

# THE DECADE OF DEMOCRACY'S DEMISE

JAMES SAMPLE\*

*In the decade since Citizens United v. FEC, which, while consequential in its own right, is also not responsible for all the ills attributed to it by its detractors, the Supreme Court has decided a stunning number of what this Article terms to be democracy cases. Each respective case is the subject of substantial scholarship within its sphere—voting rights, contribution limits, public financing, partisan gerrymandering, federal bribery law, and subvariations of each area—Decade of Democracy's Demise seeks to remove that scholarship from the respective topical silos, and to develop and analyze a heretofore scarcely considered composite.*

*This Article contends that in democracy cases, the judicial minimalists on the Court have actually engaged, during the decade, in extensive judicial fact finding in order to justify their legal conclusions. In several of these cases the Court has shown a willingness to ignore the legislative fact findings of Congress (reflected in the McCain-Feingold legislation struck down in both Citizens United and McCutcheon v. FEC and in the re-authorization of the Voting Rights Act in Shelby County); and of state courts and legislatures (reflected in American Tradition Partnership v. Bullock and Arizona Free Enterprise v. Bennett). Indeed, within the democracy arena, the Court has deferred to legislative fact finding basically only when the fact-finding body was itself hostile to participatory democracy, and actually acted upon that hostility. Examples of this antiparticipatory deference include the Husted voter purge, the Crawford v. Indiana decision in 2008 that, while technically outside the defined decade, spawned numerous carbon copy voter ID laws in states around the nation, and the deference to legislative redistricting measures that, in the*

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\* Professor of Law, Maurice A. Deane School of Law at Hofstra University. Thanks to Lindsay Wasserman for her keen and tireless research assistance. Nick Testa and Lauren Fitzsimmons also provided valuable contributions. This Article benefited greatly from the insights offered by fellow panelists at the January 2020 Symposium. Finally, gratitude is owed to James Sullivan and the staff of the *American University Law Review* for their exemplary work and professionalism. Any errors or shortcomings are mine.

*instances of Maryland and North Carolina, are not only inconsistent with one-person, one-vote norms, but are openly and transparently acknowledged by their progenitors to be so.*

The Decade of Democracy's Demise asserts that while the short-term impact of the Court's decisions in the last decade skews in a favorable direction for conservatives, the long-term impact is not necessarily favorable to either political party, so much as it favors politically and financially empowered interests who seek to employ that empowerment so as to exacerbate their antidemocratic advantages. While this dynamic is temporarily good news for conservative partisans, it may, at some future juncture be good news for liberal partisans (although historically, at least since the Civil Rights era, they are less inclined towards antiparticipatory measures), but more importantly than any partisan valence, this Article asserts that the broader consequences for American democracy are grim indeed.

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#### INTRODUCTION

*[T]he Court has fully turned its back on that which I think it has a primary responsibility to protect, and that's our electoral system.*

—Former Attorney General Eric Holder<sup>1</sup>

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1. Liam Chalk, *Former A.G. Eric Holder Advocates for SCOTUS Terms Limits, Blasts Barr at Pomona Talk*, STUDENT LIFE (Feb. 18, 2020, 11:38 AM), <https://tsl.news/eric-holder-payton-lecture> [<https://perma.cc/2Z7C-ZTC2>].

The year 2020 is the ten-year anniversary of the Court's controversial *Citizens United v. FEC*<sup>2</sup> decision. Regrettably, this Article asserts that, beginning with *Citizens United*, the Court's decisions in the prior decade have, in the aggregate, dramatically harmed representation-reinforcing values in our democratic processes. Moreover, this Article asserts that the Court majority has aggressively substituted its own fact finding when faced with legislative measures that favor participatory and equality values. However, the Court majority has shown great deference to legislatures when considering measures that are, on their face, hostile to participation and equality. While it is impossible to prove a results-oriented motive for the discrepancy, this Article ultimately contends that it is difficult not to find a brazen lack of intellectual consistency in this line of decisions.

In perhaps the most striking example of this discrepancy, the majority in *Shelby County v. Holder*<sup>3</sup> discarded decades of Congressional findings on the continued necessity of preventive ex ante safeguards in the Voting Rights Act.<sup>4</sup> Then, in *Husted v. A. Philip Randolph Institute*,<sup>5</sup> the Court emphatically accepted the findings by Congress to justify an Ohio voting purge, with Justice Alito arguing with nary a hint of irony that, "[i]t is not our prerogative to judge the reasonableness of that congressional judgment."<sup>6</sup>

Some argue that one aggregate effect of the decade of decisions has been an erosion of public trust in the Court, although hard to measure and far from the most consequential of the effects.<sup>7</sup> Alan Brownstein asserts that the impact of these recent decisions

is to cumulatively increase the influence of the wealthy and powerful in the electoral process and to facilitate actions by current government officials to manipulate electoral rules and practices in ways that entrench their party's status, and correspondingly, to undermine the confidence of the American people in the political system.<sup>8</sup>

While preserving the capital of public trust in the Court is important, the focus of this Article is the more tangible consequences for rank-and-file representation-reinforcing norms. In the span of a decade, a majority of the Court has imposed its will on nearly every major

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2. 558 U.S. 310 (2010).

3. 570 U.S. 529 (2013).

4. 52 U.S.C. § 10301 (Supp. 2018).

5. 138 S. Ct. 1833 (2018).

6. *Id.* at 1848.

7. Alan Brownstein, *Supreme Court Rulings Come at a Cost in Public Confidence*, HILL (June 5, 2019, 11:00 AM), <https://thehill.com/opinion/judiciary/446936-supreme-court-needs-to-consider-cumulating-constitutional-costs> [<https://perma.cc/YS7B-DA3T>].

8. *Id.*

element of our democratic processes: from voting to gerrymandering to campaign finance and even to bribery and misconduct. In these decisions, the Court majority systematically disregarded legislative will at their leisure and replaced it with their own judgment of fairness and societal need. During the past decade, the Court consistently rejected legislative attempts at equalizing access to democracy, dismissed attempts by Congress to target quid pro quo corruption, narrowed the definition of quid pro quo public corruption to the eye of a needle, and rolled out the red carpet for partisan gerrymandering. Even more consequentially, there is a snowball effect at play: the decade of new high Court precedent in the areas of campaign finance and voting rights gets extended yet further as waves of more and more conservative justices join the federal bench.<sup>9</sup> Despite this, there is a surprising amount of apathy on the political left regarding the courts.<sup>10</sup>

Part I of this Article details the major Supreme Court decisions of the past decade dealing with campaign finance regulations, public financing, and a high-profile consideration of a gubernatorial bribery charge. Part II considers the Court's decisions in the areas of voting rights, voter suppression, and partisan gerrymandering.

## I. KEY CAMPAIGN FINANCE AND BRIBERY DECISIONS

### A. *Citizens United v. Federal Election Commission*

In 2010, the United States Supreme Court decided *Citizens United v. FEC*.<sup>11</sup> As Alicia Bannon posits, *Citizens United* is one of “the rare Supreme Court decision[s] that many non-lawyers know by name.”<sup>12</sup> The Court's five-to-four decision garnered widespread notoriety as the majority struck down a federal ban on corporate independent expenditures,<sup>13</sup> in turn overruling decades of precedent, disregarding landmark campaign finance legislation, and ultimately ushering in the decade of democracy's demise.

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9. See Dahlia Lithwick, *Democrats Still Haven't Learned Their Lesson About the Courts*, SLATE (Aug. 1, 2019, 6:06 PM), <https://slate.com/news-and-politics/2019/08/democrats-courts-what-will-it-take-debates-election-2020.html> [https://perma.cc/2GNN-T683].

10. *Id.*

11. 558 U.S. 310 (2010).

12. Alicia Bannon, *Judicial Elections After Citizens United*, 67 DEPAUL L. REV. 169, 174 (2018).

13. *Citizens United*, 558 U.S. at 337–39.

At issue in *Citizens United* was a corporation's right to use its general treasury funds to make election-related independent expenditures.<sup>14</sup> The origin of this case can be traced back to January of 2008, when Citizens United, a nonprofit corporation, released a ninety-minute documentary entitled *Hillary: The Movie*, which provided a critical review of Hillary Clinton, then candidate for the Democratic presidential nomination.<sup>15</sup> Citizens United initially released *Hillary* in movie theatres and on DVD, but in an effort to expand its exposure, Citizens United sought to use its general treasury funds to make *Hillary* available through video-on-demand within thirty days of the 2008 primary elections.<sup>16</sup> Citizens United subsequently produced advertisements to run on broadcast and cable television in order to promote the release of its documentary.<sup>17</sup>

However, this tactic directly violated The Bipartisan Campaign Reform Act of 2002 (BCRA),<sup>18</sup> a landmark piece of legislation that Congress enacted to address large contributions made by corporations and unions to political campaigns.<sup>19</sup> A provision at the heart of the BCRA, § 441b, specifically sought to prohibit corporations and unions from using their general treasury funds to make independent expenditures for speech that is considered an "electioneering communication,"<sup>20</sup> or speech that expressly advocates the election or defeat of a particular candidate.<sup>21</sup>

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14. *See id.* at 320–21.

15. *Id.* at 319–20.

16. *Id.* at 320–21.

17. *Id.* at 320.

18. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.

19. Brief for the Federal Election Commission at 10–11, *McConnell v. FEC*, 540 U.S. 93 (2003) (No. 02-1674). The purpose of § 441b was to limit the creation of "sham issue ads" that were produced to evade existing campaign finance laws. The ads, created primarily by corporations and unions, would ordinarily focus on a named candidate and aim to influence both elected officials and the electorate. Congress ultimately found that the paper trail left behind by these ads indicated that their true purpose was to influence elections, rather than educate the public on social issues. This was supported by the fact that the corporations and unions behind these ads hired campaign consultants to devise messaging and even had the ads poll tested by professionals. These ads typically aired in the days directly leading up to an election and ceased promptly after Election Day—clearly intended to impact the upcoming election. The BCRA thus created time-based restrictions of thirty and sixty days before an election to only bar those sham ads which were intended to influence federal elections.

20. 2 U.S.C. § 441b (2012) (current version at 52 U.S.C. § 30118 (Supp. 2018)). The Act defined an electioneering communication as "any broadcast, cable or satellite communication which refers to a clearly identified candidate for Federal office" and is made within 30 days of a primary election or 60 days of a general election. 2 U.S.C. § 434(f)(3)(a).

21. § 434(f)(3)(a).

Citizens United brought suit against the FEC seeking injunctive and declaratory relief out of concern that it risked receiving penalties for violating § 441b.<sup>22</sup> The district court denied this motion for a preliminary injunction and granted summary judgment to the FEC, subsequently leading Citizens United to appeal to the Supreme Court.<sup>23</sup>

When the case came before the Court, the Justices were tasked with determining whether § 441b's prohibition on corporate independent expenditures was unconstitutional as applied to *Hillary*.<sup>24</sup> However, the Justices went on to declare that in the exercise of judicial responsibility, the Court must consider the facial validity of § 441b because it could not resolve the as-applied challenge on narrower grounds without "chilling political speech."<sup>25</sup>

In a broad ruling, the Court struck down § 441b's ban on corporate and union independent expenditures, opining that § 441b's prohibition is an outright ban on speech, and as such, is in violation of the First Amendment.<sup>26</sup> Writing for the majority, Justice Kennedy determined that the First Amendment does not allow the viewpoints of certain subjects, such as wealthy corporations, to be disfavored. Thus, the majority resolved, any restriction, such as § 441b, that allows speech by some and not others is impermissible.<sup>27</sup>

In reaching this conclusion, the majority rejected several compelling interests advanced by the government in support of restrictions on unlimited corporate spending in the electoral context.<sup>28</sup> One of these compelling interests was the *antidistortion* rationale contained in *Austin v. Michigan State Chamber of Commerce*.<sup>29</sup> Under *Austin's* rationale, the government had a compelling interest in restricting unfettered corporate political speech in order to combat the distorting effects that large aggregations of wealth have on our electoral process.<sup>30</sup> The majority conclusively denied this rationale, reasoning that it would allow the government to ban political speech just "because the speaker

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22. *Citizens United*, 558 U.S. at 321.

23. *Id.* at 322.

24. *Id.* at 322, 324.

25. *Id.* at 329.

26. *Id.* at 337.

27. *Id.* at 340–41.

28. *See id.* at 348–62.

29. 494 U.S. 652 (1990), *overruled by* *Citizens United v. FEC*, 558 U.S. 310 (2010).

30. *Id.* at 659–60 (holding that the Michigan state law in question was justified in that it prevented "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas").

is an association that has taken on the corporate form.”<sup>31</sup> The Court also remained unpersuaded by the government’s interest in protecting shareholders, as the majority found little evidence of abuse that shareholders could not correct “through the procedures of corporate democracy.”<sup>32</sup>

Most germane to this Article’s analysis, the Court rejected the government’s *anticorruption* justification, in turn drastically narrowing the kind of corruption that could justify regulations on independent expenditures to those that involved quid pro quo corruption.<sup>33</sup> While the majority maintained that wealthy corporate donors did in fact have influence over and enhanced access to elected officials, they refused to accept that this amounted to the type of corruption that warranted any reasonable restrictions.<sup>34</sup> The majority concluded that Congress had created “categorical bans on speech that are asymmetrical to preventing quid pro quo corruption,” and therefore, the “ban on corporate political speech during the critical preelection period is not a permissible remedy.”<sup>35</sup>

The dissenting justices expressed their disdain toward the brazen lack of judicial restraint the majority utilized in handing down this decision.<sup>36</sup> Justice Stevens, writing for the dissent, proffered that the majority transformed an as-applied challenge into a facial challenge because the Justices were unhappy with the limited nature of the case and ultimately seized an opportunity to transform the face of campaign finance law.<sup>37</sup> In his dissent, Justice Stevens lamented that “[t]he Court operates with a sledge hammer rather than a scalpel when it strikes down one of Congress’ most significant efforts to regulate the role that corporations and unions play in electoral politics.”<sup>38</sup> The decision amounted to the Court’s complete rejection of the extensive Congressional fact finding that went into the passage of the BCRA, with little evidence to substantiate their rejection.<sup>39</sup> The dissent argued that the Court should have pursued a path of judicial deference, particularly in an area where Congress developed a record that was a “remarkable testament to the energy and ingenuity with which corporations, unions, lobbyists, and politicians may go about scratching each other’s backs—and which amply

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31. *Citizens United*, 558 U.S. at 349.

