, took creative advantage of the

⁴⁵³ 527 organizations are created for the purpose of influencing elections. Contributions to 527 groups are not tax deductible and not capped. There are also 501(c)(3) and 501(c)(4) groups whose abilities to receive contributions, including tax deductible ones, and to participate in federal elections, are all regulated in distinct ways. See generally ROBERT F. BAUER, MORE SOFT MONEY HARD LAW 66 (2004) (cataloguing legal treatment under campaign-finance laws of different non-party organizations); Daniel L. Simmons, *An Essay on Federal Income Taxation and Campaign Finance Reform*, 54 FLA. L. REV. 1 (2002) (analyzing tax regulation of various entities in election campaigns).

⁴⁵⁴ See *supra* note [swat].

⁴⁵⁵ See, e.g., Kathleen M. Sullivan, *Political Money and Freedom of Speech: A Reply to Frank Askin*, 31 U.C. DAVIS L. REV. 1083, 1088 (1998) (arguing that BCRA should be held unconstitutional and that “it is not clear why further weakening our political parties is democratically desirable”).

⁴⁵⁶ Some experts in parties and election financing predicted in advance that parties would soon replace soft money with greater hard money contributions. See, e.g., Michael J. Malbin, *Political Parties Under the Post-McConnell Bipartisan Campaign Reform Act*, 3 ELECTION L.J. 177, 184 (2004). The Court itself relied on this point. See *McConnell v. FEC*, 124 S. Ct. 619, 677 (2003) (“If the history of campaign finance regulation discussed above proves anything, it is that political parties are extraordinarily flexible in adapting to new restrictions on their fundraising abilities.”).

Internet, and benefited from the raised caps in hard-money individual donations. The national parties have dramatically expanded their donor bases, each adding more than a million new contributors.⁴⁵⁷ A few months before the 2004 election, the national parties have raised more hard money than they had raised in hard and soft money combined at the same point in the 2000 election cycle.⁴⁵⁸ In absolute terms, the national parties are emerging just as strong — arguably even stronger — after *McConnell*.⁴⁵⁹ In retrospect, large soft-money donations might have made the parties lazy about developing their grassroots. Though the parties have had little time thus far to adapt, the fear that BCRA would destructively drain the parties of funds not only seems exaggerated, but wrong. Perhaps there are lessons here, even during the initial period of party adaptation to BCRA, for those who would generally view constitutional law as necessary to preserve the strength and vitality of American parties.

Nor do the parties appear to have been seriously weakened relative to non-party entities, though more time will be required for a full assessment. As expected, BCRA did induce some movement of soft money from parties to less accountable tertiary groups, and many more such groups have played a role in the current presidential cycle than in the past; that this change would occur was widely anticipated.⁴⁶⁰ But the mere emergence of these groups will not change the nature of democracy in significant and troubling ways; the effects of these outside groups on politics requires disaggregating the various roles such groups might play. Even if the incentives that fueled donors to give soft money to parties turn out to remain exactly the same, leading donors to shift all the money to these outside groups that was formerly given to parties — itself an unlikely premise and one that the 2004 presidential election thus far appears to have disproven⁴⁶¹ — much of this “shadow group” spending is used for registra-

⁴⁵⁷ Anthony Corrado, *Party Fundraising Success Continues Through Mid-Year*, The Brookings Institution (Aug. 2, 2004), at 2, http://www.brookings.edu/dybdocroot/views/papers/corrado20040802_paper.pdf. These figures are for the Democratic and Republican National Committees; there are also large donor increases for both the senate and congressional committees of the parties. *Id.*

⁴⁵⁸ *Id.* at 1–2.

⁴⁵⁹ Data on state and local parties is more difficult to attain, but state parties in the aggregate appear to have raised virtually the same amount in 2003, under the soft-money ban, as they did in 2001, the previous off-election year, when soft money was still readily available. See The Center for Public Integrity, *State Parties Adjust to McCain-Feingold*, at <http://www.publicintegrity.org/partylines/> (last visited Aug. 26, 2004).

