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Partitioning and Rights: The Supreme Court's Accidental Jurisprudence of Democratic Process

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PARTITIONING AND RIGHTS: THE SUPREME COURT'S ACCIDENTAL JURISPRUDENCE OF DEMOCRATIC PROCESS

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ABSTRACT

In democracies that allocate to a court responsibility for interpreting and enforcing the constitutional ground rules of democratic politics, the sheer importance of the task would seem to oblige such courts to guide their rulings by developing an account of the nature and prominent features of the constitutional commitment to democracy. The U.S. Supreme Court, however, has from the beginning refused to develop a general account—a theory—of how the U.S. Constitution establishes and structures democratic politics. The Court's diffidence left a vacuum at the heart of its constitutional jurisprudence of democratic process, and like most vacuums, this one was almost immediately occupied. But the Court filled its jurisprudential hole not primarily by invoking principles of democracy—even unstated ones—but by doing instead what reluctant decision makers often do: by reaching for whatever is handy. In a path-dependent series of small but fateful steps, the Court's reaction took two main forms. First, in the absence of a pertinent theory to guide it, the Court fell back on habit, specifically a habit, developed in its earliest cases, of solving problems of political power and representation by partitioning the electorate—that is, by ordering it subdivided. By resorting reflexively to this approach, the Court soon came to treat partitioning as the preferred solution to most problems of democratic representation. Second, the Court reached for the tools of decision that were most ready at hand, and those tools were individual rights, initially equal protection, then the freedoms of speech and association. But because these tools were ill-suited to the task, the Court ended up stretching First Amendment analysis in these cases beyond its plausible bounds and purposes. A well-ordered democratic state needs a thoughtful and deliberate jurisprudence of democracy and democratic practice. Instead, the Court has provided an accidental, haphazard jurisprudence of habit and availability.

I. INTRODUCTION

If the main function of a constitution is to set the ground rules by which a polity governs itself,[1] then in constitutional democracies

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1. *See, e.g.*, JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT, ch. X (Richard H. Cox, ed. 1982) (1690) (describing how members of a civil society create a form of government). For a more contemporary account, see RUSSELL HARDIN, LIBERALISM,

surely the most significant ground rules are those structuring democratic politics. These are the rules that establish the basic framework within which social disagreements are resolved, the processes by which binding agreements are negotiated, and the criteria by which such resolutions are to be deemed legitimate by those of whom submission to official power is demanded.[2]

In polities that, like the United States, allocate to a court responsibility for interpreting and enforcing the constitutional ground rules of democratic politics, the sheer importance of the task would seem to oblige such courts, when adjudicating disputes over basic democratic processes, to guide their rulings by developing an account of the nature and prominent features of the constitutional commitment to democracy. The very definition of a constitution is sometimes said to include not only the constitutional text, but also a "nation's . . . dominant political theories."[3] It is widely agreed that courts cannot in practice decide constitutional cases involving regulation of the democratic process without resort to some underlying theory of democratic politics—"engagement with structural theories in election law is inescapable."[4] As Heather Gerken has explained in the context of redistricting, "[c]ourts cannot decide whether power has been 'fairly' or 'properly' allocated among voters *without* having a broader theory of how a healthy democracy should function . . . ."[5] The high courts of other nations have not shrunk from developing such accounts, or at least from making a serious attempt.[6]

CONSTITUTIONALISM, AND DEMOCRACY 82-140 (1999) (describing constitutions as pragmatically necessary means of social coordination).

2. In Peter Ordeshook's words, "constitutions define the structure of the 'normally' functioning state." PETER C. ORDESHOOK, *Some Rules of Constitutional Design*, *in* LIBERALISM AND THE ECONOMIC ORDER 205 (Ellen Frankel Paul et al. eds., 1993).

3. WALTER F. MURPHY, CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST POLITICAL ORDER 13 (2007).

4. Guy-Uriel Charles, *Judging the Law of Politics*, 103 MICH. L. REV. 1099, 1126 (2005). To similar effect, see Michael S. Kang, *When Courts Won't Make Law: Partisan Gerrymandering and a Structural Approach to the Law of Democracy*, 68 OHIO ST. L.J. 1097, 1099 (2007) ("Structural understanding is a necessary predicate to developing the law of democracy . . . ."); Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 521 (2004); Richard H. Pildes, *Two Conceptions of Rights in Cases Involving Political "Rights*,*"* 34 HOUS. L. REV. 323, 324 (1997) (courts must have "some conception of what politics ought to be"); Yasmin Dawood, *Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review*, 62 U. TORONTO L.J. 499, 519-23 (2012) (arguing that even judicial reliance on specific, textual individual democratic rights cannot be accomplished satisfactorily without some kind of theory of the democratic institutions and processes that give the right meaning within the setting of a specific system of democratic governance).

5. Gerken, *supra* note 4, at 521.

6. For example, according to Yasmin Dawood, the Supreme Court of Canada "has played an important role in defining Canadian democracy." Yasmin Dawood, *Democracy and the Right to Vote: Rethinking Democratic Rights under the* Charter, 51 OSGOODE HALL L.J. 251, 253 (2013). The Australian High Court has inferred a freedom of political speech

Nevertheless, the U.S. Supreme Court has long refused to develop a general account of how the U.S. Constitution establishes and structures the democratic politics occurring within the very institutions that the Constitution itself creates: "Members of every generation of the Supreme Court's Justices have claimed that they have no theory about the way democracy should work."[7] Until the mid-twentieth century, this refusal had few consequences because the Court did not understand its power to extend to policing the operation of democratic institutions.[8] In the Court's view, the Constitution did not subject democratic politics to judicially enforceable constitutional meta-rules, and for judges to attempt to find them in the Constitution exceeded the legitimate bounds of the judicial role by asking them not to apply law, but "to choose . . . among competing theories of political philosophy."[9]

By 1962, however, the Court changed its view of its own powers, and began to intervene regularly—and with increasing impact—in the business of deciding the ground rules of democratic politics.[10] At the same time, the Court continued to refuse to develop an account of the constitutionally grounded structure of democratic processes. As a result, the Court has over the last five decades decided cases substantially reshaping the political landscape—eliminating restrictions on voting,[11] overturning long-established institutions of political representation,[12] and invalidating regulatory limits on political speech and spending[13]—largely without a compass.

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from sections of the Australian Constitution dealing with representative and responsible government. *See* Nationwide News Ltd. v Wills (1992) 177 CLR 1 (Austl.); Australian Capital Television v Commonwealth (1992) 177 CLR 106 (Austl.).

7. Heather K. Gerken, *New Wine in Old Bottles: A Comment on Richard Hasen's and Richard Briffault's Essays on* Bush v. Gore, 29 FLA. ST. U. L. REV. 407, 414 (2001). *See also* Gerken, *supra* note 4, at 514; Daniel H. Lowenstein, *The Supreme Court Has No Theory of Politics—and Be Thankful for Small Favors*, *in* THE U.S. SUPREME COURT AND THE ELECTORAL PROCESS (David K. Ryden, ed. 2000).

8. *See* Colegrove v. Green, 328 U.S. 549 (1946); Luther v. Borden, 48 U.S. 1 (1849).

9. Baker v. Carr, 369 U.S. 186, 300 (1962) (Frankfurter, J., concurring). Among members of the contemporary Court, Justice Thomas has most explicitly expressed a similar sentiment: "[M]atters of political theory are beyond the ordinary sphere of federal judges. And that is precisely the point. The matters the Court has set out to resolve in vote dilution cases are questions of political philosophy, not questions of law." *Holder v. Hall, 512 U.S. 874,* 901 (1994) (Thomas, J., concurring).

10. The pivotal case was *Baker v. Carr*, 369 U.S. 186 (1962). This history is elaborated *infra* Part II.

11. *See* Dunn v. Blumstein, 405 U.S. 330 (1972); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969); Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966); Carrington v. Rash, 380 U.S. 89 (1965).

12. *See* Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973); Wesberry v. Sanders, 376 U.S. 1 (1964); Reynolds v. Sims, 377 U.S. 533 (1964).

13. *See* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011); Citizens United v. FEC, 130 S. Ct. 876 (2010); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995); Buckley v. Valeo, 424 U.S. 1 (1976); Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971); Mills v. Alabama, 384 U.S. 214 (1966).

Scholars have advanced several possible explanations for the Court's surprising reticence. It has been suggested, for example, that the Court avoids attempting to tease out of the Constitution some plausible baseline theory of how American democratic politics ought to work because the issues are so "hard to figure out"[14] that the task may surpass judicial competence.[15] Others argue that judicial development of such a theory is properly avoided because the Constitution's indeterminacy on the subject of democratic practices raises unacceptable risks that courts might improperly ossify contingent political arrangements that are best left fluid, or that judges might rely excessively on their personal views of what democracy requires.[16] Another family of explanations proposes the Court's embrace of a minimalist approach to judging[17] or the justices' preference for highly specific doctrinal formulae couched at low levels of abstraction.[18]

Although there may be a grain of truth to all these explanations, in the end they give the Court more credit than it deserves. A close and careful look at the precise sequence in which the Court's jurisprudence of democratic process evolved tells a different story, one distinctly less appealing on account of the almost complete absence from the Court's decision making of deliberate judicial choice and reflection. What this history shows is not the application of some consistent and coherent judicial philosophy or practice of judging; to the contrary, it shows that the Court's jurisprudence of democracy arrived at its present unsatisfactory state accidentally, by way of a path-dependent sequence of small yet fateful steps.

Specifically, the Court's lack of a theory of democratic politics in its earliest cases left a vacuum at the heart of the constitutional jurisprudence of democratic process. Like nature, however, jurisprudence abhors a vacuum; cases must be decided somehow, on some basis, if decisions are to be taken. I argue here that the Court filled its jurisprudential hole not primarily by invoking principles of democracy–even unstated ones[19]–or by invoking and following consistently some set of beliefs about the modest role of courts in a democra-

14. *See* Gerken, *supra* note 4, at 508; Gerken, *supra* note 7, at 421.

15. *See* Kang, *supra* note 4, at 1099-100; Lowenstein, *supra* note 7, at 302.

16. *See* RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE* 71-72, 139, 153-54 (2003); Lowenstein, *supra* note 7; Luke P. McLoughlin, *The Elysian Foundations of Election Law*, 82 TEMP. L. REV. 89, 115-16 (2009).