32. *Id.* at 361–62 (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 794 (1978)).

33. *Id.* at 357.

34. *See id.* at 359.

35. *Id.* at 361 (emphasis omitted).

36. *Id.* at 398–99 (Stevens, J., concurring in part, dissenting in part).

37. *Id.*

38. *Id.* at 399.

39. *Id.* at 399–400.

supported Congress' determination to target a limited set of especially destructive practices."<sup>40</sup> Justice Stevens rebuked the majority by declaring that

we [as Justices] have a vital role to play in ensuring that elections remain at least minimally open, fair, and competitive. But it is the height of recklessness to dismiss Congress' years of bipartisan deliberation and its reasoned judgment on this basis, without first confirming that the statute in question was intended to be, or will function as, a restraint on electoral competition.<sup>41</sup>

The *Citizens United* Court, in systematically dismissing the extensive congressional fact finding that went into the creation of the BCRA, has implicated the efficacy of our democracy. The ruling has enhanced the influence of wealthy and powerful corporations in the electoral context, threatened the independence of the judiciary, incentivized judicial incoherence, and spurred a dangerous erosion of public confidence in the integrity of our democratic processes.<sup>42</sup>

In analyzing the scope of outside spending in the post-*Citizens United* context, Douglas M. Spencer and Abby K. Wood posit that the most notorious consequence of *Citizens United* has been the emergence of independent-expenditure-only political action committees, known as Super PACs.<sup>43</sup> In the wake of *Citizens United*, Super PACs have the ability to amass exorbitant sums of money from corporations and unions to spend in support of or in opposition to candidates.<sup>44</sup> In noting the potent influence that Super PACs have on federal elections, Spencer and Wood contend that "Super PACs have become sidecars to each campaign's motorcycle: ostensibly separate entities, but in essence comprising one vehicle."<sup>45</sup> Of particular concern is that the bulk of money from Super PACs has come from individual donors, suggesting that Super PACs act as conduits around existing individual contribution limits.<sup>46</sup>

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40. *Id.* at 448.

41. *Id.* at 462.

42. Ciara Torres-Spelliscy posits that this decision accelerated the Roberts Court's "deregulatory pace" and acted as a catalyst to solidify the Court's role as legislator in our democracy. See Ciara Torres-Spelliscy, *Deregulating Corruption*, 13 HARV. L & POL'Y REV. 471, 488 (2019). Torres-Spelliscy further postulates that through the Court's persistent intolerance of campaign finance laws, it has made "mincemeat out of the concept of corruption." Ciara Torres-Spelliscy, *Trump's Judicial Picks Are Gutting Campaign Finance Law*, LAW360 (Sept. 12, 2019), <https://www.law360.com/articles/1195479/trump-s-judicial-picks-are-gutting-campaign-finance-law>.

43. Douglas M. Spencer & Abby K. Wood, *Citizens United, States Divided: An Empirical Analysis of Independent Political Spending*, 89 IND. L.J. 315, 330 (2014).

44. *Id.*

45. *Id.*

46. *Id.*



While Super PAC funding from individual donors is not a direct result of *Citizens United*, Spencer and Wood reveal that the *Citizens United* decision has also allowed for increased nonprofit political activism from groups such as 501(c) organizations.<sup>47</sup> As the Center for Responsive Politics reported, in the 2006 federal election cycle, not a single dollar was spent by 501(c) organizations on independent expenditures or electioneering communications.<sup>48</sup> However, the 2010 election cycle saw a tremendous uptick in nonprofit political activism, with forty-two percent of all outside spending originating from 501(c) organizations.<sup>49</sup>

The recent abundance of political fundraising from groups such as nonprofits is particularly troubling as these groups are not required to disclose the source of their funding to the public, thereby leaving voters completely in the dark as to the identity of the donors who backed these powerful groups.<sup>50</sup> Moreover, while Super PACs must disclose the identity of their donors, they are free to accept unlimited contributions from “dark money” nonprofits that are not held to the same disclosure standards.<sup>51</sup>

Sarah C. Haan reveals that the 2012 election experienced a “sharp rise” in outside spending as compared to elections in the pre-*Citizens United* period.<sup>52</sup> *Citizens United* allowed outside spending from Super PACs and 501(c) “dark money” organizations to increase dramatically.<sup>53</sup> However, Haan indicates that a large percentage of reported outside spending that occurred in the 2012 federal election also came from privately held, for-profit business entities.<sup>54</sup> Similarly to the aforementioned concerns regarding undisclosed political spending from nonprofits, spending from privately held, for-profit business entities poses its own unique disclosure problems. As Haan discovered, more than forty

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47. *Id.*

48. Spencer MacColl, *Citizens United Decision Profoundly Affects Political Landscape*, OPENSECRETS (May 5, 2011), <https://www.opensecrets.org/news/2011/05/citizens-united-decision-profoundly-affects-political-landscape> [https://perma.cc/FM93-7JYY].

49. *Id.*

50. Michael Greubel, *Citizens United: 8 Years Later*, FORDHAM J. OF CORP. & FIN. L.: BLOG (Mar. 7, 2018), <https://news.law.fordham.edu/jcfl/2018/03/07/citizens-united-8-years-later> [https://perma.cc/5M2E-FWBL].

51. Karl Evers-Hillstrom et al., *A Look at the Impact of Citizens United on its 9th Anniversary*, OPENSECRETS (Jan. 21, 2019), <https://www.opensecrets.org/news/2019/01/citizens-united> [https://perma.cc/K3L2-KX9M].

52. Sarah C. Haan, *Opaque Transparency: Outside Spending and Disclosure by Privately-Held Business Entities in 2012 and Beyond*, 82 U. CIN. L. REV. 1149, 1150–51 (2014).

53. *See Outside Spending*, OPENSECRETS, [https://www.opensecrets.org/outside-spending/fes\\_summ.php](https://www.opensecrets.org/outside-spending/fes_summ.php) [https://perma.cc/9WRU-8J6Y].

54. *See* Haan, *supra* note 52, at 1154, 1160.

percent of election-related spending by privately held, for-profit entities in 2012 was donated in a way that obscured the origin of the funds.<sup>55</sup> Haan explains that a large percentage of these donations belonged to networks of affiliated private companies tracing back to one or more individual donors.<sup>56</sup> While these for-profit business entities were required to comply with existing disclosure rules, voters were “likely to view these private companies’ donations as the commitments of many separate economic actors” while in reality the money came from the pockets of a few wealthy individuals.<sup>57</sup>

Enhanced corporate spending skews voter impressions, undermines representation values, and yields a significant power asymmetry for rank-and-file voters, who are relatively powerless against wealthy corporations. In addition to the aforementioned scholarship, empirical data compiled over the last decade clearly indicates a remarkable expansion in the scope of election spending by outside groups.<sup>58</sup> As data collected from the midterm elections directly following the Court’s 2010 decision showed, *Citizens United* impacted federal elections rather quickly.<sup>59</sup> For example, outside groups spent a modest \$69,565,098 on political spending in the 2006 midterm elections.<sup>60</sup> However, in the months directly following the *Citizens United* decision in 2010, outside spending increased to \$309,833,966.<sup>61</sup> This upward trajectory has continued into the most recent 2018 midterm election, where political spending from outside groups reached an unprecedented \$1,081,968,874.<sup>62</sup> The influence that outside groups such as Super PACs and political nonprofits have had on our federal elections is exemplified further in data reflecting total outside spending from each election cycle.<sup>63</sup> In the 2006 federal election cycle, outside spending capped out at \$2,365,241.<sup>64</sup> In 2010, just months after the *Citizens United* decision, total outside spending reached \$14,868,086.<sup>65</sup> The total outside spending in federal elections

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55. *Id.* at 1173.

56. *Id.*

57. *Id.*

58. *Outside Spending*, *supra* note 53.

59. *See* Evers-Hillstrom et al., *supra* note 51.

60. *Id.*

61. *Id.*

62. *Id.*

63. *See Total Outside Spending by Election Cycle, Excluding Party Committees*, OPENSECRETS, [https://www.opensecrets.org/outsidespending/cycle\\_tots.php](https://www.opensecrets.org/outsidespending/cycle_tots.php) [https://perma.cc/88JS-F4LE] (charting a significant increase in outside spending in recent federal elections).

64. *Id.*

65. *Id.*

continued to skyrocket in the 2018 election cycle, as spending from outside groups increased to an astonishing \$99,236,743.<sup>66</sup> The amplification of spending from outside groups in the wake of *Citizens United* may be demonstrated via data compiled on competitive Senate races. The Brennan Center for Justice reports that outside expenditures increased from around \$3 million per Senate race in 2010 to over \$8 million per Senate race in 2014.<sup>67</sup> Overall, outside groups spent \$486 million on Senate races in 2014, a remarkable increase from the \$220 million that was spent just four years prior in 2010.<sup>68</sup> The enhanced outside spending that has occurred in the aftermath of *Citizens United* has also helped to create the most expensive election cycles ever in our nation's history.<sup>69</sup> In the pre-*Citizens United* period, outside spending groups had only slight influence over Senate races. The 2008 Senate race in Minnesota, the most expensive race of the cycle, saw only \$24,396,259 in spending from outside groups.<sup>70</sup> This spending changed entirely post-*Citizens United*; outside groups repeatedly shattered spending records with each new election cycle.<sup>71</sup> For example, in 2018, outside spending in Senate races reached a new extreme in Florida, with \$92,878,026 spent by outside groups.<sup>72</sup>

The astonishing growth of Super PACs in the years following the *Citizens United* decision is also supported by financial activity data from various election cycles over the past decade. In 2010, there were just eighty-three Super PACs who spent a total of \$62,641,448 during the election cycle.<sup>73</sup> These numbers completely transformed during the 2018 election cycle, where 2395 Super PACs raised a total of \$1,567,304,432, of which \$822,068,922 was spent.<sup>74</sup> *Citizens United* has allowed Super PACs to surpass national party committees as the top

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66. *Id.*

67. Neilan S. Chaturvedi, *Outside Spending in Senate Races: Danger or Dud?*, BRENNAN CTR. FOR JUST. (Aug. 16, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/outside-spending-senate-races-danger-or-dud> [<https://perma.cc/7D32-6VBF>].

68. Sarah Childress, *Report: After Citizens United, Outside Spending Doubles*, PBS: FRONTLINE (Jan. 14, 2015), <https://www.pbs.org/wgbh/frontline/article/report-after-citizens-united-outside-spending-doubles> [<https://perma.cc/HZ4Y-4Z6W>].

69. Evers-Hillstrom et al., *supra* note 51.

70. *Id.*

71. *Id.*

72. *Id.*

73. *2010 Outside Spending, by Super PAC*, OPENSECRETS, <https://www.opensecrets.org/outsidespending/summ.php?cycle=2010&chrt=V&disp=O&type=S> [<https://perma.cc/9SUZ-MWVF?type=image>].

74. *2018 Outside Spending, by Super PAC*, OPENSECRETS, <https://www.opensecrets.org/outsidespending/summ.php?cycle=2018&chrt=V&disp=O&type=S> [<https://perma.cc/44BV-UCC8>].

outside spending groups in federal elections.<sup>75</sup> In fact, in the 2018 election cycle, the top three outside spending groups were establishment connected Super PACs.<sup>76</sup> Reflecting on the exorbitant outside spending that has occurred in years since *Citizens United*, Michael Greubel argues that it is unlikely that outside spending will be curbed anytime soon.<sup>77</sup> Greubel contends that the only way that spending from outside groups will subside in the coming years is through widespread bipartisan support and a complete reversal of *Citizens United*.<sup>78</sup>

Another notable shift in spending that has transpired in the wake of *Citizens United* is in the judiciary, where money has shifted hands from candidates to independent groups.<sup>79</sup> As Erenberg and Berg reveal, candidate fundraising fell to just over \$27 million in 2009 to 2010, which is significantly lower than the \$33.2 million that candidates raised four years prior.<sup>80</sup> Judicial retention elections also reflect an enhancement of judicial spending. As Erenberg and Berg describe, “judicial retention elections before 2010 were sleepy affairs, immune to big-money politics.”<sup>81</sup> However, they warn that independent expenditures in future judicial elections may routinely overtake candidate spending as partisan and special interests attempt to gain influence over American courts.<sup>82</sup>

Alicia Bannon contemplates the consequences that enhanced independent expenditures pose to the fairness and integrity of judicial races. Bannon contends that judicial races had become very similar to ordinary elections even in years prior to *Citizens United*, as “wealthy special interest groups have increasingly turned their attention, and wallets, to judicial races.”<sup>83</sup> However, Bannon explains that *Citizens*

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75. Evers-Hillstrom et al., *supra* note 51.

