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THE SUPREME COURT  
2011 TERM

FOREWORD:  
DEMOCRACY AND DISDAIN

*Pamela S. Karlan*

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Sometimes the Justices seem barely able to hide their disdain for the other branches of government. Take the oral argument three Terms ago in *Northwest Austin Municipal Utility District No. One v. Holder*.<sup>1</sup> Justice Scalia pointed to the overwhelming congressional vote in favor of amending and extending section 5 of the Voting Rights Act of 1965<sup>2</sup> — the “crown jewel” of the Second Reconstruction<sup>3</sup> — as a reason not for deference, but for suspicion:

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\* Kenneth and Harle Montgomery Professor of Public Interest Law, Stanford Law School. I am incredibly lucky to have Jeff Fisher, Tom Goldstein, Amy Howe, Kevin Russell, and the students in the Stanford Supreme Court Litigation Clinic as my colleagues in litigating before the Supreme Court and to have Sam Issacharoff, Rick Pildes, and the students in my Regulation of the Political Process classes as my colleagues in thinking about the law of democracy. Nearly all my ideas in this Foreword owe something to these ongoing relationships, as well as to my career-long connection to the voting rights lawyers at the NAACP Legal Defense and Educational Fund. The participants in Stanford’s annual Supreme Court at Mid-Term conference also shared their expertise. Finally, I thank Jack Balkin, Ben Barton, Viola Canales, Walter Dellinger, David Freeman Engstrom, Paul Gewirtz, Bob Gordon, Lani Guinier, John Jeffries, Marty Lederman, Michael Kang, Larry Kramer, Jane Schacter, Geof Stone, and Bob Weisberg for their many insights along the way.

Justice Holmes once warned that “it is required of a man that he should share the passion and action of his time at peril of being judged not to have lived.” Oliver Wendell Holmes, Memorial Day (May 30, 1884), in *THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES* 4, 6–7 (Mark DeWolfe Howe ed., 1962). That’s true for women too. So I note that I participated as counsel in the following cases mentioned in this Foreword: *Fisher v. University of Texas at Austin*, 132 S. Ct. 1536 (2012) (mem.) (granting certiorari), where I represented amicus curiae The Association of American Law Schools; *Perry v. Perez*, 132 S. Ct. 934 (2012), where I represented appellee Mexican American Legislative Caucus; *Northwest Austin Municipal Utility District No. One v. Holder*, 129 S. Ct. 2504 (2009), where I represented the leadership of the House Judiciary Committee; *Herring v. United States*, 129 S. Ct. 695 (2009), where I represented the petitioner; and *Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008), where I represented the petitioners.

<sup>1</sup> *Nw. Austin Mun. Util. Dist. No. One*, 129 S. Ct. 2504.

<sup>2</sup> 42 U.S.C. § 1973c (2006).

<sup>3</sup> S. REP. NO. 109-295, at 2 (2006) (“The Act is rightly lauded as the crown jewel of our civil rights laws because it has enabled racial minorities to participate in the political life of the nation.”); President Ronald Reagan, Remarks on Signing the Voting Rights Act Amendments of 1982 (June 29, 1982), available at <http://www.reagan.utexas.edu/archives/speeches/1982/62982b.htm> (stating that the Act “proves our unbending commitment to voting rights . . . the crown jewel of American liberties”); see also President Lyndon B. Johnson, Remarks at the Signing of the Voting

JUSTICE SCALIA: . . . What was the vote on this 2006 extension — 98 to nothing in the Senate, and what was it in the House? Was —

MR. ADEGBILE: It was — it was 33 to 390, I believe.

JUSTICE SCALIA: 33 to 390. You know, the — the Israeli Supreme Court, the Sanhedrin, used to have a rule that if the death penalty was pronounced unanimously, it was invalid, because there must be something wrong there.<sup>4</sup>

In this Term’s argument in *Arizona v. United States*,<sup>5</sup> an important immigration case, Chief Justice Roberts cut off Solicitor General Donald B. Verrilli Jr. before Verrilli was able to utter a complete sentence.<sup>6</sup> And during argument in *National Federation of Independent Business v. Sebelius*<sup>7</sup> (*NFIB*), Justice Kennedy speculated that when the political branches take a step beyond what the Court’s existing cases “have allowed,” the presumption of constitutionality disappears, to be replaced by “a heavy burden of justification to show authoriza-

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Rights Act (Aug. 6, 1965), available at <http://www.civilrights.org/voting-rights/vra/johnson-speech.html> (calling the Act “one of the most monumental laws in the entire history of American freedom”).

<sup>4</sup> Transcript of Oral Argument at 51, *Nw. Austin Mun. Util. Dist. No. One*, 129 S. Ct. 2504 (No. 08-322), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/08-322.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-322.pdf). Justice Scalia seldom has a problem with death sentences pronounced unanimously by American juries. I believe the last time he voted to strike down a death sentence was in *Ring v. Arizona*, 536 U.S. 584 (2002), and the problem there was that a judge imposed the sentence based on his own findings, thereby running afoul of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). See *Ring*, 536 U.S. at 610 (Scalia, J., concurring). And Justice Scalia presumably is not equally skeptical of all 98–0 votes in the Senate: on Constitution Day 1986, he was confirmed for his seat on the Court by that margin. See *Supreme Court Nominations, Present–1789*, U.S. SENATE, <http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm> (last visited Sept. 29, 2012). As for the Justice’s point about the Sanhedrin, the rule against unanimity is apparently a procedural rule designed to prevent a rush to judgment: unless at least one member of the court argues initially in favor of the accused, a death verdict is considered too hasty. But once there has been full deliberation, a unanimous death verdict can be sustained; indeed, unanimity is required. See Chaya Shuchat, *Unanimous Verdict*, MEANINGFUL LIFE CENTER, [http://meaningfullife.com/torah/parsha/devarim/shoftim/Unanimous\\_Verdict.php](http://meaningfullife.com/torah/parsha/devarim/shoftim/Unanimous_Verdict.php) (last visited Sept. 29, 2012). I thank my colleagues Larry Marshall and Joe Grundfest for their suggestions on this point.

<sup>5</sup> 132 S. Ct. 2492 (2012).

<sup>6</sup> GENERAL VERRILLI: Mr. Chief Justice, and may it please the Court —

CHIEF JUSTICE ROBERTS: Before you get into what the case is about, I’d like to clear up at the outset what it’s not about.

Transcript of Oral Argument at 33–34, *Arizona*, 132 S. Ct. 2492 (No. 11-182), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/11-182.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-182.pdf); see also Ryan A. Malphurs & L. Hailey Drescher, “That’s Enough Frivolity”: A Not So Funny Countdown of the Supreme Court’s Affordable Care Act Oral Arguments 23–24 (June 6, 2012) (unpublished manuscript), available at <http://ssrn.com/abstract=2079136> (showing that during the oral argument over the minimum coverage provision in the Affordable Care Act cases, the Solicitor General was interrupted seventy times, and that a majority of the times he spoke, he was given less than twenty seconds to answer before another interruption occurred).

<sup>7</sup> 132 S. Ct. 2566 (2012).

tion under the Constitution.”<sup>8</sup> The Justices are becoming umpires in the tradition of Bill Klem, who when asked whether a particular pitch was a ball or a strike, replied that “It ain’t nothin’ till I call it.”<sup>9</sup>

It was not always so. The opening day of the marathon oral argument in the Affordable Care Act<sup>10</sup> cases — surely the defining decision for the Roberts Court so far — happened to be the fiftieth anniversary of what Chief Justice Warren called “the most important case” of *his* “tenure on the Court”<sup>11</sup>: *Baker v. Carr*.<sup>12</sup> Why *Baker*, and not *Brown v. Board of Education*<sup>13</sup> or *Miranda*<sup>14</sup> or *Gideon*<sup>15</sup> or *New York Times Co. v. Sullivan*?<sup>16</sup> Well, because *Baker* set in motion the reapportionment revolution — a centerpiece of the Warren Court’s “participation-oriented, representation-reinforcing approach to judicial review.”<sup>17</sup> The animating impulse behind many of the Warren Court’s major decisions was a commitment to civic inclusion and democratic decisionmaking. This impulse is captured not only by the *Reapportionment Cases* themselves, where the Court focused on equality in voting and problems of minority entrenchment,<sup>18</sup> but also by the way

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<sup>8</sup> Transcript of Oral Argument at 11–12, *Dep’t of Health & Human Servs. v. Florida*, 132 S. Ct. 2566 (2012) (No. 11-398), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/11-398-Tuesday.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-398-Tuesday.pdf).

Although the Government has generally won a significant majority of its cases before the Court, see Linda R. Cohen & Matthew L. Spitzer, *The Government Litigant Advantage: Implications for the Law*, 28 FLA. ST. U. L. REV. 391, 408, 422 (2000) (stating that between the 1985 and 1997 Terms, the Government prevailed in over 70% of the cases where it was the petitioner and in “just under 60% of the cases where it [was] the respondent,” *id.* at 408), this Term, the Government lost most of its cases before the Court. See Adam Winkler, *The Anti-Obama Court*, HUFFINGTON POST (June 22, 2012, 2:01 PM), [http://www.huffingtonpost.com/adam-winkler/supreme-court-obama\\_b\\_1619369.html](http://www.huffingtonpost.com/adam-winkler/supreme-court-obama_b_1619369.html).

<sup>9</sup> *Bill Klem Quotes*, BASEBALL ALMANAC, <http://www.baseball-almanac.com/quotes/quoklem.shtml> (last visited Sept. 29, 2012).

<sup>10</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.).

<sup>11</sup> EARL WARREN, *THE MEMOIRS OF EARL WARREN* 306 (1977).

<sup>12</sup> 369 U.S. 186 (1962).

<sup>13</sup> 347 U.S. 483 (1954).

<sup>14</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>15</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>16</sup> 376 U.S. 254 (1964).

<sup>17</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST* 87 (1980); see also *id.* at 117–18, 120–25 (discussing reapportionment).

<sup>18</sup> In each of the *Reapportionment Cases*, the Court pointed to the countermajoritarian nature of the challenged apportionments. See *Reynolds v. Sims*, 377 U.S. 533, 545 (1964) (reporting that in Alabama “only 25.1% of the State’s total population resided in districts represented by a majority of the members of the [state] Senate, and only 25.7% lived in counties which could elect a majority of the members of the [state] House of Representatives”); see also *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 725 (1964) (pointing to similar figures in Colorado); *Roman v. Sincock*, 377 U.S. 695, 705 (1964) (pointing to similar figures in Delaware); *Davis v. Mann*, 377 U.S. 678, 688–89 (1964) (reporting similar, although less stark, minority control in Virginia); *Md. Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 665–66 (1964) (pointing to similar figures

the Court tied public education to civic participation in *Brown*<sup>19</sup> and treated the landmark legislation of the Second Reconstruction as an important tool in realizing constitutional values.<sup>20</sup>

The Warren Court understood the problems and the promises of politics from its own experience. The Court numbered among its members former senators, representatives, and state legislators, a former governor and a former mayor, and former cabinet members.<sup>21</sup> Earl Warren himself was a politician of a kind we can scarcely imagine today. Elected Governor of California as a Republican in 1942,<sup>22</sup> he proposed that California become the first state “to create and support a system of compulsory health insurance.”<sup>23</sup> Although the proposal was defeated by one vote in the Assembly,<sup>24</sup> his health care agenda, among other things, garnered Warren such widespread admiration that when he ran for reelection in 1946, he won both the Republican and Democratic primaries.<sup>25</sup>

By contrast, the current Supreme Court is the first in U.S. history to lack even a single member who ever served in elected office.<sup>26</sup> The Chief Justice apparently thinks that that absence is a good thing.<sup>27</sup> In his opinion in *NFIB*, he fastidiously distanced himself from politics:

[W]e possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation’s elected leaders,

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in Maryland); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 647–49 (1964) (pointing to similar figures in New York).

<sup>19</sup> See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship.”).

<sup>20</sup> See, e.g., *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (upholding key provisions of the Voting Rights Act of 1965); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (same); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (upholding a key provision of the Civil Rights Act of 1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (same).

<sup>21</sup> JIM NEWTON, *JUSTICE FOR ALL* 263–77 (2006).

<sup>22</sup> *Id.* at 164.

<sup>23</sup> *Id.* at 184.

<sup>24</sup> See *id.* at 192.

<sup>25</sup> See *id.* at 196. As a result of Progressive Era reforms, California then permitted candidates to “cross-file” — that is, to run in party primaries as a Republican, as a Democrat, or as both. See *id.* at 5–6.

<sup>26</sup> See Benjamin H. Barton, *An Empirical Study of Supreme Court Justice Pre-Appointment Experience* 24 (Univ. of Tenn. Coll. of Law Legal Studies Research Paper Series, Research Paper No. 181, 2012), available at <http://ssrn.com/abstract=2010781>.

<sup>27</sup> See Chief Justice John G. Roberts, Jr., Lecture at the William H. Rehnquist Center on the Constitutional Structures of Government (Feb. 4, 2009), at 15:39–17:05, available at <http://www.rehnquistcenter.org/> (stating that the Court shifted during the Rehnquist years from a “fluid” and “wide-ranging” consideration of “policy” in constitutional cases to “the more solid grounds of legal argument” and pointing to prior Courts’ lack of federal judicial experience as a reason for the shift); see also Adam Liptak, *Judging a Court with Ex-Judges Only*, N.Y. TIMES, Feb. 17, 2009, at A14 (discussing the Chief Justice’s speech).

who can be thrown out of office if the people disagree with them. It is not our job to protect the people from the consequences of their political choices.<sup>28</sup>

But the tone of that last sentence left little doubt of what he thought about the Affordable Care Act, or perhaps the political process that produced it. It echoes Justice Holmes's writing to Harold Laski that "if my fellow citizens want to go to Hell I will help them. It's my job."<sup>29</sup>

The composition of the Supreme Court is itself the consequence of our political choices. The Court follows the election returns, not primarily in the sense that its decision in a particular case is swayed by public opinion,<sup>30</sup> but in the more fundamental sense that its composition is a product of who wins elections and what the winners do about judicial nominations. Since the 1970s, American politics has become increasingly polarized along ideological lines.<sup>31</sup> We now have a Senate in which there is no real overlap between the two parties.<sup>32</sup> And since Justice Stevens's retirement two Terms ago, the partisan divide maps onto the Court's most salient ideological division: all of the Justices nominated by Democratic presidents are more "liberal" with respect to the issues of greatest public concern than any of the Justices nominated by Republican presidents.<sup>33</sup> Perhaps that explains why, although

<sup>28</sup> Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2579 (2012) (majority opinion).

<sup>29</sup> Letter from Oliver Wendell Holmes to Harold J. Laski (Mar. 4, 1920), in 1 HOLMES-LASKI LETTERS 248, 249 (Mark DeWolfe Howe ed., 1953).

<sup>30</sup> Compare, e.g., BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* (2009) (suggesting that the Justices pay attention to public opinion), with Richard H. Pildes, *Is the Supreme Court a "Majoritarian" Institution?*, 2010 SUP. CT. REV. 103 (offering skepticism about the "majoritarian thesis" and suggesting that any such constraints may decline in the future), and Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)*, 13 U. PA. J. CONST. L. 263, 263-64 (2010) (suggesting that while the Justices' views tend to track the public's, it is unclear whether this is because the Court bends to the people or because "the people" include[s] the Justices" and they are simply influenced by the same factors as the public, *id.* at 264).

<sup>31</sup> See generally THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS* (2012); Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273 (2011).

<sup>32</sup> See Dino Grandoni, *Senate Gridlock Explained in One Chart*, THE ATLANTIC WIRE (Mar. 8, 2012), <http://www.theatlanticwire.com/national/2012/03/us-senate-now-completely-polarized/49641/> (stating that in 2011, "any remaining ideological overlap between the Democratic and Republican parties totally disappeared in the Senate, as the vote ratings, for the first time, were divided neatly by party line").

<sup>33</sup> By contrast, on the Warren Court, Justice Frankfurter (nominated by President Roosevelt) was often to the right of the Chief Justice and Justice Brennan (both Eisenhower nominees). On the Burger and Rehnquist Courts, Justice White (a Kennedy nominee) was frequently to the right of Justice Blackmun (a Nixon nominee). So, too, in the first years of the Roberts Court, Justice Stevens (a Ford nominee) and Justice Souter (a George H.W. Bush nominee) were sometimes to the left of Justices Ginsburg or Breyer (both Clinton nominees). See generally William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study*, 1 J. LEGAL ANALYSIS 775, 782-83 (2009) (providing a ranking of the Justices' votes in nonunanimous cases during the period

the Roberts Court is less politically experienced than its predecessors, the public views it as more politically motivated.<sup>34</sup>

And that perception existed *before* the decision in *NFIB*, after which Republican commentators exhibited a level of rage against the Chief Justice for betraying the agenda of the people who had placed him on the Court that revealed their assumption that Justices are selected for the purpose of voting the party line.<sup>35</sup> And it preceded Justice Scalia's extraordinary dissent in *Arizona v. United States*, in which he went beyond addressing the constitutionality of Arizona's

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between 1937 and 2007). Today, while the Chief Justice and Justice Kennedy may occasionally part ranks with their conservative colleagues, or Justices Breyer and Kagan may part company with Justices Ginsburg and Sotomayor, there is no politically salient issue on which there is a crossover. That being said, the Justices have split along a different dimension regarding two important but low-salience Sixth Amendment issues: the scope of the Confrontation Clause in *Crawford v. Washington*, 541 U.S. 36 (2004), and its progeny, and the scope of a judge's sentencing authority in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny. See generally Jeffrey L. Fisher, *Categorical Requirements in Constitutional Criminal Procedure*, 94 GEO. L.J. 1493 (2006) (discussing the outcomes of the Confrontation Clause and sentencing authority cases and suggesting the division is between formalists or originalists on the one hand and pragmatists on the other); Jeffrey L. Fisher, *Originalism as an Anchor for the Sixth Amendment*, 34 HARV. J.L. & PUB. POL'Y 53 (2011) (same).

<sup>34</sup> In one recent poll, a majority of respondents expressed concern that "the Supreme Court makes decisions based on a political agenda instead of the law," with only eleven percent of respondents expressing "a great deal of confidence that the Supreme Court puts politics aside and makes decisions based on the law." Memorandum from Geoff Garin et al., Hart Research Assocs., to Alliance for Justice, Views of the Supreme Court on Eve of the Health Care Ruling (June 11, 2012), available at <http://www.afj.org/connect-with-the-issues/supreme-court-ethics-reform/hart-afj-scotus-attitudes.pdf>. Another poll found that public approval of the Court was at its lowest point in twenty-five years, with the Court receiving low ratings from respondents across the political spectrum. PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, SUPREME COURT FAVORABILITY REACHES NEW LOW 1 (May 1, 2012), available at <http://www.people-press.org/files/legacy-pdf/5-1-12%20Supreme%20Court%20Release.pdf>.

<sup>35</sup> See, e.g., John Yoo, *Chief Justice Roberts and His Apologists*, WALL ST. J., June 30–July 1, 2012, at A15 (arguing that the Chief Justice may have sacrificed constitutional principle for "a little peace and quiet from attacks during a presidential election year" and that future Republican presidents "have to be more careful" in selecting nominees); Geoffrey R. Stone, *Savaging Roberts: Conservatives Run Amok*, HUFFINGTON POST (July 3, 2012, 7:59 PM), [http://www.huffingtonpost.com/geoffrey-r-stone/savaging-roberts-conserva\\_b\\_1647980.html](http://www.huffingtonpost.com/geoffrey-r-stone/savaging-roberts-conserva_b_1647980.html) (discussing "the stunningly venomous conservative response" to the Chief Justice's opinion and stating that "the conventional wisdom has come to accept that justices now do little more than vote their politics — or, more accurately, the politics of their 'constituents'").

One wonders what the reaction to the Chief Justice's position would have been in a counterfactual world where the individual mandate had been passed as part of the Republican-sponsored bill, S. 1770, 103d Cong. § 1501 (1993), introduced during the Clinton Administration. Cf. Mark Tushnet, *Being "Good" at Picking Judges*, BALKINIZATION (July 7, 2012, 12:46 PM), <http://balkin.blogspot.com/2012/07/being-good-at-picking-judges.html> (suggesting that "[t]he only reason that Bush's judge-pickers were 'awful,'" as post-*NFIB* conservative critiques of the process have suggested, "is that they didn't anticipate how the Republican Party's positions would change — or that they didn't look for someone fairly describable as a partisan hack who would read the morning newspapers to find out what the Republican Party leadership thought and then write that into the Constitution").

immigration statute — the issue in the case before the Court — to attack the Obama Administration’s immigration policy more generally.<sup>36</sup> In his now-classic dissent in *Morrison v. Olson*,<sup>37</sup> Justice Scalia had argued that “law enforcement functions” have “always and everywhere” been an exercise of executive power,<sup>38</sup> that “the ultimate decision whether, after a technical violation of the law has been found, prosecution is warranted” involves “the balancing of various legal, practical, and political considerations, none of which is absolute”;<sup>39</sup> and that “[t]o take this [discretion] away is to remove the core of the prosecutorial function, and not merely ‘some’ Presidential control.”<sup>40</sup> But faced with the Obama Administration’s announcement that it would exercise prosecutorial discretion to forgo deporting a class of young, law-abiding aliens who had come to the United States as children, he denounced “[a] Federal Government that does not want to enforce the immigration laws as written,”<sup>41</sup> and declared that “to say, as the Court does, that Arizona contradicts federal law by enforcing applications of the Immigration Act that the President declines to enforce boggles the mind.”<sup>42</sup>

Dissenting in *Baker*, Justice Frankfurter wrote that “[t]he Court’s authority — possessed of neither the purse nor the sword — ultimately rests on sustained public confidence in its moral sanction.”<sup>43</sup> His unstated concern was that the Court’s entry into the political thicket of apportionment would undermine its ability to enforce its then-controversial desegregation decisions in *Brown v. Board of Education* and *Cooper v. Aaron*.<sup>44</sup> That worry turned out to be unfounded. Fifty years on, *Brown* has become a primary source of sustained public confidence in the Court,<sup>45</sup> and the status of one-person, one-vote is no

<sup>36</sup> See 132 S. Ct. 2492, 2521 (2012) (Scalia, J., concurring in part and dissenting in part).

<sup>37</sup> 487 U.S. 654 (1988).

<sup>38</sup> *Id.* at 705–06 (Scalia, J., dissenting).

<sup>39</sup> *Id.* at 708.

<sup>40</sup> *Id.*

<sup>41</sup> *Arizona*, 132 S. Ct. at 2521 (Scalia, J., concurring in part and dissenting in part).

<sup>42</sup> *Id.* (emphasis omitted). In *Morrison*, Justice Scalia observed that “[u]nder our system of government, the primary check against prosecutorial abuse is a political one,” 487 U.S. at 728 (Scalia, J., dissenting), but he never suggested that the appropriate check for nonfeasance by federal prosecutors was to have states enforce federal law instead.

<sup>43</sup> *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).

<sup>44</sup> 358 U.S. 1 (1958); see also Luis Fuentes-Rohwer, Essay, *Looking for a Few Good Philosopher Kings: Political Gerrymandering as a Question of Institutional Competence*, 43 CONN. L. REV. 1157, 1168–69 (2011) (describing the Supreme Court’s sensitivity, in the wake of its desegregation decisions, to “the tenor of the times,” “the Court’s standing in the public eye,” and “the question of judicial impact”).

<sup>45</sup> See Pamela S. Karlan, *Constitutional Law as Trademark*, 43 U.C. DAVIS L. REV. 385, 401 (2009); Pamela S. Karlan, Lecture, *What Can Brown® Do For You?: Neutral Principles and the Struggle over the Equal Protection Clause*, 58 DUKE L.J. 1049, 1049 (2009). Nonetheless, the struggle over what *Brown* means continues: for example, next Term the Court will hear a case

longer up for grabs.<sup>46</sup> Ironically, Justices who want to dismantle so much else of the Warren Court’s constitutional doctrine invoked *Reynolds v. Sims*<sup>47</sup> — the decision establishing one-person, one-vote and arguably the Warren Court’s most activist decision — to support the most assertive Supreme Court decision in modern times, *Bush v. Gore*.<sup>48</sup>

This spring, as the fate of the most important single piece of social legislation since the Great Society hung in the balance, Robert Caro published the next volume of his magisterial biography of President Lyndon Johnson. Caro describes his subject this way:

But although the cliché says that power always corrupts, what is seldom said, but what is equally true, is that power always *reveals*. When a man is climbing, trying to persuade others to give him power, concealment is necessary: to hide traits that might make others reluctant to give him power, to hide also what he wants to do with that power; if men recognized the traits or realized the aims, they might refuse to give him what he wants. But as a man obtains more power, camouflage is less necessary. The curtain begins to rise. The revealing begins.<sup>49</sup>

What President Johnson revealed, Caro tells us, was a commitment to meet “government’s responsibility . . . to help people caught in ‘the tentacles of circumstance.’”<sup>50</sup> We owe to the Johnson presidency “the legislative realization of many of the noblest aspirations of the liberal

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involving the constitutionality of race-conscious affirmative action to achieve desegregation in selective institutions of higher education. See *Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (2012) (mem.) (granting certiorari).