⁴⁶⁰ See, e.g., Issacharoff & Karlan, *supra* note [swat].

⁴⁶¹ Both supply and demand for that money may diminish. First, corporate and union soft-money donations to parties could not simply be shifted into direct corporate and union spending for “electioneering communications,” because BCRA also prohibited such spending; in addition, corporate and union donations could not be given to outside groups, such as 527 organizations, for the purposes of electioneering communications. See generally BAUER, *supra* note 453, at 1–6. Thus, much of the money funding outside groups in the 2004 presidential elections has been given by individuals, not corporations and unions. See Glen Justice, *New Pet Cause for the Very Rich: Swaying the Election*, N.Y.

tion, mobilization, get-out-the-vote, and similar generic activities.⁴⁶² That some shifting of these activities from parties to outside groups will damage democratic politics is far from clear. Indeed, with more competitive sources and strategies, these multiple sources of pressure to mobilize voters might be desirable. Outside group spending on general registration and turnout activities is not likely to fragment party and candidate control over the issue agenda and dilute either the clarity of party labels or any electoral mandate; thus, the principal concerns of those who feared that BCRA would shift money from parties to outside groups does not arise from outside group spending on registration, mobilization, and turnout efforts. Instead, the real concern about increased spending by outside groups was that the money would go to their own ads, which might dilute party and candidate control over the agenda of elections. Assuming this is troubling, there is no doubt it will occur to some extent, but some outside-group advertising of this sort already occurred long before BCRA. The famous Willie Horton ads during the 1988 election, for example, were not financed or run by candidate Bush or the Republican Party but by a tertiary group.⁴⁶³ Whenever the incentives to run certain ads through such groups are strong, those ads will be produced whether or not a statute like BCRA exists: if parties are not addressing certain issues or if outside groups prefer the party to remain uninvolved in certain ads, outside groups will have incentives to spend directly rather than donate to the parties. These shadow groups are raising more money than before BCRA, as expected.⁴⁶⁴

TIMES, Sept. 25, 2004, at A10. Individual donations might be thought less potentially "corrupting" than corporate or union ones; wealthy individuals might be more ideologically driven, with less at stake in terms of rent-seeking influence with elected officials, than, for example, corporate donors. *Id.* Second, numerous corporate executives claim that soft money was less a "bribe" to officeholders than "extortion" of businesses by officeholders; if so, and BCRA makes it more difficult for officials to extort potential givers, some soft money will simply dry up. Similarly, there will be a reduction in soft money if the benefits of giving, in the form of access or influence, are less for gifts to tertiary groups. There will still be strong incentives that ensure the flourishing of these tertiary groups, but not all soft money given to parties will be simply displaced in a 1:1 ratio. Initial evidence suggests that much of the corporate soft money donated in the 2000 election has not flowed in new channels in 2004 but has simply dried up. See Jeanne Cummings, *In New Law's Wake, Companies Stash Their Political Donations*, WALL ST. J., Sept. 3, 2004, at A1.

⁴⁶² For example, a coalition of thirty-three "national progressive organizations" makes up America Votes, which is organized to "register, educate, recruit and mobilize" voters in seventeen battleground states. The coalition's largest 527 participant, America Coming Together (ACT), has budgeted \$125 million for voter turnout in these seventeen states. See America Votes, at <http://www.americavotes.org/> (last visited Aug. 24, 2004). ACT's goal is to "knock on 21 million doors, place 39 million telephone calls and mail 72 million pieces of literature, while working with its liberal partner organizations to target contacts where they can have greatest effect." John Harwood, *New Machine: In Fallout From Campaign Law, Liberal Groups Work Together*, WALL ST. J., July 27, 2004, at A1.

⁴⁶³ KATHLEEN HALL JAMIESON, *DIRTY POLITICS: DECEPTION, DISTRACTION, AND DEMOCRACY* 17 (1992).