17. *See* Kang, *supra* note 4, at 1105. On the risks of judicial grand theory, see CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (2001).

18. *See* Gerken, *supra* note 7, at 421-22.

19. *See, e.g.*, Charles, *supra* note 4, at 1114; Gerken, *supra* note 7, at 414; Kang, *supra* note 4, at 1113 (all arguing that it is impossible for courts to decide cases dealing with democratic processes without orienting themselves against some underlying conception of democracy, which is thus necessarily present even if unarticulated).

cy. Instead, the Court responded to questions about democratic process raised in its cases by doing what reluctant decision makers often do: by reaching for whatever is handy.[20] This reaction took two main forms. First, in the absence of a pertinent theory to guide it, the Court fell back on habit. Its principal relevant habit, developed in its earliest cases dealing with democratic practices, had been to solve problems of political power and representation by partitioning the electorate—that is, by ordering it subdivided, thereby converting minorities within a jurisdiction into local majorities in a smaller one. By resorting to this habit in subsequent cases, the Court soon came to treat partitioning as the preferred solution to most problems of democratic representation, even where it might be of dubious wisdom.

Second, the Court reached for the tools of decision that were most ready at hand, and those tools were individual rights. In particular, the Court unthinkingly imported an antidiscrimination approach, pioneered in cases involving racial discrimination and relying on principles of equal protection, into a large number of disputes dealing with democratic process, problems for which this approach often was not well-suited.[21] Later, when the Equal Protection Clause began to prove inadequate to the increasingly complex task of regulating political processes, the Court began, reflexively, to import other rights into the democracy arena, principally the First Amendment protections of speech and association, which it proceeded to stretch badly by applying them in circumstances for which they were not designed. As a result, the Court has developed what might plausibly be called a jurisprudence of habit and availability when it should have developed a jurisprudence of democracy and democratic practice.

How the Court reached this point is the story I wish to relate. It begins not with modern, frustratingly complex conceptual problems of campaign speech and finance, but with very old problems of brute, physical territoriality arising from the way human beings distribute themselves on the land. Part I therefore reviews briefly the historical evolution of the American system of territorial representation, demonstrating how a set of institutions initially well-matched to pre-

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20. This behavioral trait is sometimes referred to as an "availability heuristic." *See* AMOS TVERSKY & DANIEL KAHNEMAN, *Judgment Under Uncertainty: Heuristics and Biases*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 11-14 (Daniel Kahneman et al. eds., 1982); Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCH. 207 (1973).

21. *See, e.g.*, Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CALIF. L. REV. 1201, 1216 (1996) ("[T]he Court . . . has . . . created a doctrinal morass by selectively wrenching concepts out of the contexts in which they were developed and attempting to jury-rig them to work in a context where they do not make sense . . . ."); Samuel Issacharoff and & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1705-06 (1999) (the Court's practices have "led to the recasting of essentially political challenges born of electoral frustration as racial ones").

vailing political theories and practices came increasingly under pressure as social and political beliefs evolved. Part II examines the U.S. Supreme Court's entry onto this terrain in its early decisions reviewing the constitutionality of laws regulating democratic representation. Paying careful attention to the kinds of cases coming before the Court and their precise sequence, Part II shows how the Court's earliest rulings, in cases involving racial discrimination in politics, established a template for judicial intervention that the Court, in path-dependent fashion, almost immediately applied in other, far less propitious settings.

Part III describes the quick emergence and solidification of the Court's preference for solving problems of democratic representation by partitioning the electorate so as to transform complaining political minorities into content, locally dominant majorities. It argues that the Court's habitual and unthinking reliance on partitioning, unmoored to any normative conception of who ought to be represented in legislative bodies or their appropriate degree of influence, led predictably to the emergence of one of the most intractable problems in contemporary American politics: the Court's complete inability to adjudicate successfully questions of partisan gerrymandering.

Finally, Part IV examines the Court's unguided deployment of generic individual rights to solve problems of democratic process and participation, following the Court's jurisprudence step by step from an initial reliance on equal protection to its expansion into First Amendment freedoms of speech and association. Part IV shows how reliance on principles of equal protection, which had served the Court well in its early cases involving racial discrimination in politics, began to cause the Court mounting problems, leading it to turn to the freedom of speech, where it ran into even more severe and less tractable problems. Ultimately, constrained by a series of path-dependent decisions into penetrating ever more deeply into the use of individual rights—a commitment from which it apparently saw no possible retreat—the Court has continued to press First Amendment rights into service to a point well beyond the bounds of logic or necessity, a widely criticized pattern that continues to this day.

II. EVOLUTION OF THE AMERICAN SYSTEM OF TERRITORIAL REPRESENTATION

American institutions of political representation have their roots in an English system designed initially to represent land.[22] Land-

22. The argument in this section relies on findings and analysis first set out in James A. Gardner, *One Person, One Vote and the Possibility of Political Community* [hereinafter *One Person, One Vote*], 80 N.C. L. REV. 1237 (2002), and James A. Gardner, *Representation Without Party: Lessons from State Constitutional Attempts to Control Gerrymandering* [hereinafter *Representation Without Party*], 37 RUTGERS L.J. 881 (2006).

holders in feudal England held their estates under an obligation to provide various forms of aid to the crown, including, upon request, financial assistance.[23] Because financial impositions by tradition could not be assessed without the consent of those tenured in the lord's land, representatives of the land were summoned to Parliament for the purpose of giving their consent to taxation.[24]

As the rise of commerce expanded the potential sources of wealth beyond land, English monarchs sought to tap these new sources of royal revenue by expanding Parliament to include representatives from corporate towns and boroughs, where merchant wealth was mainly to be found.[25] Nevertheless, representation in Parliament continued to be based on the unit from which consent was required, irrespective of its actual characteristics, including who or how many happened to live there, or even the amount of revenue due from the taxable unit.[26] By the late fourteenth century, representatives in Parliament consisted of two knights from each county and two citizens or burgesses from each city or borough within the represented counties, regardless of population, wealth, or property value.[27]

This model eventually crossed the Atlantic to the American colonies, where representation in colonial legislatures was allocated not to individuals, but to local communities. Thus, in Massachusetts, representatives represented towns; in Virginia, plantations, hundreds or counties; and in the Carolinas, parishes.[28] As the Massachusetts Supreme Judicial Court said in 1811, "[t]he right of sending representatives [to the state legislature] is corporate, vested in the town . . . ."[29] By the time this method of representation became entrenched in the colonies, however, its justification had evolved from one based on feudal obligations in land to a more characteristically republican justification that presupposed a commonality of interest arising from shared characteristics of the inhabitants of represented units:

> The corporate method of representation presumed that physical proximity generated communal sentiment. Each geographic unit was thought to be an organic, cohesive community, whose resi-

23. *See* M.V. CLARKE, MEDIEVAL REPRESENTATION AND CONSENT 253 (1964).

24. *See* G.L. HARRISS, *The Formation of Parliament, 1272-1377*, *in* THE ENGLISH PARLIAMENT IN THE MIDDLE AGES 41 (R.G. Davies & J.H. Denton eds., 1981); WILLIAM STUBBS, THE CONSTITUTIONAL HISTORY OF ENGLAND IN ITS ORIGINS AND DEVELOPMENT 199-202 (1880).

25. *See* A.F. POLLARD, THE EVOLUTION OF PARLIAMENT 51-55 (1920); STUBBS, *supra* note 24, at 210.

26. For a thorough discussion of medieval taxation policies, see G.L. HARRISS, KING, PARLIAMENT, AND PUBLIC FINANCE IN MEDIEVAL ENGLAND TO 1369 (1975).

27. *See* A.L. Brown, *Parliament, c. 1377-1422*, *in* THE ENGLISH PARLIAMENT IN THE MIDDLE AGES 117-18 (R.G. Davies & J.H. Denton eds., 1981).

28. *See* EDMUND S. MORGAN, INVENTING THE PEOPLE 41 (1988).

29. *In re* Opinion of the Justices, 7 Mass. 523, 526 (1811).

> dents knew one another, held common values, and shared compatible economic interests. The smaller the community, the more likely that its citizens would identify with one another . . . . Large distances, in contrast, bred a diversity of peoples and values.[30]

By the time of the Revolution, the founding generation fully accepted this account of representation. The idea that the political interests of communal groups of individuals correlated strongly with territory served, for example, as an axiom in Madison's famous defense of the large republic in *Federalist 10*.[31] "Factious combinations," Madison argued, are "less to be dreaded" in a large republic than in a small one because of the greater variety of interests found among a larger populace, a characteristic that is entirely an artifact of geographical scale: "Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens . . . ."[32] The idea that territorially defined local communities may reliably serve as proxies for the shared, collective interests of the individuals who inhabit them has remained a fixture in American political thought ever since.[33] So, for example, among delegates to the Wisconsin constitutional convention of 1851, "[t]he leading idea seems to have been that each county was regarded in the nature of 'a small republic,' or 'in the light of a family,' and 'each organized county had a separate interest.' "[34] In its more modern incarnation, the belief that place and interest coincide centers on the idea of the "community of interest," a term widely used in federal reapportionment jurisprudence.[35]

Nevertheless, it is not immediately self-evident why the inhabitants of any particular locality should comprise a community of interest. Why should mere common habitation of a unit of local government reflect, or give rise to, a community of interest among the residents? The answer to this question was gradually worked out by American state courts, which typically offered two distinct, though not unrelated theories. First, the inhabitants of a county or similar

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30. ROSEMARIE ZAGARRI, THE POLITICS OF SIZE: REPRESENTATION IN THE UNITED STATES, 1776-1850 (1987), at 37-38. *See also* ANDREW REHFELD, THE CONCEPT OF CONSTITUENCY: POLITICAL REPRESENTATION, DEMOCRATIC LEGITIMACY, AND INSTITUTIONAL DESIGN 72-77 (2005).

31. THE FEDERALIST NO. 10, at 83 (James Madison) (Clinton Rossiter, ed., 1961).

32. *Id.*

33. For a strong critique of this phenomenon, see THOMAS BENDER, COMMUNITY AND SOCIAL CHANGE IN AMERICA 4-8 (1978).

34. State *ex rel.* Attorney General v. Cunningham, 51 N.W. 724, 739 (Wis. 1892) (Pinney, J., concurring), (quoting JOURNAL OF DEBATES 219-24 (1851)).