<sup>46</sup> Compare, e.g., Samuel A. Alito, Jr., Attachment to PPO Non-Career Appointment Form (Nov. 15, 1985), available at <http://www.law.com/pdf/dc/alitoDOJ.pdf> (stating, in his application for a job in the Justice Department during the Reagan Administration, that he went to law school after he “developed a deep interest in constitutional law, motivated in large part by disagreement with Warren Court decisions, particularly in the areas of criminal procedure, the Establishment Clause, and reapportionment”), with *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 380 (2006) (statement of Judge Samuel A. Alito, Jr.) (“On the issue of reapportionment, as I sit here today in 2006 — and I think that is what is most relevant — I think that the principle of one person/one vote is a fundamental part of our constitutional law.”). See also Louis L. Jaffe, Comment, *Was Brandeis an Activist? The Search for Intermediate Premises*, 80 HARV. L. REV. 986, 991 (1967) (“At least some of us who shook our heads over *Baker v. Carr* are prepared to admit . . . that it has not impaired, indeed that it has enhanced, the prestige of the Court.”).

<sup>47</sup> 377 U.S. 533 (1964).

<sup>48</sup> 531 U.S. 98, 104–05 (2000) (per curiam) (citing *Reynolds*, 377 U.S. at 555); see also Pamela S. Karlan, *Equal Protection: Bush v. Gore and the Making of a Precedent*, in THE UNFINISHED ELECTION OF 2000, at 159, 194 (Jack N. Rakove ed., 2001) (“[I]t is precisely because one-person, one-vote has been such a stunning popular and jurisprudential success that the Court attempted to wrap its decision in *Bush v. Gore* in the mantle of [the one-person, one-vote decisions].”).

<sup>49</sup> ROBERT A. CARO, THE YEARS OF LYNDON JOHNSON xiv (2012).

<sup>50</sup> *Id.* at xix.

spirit in America”: the Civil Rights Act of 1964,<sup>51</sup> the Voting Rights Act of 1965, Medicare, and Medicaid.<sup>52</sup>

As with a man, so with a Court. Forty years ago, conservatives quite deliberately set out to change how the Constitution is interpreted and enforced.<sup>53</sup> They set their sights on key doctrines undergirding the New Deal, the Second Reconstruction, and the Great Society — in particular the Supreme Court’s expansive constructions of congressional authority under the power to regulate commerce,<sup>54</sup> the taxing power,<sup>55</sup> the spending power,<sup>56</sup> and the enforcement powers in the Reconstruction Amendments.<sup>57</sup> And they recognized that the success of

<sup>51</sup> Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 and 42 U.S.C.).

<sup>52</sup> CARO, *supra* note 49, at xix.

<sup>53</sup> In 1971, Lewis F. Powell, soon to become a Supreme Court Justice, prepared a memorandum for the U.S. Chamber of Commerce laying out a strategy for countering what he saw as a broad attack on the U.S. economic system. See Memorandum from Lewis F. Powell, Jr., to Eugene B. Sydnor, Jr., U.S. Chamber of Commerce, Attack on American Free Enterprise System (Aug. 23, 1971), available at <http://law.wlu.edu/deptimages/Powell%20Archives/PowellMemorandumPrinted.pdf>. The Powell Memorandum is often described as one of the foundational documents of the conservative legal movement, although it concentrates almost entirely on issues related to regulation of business. For discussion of the Powell Memorandum and its relationship to the conservative legal movement, see Oliver A. Houck, *With Charity for All*, 93 YALE L.J. 1415, 1457–60 (1984).

The two key documents laying out the broader conservative legal agenda are OFFICE OF LEGAL POLICY, U.S. DEP’T OF JUSTICE, GUIDELINES ON CONSTITUTIONAL LITIGATION (1988), available at <http://www.ialsnet.org/documents/Patersonmaterials2.pdf> [hereinafter GUIDELINES]; and OFFICE OF LEGAL POLICY, U.S. DEP’T OF JUSTICE, THE CONSTITUTION IN THE YEAR 2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION (1988), available at <http://www.scribd.com/doc/7888685/The-Constitution-in-the-year-2000-choices-ahead-in-constitutional-interpretation> [hereinafter CHOICES]. For discussion of these documents in broader context, see Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363, 383–99 (2003).

<sup>54</sup> The Reagan Justice Department classified *Wickard v. Filburn*, 317 U.S. 111 (1942), as “inconsistent” with a proper understanding of constitutional law. See GUIDELINES, *supra* note 53, at 54.

<sup>55</sup> The Guidelines directed government attorneys to ask, in deciding whether to defend a particular tax, whether that tax was “primarily regulatory and, if so, whether it is permitted by one of the enumerated powers.” GUIDELINES, *supra* note 53, at 44. By contrast, “[a] purely regulatory tax — that is, one that operates as a penalty for violating certain conditions — that cannot be upheld under the necessary and proper clause as a means of regulating an activity properly within one of Congress’ other enumerated powers is unconstitutional.” *Id.*

<sup>56</sup> The Reagan Justice Department suggested that the Tenth Amendment should be read to limit the federal government’s power to attach conditions to federal funds that were aimed at achieving results that Congress “had no constitutional power to undertake through direct means,” and that judicial enforcement of the Tenth Amendment should be reinvigorated. See CHOICES, *supra* note 53, at 130–31, 134.

<sup>57</sup> The Guidelines classified *Katzenbach v. Morgan*, 384 U.S. 641 (1966), as “inconsistent” with a proper understanding of Section 5 of the Fourteenth Amendment because it barred literacy tests despite an earlier Supreme Court ruling that such tests were not unconstitutional on their face. GUIDELINES, *supra* note 53, at 59. The Guidelines also classified *City of Rome v. United States*, 446 U.S. 156 (1980), as “inconsistent” with a proper understanding of Section 2 of the Fifteenth

this project was “likely to be sharply influenced by the judicial philosophies of the individual justices who sit on the Court.”<sup>58</sup> But they presented their program as one of judicial modesty, restraint, and respect for the democratic process — as a reaction, in fact, to the Warren Court.<sup>59</sup>

By now, after seven Terms of the Roberts Court, the curtain has risen and the revealing is well underway. A conservative majority wants to reverse or limit much of the Warren Court legacy — not just the cases at its outer boundaries, but the cases at its very core, including its ratification of the Second Reconstruction and the Great Society.

To be sure, there are some important areas — including most prominently sex discrimination and protection for the rights of gay men and lesbians — where post-Warren Court decisions have more fully realized the values of autonomy and civic equality that the Warren Court invoked than the Warren Court itself did. But the political process is not one of them. There is an irony in the title of Professor John Hart Ely’s *Democracy and Distrust*. Ely’s theory of judicial review, rooted in the Warren Court years, rests on the view that “constitutional law appropriately exists for those situations where representative government cannot be trusted, not those where we know it can.”<sup>60</sup> But constitutional law can come into play either way. Of course, there are occasions when representative government cannot be trusted — in particular, occasions when the groups in power have barricaded themselves into place or have permanently excluded a class of citizens from participating fully in civic life. In such circumstances, courts must intervene to open up the channels of political change. There are other occasions, however, in which representative government deserves heightened judicial confidence and trust: when the political process itself is responding actively to the claims of excluded groups or addressing problems that lie beyond what courts are able to fix single-handedly. In those circumstances, courts have a special responsibility to support and enforce the ensuing legislation that realizes constitutional values of liberty, equality, opportunity, and inclusion more fully than judicial opinions alone can.

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Amendment because it barred practices with a discriminatory impact — a “form[] of ‘discrimination’ not otherwise encompassed by the Amendment.” *Id.*

<sup>58</sup> See CHOICES, *supra* note 53, at iii.

<sup>59</sup> See, e.g., Edwin Meese III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 464 (1986) (claiming, before setting out his arguments for “a jurisprudence of original intention,” that, with respect to “Federalism” cases, “one may conclude that far too many of the Court’s opinions were, on the whole, mere policy choices rather than articulations of constitutional principle,” and arguing against “a drift back toward the radical egalitarianism . . . of the Warren Court” (emphasis omitted)).

<sup>60</sup> ELY, *supra* note 17, at 183.

*Ecclesiastes* tells us that to everything there is a season, a time to break down and a time to build up.<sup>61</sup> The genius of the Warren Court lay in understanding the difference. Accounts of that Court that focus solely on its decisions holding laws unconstitutional miss its equally essential role in upholding the efforts of the national political process to realize the central commitments of the Reconstruction Amendments at a time when those efforts were deeply controversial. The Warren Court may have asserted judicial interpretive supremacy, particularly in response to southern recalcitrance to *Brown*,<sup>62</sup> but it also adopted a broad view of several key congressional powers.<sup>63</sup> Its decisions show that questions of institutional authority and the substantive scope of particular constitutional provisions, while possibly connected, are not identical. A court may have an expansive or a modest view of its own authority. And it may advance a broad or a restrictive construction of a particular enumerated power. Its decision about where on the spectrum to locate itself with respect to one of those questions is independent of where it locates itself with respect to the other. Even a court with an expansive view of its own authority may, as a practical matter, leave a great deal of room for the political branches' choices if it takes a broad view of enumerated powers. By contrast, a court with a more modest view of its own authority may end up striking down more legislation if it has a restrictive view of the enumerated power at issue.<sup>64</sup>

The current Court, in contrast to the Warren Court, combines a very robust view of its interpretive supremacy with a strikingly restrictive view of Congress's enumerated powers. The Roberts Court's approach reflects a combination of institutional distrust — the Court is better at determining constitutional meaning — and substantive distrust — congressional power must be held in check. That perspective colors the Court's approach across an array of doctrinal areas, ranging

<sup>61</sup> *Ecclesiastes* 3:1, 3:3.

<sup>62</sup> See *Cooper v. Aaron*, 358 U.S. 1, 18–19 (1958) (asserting “the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution” and declaring that principle “a permanent and indispensable feature of our constitutional system”).

<sup>63</sup> See, e.g., *Katzenbach v. Morgan*, 384 U.S. 641, 651–58 (1966) (reading the Enforcement Clause of the Fourteenth Amendment expansively); *South Carolina v. Katzenbach*, 383 U.S. 301, 324–29 (1966) (reading the Enforcement Clause of the Fifteenth Amendment expansively); *Katzenbach v. McClung*, 379 U.S. 294, 302–05 (1964) (reading the Commerce Clause expansively).

<sup>64</sup> And there is of course a third dimension that involves constitutional *prohibitions*. How a court construes constitutional prohibitions (for example, the First Amendment or the Eighth Amendment) will be especially important when it comes to addressing constitutional challenges to state-level statutes and policies. Since the time of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), while courts use a two-step process for addressing the constitutionality of federal laws — first, does some enumerated power authorize the government to act, and second, despite that grant of power, does some other constitutional prohibition nonetheless prevent the government from choosing the particular course of action at issue? — courts ask only the latter question when it comes to state laws.

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from legal regulation of the political process itself to enforcement of constitutional rights.

The Supreme Court's 2011 Term illustrates the consequences of dismissing democratic politics and democratic engagement in the articulation of constitutional values. The problem is not fundamentally that the Court overrides the choices of the people or their elected representatives. Indeed, several of the most striking examples of judicial disdain involve cases in which Justices voted to sustain the law being challenged, or in which the Court was called upon to mediate a conflict between different levels of government.<sup>65</sup> Rather, the problem is that the Court's decisions convey a broad message about the democratic process itself that may undermine public confidence in the democratic process going forward. The Court's dismissive treatment of politics raises the question whether, and for how long, the people will maintain their confidence in a Court that has lost its confidence in them and their leaders.

To understand what we have lost, we need to recapture a sense of what it would mean to have a Court that respects the possibilities of politics, even as it acknowledges the pathologies of the political process. The Warren Court provides that model. Moreover, several central issues in the law of democracy that have preoccupied the Roberts Court during its first few Terms have their antecedents or counterparts in issues that confronted the Warren Court. Part I of this Foreword therefore describes key strands of the Warren Court's approach to democratic politics and constitutional interpretation. The Warren Court's most consequential decisions reflect the view that democracy requires a level of egalitarian inclusion, even in the face of competing property rights, that courts should welcome the political branches' involvement in addressing constitutional values, and that authority to enforce constitutional values should be distributed broadly. Those strands are not unique to the Warren Court, of course. Each of them finds expression in decisions by prior and subsequent Courts as well. But the Warren Court represents a distinctively optimistic view of the potential of politics to serve constitutional values. Part II then turns to this Term to show how the Roberts Court has retreated from or abandoned each of these Warren Court commitments in favor of a less inclusive politics that gives far less leeway to the federal government to pursue a democratically derived conception of constitutional values.

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<sup>65</sup> In cases like *Arizona v. United States*, 132 S. Ct. 2492 (2012), which involved the claim that Arizona's immigration law was preempted, or *Coleman v. Court of Appeals of Maryland*, 132 S. Ct. 1327 (2012), discussed *infra* pp. 55–57, which addressed whether Congress had validly abrogated states' sovereign immunity in enacting the self-care provisions of the Family and Medical Leave Act, any plausible decision would vindicate *some* democratically elected government's policy.

Finally, Part III reflects on the possible causes and consequences of this turn away from the promises of politics.

### I. THE VERY WORLD OF ALL OF US: THE REVOLUTION OF THE WARREN COURT

The year of *Baker v. Carr* — 1962 — was also the year Professor Alexander Bickel published *The Least Dangerous Branch*,<sup>66</sup> the book with which all subsequent discussions of judicial review engage. Bickel coined the phrase “counter-majoritarian difficulty” to describe the fact that “when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not [on] behalf of the prevailing majority, but against it.”<sup>67</sup> How could judicial review be justified in a constitutional system that prizes democracy?

John Hart Ely, behind whose antique desk I now sit,<sup>68</sup> thought he had found an answer to this question in the Warren Court’s decisions. Ely saw the Warren Court’s “activism in the fields of political expression and association,” voting rights and apportionment, and “equal treatment for society’s habitual unequals” as enhancing, rather than undermining, the democratic process.<sup>69</sup> Courts should step in to override the choices made by the political branches, he wrote:

when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and

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<sup>66</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

<sup>67</sup> *Id.* at 16–17. As I have pointed out elsewhere, there was a certain irony in Bickel’s formulation given that the existing legislative bodies, including Congress itself, were the product of malapportionments that undermined real confidence in the idea of legislatures as majoritarian institutions. 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, 670 n.21 (2002); see also Anthony Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057, 1065–66 & n.44 (1958) (commenting on the consequences of malapportioned state legislatures “ignor[ing] urban needs,” *id.* at 1065, and quoting Senator Paul Douglas about the irony of “those who complain most about Federal encroachment in the affairs of the States” being the ones who deny to “urban majorities in their States the opportunity to solve their problems through State action,” *id.* at 1065 n.44 (quoting Paul Douglas, *Unequal Voting: A Challenge to Democracy*, 1 LABOR’S ECON. REV. 89, 99 (1956))).

<sup>68</sup> For a photograph of the elaborately carved wooden desk, with Dean Ely behind it, see *Remembering Dean John Hart Ely*, STAN. LAW., Spring 2004, at 12, 12, available at [http://stanfordlawyer.law.stanford.edu/issues/68/sl68\\_articles.pdf](http://stanfordlawyer.law.stanford.edu/issues/68/sl68_articles.pdf).

<sup>69</sup> ELY, *supra* note 17, at 74.

thereby denying that minority the protection afforded other groups by a representative system.<sup>70</sup>

Ely's approach, which came to be known as "process theory" because of its focus on the political process, thus had both an antientrenchment and an antidiscrimination strand.

The critics of process theory, and there are many,<sup>71</sup> have rightly pointed out that Ely's theory did not avoid making value choices; those choices were simply hidden within his view of democracy.<sup>72</sup> That problem is particularly evident when it comes to the antidiscrimination strand of his argument: since many laws provide selective benefits or impose selective burdens — a tax deduction for mortgage interest treats homeowners differently from renters; a law imposing longer sentences for robbery than for littering treats robbers differently from litterers — courts need some metric for determining when a group's claim of "built-in bias" is more than simply "a mere euphemism for political defeat at the polls."<sup>73</sup> But although there may be difficult cases, there are also easy ones, particularly when groups holding power make it impossible for citizens to participate effectively in the political process.

Because Ely was setting out a theory of judicial review, he necessarily focused on the circumstances under which courts should overturn the outcomes of the political process. These are the cases that need justification to answer Bickel's charge of illegitimate counter-majoritarian activism. But although Ely himself did not make this point, his discussion also provides the basis for a theory of when courts should exercise special restraint or construe statutes broadly: when the political system *itself* is "clearing the channels of political change"<sup>74</sup> or "facilitating the representation" and full citizenship of minorities.<sup>75</sup> In

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<sup>70</sup> *Id.* at 103.

<sup>71</sup> See, e.g., Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131, 131 (1981) (challenging Ely's contention that courts are "competent to engage in representation-reinforcing judicial review"); Erwin Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207, 1220–26 (1984) (arguing both that process theory "does not avoid the need for the Court to make substantive value judgments," *id.* at 1223, and that some decisions Ely criticizes as resting on value judgments can themselves be recast in process terms); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1065 (1980) (noting that process-based theories must confront the substantive value judgments they purport to avoid).

<sup>72</sup> Professor Jack Balkin points out that "many Supreme Court decisions can be seen as either promoting democracy or detracting from it, depending on one's political priors." Jack M. Balkin, *The Roots of the Living Constitution*, 92 B.U. L. REV. 1129, 1157 (2012).

<sup>73</sup> *Whitcomb v. Chavis*, 403 U.S. 124, 153 (1971) (declining to find unconstitutional racial vote dilution from the use of multimember electoral districts).

<sup>74</sup> ELY, *supra* note 17, at 105 (capitalization omitted).

<sup>75</sup> *Id.* at 135 (capitalization omitted).

these cases, Bickel's challenge and judicial decisions cut in the same direction.

For all that the Warren Court's "reputation as 'activist' or interventionist is deserved,"<sup>76</sup> many of its most important decisions were actually deferential to the political process. This quality is especially true of the Court's decisions involving voting and election law, the cases most directly related to the democratic process itself. While the *Reapportionment Cases* involved judicial activism in clearing the channels of political change, the Court's decisions upholding provisions of the Voting Rights Act of 1965 reflect judicial deference to political channel clearing. And the Court's decisions upholding the Civil Rights Act of 1964 similarly involved judicial restraint — one might even say judicial enthusiasm for democratically derived solutions — in enforcing constitutional values of equality in civic life. Finally, the Court's doctrines enabling decentralized enforcement of constitutional values rested on a version of process theory. The Warren Court thus adopted both a robust version of judicial review and an expansive reading of the federal government's power to address critical social problems.

#### A. *Democracy and the Electoral Process*

The *Reapportionment Cases*, which required virtually every state to redraw its congressional and state legislative districts in order to create districts with equal numbers of inhabitants,<sup>77</sup> are arguably the most

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<sup>76</sup> *Id.* at 73.

<sup>77</sup> The Court's imposition of one-person, one-vote rendered nearly every state's existing legislative apportionment unconstitutional. *Reynolds v. Sims*, 377 U.S. 533, 589 (1964) (Harlan, J., dissenting). The *Reapportionment Cases* are the judicial activism gift that keeps on giving. The requirement of one-person, one-vote interacts with the census to necessitate decennial reapportionment, and the new plans produce new rounds of litigation. For information on the current round of redistricting, see Professor Justin Levitt's invaluable site, ALL ABOUT REDISTRICTING, <http://redistricting.ils.edu/> (last visited Sept. 29, 2012). Already in this decennial redistricting cycle, the Supreme Court has decided two cases. In *Perry v. Perez*, 132 S. Ct. 934 (2012), the Court rejected Texas's request to use its legislatively drawn, but unprecleared, congressional and state legislative apportionments for the 2012 elections, although it directed the three-judge district court to reconsider the interim maps to be used. In *Fletcher v. Lamone*, No. 11-1178, 2012 WL 1030482 (U.S. June 25, 2012) (mem.), the Court summarily affirmed a decision permitting Maryland to adjust its population counts with respect to incarcerated individuals for redistricting purposes. The Court recessed for the summer without issuing any decision in *Tennant v. Jefferson County Commission*, No. 11-1184, an appeal raising interesting questions about the application of one-person, one-vote to West Virginia's congressional redistricting. Statewide legislative reapportionment is one of the few remaining pockets of mandatory appellate jurisdiction at the Supreme Court. See 28 U.S.C. §§ 1253, 2284 (2006); see also 42 U.S.C. § 1973c(a) (2006) (providing for appellate jurisdiction in a significant class of cases under the Voting Rights Act). See generally Michael E. Solimine, *Institutional Process, Agenda Setting, and the Development of Election Law on the Supreme Court*, 68 OHIO ST. L.J. 767 (2007) (discussing the effects of mandatory jurisdiction).

activist decisions in American history, certainly with respect to the number of institutional changes the cases required. The Warren Court's poll tax decisions, *Harman v. Forssenius*<sup>78</sup> and *Harper v. Virginia State Board of Elections*,<sup>79</sup> are similarly interventionist. Although Justice Douglas's opinion for the Court in *Harper* suggested that there was no rational basis for imposing a poll tax,<sup>80</sup> the case in fact marked an emergence of heightened scrutiny.<sup>81</sup> Today, *Harper* is read primarily as a fundamental rights case: because the right to vote is "a fundamental matter in a free and democratic society," restrictions on the right "must be carefully and meticulously scrutinized."<sup>82</sup> But at the time, the Court offered an alternative, more expressly egalitarian basis for heightened scrutiny: "Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored" and thus "cause[] an 'invidious' discrimination."<sup>83</sup> Combined with the Court's observation in *Douglas v. California*<sup>84</sup> that "there can be no equal justice where the kind of an appeal a man enjoys 'depends on the amount of money he has,'"<sup>85</sup> the Court seemed to be setting out a doctrine that there can be no equal democracy where the kind of influence a person enjoys depends on the amount of money he has.

The Court's desegregation decisions also, of course, profoundly destabilized the existing order in which Jim Crow permeated nearly every facet of life in the southern part of the nation. To be sure, the Court's race decisions clearly invoked the antidiscrimination strand of Ely's theory. Ultimately, the Court adopted a rule that applies strict scrutiny to racial classifications because they single out a discrete and insular minority that cannot fully protect itself through the political process. But the desegregation cases can also be connected to the more general theme of full and equal political participation that underlies

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<sup>78</sup> 380 U.S. 528 (1965).

<sup>79</sup> 383 U.S. 663 (1966).

<sup>80</sup> See *id.* at 666 ("Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax.").

<sup>81</sup> In *Breedlove v. Suttles*, 302 U.S. 277, 283 (1937), which *Harper* explicitly overruled, the Court had observed with respect to Georgia's poll tax that "[e]xaction of payment before registration undoubtedly serves to aid collection [of revenue] from electors desiring to vote," surely enough to satisfy traditional rationality review. See also *Harper*, 383 U.S. at 674 (Black, J., dissenting) (pointing to the revenue collection rationale); *id.* at 684–85 (Harlan, J., dissenting) (pointing to the likely greater propensity of taxpayers to be informed about the issues to be decided by elections, a rationale the Court had found sufficient to justify literacy tests in *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45 (1959)).

<sup>82</sup> *Harper*, 383 U.S. at 667 (quoting *Reynolds*, 377 U.S. at 561–62) (internal quotation marks omitted).

<sup>83</sup> *Id.* at 668 (citation omitted).

<sup>84</sup> 372 U.S. 353 (1963).

<sup>85</sup> *Id.* at 355 (quoting *Griffin v. Illinois*, 351 U.S. 12, 19 (1956)).

the antientrenchment strand of process theory.<sup>86</sup> For the Warren Court, reapportionment and integration were related. *Brown* was a case about full citizenship and ultimately civic participation.<sup>87</sup> The Court was aware that “much of its workload — particularly in the area of civil rights, where extremist politicians from underpopulated and disenfranchised ‘Black Belt’ regions were at the forefront of massive resistance — was an indirect consequence of malapportionment’s hold on state legislatures.”<sup>88</sup> The Warren Court believed that democracy could be made to work better by including a broader cohort of citizens and by equalizing the weight of individuals’ votes. In this reformed process, politics would likely produce better outcomes — that is, fuller realizations of the Constitution’s commitment to liberty, equality, and opportunity.<sup>89</sup> The Warren Court was optimistic about the possibility of politics.

But another equally important (though less discussed) strand of Warren Court jurisprudence consists of cases in which, rather than issuing decisions that transformed critical institutions, the Court upheld transformative statutes enacted by the political branches. While the reapportionment revolution involved the Court’s adoption of a particular theory of representative government, some of the Court’s other groundbreaking decisions ratified a democratically rather than a judicially derived “theory of representative government.”<sup>90</sup>

The most obvious example of democratic channel clearing by statute involves the Voting Rights Act of 1965. By dramatically expanding voting rights for black voters in the South (and Puerto Rican voters in New York), the Act actually advanced both goals of process theory: it opened up the channels of political change, and it protected

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<sup>86</sup> In fact, Professor Michael Klarman argues that this destabilization was more critical to the successes of the civil rights movement than *Brown* itself. The “violence that resulted from *Brown*’s radicalization of southern politics enabled transformative racial change to occur as rapidly as it did” because the violence of the backlash transformed northern (white) opinion on race and led to landmark civil rights legislation like the Civil Rights Act of 1964 and the Voting Rights Act of 1965. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 441–42 (2004).