⁴⁶⁴ As of August 2004, 527 spending had already surpassed total 527 spending from the 2000 election (\$157 million compared to \$149 million). See The Center for Public Integrity, *Overall Expendi-*

But at this stage, predictions that BCRA would undermine parties, raise the role of outside groups, and distort the agenda of elections appear exaggerated.⁴⁶⁵ And, finally, even were BCRA to weaken the parties, in absolute or relative terms, that would still not establish that a constitutional remedy was required. When restrictions on party financing in the initial 1974 election laws made it difficult for state and local parties to engage in “grass-roots” mobilization, Congress amended the laws to permit more money to flow for these activities.⁴⁶⁶ The interests of parties and members of Congress are not identical, but nor is there a deep, structural antagonism between parties and officeholders, and Congress has revised party-financing regulation in the past. As long as campaign-finance regulation is not a tool for partisan advantage seeking or incumbent entrenchment, the need to protect parties in general from congressional legislation is rarely likely to warrant aggressive constitutional oversight.⁴⁶⁷

This analysis demonstrates the range of functional considerations that would have to be ignored in a strong view of party autonomy (or associational rights of party members) as a kind of formal or deontological constitutional right. If intrinsic rights of free association were truly at stake in the way Congress regulated party fundraising and spending, those rights would trump functional considerations about the effects of party regulation on the system of democratic elections. But in rejecting the claim that BCRA violated the constitutional rights of parties and in rejecting the application of *Jones*’s strict-scrutiny test, the 5-member majority in *McConnell* implicitly recognized that parties, in the realm of election financing at least, cannot be simply analogized to private associations.⁴⁶⁸ The justifications for regulating parties, and the complex functional effects of those regulations in the election-financing context, led the Court to analyze parties on their own terms. And once any “rights” of political parties are seen as distinct to the sphere of elections and campaign financing, the content of any such rights must reflect an evaluation of the consequences of BCRA for the interaction of parties, candidates, tertiary groups, and others. *McConnell* correctly recognized that these effects of campaign-finance laws are too complex to justify judicial overriding of congressional judg-

tures Made by 527 Committees, at <http://www.publicintegrity.org/527/search.aspx?act=exp&sec=exp> (last visited Aug. 23, 2004).

⁴⁶⁵ For such predictions, see Issacharoff & Karlan, *supra* note [swat]; Sullivan, *supra* note [swat].

⁴⁶⁶ Anthony Corrado, *Party Soft Money*, in *CAMPAIGN FINANCE REFORM: A SOURCEBOOK* 167, 169–71 (Anthony Corrado et al. eds., 1997).

⁴⁶⁷ When the legislative and executive branches are dominated by one party, action or inaction that disadvantaged the other party might warrant more demanding judicial scrutiny.

⁴⁶⁸ The uncertain constitutional status of party rights, in the wake of *Jones*, is revealed in the Court’s contorted discussion of standards of review. In refusing to apply strict scrutiny, the Court says any constitutional interests of parties is to be taken into account “in the application, rather than the choice, of the appropriate level of scrutiny.” *McConnell*, 124 S. Ct. at 659. At the same time, the Court also notes that some burdens on parties might trigger strict scrutiny. *Id.* at 659 n.43.

ments. Yet the structure of political primaries has similar consequences for elections and governance, suggesting that parties should have no more intrinsic rights of association in the context of primary elections than they do in the context of campaign finance. *McConnell* should therefore cast a shadow back on *Jones*.