35. *E.g.*, Lawyer v. Dep't of Justice, 521 U.S. 567, 581 (1997); Miller v. Johnson, 515 U.S. 900, 919 (1995); Theriot v. Parish of Jefferson, 185 F.3d 477, 486 (5th Cir. 1999); Barnett v. City of Chicago, 141 F.3d 699, 704 (7th Cir. 1998).

local government unit were said to share a common local economy and economic life; second, county residents were said to participate together in the public life of a shared unit of political and governmental administration.[36]

The linkage in the state constitutional jurisprudence between counties as the basic constitutional unit of representation and the shared economic life of county residents has never been expressed more clearly than in a 1964 opinion of the New Jersey Supreme Court:

> Anciently, and still today, the counties reflect different economic interests, although of course these economic interests are not perfectly contained or separated by any political line, municipal, county or State. So, certain counties have a dominant concern with manufacturing and commerce; others have a large stake in agriculture; still others lean heavily upon the resort industry; and finally a few counties have a special interest in the products of the sea.[37]

The idea here, clearly, is that counties are not arbitrary territorial units, random shapes on a map, to be ignored or rearranged on a whim, but rather contain populations that have distinctive interests, and these interests are primarily economic; each county, that is to say, comprises a distinct local economy.

At the same time, American state courts also have frequently found that residency in a county creates what might be called an "administrative" community of interest among the inhabitants in virtue of their common experience of the county's administration of governmental programs.[38] Finally, state courts have sometimes found that common participation by a county's inhabitants in its electoral politics, and in the reciprocal relationships established between those inhabitants and their elected officials, gives rise to a political community of interest entitled to recognition.[39]

For much of American history the activities of state legislatures conformed largely to this model. During the colonial period, the matters that individual legislators brought to state legislature were "basically the business of their fellow townsmen," and the legislative

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36. This argument is worked out in greater detail in Gardner, *Representation without Party*, *supra* note 22, at 939.

37. Jackman v. Bodine, 205 A.2d 713, 718 (N.J. 1964).

38. On the role of counties in state government, see, for example, *In re* Legislative Districting of the State, 805 A.2d 292, 319 (Md. 2002), and Stephenson v. Bartlett, 562 S.E.2d 377, 385-86 (N.C. 2002).

39. *See, e.g.*, *Stephenson*, 562 S.E.2d at 386; Wilkins v. West, 571 S.E.2d 100, 110 (Va. 2002); *In re* Reapportionment of Towns of Hartland, Windsor and W. Windsor, 624 A.2d 323, 330 (Vt. 1993).

agenda was set essentially by petitions from towns and individuals.[40] This changed surprisingly little over the course of the nineteenth century. During much of that period, state legislatures "spent most of their time responding to highly specialized demands like divorces or the settlement of local disputes and land titles."[41] In mid-nineteenth-century Maryland, for example, no more than ten percent of state legislation took up matters affecting the entire polity, whereas more than half of state laws affected only specific local communities and groups, and one-third provided some kind of benefit to specific individuals.[42] Legislative politics was thus conceived primarily as an arena for satisfying demands made by communities and individuals, not as one for taking up universally applicable programmatic initiatives, much less for adjudicating among competing conceptions of collective life or governance.

The point of all this is to suggest that until at least the early twentieth century American political institutions and prevailing theories of politics suited each other rather well, reflecting a largely republican set of political beliefs implemented by largely compatible institutions. In this environment, where representatives were understood to represent territorially-defined interests, most problems with representation could therefore be solved by territorial partitioning of the electorate. For example, one of the most common complaints about inadequate representation during the nineteenth century arose from westward migration: the appearance of newly settled communities gave rise to demands for formal legal recognition and the legislative representation that came with it.[43] Legislative carving of a new town or county from previously recognized territorial communities thus provided a complete and appropriate solution to the problem: newly-formed communities entitled to legislative representation achieved the recognition they were due, and the new town or county could then become a player in the competitive processes of obtaining central legislative favors and gaining access to centrally controlled resources.

By the late nineteenth and early twentieth centuries, however, the ground began to shift. First, traditionally republican conceptions of

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40. MICHAEL ZUCKERMAN, PEACEABLE KINGDOMS: NEW ENGLAND TOWNS IN THE EIGHTEENTH CENTURY 35 (1970).

41. CHARLES A. KROMKOWSKI, RECREATING THE AMERICAN REPUBLIC: RULES OF APPORTIONMENT, CONSTITUTIONAL CHANGE, AND AMERICAN POLITICAL DEVELOPMENT, 1700–1870 (2002), at 363. For similar data, see J. MILLS THORNTON III, POLITICS AND POWER IN A SLAVE SOCIETY ALABAMA, 1800–1860 (1978), at 85-86, and Gerald Gamm & Thad Kousser, *Broad Bills or Particularistic Policy? Historical Patterns in American State Legislatures*, 104 AM. POL. SCI. REV. 151 (2010).

42. *See* JEAN H. BAKER, AMBIVALENT AMERICANS: THE KNOW-NOTHING PARTY IN MARYLAND 94 (1977).

43. *See* Gardner, *Representation without Party*, *supra* note 22, at 892.

politics began to be displaced by increasingly influential utilitarian theories.[44] Unlike traditional republicanism, which presupposed organic and enduring linkages between place, community, and interest, utilitarianism argued that interests were both individual and highly contingent, and therefore unpredictable.[45] What pleased a person was a matter of personal taste, and a person's taste was a priori no more likely to be satisfied by one thing than by another.[46] Place and community were thus knocked off their pedestal and demoted to a level of equality with all other potential consumption values. In politics, this meant that the political cleavages that individuals found most salient could just as easily revolve around occupation, social class, ideology, clan, or any of a host of other factors, as around the traditional center of gravity of local community.

By the mid-twentieth century, political scientists had appropriated this new understanding by constructing influential and distinctly anti-republican models of political pluralism.[47] These models rejected a conception of citizenship as revolving around the pursuit of republican virtue and replaced it with one stressing the pursuit of self-interest.[48] By the same token, they also rejected a static conception of politics as jostling among fixed communities in favor of a conception of politics as a fluid, constantly evolving competition among shifting groups organized around contingently salient interests of the moment.[49]

The rise of Progressivism during the late nineteenth and early twentieth centuries launched a second kind of attack on traditional republican institutions. Progressives argued that corruption in politics was pervasive; that the rich and powerful unduly dominated, for their own benefit, the inherited institutions of politics; and that citi-

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44. For a concrete example of the direct influence of John Stuart Mill's writings on the members of a late-nineteenth-century state constitutional convention, see Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992).

45. *See, e.g.*, JEREMY BENTHAM, THE PRINCIPLES OF MORALS AND LEGISLATION 1-7 (Prometheus Books 1988) (1781); John Stuart Mill, *Utilitarianism*, *in* JOHN STUART MILL ON LIBERTY AND OTHER ESSAYS 136 (John Gay ed., Oxford Univ. Press 1991) (1861).

46. In Bentham's famous formulation, the only distinction between "push-pin . . . and poetry" is the pleasure people happen to derive from them. JEREMY BENTHAM, THE RATIONALE OF REWARD 206 (John & H.L. Hunt 1917) (1825). *Accord* BENTHAM, *supra* note 45, at 43-45.

47. *See* ARTHUR F. BENTLEY, THE PROCESS OF GOVERNMENT: A STUDY OF SOCIAL PRESSURES (The Principia Press, Inc. 1935); ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956); ROBERT A. DAHL, WHO GOVERNS?: DEMOCRACY AND POWER IN AN AMERICAN CITY [hereinafter WHO GOVERNS?] (1975); DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION (1951).

48. This movement reached its apotheosis in ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957).

49. Dahl's detailed account of "minorities rule" in municipal self-governance probably makes this point as vividly as it has ever been made. DAHL, WHO GOVERNS?, *supra* note 47.

zens, though retaining in theory the capacity to control existing institutions of government for the public good, had permitted themselves to be distracted by objectively irrelevant distinctions of family, neighborhood, and ethnicity.[50] Progressives consequently mounted a sustained attack on the inherited institutional structure, seeking to replace existing institutions with others they believed more conducive to popular pursuit of rational self-governance in the public interest.[51] This movement was in many respects extremely successful. Progressives won widespread adoption of measures designed to make voting more rational, such as the secret ballot and the short ballot; to enhance popular control of government, such as primary elections, initiatives, referenda, recall, direct election of U.S. Senators, and female suffrage; and to reduce the role of partisanship in governance, such as the city manager and commission forms of local government, nonpartisanship, and at-large elections.[52] With the exception of direct election of Senators and the extension of the vote to women, however, all the significant institutional reforms occurred at the state and local levels; the institutions of democratic politics at the national level remained firmly in place.

Lastly, by the mid-twentieth century, popular tolerance for racial exclusions from democratic life waned substantially in most of the country. The civil rights movement focused much of its effort on breaking down racial barriers to voter registration and balloting, achieving a modest initial success in the federal Civil Rights Act of 1957, followed by what would turn out to be a transformational victory in the federal Voting Rights Act of 1965 (VRA).[53]

All these developments—the eclipse of republicanism, the Progressive reform movement, and the evolution of attitudes concerning race—created serious tensions in the political environment. Existing institutions of democratic politics came increasingly to be seen as out of step with, and inhospitable to, prevailing beliefs about democracy and democratic practice. It was into this frothing cauldron that the Supreme Court finally inserted itself.

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50. *See* RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R. (1955); WILLIAM ALLEN WHITE, THE OLD ORDER CHANGETH A VIEW OF AMERICAN DEMOCRACY (1910); John D. Buenker, *Sovereign Individuals and Organic Networks: Political Cultures in Conflict During the Progressive Era*, 40 AM. Q. 187, 188 (1988).

51. HERBERT CROLY, THE PROMISE OF AMERICAN LIFE 315-50 (1909); Buenker, *supra* note 50, at 188.

52. *See generally* RICHARD S. CHILDS, CIVIC VICTORIES: THE STORY OF AN UNFINISHED REVOLUTION (1952); BENJAMIN PARKE DE WITT, THE PROGRESSIVE MOVEMENT (Richard T. Ely ed., Macmillan 1915); HOFSTADTER, *supra* note 50.

53. *See* TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954-63 (1988); GARY MAY, BENDING TOWARD JUSTICE: *THE* VOTING RIGHTS ACT *AND THE* TRANSFORMATION *OF* AMERICAN DEMOCRACY (2013).