<sup>87</sup> See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (recognizing “the importance of education to our democratic society” because, among other things, “[i]t is required in the performance of our most basic public responsibilities” and “is the very foundation of good citizenship”).

<sup>88</sup> Pamela S. Karlan, *John Hart Ely and the Problem of Gerrymandering: The Lion in Winter*, 114 YALE L.J. 1329, 1333 (2005); see also JOHN HART ELY, ON CONSTITUTIONAL GROUND 4 (1996) (reporting that Chief Justice Warren “used to say that if *Reynolds v. Sims* had been decided before 1954, *Brown v. Board of Education* would have been unnecessary”).

<sup>89</sup> G. EDWARD WHITE, EARL WARREN 337 (1982) (recounting that Chief Justice Warren thought that *Reynolds v. Sims* “insured that henceforth elections would reflect the collective public interest — embodied in the ‘one-man, one-vote’ standard — rather than the machinations of special interests”).

<sup>90</sup> ELY, *supra* note 17, at 74.

the rights of discrete and insular minorities.<sup>91</sup> In *South Carolina v. Katzenbach*<sup>92</sup> and *Katzenbach v. Morgan*,<sup>93</sup> the Court upheld several “inventive” provisions of the Act<sup>94</sup> that essentially bypassed the normal process of constitutional adjudication, in which courts play a primary role, in favor of categorical legislation and executive branch enforcement.

At issue in *South Carolina* were, among other things, a provision of the Act suspending the use of literacy tests as a prerequisite to voting in targeted jurisdictions and a provision requiring those same jurisdictions to submit all proposed voting changes for federal approval before putting them into effect.<sup>95</sup> Chief Justice Warren began his opinion for the Court by noting the duration and depth of the problem Congress had addressed in the Act.<sup>96</sup> And he acknowledged the failure of conventional constitutional litigation to cure that problem.<sup>97</sup>

South Carolina had argued that allowing Congress to suspend literacy tests and essentially enjoin all voting changes pending federal approval would “rob the courts of their rightful constitutional role.”<sup>98</sup> The Chief Justice rejected that argument:

[Section] 2 of the Fifteenth Amendment expressly declares that “Congress shall have power to enforce this article by appropriate legislation.” By adding this authorization, the Framers indicated that Congress was to be *chiefly* responsible for implementing the rights created in § 1 [which forbids racial discrimination in voting]. . . . Accordingly, in addition to the courts, Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting.<sup>99</sup>

<sup>91</sup> For a discussion of how the Court’s voting law jurisprudence furthered both process theory goals, see Karlan, *supra* note 88, at 1335–36.

<sup>92</sup> 383 U.S. 301 (1966).

<sup>93</sup> 384 U.S. 641 (1966).

<sup>94</sup> *South Carolina*, 383 U.S. at 327.

<sup>95</sup> For a discussion of how the coverage, suspension, and preclearance provisions of the Act worked in tandem, see *id.* at 317–20.

<sup>96</sup> *Id.* at 308–13 (recounting the history of discriminatory practices since ratification of the Fifteenth Amendment).

<sup>97</sup> See *id.* at 314–15.

<sup>98</sup> *Id.* at 325.

<sup>99</sup> *Id.* at 325–26 (emphasis added). He continued:

We therefore reject South Carolina’s argument that Congress may appropriately do no more than to forbid violations of the Fifteenth Amendment in general terms — that the task of fashioning specific remedies or of applying them to particular localities must necessarily be left entirely to the courts. Congress is not circumscribed by any such artificial rules under § 2 of the Fifteenth Amendment. In the oft-repeated words of Chief Justice Marshall, referring to another specific legislative authorization in the Constitution, “This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.”

*Id.* at 327 (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824)).

Applying this deferential standard, the Court upheld the Act's innovative remedies. In the course of upholding the Act's suspension of new voting-related laws until those laws received federal preclearance, the Court declared that "[t]his may have been an uncommon exercise of congressional power, . . . but the Court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate."<sup>100</sup>

In *Katzenbach v. Morgan*, the Court elaborated further on Congress's special role in ensuring full access to the political process. *Morgan* involved a challenge to section 4(e) of the Voting Rights Act, which prohibited enforcement of English-language literacy tests against citizens who had completed at least the sixth grade in Puerto Rican schools where the language of instruction was not English.<sup>101</sup> Section 4(e) precluded New York from enforcing its requirement that citizens be able to read and write in English against several hundred thousand Puerto Ricans living in the state.<sup>102</sup>

As it had with respect to South Carolina's argument regarding Section 2 of the Fifteenth Amendment, the Court rejected New York's argument that congressional enforcement under Section 5 of the Fourteenth Amendment required a prior judicial determination that a practice was invalid: that construction "would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment."<sup>103</sup> Thus, even though the Court had earlier upheld neutrally administered literacy tests against constitutional attack under the Equal Protection Clause,<sup>104</sup> the Court held that the categorical congressional ban was "appropriate legislation" to enforce the clause.<sup>105</sup>

The Court identified two related theories that would support Congress's decision.<sup>106</sup> Under the first, Congress might rationally have concluded that New York's English-language requirement itself constituted "an invidious discrimination," particularly in light of "some evidence suggesting that prejudice played a prominent role in the en-

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<sup>100</sup> *Id.* at 334 (citing *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934); *Wilson v. New*, 243 U.S. 332 (1917)).

<sup>101</sup> *Katzenbach v. Morgan*, 384 U.S. 641, 643-45 & n.1 (1966).

<sup>102</sup> *Id.* at 643-45.

<sup>103</sup> *Id.* at 648; *see also id.* at 648 n.7 (citing sources discussing "historical evidence suggesting that the sponsors and supporters of the Amendment were primarily interested in augmenting the power of Congress, rather than the judiciary").

<sup>104</sup> *See Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45, 50-53 (1959).

<sup>105</sup> *Morgan*, 384 U.S. at 658.

<sup>106</sup> I discuss these theories, along with an additional one identified in the Burger Court's later decision to uphold a nationwide ban on literacy tests, in Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725, 728-29 (1998).

actment of the requirement.”<sup>107</sup> Under the second, Congress might have concluded that extending the franchise to Puerto Ricans who were not literate in English was not designed to vindicate only (or primarily) their Fourteenth Amendment–protected right to vote, but rather to ensure “nondiscriminatory treatment by government [in] . . . the provision or administration of governmental services, such as public schools, public housing and law enforcement.”<sup>108</sup> In short, in *South Carolina* and *Morgan*, the Court viewed Congress as having a special role in vindicating the right to vote and equal protection more generally, based both on the Constitution’s text itself and on the historical experience that judicial remedies alone could not fully vindicate the constitutional commitment.

The important thing to recognize about *South Carolina* and *Morgan* is that the Court was not being called upon in either case to derive a theory of democracy for itself — as it had been forced to do in the *Reapportionment Cases*.<sup>109</sup> Rather, it was being asked to enforce Congress’s choice among different concepts of democracy. The key constitutional issue, then, was one of congressional power to make that choice, an issue as to which there are textual, historical, and prudential arguments in favor of judicial deference. In many situations, there will be conflicting visions of what democracy requires. How to balance the competing values inherent in those visions reflects a choice among theories of democracy. That, after all, had been the criticism of the dissenters in the one-person, one-vote cases: what warrant did the Court have to choose among different theories of representation?<sup>110</sup> But in the Voting Rights Act cases, the choice among political theories was itself made democratically: Congress chose to outlaw literacy tests and other restrictive devices despite potential counterarguments. In enforcing the Act against resistant state and local jurisdictions, the Justices were not being asked to substitute their judgment for a democratically derived one. Rather, they were being asked to enforce the views of national political actors in the face of contrary local preferences. The enforcement provisions of the Reconstruction Amendments provided a textual hook for Congress to make that choice.

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<sup>107</sup> *Morgan*, 384 U.S. at 654.

<sup>108</sup> *Id.* at 652.

<sup>109</sup> Indeed, Ely himself acknowledged that while the one-person, one-vote standard “is certainly administrable[,] . . . the more troublesome question is what else it has to recommend it.” ELY, *supra* note 17, at 121.

<sup>110</sup> See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 589–91 (1964) (Harlan, J., dissenting).

### B. Trusting Congress

The Court's decisions in *Heart of Atlanta Motel v. United States*<sup>111</sup> and *Katzenbach v. McClung*<sup>112</sup> upholding the public accommodations provisions of the Civil Rights Act of 1964 illustrate a similar dynamic with respect to the antidiscrimination prong of process theory: bringing minorities more fully into civic life and protecting them against invidious prejudice. The Court recognized that "the fundamental object of Title II was to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'"<sup>113</sup> While that object sounded in equality, a value most clearly articulated in the Thirteenth and Fourteenth Amendments, the Court's prior decision in the *Civil Rights Cases*<sup>114</sup> seemed to pose a barrier to Congress's reaching private conduct under the Equal Protection Clause.<sup>115</sup> At the same time, the Court had been facing a series of cases arising out of the sit-in movement and other civil rights demonstrations,<sup>116</sup> and had been straining to find sufficient state action in those cases to invalidate segregationist practices that the Justices found inconsistent with basic

<sup>111</sup> 379 U.S. 241 (1964).

<sup>112</sup> 379 U.S. 294 (1964).

<sup>113</sup> *Heart of Atlanta Motel*, 379 U.S. at 250 (quoting S. REP. NO. 88-872, at 16-17 (1964)).

<sup>114</sup> 109 U.S. 3 (1883).

<sup>115</sup> The *Civil Rights Cases* held that the Fourteenth Amendment reached only state action. *Id.* at 11. A few years after *Heart of Atlanta Motel* and *McClung*, in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), the Court read a Reconstruction-era statute, 42 U.S.C. § 1982, to forbid racial discrimination by private individuals in the sale and rental of property. 392 U.S. at 421-22. The Court located Congress's power here not in the Commerce Clause, but in the enforcement provision of the Thirteenth Amendment, which prohibits slavery and involuntary servitude: "Does the authority of Congress to enforce the Thirteenth Amendment 'by appropriate legislation' include the power to eliminate all racial barriers to the acquisition of real and personal property? We think the answer to that question is plainly yes." *Id.* at 439. The Court held that Congress has the power "rationally to determine what are the badges and the incidents of [the] slavery" prohibited by the Amendment and "the authority to translate that determination into effective legislation." *Id.* at 440. Since one of the disabilities imposed by slavery was restraints on the right to inherit, purchase, or lease real property, Congress could "eradicate the last vestiges and incidents of a society half slave and half free," *id.* at 441 n.78, by legislating to protect black persons' ability to acquire property:

Negro citizens, North and South, who saw in the Thirteenth Amendment a promise of freedom — freedom to "go and come at pleasure" and to "buy and sell when they please" — would be left with "a mere paper guarantee" if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man. At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.

*Id.* at 443 (footnotes omitted).

<sup>116</sup> See, e.g., *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964); *Bell v. Maryland*, 378 U.S. 226 (1964); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961).

principles of equality.<sup>117</sup> And so the Court welcomed Congress's use of its "ample power" under the Commerce Clause to bar racial discrimination by a wide range of businesses<sup>118</sup>:

That Congress was legislating against moral wrongs in many of these areas rendered its enactments no less valid. In framing Title II of this Act Congress was also dealing with what it considered a moral problem. But that fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse. It was this burden which empowered Congress to enact appropriate legislation, and, given this basis for the exercise of its power, Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong.<sup>119</sup>

In light of Congress's decision to exercise this power, the Court rejected the motel's claim that Congress could not force it to accommodate guests whom it did not want to serve. The only relevant questions were "(1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate."<sup>120</sup> Answering those questions in the affirmative, the Court saw no countervailing property interest sufficient to let the business operate "as it sees fit, free from governmental regulation."<sup>121</sup> Put more abstractly, in choosing how to regulate commerce, Congress could choose citizen equality over commercial autonomy.<sup>122</sup>

Writing in these pages after the Court decided the Civil Rights Act and Voting Rights Act cases, Archibald Cox suggested that the deci-

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<sup>117</sup> Ultimately, the Court either found some state action in the activities of government officials' enforcing trespass laws and the like or reached for some other doctrine that would allow it to reverse the demonstrators' convictions. See, e.g., *Bouie v. City of Columbia*, 378 U.S. 347 (1964) (straining to find a denial of due process in the state's enforcement of its trespass statute against sit-in participants). See generally McKenzie Webster, Note, *The Warren Court's Struggle with the Sit-In Cases and the Constitutionality of Segregation in Places of Public Accommodations*, 17 J.L. & POL. 373 (2001).

<sup>118</sup> *Heart of Atlanta Motel*, 379 U.S. at 250; see also *id.* at 247–50.

<sup>119</sup> *Id.* at 257.

<sup>120</sup> *Id.* at 258.

<sup>121</sup> *Id.* at 259; see also *Katzenbach v. McClung*, 379 U.S. 294, 300 (1964) (finding that discrimination in the restaurant industry affects interstate commerce in a variety of ways).

<sup>122</sup> The concurring opinions of Justices Douglas and Goldberg were even more explicit on this point. See *Heart of Atlanta*, 379 U.S. at 279 (Douglas, J., concurring) (expressing his reluctance "to rest solely on the Commerce Clause" because "the right of people to be free of state action that discriminates against them because of race[] . . . 'occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines'" (quoting *Edwards v. California*, 314 U.S. 160, 177 (1941) (Douglas, J., concurring))); *id.* at 291, 293 (Goldberg, J., concurring) (describing the primary purpose of the Act as "the vindication of human dignity and not mere economics," *id.* at 291, and stating his "conviction that § 1 of the Fourteenth Amendment guarantees to all Americans the constitutional right 'to be treated as equal members of the community with respect to public accommodations,'" *id.* at 293 (quoting *Bell v. Maryland*, 378 U.S. 226, 286 (1964) (Goldberg, J., concurring))).

sions marked the emergence of a more collaborative model for promoting “liberty, equality, and dignity”<sup>123</sup>:

A Supreme Court decision reversing the conviction of the sit-in demonstrators upon the ground that the fourteenth amendment required the keepers of places of public accommodation to serve Negroes without discrimination or segregation could never have commanded the same degree of assent as the equal public accommodations title of the Civil Rights Act of 1964 after it was enacted by Congress and held constitutional by the Court. In this sense, the principle of *Brown v. Board of Education* became more firmly law after its incorporation into title VI of the Civil Rights Act of 1964.<sup>124</sup>

Particularly in a modern world in which liberty, equality, and dignity may depend on the provision of government services, the political branches might often be better equipped than the courts to vindicate those values.<sup>125</sup>

The public accommodations and voting rights cases illustrate the Warren Court’s respect for and reliance on the political branches’ contributions to realizing constitutional commitments. The Court was well aware that constitutional adjudication of school-segregation and disenfranchisement cases had achieved only minimal tangible progress on its own.<sup>126</sup> By contrast, innovative executive branch enforcement — in the desegregation context through threats of federal funds cutoffs under Title VI of the Civil Rights Act of 1964<sup>127</sup> and in

<sup>123</sup> Archibald Cox, *The Supreme Court, 1965 Term — Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 93 (1966).

<sup>124</sup> *Id.* at 94 (footnotes omitted); see also Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 31 (2003) (noting that in *Brown*, the Court had asked for briefing regarding Congress’s Section 5 power to forbid segregation because they understood that “entrenching the constitutional vision of *Brown* required the kind of political mobilization that altered the nation’s sense of itself”).

<sup>125</sup> For arguments that the proper role of courts under these circumstances is to interact with the political branches rather than to solve the problem unilaterally, see, for example, CASS R. SUNSTEIN, *DESIGNING DEMOCRACY* 221–37 (2001); MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS* 247–64 (2008).

<sup>126</sup> Roughly a decade after *Brown*, only 2.3% of black children in the South attended a school with any white students. Note, *The Courts, HEW, and Southern School Desegregation*, 77 YALE L.J. 321, 322 (1967). Litigation under the Fifteenth Amendment and the Civil Rights Acts of 1957 and 1960 similarly did:

little to cure the problem of voting discrimination. . . . [R]egistration of voting-age Negroes in Alabama rose only from 14.2% to 19.4% between 1958 and 1964; in Louisiana it barely inched ahead from 31.7% to 31.8% between 1956 and 1965; and in Mississippi it increased only from 4.4% to 6.4% between 1954 and 1964.

*South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966).

<sup>127</sup> Section 601 provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d (2006); see also David L. Kirp, *School Desegregation and the Limits of Legalism*, PUB. INT., Spring 1977, at 101, 107–09 (stating that although the drafters of the Civil Rights Act had assumed that “the courts were supposed to define discrimination, and HEW, with its substantially

the disenfranchisement context through the appointment of federal officials to register voters under sections 6 and 7 of the Voting Rights Act of 1965<sup>128</sup> — produced fundamental institutional change. Thus, even with respect to some core constitutional values, the Court recognized the political branches' special institutional competence in achieving those values.

### C. *The Democratization of Constitutional Enforcement*

Another Warren Court strategy reflecting a trust of decentralized and democratic processes for enforcing constitutional values involved enlisting affected individuals. In *Monroe v. Pape*,<sup>129</sup> the Court construed 42 U.S.C. § 1983, initially enacted as part of the Civil Rights Act of 1870, to authorize a federal damages cause of action for violations of constitutional rights committed by state and local government officials.<sup>130</sup> The innovation in Justice Douglas's opinion for the Court lay in permitting a federal damages action even when the plaintiff had the ability to sue the official in state court on a state law claim.<sup>131</sup>

Justice Douglas found in the legislative history of § 1983 an echo of process theory's antidiscrimination strand. The drafters of § 1983 turned to federal courts, he explained, because they worried that “by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.”<sup>132</sup> In particular,

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greater manpower, [was supposed] to enforce the judicial standards,” ultimately “the process worked in almost precisely the reverse fashion,” *id.* at 107, and that by 1968 in the rural South, “a convulsive and by most accounts successful revolution had been achieved in only four years,” *id.* at 108, due to “the determined imposition of federal will,” exemplified by the threat of “cutting . . . of federal funds,” *id.* at 108–09).

<sup>128</sup> 42 U.S.C. §§ 1973d–1973f (1970). In the five years after the Act was passed, executive enforcement efforts led to nearly as many African Americans registering to vote in six southern states as had registered in the century since the Fifteenth Amendment had been ratified. Chandler Davidson, *The Voting Rights Act: A Brief History*, in *CONTROVERSIES IN MINORITY VOTING* 7, 21 (Bernard Grofman & Chandler Davidson eds., 1992).

<sup>129</sup> 365 U.S. 167 (1961).

<sup>130</sup> The Monroes, an African American couple living in Chicago, alleged their Fourth Amendment rights against unreasonable searches and seizures had been violated when city police officers, led by Chief of Detectives Frank Pape, burst into their apartment without a warrant, abused the family, ransacked the premises, and then took Mr. Monroe to the police station where he was interrogated about a recent murder without being permitted to call an attorney, only to be released hours later. *See id.* at 203–04 (Frankfurter, J., dissenting). The murder victim's wife, who was later convicted for aiding her paramour in killing her husband, had picked Monroe's photograph from an array, apparently at random. *See* CHARLES F. ADAMSON, *THE TOUGHEST COP IN AMERICA* 170, 174 (2001).

<sup>131</sup> *See Monroe*, 365 U.S. at 183.

<sup>132</sup> *Id.* at 180.

Justice Douglas pointed to a statement by Representative George Hoar of Massachusetts:

The question is not whether a majority of the people in a majority of the States are likely to be attached to and able to secure their own liberties. The question is not whether the majority of the people in every State are not likely to desire to secure their own rights. It is, whether a majority of the people in every State are sure to be so attached to the principles of civil freedom and civil justice as to be as much desirous of preserving the liberties of others as their own, as to insure that under no temptation of party spirit, under no political excitement, under no jealousy of race or caste, will the majority either in numbers or strength in any State seek to deprive the remainder of the population of their civil rights.<sup>133</sup>

In his concurrence, Justice Harlan elaborated on a point implicit in the Court's opinion — namely, that “a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right.”<sup>134</sup> He also observed that it might be “the purest coincidence if the state remedies for violations of common-law rights by private citizens were fully appropriate to redress those injuries which only a state official can cause and against which the Constitution provides protection.”<sup>135</sup>

The Court's decision in *Monroe* coincided with its project of incorporating the protections of the Bill of Rights against the states<sup>136</sup>: at roughly the same time that the Court was imposing a new set of constraints on state and local governments and their officers, it was providing a new and potentially more effective remedy to the victims of unconstitutional conduct. Today, § 1983 cases are the second-most prevalent form of constitutional litigation.<sup>137</sup>

As damages actions, § 1983 cases depend on democratic enforcement in another way as well: including juries in the vindication and valuation of constitutional principles. The jury, to be sure, is instructed by the court on the legal content of the federal constitutional right at issue. But the jury has considerable leeway in assigning a value to the deprivation of that right. In *Monroe*'s case, for example, the jury

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<sup>133</sup> *Id.* at 182–83 (quoting CONG. GLOBE, 42d Cong., 1st Sess. 334–35 (1871) (statement of Sen. George Hoar)) (internal quotation marks omitted).

<sup>134</sup> *Id.* at 196 (Harlan, J., concurring).

<sup>135</sup> *Id.* at 196 n.5.

<sup>136</sup> For a discussion of this coincidence, see Louise Weinberg, *The Monroe Mystery Solved: Beyond the “Unhappy History” Theory of Civil Rights Litigation*, 1991 BYU L. REV. 737, 746–47.

<sup>137</sup> OFFICE OF JUDGES PROGRAMS, ADMIN. OFFICE OF U.S. COURTS, 2011 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 128 (2012), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf>.

awarded the family \$13,000 in damages — roughly \$78,000 in current dollars.<sup>138</sup>

In a similar vein, the Warren Court took an expansive view of private attorneys general. As the Court explained in *Newman v. Piggie Park Enterprises*,<sup>139</sup> where it construed one of the attorney’s fees provisions in the Civil Rights Act of 1964, Congress recognized that it could not achieve compliance with the provisions of Title II that mandated nondiscrimination in places of public accommodation solely through lawsuits initiated by the Attorney General. Accordingly, even when an excluded individual brings suit, his suit is “private in form only. . . . If he obtains an injunction, he does so not for himself alone but also as a ‘private attorney general,’ vindicating a policy that Congress considered of the highest priority.”<sup>140</sup> *Piggie Park* recognized that Congress might reasonably diffuse enforcement power downward.

Thus, the Warren Court’s “participation-oriented, representation-reinforcing approach to judicial review”<sup>141</sup> informed more than its decisions to upend the results of the political process. On the one hand, this approach led the Court to strike down state practices that restricted citizens’ ability to participate fully and equally in the political process. Decisions imposing one-person, one-vote; striking down the poll tax; and dismantling Jim Crow fall into this category. So, too, do decisions enabling individual litigants to vindicate constitutional values as private attorneys general. On the other hand, this approach also led the Court to *uphold* against constitutional challenges federal statutes that enhanced full civic participation by previously excluded groups, most notably the Civil Rights Act of 1964 and the Voting Rights Act of 1965. The Warren Court thereby combined a muscular view of its own interpretive authority with a robust view of federal power. By contrast, the Roberts Court has elevated a particular vision of individual liberty over a commitment to equal civic inclusion and has adopted a constricted view of federal power to respond to pressing social problems.

## II. AS ON A DARKLING PLAIN: THE COUNTERREVOLUTION OF THE ROBERTS COURT

The last week of the Term before the Court breaks for its summer recess is always a hectic one as the Justices scramble to get everything

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<sup>138</sup> See ADAMSON, *supra* note 130, at 191 (reporting the jury’s verdict, which was reduced by the trial court to \$11,000, of which the Cook County Welfare Department claimed \$9000).

<sup>139</sup> 390 U.S. 400 (1968) (per curiam).

<sup>140</sup> *Id.* at 401–02.

<sup>141</sup> ELY, *supra* note 17, at 87.

out the door,<sup>142</sup> and this Term was no different. But with everyone's eyes fixed on *NFIB* (with an occasional sideways glance at the Arizona immigration case), a number of equally telling decisions largely escaped notice. When viewed alongside *NFIB*, however, the Court's summary disposition of *American Tradition Partnership, Inc. v. Bull-ock*,<sup>143</sup> along with its decision in *Knox v. Service Employees International Union, Local 1000*<sup>144</sup> the previous week, and the Court's dismissal of *First American Financial Corp. v. Edwards*,<sup>145</sup> along with its decisions earlier in the Term on congressional enforcement power under the Fourteenth Amendment,<sup>146</sup> show a Court with a deep distrust of democratic processes. My point is not that the Roberts Court is more — or less — “activist” than the Warren Court.<sup>147</sup> With the possible exception of “originalism,”<sup>148</sup> there is no word in constitutional

<sup>142</sup> For a striking example of the problems Justices can face with difficult cases, see LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN* 157–58 (2005) (reporting that Chief Justice Burger never assigned anyone to write the opinion in *INS v. Chadha*, 462 U.S. 919 (1983), and that when Justice Blackmun noted that the case was not included on the internal list of the Court's final opinions, the Chief Justice had the case set for reargument in the fall). See also Margaret Meriwether Cordray & Richard Cordray, *The Calendar of the Justices: How the Supreme Court's Timing Affects Its Decisionmaking*, 36 ARIZ. ST. L.J. 183, 213–14 (2004) (quoting Justices Brandeis and Frankfurter, who worried that the quality of the Court's decisions in late-argued and late-decided cases suffers); Linda Greenhouse, *Case of the Shrinking Docket: Justices Spurn New Appeals*, N.Y. TIMES, Nov. 28, 1989, at A1 (“When a case is argued in April, the Court has only two months to produce an opinion before the term ends. Over the years this group of cases has been notorious for leading to weak opinions.”).