The one area where BCRA-like laws might be thought to impinge upon what might most justifiably be viewed as intrinsic rights of political participation involves regulation — particularly prohibition — of independent groups forming to raise issues or to promote candidates through means like election advertising. BCRA does prohibit corporations and unions from direct or indirect spending on “electioneering communications”⁴⁶⁹ (other large contributors must now disclose such contributions, a requirement the Court upheld by an 8-1 vote⁴⁷⁰). But even this prohibition does not implicate core rights of political speech: the Court had long held that legislatures could treat election spending from corporate and union general treasuries as qualitatively distinct from other election spending. Thus, corporate and union general-treasury spending does not implicate intrinsic speech or associational rights in the same way that such activities by other associations might.⁴⁷¹ Corporate and union treasury spending could be disfavored because they involved “other people’s money.”⁴⁷² Government could therefore restrict financing of political speech by these entities to separate, segregated funds with money raised voluntarily from members specifically for the purpose of financing political speech. A number of modern cases, with Chief Justice Rehnquist’s support and over Justice O’Connor’s dissent, had endorsed the distinct, segregated fund regulatory

⁴⁶⁹ With respect to non-profit corporations, the Court essentially saved the almost certainly unconstitutional Wellstone Amendment by carving it down to a limited scope. In *FEC v. Massachusetts Citizens for Life (MCFL), Inc.*, 478 U.S. 239 (1986), the Court had held constitutionally protected election advertising by organizations created for political rather than business purposes, as long as they did not have shareholders or others affiliated who had a claim on the corporation’s assets or earnings and did not accept contributions from business corporations. Although former Senator Wellstone succeeded in amendments to BCRA that effectively extended its ban on corporate electioneering to non-profits, the Court read this provision not to apply to MCFL corporations. 124 S. Ct. 698-99. Some non-profits do receive business or union funds, as the District Court found, 251 F. Supp.2d at 639-43 (opinion of Kollar-Kotelly, J.); *id.* at 803-05 (opinion of Leon, J.), and those entities are still covered by BCRA until as-applied challenges test the limits of this provision.

⁴⁷⁰ Disbursements of more than \$10,000 per year for the direct costs of producing and airing such ads must be disclosed. See 2. U.S.C. Sec. 434 for further requirements.

⁴⁷¹ The Court had established the modern framework for corporate and union political speech in cases from 1948-1972. The cases, known as the Segregated Fund cases, are *Pipefitters v. United States*, 407 U.S. 385 (1972); *United States v. Autoworkers*, 352 U.S. 567 (1957); *United States v. CIO*, 335 U.S. 106 (1948). The point in text is made and elaborated in Adam Winkler, *McConnell v. FEC, Corporate Political Speech, and the Legacy of the Segregated Fund Cases*, 3 ELECTION L.J. 361 (2004).

⁴⁷² *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); see also *Beck*; *Ellis v. Railway Clerks*, 466 U.S. 435 (1984) (extending *Abood* to private sector unions).

regime.⁴⁷³ BCRA followed this structure: it permitted segregated corporate and union funds to be raised and spent on electioneering communications but banned use of general treasury funds.

But there was one twist, with major implications for constitutional rights and democratic elections, along this road. At least once, the Court had held that the First Amendment addressed the rights of listeners to receive speech, whether or not the speaker had a right to engage in the speech. As the Court had said in *First National Bank v. Bellotti*,⁴⁷⁴ another 5-4 corporate speech case, “[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.”⁴⁷⁵ Justice Scalia, dissenting in *McConnell*, built on this viewpoint to argue that “[i]n the modern world, giving the government power to exclude corporations from the political debate enables it effectively to muzzle the voices that best represent the most significant segments of the economy and the most passionately held social and political views.”⁴⁷⁶ On this view, more speech always enhances democracy, independent of its source. If the Court followed the *Bellotti* principle, the ban on corporate and union election ads would be unconstitutional. Chief Justice Rehnquist, abandoning his votes in nearly all the corporate political speech cases of the past twenty years, would have so held. At the same time, Justice O’Connor, in a rare switch of position, changed her earlier views and voted to uphold the BCRA provisions. The 5-4 Court thus reaffirmed that legislatures could treat general-treasury corporate and union spending as qualitatively distinct from spending by other associations that might seek to influence public debate or elections. Campaign finance reform might seek in coming years to move beyond parties and corporate and union general-treasury funds to reach more general forms of political associations. At that point, depending on the form regulation takes, core political rights of speech and association might genuinely be implicated. But BCRA, in focusing on corporate and union general-treasury spending, did not reach that point.