III. THE SUPREME COURT ENTERS THE FIELD

For a long time, the Supreme Court did not concern itself with questions involving the structure or regulation of political practices. For much of American history, opportunities for federal judicial intervention simply did not arise. Throughout the nineteenth century, much of political life was left to private self-regulation. Political parties formed freely, selected candidates by processes of their own choosing, printed their own ballots, and ran campaigns free from governmental oversight.[54] Such election law as existed was almost entirely at the state level, making it a matter for state courts, not federal ones.[55] Indeed, the U.S. Constitution expressly grants to states the authority to regulate federal congressional and presidential elections.[56]

The Supreme Court, moreover, had long taken the position that democratic processes generally, and questions of political representation in particular, were not the business of the federal courts. In a pivotal 1946 ruling, a plurality of the Court ruled malapportionment a nonjusticiable political question, warned against judicial entry into a "political thicket," and decreed that the only remedy for defects in political representation lay in voluntary legislative action to correct it.[57] The entire panoply of Progressive reforms was implemented, after all, not by judicial intervention, but by legislative action taken in the wake of a highly successful process of political mobilization.

Eventually, however, profound shifts in the social and political environment produced tensions that became too much for the Court to bear, and its resolve to stay out of democratic processes crumbled. As I shall describe shortly, this occurred first in a limited way in *Gomillion v. Lightfoot* (1960),[58] and then more broadly in *Baker v. Carr* (1962),[59] until by the time it decided *Buckley v. Valeo* (1976),[60] the Court was not only heavily involved, but routinely altering the political landscape. This pattern has only continued with decisions such as *Bush v. Gore* (2000),[61] *Citizens United v. FEC* (2010),[62] and,

54. *See* RICHARD FRANKLIN BENSEL, THE AMERICAN BALLOT BOX IN THE MID-NINETEENTH CENTURY (2004); Peter H. Argersinger, *"A Place on the Ballot": Fusion Politics and Antifusion Laws*, 85 AM. HIST. REV. 287 (1980).

55. This is still the case today: there is very little election law at the federal level while comprehensive election codes exist in every state. *See* JAMES A. GARDNER & GUY-URIEL CHARLES, ELECTION LAW IN THE AMERICAN POLITICAL SYSTEM 90 (2012).

56. *See* U.S. CONST. art. I, § 4; *id.* art. II, § 1.

57. Colegrove v. Green, 328 U.S. 549, 556 (1946).

58. 364 U.S. 339 (1960).

59. 369 U.S. 186 (1962).

60. 424 U.S. 1 (1976) (per curiam).

61. 531 U.S. 98 (2000).

62. 558 U.S. 310, 352 (2010).

most recently, *Shelby County v. Holder* (2013)[63] and *McCutcheon v. FEC* (2014).[64]

The Court's first significant ruling of the modern era in the field of democratic process was *Gomillion v. Lightfoot* (1960),[65] a case that followed closely on the heels, both in time and in subject matter, of perhaps its most important ruling of the twentieth century, *Brown v. Board of Education* (1954),[66] in which the Court ordered an end to racial segregation in public schools. *Gomillion* concerned a law, enacted by the Alabama Legislature at the request of the City of Tuskegee, that altered the boundaries of the city from a perfect square to a meandering 28-sided polygon. After this boundary change, every white resident of Tuskegee still lived within the city, while virtually all of its black residents found themselves outside it.[67] In a gnostic opinion that laid out more clearly the justices' horror at this racial gerrymander than their legal reasoning, the Court invalidated the law as an infringement of the right to vote on the basis of race in contravention of the Fifteenth Amendment to the U.S. Constitution.[68]

That *Gomillion* got things started turns out to have been unfortunate in a way; although the case established a template for adjudication that the Court has followed ever since, it is a template that turns out not to be very useful outside the arena of naked racial discrimination. One way in which *Gomillion* got things off to a poor start is that it involves political exclusion in the most literal sense—through the drawing of boundaries to partition, and by partitioning to exclude one portion of, the electorate. Although the case might have been framed as raising questions about the practice of partitioning itself, it was framed instead in a way that assumed the legitimacy of partitioning but treated this particular partition as illicit. As a result, the Court was immediately cast in the role of policing the practice of partitioning the electorate, rather than examining the practice itself on its merits, or inquiring into alternative ways to structure democratic representation that might more directly address the problems of racial exclusion from democratic life.

This was especially unfortunate because the racial gerrymandering undertaken in *Gomillion* represented an extremely unusual form of racial exclusion from democratic participation. Most forms of race-based political exclusion in the United States have not involved the creation of formal geographical boundaries; they have involved in-

63. 133 S. Ct. 2612 (2013).

64. 134 S. Ct. 1434 (2014).

65. *See* Gomillion v. Lightfoot, 364 U.S. 339 (1960).

66. 347 U.S. 483 (1954).

67. *See Gomillion*, 364 U.S. at 340-41.

68. *See id.* at 345.

stead the application of law, force, and social pressure to exclude members of an existing community from participating in that community's own democratic practices.[69] They create, in other words, *interior* boundaries within a society, not reified, external boundaries formally fencing out the disfavored populations.

Second, the gerrymander in *Gomillion* was undertaken only when more common forms of racial exclusion and suppression had been deemed unpromising. Tuskegee had been since 1881 the home of the Tuskegee Institute (now Tuskegee University), which by the 1950s was an unusually successful, well-regarded, and well-funded black college.[70] During that era, the typical method of first resort in the American South to exclude blacks from participation in a community's political life was the literacy test.[71] Testing literacy, however, did not recommend itself as a way to exclude black voters associated with the Tuskegee Institute, many of whom held a Ph.D., and were generally far better educated than the city's white population.[72] The redrawing of the town's borders to move the Institute and its faculty, staff, and students outside the town was thus an atypical measure of some desperation. Additionally, unlike most other forms of political and social exclusion of blacks, the boundary drawing was not only readily observable, but susceptible essentially to *res ipsa loquitur* proof of racial animus—no other plausible explanation could account for it.[73]

Finally, the pattern established in *Gomillion* included deployment of an individual right to solve a problem of democratic practice. The Fifteenth Amendment was available, ready-at-hand, had previously been used by the Court in a few earlier cases,[74] and seemed tailor-made for the kind of problem presented by the Tuskegee racial gerrymander. As a result, the Court gave no thought—and in fairness really did not need to give any thought—to larger, more systemic

69. For innumerable examples, see BRANCH, *supra* note 53, and MAY, *supra* note 53.

70. For a brief history, see 3 ENCYCLOPEDIA OF AFRICAN AMERICAN HISTORY 1067-68 (Leslie Alexander & Walter C. Rucker eds., 2010).

71. *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 142, 144 (2000); MAY, *supra* note 53, at xi-xii.

72. *See* BERNARD TAPER, GOMILLION VERSUS LIGHTFOOT: THE TUSKEGEE GERRYMANDER CASE 14, 62 (1962).

73. *See* Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960) ("If these allegations upon a trial remained uncontradicted or unqualified, the conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote.").

74. These include the "grandfather clause" cases and the "white primary" cases. *See* Lane v. Wilson, 307 U.S. 268 (1939); Guinn v. United States, 238 U.S. 347 (1915); *see also* Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944).

questions concerning appropriate patterns of representation and democratic political life.

Despite the very unusual circumstances of *Gomillion*, the pattern pioneered there was soon applied outside the setting of racial discrimination in a case that went a long way toward cementing it.[75] In *Baker v. Carr* (1962),[76] decided just two years after *Gomillion*, the Court took up the problem of legislative malapportionment, in which legislative election districts contain grossly disparate numbers of voters. In a decision that changed the course of American democracy, the Court reversed its earlier position and held that district population disparities present a justiciable question of constitutional law under the Equal Protection Clause.[77]

Garden-variety malapportionment does not present problems of either race or exclusion. Everyone in a malapportioned district is entitled to vote and to participate fully in politics, and may do so on an equal footing with everyone else in the district.[78] If malapportionment harms processes of political representation, it does so by operation of some defect other than outright exclusion. Upon taking up this problem for the first time, the Court could have dealt with it by deriving or advancing a constitutionally grounded theory of representation. It might have held, for instance, that malapportionment violates some aspect of the way popular sovereignty is meant to work. It could have taken the position, on a kind of pluralist or agency view, that malapportionment erects a barrier to some contemplated degree of government responsiveness to public opinion. Or it might even have invoked a more traditional, republican theory of disenfranchisement of *communities*, understood as territorially defined populations or as territorially defined interests of groups of co-residents.

Instead, the Court approached the problem of malapportionment using the *Gomillion* model. It reached for the most readily available tool—an individual right, the Equal Protection Clause[79]—thereby forcing the case into the mold of an intervention designed to thwart discrimination. But who was discriminating against whom? In the Court's view, elaborated in later cases, the discrimination effectuated by malapportionment was discrimination in favor of sparsely populated rural areas at the expense of densely populated urban ones.[80]

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75. In this sense, the phenomenon I am describing may be conceived as a kind of path-dependence. *See, e.g.*, Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251, 251 (2000).

76. 369 U.S. 186 (1962).

77. *Id.* at 226-37.

78. *See id.* at 335 (Harlan, J., dissenting); Gerken, *supra* note 4, at 506-07.

79. *See Baker*, 369 U.S. at 226, 232, 237.

80. *See* Reynolds v. Sims, 377 U.S. 533, 568 (1964) ("A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm."). Although the Court never

As in *Gomillion*, the Court again cast itself not as inquiring into the propriety of partitioning of the electorate as a way of organizing political representation, but as policing the practice of partitioning, the legitimacy of which was assumed, and the basis of which was not examined.