<sup>143</sup> 132 S. Ct. 2490 (2012).

<sup>144</sup> 132 S. Ct. 2277 (2012).

<sup>145</sup> 132 S. Ct. 2536 (2012) (per curiam).

<sup>146</sup> See *infra* pp. 55–57.

<sup>147</sup> A study covering the Terms between 1994 and 2005 found that the “justices var[ie]d] widely in their inclination to strike down Congressional laws,” with Justice Thomas “the most inclined, voting to invalidate 65.63 percent of” the federal laws on whose constitutionality the Court ruled, and Justice Breyer “the least, voting to invalidate 28.13 percent.” Paul Gewirtz & Chad Golder, Op-Ed., *So Who Are the Activists?*, N.Y. TIMES, July 6, 2005, at A19. The authors of the study argued that “[d]eclaring an act of Congress unconstitutional is the boldest thing a judge can do.” *Id.* The study found that between 1791 and 1858, the Court struck down only two acts of Congress and that before 1991, “the court struck down an average of one Congressional statute every two years.” *Id.* It concluded that “those justices often considered more ‘liberal’ — Justices Breyer, Ruth Bader Ginsburg, David Souter and John Paul Stevens — vote least frequently to overturn Congressional statutes, while those often labeled ‘conservative’ vote more frequently to do so.” *Id.*

<sup>148</sup> Edwin Meese believes in a “jurisprudence of original intention.” Meese, *supra* note 59, at 464 (emphasis omitted); see also Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL'Y 5 (1988) (setting out his theory). Justice Scalia champions “original meaning.” ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* 92 (2012). Professor Jack Balkin propounds “living originalism.” JACK M. BALKIN, *LIVING ORIGINALISM* (2011); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 293 (2007). Professor James Fleming claims that “Mitchell Berman has distinguished seventy-two varieties of originalism,” James E. Fleming, *The Balkinization of Originalism*, 2012 U. ILL. L. REV. 669, 671, which beats Baskin-Robbins's 31 and Heinz's 57. See also Pamela S. Karlan, *Constitutional Law*

law whose meaning means less than “activism.”<sup>149</sup> Rather, it is that the Roberts Court has lost faith in the democratic process, and that doubt affects its decisions in ways both large and small. The Court’s decisions regarding the political process itself show that this lost faith can lead the Court both to strike down challenged laws — as it has done with respect to nearly every campaign finance regulation it has confronted — and to uphold them, as it has done with respect to voter identification. The Justices no longer treat Congress as an indispensable partner in realizing constitutional commitments. And they seem poised to further restrict decentralized enforcement of constitutional values.

*A. Protecting Spenders and Suspecting Voters:  
The Roberts Court and the Political Process*

Until its decision in *NFIB*, the most controversial decision of the Roberts Court was *Citizens United v. FEC*.<sup>150</sup> There, the Court held, 5–4, that a federal prohibition on corporations’ or unions’ using general treasury funds to make independent expenditures on “electioneering communications” or speech expressly advocating the election or defeat of a candidate violated the First Amendment.<sup>151</sup> In a sense, *Citizens United* was the Roberts Court’s version of *Reynolds v. Sims*, as it upended campaign finance law in twenty-four states.<sup>152</sup> But it did so in the service of elevating a particular conception of liberty over the political branches’ choice of a competing conception of equality.

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as *Trademark*, 43 U.C. DAVIS L. REV. 385, 395–401 (2009) (claiming that “originalism” has become genericized so that the word no longer differentiates one constitutional theory from another).

<sup>149</sup> See Pamela S. Karlan, *Acting Out*, BOS. REV., Nov./Dec. 2010, at 10, 10 (stating that “the phrase ‘judicial activist’ (or ‘activist judge’) is so frequently used that it has come to exemplify what George Orwell described in the 1946 essay ‘Politics and the English Language’ as a term with ‘no meaning except in so far as it signifies “something not desirable””).

<sup>150</sup> 130 S. Ct. 876 (2010).

<sup>151</sup> *Id.* at 886. For discussions of *Citizens United*, see Lucian A. Bebchuk & Robert J. Jackson, Jr., *The Supreme Court, 2009 Term — Comment: Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83 (2010); Samuel Issacharoff, *The Supreme Court, 2009 Term — Comment: On Political Corruption*, 124 HARV. L. REV. 118 (2010); and Kathleen M. Sullivan, *The Supreme Court, 2009 Term — Comment: Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143 (2010).

<sup>152</sup> See Robert Barnes, *Campaign-Contribution Law Remains Unsettled*, WASH. POST, May 23, 2011, at A17, available at [http://www.washingtonpost.com/politics/citizens-united-decision-reverberates-in-courts-across-country/2011/05/20/AFbJEK9G\\_story.html](http://www.washingtonpost.com/politics/citizens-united-decision-reverberates-in-courts-across-country/2011/05/20/AFbJEK9G_story.html) (noting that *Citizens United* “free[d] corporations and unions to spend whatever they like for and against candidates [and] wiped out laws in 24 states banning such spending”); *Life After Citizens United*, NAT’L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/legislatures-elections/elections/citizens-united-and-the-states.aspx> (last visited Sept. 29, 2012) (discussing the impact of *Citizens United* on state campaign finance regulations).

It certainly is possible to defend the result in *Citizens United* as an application of process theory.<sup>153</sup> The “central function” of the First Amendment is to “assur[e] an open political dialogue and process,”<sup>154</sup> and courts must therefore “police inhibitions on expression and other political activity because we cannot trust elected officials to do so: ins have a way of wanting to make sure the outs stay out.”<sup>155</sup> Accordingly, in a brief aside, Ely criticized the Court’s foundational campaign finance decision in *Buckley v. Valeo*<sup>156</sup> that limits on political contributions survive heightened First Amendment scrutiny, “expressing concern that the Burger Court was balancing away freedom of speech that the Warren Court had protected more robustly.”<sup>157</sup> Indeed, Justice Kennedy, who wrote the opinion for the Court in *Citizens United*, had earlier deployed this version of process theory, suggesting that the Bipartisan Campaign Reform Act (BCRA) “look[s] very much like an incumbency protection plan.”<sup>158</sup>

But it is just as possible to defend campaign finance regulation as an effort to clear the channels of political change by reducing the influence of wealth on electoral outcomes. In 1990, in *Austin v. Michigan Chamber of Commerce*,<sup>159</sup> the three remaining members of the Warren Court (Justices Brennan, White, and Marshall) all joined an opinion for the Rehnquist Court upholding a Michigan statute that prohibited nonmedia corporations from using general treasury funds to make independent expenditures in state candidate elections.<sup>160</sup> The Michigan statute, the Court held, was sufficiently aimed at preventing “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form[,] . . . that have little or no correlation to the public’s support for the corporation’s political ideas,” and that stem from “the unique state-conferred

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<sup>153</sup> The following discussion borrows from Kathleen M. Sullivan & Pamela S. Karlan, Symposium, *Foreword: The Elysian Fields of the Law*, 57 STAN. L. REV. 695, 698–703 (2004). For another version of the point that representation reinforcement theory can support the Roberts Court’s campaign finance decisions, see Balkin, *supra* note 72, at 1156–57.

<sup>154</sup> ELY, *supra* note 17, at 112.

<sup>155</sup> *Id.* at 106.

<sup>156</sup> 424 U.S. 1 (1976).

<sup>157</sup> Sullivan & Karlan, *supra* note 153, at 699; *see also* ELY, *supra* note 17, at 234 n.27 (criticizing *Buckley*).

<sup>158</sup> *McConnell v. FEC*, 540 U.S. 93, 306 (2003) (Kennedy, J., concurring in the judgment in part and dissenting in part with respect to BCRA Titles I and II). Similarly, Justice Scalia declared that “any restriction upon a type of campaign speech that is equally available to challengers and incumbents tends to favor incumbents.” *Id.* at 249 (Scalia, J., concurring with respect to BCRA Titles III and IV, dissenting with respect to BCRA Titles I and V, and concurring in the judgment in part and dissenting in part with respect to BCRA Title II) (emphasis omitted).

<sup>159</sup> 494 U.S. 652 (1990).

<sup>160</sup> *See id.* at 654–55.

corporate structure that facilitates the amassing of large treasuries.”<sup>161</sup> As the Court noted more recently, public confidence in the fairness of the electoral process is critical to its legitimacy, and a “cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.”<sup>162</sup>

*Citizens United* came down decisively on the libertarian, as opposed to the egalitarian, side of this divide. The Court expressly overruled *Austin* and rejected its antidistortion rationale.<sup>163</sup> It held, essentially as a matter of law, that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption”<sup>164</sup> — the only acceptable justifications for limiting political speech:

The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy. By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate. The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials. This is inconsistent with any suggestion that the electorate will refuse “to take part in democratic governance” because of additional political speech made by a corporation or any other speaker.<sup>165</sup>

The popular reaction to *Citizens United* was swift and overwhelmingly negative.<sup>166</sup> The shorthand version, according to popular perception, was that the Court had added to *Buckley*’s debatable equation that “money is speech” the more pernicious equation that “corporations are people.”<sup>167</sup>

In his dissent, Justice Stevens pushed back against the majority’s view that the First Amendment did not permit the government to distinguish among different speakers.<sup>168</sup> He added: “Under the majority’s view, I suppose it may be a First Amendment problem that corpora-

<sup>161</sup> *Id.* at 660.

<sup>162</sup> *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 390 (2000).

<sup>163</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010).

<sup>164</sup> *Id.* at 909.

<sup>165</sup> *Id.* at 910 (citations omitted) (quoting *McConnell v. FEC*, 540 U.S. 93, 144 (2003)).

<sup>166</sup> See Pildes, *supra* note 30, at 111–12 (“Though public opinion polls are notoriously suspect as a gauge of popular views, 80 percent of Americans reportedly oppose the Court’s decision, with a strikingly high percentage, 65 percent, reporting that they ‘strongly oppose’ it.”).

<sup>167</sup> *But see* Pamela S. Karlan, *Me, Inc.*, BOS. REV., July/Aug. 2011, at 10, 10–11 (explaining why this equivalence is not the central problem).

<sup>168</sup> *Citizens United*, 130 S. Ct. at 948 (Stevens, J., dissenting) (“[T]he Court dramatically overstates its critique of identity-based distinctions, without ever explaining why corporate identity demands the same treatment as individual identity. Only the most wooden approach to the First Amendment could justify the unprecedented line it seeks to draw.”).

tions are not permitted to vote, given that voting is, among other things, a form of speech.”<sup>169</sup>

There are echoes in Justice Stevens’s riposte of the famous lines from *Reynolds*: “Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests,”<sup>170</sup> and “people, not land or trees or pastures, vote.”<sup>171</sup> Regardless of how one thinks about the question with respect to political spending, the one-person, one-vote cases support the premise, rejected by the *Citizens United* majority, “that the Government has an interest ‘in equalizing the relative ability of individuals and groups to influence the outcome of elections.’”<sup>172</sup> If we focus on the final and most direct form of influencing the outcome of elections — namely, casting a ballot — the government not only has that interest, but it has also had, since the reapportionment revolution, that obligation.

A striking feature of the Roberts Court is that, when it comes to the act of voting, the Justices are decidedly less skeptical of government restrictions. In *Crawford v. Marion County Election Board*,<sup>173</sup> the Court upheld against a facial challenge Indiana’s imposition of a new, highly restrictive voter identification law that required all individuals voting in person — and Indiana had fairly limited provisions for absentee voting — to present currently valid, government-issued photo identification before casting a countable ballot.<sup>174</sup>

Writing for himself, the Chief Justice, and Justice Kennedy, Justice Stevens declined to apply strict scrutiny of the kind the Warren Court applied in the poll tax cases<sup>175</sup> (which parallel voter identification cases in that, as a technical matter, voters were being required to present a government-issued document — namely, a poll tax receipt — in order to vote<sup>176</sup>). Although he cited *Harper*,<sup>177</sup> he omitted reference to

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<sup>169</sup> *Id.* Justice Stevens also criticized the majority “for being so dismissive of Congress.” *Id.* at 968. In his view, the Court “should instead start by acknowledging that ‘Congress surely has both wisdom and experience in these matters that is far superior to ours.’” *Id.* at 969 (quoting *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 650 (1996) (Stevens, J., dissenting)).

<sup>170</sup> *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

<sup>171</sup> *Id.* at 580.

<sup>172</sup> *Citizens United*, 130 S. Ct. at 904 (quoting *Buckley v. Valeo*, 424 U.S. 1, 48 (1976)).

<sup>173</sup> 128 S. Ct. 1610 (2008).

<sup>174</sup> *See id.* at 1614 (opinion of Stevens, J.) (explaining that a voter “may file a provisional ballot that will be counted if she brings her photo identification to the circuit county clerk’s office within 10 days [of the election]”).

<sup>175</sup> *See, e.g., Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667 (1966).

<sup>176</sup> *See, e.g., VIRGINIA FOSTER DURR, OUTSIDE THE MAGIC CIRCLE 177–78* (Hollinger F. Barnard ed., 1985) (describing how the poll tax operated in Virginia); Judith Kilpatrick, *Wiley Austin Branton and the Voting Rights Struggle*, 26 U. ARK. LITTLE ROCK L. REV. 641, 651 (2004) (describing how voters in Arkansas were “required to pay the tax each year and to retain the payment receipt for display before entering the voting booth at the next election”).

<sup>177</sup> *Crawford*, 128 S. Ct. at 1615 (opinion of Stevens, J.).

its directive that “where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.”<sup>178</sup> Instead, he moved immediately to declare that “‘evenhanded restrictions that protect the integrity and reliability of the electoral process itself’ are not invidious and satisfy the standard set forth in *Harper*.”<sup>179</sup> Thus, “a court evaluating a constitutional challenge to an election regulation” should “weigh the asserted injury to the right to vote against the precise interests put forward by the State as justifications for the burden imposed by its rule.”<sup>180</sup>

In the case before him, Justice Stevens identified two salient interests that would justify the voter identification requirement: “detering and detecting voter fraud” and “safeguarding voter confidence.”<sup>181</sup> With respect to the first interest, Justice Stevens acknowledged that the record contained no evidence of in-person voter impersonation “actually occurring in Indiana at any time in its history.”<sup>182</sup> Accordingly, he justified the concern by pointing to an “infamous example” of such fraud in an 1868 mayoral election in New York City,<sup>183</sup> and some “occasional examples” in other jurisdictions, plus some episodes of absentee ballot fraud in Indiana itself.<sup>184</sup>

With respect to the second interest, Justice Stevens declared that “public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process.”<sup>185</sup> Justice Stevens’s language echoed *Purcell v. Gonzalez*,<sup>186</sup> in which the Court elaborated on this idea:

Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised. “[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”<sup>187</sup>

The citation of *Reynolds* for the proposition that voters could be excluded from the polls turns *Reynolds* completely upside down. It

<sup>178</sup> *Harper*, 383 U.S. at 670.

<sup>179</sup> *Crawford*, 128 S. Ct. at 1616 (opinion of Stevens, J.) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)).

<sup>180</sup> *Id.* (quoting *Anderson*, 460 U.S. at 789) (internal quotation marks omitted).

<sup>181</sup> *Id.* at 1617.

<sup>182</sup> *Id.* at 1619.

<sup>183</sup> *Id.* at 1619 n.11.

<sup>184</sup> *Id.* at 1619.

<sup>185</sup> *Id.* at 1620.

<sup>186</sup> 549 U.S. 1 (2006) (per curiam).

<sup>187</sup> *Id.* at 4 (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)).

would have been inconsistent with Chief Justice Warren’s insistence that restrictions on “the right to vote freely for the candidate of one’s choice . . . strike at the heart of representative government”<sup>188</sup> to suggest that the remedy for some voters’ skepticism about the legitimacy of the political process would be to deny other citizens the right to participate.

*Purcell’s* hypotheses about voter confidence had no more basis in evidence than *Crawford’s* fears of fraud. Both were speculations based on virtually no data. On the one hand, fears of voter fraud apparently “do not have any relationship to a [citizen’s] likelihood of intending to vote or turning out to vote.”<sup>189</sup> On the other hand, voter identification laws have the potential to exclude millions of citizens who lack the documents necessary to satisfy the most restrictive voter identification requirements.<sup>190</sup> The juxtaposition of Justice Kennedy’s breezy confidence in *Citizens United* that no amount of money in the form of independent expenditures sloshing through the system will “cause the electorate to lose faith in our democracy”<sup>191</sup> is hard to square with *Purcell’s* concern that even the specter of voter impersonation “drives honest citizens out of the democratic process and breeds distrust of our government.”<sup>192</sup>

The biennium since *Citizens United* has undercut Justice Kennedy’s prediction with an explosion of new forms of political spending. Nearly half of all political spending by outside groups is now attribut-

<sup>188</sup> *Reynolds*, 377 U.S. at 555.

<sup>189</sup> Stephen Ansolabehere & Nathaniel Persily, Essay, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV. 1737, 1739 (2008).

<sup>190</sup> See Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 658–61 (2007) (providing data suggesting that between six and ten percent of all citizens of voting age lack such documentation, with much higher rates among the youngest and oldest Americans of voting age and among minority communities, as well as somewhat higher rates among persons with disabilities).

Justices Scalia, Thomas, and Alito — the other Justices who voted to uphold the Indiana voter identification law — took an even more permissive approach, which would foreclose virtually all challenges by voters who lack identification, without regard to how difficult obtaining that identification would be. See *Crawford*, 553 U.S. at 1624–25 (Scalia, J., concurring in the judgment) (arguing that photo identification requirements are permissible as long as they are generally applicable and nondiscriminatory, regardless of the impact on individual voters). Allegations that poor, disabled, and elderly voters might be particularly burdened by the requirement were irrelevant:

The Fourteenth Amendment does not regard neutral laws as invidious ones, *even when their burdens purportedly fall disproportionately on a protected class*. *A fortiori* it does not do so when, as here, the classes complaining of disparate impact are not even protected. See *Harris v. McRae*, 448 U.S. 297, 323, and n. 26 (1980) (poverty); *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 442 (1985) (disability); *Gregory v. Ashcroft*, 501 U.S. 452, 473 (1991) (age) . . .

*Id.* at 1626.

<sup>191</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 910 (2010).

<sup>192</sup> *Purcell*, 549 U.S. at 4.

able to groups that do not disclose their donors, and close to three-quarters of outside-group spending on political advertisements in 2010 “came from sources that were prohibited from spending money in 2006.”<sup>193</sup> Whatever the precise relationship among the decision in *Citizens United*, the subsequent D.C. Circuit decision in *SpeechNow.org v. FEC*,<sup>194</sup> and the massive flow of money into the political process,<sup>195</sup> public perceptions have surely shifted, and in directions that undercut the Court’s assertion in *Citizens United* that citizens would not lose faith in the political process.<sup>196</sup>

That the Court’s decision in *Citizens United* reflected a philosophical, rather than an empirical, position on money’s effect on politics was driven home the last week of the Term by the Court’s summary disposition in *American Tradition Partnership, Inc. v. Bullock*.<sup>197</sup> The case involved a First Amendment challenge to a Montana statute, enacted by initiative in 1912, that paralleled the federal ban on corporate political spending struck down in *Citizens United*.<sup>198</sup>

Among the three challengers to the Montana ban was a shadowy group, Western Tradition Partnership, incorporated apparently for the sole purpose of serving “as a conduit of funds for persons and entities including corporations who want to spend money anonymously to influence Montana elections.”<sup>199</sup> Western Tradition is thus a kind of Su-

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<sup>193</sup> Spencer MacColl, *Citizens United Decision Profoundly Affects Political Landscape*, OPENSECRETS BLOG (May 5, 2011, 11:16 AM), <http://www.opensecrets.org/news/2011/05/citizens-united-decision-profoundly-affects-political-landscape.html>. For more recent data, check the website of the Center for Responsive Politics at <http://www.opensecrets.org>.

<sup>194</sup> 599 F.3d 686 (D.C. Cir. (en banc) (striking down Federal Election Campaign Act limits on the amounts that could be contributed to a political committee that receives contributions solely for the purpose of making independent expenditures), *cert. denied*, 131 S. Ct. 553 (2010).

<sup>195</sup> See Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 21–44 (2012) (discussing the post-*Citizens United* landscape).

<sup>196</sup> See generally Memorandum from Stan Greenberg et al. to Friends of Democracy Corps, Greenberg Quinlan Rosner, and Public Campaign Action Fund (Jan. 19, 2012), available at <http://campaignmoney.org/files/DemCorpPCAFmemoFINAL.pdf>.

<sup>197</sup> 132 S. Ct. 2490 (2012) (per curiam).

<sup>198</sup> See *W. Tradition P’ship v. Att’y Gen.*, 271 P.3d 1, 3 (Mont. 2011).

<sup>199</sup> *Id.* at 4. The Supreme Court of Montana noted that Western Tradition “appears to be engaged in a multi-front attack on both contribution restrictions and the transparency that accompanies campaign disclosure requirements.” *Id.* In a move reminiscent of the child who kills his parents and then asks the court for mercy because he is an orphan, Western Tradition, under its new name of American Tradition Partnership, argued that its compliance with disclosure laws “should remedy any concerns regarding the potential corrupting influence of its unlimited corporate expenditures,” even though it was challenging those same disclosure laws in a separate action. *Id.* at 5.

But perhaps that shift is the shape of things to come. See Peter Overby, *Sen. McConnell: Political Donations Are Free Speech*, NPR (June 18, 2012), <http://www.npr.org/2012/06/18/155263978/sen-mcconnell-political-donations-are-free-speech> (reporting that Senator Mitch McConnell (R-Ky.), who once supported full disclosure as an adequate alternative to other campaign finance regulations, is now attacking disclosure requirements on outside groups that make independent expenditures).

per PAC: an entity created “to solicit and anonymously spend” unlimited funds contributed by “other corporations, individuals and entities to influence the outcome of Montana elections.”<sup>200</sup> Its ability to do so would undercut the disclosure provisions of Montana law.

Despite the Supreme Court’s decision in *Citizens United*, the Supreme Court of Montana upheld the state’s law by a 5–2 vote. It described *Citizens United* as a case “decided under its facts or lack of facts” about the risk or appearance of actual corruption.<sup>201</sup> It distinguished Montana’s law on the grounds that the law reflected the state’s distinctive history — in which “mining and industrial enterprises controlled by foreign trusts or corporations”<sup>202</sup> had quite blatantly corrupted the state’s politics at the turn of the twentieth century,<sup>203</sup> precipitating the ban on corporate expenditures<sup>204</sup> — and its distinctive character as a sparsely populated state still dependent economically on industries controlled by out-of-state corporations, and thus “especially vulnerable to continued efforts of corporate control to the detriment of democracy and the republican form of government.”<sup>205</sup> And the Montana court pointed to the special risk of corporate spending with respect to judicial elections, highlighting the Supreme Court’s decision in *Caperton v. A.T. Massey Coal Co.*,<sup>206</sup> which found a due process violation when a judge who had benefitted from massive independent expenditures in his favor during his election campaign later sat on a case involving a corporation whose head was responsible for the expenditures.<sup>207</sup> The Montana court suggested that the presence of

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<sup>200</sup> *W. Tradition*, 271 P.3d at 7.

<sup>201</sup> *Id.* at 6.

<sup>202</sup> *Id.* at 8.

<sup>203</sup> *See id.* at 8–9 (recounting that history).

<sup>204</sup> *See id.* at 9.

<sup>205</sup> *Id.* at 11.

<sup>206</sup> 129 S. Ct. 2252 (2009). For discussions of *Caperton*, see Pamela S. Karlan, *The Supreme Court, 2008 Term — Comment: Electing Judges, Judging Elections, and the Lessons of Caperton*, 123 HARV. L. REV. 80 (2009); Lawrence Lessig, *The Supreme Court, 2008 Term — Comment: What Everybody Knows and What Too Few Accept*, 123 HARV. L. REV. 104 (2009); Penny J. White, *The Supreme Court, 2008 Term — Comment: Relinquished Responsibilities*, 123 HARV. L. REV. 120 (2009); and *The Supreme Court, 2008 Term — Comment: Caperton v. A.T. Massey Coal Co.: Due Process Limitations on the Appearance of Judicial Bias*, 123 HARV. L. REV. 73 (2009).