76. *Id.*

77. Greubel, *supra* note 50.

78. *Id.*

79. Debra Erenberg & Matt Berg, *The Dark Night Rises: The Growing Role of Independent Expenditures in Judicial Elections After Citizens United*, 49 WILLAMETTE L. REV. 501, 512 (2013).

80. *Id.*

81. *Id.* at 515–16.

82. *Id.* at 518. Erenberg and Berg discuss the 2010 retention election contest in Iowa which shocked the nation, where voters decided to remove three justices from the Iowa Supreme Court. *Id.* at 505. Erenberg and Berg highlight that the removal of these justices was spurred as a result of their decision in *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009), where the court held that Iowa’s Defense of Marriage Act violated the equal protection clause of the Iowa Constitution. 763 N.W.2d at 906. In the 2010 Iowa race, opponents spent close to \$1 million in independent expenditures to remove these justices from the bench. Erenberg & Berg, *supra* note 79, at 505.

83. Bannon, *supra* note 12, at 172.

*United* eliminated campaign finance restrictions in states where they existed, maintained the legal status quo in states where they did not, and foreclosed any future reforms from coming to fruition.<sup>84</sup> Functionally, *Citizens United* became a “one-way ratchet” for states and the regulation of money in judicial elections.<sup>85</sup> As a result, *Citizens United* made it easier for interest groups to influence federal elections via shell organizations and nonprofit groups.<sup>86</sup> However, these groups soon turned their attention to spending in state elections, particularly at the supreme court level. Bannon argues that the “*composition* and *transparency* of spending in judicial races” has seen the most significant effect,<sup>87</sup> as outside groups who do not disclose their donors have flooded judicial elections at the state level.<sup>88</sup>

Bannon warns that this transformation poses serious risks to the fairness and integrity of state courts. She urges that spending via nontransparent outside groups “can obscure the identity of powerful interests seeking to shape courts’ ideological composition, interests which may have a strong economic interest in how state courts rule on important legal issues, or even a direct stake in pending litigation.”<sup>89</sup> This is particularly problematic for the sake of judicial integrity as it deprives the voting public of the information necessary to assess the motives and credibility of the special interest groups that seek to shape their own state courts.<sup>90</sup> As Bannon concludes, “[p]olitical and special interest pressure, if not adequately checked, threatens this basic promise of equal justice, undermining both the appearance and reality of fairness in state court systems.”<sup>91</sup> Adam Skaggs from the Brennan Center for Justice also reflects these concerns as he highlights that corporations and special interests have a very obvious incentive to support judges they believe they will come before.<sup>92</sup> Skaggs notes that

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84. *Id.* at 176.

85. *Id.* (quoting James Sample, *Retention Elections 2010*, 46 U.S.F. L. REV. 383, 393 (2011)).

86. *Id.*

87. *Id.* at 171.

88. *Id.* at 176.

89. *Id.* at 180.

90. *Id.*

91. *Id.* at 185. While commentators may find solace in the 2015 Court decision *Williams-Yulee v. Florida Bar*, 575 U.S. 433 (2015), that decision only upheld restrictions on judicial candidates being able to personally solicit money for their campaigns and did nothing to stem the flow of money into Super PACs favoring these candidates.

92. ADAM SKAGGS, BRENNAN CTR. FOR JUSTICE, *BUYING JUSTICE: THE IMPACT OF CITIZENS UNITED ON JUDICIAL ELECTIONS 2* (2010), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Buying-Justice.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Buying-Justice.pdf) [<https://perma.cc/3AMH-FGJP>]. Skaggs notes that the rise of this type of conflict of interest puts increased pressures on independent and impartial judges;

at the state level, this incentive arises in high courts where a majority or swing vote can determine the outcome of multi-million-dollar claims.<sup>93</sup> Unsurprisingly, business interests and lawyers make up almost two-thirds of all contributions to state supreme court candidates.<sup>94</sup>

Erwin Chemerinsky underscores the disturbing influence that exorbitant corporate spending in judicial elections poses to our American democracy, as thirty-nine states have some form of judicial elections.<sup>95</sup> This record spending in judicial races creates not only the perception but, often times, the actuality of pay-to-play justice in state courts.<sup>96</sup> While Chemerinsky argues that we may see regulations in elections within the judicial realm in the future,<sup>97</sup> the reality is that judicial elections are here to stay. This begs the question as to how the Supreme Court will treat campaign finance in the judicial context should the issue come before it.

Richard Hasen examines another significant democratic consequence that has arisen in the wake of *Citizens United*: judicial incoherence within the Supreme Court. When the Court decided *Citizens United* in 2010, the majority celebrated its opinion as a return to *Buckley v. Valeo*,<sup>98</sup> the so-called “fountainhead” of campaign finance jurisprudence.<sup>99</sup> However, Hasen argues that, in reality, this supposed harmony will only amplify incoherence within the Court’s campaign finance doctrine as the

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the public is forced to rely on judges’ duty to act in good faith and remove themselves from conflict situations.

93. *Id.* A palpable consequence of justice being sold to the highest bidder.

94. *Id.*

95. Erwin Chemerinsky, Richard Hasen & James Sample, *Citizens United Impact on Judicial Elections*, 60 *DRAKE L. REV.* 685, 686 (2012).

96. *Id.* at 691.

97. *Id.* at 688–90. Chemerinsky proffers that the answer to this question will most likely depend on the perception of Justice Kennedy, due to his vote in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). In *Caperton*, Justice Kennedy joined the Court’s majority in ruling that a Virginia Supreme Court justice was required to recuse himself from hearing the appeal of a \$50 million-dollar verdict because the defendant in the case contributed over \$3 million in support of the justice’s recent campaign. 556 U.S. at 872, 884. However, Justice Kennedy’s position in the Court’s majority in *Citizens United* suggests to Chemerinsky that “*ex ante* limits on expenditures would not be acceptable, but that *ex post* remedy of recusal is acceptable.” Chemerinsky, *supra* note 95, at 694. However, as the moderator of the panel Richard Hansen points out, there have been few successful *Caperton* motions since the Court’s decision, which indicates that the recusal standard in *Caperton* requires such an egregious problem that the standard will rarely be met. *Id.* at 696.

98. 424 U.S. 1 (1976).

99. Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 *MICH. L. REV.* 581, 583 (2011).

Court is unlikely to take the decision to its most extreme ends.<sup>100</sup> Hasen explains that the Court's "narrow, crabbed, view of corruption"<sup>101</sup> and rejection of the *antidistortion* rationale in *Citizens United* will force the Justices to proclaim that limits may never be placed on money in politics, if they wish to maintain doctrinal coherence.<sup>102</sup> However, this is not the path that the Court will likely take, particularly in areas such as foreign-initiated spending, spending in judicial elections, and reasonable limits on campaign contributions made directly to candidates.<sup>103</sup> Hasen posits that the Court will ignore the inconsistent portions of its *Citizens United* ruling if it wishes to impose sensible and appealing spending limits because the justifications for these limits will come in the form of the antidistortion and anticorruption rationales that the majority emphatically rejected in *Citizens United*.<sup>104</sup> This inconsistency will ultimately delegitimize the judicial system as coherence on the highest court in the land has both doctrinal and theoretical importance within our judiciary.<sup>105</sup>

For some, the majority's ruling in *Citizens United* is lauded as a powerful victory for free speech and a landmark for political freedom.<sup>106</sup> As Joel Gora asserts, *Citizens United* reaffirmed that the "core purpose of the First Amendment is to guarantee that the people, not the government, get to determine what they want to say . . ." <sup>107</sup> This notion stands in stark opposition to the views of other scholars such as Stephen Feldman, who categorizes *Citizens United* as an attempt by the Roberts Court to promote its probusiness agenda, allowing the private sphere to subsume the public and in turn endangering our

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100. *Id.* at 585.

101. *Id.* at 583.

102. *Id.* at 584, 595.

103. *Id.* at 585.

104. *Id.* at 606–09.

105. *Id.* at 604–05. Doctrinally, the question of judicial coherence "is important as the federal, state, and local governments attempt to rework their campaign finance laws to comport with both the *Citizens United* decision and for the likely lower courts' judicial reactions to that decision." *Id.* On a theoretical level, the coherence of Supreme Court doctrine "sheds some light on the interaction of legal doctrine and the political legitimacy of the Court." *Id.*

106. See generally Joel M. Gora, *Free Speech Matters: The Roberts Court and the First Amendment*, 25 J.L. & POL'Y 63, 85 (2016) (arguing that, despite widespread criticism, the *Citizens United* decision "embodied and applied classic First Amendment principles . . . especially the notion that it is the people, not the government, that must determine the nature and range of political speech").

107. *Id.* at 66.

democratic system.<sup>108</sup> The ramifications that have stemmed from the *Citizens United* decision have unquestionably undermined public confidence in key aspects of the democratic system, including the integrity of the government and the fairness of the judiciary.<sup>109</sup>

This perceived consequence is supported by empirical data conducted by the Pew Research Center in 2018, which indicates that there is overwhelming bipartisan support for limits on political campaign spending amongst most Americans.<sup>110</sup> The research indicates that seventy-seven percent of the public believes that there should be limits on the amount of money individuals and organizations can spend on political campaigns.<sup>111</sup> Moreover, this research demonstrates that roughly seven-in-ten people believe that people who contribute more money to elected officials have more influence than others who do not contribute as much.<sup>112</sup> This research clearly exemplifies the public's lack of confidence in the most intrinsic values of our democracy.

While disheartening, Richard Hasen interestingly points out the importance that public opinion has over the Supreme Court. Hasen posits that the Justices do in fact care about what the public thinks and respond directly to public pressures as a result.<sup>113</sup> With this in mind, Hasen argues that it is unlikely that the Court will move in an extreme direction either way when it comes to the future of campaign finance decisions.<sup>114</sup> However, the demographic of the Court is transforming in an unnerving way as the conservative bloc gains power, making it unclear whether Hasen's argument will hold true in the years to come.

While Hasen's assertion may address the Supreme Court's receptiveness towards the public, it does little to quell the legitimate fears that many have regarding the Court's complete unwillingness to defer to

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108. Stephen M. Feldman, *The End of the Cold War: Can American Constitutionalism Survive Victory?*, 41 OHIO N.U. L. REV. 261, 324 (2015).

109. See Bannon, *supra* note 12, at 180–81 (arguing that secret spending in judicial elections can obscure conflicts of interest and erode public confidence in the integrity of state courts); Hasen, *supra* note 99, at 606–09 (claiming that *Citizens United* could enable massive foreign spending in U.S. elections that could cause voters to believe that foreign nationals are improperly influencing U.S. elections or legislative decisions).

110. Bradley Jones, *Most Americans Want to Limit Campaign Spending, Say Big Donors Have Greater Political Influence*, PEW RES. CTR.: FACT TANK (May 8, 2018), <https://www.pewresearch.org/fact-tank/2018/05/08/most-americans-want-to-limit-campaign-spending-say-big-donors-have-greater-political-influence> [https://perma.cc/JUJ2-E5PE].

111. *Id.*

112. *Id.*

113. Hasen, *supra* note 99, at 622.

114. *Id.*



legislative judgment. As shown in the context of the *Citizens United* decision, the level of deference that the Court gives to legislative findings has grave consequences on the rule of law and the efficacy of American democracy. While *Citizens United* has become the face of money in politics, it is only the first of several Supreme Court decisions where the Justices have completely repudiated the extensive fact finding and wisdom of federal and state legislatures, in turn transforming the campaign finance landscape and democracy as a whole.

### B. American Tradition Partnership v. Bullock

In *American Tradition Partnership, Inc. v. Bullock*,<sup>115</sup> the Supreme Court was presented with an opportunity to reconsider its holding in *Citizens United*—an opportunity that the Court conclusively declined.

At issue in the case was the constitutionality of Montana's Corrupt Practices Act,<sup>116</sup> which required that a "corporation may not make . . . an expenditure in connection with a candidate or a political committee that supports or opposes a candidate or a political party."<sup>117</sup> Specifically at issue was whether *Citizens United* applied to this Montana law. The law had been around since a 1912 ballot initiative and was considered part of the Montana political fabric.<sup>118</sup>

In a per curiam decision, the Court's five-to-four majority ruled "there can be no serious doubt that" *Citizens United* does apply, issuing a *summary reversal*.<sup>119</sup> As Anthony Johnstone asserts, at that point in time

115. 567 U.S. 516 (2012) (per curiam).

116. The Act was part of a one-hundred-year-old state ban on corporate spending prior to being overturned by the Court. Franita Tolson, Introduction: *The Law of Democracy at a Crossroads: Reflecting on Fifty Years of Voting Rights and the Judicial Regulation of The Political Thicket*, 43 FLA. ST. L. REV. 345, 349 (2016).

117. *Am. Tradition*, 567 U.S. at 516 (quoting MONT. CODE ANN. § 13-35-227(1) (2011)).

118. Amy Davidson Sorkin, *Remember Montana: The Supreme Court Won't Reexamine Citizens United*, NEW YORKER (June 25, 2012), <https://www.newyorker.com/news/amy-davidson/remember-montana-the-supreme-court-wont-reexamine-citizens-united> [<https://perma.cc/TG5S-SE5Z>].