Two years later, in the seminal case of *Reynolds v. Sims* (1964),[81] the Court used the new, individual rights lever it identified in *Baker* to effectuate perhaps the most sweeping change in American democratic practice since adoption of the Reconstruction Amendments following the conclusion of the Civil War. In *Reynolds*, the Court for the first time applied the equal protection remedy identified in *Baker* to the apportionment of state legislatures.[82] In a far-reaching decision, the Court held that population disparities among legislative districts violated the right to vote of individuals in overpopulated districts, and that a constitutionally mandated rule of one person, one vote applied to both houses of bicameral state legislatures.[83]

The impact of this decision cannot be overstated. At a stroke, it placed a core feature of a historically decentralized system of representation under central control and destroyed the long-standing structural framework instituting political representation on the basis of place and local community. After *Reynolds*, institutions formerly aimed at achieving representation of communities—of inhabited places—were required to be based instead on shifting, equipopulous groupings of placeless individuals.[84] The Court thus discarded the theory of representation that had long prevailed in the states, not only invalidating it, but deeming it incompatible with what the Court now announced to be constitutionally-grounded notions of equal citizenship.[85]

Although *Reynolds* precipitated wide-ranging and doubtless beneficial changes in the balance of political power across the nation,[86] it established a poor pattern for judicial involvement in the realm of democratic practice.[87] First, the Court did not advance any affirmative theory of political representation; its only theory was negative in

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said so directly in any of its major malapportionment decisions, the idea of discrimination by rural against urban areas of course has an implicitly racial valence, bringing it squarely within the Court's emerging comfort zone.

81. 377 U.S. 533 (1964).

82. *Id.* at 557.

83. *See id.* at 568-72.

84. *See* Gardner, *One Person, One Vote*, *supra* note 22, at 1238.

85. *Reynolds*, 377 U.S. at 561-69.

86. *See* STEPHEN ANSOLABEHERE & JAMES M. SNYDER JR., THE END OF INEQUALITY: ONE PERSON, ONE VOTE AND THE TRANSFORMATION OF AMERICAN POLITICS (2009).

87. *See* Luis Fuentes-Rohwer, *Reconsidering the Law of Democracy: Of Political Questions, Prudence, and the Judicial Role*, 47 WM. & MARY L. REV. 1899, 1945-46 (2006).

the sense that certain practices—in fact, the old, prevailing practices—were invalid. Second, the Court's establishment of equal protection as the tool of choice outside the racial context, without a theory of democratic practice and participation to guide its application, was especially problematic. Equal protection outcomes tend to be parasitic on underlying substantive values.[88] One cannot know whether a person is being treated unequally in any way that counts without first knowing whether that person has a substantive entitlement to the thing he or she has been denied in equal measure, and whether a person has such an entitlement is a question not of equality, but of desert.[89] By applying equal protection to democratic practices without first specifying the underlying substantive values that are implicated by democratic participation, the Court thus founded its democratic jurisprudence on shifting and unstable ground.

In particular, as Justice Harlan pointed out in dissent, the Court specified neither how much influence citizens *should* have in a democracy, nor even the outer parameters of what such influence might reasonably be, nor yet any framework within which to think about these questions.[90] As a result, equal protection outcomes in democracy cases are consistent with a wide array of outcomes that cannot be narrowed except by invoking some antecedent theory of democracy or democratic authority.[91] Unfortunately, the Court failed to specify what that theory is—it did not indicate, in other words, the proper baseline of comparison for deciding whether democratic influence has been improperly and unequally withheld.[92] This lacuna has ever since confounded the coherence and utility of constitutional oversight of the political process, and raised many problems that still plague the jurisprudence.

The next two sections focus on two of the most notable problems arising from the template for judicial intervention developed by the Supreme Court in these early cases: its reflexive resort to partitioning of the electorate as a remedy for perceived democratic wrongs or imperfections; and its unthinking deployment of an individual rights model.

IV. PERFECTIBILITY THROUGH PARTITIONING

In cases involving democratic practice in which groups have been excluded or mistreated, the Supreme Court has from the beginning of

88. *See* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

89. *See id.* at 546-47.

90. *See* Reynolds v. Sims, 377 U.S. 553, 620-25 (1964) (Harlan, J., dissenting).

91. *See* CHARLES R. BEITZ, POLITICAL EQUALITY: AN ESSAY IN DEMOCRATIC THEORY 148-49 (1989).

92. *See* Gerken, *supra* note 4, at 507.

its modern jurisprudence displayed a distinct preference for solutions that rely on partitioning the jurisdiction over those that rely on enhancing participation and engagement within the jurisdiction. That is, where members of some group complain that their desire to become full participants in the political life of their community has been thwarted by some officially created obstacle, the Court has preferred not to dwell on ways in which the complaining group might be more fully integrated into existing democratic structures and practices. Instead, it has tended to solve these problems by partitioning the jurisdiction in such a way as to make the complaining minority into a local majority.

An early, important, and in many ways typical example of this approach is *White v. Regester* (1973).[93] In *Regester*, black and Chicano populations of two large, metropolitan counties in Texas complained that they had been unconstitutionally excluded from effective participation in the congressional politics of their jurisdictions.[94] The claim involved many moving parts. The plaintiffs complained that they had been victims of a long history of official discrimination in political affairs; that local party processes of choosing candidates were controlled by whites who did not pay sufficient attention to minority communities; that racially divisive campaign tactics had been deployed routinely in white areas; and that, in the case of the Mexican-American plaintiffs, cultural and language barriers and restrictive voter registration practices significantly impeded their political effectiveness.[95] In light of these background conditions, the plaintiffs focused their objections on a specific institutional choice made by the state: its decision to use in these counties large, multimember congressional districts and a place system, in which all candidates ran at-large for specific seats.[96] Ultimately, the plaintiffs argued, the combination of underlying discrimination and the specific institutional choice created conditions in which it was virtually impossible for members of these groups to participate effectively in local congressional politics.[97]

The Court understood these claims perfectly, casting them as challenges to effective participation in democratic processes:

> The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question–that its members had less opportunity than did other residents in

93. 412 U.S. 755 (1973).

94. *Id.* at 767, 769.

95. *Id.* at 766-69.

96. *Id.*

97. *Id.* at 765, 769.

> the district to participate in the political processes and to elect legislators of their choice.[98]

Relying on an examination of "the totality of the circumstances,"[99] the Court held that the plaintiffs had met their evidentiary burden, showing that they had been "effectively excluded" and were "generally not permitted to enter into the political process in a reliable and meaningful manner."[100]

When it came to the remedy, however, the Court made a bizarre leap of logic. If the constitutional problem consisted of barriers to *participation*, then we might expect the remedy to focus on how to lower those barriers and integrate the plaintiff groups effectively into the mainstream of political life in those jurisdictions. Instead, the Court ordered the multimember districts broken up into single-member districts in at least one of which the complaining minority groups would, presumably, become local majorities.[101] Somehow, the Court suggested, this partitioning of aggrieved minority groups into smaller districts that they could independently control would "bring the community into the full stream of political life of the county and State."[102] Yet partitioning is the antithesis of overcoming exclusion from participation; it is in fact a different, and in some ways a more extreme, form of exclusion: it takes the complaining group out of the offending jurisdiction and creates a new one in which the group in question no longer has to worry about—much less to engage and work with—the larger group that had previously excluded it.[103] Certainly, the Court gave no thought to the fact that partitioning the electorate creates new minorities within the newly formed majority-minority districts, or whether the harm of exclusion from participation might now be shifted to such other groups.[104]

Since *Regester*, the solution of partitioning has been applied routinely in many contexts. Where at-large systems have been used for discriminatory purposes, division of the multimember jurisdiction into equipopulous districts has long been the Court's remedy of choice

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98. *Id.* at 766.

99. *Id.* at 769.

100. *Id.* at 767.

101. *See id.* at 769.

102. *Id.*

103. *See* Kathryn Abrams, *"Raising Politics Up": Minority Political Participation and Section 2 of the Voting Rights Act*, 63 N.Y.U. L. REV. 449 (1988). *But see* LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 82 (1994) (arguing that inclusion alone may be futile if it leads to token representation and consistent outvoting, and arguing for alternation in power as an alternative to partitioning).

104. Aleinikoff and Issacharoff call these groups "filler people." T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Lines after* Shaw v. Reno, 92 MICH. L. REV. 588 (1993). For a well-known example, see United Jewish Orgs. of Williamsburg, Inc. v. Carey, 430 U.S. 144 (1977).

in constitutional cases.[105] It is also the Court's remedy of choice in cases arising under the Voting Rights Act of 1965 (VRA). The VRA, perhaps the most significant American civil rights legislation ever enacted, implements the Fifteenth Amendment's prohibition of racial discrimination in voting. Section 2(b) of the Act, using language lifted directly from the Supreme Court's opinion in *White v. Regester*, provides:

> A violation . . . of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by [this statute] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.[106]

The statute thus defines an offense in terms of harm to "participation . . . in the political process."[107] Yet in *Thornburg v. Gingles* (1986),[108] its leading decision on the treatment under the VRA of multimember districts, the Supreme Court ruled that the preferred remedy for denials of participation is not removal of barriers to participation within such districts, but the destruction of multimember districts by partitioning the electorate into single-member districts such that the protected minority is awarded control of one or more of the new districts.

The Court's habitual resort to partitioning might be perfectly coherent were it led to this remedy by some theory of representation or of democratic process. In fact, however, it has no such theory, and this has produced some significant, persistent problems in the jurisprudence. First, the Court's lack of an underlying theory leaves unanswered a host of important questions. For example, the act of partitioning the electorate into subgroups necessarily involves decisions about who will have the ability to control an election district, and consequently about who will obtain effective representation in the legislature. Yet without a theory of representation we cannot know who or what is properly represented in a legislature, and thus cannot

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105. *See* Chapman v. Meier, 420 U.S. 1, 17-19 (1975); Mahan v. Howell, 410 U.S. 315, 333 (1973); Connor v. Williams, 404 U.S. 549, 551 (1972); Connor v. Johnson, 402 U.S. 690, 692 (1971).

106. *Id.*

107. *Id.* A Senate Report accompanying the legislation listed numerous factors that might help establish the requisite harm to political participation, including a history of official discrimination in voting; the existence in the jurisdiction of racially polarized voting; the use of electoral procedures that enhance the opportunity for discrimination; denial of access to candidate slating processes; depressed political participation on account of past discrimination in education or employment; racial appeals during campaigns; and the lack of election of minorities to office in the jurisdiction. *See* Thornburg v. Gingles, 478 U.S. 30, 44-45 (1986).