<sup>207</sup> *See W. Tradition*, 271 P.3d at 12. As I noted, the Court’s opinion in *Caperton* elided the seemingly crisp distinction between regulable campaign “contributions” given directly to candidates and “expenditures,” which are subject to sweeping protection against regulation. Justice Kennedy’s opinion for the Court “repeatedly refers to the exceptional or ‘extraordinary’ nature” of Massey CEO Don Blankenship’s “campaign contributions.” Karlan, *supra* note 206, at 91 n.64 (quoting *Caperton*, 129 S. Ct. at 2256–57, 2264). But Blankenship had contributed only \$1000, the statutory maximum, to the jurist’s campaign committee. What was extraordinary was the \$500,000 he spent on direct mailings, letters seeking donations from others, and advertisements, and the nearly \$2.5 million he contributed to a political organization calling itself “And For The Sake Of The Kids,” which supported the winning judicial candidate and opposed the incumbent justice against whom he was running. *Caperton*, 129 S. Ct. at 2257.

an elected judiciary — not a factor at the federal level — provided an additional rationale for upholding state bans on corporate political spending.<sup>208</sup> And it pointed to comments by retired Justice O'Connor about a “crisis of confidence in the impartiality of the judiciary [that] is real and growing” and seemed fueled in part by the extraordinary spending by corporately funded “super spender groups.”<sup>209</sup>

The two dissenting members of the Montana court did not disagree with their colleagues that corporate spending, and particularly the kind of anonymous spending that *Western Tradition* aimed to facilitate, posed serious dangers to the integrity of Montana’s political and judicial processes. But they felt themselves bound to apply *Citizens United* and saw no room to distinguish the situation in Montana.<sup>210</sup>

Initially, the U.S. Supreme Court stayed the Montana court’s decision pending the timely filing and disposition of a petition for writ of certiorari.<sup>211</sup> Although they too voted to grant the stay, Justices Ginsburg and Breyer issued a statement, perhaps alluding to the massive influx of new forms of spending in the current election cycle, declaring that “Montana’s experience, and experience elsewhere since this Court’s decision in *Citizens United v. Federal Election Comm’n*, make it exceedingly difficult to maintain that independent expenditures by corporations ‘do not give rise to corruption or the appearance of corruption,’”<sup>212</sup> and suggesting that the Court should “consider whether, in light of the huge sums currently deployed to buy candidates’ allegiance, *Citizens United* should continue to hold sway.”<sup>213</sup>

That reconsideration never happened. The last week of the Term, the Court summarily reversed the judgment of the Montana Supreme Court in a one-paragraph per curiam order.<sup>214</sup> The operative language was terse in the extreme:

The question presented in this case is whether the holding of *Citizens United* applies to the Montana state law. There can be no serious doubt that it does. See U.S. Const., Art. VI, cl. 2. Montana’s arguments in sup-

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<sup>208</sup> See *W. Tradition*, 271 P.3d at 12–13.

<sup>209</sup> *Id.* at 13 (quoting Sandra Day O’Connor, *Foreword* to JAMES SAMPLE ET AL., *THE NEW POLITICS OF JUDICIAL ELECTIONS, 2000–2009* (2010)) (internal quotation marks omitted).

<sup>210</sup> See *id.* at 18 (Nelson, J., dissenting) (“Admittedly, I have never had to write a more frustrating dissent. I agree, at least in principle, with much of the Court’s discussion and with the arguments of the Attorney General. More to the point, I thoroughly disagree with the Supreme Court’s decision in *Citizens United*. I agree, rather, with the eloquent and, in my view, better-reasoned dissent of Justice Stevens. As a result, I find myself in the distasteful position of having to defend the applicability of a controlling precedent with which I profoundly disagree.”).

<sup>211</sup> *Am. Tradition P’ship v. Bullock*, 132 S. Ct. 1307 (2012).

<sup>212</sup> *Id.* at 1307–08 (statement of Ginsburg, J.) (citation omitted) (quoting *Citizens United v. FEC*, 130 S. Ct. 876, 909 (2010)).

<sup>213</sup> *Id.* at 1308.

<sup>214</sup> *Am. Tradition P’ship v. Bullock*, 132 S. Ct. 2490 (2012) (per curiam).

port of the judgment below either were already rejected in *Citizens United*, or fail to meaningfully distinguish that case.<sup>215</sup>

The citation to the Supremacy Clause was gratuitous. The Montana Supreme Court had acknowledged that it was bound by the First Amendment.<sup>216</sup> Its mistakes were to take the *Citizens United* opinion at its word that laws burdening political speech were subject to strict scrutiny rather than being unconstitutional “as a categorical matter”<sup>217</sup> and to think that the Court’s rejection of the anticorruption argument with respect to independent expenditures rested on the absence of a factual record.<sup>218</sup> The Montana Supreme Court, applying the legal standard that had been laid out in *Citizens United*, concluded that the Montana law, on the facts of the case, satisfied strict scrutiny.<sup>219</sup> The United States Supreme Court could disagree with that conclusion (as it did), and of course its decision would control the outcome of the litigation (again, as it did), but this case hardly merited the “bitter medicine of summary reversal.”<sup>220</sup> Among other things, even if McCain-Feingold could have been described as an incumbent-protection measure, it was far harder to view the Montana statute as a process failure: laws enacted by initiative seem less likely to be incumbent-protection measures.<sup>221</sup> And a 1912 restriction on corporate spending, particularly in light of the history of demonstrated corruption that had prompted its adoption, seems a far cry from a contemporaneous restriction adopted by sitting politicians who expressed distress over the attack ads being run against them.<sup>222</sup>

Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, dissented. They renewed Justice Stevens’s claim in his *Citizens United* partial dissent that “technically independent expenditures can be corrupting in much the same way as direct contributions.”<sup>223</sup> And Justice

<sup>215</sup> *Id.* at 2491.

<sup>216</sup> See *W. Tradition P’ship v. Att’y Gen.*, 271 P.3d 1, 6 (Mont. 2011).

<sup>217</sup> *Citizens United*, 130 S. Ct. at 898; see also *W. Tradition*, 271 P.3d at 6.

<sup>218</sup> See *W. Tradition*, 271 P.3d at 6.

<sup>219</sup> See *id.* (stating that with respect to Montana’s law “the government met [its] burden” of establishing “a compelling interest” as required by *Citizens United*).

<sup>220</sup> *Spears v. United States*, 129 S. Ct. 840, 845 (2009) (Roberts, C.J., dissenting).

<sup>221</sup> Cf. Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 503, 509–10 (1997) (pointing out that “legislative term limits in the United States have been almost entirely a product of initiative and referendum,” *id.* at 503, and serve as anti-entrenchment devices).

<sup>222</sup> See Charles J. Cooper & Derek L. Shaffer, *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, 224–25 (2004) (quoting multiple senators as supporters of the law during floor debate or as intervenors in the litigation).

<sup>223</sup> *Am. Tradition P’ship v. Bullock*, 132 S. Ct. 2490, 2491 (2012) (per curiam) (Breyer, J., dissenting) (quoting *Citizens United v. FEC*, 130 S. Ct. 876, 965 (2010) (Stevens, J., concurring in part and dissenting in part)) (internal quotation marks omitted).

Breyer suggested, as he and Justice Ginsburg had done at the stay stage, that “Montana’s experience, like considerable experience elsewhere since the Court’s decision in *Citizens United*, casts grave doubt on the Court’s supposition that independent expenditures do not corrupt or appear to do so.”<sup>224</sup> But because they saw no “significant possibility of reconsideration,”<sup>225</sup> Justice Breyer and his three colleagues voted to deny the petition. *American Tradition* thus illustrates the point Professor Ernest J. Brown made in his Foreword more than fifty years ago that a summary reversal “suggests — though possibly it does not prove — the predetermined purpose, the assured if not the tendentious mind.”<sup>226</sup>

Four days before *American Tradition* was decided, the Court had issued another campaign finance–related decision in *Knox v. SEIU*.<sup>227</sup> With the same five justices in the majority, the Court restricted the ability of public sector unions to raise political funds.<sup>228</sup> The decision drove home the majority’s indifference to the consequences of its campaign finance decisions for the actual operation of the political system.

Under longstanding doctrine, public sector labor unions are entitled to charge nonmembers an “agency fee” to cover the cost of nonpolitical services related to collective bargaining, but the unions must also adopt procedures that allow a nonmember to vindicate his First Amendment right not to have his fees spent on unrelated political activity.<sup>229</sup> Under the *Hudson* doctrine, unions must notify employees annually of the next year’s dues and of nonmembers’ ability to opt out of a predetermined percentage of the dues that is attributable to nonchargeable expenses.<sup>230</sup> *Knox* concerned the question of how a mid-year special assessment temporarily raising monthly dues should be treated. The union imposed the assessment to finance a “Political Fight-Back Fund” to influence the outcome of two upcoming statewide elections.<sup>231</sup> Nonmembers were not provided with an opportunity to opt out.<sup>232</sup>

In an opinion delivered by Justice Alito, the Court held that the First Amendment requires that unions imposing special assessments or dues increases “may not exact any funds from nonmembers without

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<sup>224</sup> *Id.* at 2491–92.

<sup>225</sup> *Id.* at 2492.

<sup>226</sup> Ernest J. Brown, *The Supreme Court, 1957 Term — Foreword: Process of Law*, 72 HARV. L. REV. 77, 77 (1958).

<sup>227</sup> 132 S. Ct. 2277 (2012).

<sup>228</sup> *See id.* at 2295–96.

<sup>229</sup> *See* Chi. Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292, 302–11 (1986); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222–23 (1977).

<sup>230</sup> *See Hudson*, 475 U.S. at 309–11.

<sup>231</sup> *See Knox*, 132 S. Ct. at 2285.

<sup>232</sup> *See id.* at 2286.

their affirmative consent.”<sup>233</sup> In other words, not only must unions provide notice, but the default regime also is switched so that they cannot collect the additional fee unless the nonmember opts in. Along the way to this holding, Justice Alito described the normal default as “tolerat[ing] a substantial impingement on First Amendment rights by allowing unions to impose an opt-out requirement at all.”<sup>234</sup> Being “forced to support financially an organization with whose principles and demands [a worker] may disagree . . . constitute[s] a form of compelled speech and association that imposes a ‘significant impingement on First Amendment rights.’”<sup>235</sup>

Save for the offhanded remark that “[p]ublic-sector unions have the right under the First Amendment to express their views on political and social issues without government interference,”<sup>236</sup> *Citizens United* goes unmentioned in *Knox*. And so the Court never grappled with the consequence of its decision: the creation of a further asymmetry between the ability of management and workers to fund political activities. As a formal matter, *Citizens United* freed both corporations and unions to spend general treasury funds to influence elections. But unions face greater legal barriers to acquiring such funds not only because public sector workers are normally less wealthy than the proprietors of the kinds of closely held corporations that are the source of most corporate political spending,<sup>237</sup> but also because dues payments rather than general business operations generate their general treasury funds.<sup>238</sup> Corporate employees, customers, and shareholders, by contrast, are not entitled to opt out of financing corporate political activity,<sup>239</sup> and the Court in *Citizens United* seemed ignorant of or indifferent to this problem. *Knox* only exacerbates the asymmetry between corporate and labor access to political money with its new opt-in regime, which Justice Alito seems ready to impose across the board.<sup>240</sup>

The poet Robert Pinsky wrote that “[a] country is the things it wants to see.”<sup>241</sup> So we might ask why so many Justices see a threat to

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<sup>233</sup> *Id.* at 2296.

<sup>234</sup> *Id.* at 2293.

<sup>235</sup> *Id.* at 2289 (quoting *Ellis v. Ry. Clerks*, 466 U.S. 435, 455 (1984)).

<sup>236</sup> *Id.* at 2295 (citing *Citizens United v. FEC*, 130 S. Ct. 876 (2010)).

<sup>237</sup> See Letter from Laura W. Murphy et al., Am. Civil Liberties Union, to Senator Richard Durbin & Ranking Member Lindsey Graham 3 (July 24, 2012), available at [http://www.aclu.org/files/assets/aclu\\_statement\\_on\\_citizens\\_united\\_7\\_24\\_hearing\\_final.pdf](http://www.aclu.org/files/assets/aclu_statement_on_citizens_united_7_24_hearing_final.pdf).

<sup>238</sup> See Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 COLUM. L. REV. 800, 802–03 (2012).

<sup>239</sup> See generally Bebchuk & Jackson, Jr., *supra* note 151, at 83 (noting that corporate directors and officers have “virtually plenary authority” to engage in political speech); Victor Brudney, *Association, Advocacy, and the First Amendment*, 4 WM. & MARY BILL RTS. J. 1, 47–58 (1995).

<sup>240</sup> See *Knox*, 132 S. Ct. at 2293, 2296 (seeming to hold open the question whether opt-out regimes provide sufficient First Amendment protection).

<sup>241</sup> ROBERT PINSKY, AN EXPLANATION OF AMERICA 8 (1979).

public confidence in the political process from ineligible individuals' casting ballots (despite no evidence of a pervasive problem), but no threat from the vastly more likely exclusion of qualified citizens who lack government identification<sup>242</sup> or from the public's belief that electoral outcomes are controlled by the wealthy. Or we might ask why the Justices downplay the burdens poor people face from having to negotiate a bureaucratic maze to obtain sufficient identification, or the burdens unions will face in mobilizing for the collective action that is their reason for being, while being so solicitous of the First Amendment burdens placed on wealthy speakers. The Warren Court transformed the equal protection principle from what Justice Holmes derided as "the usual last resort of constitutional arguments,"<sup>243</sup> into a fundamental principle of justice.<sup>244</sup> The Roberts Court, by contrast, seems more concerned with protecting the ability of the powerful to spend money in the political process than with protecting equal access to the levers of political power.<sup>245</sup>

### B. Suspecting Congress

A stalled economic recovery. Airwaves filled with demagoguery about important constitutional issues. A President in the middle of seeking reelection who claims that the Supreme Court should not be in the business of striking down major federal legislation. And in response to charges of a pro-corporate tilt on a Court with a narrow conservative majority, Justice Roberts defends the Court's exercise of judicial review with a claim that judges do nothing more than "lay the article of the Constitution which is invoked beside the statute which is challenged" in order "to decide whether the latter squares with the former."<sup>246</sup> He also distances the Court from politics by insisting that "[t]his court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the leg-

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<sup>242</sup> More retired nuns were refused ballots in a single election — and by a poll worker who was a member of their own order, no less!, see Cynthia Tucker, Editorial, *Even God Couldn't Vote in Indiana Without Proper ID*, BALTIMORE SUN, May 12, 2008, at 9A — than all the verified examples of in-person voter impersonation fraud in Indiana history, see *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 194 (2008) (opinion of Stevens, J.) (noting that the record contained "no evidence" of "in-person voter impersonation at polling places . . . actually occurring in Indiana at any time in its history").

<sup>243</sup> *Buck v. Bell*, 274 U.S. 200, 208 (1927).

<sup>244</sup> Cf. *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005) (referring to the "basic principle of justice that like cases should be decided alike").

<sup>245</sup> Cf. Mark Tushnet, *The Supreme Court, 1998 Term — Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 66 (1999) (concluding of the Rehnquist Court that "[t]he best description of the modern Court is that it acts in ways that satisfy a rather well-to-do constituency").

<sup>246</sup> *United States v. Butler*, 297 U.S. 1, 62 (1936). This passage is adapted from Karlan, *supra* note 149.

islation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.”<sup>247</sup>

It’s déjà vu all over again. The previous paragraph describes 1936 as much as it describes 2012, and the quotation comes from Justice Owen Roberts in the course of his opinion for the Court in *United States v. Butler*<sup>248</sup> striking down a major piece of New Deal legislation — the Agricultural Adjustment Act. But Chief Justice John Roberts offered similar expressions in his opinion in *NFIB*,<sup>249</sup> a decision largely upholding the central legislative achievement of the Obama Administration — the Affordable Care Act.

In the end, as we all know, the Court ratified the New Deal.<sup>250</sup> In *Wickard v. Filburn*,<sup>251</sup> the Court upheld a provision of the reenacted Agricultural Adjustment Act that imposed a penalty on farmers who produced wheat, even if for their own consumption, in excess of the amount authorized by a government-set quota.<sup>252</sup> Writing for a unanimous Court, Justice Jackson held that the Commerce Clause provided Congress with the power to reach farmer Filburn’s conduct.<sup>253</sup> In reaching that conclusion, he rejected “reference to any formula which would give controlling force to nomenclature” about whether the thing being regulated was “production” or “consumption,” as opposed to “marketing,” or whether the effect on an interstate market was “direct” or “indirect,” in favor of considering “the actual effects of the activity in question upon interstate commerce.”<sup>254</sup> And Justice Jackson located the primary constraint on Congress’s exercise of its commerce power in the political process itself:

At the beginning Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded. He made emphatic the embracing and penetrating nature of this power by warning that effective restraints on its exercise must proceed from political rather than from judicial processes. . . .

<sup>247</sup> *Butler*, 297 U.S. at 63.

<sup>248</sup> 297 U.S. 1, 62.

<sup>249</sup> *NFIB*, 132 S. Ct. 2566, 2579–80 (2012) (stating that “[t]he powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written,” that “it is the responsibility of this Court to enforce the limits on federal power by striking down acts of Congress that transgress those limits,” and that “Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments”).

<sup>250</sup> “Scholars have battled for decades . . . over the role of Justice [Owen] Roberts” in that ratification. Daniel E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?*, 2 J. LEGAL ANALYSIS 69, 71 (2010) (suggesting that Justice Roberts veered sharply to the left during the 1936 Term before returning to the right, but that ultimately changes in the Court’s membership solidified the New Deal settlement).

<sup>251</sup> 317 U.S. 111 (1942).

<sup>252</sup> *Id.* at 124–25.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at 119–20, 124.

... The conflicts of economic interest between the regulated and those who advantage by it are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process.<sup>255</sup>

In private, he was even more categorical:

If we were to be brutally frank, . . . I suspect what we would say is that in any case where Congress thinks there is an effect on interstate commerce, the Court will accept that judgment. All of the efforts to set up formulae to confine the commerce power have failed. When we admit that it is an economic matter, we pretty nearly admit that it is not a matter which courts may judge.<sup>256</sup>

From *Wickard* until the emergence of the Second Rehnquist Court,<sup>257</sup> the Supreme Court adhered to that view. Since then, “[t]he path of [its] Commerce Clause decisions has not always run smooth,”<sup>258</sup> and in *NFIB*, a five-Justice majority took an exit ramp,

<sup>255</sup> *Id.* at 120, 129 (footnotes omitted) (citations omitted). Justice Jackson’s opinion cited *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824), as support for this proposition. *Wickard*, 317 U.S. at 120. There, Chief Justice Marshall wrote:

If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.

22 U.S. (9 Wheat.) at 197.

<sup>256</sup> John Q. Barrett, *Wickard v. Filburn (1942)*, THE JACKSON LIST 4–6 (June 27, 2012), <http://www.stjohns.edu/media/3/638cd994e8484fd3bdb841f31b11952f.pdf?d=20120626> (quoting a letter from Justice Jackson, the author of the Court’s opinion, to then-Judge (later Justice) Minton); see also Karlan, *supra* note 67, at 685–87 (discussing the Court’s shift in *Wickard* to broader interpretations of the Commerce Clause and reliance on the political branches to police the commerce power’s limits).

<sup>257</sup> I borrow the term from Professor Thomas Merrill. See Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 575 (2003) (identifying the Second Rehnquist Court as beginning in 1994 when the Court “altered its agenda . . . away from social issues to federalism issues” and the conservative majority became “steadfast proponent[s] of limiting congressional power under the Commerce Clause and Fourteenth Amendments, and of erecting new protections for states’ rights in the name of the Tenth and Eleventh Amendments”).

<sup>258</sup> *NFIB*, 132 S. Ct. 2566, 2585 (2012) (opinion of Roberts, C.J.). Compare, e.g., *United States v. Lopez*, 514 U.S. 549, 567–68 (1995) (striking down the Gun-Free School Zones Act as exceeding Congress’s commerce power because it regulated the noneconomic act of carrying a concealed weapon in a school), and *United States v. Morrison*, 529 U.S. 598, 613–19 (2000) (striking down a provision of the Violence Against Women Act as exceeding Congress’s commerce power because it regulated noneconomic violent criminal activity, and such regulation could not be solely justified by the activity’s aggregate effect on interstate commerce), with *Gonzales v. Raich*, 545 U.S. 1, 9 (2005) (upholding the application of federal drug laws to the possession of home-grown marijuana).

holding that the Affordable Care Act's minimum coverage provision — § 5000A, which requires that a large proportion of Americans carry health insurance<sup>259</sup> — exceeded Congress's power under the Commerce Clause.<sup>260</sup> Similarly, after *Butler*, the Court deferred completely to Congress's exercise of its Spending Clause powers,<sup>261</sup> but in *NFIB*, a seven-Justice majority announced new limits on congressional authority to impose conditions on revenue streams going to state governments.<sup>262</sup>

Other contributors to this issue of the *Harvard Law Review* discuss the substantive content of *NFIB* in greater depth.<sup>263</sup> The Court's new limitations on Congress's commerce and spending powers will no doubt be the focus of popular and political debate, litigation, and scholarship for years to come. My focus here is not so much on the content of the doctrine but on the character of the analysis. Although they reached different bottom lines, both Chief Justice Roberts's opinion and the joint dissent manifested a pervasive disrespect for, and exasperation with, Congress.

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<sup>259</sup> Although the provision is popularly referred to as the "individual mandate," the vast majority of the population satisfies the requirement through either employer- or government-provided insurance. See KAISER FAMILY FOUND., FOCUS ON HEALTH REFORM: A GUIDE TO THE SUPREME COURT'S AFFORDABLE CARE ACT DECISION 2 & n.4 (2012), available at <http://www.kff.org/healthreform/upload/8332.pdf> (noting a Congressional Budget Office projection that about 80% of the nonelderly population would have been insured even in the absence of the ACA).

<sup>260</sup> The Chief Justice so concluded in an opinion for himself. See *NFIB*, 132 S. Ct. at 2584–93 (opinion of Roberts, C.J.). In a rare joint dissent, Justices Scalia, Kennedy, Thomas, and Alito reached the same conclusion. See *id.* at 2644–50 (joint dissent).

<sup>261</sup> See *id.* at 2634 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("Prior to today's decision, however, the Court has never ruled that the terms of any grant crossed the indistinct line between temptation and coercion.").

<sup>262</sup> The Chief Justice, joined by Justices Breyer and Kagan, concluded that Congress could not terminate all of a state's Medicaid funding if the state refused to participate in the Act's expansion of Medicaid to serve additional populations. He viewed the expansion as so dramatic that it effectively constituted a new program, and thus "Congress is not free . . . to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding." *Id.* at 2607 (opinion of Roberts, C.J.). He then concluded that prohibiting the Secretary of Health and Human Services from "withdraw[ing] existing Medicaid funds for failure to comply with the requirements set out in the expansion" would fully cure the constitutional infirmity and, as so understood, the statute passed constitutional muster. *Id.* The joint dissent, by contrast, having held that "the offer of the Medicaid Expansion was one that Congress understood no State could refuse," *id.* at 2666 (joint dissent), and therefore was one that violated an antic coercion constraint on congressional spending power, would have struck down the Affordable Care Act in its entirety (including provisions totally unrelated to the provision of medical care, such as the requirement that nursing mothers be provided with break time and a private place to express their breast milk, see 29 U.S.C. § 207(r)(1) (Supp. IV 2011)). See 132 S. Ct. at 2677 (joint dissent).

<sup>263</sup> See generally Gillian E. Metzger, *The Supreme Court, 2011 Term — Comment: To Tax, To Spend, To Regulate*, 126 HARV. L. REV. 83 (2012); Martha Minow, *The Supreme Court, 2011 Term — Comment: Affordable Convergence: "Reasonable Interpretation" and the Affordable Care Act*, 126 HARV. L. REV. 117 (2012).

To be sure, the legislative process that produced the Affordable Care Act was replete with the sorts of maneuvers that lead to unfavorable comparisons with sausage making.<sup>264</sup> The bill was the product of a series of compromises.<sup>265</sup> Congressional hyperpolarization meant there were “no Republican votes available for any major legislative initiative” after the economic stimulus act<sup>266</sup> and certainly not for health care reform. The increased use of filibuster threats meant the bill needed to garner sixty votes in the Senate rather than a simple majority; these circumstances resulted in the inclusion of a number of targeted provisions designed to keep fence-sitting Democrats in line.<sup>267</sup> After the death of Senator Edward M. Kennedy (who poignantly had made passage of universal health care legislation one of his life’s works<sup>268</sup>) and the loss of his Senate seat, it became difficult to negotiate<sup>269</sup> over differences between the Senate’s version of health care reform and the version favored by Democrats in the House (which would have included a public option).<sup>270</sup> Ultimately, after “a series of wild political twists and turns,” Congress used the “procedural emergency exit” of the budget reconciliation process, which can be accomplished by simple majority vote, to enact the law.<sup>271</sup> But the law was still a major political achievement after fifty years’ effort to achieve universal coverage.

The Justices were surely aware of this backdrop, as well as of the delicate political framing in which the Administration had engaged. During his election campaign, President Obama had promised not to

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<sup>264</sup> See Fred R. Shapiro, *Quote . . . Misquote: Familiar Words from Unfamiliar Speakers*, N.Y. TIMES MAG., July 27, 2008, at 16, 16 (pointing out that the famous wisecrack comparing laws and sausages was not attributed to Otto von Bismarck until the 1930s — he died in 1898 — and can instead be traced to “The Daily Cleveland Herald, Mar. 29, 1869, quoting the lawyer-poet John Godfrey Saxe’s observation that ‘Laws, like sausages, cease to inspire respect in proportion as we know how they are made’”).