119. *Am. Tradition*, 567 U.S. at 516–17 (citing U.S. CONST., art. VI, cl. 2). It is important to note that the same five conservative justices in the majority in *Citizens United* were again in the majority in *American Tradition*. Christopher Terry & Mitchell Bard, *Milwaukee Radio Public File Data, 1998–2011: An Empirical Analysis of Issue Advertising After the BCRA and Citizens United*, 24 U. FLA. J.L. & PUB. POL'Y 157, 159 (2013). Anthony Johnstone contends that the summary disposition is part of an increasingly common trend which has been criticized by Alex Hemmer as "a form of judicial carelessness in which summary disposition is used not simply to manage and oversee lower courts' dockets, but—contrary to tradition and reason—to make new law." Anthony Johnstone, *Foreword: The State of the Republican Form of Government in Montana*, 74 MONT. L. REV. 5, 14 (2013) (quoting Alex Hemmer, *Courts as Managers:*

*Citizens United* was “settled law as to the states for little more reason than because the Court had said so.”<sup>120</sup> Joseph Fishkin and William Forbath contend that the Court based its belief that there was “nothing new to see” on the premise that “the only aspect of the Constitution in play is a First Amendment liberty to speak and spend.”<sup>121</sup>

After the Court’s decision in *American Tradition*, Montana state officials, as well as most of the Montana general public, responded with indignance and resistance.<sup>122</sup> Stand With Montanans, a state-wide political organization, gained substantial support in the months following the Court’s decision to campaign for a national constitutional amendment that would prohibit campaign contributions from corporations.<sup>123</sup>

The four dissenting liberal justices on the Court asserted that Montana should have at least been granted oral argument to provide the Court the opportunity to reconsider *Citizens United*’s application in the case, if not *Citizens United* itself.<sup>124</sup> The dissent echoed the remarks of Justice Stevens in his dissent in *Citizens United*. In writing for the dissent, Justice Breyer emphasized the findings of Montana’s Supreme Court that the state had a compelling interest in limiting independent expenditures by corporations given the history and political landscape of Montana.<sup>125</sup> By denying Montana the opportunity to brief and argue its

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American Tradition Partnership v. Bullock and Summary Disposition at the Roberts Court, 122 YALE L.J. ONLINE 209, 210 (2013)).

120. Johnstone, *supra* note 119, at 15.

121. Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669, 695 (2014).

122. Neil K. Sawhney, Legislative Note, *Advisory Initiatives as a Cure for the Ills of Direct Democracy? A Case Study of Montana Initiative 166*, 24 STAN. L. & POL’Y REV. 589, 594 (2013) (citing Laura Lundquist, *Montana Reacts to Supreme Court Campaign Finance Decision*, BOZEMAN DAILY CHRON. (June 26, 2012), [http://www.bozemandailychronicle.com/news/politics/article\\_9909d186-bf49-11e1-8c24-001a4bcf887a.html](http://www.bozemandailychronicle.com/news/politics/article_9909d186-bf49-11e1-8c24-001a4bcf887a.html)).

Despite the outcome, Attorney General Bullock remained optimistic about the future of campaign finance regulation, stating that “the last word has not been spoken on the issue of how we preserve a viable democracy in which everyday people have a meaningful voice.” Lundquist, *supra*.

123. Sawhney, *supra* note 122, at 595.

124. *Am. Tradition*, 567 U.S. at 518. Justice Ginsburg, in a statement explaining her vote to block the Montana decision, viewed the case as “an opportunity to consider whether, in light of the huge sums deployed to buy candidates’ allegiance, *Citizens United* should continue to hold sway.” Adam Liptak, *Mystery of Citizens United Sequel Is Format, Not Ending*, N.Y. TIMES (June 12, 2012), <https://www.nytimes.com/2012/06/12/us/in-citizens-united-ii-how-justices-rule-may-be-an-issue-itself.html>.

125. *Am. Tradition*, 567 U.S. at 517 (Breyer, J., dissenting). Specifically, the Montana Supreme Court considered the political landscape at the time of the Act’s passage in 1912, the state government was “under a mere shell of legal authority, and the real

position, the Court deprived Montana the ability to empirically challenge the contention that unlimited and unregulated corporate spending actually corrupted politics.<sup>126</sup> Michael Morely asserts, “[i]f the Court wished to categorically preclude any governmental entity from limiting independent expenditures as a matter of law, without regard to the existence of extrinsic facts, then it should have framed its conclusion . . . as a purely legal assertion, rather than a factually contingent holding.”<sup>127</sup>

Christopher Terry and Mitchell Bard contend that Montana’s “missed opportunity is indicative of a larger problem that surrounds the *Citizens United* case: one of empirical evidence.”<sup>128</sup> Empirical evidence, they believe, “would go a long way toward settling the debate on the case’s impact on political speech.”<sup>129</sup> They further argue that empirical data provides the best opportunity to assess *Citizens United* without political or ideological bias.<sup>130</sup>

Andrew Moshirnia and Aaron Dozerman similarly contend that the facts in *American Tradition Partnership* were integral to the outcome of the case—distinguishing it from its *Citizens United* counterpart.<sup>131</sup> The facts illustrated Montana’s history of undue political influence, which unquestionably justified the state’s compelling interest in preventing

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social and political power was wielded by powerful corporate managers to further their own business interests.” *W. Tradition P’ship v. Attorney Gen.*, 271 P.3d 1, 11 (Mont. 2011). The Act was passed through one of the first voter initiatives in Montana—stressing citizens’ frustration with political corruption and the lack of public accountability. Sawhney, *supra* note 122, at 594.

126. Terry & Bard, *supra* note 119, at 159; *see also* Christopher Terry & Mitchell T. Bard, *Judicial Elections and Issue Advertising: A Two State Study*, 39 U. ARK. LITTLE ROCK L. REV. 579 (2017) (exploring the relationship between outside spending and judicial candidates).

127. Michael T. Morely, *Contingent Constitutionality, Legislative Facts, and Campaign Finance Law*, 43 FLA. ST. U. L. REV. 679, 713–14 (2016).

128. Terry & Bard, *supra* note 119, at 159.

129. *Id.* at 160. But not to all. Justice James C. Nelson, one of the dissenting justices in the Montana Supreme Court’s decision, recognized albeit begrudgingly that *Citizens United* applied to this case. He stated, “I find myself in the distasteful position of having to defend the applicability of a controlling precedent with which I profoundly disagree.” *W. Tradition P’ship v. Attorney Gen.*, 271 P.3d 1, 18 (Mont. 2011) (Nelson, J., dissenting).

130. Terry & Bard, *supra* note 126, at 586. Terry and Bard support this position by showing research demonstrating a correlation between direct contributions to justices and favorable rulings. *Id.* (citing Christopher Terry & Mitchell T. Bard, *An Opening for Quid Pro Quo Corruption? Issue Advertising in Wisconsin Judicial Races Before and After Citizens United*, 16 J. APP. PRAC. & PROCESS 305, 318 (2015)).

131. Andrew V. Moshirnia & Aaron T. Dozerman, *In All Fairness: Using Political Broadcast Access Doctrine to Tailor Public Campaign Fund Matching*, 48 U. MICH. J.L. REFORM 641, 656–57 (2015).

further corruption.<sup>132</sup> Justice Breyer indicated in his dissent that he agreed, recognizing “that independent expenditures by corporations did in fact lead to corruption or the appearance of corruption in Montana.”<sup>133</sup>

Critics of the Court’s decision in *American Tradition Partnership* concurred. The Brennan Center contends that the Court’s decision to strike down Montana’s law without so much as reviewing the extensive and powerful record was a “serious mistake.”<sup>134</sup> The Montana Supreme Court, in its decision, even emphasized the importance of the facts, stating that “[i]ssues of corporate influence, sparse population, dependence upon agriculture and extractive resource development, location as a transportation corridor, and low campaign costs make Montana especially vulnerable to continued efforts of corporate control to the detriment of democracy and the republican form of government.”<sup>135</sup>

### C. Arizona Free Enterprise Club v. Bennett

A year after *Citizens United* and one year prior to *American Tradition Partnership*, albeit in a slightly different context within campaign finance law, the Court rejected an opportunity to endorse a democratically enacted public financing system in the case of *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*.<sup>136</sup> This time, it was not the will of Congress that the justices were unilaterally rejecting, rather the will of the rank-and-file voters of Arizona.<sup>137</sup>

Leading up to the decision, the idea of matching funds was generally considered the single affirmative mechanism which “made public financing politically and fiscally viable.”<sup>138</sup> Supporters of public financing maintain that public funds enable politicians to “focus more on the interests of a broader cross section of the population,”<sup>139</sup> work towards shifting politician’s attention away from the elite, and redevelop voter engagement in the process.<sup>140</sup>

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132. *Id.* at 657.

133. *Am. Tradition P’ship, Inc. v. Bullock*, 567 U.S. 516, 517 (2012) (Breyer, J., dissenting).

134. Erik Opsal, *Supreme Court Lets Unlimited Money Stand, Ignores Extensive Record of Corruption*, BRENNAN CTR. FOR JUST. (June 25, 2012), <https://www.brennancenter.org/press-release/supreme-court-lets-unlimited-money-stand-ignores-extensive-record-corruption> [<https://perma.cc/R2G4-B372?type=image>].

135. *W. Tradition P’ship v. Attorney Gen.*, 271 P.3d 1, 11 (Mont. 2011).

136. 564 U.S. 721 (2011).

137. Arizona Citizens Clean Elections Act, ARIZ. REV. STAT. ANN. § 16-940 (1998).

138. James Sample, *The Last Rites of Public Campaign Financing?*, 92 NEB. L. REV. 349, 351 (2013).

139. *Id.* at 362.

140. *Id.*

However, the modern state of campaign financing made it so that a candidate who opted for total public financing over private financing was essentially a “sitting duck.”<sup>141</sup> Thus, matching funds provisions were appealing in that they allowed the government to “dispense limited resources while allowing participating candidates to respond in races where the most debate is generated,” instead of needlessly spending money on low dollar races or noncompetitive races.<sup>142</sup>

In 1998, Arizona voters approved Proposition 200, the Arizona Citizens Clean Elections Act.<sup>143</sup> The act, inter alia, created a voluntary public financing system, such that candidates for state office who accepted public financing could receive additional money from the State in direct response to the campaign activities of privately financed candidates and independent expenditure groups.<sup>144</sup> The system sought to equalize campaign funding and strip disproportionate power away from wealthy candidates and donors.<sup>145</sup> Referred to as “trigger matching funds,” the concept enabled a candidate to receive public funding while not restricting their ability to raise money above the public spending limit.<sup>146</sup> Many advocates referred to this system as the single “most effective tool ever enacted into law to induce candidates to opt in to public campaign financing.”<sup>147</sup>

Despite the widespread appeal that the trigger matching funds system garnered, the Arizona statute was challenged by a group of Republican candidates and independent expenditure groups who argued that the provision penalized their speech and burdened their First Amendment rights.<sup>148</sup> The candidates and independent expenditure groups asserted that the “looming threat of trigger matching funds” chilled their speech, an argument that was at least in part derived from a previous Roberts Court decision in *Davis v. FEC*.<sup>149</sup>

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141. *Id.* at 352.

142. *Dagget v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 469 (1st Cir. 2000).

143. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 728 (2011).

144. *Id.* at 727–29. By opting in, a candidate had to agree to some modest restrictions, such as a threshold number of contributions and a limit on personal expenditures. *Id.*

145. *See id.* at 729 (discussing when conditions for public financing are met, candidates are granted additional equalizing funds).

146. Sample, *supra* note 138, at 384 (citing Richard Briffault, *Davis v. FEC: The Roberts Court Continuing Attack on Campaign Finance Reform*, 44 TULSA L. REV. 475, 479 (2009)).

147. Michael Pernick, *Making Arizona Free Enterprise Kick the Bucket: A New Path Forward for Public Financing*, 40 NYU R. L. & SOC. CHANGE 468, 472 (2015).

148. *Free Enter.*, 564 U.S. at 733.

149. 554 U.S. 724 (2008).

In *Davis*, the Court held that spending limits which triggered matching funds was a burden on free speech by discouraging candidates from raising additional funds.<sup>150</sup> However, the Court's desire to invalidate these laws on First Amendment grounds would fundamentally "misconstrue the meaning of the First Amendment's protection of [free] speech," in that it would establish a First Amendment right in outraising and outspending an opponent free from response.<sup>151</sup>

Leading up to *Free Enterprise*, courts of appeals had been largely supportive of trigger matching funds.<sup>152</sup> The First Circuit in the *Daggett v. Commission on Governmental Ethics & Election Practices*<sup>153</sup> decision held that there is no right to speak free from response and that "the purpose of the First Amendment is to 'secure the widest possible dissemination of information from diverse and antagonistic sources.'"<sup>154</sup> The Fourth Circuit Court of Appeals forcefully wrote that matching funds provisions placed no limitations or punishment on politicians who exceeded the trigger limits and that their free speech was in no way infringed upon by simply providing their opponent with the tools to respond.<sup>155</sup>

In *Free Enterprise*, the Arizona District Court granted an injunction against enforcement of the Arizona matching funds provision. On appeal, the Ninth Circuit Court of Appeals reversed, concluding that any minimal burdens that the provision imposed on speech were justified by the state's compelling interest in reducing quid pro quo corruption.<sup>156</sup> The case then made its way to the Supreme Court, which delivered yet another shocking blow to American democracy.

Chief Justice Roberts delivered the opinion of the Court, which held that the Arizona Citizens Clean Elections Act violated the First Amendment as it utilized public funds to support a candidate who the opposing candidate and their donors opposed.<sup>157</sup> The majority's

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150. Sample, *supra* note 138, at 382 (citing *Davis v. FEC*, 554 U.S. 724 (2008)). This case also struck down any limits whatsoever on an individual candidate's right to spend as much money as they want on their own election, previously referred as the "Millionaire's Amendment." *Davis*, 554 U.S. at 729, 743–44.