108. 478 U.S. at 50.

make principled decisions about which ways of subdividing the electorate are appropriate and which are not.[109]

An example of how these kinds of problems can arise is afforded by *Kramer v. Union Free School District No. 15* (1969).[110] That case concerned the validity of a New York law that limited eligibility to vote in school board elections to parents of school-age children and those who owned or rented taxable property in the district.[111] The purpose of the law clearly was to confine the school board electorate to those who had some direct or indirect stake in its activities—parents had an interest in the education of their children, and owners and renters of taxable property had an interest in the activities of the school board because it levied school taxes within the district.[112] The plaintiff, who lived rent-free in his parents' house and was thus ineligible under the statute to vote, claimed his right to vote had been infringed.[113] The Court agreed,[114] but the basis and significance of its ruling is unclear. It did not offer any theory (or if "theory" is too fancy a term, any "account") of who might be entitled to representation on an elected legislative body, and on what basis. Nor did it suggest that universal suffrage is a constitutional default rule. Instead, the Court "express[ed] no opinion"[115] as to whether the state might legitimately restrict the franchise to those who are most directly interested in or affected by governmental actions, but struck down the statute on the ground that it did not advance with sufficient precision the state's asserted justifications, whether or not they were constitutionally valid.[116] The ruling thus clarifies nothing.

Another example is the eye-opening result in *Holt Civic Club v. City of Tuscaloosa* (1978).[117] Under Alabama law, cities were permitted to extend the reach of their laws beyond municipal boundaries to unincorporated areas located up to three miles outside city limits.[118] Tuscaloosa exercised this option to extend many of its ordinances and regulations to the nearby town of Holt.[119] Under the statute, however, Tuscaloosa was not obliged to offer the residents of Holt an opportunity to vote for Tuscaloosa's city council or mayor.[120] As a result,

109. REHFELD, *supra* note 30, at 199.
110. *See* 395 U.S. 621 (1969).
111. *Id.* at 622.
112. *Id.* at 631.
113. *Id.* at 624-25.
114. *Id.* at 633.
115. *Id.* at 632.
116. *See id.* at 632-33.
117. *See* 439 U.S. 60 (1978).
118. *Id.* at 62.
119. *Id.* at 61-62.
120. *Id.* at 62-63.

Holt residents were subject to laws in the making of which they had no voice—a kind of virtual representation soundly repudiated by the American Revolution.[121] The Court nevertheless upheld this governance arrangement on the ground that Holt residents did not live in Tuscaloosa,[122] once again failing to buttress its ruling with any account of who is entitled to representation on legislative bodies, and in what circumstances. One might well ask, for example, why residents of Holt, Alabama, were not entitled to representation on a city council that made laws directly binding on them while Mr. Kramer was entitled to representation on a local school board that made laws directly governing the behavior only of others. It may not be necessary for a constitution to provide detailed answers to every question about representation that might arise, but to the extent there is slack in the system, it seems important to know the range of discretion invested in legislatures to define the basis of their own representation.[123]

A second problem arising from the Court's habitual resort to partitioning despite its lack of a theory of democratic practice or representation is what might be called "partitioning anxiety." Without any underlying theory of democratically legitimate representation, partitioning is essentially unguided, and the only way corrections to existing arrangements can be made is ad hoc, based on distaste for particular representation schemes. This has led to occasional judicial anxiety about the impact of partitioning.

A clear example of this is the Court's decisions in a line of cases beginning with *Shaw v. Reno* (1993).[124] As explained above, the VRA, as construed by the Court, in some circumstances requires states to partition the electorate so as to give blacks and other protected populations a substantial degree of control over an appropriate number of election districts.[125] States got the message, and proceeded to comply.[126] Having set this pattern in motion, however, the Court soon began to exhibit a case of severe anxiety.

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121. *See, e.g.*, BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (Harvard Univ. Press 4th ed.1967).

122. *Holt Civic Club*, 439 U.S. at 70.

123. *See* James A. Gardner, *How to Do Things with Boundaries: Redistricting and the Construction of Politics*, 11 ELECTION L.J. 399, 417-18 (2012) (arguing that constitutionalized norms of democracy can be adequately regulated by defining a range of permissible choices, requiring jurisdictions to make explicit choices about institutional arrangements, and then exercising judicial enforcement by requiring those jurisdictions to act consistently with their publicly declared commitments).

124. 509 U.S. 630, 633-34 (1993). *See also* Hunt v. Cromartie, 526 U.S. 541 (1999); Abrams v. Johnson, 521 U.S. 74 (1997); Lawyer v. Dep't of Justice, 521 U.S. 567 (1997); Bush v. Vera, 517 U.S. 952 (1996); Shaw v. Hunt, 517 U.S. 899 (1996); Miller v. Johnson, 515 U.S. 900 (1995).

125. *See* Thornburg v. Gingles, 478 U.S. 30 (1986).

126. *See, e.g.,* QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965-1990 (Chandler Davidson & Bernard Grofman, eds. 1994).

Shaw v. Reno concerned the constitutionality of a tortuous district drawn by North Carolina for the purpose of sweeping up black populations in different parts of the state in sufficient numbers to give them political control of a congressional district.[127] The state drew the district for no purpose other than to comply with the VRA.[128] Yet the Court found the shape of the district too "bizarre,"[129] and the state's reliance on race as the operative criterion for partitioning voters too single-minded, causing it to invalidate the district as racially discriminatory under the Equal Protection Clause.[130] In so doing, the Court placed states in the impossible position of attempting to walk a fine line, the location of which remained obscure: on one hand, a state violated the VRA if it did not try hard enough to provide racial minorities with districts they could control; on the other, a state violated the Equal Protection Clause if it tried too hard.[131]

All this is a direct and predictable consequence of the Court's insistence that the electorate be partitioned coupled with its refusal to supply any guidance as to what kind of representation a partitioned electorate ought to enjoy. Having demanded the creation of majority-minority districts, the Court balked at the implications of its own requirement, and its instruction to states amounted more or less to the following directive: partition, but not like this. The only thing the Court has done since then to make things easier for states engaged in redistricting is its recent invalidation of a significant provision of the VRA in *Shelby County v. Holder* (2013).[132] Following that ruling, states need be much less fearful of liability under the VRA, leaving them to fear realistically only liability under the Equal Protection Clause, a more difficult kind of case for plaintiffs to prove up.[133] Nevertheless, the ruling does nothing to clarify how states ought to draw election districts.

But perhaps the most serious problem arising from the Court's heavy reliance on partitioning to solve problems of democratic pro-

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127. *Shaw*, 509 U.S. at 633.

128. *Id.* at 634.

129. *Id.* at 644, 655-56.

130. *See id.* at 642-45.

131. *See, e.g.*, Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505, 2510-11 (1997) (describing the Court's decisions as forcing states to walk a line between permissible affirmative action and impermissible racial discrimination).

132. *See* 133 S. Ct. 2612, 2631 (2013).

133. Proof of a violation of the Equal Protection Clause requires proof of intentional discrimination, Washington v. Davis, 426 U.S. 229 (1976), whereas proof of a violation of the VRA requires at most, in a section 2 case, a showing of disparate impact, without regard to intent. Thornburg v. Gingles, 478 U.S. 30, 74 (1986). Under Section 5, prior to *Shelby County*, changes by a covered state to its electoral laws were presumed discriminatory until proven by the state to be racially benign or neutral. *See* Georgia v. Ashcroft, 539 U.S. 461 (2003).

cess is that it leads political actors to focus not on the fairness or content of political processes within a district, but on acquisition of tactical control over the boundaries of districts.[134] In the world the Court has helped to create, democracy is constructed not only by processes of voice and mutual engagement within a jurisdiction, but also by manipulating who is in and who is out of that jurisdiction. The route to success in politics thus often lies less in offering a set of normative commitments attractive enough to appeal to voters than in sending one's opponents into exile by partitioning them out of the territory.

This problem plagues American democracy. It manifests itself most often in persistently contentious processes of redistricting in which political actors contest for power unguided by transparent and binding legal principles.[135] Lacking constitutionally grounded standards they are required to respect, redistricting authorities typically fall back on coarse imperatives of power and partisanship. Redistricting thus is treated not as an occasion to bring democratic practice into conformity with democratic ideals—which remain unspecified—but as an opportunity to cement temporary partisan advantage into place for the next ten years until a new census is taken and the process repeats itself.

V. AVAILABILITY: THE UNGUIDED DEPLOYMENT OF GENERIC INDIVIDUAL RIGHTS

As explained above, the Court's reluctance to develop a constitutionally-grounded account of the norms that structure and guide American democratic processes created a vacuum at the heart of its jurisprudence of democratic practice, a vacuum that, inevitably, had to be filled with something. The previous section demonstrated how the Court filled this vacuum in part by falling back on habitual forms of problem-solving by reflexively deploying partitioning of the electorate as the standard treatment for a host of democratic ills. This part describes another way in which the Court filled the vacuum left by its refusal to specify a constitutional theory of democratic practice: by reaching for the handiest and most readily available tool— though not necessarily the most appropriate one—to resolve constitutional challenges to the democratic legal order. That tool was individual rights.[136]

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134. The title of a recent book by a prominent political scientist says it all. *See* CHARLES S. BULLOCK III, REDISTRICTING: THE MOST POLITICAL ACTIVITY IN AMERICA (2010).

135. States and even electorates (in initiative states) have tried to shape the process by providing some limited forms of normative guidance, but without much success. *See* Gardner, *Representation without Party*, *supra* note 22, at 894-98.

136. On the disadvantages of a rights-based approach compared to one based on constitutional structure in cases addressing the constitutionality of democratic practice and process, see Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of*

A. The Reign of Equal Protection

For about two decades, the Court's main tool for resolving disputes over democratic practices and processes was the Equal Protection Clause. Following *Baker v. Carr* and subsequent one person, one vote cases, the Court routinely turned to equal protection in dozens of cases involving challenges to franchise restrictions,[137] malapportionment,[138] restrictions on ballot access,[139] regulation of political parties,[140] and many other issues. Yet outside of cases involving obvious racial discrimination, the Equal Protection Clause was not well suited to carry the burden of the Court's reliance.