3. *Justifications for Regulation.* — This Foreword has argued that government should have considerable leeway to design democratic institutions on the basis of different substantive views of the aims of democracy, as long as laws neither constitute forms of self-entrenchment or violate intrinsic political rights. In *McConnell*, the Court recognized one and intimated another new justification or vision of democracy and its discontents upon which government could act to regulate election financing. Similar to the way in which *Georgia v. Ashcroft* shifted from more formal to more func-

⁴⁷³ See *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (involving corporate but not union restrictions).

⁴⁷⁴ *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

⁴⁷⁵ *Id.* at 776.

⁴⁷⁶ 124 S. Ct. at [swat].

tional analysis in deciding what political equality means, *McConnell* shifted the way in which the reasons for campaign finance regulation were understood, as a response to experience in the years since *Buckley v. Valeo*⁴⁷⁷.

The more novel justification (in the context of election financing) hinted at in *McConnell* is governmental effort to advance participation in self-government itself. Reflecting the democratic disaffection of the times noted in the introduction to this Foreword,⁴⁷⁸ the Court cast campaign finance regulation as a response to the “cynical assumption that large donors call the tune”⁴⁷⁹ and the “dispiriting”⁴⁸⁰ consequences of that assumption for public participation in elections and self-government. This view of the link between perceptions of the “integrity” of elections and the willingness of citizens to participate in voting⁴⁸¹ was adumbrated in earlier cases,⁴⁸² and has been most fully articulated by Justice Breyer.⁴⁸³ In lectures and individual opinions, Justice Breyer has put forward the position that a “general participatory self-government objective” can be both a compelling justification for regulation of politics and, even perhaps, an affirmative constitutional obligation to be read into constitutional provisions such as the First Amendment.⁴⁸⁴ Whether this is meant to be an explanation of the consequences of practices the Court would otherwise already deem corrupt, or whether this “participatory self-government” rationale itself provides an independent justification for campaign finance regulation, is not yet clear. This focus on participation and self-government shifts the conceptual ground from the explicitly egalitarian basis for campaign finance

⁴⁷⁷ 424 U.S. 1 (1976).

⁴⁷⁸ See *supra* TAN42–51.

⁴⁷⁹ *McConnell*, 124 S. Ct. at 660–61 (quoting *Shrink*, 528 U.S. at 390).

⁴⁸⁰ *Id.* at 666.

⁴⁸¹ See *id.* at 656–57, 660–61, 664–66.

⁴⁸² See, e.g., *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788–89 (1978) (citing *Buckley v. Valeo*, 424 U.S. 1 (1976)). Although J. Skelly Wright's early critique of *Buckley* is better known for its argument that money is not speech, Wright also raised similar arguments about the effects of unregulated election financing on democratic participation. See J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 638 (1982) (arguing that campaign finance regulation is justified because “it is hazardous to discourage civic spirit, hope, and participation; that disillusionment breeds alienation; that alienation breeds apathy; that apathy menaces the democratic idea”).

⁴⁸³ Justice Breyer has developed this position most fully thus far in his Madison Lecture. See Stephen Breyer, *Madison Lecture: Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 252–53 (2002) (Congress permitted, in pursuit of “general participatory self-government objective,” to “democratize the influence that money can bring to bear upon the electoral process, thereby building public confidence in that process, broadening the base of a candidate's meaningful financial support, and encouraging greater public participation”). Justice Breyer first took this position in *Shrink*, where he noted that contribution limits “aim to democratize the influence that money itself may bring to bear upon the electoral process. In doing so, they seek to build public confidence in that process . . . encouraging the public participation and open discussion that the First Amendment itself presupposes.” 528 U.S. at 401 (Breyer, J., concurring) (citation omitted).