151. *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 464 (1st Cir. 2000).

152. Sample, *supra* note 138, at 385.

153. 205 F.3d 445 (1st Cir. 2000).

154. *Id.* at 464 (quoting *Buckley v. Valeo*, 424 U.S. 1, 49 (1976) (per curiam)) (citations omitted).

155. *N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427, 437 (4th Cir. 2008).

156. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 733–34 (2011).

157. *Id.* at 754–55.

approach was controlled largely by the logic of *Davis*, which stated that the matching funds system “imposes an unprecedented penalty on any candidate who robustly exercises [his] First Amendment right[s].”<sup>158</sup> While the majority recognized differences between the penalty imposed by the matching funds provision and the penalty imposed by the law struck down in *Davis*,<sup>159</sup> the majority determined that the difference made the Arizona provision more constitutionally problematic.<sup>160</sup> The Court reasoned that the matching funds provision penalized a candidate or independent expenditure group who vigorously exercised their right to use funds to finance campaign speech as it triggered a guaranteed financial payout to the publicly funded candidate that the candidate or group directly opposed.<sup>161</sup>

The State of Arizona, the Clean Elections Institute, and the U.S. government offered several arguments to justify the existence of any burdens imposed by the provision, all of which the Court emphatically denied.<sup>162</sup> Most notably, the majority rejected Arizona’s interest in leveling the playing field to justify any undue burdens on protected free speech.<sup>163</sup> Chief Justice Roberts opined that “in a democracy, campaigning for office is not a game” and “[t]he First Amendment embodies our choice as a Nation that, when it comes to such speech, the guiding principle is freedom—the ‘unfettered interchange of ideas’—not whatever the State may view as fair.”<sup>164</sup> The majority completely negated the possibility of quid pro quo corruption or the appearance thereof because the independent expenditures were not formally coordinated with a candidate and the candidates and groups were separated.<sup>165</sup> Yet again completely rejecting a legislative attempt at equalizing access to democracy.<sup>166</sup>

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158. *Id.* at 736 (quoting *Davis v. FEC*, 554 U.S. 724, 739 (2008)).

159. *Id.* at 737. *Davis* concerned a First Amendment challenge to the Millionaire’s Amendment of BCRA. *Davis*, 554 U.S. at 728. In *Davis*, the Court held that while the provision of that Amendment did not impose an outright cap on a candidate’s personal expenditures, the Amendment was still unconstitutional because it forced a candidate to choose between the right to engage in political speech or to be subjected to discriminatory fundraising limitations due to the fact that a candidate who chose to spend \$350,000 of his own money was forced to shoulder a burden because his choice provided fundraising advantages to the candidate’s adversary. *See id.* at 736, 739, 744.

160. *Free Enter.*, 564 U.S. at 737.

161. *Id.* at 738–39.

162. *Id.* at 740.

163. *Id.* at 749–51.

164. *Id.* at 750 (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam)) (citations omitted).

165. *Id.* at 751.

166. *See generally* Sample, *supra* note 138 (asserting that any available options for public campaign financing are “political non-starters”). An excellent article by Frank

Writing for the dissent, Justice Kagan defended the public financing of elections as a potent mechanism that preserves the independence of elected officials who are not beholden to the interests of wealthy donors.<sup>167</sup> The dissent rebuked the majority for conveying the matching funds provision as a restraint on electoral speech as the statute did not impose a ceiling on speech nor did it prevent anyone from speaking.<sup>168</sup> The dissent contended that the petitioners were motivated by a desire to quash the speech of others in order to have the field to themselves.<sup>169</sup> Justice Kagan averred that the majority erred in holding that the government substantially burdened speech, particularly because the matching funds provision in fact promoted additional speech from publicly financed candidates.<sup>170</sup> The dissent concluded by exclaiming that the state's compelling interest in attacking corruption and the appearance thereof in the state's political system was on the "very face of Arizona's public financing statute,"<sup>171</sup> and the majority's personal distaste for "level[ing] the playing field" did not constitute a viable excuse to strike down the Arizona law.<sup>172</sup>

Just as in the post-*Citizens United* context, the *Free Enterprise* decision unleashed a string of detrimental effects on our democratic system. In the wake of the decision, trigger matching funds across the nation were quickly eliminated, and certain states entirely repealed public financing systems altogether.<sup>173</sup> Conservative lawmakers also seized on the opportunity to increase state-level contribution limits, removing any remaining incentives for candidates to opt into running a publicly financed campaign.<sup>174</sup> Empirical evidence from Arizona demonstrates how participation in publicly financed elections completely transformed as a result of the *Free Enterprise* decision. In 2008, the year of the last general election in Arizona to have the trigger matching funds provision, sixty-seven percent of candidates participated in the public

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Pasquale discusses a theory of democracy that requires the state to intervene and structure more equalized access to the public forum. Frank Pasquale, *Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform*, 2008 U. ILL. L. REV. 599, 601.

167. *Free Enter.*, 564 U.S. at 757 (Kagan, J., dissenting).

168. *Id.* at 763.

169. *Id.* at 766.

170. *Id.* at 757.

171. *Id.* at 777.

172. *Id.* at 780 (citations omitted).

173. See generally Pernick, *supra* note 147 (outlining the impact of the *Free Enterprise* decision in states nationwide).

174. *Id.* at 490.



financing system.<sup>175</sup> By 2014, three years after the decision, this number dropped to a modest twenty-eight percent.<sup>176</sup> As David Cantelme contends, the 2014 election cycle revealed the significant impact that the decision had on Arizona politics as “dark money” flowed into elections and the state public funding system neared utter collapse.<sup>177</sup>

#### D. *McCutcheon v. Federal Election Commission*

As part of the Federal Election Campaign Act of 1971 (FECA),<sup>178</sup> Congress established aggregate limits on campaign contributions.<sup>179</sup> In doing so, Congress hoped to restore public confidence in the political system.<sup>180</sup> The limits increased over time and were amended by the BCRA.<sup>181</sup> The most recent limits capped contributions to candidates for federal office at \$48,600, and contributions to party committees at \$74,600.<sup>182</sup> Plaintiff *McCutcheon*, a major Republican Party donor, brought suit challenging the constitutionality of the aggregate limits.<sup>183</sup>

The Court previously addressed FECA campaign contribution limits in *Buckley v. Valeo*. In that case, the Court held that the limits were constitutional when aimed at protecting against quid pro quo corruption.<sup>184</sup> *Buckley* also held that aggregate campaign limits, then \$25,000, were constitutional.<sup>185</sup> Although the limits imposed a “modest restraint upon protected political activity,” they were justified to prevent evasion of the individual donation limit.<sup>186</sup> For example, a donor could make unarmarked donations to committees, which would then donate to a particular candidate.<sup>187</sup> Thus, the *Buckley* Court saw aggregate limits as no different than the individual limits.<sup>188</sup>

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175. *Id.* at 491.

176. *Id.*

177. See Daniel J. Cantelme, *Arizona Campaign Finance Laws Are Teetering*, ARIZ. ATT'Y, Mar. 2015, at 36–37.

178. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 591, 62 Stat. 719 (1972).

179. See *id.*; see also Jason M. Breslow, *Supreme Court Strikes Down Limits on Campaign Spending*, PBS: FRONTLINE (Apr. 2, 2014), <https://www.pbs.org/wgbh/frontline/article/supreme-court-strikes-down-limits-on-campaign-spending> [<https://perma.cc/X5UL-TQUJ>] (noting that the limits at issue in *McCutcheon v. FEC* were established in the wake of the Watergate scandal).

180. See Breslow, *supra* note 179.

181. See *McCutcheon v. FEC*, 572 U.S. 185, 193 (2014).

182. Breslow, *supra* note 179.

183. *Id.*

184. *McCutcheon*, 572 U.S. at 199 (citing *Buckley v. Valeo*, 424 U.S. 1, 27–28 (1976)).

185. *Buckley*, 424 U.S. at 38.

186. *Id.*

187. *Id.*

188. *Id.*

The *McCutcheon* Court, however, held that the aggregate limits implicated significant First Amendment interests.<sup>189</sup> Contributing money to political candidates is one way people participate in democracy, the Court held. Aggregate limits impose more than a mere “modest restraint” on this right as they effectively penalize the individual donor who wishes to contribute to multiple candidates, so this donor might have to give less than he wishes to certain candidates to comply with the limit.<sup>190</sup>

Under *McCutcheon*, Congress may only suppress campaign speech to target quid pro quo corruption. The Court acknowledged that the line between quid pro quo corruption and general influence can be blurry.<sup>191</sup> However, it rejected the idea that aggregate limits target such corruption.<sup>192</sup> Furthermore, the Court held that Congress may not suppress campaign speech to equalize the electoral opportunities or financial resources of candidates.<sup>193</sup> *McCutcheon*, therefore, reemphasized the holding in *Free Enterprise*.

*McCutcheon* did leave in place limits on contributions to an individual candidate.<sup>194</sup> However, the decision dramatically increased the amount of money that a donor can contribute during an election cycle. Previously, aggregate limits capped total contributions at approximately \$123,000.<sup>195</sup> Few people met this limit.<sup>196</sup> During the 2012 election, only 644 people nationwide hit the aggregate limit.<sup>197</sup> However, with the removal of aggregate limits and only the cap on individual contributions remaining, the total amount an individual can contribute during a campaign cycle increased to over \$2.4 million.<sup>198</sup> Therefore, the *McCutcheon* decision benefitted an extremely small bloc of American political donors.

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189. *McCutcheon*, 572 U.S. at 203.

190. *Id.*

191. *Id.* at 210.

192. *Id.*

193. *Id.* at 207. Adam Lamparello contends, however, that the limits at issue did not reflect a Congressional attempt to merely level the playing field. Instead, he argues, Congress was really trying to maintain the integrity of the entire system. Adam Lamparello, *Citizens Disunited: McCutcheon v. Federal Election Commission*, 90 IND. L.J. SUPPLEMENT 43, 47 (2014).

194. Breslow, *supra* note 179.

195. *Id.*

196. *Id.*

197. Bob Biersack, *McCutcheon Decision: Add Some More Zeroes to That Check*, OPENSECRETS NEWS (Apr. 2, 2014), <https://www.opensecrets.org/news/2014/04/mccutcheon-decision-add-some-more-z> [<https://perma.cc/3TX5-6NX9>].

198. *Id.*

Adam Lamparello notes that the First Amendment is silent on campaign finance issues, including aggregate limits.<sup>199</sup> He contends, therefore, that the Court should have taken a “pragmatic approach” and deferred to Congress’s judgment that such limits were necessary.<sup>200</sup> He also argues that the Court could have upheld aggregate limits under a “time, place, and manner” type regime.<sup>201</sup> Unfortunately, like the other cases discussed in this Article, the Court refused to defer to Congressional judgment.

There is a nontrivial possibility that the Supreme Court will eventually strike down *all* campaign contribution limits. At least one justice supports this view. Justice Thomas, concurring in *McCutcheon*, argued that *Buckley v. Valeo* should be overruled in its entirety and that all campaign contribution limits violate the First Amendment.<sup>202</sup> Following *McCutcheon*, it is inevitable that the crux of *Buckley*, the constitutionality of the limit on contributions to political candidates, will come before the Court.<sup>203</sup>

This is far from mere speculation. Paul Clement is currently petitioning the Court to review the Ninth Circuit’s decision in *Thompson v. Hebdon*.<sup>204</sup> That decision upheld Alaska’s \$500 limit on campaign contributions.<sup>205</sup> Clement argues that the limit is too low.<sup>206</sup> If the Court grants certiorari and reverses the Ninth Circuit’s decision, it would “hasten a world in which individuals could give unlimited sums directly to candidates, buying all the ingratiation and access they want.”<sup>207</sup>

Clement’s concern is warranted in light of the Court’s previous decisions and recent Trump appointments to the bench. As of September 2019, 150 Trump appointees had been confirmed to the federal judiciary, including Justices Kavanaugh and Gorsuch, who have expressed

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199. Lamparello, *supra* note 193, at 43.

200. *Id.*

201. *Id.* at 48.

202. *Id.* at 44. This view also finds support from James Bopp Jr. and Randy Elf, advocates for more campaign spending. See James Bopp Jr. et al., *Contribution Limits After McCutcheon v. FEC*, 49 VAL. U. L. REV. 361, 361–62 (2015).

203. The Editorial Bd., *The Court Follows the Money*, N.Y. TIMES (Apr. 3, 2014), <https://www.nytimes.com/2014/04/03/opinion/the-court-follows-the-money.html> (questioning whether the Court would uphold the constitutionality of per-candidate limits after its decision in *McCutcheon*).

204. Richard L. Hasen, *Unlimited Donations to Candidates, Coming Soon?*, ATLANTIC (July 26, 2019), <https://www.theatlantic.com/ideas/archive/2019/07/campaign-finance-supreme-court/594751>.