The Equal Protection Clause is clearly useful in cases challenging official racial discrimination in democratic processes because redressing racial discrimination is what the Clause was principally designed to achieve. Moreover, the fact that principles of equality are generally parasitic on underlying substantive norms—their application, in other words, depends upon the existence of an independently supplied normative baseline[141]—does not pose a problem in cases of racial discrimination for the obvious reason that the Constitution itself clearly and emphatically establishes such a normative baseline: purposeful racial discrimination is not to be tolerated in any official endeavor.[142]

The Equal Protection Clause, however, is much less useful for resolving problems of democracy that do not present claims of racial discrimination. Its limited suitability to resolving such claims is perhaps most clearly revealed by the awkward gyrations the Court was forced to undergo simply to find the Clause applicable to the most basic controversies involving voting. In these cases, what the Court wanted was a constitutional right to vote. On its face, this presented

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the Democratic Process, 50 STAN. L. REV. 643, 645 (1998); Daniel R. Ortiz, *From Rights to Arrangements*, 32 LOY. L.A. L. REV. 1217 (1999); Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from* Shaw v. Reno *to* Bush v. Gore, 79 N.C. L. REV. 1345 (2001); Gerken, *supra* note 4, at 504, 506, 512, 516-17, 520; Fuentes-Rohwer, *supra* note 87, at 1946; James A. Gardner, *The Dignity of Voters – A Dissent*, 64 U. MIAMI L. REV. 435, 436 (2010); Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L.J. 1289, 1293 (2011). Also, some scholars have suggested that rights can be deployed in a way that puts them in the service of structural considerations. *See* Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803 (1999); Charles, *supra* note 4; Dawood, *supra* note 4. For a full-bore defense of the use of rights to adjudicate election law issues, see HASEN, *supra* note 16.

137. *See* Burdick v. Takushi, 504 U.S. 428, 434 (1992).

138. *See* Reynolds v. Sims, 377 U.S. 533, 568 (1964).

139. *See* Lubin v. Panish, 415 U.S. 709 (1974); Bullock v. Carter, 405 U.S. 134 (1972); Williams v. Rhodes, 393 U.S. 23 (1968).

140. *See* Buckley v. Valeo, 424 U.S. 1, 93-107 (1976) (per curiam).

141. *See* Westen, *supra* note 88. *See also supra* notes 87-91 and accompanying text.

142. Washington v. Davis, 426 U.S. 229 (1976) (purposeful discrimination required to make out claim under Fourteenth Amendment); Mobile v. Bolden, 446 U.S.55 (1980) (same for Fifteenth Amendment).

a problem: the U.S. Constitution does not expressly grant in any provision a right to vote in federal elections,[143] and indeed it incorporates as the criterion of eligibility to vote in federal elections whatever standards states have chosen to adopt for eligibility to vote in their own legislative elections.[144] Thus, as the Court has said on more than one occasion, "the Constitution . . . does not confer the right of suffrage upon any one . . . ."[145]

Still, a constitution may be found to confer rights by means other than express enumeration.[146] The Court might, for example, have inferred the existence of a right to vote from the structure and purpose of the Constitution's many provisions establishing representative democracy.[147] Doing so, though, would presumably have forced the Court to acknowledge that the Constitution implicitly establishes some principles of democratic self-rule, something it has not wished to do. To avoid doing so, the Court chose instead to find the right to vote buried awkwardly in the Equal Protection Clause. It consequently ruled that although the U.S. Constitution does not oblige a state to allow anyone in particular to vote, once a state chooses to extend the franchise to anyone at all, the Equal Protection Clause requires that individuals be permitted to participate in elections "on an equal basis with other qualified voters whenever the State has adopted an elective process for determining who will represent any segment of the State's population."[148] Thus, bizarrely, the right to vote came to be lodged in a provision that does not speak of voting;

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143. *See* Minor v. Happersett, 88 U.S. 162, 178 (1874).

144. *See* U.S. CONST. art. I, § 2; *id.* art. II, § 1; *id.* amend. XVII. *See also* James A. Gardner, *Liberty, Community, and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*, 145 U. PA. L. REV. 893, 959-67 (1997).

145. *Happersett*, 88 U.S. at 178. *Accord* Rodriguez v. Popular Democratic Party, 457 U.S. 1, 8 (1982).

146. This is the premise of the Ninth Amendment. *See* U.S. CONST. amend. IX.

147. In a very early case, the Court appeared as though it might move in this direction. In *Wesberry v. Sanders*, 376 U.S. 1 (1964), the Court invalidated malapportionment of congressional districts on the basis of inferences drawn from a structural provision, Article I, § 2 of the U.S. Constitution, which requires that members of the House be elected "by the People of the several States." However, it immediately retreated from this turn to structure in its next case, *Reynolds v. Sims*, 377 U.S. 533 (1964), in which it invalidated malapportionment in state legislative districts on equal protection grounds. The only other significant decisions in the field that the Court has reached on structural grounds are *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), in which the Court relied on the Qualifications Clauses to invalidate state-imposed term limits on members of Congress; and *Cook v. Gralike*, 531 U.S. 510 (2001), in which the Court invalidated a state law requiring disparaging statements to be placed on the ballot next to the names of candidates who refused actively to pursue a federal constitutional amendment to impose term limits on members of Congress. In the latter ruling, the Court relied on implicit structural conceptions of proper representation and legislative judgment. *Gralike*, 531 U.S. at 510.

148. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 n.78 (1973). *Accord* Dunn v. Blumstein, 405 U.S. 330, 336 (1972) ("[A] citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.").

does not confer on its own a right to vote; and cannot itself supply a normative decision principle for resolving disputes about the proper extent of the right to vote.

This latter problem, at least, could have been solved were the Court willing to supply a principle of decision by extracting from the Constitution some theory about what the vote is for and why, and in what circumstances, citizens are entitled to have it. As we have seen, however, this is precisely what the Court declines to do. As a result, equal protection analysis in the area of voting rights becomes unmoored and haphazard as the Court searches for, or lurches between, principles adequate to resolve its cases.

In no subfield of election law has this problem more thoroughly crippled the Court's decision making capacity than in the field of redistricting, an area that presents perhaps the most pressing problems in all of American democratic practice. When redistricting raises issues of racial discrimination, the Court's tools for dealing with it are more than adequate.[149] Difficulties arise in handling a much more widespread problem, the problem of partisan gerrymandering, in which redistricting is performed so as to provide one party with an outsized and undeserved advantage over its opponents.[150] The Court's attempt to handle this problem by resort to principles of equal protection has been a spectacular failure.

On three occasions in the last thirty years the Court has tried and failed to identify a constitutional standard under the Equal Protection Clause for adjudicating the constitutionality of partisan gerrymandering.[151] Its failure is directly traceable to the Court's deployment of equal protection without an underlying theory to identify a baseline of *proper* representation, departure from which can therefore be understood as illicit gerrymandering.[152] Justice Kennedy, who cast the deciding vote in *Vieth v. Jubelirer* (2004),[153] admitted this frankly in his opinion:

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149. The Fourteenth and Fifteenth Amendments both provide strong proscriptions and remedies. *See* White v. Regester, 412 U.S. 755, 769 (1973); Gomillion v. Lightfoot, 364 U.S. 339, 341-42 (1960).

150. To the extent that members of the Court have been able even to settle on a definition of the problem, they have defined it, for example, as conferring on the dominant party a degree of power that is "excessive," *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 463 (2006) (Stevens, J., concurring in part and dissenting in part), or "too much" in relation to its fair or appropriate share, *Vieth v. Jubelirer*, 541 U.S. 267, 344 (2004) (Souter, J., dissenting), or as the "continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process," *Davis v. Bandemer*, 478 U.S. 109, 133 (1986) (White, J., for a four-justice plurality).

151. *See League of United Latin Am. Citizens*, 548 U.S. at 404; *Vieth*, 541 U.S. at 305; *Davis*, 478 U.S. at 110.

152. Gerken, *supra* note 4, at 506-07; Gerken, *supra* note 7, at 414, 420.

153. 541 U.S. 267.

> Because there are yet no agreed upon substantive principles of fairness in districting, we have no basis on which to define clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights. Suitable standards for measuring this burden, however, are critical to our intervention.[154]

He went on to issue an earnest appeal for help in identifying an appropriate baseline:

> That no such standard has emerged in this case should not be taken to prove that none will emerge in the future. Where important rights are involved, the impossibility of full analytical satisfaction is reason to err on the side of caution. . . . This possibility suggests that in another case a standard might emerge that suitably demonstrates how an apportionment's de facto incorporation of partisan classifications burdens rights of fair and effective representation.[155]

This is as far as the Court has ever gotten in a partisan gerrymandering case, and consequently legislatures engaged in the task of redistricting have little reason to fear effective judicial enforcement of any constitutional prohibition on gerrymandering.

B. The Empire of the First Amendment

By the mid-1970s, the Court began to find that the Fourteenth and Fifteenth Amendments no longer reliably supplied decision rules for every kind of case dealing with democratic practice and process that the Court was willing to accept. Consequently, if the Court was to continue to adjudicate such cases by deploying off-the-shelf, readily available individual rights, it would have to import some other right into the democratic arena. In *Buckley v. Valeo* (1976),[156] the Court turned decisively to the First Amendment guarantee of freedom of speech. In *Buckley*, the Court invoked the First Amendment to determine the constitutional validity of the Federal Election Campaign Act, the most comprehensive piece of federal campaign finance regulation ever enacted, invalidating numerous portions of the Act in large part on the ground that they unduly impaired constitutionally protected speech.[157] Not long after, in *Anderson v. Celebrezze* (1983),[158] a case challenging state rules restricting access of independent presidential candidates to the election ballot, the Court took the significant step of repudiating the Equal Protection Clause as its main workhorse in ballot access cases. Instead, the Court announced

154. *Id.* at 307-08.

155. *Id.* at 311-12.

156. 424 U.S. 1, 51 (1976) (per curiam).

157. *Id.* at 19-22, 50, 54, 58.

158. 460 U.S. 780, 786-87 n.7 (1983).

without explanation that it would thenceforth analyze ballot access restrictions under the First Amendment right of freedom of association, a second-order right derived by implication from the freedom of speech.[159] The Court went on in *Anderson* to invalidate the restriction at issue on the ground that it burdened constitutionally protected association between candidates and their supporters.[160]

In subsequent cases, the Court has invoked the First Amendment to adjudicate nearly every kind of dispute involving regulation of the democratic process. It has deployed the First Amendment not only in cases revolving around campaign speech, campaign finance, and ballot access, but also in cases dealing with restrictions on voting,[161] political parties,[162] primary elections,[163] and election integrity.[164] Some justices have suggested that even partisan gerrymandering cases would be more tractable if handled under the First Amendment.[165] In fact, so versatile has the Court found the First Amendment that it has begun to approach its democracy cases as though the First Amendment is the *only* provision in the entire Constitution of the slightest relevance to the system of representative democracy it institutionalizes. This odd approach might be harmless if the Court's resort to the First Amendment represented merely some kind of well-understood judicial synecdoche, in which the First Amendment is invoked as a kind of short-hand reference to the entirety of the constitutional scheme. Unfortunately, that is not the case. The Court's understanding has become close to literal; the First Amendment has become for the Court essentially a one-provision constitution, complete in itself, capable of solving any and every problem of democracy for which judicial review may be had.