⁴⁸⁴ See Breyer, *supra* note 483, at 252.

reform advocated by some reformers but explicitly rejected by the Court in *Buckley*. In passages central to *Buckley*, the Court had famously held that “equalizing the relative ability of individuals and groups to influence the outcome of elections”⁴⁸⁵ was not a constitutionally permissible purpose and that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”⁴⁸⁶

The self-government rationale appears to differ from the “egalitarian influence” rationale in three ways. First, and most importantly, the egalitarian justification was viewed by some as a form of viewpoint discrimination — as the imposition of a particular substantive “vision of good government”⁴⁸⁷ — that violated First Amendment principles. Government cannot generally manage public discourse on the basis of such substantive judgments, and campaign-finance regulation seemed, to *Buckley* and others, to run afoul of this essential constitutional premise. But the preservation or enhancement of self-government is not a controversial aim in the same way; it does not entail governmental promotion of better and worse visions of democracy, but governmental preservation of the essential premise of democracy itself. If the value of self-government is not substantively “neutral,” it is nonetheless a consensual premise of the constitutional order itself. Put concretely, if certain practices lead voters to conclude their participation is meaningless and voting turnout drops precipitously, the legitimacy of democratic government would be in question. . That the Constitution would preclude government from acting for the purpose of restoring that legitimacy is difficult to assert..

Second, the egalitarian justification sometimes rests on the quixotic vision that political influence can somehow be equalized, or, even more naively, that ending the disproportionate influence of money would somehow itself ensure equal political influence. But regulation justified by the aim of increased participation is grounded in more realistic possibilities. Third, while the egalitarian justification sometimes threatens to revamp the entire system of public discourse, as some egalitarians have indeed advocated,⁴⁸⁸

⁴⁸⁵ *Buckley*, 424 U.S. at 48.

⁴⁸⁶ *Id.* at 48–49.

⁴⁸⁷ This critique is strongly expressed in Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS. L. REV. 663, 680–82 (1997). As this debate indicates, the boundary between what constitutes regulation of the design of democratic institutions and what constitutes viewpoint discrimination is itself contested. If regulation of election financing is conceived as regulation of democratic institutional design, then preferring one form of democratic organization over another, for substantive reasons, would be less problematic.

⁴⁸⁸ See, e.g., OWEN M. FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER* (1996). Robert Post has critiqued the egalitarian arguments along similar lines to those in the text. See Robert Post, *Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1119–23 (1993); Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517 (1997) (reviewing OWEN FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER* (1996)).

the participation rationale might more obviously and readily be confined to the specific and unique domain of elections.⁴⁸⁹

To the extent this nascent participation rationale is offered as an independent justification, one question becomes how concretely this justification is meant to be understood. If participation means voter turnout in elections, the participatory rationale would offer a clear objective yardstick against which courts could assess regulations of election financing or other electoral laws. But it seems unlikely that anything as concrete as voter turnout could be tied empirically to election-financing regimes. On the other hand, however, if participation means something broader than turnout, this rationale might provide no more firm an anchor for judicial assessment of campaign finance laws than the earlier, anti-corruption rationale. In that case, “participatory self-government” would provide a different rhetorical justification than avoidance of “corruption,” but it would not otherwise change the judicial role. Justice Breyer or the Court will have to develop this rationale further before it becomes clear how significant a jurisprudential change might be at stake.