205. *Id.*

206. *Id.*

207. *Id.*

considerable hostility towards campaign finance regulations.<sup>208</sup> These Justices are likely to team up with Chief Justice Roberts, who equated the right to donate money with the right to vote in the *McCutcheon* decision.<sup>209</sup> Certainly, the current conservative majority will further campaign finance deregulation.<sup>210</sup>

As Justice Breyer lamented in his dissent, *McCutcheon*

is a decision that substitutes judges' understandings of how the political process works for the understanding of Congress; that fails to recognize the difference between influence resting upon public opinion and influence bought by money alone; that overturns key precedent; that creates huge loopholes in the law; and that undermines, perhaps devastates, what remains of campaign finance reform.<sup>211</sup>

On the other hand, defenders of *McCutcheon* contend that the decision enables greater contributions to party committees, which soaks up some of the spending that was going to outside groups.<sup>212</sup> Under this rather cynical view of campaign finance, the flow of big money must go somewhere, so it may as well go to the more well-known entity. However, as Michael Kang argues, this simply leads to "party-based" corruption rather than individual corruption.<sup>213</sup> Under this theory, the parties act as wide networks through which large donations are filtered.<sup>214</sup> While quid pro quo corruption still occurs, it becomes more attenuated and difficult to prove.<sup>215</sup>

These campaign finance decisions have increased the concentration of political power in the rich and powerful. As Stephen Feldman argues, the Roberts Court has turned American democracy into "Democracy, Inc."<sup>216</sup> This Court has been the most probusiness since World War II, favoring corporations even when evidence proves it harmful to the representation-reinforcing values central to the democratic system and ultimately undermining the confidence of the American people in the political system.

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208. Ciara Torres-Spelliscy, *Trump's Judicial Picks Are Gutting Campaign Finance Law*, LAW 360 (Sept. 12, 2019, 8:04 PM), <https://www.law360.com/articles/1195479/trump-s-judicial-picks-are-gutting-campaign-finance-law>.

209. *Id.*

210. *Id.*

211. *McCutcheon v. FEC*, 572 U.S. 185, 260–61 (2014) (Breyer, J., dissenting).

212. Bopp et al., *supra* note 202, at 386; *see also* Marc E. Elias & Jonathan S. Berkon, *After McCutcheon*, 127 HARV. L. REV. F. 373, 374 (2014); Robert Kelner, *The Practical Consequences of McCutcheon*, 127 HARV. L. REV. F. 380, 384 (2014).

213. Michael Kang, *Party-Based Corruption and McCutcheon v. FEC*, 108 NW. L. REV. ONLINE 240, 241–42 (2014).

214. *Id.* at 242.

215. *Id.*

216. Stephen M. Feldman, *The End of the Cold War: Can American Constitutionalism Survive Victory?*, 41 OHIO N.U. L. REV. 261, 267 (2015).

*E. McDonnell v. United States*

One of the threads that ties the Court's decisions in *Citizens United v. FEC*, *Arizona Free Enterprise v. Bennett*, and *McCutcheon v. FEC* together is the majority's perfunctory invalidation of statutes targeted at the scourge of quid pro quo corruption that has plagued our democratic institutions. The Court was again provided with the opportunity to admonish quid pro quo corruption in the context of a high-profile gubernatorial bribery charge in *McDonnell v. United States*.<sup>217</sup> However, the Court refused to acknowledge the existence of this blatant corruption, delivering yet another shocking blow to the efficacy of our democracy.<sup>218</sup>

At issue in *McDonnell* was the proper interpretation of the federal bribery statute 18 U.S.C. § 201. The federal bribery statute was enacted in 1962 to strengthen criminal laws on bribery, graft, and conflicts of interest.<sup>219</sup> The extensive legislative history behind the 1962 bill reveals that both Congress and President John F. Kennedy sought to pass the law in order to raise ethical standards and increase public confidence in government.<sup>220</sup>

18 U.S.C. § 201 makes it a crime for a public official to directly or indirectly corruptly demand, seek, receive, accept, or agree "to receive or accept anything of value" in exchange for "being influenced in the performance of any official act."<sup>221</sup> For purposes of the statute, an "official act" is defined as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit."<sup>222</sup>

The interpretation of this statute became relevant in 2009, when Governor Robert McDonnell and his wife began their interactions with businessman Jonnie Williams during McDonnell's gubernatorial campaign.<sup>223</sup> From the onset of his campaign, Governor McDonnell focused heavily on promoting business and fostering economic development in Virginia.<sup>224</sup> This caught the attention of Jonnie Williams, the CEO of a Virginia-based company, Star Scientific.

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217. 136 S. Ct. 2355 (2016).

218. *See id.* at 2372.

219. *See* ARNOLD & PORTER, LEGISLATIVE HISTORY OF BRIBERY, GRAFT, AND CONFLICTS OF INTEREST (18 U.S.C. 201 ET SEQ.) P.L. 87-849, <https://heinonline.org/HOL/P?h=hein.leghis/gihiscoter0001&i=1&a=YW11cmljYW4uZWR1>.

220. *Id.*

221. 18 U.S.C. § 201(b)(2) (2012).

222. § 201(a)(3).

223. *McDonnell*, 136 S. Ct. at 2361–62, 2365.

224. *Id.* at 2361.

Williams wanted local universities to perform research on the nutritional supplement, Anatabloc, to determine its health benefits and ultimately obtain FDA approval of Anatabloc as an anti-inflammatory drug.<sup>225</sup> In exchange for help in advancing this agenda, Williams entered into a close relationship with McDonnell in that he provided monetary loans and other benefits to McDonnell to help him through his financial struggles.<sup>226</sup> In return for this monetary assistance, Governor McDonnell set up meetings for Williams with state agencies, held luncheons with university researchers, and even suggested that Anatabloc be included in state employees' healthcare plans.<sup>227</sup>

The scope of the financial assistance increased significantly as Williams provided McDonnell and his wife with various gifts, including shopping sprees, expensive vacations, designer watches, and a loan to help with their daughter's wedding.<sup>228</sup> By the end of their relationship, Williams gave \$175,000 to the McDonnells in loans, gifts, and other benefits.<sup>229</sup>

In January of 2014, federal prosecutors indicted McDonnell and his wife on federal bribery charges while Williams received immunity in exchange for his testimony.<sup>230</sup> To convict the McDonnells, it was incumbent on the government to prove the Governor committed, or agreed to commit, an "official act" in exchange for financial benefit like the gifts and loans Williams provided.<sup>231</sup> The government cited at least five instances in which the Governor committed an "official act" for Williams, including hosting events, arranging meetings, and contacting government officials on his behalf.<sup>232</sup>

Controversy arose surrounding how the jury would be instructed as to what constituted an "official act" under the statute.<sup>233</sup> The district court instructed the jury according to the government's understanding of an "official act."<sup>234</sup> In order to convict McDonnell using the government's definition, he would have had to agree to "accept a thing of value in exchange for official action."<sup>235</sup> However, McDonnell's defense team

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225. *Id.* at 2362.

226. *Id.*

227. *Id.* at 2362–64.

228. *Id.* at 2362–63.

229. *Id.* at 2364.

230. *Id.* at 2364–66.

231. *Id.* at 2365.

232. *Id.* at 2365–66.

233. *Id.* at 2366.

234. *Id.*

235. *Id.* The Court informed the jury that the statutory definition of "official act" "encompassed 'acts that a public official customarily performs,' including acts 'in

objected to this instruction, arguing that merely arranging an event or a meeting, standing alone, is not an “official act.”<sup>236</sup> McDonnell’s team furthered its argument by explaining that “official acts” should relate to a specific gubernatorial decision, enumerating issuing a license, awarding a contract, passing a law, or implementing a regulation.<sup>237</sup>

The Supreme Court—in a unanimous decision written by Chief Justice Roberts—ruled that the government’s interpretation of an “official act” was too broad as it encompassed nearly “*any* decision or action, on *any* question or matter” that is pending at any time or can be brought before any public official.<sup>238</sup> According to the Court, a more circumscribed interpretation was necessary.<sup>239</sup> The Court averred that the proper interpretation of an “official act” is a decision or action on a “question, matter, cause, suit, proceeding or controversy. The ‘question, matter, cause, suit, proceeding or controversy’ must involve a formal exercise of governmental power . . . . [i]t must also be something specific and focused that is ‘pending’ or ‘may by law be brought’ before a public official.”<sup>240</sup> Under this “proper” definition, the Court concluded that merely setting up a meeting, hosting an event, or calling another official is not a decision or action on any of the questions or matters before the Court.<sup>241</sup>

The Court also contemplated the constitutional concerns that the government’s interpretation of “official act” raised.<sup>242</sup> The Court proffered that under the government’s overly broad interpretation, nearly anything a public official did would count as a *quid pro quo*.<sup>243</sup> Chief Justice Roberts concluded that the government’s interpretation could “cast a pall of potential prosecution” over day-to-day relationships between conscientious public officials and their constituents.<sup>244</sup> The

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furtherance of longer-term goals’ or ‘in a series of steps to exercise influence or achieve an end.’” *Id.*

236. *Id.*

237. *Id.*

238. *Id.* at 2367–68.

239. *Id.* at 2368.

240. *Id.* at 2372.

241. *Id.* at 2370. The Court agreed with the determination of the Fourth Circuit that there were three questions or matters at issue in the case including “(1) ‘whether researchers at any of Virginia’s state universities would initiate a study of Anatabloc’; (2) ‘whether the state-created Tobacco Indemnification and Community Revitalization Commission’ would ‘allocate grant money for the study of anatabine’; and (3) ‘whether the health insurance plan for state employees in Virginia would include Anatabloc as a covered drug.’” *Id.*

242. *Id.* at 2372.

243. *Id.*

244. *Id.*

Court feared such a situation would cause officials and citizens alike to refrain from participating in democratic discourse and chill interactions that are typical in a representative government.<sup>245</sup>

Yet, it is hard to reconcile the fact that the Court unanimously recognized \$175,000 in gifts and loans from Williams to the McDonnell family as a “normal” constituent relationship under a representative government.<sup>246</sup> This appears to be an utter failure by the Court to fully gauge the difference between normal day-to-day constituent services and the totality of the conduct by Governor McDonnell, which clearly amounted to quid pro quo corruption.

The result of the *McDonnell* decision was a collective sigh of relief from lobbyists and anticampaign regulation activists.<sup>247</sup> While there was some disagreement as to how far the decision would reach, it was universally agreed that *McDonnell* was a further relaxation of rules for lobbyists and politicians.<sup>248</sup> Certain scholars concurred with the Court’s conclusion that the link between the gifts given to the Governor and his undertaking of an “official act” was tenuous.<sup>249</sup> Yet, others saw the *McDonnell* decision for what it was—another judicial step that eroded institutions intrinsic to representative democracy. As the leader of one watchdog group bemoaned, “the repercussions are massive. . . [t]his case was a critical test, and the [C]ourt failed.”<sup>250</sup>

## II. VOTING RIGHTS

The Court’s undermining of representation-reinforcing values during the decade was definitely not limited to the campaign finance arena. The Court struck a brutal blow to voting rights in *Shelby County v. Holder* and a lesser, but still significant, one in *Husted v. A. Philip Randolph Institute*. Then, as the decade of democracy’s demise neared its conclusion, the Court shut the doors of federal courts to partisan gerrymandering claims in *Rucho v. Common Cause*. In isolation, each of these decisions undermines voting rights. In the aggregate, they are a democratic disaster.

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245. *Id.*

246. *Id.* at 2364.

247. Kate Ackley, *Campaign Finance Watchdogs Decry McDonnell Corruption Ruling*, ROLL CALL (June 27, 2016, 3:53 PM), <https://www.rollcall.com/news/policy/campaign-finance-watchdogs-decry-mcdonnell-corruption-ruling> [<https://perma.cc/3GSS-N6PX>].

248. *Id.*

249. *Id.*

250. *Id.*



In 1965, Congress passed the landmark Voting Rights Act (VRA)<sup>251</sup> in response to the segregationist era voter suppression tactics that remained as the influence of Jim Crow began to recede through the South.<sup>252</sup> The Act required covered jurisdictions to seek preclearance from federal authorities prior to changing their voting procedures.<sup>253</sup> The Supreme Court has described a covered jurisdiction as “those States or political subdivisions that had maintained a test or device as a prerequisite to voting as of November 1, 1964, and had less than 50 percent voter registration or turnout in the 1964 Presidential Election.”<sup>254</sup> This encompassed the entirety of Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, as well as scattered counties throughout the country.<sup>255</sup>

The preclearance provision required a covered jurisdiction to obtain permission from federal authorities, either the D.C. District Court or the U.S. Attorney General’s Office, before making any changes to voting procedures.<sup>256</sup> In seeking preclearance, a covered jurisdiction had the burden to show that the change in voting procedure had “neither ‘the purpose [nor] the effect of denying or abridging the right to vote on account of race or color.’”<sup>257</sup> The Court first upheld the VRA in *South Carolina v. Katzenbach*.<sup>258</sup> In that decision, the Court ruled that the VRA was justified to address “voting discrimination where it persists on a pervasive scale.”<sup>259</sup> Nearly forty-five years later, the Court once again faced the issue of whether to uphold the VRA.

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251. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

252. See *South Carolina v. Katzenbach*, 383 U.S. 301, 309–15 (1966) (summarizing the legislative history behind the VRA, which documented the various kinds of legislative devices and tests used throughout the South to disenfranchise blacks, and stating that the VRA intended to eliminate racial discrimination from voting).

253. See Voting Rights Act § 5.

254. *Shelby Cty. v. Holder*, 570 U.S. 529, 537 (2013).

255. *Id.* at 537 (citing 28 C.F.R. pt. 51 app. (2012)).

256. *Id.*

257. *Id.* (quoting Voting Rights Act of 1965, 79 Stat. at 439).

258. 383 U.S. 301 (1966).

259. *Shelby Cty.*, 570 U.S. at 538 (quoting *Katzenbach*, 383 U.S. at 308).