For detailed descriptions of the process of passing the Affordable Care Act, see Ceci Connolly, *How We Got Here*, in LANDMARK: THE INSIDE STORY OF AMERICA’S NEW HEALTH-CARE LAW AND WHAT IT MEANS FOR US ALL 9, 11–62 (2010); and Jonathan Cohn, *How They Did It: The Inside Account of Health Care Reform’s Triumph*, NEW REPUBLIC, June 10, 2010, at 14.

<sup>265</sup> See generally, e.g., Cohn, *supra* note 264.

<sup>266</sup> MANN & ORNSTEIN, *supra* note 31, at 81.

<sup>267</sup> For some examples, including the notorious “Cornhusker kickback,” see Robert Pear, *Buried in Health Bill, Very Specific Beneficiaries*, N.Y. TIMES, Dec. 21, 2009, at A1.

<sup>268</sup> Edward M. Kennedy, “*The Cause of My Life*,” NEWSWEEK, July 27, 2009, at 34, available at <http://www.thedailybeast.com/newsweek/2009/07/17/the-cause-of-my-life.html>.

<sup>269</sup> Shailagh Murray, *Both Parties Mourn Loss of Kennedy in Health-Care Debate*, WASH. POST, Aug. 27, 2009, at A9, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/26/AR2009082603677.html>.

<sup>270</sup> See Pear, *supra* note 267.

<sup>271</sup> Carl Hulse, *A Fail-Safe Works for Legislation, but Not as Expected*, N.Y. TIMES, Mar. 28, 2010, at A25.

raise taxes on the middle class.<sup>272</sup> The Affordable Care Act therefore denominated the payment exacted from individuals who failed to maintain the required insurance coverage a “penalty.”<sup>273</sup> The President publicly “reject[ed]” any claim that the payment was a “tax increase.”<sup>274</sup>

At the Supreme Court, the government defended the Act’s minimum coverage provision as a permissible exercise of both the commerce and the taxing powers. At oral argument, the Justices pressed Solicitor General Verrilli on whether the provision could be treated as a tax in light of the political branches’ framing.<sup>275</sup> Justice Scalia twice taxed the Solicitor General with the President’s statements. “The President said it wasn’t a tax, didn’t he?”<sup>276</sup> When the Solicitor General attempted to explain that the relevant question was what power *Congress* was exercising (as opposed to how the *President* might characterize what Congress was doing), Justice Scalia shot back: “Is it a tax or not a tax? The President didn’t think it was.”<sup>277</sup> Justice Kagan pressed the point a bit differently:

I suppose, though, General, one question is whether the determined efforts of Congress not to refer to this as a tax make a difference. I mean, you’re suggesting we should just look to the practical operation. We shouldn’t

<sup>272</sup> Peter Baker, *Speculation Prompts Obama to Renew Vow of No Tax Increase on Middle Class*, N.Y. TIMES, Aug. 4, 2009, at A12.

<sup>273</sup> See 26 U.S.C. § 5000A (Supp. IV 2010) (describing the “[s]hared responsibility payment” as a “penalty”).

<sup>274</sup> See John Kass, *Taxing the Patients of America with Semantics*, CHI. TRIB., June 29, 2012, § 1, at 2 (describing a 2009 interview in which the President told ABC’s George Stephanopoulos that “for us to say that you’ve got to take a responsibility to get health insurance is absolutely not a tax increase,” and when asked, with respect to the individual mandate, whether he “reject[ed] that it’s a tax increase,” replied, “I absolutely reject that notion”).

<sup>275</sup> See Transcript of Oral Argument at 45–53, *Dep’t of Health & Human Servs. v. Florida*, 132 S. Ct. 2566 (2012) (No. 11-398), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/11-398-Tuesday.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-398-Tuesday.pdf) (containing the discussion of the taxing power). The Solicitor General’s task was further complicated by the fact that the previous day, he had argued that the payment was not a tax for purposes of the Anti-Injunction Act, 26 U.S.C. § 7421(a) (2006), which provides that “no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.” See Transcript of Oral Argument at 31–34, *Dep’t of Health & Human Servs.*, 132 S. Ct. 2566 (No. 11-398), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/11-398-Monday.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-398-Monday.pdf) (discussing the applicability of the Anti-Injunction Act to the penalties imposed by the Affordable Care Act). Had the payment been construed as a tax for purposes of the Anti-Injunction Act, the Court would have been deprived of jurisdiction, and determination of the constitutionality of the minimum coverage provision would have had to await a suit after 2014 by an individual who made the payment and then sued for a refund. See *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962) (stating that the “manifest purpose” of the Anti-Injunction Act is “to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund”).

<sup>276</sup> Transcript of Oral Argument, *supra* note 275, at 47.

<sup>277</sup> *Id.*

look at labels. And that seems right, except that here we have a case in which Congress determinedly said, this is not a tax, and the question is why should that be irrelevant?<sup>278</sup>

The Solicitor General pointed to occasions on which members of Congress had invoked their taxing power with respect to the minimum coverage provisions,<sup>279</sup> but he had no very plausible answer for why Congress had called the payment a penalty rather than a tax,<sup>280</sup> and as time ran out, Justice Scalia vented his frustration:

You're saying that all the discussion we had earlier about . . . the Commerce Clause, blah, blah, blah, it really doesn't matter. This is a tax and the Federal Government could simply have said, without all of the rest of this legislation, could simply have said, everybody who doesn't buy health insurance at a certain age will be taxed so much money, right? . . . You didn't need [arguments about the relationship of the minimum coverage provision to other parts of the Act]. If it's a tax, it's only — raising money is enough. . . . Okay. Extraordinary.<sup>281</sup>

Justice Scalia sure called it. At the end of the day, the Court voted 5–4 to uphold the minimum coverage provision as a permissible exercise of Congress's taxing power.

The Chief Justice could have simply delivered an opinion of the Court to that effect, consisting of Parts I, II, and III-C of the opinion he did issue. (He would still have had to deal separately with the Medicaid issue, on which the Court divided 2–3–4.<sup>282</sup>) Instead, the Chief Justice issued an opinion that also contained three solo sections. It was probably the most grudging opinion ever to uphold a major piece of legislation. In each of his solo sections, the Chief Justice expressed a basic distrust of Congress.

The first such section, Part III-A of his opinion, consisted of his explanation of why he viewed the minimum coverage provision as exceeding Congress's powers under the Commerce and Necessary and Proper Clauses.<sup>283</sup> After observing that Congress has “broad authority” under the Commerce Clause<sup>284</sup> and had “employed the commerce

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<sup>278</sup> *Id.* at 49.

<sup>279</sup> *See id.*

<sup>280</sup> *See id.* at 50–52.

<sup>281</sup> *Id.* at 52–53.

<sup>282</sup> Justices Ginsburg and Sotomayor believed that the Medicaid expansion and the conditions imposed were constitutional. *See NFIB*, 132 S. Ct. 2566, 2641–42 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part). The Chief Justice and Justices Breyer and Kagan concluded that it would exceed Congress's conditional spending power for the Secretary of Health and Human Services to withdraw existing funds from states that failed to comply with the new conditions, but that authority having been excised, they voted to uphold the expansion. *See id.* at 2607–08 (opinion of Roberts, C.J.). Justices Scalia, Kennedy, Thomas, and Alito would have struck down the Medicaid expansion altogether. *See id.* at 2667 (joint dissent).

<sup>283</sup> *See id.* at 2585–93 (opinion of Roberts, C.J.).

<sup>284</sup> *Id.* at 2585.

power in a wide variety of ways to address the pressing needs of the time,”<sup>285</sup> the Chief Justice added a caution. Characterizing the minimum coverage provision as different from prior exercises of the power, he wrote:

Legislative novelty is not necessarily fatal; there is a first time for everything. But sometimes “the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent” for Congress’s action. At the very least, we should “pause to consider the implications of the Government’s arguments” when confronted with such new conceptions of federal power.<sup>286</sup>

The rising cost of and limited access to quality health care have been problems bedeviling the United States for at least a half century.<sup>287</sup> But in contrast to the Warren Court, which treated legislative innovation in dealing with intractable societal problems as a sign of congressional “resourcefulness,”<sup>288</sup> Chief Justice Roberts saw innovation as a basis for judicial suspicion.<sup>289</sup>

He also expressed a fear that if Congress were not stopped here, there would be no stopping its potentially ever-greater intrusion into individuals’ lives. Could Congress also decide that obesity and bad food habits were causing health problems and decide to force individuals to buy vegetables?<sup>290</sup> Whatever our eating disorders, the Chief Justice worried about a Congress with an insatiable appetite, “everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.”<sup>291</sup>

<sup>285</sup> *Id.* at 2586.

<sup>286</sup> *Id.* (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3159 (2010) (internal quotation marks omitted); *United States v. Lopez*, 514 U.S. 549, 564 (1995)).

<sup>287</sup> See generally PAUL STARR, *REMEDY AND REACTION* (2011).

<sup>288</sup> *E.g.*, *Katzenbach v. Morgan*, 384 U.S. 641, 648 (1966).

<sup>289</sup> *NFIB*, 132 S. Ct. at 2586 (opinion of Roberts, C.J.). It will be interesting to see whether the Chief Justice’s suspicions carry over to the 2012 Term, when the Court is likely to take up the constitutionality of the federal Defense of Marriage Act, 1 U.S.C. § 7 (2006), where Congress, for the first time, created a federal definition of marriage. In *United States v. Lopez*, cited by Chief Justice Roberts to bolster his skepticism of new conceptions of federal power, Chief Justice Rehnquist expressed concern that a broad reading of congressional power would enable the federal government to reach, among other areas traditionally left to the states, subjects like “family law . . . including marriage.” 514 U.S. at 549, 564 (1995).

<sup>290</sup> See *NFIB*, 132 S. Ct. at 2588–89 (opinion of Roberts, C.J.).

<sup>291</sup> *Id.* at 2589 (quoting THE FEDERALIST NO. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961)) (internal quotation marks omitted). The joint dissent went much farther, claiming that if Congress could impose a minimum coverage requirement, then it could make “breathing in and out the basis for federal prescription.” *Id.* at 2643 (joint dissent); see also *id.* at 2646 (relying on a different *Federalist* paper, *The Federalist No. 33* (Hamilton), to conjure the specter of a “hideous monster whose devouring jaws . . . spare neither sex nor age, nor high nor low, nor sacred nor profane” (quoting THE FEDERALIST NO. 33 (Alexander Hamilton), *supra*, at 202) (internal quotation marks omitted)).

Initially, Justice Ginsburg, concurring in part, concurring in the judgment in part, and dissenting in part, sought to respond to what she drily called “the broccoli horrible”<sup>292</sup> by pointing to the unique nature of the market for health care and by trying to pick apart the causal chain between a vegetable-purchase mandate and health.<sup>293</sup> But her most persuasive argument was the one offered by Chief Justice Marshall in *Gibbons v. Ogden*<sup>294</sup> and echoed by Justice Jackson in *Wickard v. Filburn*.<sup>295</sup> “Supplementing these legal restraints is a formidable check on congressional power: the democratic process.”<sup>296</sup> Congress had struggled for many years over whether, and how, to provide broad-scale health care. The solution it adopted was more modest in several respects than initial proposals to adopt a single-payer system that would create the equivalent of a national health service.<sup>297</sup> The idea that a contemporary Congress would casually impose a broccoli mandate assumes that Congress legislates carelessly and abusively. Unless one starts from that premise of distrust, the buy-your-vegetables or federal-regulation-of-breath hypotheticals prove nothing.<sup>298</sup>

Justice Ginsburg also pointedly wondered why the Chief Justice had bothered with his “Commerce Clause essay” in the first place since these views were not outcome determinative in light of his conclusion that § 5000A could be sustained under Congress’s taxing power.<sup>299</sup> The Chief Justice responded in Part III-D of his opinion that he had to address the Commerce Clause power first because the most plausible

<sup>292</sup> *Id.* at 2624 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

<sup>293</sup> *See id.*

<sup>294</sup> 22 U.S. (9 Wheat.) 1, 197 (1824).

<sup>295</sup> 317 U.S. 111, 120 (1942).

<sup>296</sup> *NFIB*, 132 S. Ct. at 2624 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

<sup>297</sup> *See STARR*, *supra* note 287.

<sup>298</sup> *See* Paul Gewirtz, *The Jurisprudence of Hypotheticals*, 32 J. LEGAL EDUC. 120, 122 (1982) (“[I]f a theory is premised on a view about what kind of fact patterns actually will emerge in the real world, the theory cannot be attacked by a question that assumes that other kinds of fact patterns will emerge. These premise-denying hypotheticals represent an abuse of the imagination.”).

Moreover, the two hypotheticals offered by the Chief Justice and the dissenters confuse the concepts of analytic limits and policy limits on congressional powers. *Any* power, even an undoubted one, might be used in absurd or abusive ways. For example, Congress clearly would be using its commerce power if it required any patient who purchased a medical device that had traveled in interstate commerce to pay for the device in pennies. But pointing to the implausible possibility that Congress might pass such a patently daffy statute cannot support an argument that there are Commerce Clause-based limits on Congress’s ability to regulate the purchase and sale of medical devices that have moved across state lines. That power remains plenary. Thus, protections against that kind of law stem from a combination of the political process and constitutional constraints outside the commerce power itself.

<sup>299</sup> *NFIB*, 132 S. Ct. at 2629 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

way to understand the provision was to read it as a command to obtain insurance, rather than a tax on not buying it.<sup>300</sup> If the statute could be upheld under its most plausible reading, then there would be no reason to contort it to fit within another power.<sup>301</sup> Combined with Part III-B of his opinion, which provided a lead-in to the Chief Justice's discussion of the taxing power, Part III-D offered a thinly veiled critique of Congress: the fools couldn't even figure out how to structure § 5000A to render it constitutional. Only Chief Justice Roberts, a real lawyer and not a politician, could massage the statute into shape.<sup>302</sup>

"The most straightforward reading of the mandate," the Chief Justice declared, "is that it commands individuals to purchase insurance."<sup>303</sup> A straightforward reading would thus, in the Chief Justice's view, render the statute unconstitutional as exceeding Congress's commerce powers. But it would be possible to give the statute a (presumably) less straightforward reading that might save it. If "going without insurance [is] just another thing the Government taxes, like buying gasoline or earning income," and "if the mandate is in effect just a tax hike on certain taxpayers who do not have health insurance," then the taxing power arguably comes into play.<sup>304</sup>

Note what the Chief Justice managed to do. He reframed the question as one where the judiciary is saving Congress's bacon, while undercutting the President's assertion that the minimum coverage provision was not a tax increase. He conveyed disdain even as he upheld the Act. There was no acknowledgment anywhere that the political branches were dealing with one of the most pressing issues of the day. There was nothing of the Warren Court's recognition of legislative innovation.<sup>305</sup> Indeed, by treating the minimum coverage provision as just another tax, the Chief Justice undercut the significance of the Affordable Care Act as a piece of transformative social legislation.

The other striking feature of the Chief Justice's discussion of the taxing power is how little worry he expressed that that power — as opposed to the commerce power — will be abused. That confidence could hardly be based on existing judicial constraints. After all, as the Chief Justice essentially conceded, the Court long ago abandoned its effort "to closely examine the regulatory motive or effect of [purported]

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<sup>300</sup> See *id.* at 2600 (opinion of Roberts, C.J.).

<sup>301</sup> See *id.* at 2600–01.

<sup>302</sup> The dissenters pressed this point in the opposite direction. In their view, "Congress knew precisely what it was doing when it rejected an earlier version of this legislation that imposed a tax instead of a requirement-with-penalty": it was trying to avoid being tarred with the charge of having raised taxes. *Id.* at 2655 (joint dissent).

<sup>303</sup> *Id.* at 2593 (opinion of Roberts, C.J.).

<sup>304</sup> *Id.* at 2594.

<sup>305</sup> See *supra* pp.19–25, 27.

revenue-raising measures” to prevent Congress from accomplishing through the tax code what it could not regulate directly.<sup>306</sup> And the Court has repeatedly held that once Congress is entitled to tax a particular transaction or source of income, courts have no power to “hold the tax to be void because it is deemed that the tax is too high.”<sup>307</sup>

So why don’t we face confiscatory tax levels in the contemporary United States?<sup>308</sup> For the same reason Congress hasn’t held (and won’t ever hold) hearings on the Compulsory Broccoli Purchase Act of 2012: the political process. As the Court long ago explained in *United States v. Kahriger*,<sup>309</sup> “The remedy for excessive taxation is in the hands of Congress not the courts.”<sup>310</sup> Or as Justices Scalia, Thomas, and Alito observed on the very day that they insisted in *NFIB* that judicial intervention was critical to protecting American liberty against congressional overreaching, “The safeguard against such laws is democracy . . . . Not every foolish law is unconstitutional.”<sup>311</sup> These Justices’ selective trust of the political system maps disturbingly onto the current preoccupations of conservative political movements.

The joint dissent ratcheted up the level of disdain for the political process. It began with a swipe at the federal government as a whole:

As for the constitutional power to tax and spend for the general welfare: The Court has long since expanded that beyond (what Madison thought it meant) taxing and spending for those aspects of the general welfare that were within the Federal Government’s enumerated powers. Thus, we now have sizable federal Departments devoted to subjects not mentioned among Congress’ enumerated powers, and only marginally re-

<sup>306</sup> *NFIB*, 132 S. Ct. at 2599.

<sup>307</sup> *McCray v. United States*, 195 U.S. 27, 60 (1904); *see also, e.g.*, *City of Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369, 373 (1974) (“The claim that a particular tax is so unreasonably high and unduly burdensome as to deny due process is both familiar and recurring, but the Court has consistently refused either to undertake the task of passing on the ‘reasonableness’ of a tax that otherwise is within the power of Congress . . . or to hold that a tax is unconstitutional because it renders a business unprofitable.”). At the same time, as the Court reiterated in *NFIB*, “the ‘power to tax is not the power to destroy while this Court sits.’” 132 S. Ct. at 2599–600 (quoting *Oklahoma Tax Comm’n v. Tex. Co.*, 336 U.S. 342, 365 (1949)).

<sup>308</sup> During World War II, Congress set the top rate on an excess profits tax at 95%. JOHN F. WITTE, *THE POLITICS AND DEVELOPMENT OF THE FEDERAL INCOME TAX* 121 (1985). The top marginal income tax rate was 93%. *Id.* at 118. There are no reported takings challenges to these laws. ERIKA K. LUNDER ET AL., CONG. RESEARCH SERV., R40466, *RETROACTIVE TAXATION OF EXECUTIVE BONUSES: CONSTITUTIONALITY OF H.R. 1586 AND S. 651*, at 6 (2009), available at [http://garrettforms.house.gov/uploadedfiles/crs\\_report\\_march\\_25\\_2009\\_retroactive\\_taxation\\_of\\_executive\\_bonuses\\_-\\_constitutionality\\_of\\_hr\\_1586\\_and\\_s\\_651.pdf](http://garrettforms.house.gov/uploadedfiles/crs_report_march_25_2009_retroactive_taxation_of_executive_bonuses_-_constitutionality_of_hr_1586_and_s_651.pdf).

<sup>309</sup> 345 U.S. 22 (1953).

<sup>310</sup> *Id.* at 28; *see also NFIB*, 132 S. Ct. at 2655 (joint dissent) (claiming that “to say that the Individual Mandate merely imposes a tax is not to interpret the statute but to rewrite it” because “[t]axes have never been popular” and the Chief Justice’s recharacterization of the mandate bypasses the political constraints on taxation).

<sup>311</sup> *United States v. Alvarez*, 132 S. Ct. 2537, 2565 (2012) (Alito, J., joined by Scalia and Thomas, JJ., dissenting).

lated to commerce: the Department of Education, the Department of Health and Human Services, the Department of Housing and Urban Development.<sup>312</sup>

Who cares what Madison thought it meant? Hamilton thought differently.<sup>313</sup> And anyway, hasn't Justice Scalia told us to stop "trying to read the minds of enactors or ratifiers"?<sup>314</sup> More profoundly, the dissenters ignored the possibility that these Federal Departments might be vindicating interests beyond increasing wealth in the commercial republic — though a healthy, well-educated, adequately housed populace is likely to produce and purchase more and better goods and services.<sup>315</sup> Many of the most important programs in each of these Departments (and in the case of Housing and Urban Development, the Department itself) have their genesis in the Great Society. So one might think that in funding these Departments, Congress is also vindicating Fourteenth Amendment–based liberty or equality rights through providing education, health care, and affordable housing. And of course, funding education and medical care contributes importantly to the national defense.<sup>316</sup>

<sup>312</sup> *NFIB*, 132 S. Ct. at 2643 (joint dissent) (citation omitted).

<sup>313</sup> See *United States v. Butler*, 297 U.S. 1, 65–66 (1936) (footnote omitted) (“[Alexander Hamilton] maintained the [spending] clause confers a power separate and distinct from those later enumerated, is not restricted in meaning by the grant of them, and Congress consequently has a substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States. . . . Mr. Justice Story, in his Commentaries, espouses the Hamiltonian position. We shall not review the writings of public men and commentators or discuss the legislative practice. Study of all these leads us to conclude that the reading advocated by Mr. Justice Story is the correct one. While, therefore, the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of § 8 which bestow and define the legislative powers of the Congress. It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.”).

<sup>314</sup> SCALIA & GARNER, *supra* note 148, at 92.

<sup>315</sup> President Franklin Roosevelt acknowledged the link between the population's well-being and national commerce in his second inaugural address:

But here is the challenge to our democracy: In this nation I see tens of millions of its citizens — a substantial part of its whole population — who at this very moment are denied the greater part of what the very lowest standards of today call the necessities of life. . . .

I see millions denied education, recreation, and the opportunity to better their lot and the lot of their children.

I see millions lacking the means to buy the products of farm and factory and by their poverty denying work and productiveness to many other millions.

I see one-third of a nation ill-housed, ill-clad, ill-nourished.

President Franklin D. Roosevelt, Second Inaugural Address (Jan. 20, 1937), *in* INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES 274, 277 (Bicentennial ed. 1989), available at <http://www.bartleby.com/124/pres50.html>.

<sup>316</sup> Cf. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006) (upholding a Spending Clause–based statute that required educational institutions receiving federal funds to provide access to military recruiters); *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (high-

The strongest expression of disdain came in the joint dissent’s discussion of severability. There was a certain disjunction to the analysis, which proceeded as if the Court had held that the minimum coverage and Medicaid expansion were “invalid.”<sup>317</sup> Neither assumption was precisely true. Even before the Chief Justice framed § 5000A as giving individuals a choice between obtaining coverage or being subject to a shared-responsibility payment/penalty/tax/who-cares-what-it’s-called, that choice had been there, and Congress had implicitly made the judgment that the system would work acceptably regardless of which choice some individuals made. And given the Medicaid expansion fix adopted by the Chief Justice and Justices Breyer and Kagan (which Justices Ginsburg and Sotomayor, who voted to uphold the Medicaid expansion outright, agreed solved the severability problem), it is quite unclear how many states will, in the end, refuse to expand Medicaid and forgo the new funds. Political pressure within the states to accept the funds will likely be substantial.<sup>318</sup> It was one thing for state governments to challenge the law, but it would be quite another for them to walk away from billions of dollars of federal money. So if nearly all the states accept the new Medicaid funds along with the new Medicaid conditions, then the system will essentially “function in a manner consistent with the intent of Congress”<sup>319</sup> — that is, the Act will achieve its goal of expanding Medicaid coverage. And if that happens, then the Act would survive under the first prong of the Court’s established severability analysis.<sup>320</sup> The only scenario in which the joint dissent’s severability analysis makes sense is one in which the dissenters’ views had prevailed on the merits of both the individual mandate and the Spending Clause claims: *if* the individual mandate had been struck down *and* the Medicaid expansion had been declared invalid, *then* (and only then) would the Act have been so decimated that provisions like the guaranteed-issue and community-rating requirements could not survive.

It was when the joint dissent got to what it characterized as the “minor” provisions of the Act that the Justices’ disdain for Congress came to the foreground. At oral argument on the question of severability, Justice Scalia had joked that it would violate the Eighth Amendment to require the Justices to go through the Act item by item

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lighting the military’s dependence on graduates of institutions of higher education to provide a pool of highly qualified potential officer corps recruits).

<sup>317</sup> *NFIB*, 132 S. Ct. at 2668 (joint dissent).

<sup>318</sup> *Cf.* *Steward Mach. Co. v. Davis*, 301 U.S. 548, 567–68 (1937) (describing the political dynamic within states that resulted in their participation in the unemployment insurance program).

<sup>319</sup> *NFIB*, 132 S. Ct. at 2668 (joint dissent) (emphasis omitted) (quoting *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987)) (internal quotation mark omitted).

<sup>320</sup> *Id.*

to determine whether individual provisions should stand.<sup>321</sup> But by the time he and his colleagues had gotten around to dissenting, they had combed the Act for potentially appealing targets. Sometimes, though, they overshot the mark. One provision, 42 U.S.C. § 1315a, they described this way: “It spends government money on, among other things, the study of how to spend less government money.”<sup>322</sup> But even a quick look at the cited section belies their ridicule. The section governs creation of pilot projects for health care delivery.<sup>323</sup> And it directs the Center for Medicare and Medicaid Innovation to analyze both “the quality of care furnished” under each model and “changes in spending . . . by reason of the model.”<sup>324</sup> That provision thus seems an entirely sensible way to approach the development of new programs.