This approach has been costly, and the main casualty has been the First Amendment, which has in these cases been stretched beyond all recognition. Although it is indisputably handy, dangling tantalizingly at the top of the Bill of Rights like a fly before a trout, freedom of speech simply is not an instrument well-suited to the work of

159. NAACP v. Alabama, 357 U.S. 449, 462 (1958).

160. *Id.* at 792-95, 806.

161. *See* Burdick v. Takushi, 504 U.S. 428, 441-42 (1992).

162. *See* Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 233 (1989).

163. *See* Clingman v. Beaver, 544 U.S. 581, 593 (2005); Cal. Democratic Party v. Jones, 530 U.S. 567, 586 (2000); Tashjian v. Republican Party of Conn., 479 U.S. 208, 214 (1986).

164. *See* Burson v. Freeman, 504 U.S. 191, 211 (1992).

165. *See* Vieth v. Jubelirer, 541 U.S. 267, 314-15 (2004) (Kennedy, J., concurring); *id.* at 324 (Stevens, J., dissenting).

adjudicating many of the complex questions that arise concerning democratic practice and procedure.[166]

The most notable example of the inadequacy of the right to free speech to handle problems for which it has been deployed is the area of campaign finance. In a series of cases beginning with *Buckley v. Valeo* (1976)[167] and continuing through the Court's recent decisions in *Citizens United v. FEC* (2010)[168] and *McCutcheon v. FEC* (2014),[169] the Court has deployed the freedom of speech to decide the constitutionality of laws that restrict the giving and spending of money in connection with election campaigns for public office. In so doing, the Court has afforded the same degree of First Amendment protection to giving and spending money in election campaigns as it does to campaign speech itself; in the Court's jurisprudence, there is no constitutionally significant difference between political spending and political speaking.[170]

The Court's indiscriminate use of the First Amendment has been harshly criticized for decades,[171] and there is no need to rehearse that criticism here. Suffice it to say that money is tied to speech only loosely, and that equating the regulation of money spent to buy speech with regulation of the speech itself proves far too much and thus bites far too deeply into democratically legitimate and justifiable regulatory regimes.[172] Furthermore, a crucially important component of the First Amendment doctrine that the Court imported into the arena of democratic practice is a long-standing judicial tradition of very nearly absolute opposition to the regulation of fully protected forms of speech.[173] As a result, the Court's importation into the democracy arena of a pure free speech regime, unmodified to suit the context, has led, predictably, to shockingly deregulatory results.

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166. See sources cited *supra* note 136, arguing for the superiority of a structural approach, or at least an approach to rights that places them in the service of structural considerations.

167. 424 U.S. 1, 51 (1976) (per curiam).

168. 558 U.S. 310, 365 (2010).

169. 134 S. Ct. 1434, 1441, 1448 (2014).

170. For a classic statement of this view, see J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976).

171. A small but suggestive collection of such critiques may be found in GARDNER & CHARLES, *supra* note 55, at 684-91.

172. This objection was immediately raised in *Buckley* itself by Justice White. *See Buckley*, 424 U.S. at 262-64 (White, J., concurring in part and dissenting in part).

173. This impulse takes the form of application of "strict scrutiny," the highest possible standard of constitutional judicial review, to cases regulating speech on the basis of their content. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 640-42 (1994); N.Y. Times v. Sullivan, 376 U.S. 254, 279 (1964). On the inappropriate application of an absolutist First Amendment approach in campaign finance cases, see James A. Gardner, *Anti-Regulatory Absolutism in the Campaign Arena:* Citizens United *and the Implied Slippery Slope*, 20 CORNELL J. L. & PUB. POL'Y 673 (2011).

Thus, in *Buckley*, the Court gutted the Federal Election Campaign Act by invalidating nearly every limitation on campaign spending contained in the Act.[174] It continued to invalidate regulatory limitations on political spending in a long series of cases,[175] and in some instances invalidated limitations on campaign contributions to candidates as well.[176] In its 2010 decision in *Citizens United*, the Court shocked observers by invalidating a century-old prohibition on direct political spending by corporations.[177]

Critical to the Court's ruling in these cases is its rejection in *Buckley* of the basic legitimacy of one of Congress's principal reasons for enacting restrictions on campaign spending: to redress inequality in political influence between the rich and the poor,[178] an interest the Court deemed "wholly foreign to the First Amendment."[179] As a matter of run-of-the-mill First Amendment free speech doctrine, government attempts to orchestrate a fair balance of views expressed in everyday discourse in civil society might well be viewed with extreme skepticism.[180] Speech made in the course of democratic processes intended to constitute a binding expression of the popular will, however, is no ordinary speech,[181] and the Court's importation into this arena of an existing, off-the-shelf First Amendment regime seems effectively to have blinded the Court to extremely significant differences in context—differences of goals, stakes, complexity, and countervailing values.[182]

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174. *See Buckley*, 424 U.S. at 39-59.

175. *See* Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996); FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986); FEC v. Nat'l Conservative PAC, 470 U.S. 480 (1985); First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765 (1978).

176. *See* Randall v. Sorrell, 548 U.S. 230 (2006).

177. *See* Citizens United v. FEC, 558 U.S. 310 (2010).

178. *See* GARDNER & CHARLES, *supra* note 55, at 681-83, and sources cited therein.

179. *Buckley*, 424 U.S. at 49.

180. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992); Brandenberg v. Ohio, 395 U.S. 444, 447-48 (1969); N.Y. Times v. Sullivan, 376 U.S. 254, 279-84 (1964).

181. *See, e.g.*, DENNIS F. THOMPSON, JUST ELECTIONS: CREATING A FAIR ELECTORAL PROCESS IN THE UNITED STATES 115 (2002) ("[E]lections and the campaigns leading up to them may be considered more a part of government than a part of politics that influences government. The standards that control the conduct of elections should therefore be determined more by collective decision than by individual choice."). To similar effect, see Dennis F. Thompson, *Election Time: Normative Implications of Temporal Properties of the Electoral Process in the United States*, 98 AM. POL. SCI. REV. 51, 60-62 (2004); Saul Zipkin, *The Election Period and Regulation of the Democratic Process*, 18 WM. & MARY BILL RTS. J. 533, 575-76 (2010).

182. For an overview, see GARDNER & CHARLES, *supra* note 55, at 670-78. A comprehensive account of the best reasons for and against campaign finance restrictions may be found in JACOB ROWBOTTOM, DEMOCRACY DISTORTED: WEALTH, INFLUENCE AND DEMOCRATIC POLITICS (2010). An alternative and more nuanced approach is that of the Supreme Court of Canada, which has found the constitutional protection of democracy to embody numerous distinct values which are capable in many circumstances of coming into conflict. *See* Dawood, *supra* note 6, at 252-57.

Nor is First Amendment doctrine particularly well-suited to deal with other issues to which the Court has applied it. Consider, for example, the Court's handling of questions of ballot access, which arise when laws regulate the conditions under which candidates may have their names placed on the election ballot. For three decades, the Court has adjudicated such cases under the First Amendment right of association, evaluating ballot access rules in terms of the degree to which they burden association between candidates and their followers.[183] There are many ways to think about ballot access. One might plausibly say that what is at stake in ballot access cases is presenting voters with an appropriate and meaningful range of choices;[184] or that governmental restrictions on ballot access raise issues of incumbent self-protection or partisan self-dealing;[185] or that ballot access restrictions potentially limit the optimal degree of political competition.[186] But to proceed as though the only constitutionally relevant question concerns the ability of candidates and their supporters to associate is downright strange. Enjoyment of association with others may be a worthwhile benefit of group political participation, but it is not the main goal, nor does the printing of a candidate's name on the ballot in any meaningful way enhance the quantity or quality of association between the candidate and his or her supporters.[187] A more plausible explanation for why the Court analyzes ballot access in these terms, then, is its desire to make use of a readily available, off-the-shelf right, in lieu of thinking about new or alternative frameworks to apply in such cases.

VI. CONCLUSION

The phrase "constitutional jurisprudence" generally conjures up the image of a court working hard to develop a versatile and internally coherent body of doctrine that furnishes appealing solutions to pressing legal problems while bringing constitutional text and purpose into harmonious alignment with judicial implementation. If so, then one is hard-pressed to apply the term to the incoherent and haphazard body of law developed by the U.S. Supreme Court to adjudicate problems of democratic practice and process. To the extent the

183. Since, that is, its decision in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). The Court has continued to rely on the First Amendment in ballot access cases. *See, e.g.*, Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358-59 (1997); Burdick v. Takushi, 504 U.S. 428, 434 (1992).

184. *See, e.g.*, AUSTIN RANNEY, THE DOCTRINE OF RESPONSIBLE PARTY GOVERNMENT: ITS ORIGINS AND PRESENT STATE (1954) (setting out a theory of democratic accountability based on active and meaningful party competition).

185. *See* Issacharoff & Pildes, *supra* note 136, at 683-87.

186. *See id.*

187. For a skeptical view of this proposition, see Tashjian v. Republican Party of Conn., 479 U.S. 208, 235 (1986) (Scalia, J., dissenting).

Court can be said to have such a jurisprudence at all, it is a largely accidental one that the Court has stumbled into through habit, the vagaries of doctrinal availability, and a susceptibility to path-dependent decision making, rather than one that has been deliberately crafted through the application of judicial imagination and diligence.

What is required, clearly, is for the Court to set aside its squeamishness about "political theory" and do in the area of democratic politics precisely what it has done in other areas of constitutional structure, such as federalism and the horizontal separation of powers: develop a theory of what the Constitution is trying to do and how it strives to go about it. There is no reason why the Court cannot derive from the Constitution's structural provisions, underlying principles, and historic democratic commitments an account of the nature and appropriate processes of representative democracy. That would be a useful first step in a much-needed program to undo the damage caused by the Court's failure to provide a sensible foundation for judicial review in this singularly important area of constitutional law.