A. *Shelby County v. Holder*

In 2010, Shelby County, Alabama sought a declaratory judgment that the coverage formula and preclearance requirement were unconstitutional and sought a permanent injunction against their enforcement.<sup>260</sup> The statute was upheld by both the District Court and the D.C. Circuit Court of Appeals before landing at the Supreme Court.<sup>261</sup>

In a sweeping decision written by Chief Justice Roberts, the Court ruled that the VRA's coverage formula was unconstitutional.<sup>262</sup> The Court first cited its decision in *Northwest Austin Municipal Utility District No. 1 v. Holder*,<sup>263</sup> where it expressed doubt about the coverage formula's constitutionality in holding that "[a statute's] current burdens must be justified by current needs . . . . [and any] disparate geographic coverage [must be] sufficiently related to the problem that it targets."<sup>264</sup> The Court then cited to facts that voter registration and turnout had more or less reached parity between blacks and whites in 2006, that blacks were being elected to office in record numbers, and that black turnout even exceeded white turnout in five of the six covered states.<sup>265</sup> Thus, the Court opined that the coverage formula violated the "'fundamental principle of equal sovereignty' among the States" because covered jurisdictions had to "beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own."<sup>266</sup>

Central to the Court's decision in *Shelby County* was its belief that "[o]ur country has changed," thus rendering the coverage formula outdated and unnecessary.<sup>267</sup> Counsel for Shelby County echoed this

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260. *Id.* at 540–41.

261. *Id.*

262. The Court's four other conservative justices joined in the majority.

263. 557 U.S. 193 (2009).

264. *Id.* at 203.

265. *Id.* at 547–48.

266. *Id.* at 544. For a discussion on the problematic roots of the "equal sovereignty principle," see generally James Blacksher & Lani Guinier, *Free at Last: Rejecting Equal Sovereignty and Restoring the Constitutional Right to Vote*, *Shelby County v. Holder*, 8 HARV. L. & POL'Y REV. 39 (2014). The authors argue that the equal sovereignty principle has its roots in *Dred Scott* and was reaffirmed in the *Slaughter-House Cases*. *Id.* at 41–42, 47, 55. The *Shelby County* Court, of course, does not cite to these cases—but "[s]urely the Court had to be aware of the racially discriminatory origins of its 'equal sovereignty' doctrine." *Id.* at 58.

267. *Shelby Cty.*, 570 U.S. at 557 (Thomas, J., concurring). The Court reasoned that because the coverage formula was "based on 40-year-old facts having no logical relation to the present day," and thus was "not . . . grounded in current conditions." *Id.* at 554 (majority opinion). In addition, in reference to the aforementioned House report, the

sentiment by arguing that “the problem to which the Voting Rights Act was addressed is solved. You look at the registration, you look at the voting. That problem is solved on an absolute, as well as, a relative basis.”<sup>268</sup> Justice Kagan pointed out the fundamental flaw in this argument by asking, “[y]ou said the problem has been solved. But who gets to make that judgment really? Is it you, is it the Court, or is it Congress?”<sup>269</sup>

The extensive legislative history of the VRA and its subsequent reauthorization underscores why the Court should have deferred to Congressional judgment here. The VRA was reauthorized by Congress three times between its initial passage and 2006, when the VRA was extended for another twenty-five years.<sup>270</sup> When the VRA came back up for reauthorization in 2006, Congress compiled a record with over 12,000 pages of evidence as to why the VRA needed to be reauthorized along with the same coverage formula.<sup>271</sup> The report, completed by the House Judiciary Committee, found that preclearance of covered jurisdictions had been a “vital prophylactic tool[] . . . [against new efforts] employed by covered . . . jurisdictions.”<sup>272</sup> The report also found that since the previous authorization in 1982, the Department of Justice (DOJ) had objected to over 700 changes in voting laws that were determined to be discriminatory.<sup>273</sup> In fact, there were more objections to voting changes between 1982 and 2004 than between 1965 and 1982.<sup>274</sup>

Even the mere threat of preclearance was an effective deterrent against jurisdictions considering discriminatory changes. The DOJ, when it suspected a discriminatory motive, would send the jurisdiction

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Court said that “no one can fairly say that [the record] shows anything approaching the ‘pervasive,’ ‘flagrant,’ ‘widespread,’ and ‘rampant’ discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time.” *Id.*

268. Transcript of Oral Argument at 65–66, *Shelby County v. Holder*, 570 U.S. 529 (2013) (No. 12–96).

269. *Id.* at 66.

270. *Shelby Cty.*, 570 U.S. at 536–39.

271. H.R. Rep. No. 109-478, at 5 (2006). Congress clearly recognized the importance of this legislation because it “result[ed] from the development of one of the most extensive legislative records in the Committee on the Judiciary’s history.” *Id.* The investigation included ten oversight hearings before the Subcommittee on the Constitution which had oral testimony from thirty-nine witnesses, additional written testimony from the Department of Justice, government and nongovernmental organizations, and private citizens, and incorporated two comprehensive reports compiled by nongovernmental organizations. *Id.*

272. *Id.* at 21.

273. *Id.* at 36.

274. *Id.* at 6, 21.

a “More Information Request” (“MIR”).<sup>275</sup> Since the 1982 reauthorization, covered jurisdictions withdrew over 205 proposed voting changes after receiving an MIR.<sup>276</sup> The report found that racial disparities in voter turnout and elected officials persisted in covered jurisdictions but that the preclearance provision was the direct cause of an increase in both turnout and the election of African American officials.<sup>277</sup> On the heels of this report, Congress passed the 2006 reauthorization with overwhelming bipartisan support: the Senate passed it 98–0; the House passed it 390–33; and Republican President George W. Bush enthusiastically signed it into law.<sup>278</sup>

The Court emphasized the rigidity of a coverage formula that forced covered jurisdictions to “beseech the Federal Government for permission” to change their voting procedures.<sup>279</sup> The Court, however, overlooked the flexibility afforded to covered jurisdictions through the “bailout” procedure. A covered jurisdiction that showed its compliance with the VRA for the previous ten years could lose its covered status.<sup>280</sup> The bailout provisions reflected Congress’s concern about subjecting jurisdictions to preclearance for extended periods of time.<sup>281</sup> In reauthorizing the VRA in 1982, Congress expected that covered jurisdictions would take advantage of the bailout provision and that “few jurisdictions would remain covered 25 years later.”<sup>282</sup> By 2006, eleven counties from Virginia successfully bailed out from covered status, thus demonstrating that “covered status is neither permanent nor over-broad”

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275. *Id.* at 40. MIRs forced covered jurisdictions to either “(1) submit additional information to prove a change is non-discriminatory; (2) withdraw a proposed change from consideration because it is discriminatory; (3) submit a new or amended non-discriminatory voting plan; or (4) make no change.” *Id.* at 40.

276. *Id.* at 41.

277. *Id.* at 12.

278. Press Release, The White House: President George W. Bush, Fact Sheet: Voting Rights Act Reauthorization and Amendments Act of 2006 (July 27, 2006), <https://georgewbush-whitehouse.archives.gov/news/releases/2006/07/20060727-1.html> [<https://perma.cc/C77E-5WUJ>]. “At least 13 laws were blocked by preclearance in just the 18 months prior to” the *Shelby County* decision. Max Feldman, *A Chance to Revive the Voting Rights Act*, BRENNAN CTR. FOR JUST. (Oct. 23, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/chance-revive-voting-rights-act> [<https://perma.cc/54F7-ARLE>].

279. *Shelby Cty. v. Holder*, 570 U.S. 529, 544 (2013).

280. *Id.* at 539.

281. H.R. Rep. No. 109-478, at 10 (2006). In the 1982 reauthorization, Congress amended the bailout provision “to allow a political subdivision to terminate coverage independent of a covered State.” *Id.*

282. *Id.*

and that covered status is “within the control of the jurisdiction . . . .”<sup>283</sup> However, Congress was “disappointed” that more States did not take advantage of the bailout process over that twenty-five-year span.<sup>284</sup> Congress found that the lack of successful bailouts was “telling of the commitment by some of the covered jurisdictions to end discriminatory practices.”<sup>285</sup> Thus, the Court’s portrayal of the coverage formula as “static, unchanged since 1965” is inaccurate.<sup>286</sup> Liberalized bailout procedures allowed covered jurisdictions to control their own destiny. The fact that so many jurisdictions were unable to bail out “reinforces the congressional judgment that these jurisdictions were rightfully subject to preclearance, and ought to remain under that regime.”<sup>287</sup>

Professor Ellen Katz defended the coverage formula and criticized the Court’s following statement: “if ‘Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula . . . . [but] that is exactly what Congress has done.’”<sup>288</sup> To the contrary, Professor Katz argues that “Congress was not starting from scratch in 2006. Instead, it was considering whether a remedy everyone agreed had been lawfully imposed should continue.”<sup>289</sup> Congress concluded, based on the evidence it had compiled, that the coverage formula and preclearance were still necessary.<sup>290</sup> Reauthorization of the VRA preserved the “opportunities to refine coverage through the bailout and bail-in procedures.”<sup>291</sup>

The majority argued that “first-generation” barriers to voting (i.e., literacy tests, other devices that block ballot access) have largely been eliminated.<sup>292</sup> Therefore, “current conditions” in the covered states did not justify the coverage formula.<sup>293</sup> The presence of “second-generation barriers” (which “affect the weight of minority votes”) does not “cure” the problem of the coverage formula, according to the majority opinion.<sup>294</sup>

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283. *Id.* at 25.

284. *Id.* at 58.

285. *Id.*

286. *Shelby Cty. v. Holder*, 570 U.S. 529, 580 (2013) (Ginsburg, J., dissenting).

287. *Id.*

288. Ellen D. Katz, *What Was Wrong with the Record?*, 12 ELECTION L.J. 329, 330 (2013) (quoting *Shelby Cty.*, 570 U.S. at 556).

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.* (quoting *Shelby Cty.*, 570 U.S. at 547).

293. *Id.* (quoting *Shelby Cty.*, 570 U.S. at 553).

294. *Id.* at 331 (quoting *Shelby Cty.*, 570 U.S. at 554).

Katz contends, however, that the VRA was always intended to prevent second-generation barriers. Second-generation practices, such as racial gerrymandering, “predate the VRA by decades.”<sup>295</sup> Southern states used second-generation barriers in conjunction with first-generation barriers throughout the Jim Crow era.<sup>296</sup> Therefore, “the practices grouped as ‘second generation’ are not unrelated to the concerns that first animated Congress to enact the VRA. They were part and parcel of the practices the original statute targeted.”<sup>297</sup> The coverage formula used lower voter turnout tests and devices as a “trigger” for preclearance.<sup>298</sup> However, these “elements” “captured with remarkable accuracy” places in the South that also engaged in “second-generation” barriers to voting.<sup>299</sup> “The statutory ‘trigger’ linked tests and devices to low participation, but the statute’s target was never so limited.”<sup>300</sup>

The majority opinion “may signal deeper skepticism about congressional judgment” and “portend more rigorous examination of congressional action in the future.”<sup>301</sup>

Wendy Scott argues that while *Shelby County* may have provoked an outcry, the decision was actually foreseeable.<sup>302</sup> She points out that southern states actively circumvented the VRA throughout the Act’s history.<sup>303</sup> States used “reapportionment, annexation,” “at-large voting schemes,” and “outright defiance of federal authority” to disenfranchise black voters.<sup>304</sup> Some local officials have even “closed their registration offices to freeze the voting rolls.”<sup>305</sup> Nonetheless, the Court often reacted to these practices with “ambivalence.”<sup>306</sup> For example, in *Allen v. State Board of Elections*,<sup>307</sup> Mississippi changed its voting procedures to discriminate against African-American voters but did not seek preclearance.<sup>308</sup> The Court held that Mississippi did need to seek

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295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. Wendy B. Scott, *Reflections on Justice Thurgood Marshall and Shelby County v. Holder*, 76 LA. L. REV. 121, 125 (2015).

303. *Id.*

304. *Id.* at 131.

305. *Id.* at 132 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966)).

306. *Id.* at 125.

307. 393 U.S. 544 (1969).

308. Scott, *supra* note 302, at 132; *see also Allen*, 393 U.S. at 571.

preclearance and did not order new elections.<sup>309</sup> This left officials elected through an illegal voting scheme in power and advantaged by the benefits of incumbency.<sup>310</sup>

In another example, the Court upheld a Virginia reapportionment plan that diluted minority voting strength because the population variances were “unavoidable.”<sup>311</sup> The Court also upheld the City of Richmond’s annexation scheme under the VRA, which diluted minority voting strength.<sup>312</sup> In *City of Mobile v. Bolden*,<sup>313</sup> the Court upheld Mobile, Alabama’s at-large voting law.<sup>314</sup> A group of black voters challenged the law under the VRA, but the Court held that “‘political groups’ have no ‘constitutional claim to representation’ independent from ‘the right of a person to vote on an equal basis.’”<sup>315</sup> Justice Marshall’s dissent noted that the at-large system “submerg[ed] electoral minorities and overrepresent[ed] electoral majorities.”<sup>316</sup>

Another way *Shelby County* was foreseeable, according to Wendy Scott, was the Court’s imposition of “high standards for proving racial discrimination.”<sup>317</sup> In *Beer v. United States*,<sup>318</sup> the Court held that a plan violated the VRA if it led to a “retrogression in the position of racial minorities,” as compared with the existing plan.<sup>319</sup> As Justice Marshall noted in his dissent, Congress enacted the VRA to prevent new voting plans that “perpetuate discrimination,” not to simply prevent existing discrimination from worsening.<sup>320</sup>

Scott argues *Shelby County* is also unsurprising considering the Roberts Court’s commitment to “post-racial constitutionalism,” under which minorities no longer need to be protected from racial discrimination.<sup>321</sup> *Shelby County* falls squarely within this tradition by holding that the “conditions that originally justified [the VRA coverage formula and preclearance] no longer characterize voting in the covered jurisdictions.”<sup>322</sup>

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309. Scott, *supra* note 302, at 132; *see also* *Allen*, 393 U.S. at 572.