The dissent’s more substantive argument rested on the claim that Congress would never have enacted the minor provisions standing alone.<sup>325</sup> The Senate Majority Leader had doubted that there was “a senator that doesn’t have something in this bill that was important to them. . . . [And] if they don’t have something in it important to them, then it doesn’t speak well of them. That’s what this legislation is all about: It’s the art of compromise.”<sup>326</sup> The dissenters drew from this observation that there was no reason to believe that any particular part of the bill would have passed on its own:

When we are confronted with such a so-called “Christmas tree,” a law to which many nongermane ornaments have been attached, we think the proper rule must be that when the tree no longer exists the ornaments are superfluous. We have no reliable basis for knowing which pieces of the Act would have passed on their own. It is certain that many of them would not have, and it is not a proper function of this Court to guess which.<sup>327</sup>

The image is telling. Rather than understanding legislation as a process of compromise to achieve an attainable solution to a longstanding and wide-ranging national problem, the dissenters saw the Act as laden down with “ornaments” that are “nongermane.”

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<sup>321</sup> See Transcript of Oral Argument at 38, *NFIB*, 132 S. Ct. 2566 (No. 11–393), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/11-393.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-393.pdf).

<sup>322</sup> *NFIB*, 132 S. Ct. at 2675 (joint dissent) (citing 42 U.S.C. § 1315a (Supp. IV 2010)).

<sup>323</sup> 42 U.S.C. § 1315a.

<sup>324</sup> *Id.* § 1315a(b)(4)(A).

<sup>325</sup> *NFIB*, 132 S. Ct. at 2668–69 (joint dissent); see also *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 330 (2006) (framing the severability inquiry as “[w]ould the legislature have preferred what is left of its statute to no statute at all?”); *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987) (“[An] unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted.”).

<sup>326</sup> *NFIB*, 132 S. Ct. at 2675 (joint dissent) (citing Robert Pear, *In Health Bill for Everyone, Provisions for a Few*, N.Y. TIMES, Jan. 4, 2010, at A10 (quoting Senator Harry Reid) (internal quotation mark omitted)).

<sup>327</sup> *Id.* at 2675–76.

Moreover, the dissenters were surely aware that the passage of the Affordable Care Act had been the result of a rare confluence of political factors. If the Act were invalidated in its entirety, the issues it resolved would be returned to a very different, even more polarized Congress, with little chance that even previously noncontroversial provisions would be revisited. Far from viewing Congress as a full partner in seeking to address the Nation's pressing problems, the four dissenters seem to view it as a bunch of logrolling political hacks.

### C. Undermining Enforcement

The consequences of the Roberts Court's failure to treat legislation as the art of the possible was not limited to its treatment of the Commerce Clause. It was also on display in this Term's case involving congressional enforcement power under the Reconstruction Amendments, *Coleman v. Court of Appeals of Maryland*.<sup>328</sup> Nine years earlier, in *Nevada Department of Human Resources v. Hibbs*,<sup>329</sup> the Court had ruled 6–3 (with Chief Justice Rehnquist writing the opinion for the Court) that Congress had validly abrogated state sovereign immunity for violations of the Family and Medical Leave Act's (FMLA) family-care provision.<sup>330</sup> That provision, the Court concluded, responded to documented unconstitutional discrimination in the administration of leave benefits and was targeted at overcoming a “pervasive sex-role stereotype that caring for family members is women's work.”<sup>331</sup> Congress's abrogation of state sovereign immunity was thus congruent and proportional to the risk of a violation of the Equal Protection Clause. This time around, however, the Court held 5–4 that the self-care provision of the Act could not validly abrogate states' sovereign immunity.<sup>332</sup>

Justice Kennedy's plurality opinion found scant evidence in the record that state employers had been discriminating in the administration of sick leave.<sup>333</sup> Instead, he described Congress's concern as being directed at illness, rather than at sex discrimination.<sup>334</sup> And since ex-

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<sup>328</sup> 132 S. Ct. 1327 (2012).

<sup>329</sup> 538 U.S. 721 (2003).

<sup>330</sup> *Id.* at 726. Among other things, the Act entitles eligible employees to twelve weeks of unpaid leave during any year-long period: (A) to care for a newborn child; (B) to care for a newly adopted child; (C) to care for a spouse, child, or parent with a serious health condition; or (D) because the employee has a serious health condition himself or herself. 29 U.S.C. § 2612(a)(1) (2006). The provision at issue in *Hibbs* was subsection (C). 538 U.S. at 725.

<sup>331</sup> *Hibbs*, 538 U.S. at 731.

<sup>332</sup> *Coleman*, 132 S. Ct. at 1332 (plurality opinion). The provision at issue was subsection (D). *Id.*

<sup>333</sup> *Id.* at 1336.

<sup>334</sup> *See id.* at 1335 (“The legislative history of the self-care provision reveals a concern for the economic burdens on the employee and the employee's family resulting from illness-related job

isting sick-leave policies “would have sufficed” to enable women to take leave for pregnancy-related illnesses, there was no need for federal intervention.<sup>335</sup>

Justice Scalia, who provided the fifth vote for upholding state sovereign immunity, wrote a short concurrence in the judgment reiterating his view that congressional enforcement power under Section 5 of the Fourteenth Amendment should be limited “to the regulation of conduct that *itself* violates the Fourteenth Amendment.”<sup>336</sup> He thus continued his view — in sharp contrast to the Warren Court’s — that the Amendment’s use of the word “enforce” served to *limit* Congress’s power under the Amendment. But a less faint-hearted originalist might have focused more on the presence of the word “Congress” in Section 5. As my colleague Professor Michael McConnell explains:

Section Five of the Fourteenth Amendment was born of the fear that the judiciary would frustrate Reconstruction by a narrow interpretation of congressional power. . . . As Republican Senator Oliver Morton explained: “the remedy for the violation of the fourteenth and fifteenth amendments was expressly not left to the courts. The remedy was legislative, because in each the amendment itself provided that it shall be enforced by legislation on the part of Congress.”<sup>337</sup>

In contrast to the plurality opinion, Justice Ginsburg’s dissent focused on explaining why concerns over sex discrimination lay at the heart of the self-care provisions of the FMLA.<sup>338</sup> In particular, she explained that supporters deliberately used gender-neutral language and adopted a gender-neutral proposal as part of an “equal treatment” feminist strategy.<sup>339</sup> The supporters’ view was that leave legislation expressly tied to pregnancy and childbearing was likely to be counterproductive: it would signal to employers that women of childbearing age would enjoy a special protection, and would thus create an additional incentive for discrimination against them.<sup>340</sup> According to Justice Ginsburg, “Congress had every reason to believe that a pattern of workplace discrimination against pregnant women existed in public-sector employment, just as it did in the private sector,” and Congress

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loss and a concern for discrimination on the basis of illness, not sex. In the findings pertinent to the self-care provision, the statute makes no reference to any distinction on the basis of sex.” (citation omitted)).

<sup>335</sup> *Id.*

<sup>336</sup> *Id.* at 1338 (Scalia, J., concurring in the judgment).

<sup>337</sup> Michael W. McConnell, *The Supreme Court, 1996 Term — Comment: Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 182 (1997) (quoting CONG. GLOBE, 42d Cong., 2d Sess. 525 (1872)).

<sup>338</sup> See *Coleman*, 132 S. Ct. at 1339–40 (Ginsburg, J., dissenting).

<sup>339</sup> See *id.* at 1340.

<sup>340</sup> See *id.* at 1346.

therefore had a reasonable basis for abrogating states' sovereign immunity.<sup>341</sup> She concluded:

Essential to its design, Congress assiduously avoided a legislative package that, overall, was or would be seen as geared to women only. Congress thereby reduced employers' incentives to prefer men over women, advanced women's economic opportunities, and laid the foundation for a more egalitarian relationship at home and at work.<sup>342</sup>

For the dissenters, then, the absence of pervasive, express focus on gender in the architecture and legislative history of the self-care provisions reflected Congress's considered judgment that gender equality could better be attained through a more subtle strategy, a strategy that the plurality simply failed to understand because the plurality demanded that Congress invoke its enforcement powers in a prescribed way. Here, as with the Commerce Clause, the conservative Justices simply did not trust Congress to set appropriate limits on its own power. The result of cases like *Coleman* is to create a regulation-remedy gap: Congress can tell states to provide workers with job-protected medical leave — its commerce power gives it that authority — but it cannot enforce that regulation through private damages actions.<sup>343</sup>

Justice Brandeis was fond of saying of the Court that “the most important thing we do is *not* doing.”<sup>344</sup> Alexander Bickel used this observation as the jumping-off point for his theory of the passive virtues.<sup>345</sup> On the day that the Court broke for the summer, it disposed of the last three still-pending merits cases. In *NFIB*, as we saw, it issued a set of opinions that may set the terms of constitutional arguments for years to come. In *United States v. Alvarez*,<sup>346</sup> it struck down the Stolen Valor Act, which made it a crime to falsely claim receipt of military decorations or medals, continuing its expansive First Amendment protection of certain kinds of speech.<sup>347</sup> And in *First American*

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<sup>341</sup> *Id.* at 1344.

<sup>342</sup> *Id.* at 1350.

<sup>343</sup> For more detailed discussion of this point, see Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 188–95.

<sup>344</sup> Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 SUP. CT. REV. 299, 313.

<sup>345</sup> See BICKEL, *supra* note 66, at 71 (quoting Justice Brandeis); *id.* at 111–98 (discussing the passive virtues).

<sup>346</sup> 132 S. Ct. 2537 (2012).

<sup>347</sup> See, e.g., *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2742 (2011) (striking down a California statute that forbade distributing violent video games to minors); *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011) (holding that the First Amendment bars claims of intentional infliction of emotional distress based on speech about issues of public concern); *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (striking down a federal statute making it a crime to distribute depictions of animal cruelty). See generally Adam Liptak, *Study Challenges Supreme Court's Image as Defender of Free Speech*, N.Y. TIMES, Jan. 8, 2012, at A25 (discussing how the Roberts Court has been extremely protective of some categories of speech but not of others).

*Financial Corp. v. Edwards*,<sup>348</sup> it did nothing. More precisely, it dismissed the writ of certiorari as improvidently granted.<sup>349</sup>

*First American* had been argued during the Court's December sitting. The modal DIG — the colloquial term for dismissing the writ as improvidently granted — happens relatively soon after oral argument, when the Court realizes that there might be a problem in reaching the issue on which certiorari was granted. Perhaps there is a jurisdictional defect or a factual or procedural wrinkle.<sup>350</sup> Or perhaps changed circumstances — the passage or repeal or amendment of a statute, for example — make the case no longer important enough to decide.

At least in recent Terms, it has been unusual for a case to be DIG'd so long after oral argument.<sup>351</sup> So there is a bit of a puzzle about what happened. But *First American* was a case with the potential to undercut significantly Congress's ability to use private attorneys general.

*First American* involved a suit brought under the Real Estate Settlement Procedures Act of 1974 (RESPA).<sup>352</sup> RESPA contains an anti-kickback provision; defendants who violate that provision are liable to the "person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service."<sup>353</sup>

Denise Edwards sued First American, which had provided title insurance for the house she had bought, claiming that First American

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<sup>348</sup> 132 S. Ct. 2536 (2012) (per curiam).

<sup>349</sup> *Id.*

<sup>350</sup> See EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 358–62 (9th ed. 2007). For additional discussion of the DIG process, see Michael E. Solimine & Rafael Gely, *The Supreme Court and the DIG: An Empirical and Institutional Analysis*, 2005 WIS. L. REV. 1421.

<sup>351</sup> One prominent counterexample is *Philip Morris USA, Inc. v. Williams*, 129 S. Ct. 1436 (2009) (per curiam). But that case, which involved the constitutionality of a multimillion-dollar punitive damages award, had bounced between the Oregon state courts and the U.S. Supreme Court three times. Catherine M. Sharkey, *Federal Incursions and State Defiance: Punitive Damages in the Wake of Philip Morris v. Williams*, 46 WILLAMETTE L. REV. 449, 449 (2010). The third petition intimated that the Oregon Supreme Court had refused to apply the rule laid out in the U.S. Supreme Court's prior remand. *See id.* at 450. At oral argument, several of the Justices seemed concerned about possible defiance, but Justice Stevens "elicited a concession from Philip Morris's attorney that there was no basis for questioning the good faith of the Oregon Supreme Court." *Id.* at 462. Nearly four months after the oral argument, the Court DIG'd the case. *See Docket for No. 07-1216*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/07-1216.htm> (last visited Sept. 29, 2012). In *Nike, Inc., v. Kasky*, 539 U.S. 654 (2003) (per curiam), there was a two-month lag between oral argument and dismissal, but Justice Stevens (joined in full by Justice Ginsburg and in part by Justice Souter) wrote a lengthy concurrence in the dismissal, *see id.* at 656–65 (Stevens, J., concurring), and Justice Breyer (joined by Justice O'Connor) wrote a lengthy dissent from the dismissal, *see id.* at 665–84 (Breyer, J., dissenting), so it is plausible that the vote to DIG came shortly after oral argument but that the separate writing delayed its announcement.

<sup>352</sup> *See Edwards v. First Am. Fin. Corp.*, 610 F.3d 514, 515 (9th Cir. 2010).

<sup>353</sup> 12 U.S.C. § 2607(d)(2) (2006).

had violated the anti-kickback provision.<sup>354</sup> Under Ohio law, however, all title insurers are required to charge the same price.<sup>355</sup> So First American argued that Edwards lacked Article III standing, since she could show no injury from the referral arrangement First American had allegedly set up.<sup>356</sup>

Relying on the Supreme Court's 1975 decision in *Warth v. Seldin*,<sup>357</sup> the Ninth Circuit disagreed with First American's argument, holding that the "injury required by Article III can exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'"<sup>358</sup> RESPA provided the right to recover three times the amount of "any" charge without requiring that the plaintiff show that the charge was excessive.<sup>359</sup> The court of appeals thought that choice was intentional in light of Congress's expressed concern that "these practices could result in harm beyond an increase in the cost of settlement services" due to an adviser's losing her impartiality.<sup>360</sup>

Although an overwhelming share of the Supreme Court's docket consists of cases where there is a conflict among the circuits,<sup>361</sup> the Court agreed to review the Ninth Circuit's decision despite the absence of any circuit split. Moreover, the Court granted certiorari only on the question whether a "private purchaser of real estate settlement services" has suffered an "injury in fact" sufficient to confer Article III standing.<sup>362</sup> By limiting its grant in this way — the petitioner had also asked the Court simply to construe RESPA not to have conferred standing<sup>363</sup> — the Court ratcheted up the stakes. Rather than asking whether Congress *meant* to permit plaintiffs like Edwards to sue, the Court was asking whether Congress constitutionally *could* create a cause of action.

First American argued that the injury-in-fact requirement cannot be satisfied unless a plaintiff can show some palpable injury<sup>364</sup> — that

<sup>354</sup> *Edwards*, 610 F.3d at 515.

<sup>355</sup> See OHIO REV. CODE ANN. §§ 3935.04, 3935.07 (West 2010).

<sup>356</sup> *Edwards*, 610 F.3d at 516.

<sup>357</sup> 422 U.S. 490 (1975).

<sup>358</sup> *Edwards*, 610 F.3d at 517 (quoting *Warth*, 422 U.S. at 500).

<sup>359</sup> See 12 U.S.C. § 2607(d)(2) (2006).

<sup>360</sup> *Edwards*, 610 F.3d at 517.

<sup>361</sup> See SUP. CT. R. 10(a); David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 981 (2007) (book review) (finding that in recent years, "nearly 70% of the cases reviewed by the Court involved a split among the lower courts").

<sup>362</sup> Petition for Writ of Certiorari at i, *First Am. Fin. Corp. v. Edwards*, 132 S. Ct. 2536 (2012) (No. 10-708); see also *Docket for No. 10-708*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10-708.htm> (last updated July 30, 2012) (limiting the grant of certiorari to the second question in the petition).

<sup>363</sup> Petition for Writ of Certiorari, *supra* note 362, at 23.

<sup>364</sup> Brief for the Petitioner at 13, *First Am.*, 132 S. Ct. 2536 (No. 10-708).

is, some way in which the actual price or quality of the services she received was affected by the unlawful conduct. Otherwise, it argued, the plaintiff has failed to show the kind of “concrete and particularized” injury Article III standing requires.<sup>365</sup> Essentially, First American sought to extend the Court’s decision in *Lujan v. Defenders of Wildlife*,<sup>366</sup> which had refused to find Article III standing based on “citizen-suit” provisions (which allow “any person” to bring suit against the government to enjoin compliance with a statutory duty).<sup>367</sup>

At oral argument, the Justices’ questioning made clear the stakes. The Chief Justice raised the question of what injury-in-fact means:

You said violation of a statute is injury-in-fact. I would have thought that would be called injury-in-law. And when we say, as all our standing cases have, is that what is required is injury-in-fact, I understand that to be in contradistinction to injury-in-law. . . .

. . . .

. . . [W]hy do we always say injury-in-fact then? You say [a plaintiff has standing] so long as the harm is a violation of the law, a legally protected interest. Our standing cases always say injury-in-fact as opposed to injury-in-law. And yet, you’re saying if you violate the law, you have sufficient injury.<sup>368</sup>

The distinction the Chief Justice drew — injury-in-fact versus injury-in-law — was novel. Conventionally, as Edwards’s counsel suggested, the modifier “-in-fact” is used not to invoke the fact/law distinction but to point to the difference between actual and hypothetical states of the world.<sup>369</sup> If a plaintiff’s injury is too speculative, then the plaintiff has not established injury-in-fact. The implication of the Chief Justice’s questioning might be to limit the kinds of injuries that can confer standing to ones where there is the kind of impact that occurs in common law causes of action.

Justice Scalia’s questioning pursued this issue from a different angle. In response to the argument that Congress could “elevate” a consumer’s interest in “conflict-free advice to legal protection,”<sup>370</sup> Justice Scalia responded:

<sup>365</sup> *Id.* at 29 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000)) (internal quotation marks omitted).

<sup>366</sup> 504 U.S. 555 (1992).

<sup>367</sup> *Id.* at 571–73.

<sup>368</sup> Transcript of Oral Argument at 32, 54, *First Am.*, 132 S. Ct. 2536 (No. 10-708), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/10-708.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-708.pdf).

<sup>369</sup> *Id.* at 32–34; see also *Lujan*, 504 U.S. at 560 (requiring that an injury-in-fact be “actual or imminent, not conjectural or hypothetical” (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)) (internal quotation marks omitted)); Transcript of Oral Argument, *supra* note 368, at 54 (agreeing that an injury-in-fact “can’t be . . . abstract”).

<sup>370</sup> Transcript of Oral Argument, *supra* note 368, at 29.

Well, the issue isn't whether they can afford it legal protection. They certainly can. And there can be suits by — by the Federal Government or, I think, under this statute even by State — State attorneys general. The issue isn't whether Congress can achieve that result. It's whether they can achieve it by permitting private suits.<sup>371</sup>

In *Lujan*, Justice Scalia's opinion for the Court rejecting citizen suits had rested on separation of powers principles: the target of the lawsuit was the executive branch, and Congress could not "convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts" without infringing on "the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'"<sup>372</sup> But here, the separation of powers concern was entirely absent, since the plaintiff was not part of an "undifferentiated public," nor was the executive branch the target of the lawsuit. By floating the possibility of a new conception of injury-in-fact, *First American* had the potential to undermine an enforcement technique Congress has been using in a variety of fields: having proscribed certain conduct, Congress then confers a statutory right to sue on individuals subjected to the conduct without requiring proof of injury beyond violation of the statutory duty.<sup>373</sup>

Like Kevin Russell, I viewed *First American* as "the sleeper case of the Term."<sup>374</sup> In a variety of arenas, the Roberts Court has been cutting back not on the content of rights or duties but on their enforceability, creating the regulation-remedy gap I discussed earlier.<sup>375</sup> The most striking example, from the perspective of democratic enforcement of constitutional constraints, has been with respect to § 1983 lawsuits, a prime innovation of the Warren Court. Since the 1980s, the Supreme Court has dramatically transformed the doctrine of qualified immunity from its initial function as an affirmative defense to § 1983 liability into a threshold protection of "all but the plainly incompetent or those who knowingly violate the law."<sup>376</sup> In recent Terms, the Roberts Court has refined this rule to provide that qualified immunity attaches unless "existing precedent [has] placed the statutory or constitu-

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<sup>371</sup> *Id.*

<sup>372</sup> 504 U.S. at 577 (quoting U.S. CONST. art. II, § 3).

<sup>373</sup> See Brief for the United States as Amicus Curiae at 25–27, *First Am.*, 132 S. Ct. 2536 (No. 10-708) (citing examples of statutory damages authorized by Congress without proof of harm, as in copyright and credit reporting statutes).

<sup>374</sup> Kevin Russell, *First American Financial v. Edwards: Surprising End to a Potentially Important Case*, SCOTUSBLOG (June 28, 2012, 7:00 PM), <http://www.scotusblog.com/2012/06/first-american-financial-v-edwards-surprising-end-to-a-potentially-important-case/>.

<sup>375</sup> See *supra* pp.55–57.

<sup>376</sup> *Malley v. Briggs*, 475 U.S. 335, 341 (1986); see also *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1244–46 (2012) (invoking this standard to hold that officers who executed a constitutionally flawed warrant were entitled to qualified immunity).

tional question beyond debate.”<sup>377</sup> In this Term’s decision in *Reichle v. Howards*,<sup>378</sup> the Court seemed even to go a step further, finding qualified immunity in part because “[t]his Court” had never recognized the underlying right.<sup>379</sup>

In short, much as the Court created a presumption against granting relief to habeas petitioners — who at least normally have had some opportunity to assert their claims in the underlying criminal proceedings<sup>380</sup> — the Court has created a presumption against recovery under § 1983. The “government interest in avoiding ‘unwarranted timidity’ on the part of those engaged in the public’s business” drives the scope of qualified immunity.<sup>381</sup> The result, to which the Court no longer even adverts, is to leave the impact of constitutional violations on the victims. Moreover, the Court has increasingly adopted the view that the primary purpose of constitutional adjudication is deterrence of future wrongdoing, rather than compensation of victims.<sup>382</sup> “There is something deeply ironic about a system of constitutional litigation” that contemplates ratcheting up the level of individualized harm necessary to establish standing at the same time that it deemphasizes

<sup>377</sup> *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011).

<sup>378</sup> 132 S. Ct. 2088 (2012).

<sup>379</sup> *Id.* at 2093. John Jeffries identifies the way in which this formulation overemphasizes the judiciary’s role:

The problem with the current law is its implicit equation of reasonable error [ — the presence of which triggers qualified immunity — ] with the space between decided cases. An act violative of the Constitution is not made reasonable simply by the absence of a prior adjudication of similar facts in the same jurisdiction. Something more is required. Reasonable error must be reasonable, and not merely not yet specifically pronounced.

John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts* 53 (2012) (unpublished manuscript) (on file with the Harvard Law School Library).

<sup>380</sup> *But see* *Martinez v. Ryan*, 132 S. Ct. 1309, 1320 (2012) (holding that when a state court defendant is constrained to bring his claim of ineffective assistance of counsel in state collateral proceedings, procedural default will not bar a federal habeas claim if the defendant either received no counsel in that proceeding or his counsel there was ineffective).

<sup>381</sup> *Filarsky v. Delia*, 132 S. Ct. 1657, 1665 (2012) (quoting *Richardson v. McKnight*, 521 U.S. 399, 409 (1997)).

<sup>382</sup> This point has long driven the Court’s decisions in exclusionary rule cases. *See, e.g.*, *Herring v. United States*, 129 S. Ct. 695, 702–03 (2009); *Hudson v. Michigan*, 547 U.S. 586, 591 (2006). It also has become the primary focus of whether to recognize a plaintiff’s right to bring a *Bivens* suit, the federal analog to § 1983. *See, e.g.*, *Minnecci v. Pollard*, 132 S. Ct. 617, 622 (2012) (suggesting that the Court had recognized a damages cause of action for violation of the Eighth Amendment by federal officials because it “would prove a more effective deterrent” than alternative remedies); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001) (stating that “[t]he purpose of *Bivens* is to deter individual federal officers from committing constitutional violations” and that “the threat of litigation” will perform that function even when qualified immunity deprives victims of compensation).

compensation for individualized injury as the central purpose of adjudication.<sup>383</sup>

It is hard to know whether the Court dismissed *First American* because there turned out to be some problem with reaching the question presented,<sup>384</sup> “because it could not reach agreement on a workable constitutional test,”<sup>385</sup> or because, with the press of *NFIB*, the Justices simply ran out of time to work through their views. As with the Court’s new Commerce Clause and Spending Clause doctrines — not to mention the significance of the French Revolution for western civilization — it may be too soon to tell.<sup>386</sup>

### III. SHINE, PERISHING REPUBLIC

*First American* makes an interesting bookend to the leadoff case of October Term 2011, *Douglas v. Independent Living Center*.<sup>387</sup> That case also raised the prospect of significantly restricting private litigation as a mechanism of enforcing public values, only to fizzle out in the end.<sup>388</sup> *NFIB* might also be characterized as full of sound and fu-

<sup>383</sup> Pamela S. Karlan, *Shoe-Horning, Shell Games, and Enforcing Constitutional Rights in the Twenty-First Century*, 78 UMKC L. REV. 875, 887 (2010).