The second change in justification that *McConnell* recognized was an expansion in the concept of how money can corrupt democratic processes. In upholding BCRA, the Court understood corruption to include contributions that might buy “special access” to influence, including influence over legislative agendas.⁴⁹⁰ This shift reflects the rise of White House coffees and Lincoln bedroom sleepovers for specified soft-money party contributions,⁴⁹¹ campaign-committee menus that priced the contribution required for an entitlement to speak or go on retreats with legislative leaders, and a record of CEO testimony that campaign contributions were a rational investment in special access. By focusing on special access, the Court shifted from *Buckley*’s emphasis on the possible effects of money on actual policymaking to its effects on the opportunity to influence policymaking or gain special access. Differential access to public officials is easier to notice and measure than differential influence over actual voting decisions. That large contributors do have privileged access of various sorts is also not disputed.

If “special access” is itself a form of corruption or legitimately raises an appearance of corruption problem sufficient for government to act upon, this more expansive view of corruption would change the terms of consti-

⁴⁸⁹ On the importance to the constitutionality of campaign-finance laws of constructing a theory of elections as a distinct domain from the sphere of public discourse, see Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism*, in *IF BUCKLEY FELL: A FIRST AMENDMENT BLUEPRINT FOR REGULATING MONEY IN POLITICS*, 103 (E. Joshua Rosenkranz ed., 1999).

⁴⁹⁰ *McConnell v. FEC*, 124 S. Ct. 619, 664, 667–68, 678 (2003).

⁴⁹¹ See Corrado, *supra* note 466, at 167–68 (noting that for a contribution of at least \$100,000 donors would have private White House coffees with President Clinton, would attend special receptions with administration officials, or would spend the night in the Lincoln bedroom).

tutional assessment dramatically. But if “special access” is problematic instead only as a proxy for actual special influence over substantive decisions, the problem of proving whether money and access buy changed outcomes would remain. Law school deans might spend more time discussing the admissions cases of the sons and daughters of wealthy donors; but if admissions decisions are not changed, is this special access itself a form of institutional corruption? Similarly, special access might accentuate the appearance of corruption, but for those who argue that appearances cannot justify regulation absent evidence of actual corruption, shifting the focus to “special access” will not change the underlying debate. *McConnell*’s new emphasis on “special access” as corruption will make it easier for courts to uphold contribution caps in various forms. If consensus emerges that the purchase of differential access is itself a corruption of the democratic process, *McConnell*’s shift in this direction will mark a major transformation, not just in doctrine, but in how the campaign-finance problem is understood.

From a policy perspective, BCRA and previous national regulation seeks to reduce “corruption” by leveling down or capping the size of campaign contributions to candidates and parties. Yet the more promising direction for reform might be bringing more money from acceptable sources into the system. Possible means include tax credits for campaign contributions, voucher systems, and public financing.⁴⁹² The most dramatic experiments in election financing are reflected not in BCRA, but in the states, where several comprehensive public financing systems have recently been adopted.⁴⁹³ Such efforts seek to reduce the marginal utility of “corrupting” sources of money, not by trying to dam them up, but by overwhelming them. Such regimes might also bring about broader participation in financing elections. Given the lack of competitiveness in American elections in the current era, and the loss of electoral accountability as a result, these efforts should also be specifically designed to promote challenges to incumbents. Measures focused on enhancing competition by funding challengers might be specifically required; these could include in-kind support to challengers, such as equivalents to the franking privilege, or grants to parties required to be channeled to challengers.⁴⁹⁴ The central problem of election financing might be not that incumbents have too much money, but that challengers have too little. Though the Court has opened

⁴⁹² On tax credits, see John de Figueiredo and Elizabeth Garrett, *Paying for Politics* (unpublished manuscript), <http://ssrn.com/abstract=578304>; on vouchers, see BRUCE ACKERMAN & IAN AYRES, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE* 3 – 44 (2002); Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1 (1996).

⁴⁹³ See *supra* note [swat].

⁴⁹⁴ See Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil is Deeply Rooted*, 18 HOFSTRA L. REV. 301, 351 – 360 (1989).

the door to the constitutionality of leveling down approaches, in the form of contribution ceilings, other approaches that bring more money into the system from “clean sources” might be the most productive direction for future efforts to structure election financing.

III. CONCLUSION

[to be added]