<sup>384</sup> See Russell, *supra* note 374 (expressing skepticism that such a problem produced the DIG).

<sup>385</sup> *Id.*

<sup>386</sup> See Pamela S. Karlan, *New Beginnings and Dead Ends in the Law of Democracy*, 68 OHIO ST. L.J. 743, 743 (2007) (“Asked about the significance of the French Revolution for western civilization, Chou En-Lai is reported to have said that it was too soon to tell. When it comes to the Roberts Court and the law of democracy, the early returns are similarly provisional.”). Interestingly, some have recently cast doubt on the conventional wisdom regarding the Zhou Enlai quotation. See Dean Nicholas, *Zhou Enlai’s Famous Saying Debunked*, HISTORY TODAY (June 15, 2011, 11:30), <http://www.historytoday.com/blog/news-blog/dean-nicholas/zhou-enlais-famous-saying-debunked> (noting that Zhou’s 1972 comment may have referred instead to the far more recent student uprisings of May 1968).

<sup>387</sup> 132 S. Ct. 1204 (2012).

<sup>388</sup> *Independent Living Center* involved a set of challenges by Medicaid providers and beneficiaries to a California statute reducing payments to providers. The challengers claimed that the California statute conflicted with federal law. See *id.* at 1208–09. The issue before the Supreme Court was whether private parties can bring suit directly under the Supremacy Clause to seek equitable relief against state policies they claim are preempted by federal law when the federal law itself provides no private cause of action. See *id.* at 1207. A restrictive decision would have upset decades of cases in which the Court had adjudicated such claims. See, e.g., *Rowe v. N.H. Motor Transp. Ass’n*, 128 S. Ct. 989, 993 (2008) (holding that Maine’s Tobacco Delivery Law was preempted by the Federal Aviation Administration Authorization Act); *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 401 (2003) (holding that California’s Holocaust Victim Insurance Relief Act was preempted by federal foreign affairs power); see also Brief of United States as Amicus Curiae in Support of Petitioners at 17–18, *Indep. Living Ctr.*, 132 S. Ct. 1204 (Nos. 09-958, 09-1158, 10-283) (noting that the Supreme Court has “decided dozens of preemption claims against state officials on their merits in cases brought in federal court, perhaps implicitly assuming that some federal cause of action exists in some circumstances”).

The Court avoided deciding the question, remanding the case to the court of appeals to decide whether an intervening federal agency decision meant that an action against federal regulators under the Administrative Procedure Act, rather than a Supremacy Clause-based action

ry but signifying very little. At the end of the day, the Affordable Care Act was upheld almost entirely. Given the opinions' emphasis on either the unprecedented nature of the Act (in the case of the Chief Justice's opinion<sup>389</sup> and the joint dissent<sup>390</sup>) or the distinctive nature of the underlying problem the Act addressed (in the case of Justice Ginsburg's opinion<sup>391</sup>), it is unclear whether the Court's Commerce Clause and Spending Clause holdings will affect any future cases.

But it would be a mistake to underestimate the significance of the message the Court sent this Term. Across a broad range of cases, the Court expressed a suspicion of the political process — a suspicion that goes beyond skepticism toward the traditional *Carolene Products* categories of government actions that fall within a specific constitutional prohibition, that “restrict[] those political processes which can ordinarily be expected to bring about repeal of undesirable legislation,” or that target “discrete and insular minorities.”<sup>392</sup> And while the distrust was expressed more often by the more conservative members of the Court, it was not limited to them.<sup>393</sup>

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against state officials, was the proper vehicle for challenging the state's actions. *See Indep. Living Ctr.*, 132 S. Ct. at 1210–11. In dissent, Chief Justice Roberts, joined by Justices Scalia, Thomas, and Alito, noted that they would have reached the question initially presented and would have held that “[w]hen Congress did not intend to provide a private right of action to enforce a statute enacted under the Spending Clause, the Supremacy Clause does not supply one of its own force.” *Id.* at 1215 (Roberts, C.J., dissenting).

*Independent Living Center* also provides an interesting bookend to the Court's decision the previous Term in *Bond v. United States*, 131 S. Ct. 2355 (2011). In *Bond*, the Court held that individuals have standing to raise (and presumably can bring, although Bond herself raised her claim as a defense against federal prosecution) Tenth Amendment–based claims — that is, claims that the federal government has encroached on powers properly left to the states. *See id.* at 2363–64. By contrast, in *Independent Living Center*, the Court declined to squarely hold that individuals can bring Supremacy Clause–based claims — that is, claims that a state or local government has encroached on powers properly exercised by the federal government. The two cases thus seem to treat a private party's ability “to object to a violation of a constitutional principle that allocates power within government,” *id.* at 2365, rather differently, depending on which government's power the individual is trying to vindicate.

*Independent Living Center* also stands in an interesting relationship to *NFIB*. There, the Court ratcheted up the substantive constraints on Congress's use of its spending power. If the position taken by the dissent in *Independent Living Center* ultimately carries the day, it may impose a practical constraint as well, by limiting private enforcement of conditions in federal spending statutes.

<sup>389</sup> *See NFIB*, 132 S. Ct. 2566, 2586–87 (2012) (opinion of Roberts, C.J.).

<sup>390</sup> *See id.* at 2644 (joint dissent).

<sup>391</sup> *See id.* at 2610 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

<sup>392</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

<sup>393</sup> In this respect, consider *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012). *Christopher* concerned the question whether pharmaceutical sales representatives were “outside salesmen” and thus exempt from the overtime provisions of the Fair Labor Standards Act (FLSA). *Id.* at 2161. The case turned on Department of Labor regulations determining who counts as an outside salesman. *See id.*

How did we move, in the past half century, from a Court optimistic about the possibility that democracy could be made to work better and committed to a view that Congress and the executive branch could be “resourceful[.]” partners in realizing constitutional values<sup>394</sup> to a world in which the Justices see the political process as perhaps irredeemably flawed,<sup>395</sup> see the legislative process as an inferior substitute for judi-

None of the Justices were prepared to defer to the Department’s interpretation. Writing for the Court, Justice Alito declined to accord *Auer* deference, *see Auer v. Robbins*, 519 U.S. 452, 462 (1997) (holding that an agency’s construction of its own regulations is entitled to deference unless it is plainly erroneous, even if the “interpretation comes to us in the form of a legal brief”), to the Department’s construction of its regulations. *See Christopher*, 132 S. Ct. at 2165–70; *see also id.* at 2175 (Breyer, J., joined by Ginsburg, Sotomayor, and Kagan, JJ., dissenting) (agreeing with the majority that no deference was due to the Department’s interpretation, but disagreeing with the majority’s construction of the underlying FLSA provisions).

At the core of the Court’s refusal to defer was the fact that the Department had first articulated its position during litigation in 2009, after the events in question had occurred and after “a very lengthy period of conspicuous inaction,” *id.* at 2168 (majority opinion), by the Department in enforcing the FLSA against the pharmaceutical industry. *See id.* at 2165–68 (focusing on the date of the Department’s interpretation). But an agency’s decision about whether and how vigorously to enforce a particular statute is likely to reflect the policy choices of particular administrations. *See, e.g., Elena Kagan, Presidential Administration*, 114 HARV. L. REV. 2245, 2383–84 (2001) (discussing, as “the most important development in the last two decades in administrative process,” the rise of more direct “presidential control over the regulatory state,” *id.* at 2383, and celebrating that control because it “advances political accountability by subjecting the bureaucracy to the control mechanism most open to public examination and most responsive to public opinion,” *id.* at 2384). The intimation that an agency interpretation lacks a presumption of legitimacy because it follows from a change in administrations — embraced by all nine Justices — reflects a sense that there is something illegitimate about politically inflected interpretation.

In a related vein, consider the Justices’ attitudes toward the role of juries. In recent Terms, the Court has addressed this issue both in the context of the Sixth Amendment–based question whether a particular fact related to a defendant’s criminal punishment must be found by a jury, *see, e.g., S. Union Co. v. United States*, 132 S. Ct. 2344 (2012); *Oregon v. Ice*, 129 S. Ct. 711 (2009); *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004); *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and in the substantive due process–based context of deciding whether particular punitive damages awards comport with constitutional limits, *see, e.g., Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008); *Philip Morris USA v. Williams*, 549 U.S. 346 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). In these cases, the division among the Justices did not track conventional liberal-conservative lines. The Justices most inclined to distrust juries were not the Justices at the ideological ends of the Court but those in the pragmatic middle. *See generally Fisher, supra* note 33 (discussing the Sixth Amendment and punitive damages cases and the Justices’ varying interpretive positions).

<sup>394</sup> *Katzenbach v. Morgan*, 384 U.S. 641, 648 (1966); *see also supra* pp. 20–21.

<sup>395</sup> In *Vieth v. Jubelirer*, 541 U.S. 267 (2004), for example, all nine members of the Court saw serious constitutional difficulties with partisan gerrymandering, *see id.* at 292–93 (plurality opinion) (expressing an assumption that severe partisan gerrymandering is “incompatib[le] . . . with democratic principles,” *id.* at 292, and “unlawful,” *id.* at 293); *id.* at 313–14, 316 (Kennedy, J., concurring in the judgment); *id.* at 318 (Stevens, J., dissenting); *id.* at 347–52 (Souter, J., joined by Ginsburg, J., dissenting); *id.* at 365 (Breyer, J., dissenting), but four Justices concluded that challenges to partisan gerrymanders were nonjusticiable, *see id.* at 305–06 (plurality opinion), while a fifth found “failings” in all of the proposed standards for adjudicating such cases but left open the possibility that “[i]f workable standards do emerge,” courts should address such claims, *id.* at 317 (Kennedy, J., concurring in the judgment).

cial analysis,<sup>396</sup> and believe, as Justice Scalia recently wrote, that the “modern Congress” is “sailing close to the wind” — that is, “entering an area of questionable constitutionality” — “*all the time*”?<sup>397</sup>

Some of the explanation must lie with the changes in our politics itself. We live in an era of hyperpolarized, ugly partisanship.<sup>398</sup> It would be hard for *any* informed observer not to worry about the way we elect our representatives and their performance once in office.<sup>399</sup> For the members of the Court, that general impulse may be heightened by a series of additional factors. For nearly all the Justices, their most extensive exposure to Congress probably came during their confirmation hearings, and that experience is unlikely to have left them with much admiration for how Congress operates.<sup>400</sup> While Chief Justice Stone, Justice Brennan, and Justice Powell were each nominated by a president of the opposite party, it is simply impossible to imagine anything like that happening today. Justices who emerge from a highly partisan, consciously ideological process may face both an urge to distance themselves from everything political and a skepticism about the competence and bona fides of the other side’s partisans.

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<sup>396</sup> For discussions of the Court’s skeptical approach to the adequacy of the legislative process, see generally William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87 (2001); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001); Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707 (2002); and Amanda Frost, *Congress in Court*, 59 UCLA L. REV. 914, 922–29, 932–37 (2012).

<sup>397</sup> SCALIA & GARNER, *supra* note 148, at 248 (emphasis added).

<sup>398</sup> For discussions of the hyperpolarization, see generally MANN & ORNSTEIN, *supra* note 31; and Pildes, *supra* note 31. For discussions of the ugliness, see, for example, STEPHEN ANSOLABEHRE & SHANTO IYENGAR, GOING NEGATIVE 113–14 (1995) (discussing how the ugliness of campaigns leads to further polarization in office, which in turn only increases campaign ugliness); and Toni M. Massaro & Robin Stryker, *Freedom of Speech, Liberal Democracy, and Emerging Evidence on Civility and Effective Democratic Engagement*, 54 ARIZ. L. REV. 375, 420–27 (2012) (discussing the uncivil nature of contemporary American politics, including empirical evidence that negative campaigning has increased since 1960).

<sup>399</sup> In a related vein, Professor Kramer identifies as a background factor in the decline of popular constitutionalism and the acceptance of judicial supremacy in the latter half of the twentieth century “the general skepticism about popular government that came to characterize western intellectual thought after World War II” given the “seeming eagerness with which mass publics in Europe had embraced fascism and communism.” LARRY D. KRAMER, THE PEOPLE THEMSELVES 221–22 (2004).

<sup>400</sup> See generally, e.g., JANE MAYER & JILL ABRAMSON, STRANGE JUSTICE (1994) (discussing Justice Thomas’s contentious confirmation hearings); David G. Savage, *Obama, Biden Talk with Justices*, L.A. TIMES, Jan. 15, 2009, at A10 (suggesting that Justice Alito has “voiced lingering anger” over his treatment by Senate Democrats and has said that “[w]hen walking on Capitol Hill . . . he crosses to the far side of the street whenever he nears the Senate Office Building”); cf. Elena Kagan, *Confirmation Messes, Old and New*, 62 U. CHI. L. REV. 919 (1995) (reviewing STEPHEN L. CARTER, THE CONFIRMATION MESS (1994)) (stating that the problem with the confirmation process is often not its harshness, but its vapidness).

The Justices' pre-Court professional experience may play a role as well. None of the Justices ever held elective office at any level.<sup>401</sup> Their high-level public service, with only a few notable exceptions, was as lawyers.<sup>402</sup> To be sure, jobs like Principal Deputy Solicitor General (Chief Justice Roberts) or Assistant Attorney General for the Office of Legal Counsel (Justice Scalia) or Chief Counsel of the Senate Judiciary Committee (Justice Breyer) demand good judgment and interpersonal skills as well as doctrinal firepower. But even if those jobs involve a kind of "politics," that politics is not primarily the electoral, art-of-the-possible politics whose policies the Justices are called upon to enforce, adjudicate, and review.<sup>403</sup>

The current Justices spent much of their lives being rewarded for a particular intellectual approach. That approach can stand them in good stead when it comes to technical legal issues: the Court's unanimity in many of its statutory interpretation cases perhaps stems from there being a shared lawyerly perspective on what the right answer is.<sup>404</sup> But many of the constitutional cases before the Supreme Court are there precisely because they raise hard questions that cannot be answered simply by bringing technical acumen to bear. In these cases, Justices whose stock-in-trade has been their doctrinal acuity or their articulation of a particular interpretive method may continue to elevate lawyerly technique over alternative ways of thinking about the Constitution.<sup>405</sup> As Sir Isaiah Berlin once remarked, "[D]oubtless all men are liable to exaggerate the importance of their own wares: ideas are the commodity in which intellectuals deal — to a cobbler there's nothing like leather . . . ."<sup>406</sup>

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<sup>401</sup> See sources cited *supra* p. 5.

<sup>402</sup> Justice Thomas served briefly as Assistant Secretary for Civil Rights at the Department of Education before spending eight years as Chairman of the Equal Employment Opportunity Commission. Justice Kagan spent two years as Deputy Director of the Domestic Policy Council. A short biography of each Justice is available on the Court's website. *Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/about/biographies.aspx> (last visited Sept. 29, 2012).

<sup>403</sup> Justice Breyer — the Justice least likely to vote to overturn federal statutes, see Gewirtz & Golder, *supra* note 147 — is also the Justice who had the most prior experience with Congress. See JEFFREY TOOBIN, *THE OATH* 84–85 (2012) (describing Justice Breyer's favorable experience with Congress during his stint with the Judiciary Committee).

<sup>404</sup> Many of these cases involve resolving conflicts among the circuits, see, e.g., *Holder v. Martinez Gutierrez*, 132 S. Ct. 2011, 2016 (2012); *Filarsky v. Delia*, 132 S. Ct. 1657, 1661 (2012); *Rehberg v. Paulk*, 132 S. Ct. 1497, 1501 (2012), which naturally raises the question of why the courts of appeals disagree if the answer is so clear.

<sup>405</sup> This tendency is one of Professor Kramer's central points: "The Constitution, in this modern understanding, is a species of law" to be handled by legal elites — "subject to paramount supervision from the U.S. Supreme Court" — as opposed to a site for popular political contestation. KRAMER, *supra* note 399, at 7–8.

<sup>406</sup> ISAAH BERLIN, *THE HEDGEHOG AND THE FOX* 24 (1953).

This assertion of legal analysis over other methods of constitutional argument — treating the Constitution as a kind of statute, albeit a superior one, rather than as a quintessentially political document — ties into another development of the past half-century. Not only has politics become more ideological, but constitutional theory has also become more confident that it can deliver “right answers” to even difficult constitutional questions.<sup>407</sup> This development may reinforce Justices’ sense of their superiority at resolving constitutional controversies. If a Justice thinks the answer to a question before the Court turns on a choice among constitutional theories, rather than on judgments about social or economic policy, he or she will be less likely to defer to the views of Congress or the executive branch.

The problem is not — or certainly not just — the Court’s assertion of judicial supremacy or its claim of final interpretive authority for itself with respect to constitutional questions.<sup>408</sup> That is the problem to which the popular constitutionalism scholarship has largely devoted itself.<sup>409</sup> The potential consequences of the current Court’s disdain for democracy are potentially far more profound. After all, a Court committed to judicial interpretive supremacy might also adopt an expansive reading of constitutional provisions setting out congressional or executive powers, in which case the effect of its assertion of interpretive authority would be dampened. For example, one could imagine a Court with a robust view of judicial interpretive supremacy but a capacious understanding of what counts as “Commerce . . . among the several States” or “the equal protection of the laws.” In that context, the Court would uphold congressional exercises of the power at issue

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<sup>407</sup> See Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519, 535–36 (2012). Judge Posner noted:

Modern constitutional theory gives the theorists the required certitude, emboldening them to ignore Holmes’s dictum that certitude is not the test of certainty. So “Scalia and Thomas insist that the apparent tension between their sharp demands for restraint in some areas and their sweeping exercise of activism in others is resolved by the written Constitution itself.” Their motto should be: the Constitution made me do it. They make prudence seem a cop-out; one is put in mind of William Blake’s definition of prudence: “a rich ugly old maid courted by Incapacity.”

*Id.* at 536 (quoting Thomas M. Keck, *Activism and Restraint on the Rehnquist Court: Timing, Sequence and Conjunction in Constitutional Development*, 35 POLICY 121, 139 (2002); WILLIAM BLAKE, *THE MARRIAGE OF HEAVEN AND HELL* 31 (Dover Publ’ns, Inc. 1994) (1794)).

<sup>408</sup> See *NFIB*, 132 S. Ct. 2566, 2608 (2012) (opinion of Roberts, C.J.) (“The Framers created a Federal Government of limited powers, and assigned to this Court the duty of enforcing those limits.”); *United States v. Morrison*, 529 U.S. 598, 617 n.7 (2000) (“No doubt the political branches have a role in interpreting and applying the Constitution, but ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text.”).

<sup>409</sup> For leading examples, see generally KRAMER, *supra* note 399; MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); and Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003).

not because it was deferring to Congress's construction of constitutional language, but because the legislation before it comported with the Justices' own interpretation. In *Nevada Department of Human Resources v. Hibbs*,<sup>410</sup> for example, Chief Justice Rehnquist's opinion for the Court upheld Congress's abrogation of state sovereign immunity under the family-care provisions of the Family and Medical Leave Act.<sup>411</sup> The Court reached this result not because the Justices deferred to Congress's view of what counted as a violation of the Equal Protection Clause, but because the Court had previously held that sex discrimination triggers heightened scrutiny.<sup>412</sup> Thus, Congress's decision satisfied the congruence-and-proportionality test<sup>413</sup> — a test expressly based on an assertion of judicial interpretive supremacy.<sup>414</sup>

But when a robust version of judicial interpretive supremacy is combined with a narrow construction of key enumerated powers, there is a serious danger that the Court will disable the government from addressing critical national problems. Depending on the problem, the effect may be magnified. Courts are fully capable of enforcing constitutional provisions that operate within the judicial process. They can effectively safeguard a principle like the due process requirement that defendants not be convicted unless every element of the offense is proved to the jury beyond a reasonable doubt<sup>415</sup> by instructing the jury properly and, in appropriate cases, directing verdicts of acquittal or reversing convictions. They can protect individuals against statutes that criminalize the exercise of First Amendment rights by striking down those statutes when the government brings prosecutions.<sup>416</sup>

By contrast, some constitutional violations are not entirely amenable to judicial solutions, as the experience with black disenfranchisement in the South prior to the passage of the Voting Rights Act showed.<sup>417</sup> (The remedial inadequacy will be even more pronounced if

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<sup>410</sup> 538 U.S. 721 (2003).

<sup>411</sup> *Id.* at 741. The same statute was interpreted restrictively this Term with respect to congressional abrogation power regarding the self-care provision in *Coleman v. Court of Appeals of Maryland*, 132 S. Ct. 1327 (2012). See *supra* pp. 55–57 (discussing *Coleman*).

<sup>412</sup> See *Hibbs*, 538 U.S. at 728–29 (citing *Craig v. Boren*, 429 U.S. 190, 197–99 (1976); *United States v. Virginia*, 518 U.S. 515, 533 (1996)).

<sup>413</sup> *Id.* at 737.

<sup>414</sup> See *City of Boerne v. Flores*, 521 U.S. 507, 524, 527 (1997) (stating that “[a]ny suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law,” *id.* at 527, and asserting that “[t]he power to interpret the Constitution in a case or controversy remains in the Judiciary,” *id.* at 524).

<sup>415</sup> *In re Winship*, 397 U.S. 358, 363–64 (1970). The Court reiterated the requirement this Term in *Southern Union Co. v. United States*, 132 S. Ct. 2344, 2358 (2012).

<sup>416</sup> See *United States v. Alvarez*, 132 S. Ct. 2537, 2551 (2012) (holding that the Stolen Valor Act violates the First Amendment). First Amendment overbreadth doctrine is designed to respond to the chilling effect such statutes might have even if they are not enforced.

<sup>417</sup> See *supra* pp.19–20.

courts are hostile to institutional reform litigation.<sup>418</sup>) Moreover, the most specific constitutional liberty interests are largely phrased in negative terms.<sup>419</sup> Pursuing broader constitutional values that depend on providing resources to individuals inherently requires the cooperation — indeed, the active engagement — of the political branches. In today’s world, the Constitution’s commitments to “promote the general Welfare, and secure the Blessings of Liberty” often depend on the government’s ability to regulate various actors’ behavior either directly or through the carrot-and-stick method of the Spending Clause. Providing safe drinking water, solving climate change–related issues, preparing children and young people for the global economy, and yes, dealing with the crises in health care all require effective action by the federal government. Making the budgetary and policy trade-offs is not something courts are well equipped to handle.

A Court with a transsubstantive distrust for the political process seems more likely to adopt a restrictive vision of the political branches’ powers across the array of constitutional provisions. Why, after all, would the Framers have granted sweeping powers to a process that cannot be trusted? The Roberts Court’s narrow substantive reading of enumerated powers maps fairly closely onto the contemporary conservative political agenda. To the extent that the conservative agenda gains popular acceptance, the Court may garner acclaim as a guardian of constitutional values. But if the public rejects that agenda, or remains sharply divided, the Court risks being perceived as simply another partisan institution. The Court’s current status rests in substantial measure on its having been on the right side of history in *Brown v. Board of Education*.<sup>420</sup> Only time will tell whether the Court will retain that status given the choices the Roberts Court is making.

In *The Spirit of Liberty*, Judge Learned Hand wonders “whether we do not rest our hopes too much upon constitutions, upon laws and upon courts.”<sup>421</sup> Liberty, he continues, “lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save

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<sup>418</sup> For an example of the Roberts Court’s hostility to structural reform litigation, see *Horne v. Flores*, 129 S. Ct. 2579 (2009). For a notable counterexample, see *Brown v. Plata*, 131 S. Ct. 1910 (2011).

<sup>419</sup> I borrow this formulation from ISALAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 122–34 (1969). A negative conception of liberty treats liberty as the ability to “ward[] off interference,” *id.* at 127, while a positive conception involves individuals “conceiving goals and policies of [their] own and realizing them,” *id.* at 131.

<sup>420</sup> 347 U.S. 483 (1954).

<sup>421</sup> LEARNED HAND, *The Spirit of Liberty*, in *THE SPIRIT OF LIBERTY* 189, 189–90 (Irving Dilliard ed., 3d ed. 1960).

it.”<sup>422</sup> I think Judge Hand overstates the case: these institutions play a critical role in shaping the world in which we live. The Constitution and debate, struggle, legislation, and litigation over its meaning have played, and continue to play, a central role in our nation’s struggles over liberty, equality, and similar values.

But Judge Hand is right that what lies in the hearts and minds of the public is critical to the enterprise. Thus, Alexander Hamilton was slightly off base when he wrote that the judiciary has “neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”<sup>423</sup> The judiciary must ultimately depend on the people. A Supreme Court that so distrusts the political process that it hobbles the democratic branches’ capacity to provide opportunities and effective protection to large swathes of society will find it hard over the long run to retain public respect. And a Court that intervenes in the political process in ways that seem to take sides in a partisan struggle is likely to exacerbate the pathologies in our politics even as it damages its own standing. For if the Justices disdain us, how ought we to respond?

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<sup>422</sup> *Id.* at 190.

<sup>423</sup> THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 291, at 464.