310. *Shelby Cty. v. Holder*, 570 U.S. 529, 572 (2013) (Ginsburg, J., dissenting).

311. Scott, *supra* note 302, at 134 (discussing *Mahan v. Howell*, 410 U.S. 315 (1973)).

312. *Id.* at 135 (discussing *City of Richmond v. United States*, 422 U.S. 358 (1975)).

313. 446 U.S. 55 (1980).

314. *Id.* at 78.

315. Scott, *supra* note 302, at 137 (quoting *City of Mobile*, 446 U.S. at 78).

316. *Id.* (quoting *City of Mobile*, 446 U.S. at 105 (Marshall, J., dissenting)).

317. *Id.* at 138.

318. 425 U.S. 130 (1976).

319. Scott, *supra* note 302, at 139 (citing *Beer*, 425 U.S. at 141).

320. *Id.* (quoting *Beer*, 425 U.S. at 151 (Marshall, J., dissenting)).

321. *Id.* at 124–25, 144, 145.

322. *Shelby Cty. v. Holder*, 570 U.S. 529, 535 (2013).

The conservative Justices echoed this sentiment during oral argument. Justice Scalia notoriously referred to the VRA as an example of “racial entitlement,” pointing out that “[t]here are certain districts in the House that are black districts by law just about now.”<sup>323</sup> Racial entitlements, Scalia contended, are difficult to eliminate “through the normal political processes” once the entitlements are no longer needed.<sup>324</sup> Kennedy, who sided with the conservative bloc, acknowledged that the coverage formula was upheld as rational and effective in *South Carolina v. Katzenbach* in 1966.<sup>325</sup> However, “the Marshall Plan was very good, too, the Morrill Act, the Northwest Ordinance, but times change,” he argued.<sup>326</sup> Counsel for Shelby County boldly claimed that “the problem to which the Voting Rights Act was addressed is solved. You look at the registration, you look at the voting. That problem is solved on an absolute, as well as, a relative basis.”<sup>327</sup> The Court, by adopting this post-racial argument, “seemingly embraced the *Plessy v. Ferguson* concept that the continued existence of racism is a construct of the African-American imagination.”<sup>328</sup>

Not everyone laments the Court’s holding.<sup>329</sup> Cato Institute Director Ilya Shapiro contends that the *Shelby County* decision “underlines, belatedly, that Jim Crow is dead, and that American election law is ready to return to normalcy.”<sup>330</sup> He argues that prior to the decision, the “widespread, official racial discrimination in voting ha[d] disappeared,” because the institutionalized and sanctioned racial discrimination was no longer in place throughout the country.<sup>331</sup> He criticizes the “media and political elites” for suggesting otherwise and for focusing energy on the Court’s decision.<sup>332</sup> He contends that because there is no overt act of disenfranchisement, there is no need for efforts to prevent “[r]acial discrimination in voting.”<sup>333</sup>

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323. Transcript of Oral Argument at 47, *Shelby Cty. v. Holder*, 570 U.S. 529 (2013) (No. 12-96).

324. *Id.*

325. *Id.* at 35.

326. *Id.*

327. *Id.* at 65–66. Justice Kagan replied, “You said the problem has been solved. But who gets to make that judgment really? Is it you, is it the Court, or is it Congress?” *Id.* at 66.

328. Scott, *supra* note 302, at 145.

329. See Ilya Shapiro, *Shelby County and the Vindication of Martin Luther King’s Dream*, 8 N.Y.U. J.L. & LIBERTY 182, 191 (2013).

330. *Id.*

331. *Id.* at 192.

332. *Id.* at 185.

333. See *id.* at 188. But see Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 104 (2013). Professor Issacharoff singles out “partisan



However, empirical data suggest that the coverage formula was, contrary to the majority's holding and Shapiro's analysis, "justified by 'current needs.'"<sup>334</sup> The Brennan Center for Justice found that previously covered jurisdictions "have engaged in recent, significant efforts to disenfranchise voters."<sup>335</sup> These jurisdictions have succeeded in enacting laws that restrict voting.<sup>336</sup> Overall, *Shelby County* has had a "profound and negative impact" on voter participation in previously covered jurisdictions.<sup>337</sup>

The Court in *Shelby County* only formally addressed the coverage formula and did not issue a holding on the preclearance requirement. However, without the coverage formula, section 5 is essentially a nullity. Thus, *Shelby County* "crippled" the VRA, and invited previously covered jurisdictions to "implement[] changes to voting practices that would have otherwise required preclearance."<sup>338</sup> The effects were immediately felt.<sup>339</sup> Previously covered jurisdictions enacted voter identification laws, even in the absence of evidence of voter fraud.<sup>340</sup> Some localities limited early voting and certain polling locations.<sup>341</sup>

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battleground states such as Colorado, Florida, Ohio, and Pennsylvania," as noncovered jurisdictions that "sought to implement restrictive voter access laws." *Id.* at 104. Furthermore, "[t]he likelihood that a state would have introduced restrictive voter identification laws in recent years turns on one variable: Republican control of the state legislature." *Id.* at 103.

334. *Shelby Cty. v. Holder*, 570 U.S. 529, 550–51 (2013) (quoting *N.W. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 198, 203 (2009)); see also *The Effects of Shelby County v. Holder*, BRENNAN CTR. FOR JUST. (Aug. 6, 2018), <https://www.brennancenter.org/analysis/effects-shelby-county-v-holder> [<https://perma.cc/S2TT-JYE4>].

335. *The Effects of Shelby County v. Holder*, *supra* note 334.

336. *Id.*

337. JONATHAN BRATER ET AL., BRENNAN CTR. FOR JUST., PURGES: A GROWING THREAT TO THE RIGHT TO VOTE 1 (2018), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Purges\\_Growing\\_Threat.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Purges_Growing_Threat.pdf) [<https://perma.cc/P2WT-ELL9>].

338. Scott, *supra* note 302, at 123.

339. *Id.*

340. See *id.* For example, "[w]ithin 24 hours of the ruling, Texas announced that it would implement a strict photo ID law." *The Effects of Shelby County v. Holder*, *supra* note 334; see also Rick Lyman, *Texas' Stringent Voter ID Law Makes a Dent at Polls*, N.Y. TIMES (Nov. 6, 2013), [https://www.nytimes.com/2013/11/07/us/politics/texas-stringent-voter-id-law-makes-a-dent-at-polls.html?\\_r=0%20](https://www.nytimes.com/2013/11/07/us/politics/texas-stringent-voter-id-law-makes-a-dent-at-polls.html?_r=0%20) (discussing the Texas voter ID law, although federal courts would eventually strike down this law as discriminatory). But see Max Feldman, *Voting Rights in America, Six Years after Shelby v. Holder*, BRENNAN CTR. FOR JUST. (June 25, 2019), <https://www.brennancenter.org/blog/voting-rights-america-six-years-after-shelby-v-holder> [<https://perma.cc/LC7Q-2ZR9>] (noting that states including Alabama and Mississippi implemented photo ID laws, which had been previously barred due to federal preclearance; although other state laws, including Texas', have been successfully challenged, not all state laws have been).

341. Scott, *supra* note 302, at 124.

North Carolina, for example, enacted an extremely restrictive voting bill only two months after the *Shelby County* decision. The bill required a photo ID to vote, limited early voting, “eliminated same day registration; restricted pre-registration; ended annual voter registration drives; and eliminated the authority of county boards of elections to keep polls open for an additional hour.”<sup>342</sup> The Fourth Circuit struck this law down three years later under section 2 of the VRA.<sup>343</sup> However, this three-year delay highlights the important function that preclearance served: “shift[ing] the benefit of time and inertia from the perpetrators of evil to the victim.”<sup>344</sup> Without preclearance, illegal voting laws like North Carolina’s can take effect for years before a court strikes them down under section 2.<sup>345</sup> Of course, there is no guarantee that a court will even strike down such illegal voting laws under section 2, notwithstanding the “expensive and protracted” nature of the litigation to reach that junction.<sup>346</sup>

Following *Shelby County*, voter suppression laws have left their mark on electoral outcomes. During the 2016 election, fourteen states had new voting restrictions in place for the first time.<sup>347</sup> Reports suggest that the voter ID law in Wisconsin prevented nearly 45,000 people from voting.<sup>348</sup> President Trump won the state by only 22,177 votes.<sup>349</sup> Milwaukee, a majority African American city, saw its voter turnout decrease by nearly 41,000 people.<sup>350</sup>

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342. *The Effects of Shelby County v. Holder*, *supra* note 334.

343. *Id.*

344. H.R. Rep. No. 109-478, at 6 (2006) (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966)).

345. As Justice Ginsburg noted in her *Shelby County* dissent, this allows politicians elected under “illegal voting scheme[s],” to “gain[] the advantages of incumbency.” *Shelby Cty. v. Holder*, 570 U.S., 529, 572 (2013) (Ginsburg, J., dissenting).

346. Scott, *supra* note 302, at 124; *see also* Feldman, *supra* note 278.

347. *New Voting Restrictions in America*, BRENNAN CTR. FOR JUST. (Oct. 1, 2019), <https://www.brennancenter.org/new-voting-restrictions-america> [<https://perma.cc/XW85-X8TS>]. New restrictions on the right to vote impacted Alabama, Arizona, Indiana, Kansas, Mississippi, Nebraska, New Hampshire, Ohio, Rhode Island, South Carolina, Tennessee, Texas, Virginia, and Wisconsin. *Id.*

348. Ari Berman, *Rigged: How Voter Suppression Threw Wisconsin to Trump*, MOTHER JONES (Nov.-Dec. 2017), <https://www.motherjones.com/politics/2017/10/voter-suppression-wisconsin-election-2016> [<https://perma.cc/6TLM-R8EG>].

349. Brooke Seipel, *Trump’s Victory Margin Smaller than Total Stein Votes in Key Swing States*, HILL (Dec. 1, 2016), <https://thehill.com/blogs/blog-briefing-room/news/308353-trump-won-by-smaller-margin-than-stein-votes-in-all-three> [<https://perma.cc/HTQ6-HU5L>].

350. Berman, *supra* note 348. Some blamed Hillary Clinton’s loss in Wisconsin on her “failure to campaign in the state,” or the populace’s “lack of enthusiasm” about her campaign in general. *Id.*

Previously covered jurisdictions have leapt at the chance to close polling locations.<sup>351</sup> Arizona closed 212 locations.<sup>352</sup> Texas closed 403.<sup>353</sup> In total, previously covered jurisdictions closed 868 polling locations in time for the 2016 election.<sup>354</sup>

States also purged voters from voting rolls in record numbers following *Shelby County*.<sup>355</sup> Between 2014 and 2016, states removed nearly sixteen million voters from the rolls—four million more than before the 2008 election.<sup>356</sup> Between 2016 and 2018, an additional seventeen million voters were purged from the rolls.<sup>357</sup> Previously covered states purged voters at much higher rates than noncovered states.<sup>358</sup> The Brennan Center calculates that between 2012 and 2016, “2 million fewer voters would have been purged” if previously covered jurisdictions purged at the same rate as noncovered jurisdictions.<sup>359</sup> This trend has continued into 2018<sup>360</sup> and 2019.<sup>361</sup>

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351. See, e.g., Zak Cheney-Rice, *Georgia Republicans Secure Another Victory in Their Voter Purge*, N.Y. MAG. (Dec. 30, 2019), <http://nymag.com/intelligencer/2019/12/georgia-republicans-voter-purge.html> [<https://perma.cc/V6NF-2VZR>] (describing Georgia polling place closures). In the six years prior to the 2018 election, Georgia eliminated or relocated almost half of the state’s polling locations. *Id.* The impacts of the “closures and relocations” had a disproportionate impact and “were 20 percent more likely to be prohibitive for black voters than their white counterparts.” *Id.* (citing Mark Niesse & Nick Thieme, *Precinct Closures Harm Voter Turnout in Georgia, AJC Analysis Finds*, ATLANTA J.-CONST. (Dec. 13, 2019), <https://www.ajc.com/news/state-regional-govt-politics/precinct-closures-harm-voter-turnout-georgia-ajc-analysis-finds/11sVcLyQCHuQRC8qtZ6IYP> [<https://perma.cc/LN5U-T66T>]); see also Ari Berman, *There Are 868 Fewer Places to Vote in 2016 Because the Supreme Court Guttled the Voting Rights Act*, NATION (Nov. 4, 2016), <https://www.thenation.com/article/there-are-868-fewer-places-to-vote-in-2016-because-the-supreme-court-guttled-the-voting-rights-act> [<https://perma.cc/F79K-L2RG>].

352. Berman, *supra* note 351.

353. *Id.*

354. *Id.*

355. BRATER ET AL., *supra* note 337, at 1.

356. Joe Davidson, *Almost 16 Million Voters Were Removed from the Rolls. We Should Be Alarmed*, WASH. POST (May 15, 2019), [https://www.washingtonpost.com/politics/almost-16-million-voters-were-removed-from-the-rolls-we-should-be-alarmed/2019/05/15/f3de396a-7682-11e9-bd25-c989555e7766\\_story.html](https://www.washingtonpost.com/politics/almost-16-million-voters-were-removed-from-the-rolls-we-should-be-alarmed/2019/05/15/f3de396a-7682-11e9-bd25-c989555e7766_story.html).

357. Kevin Morris, *Voter Purge Rates Remain High, Analysis Finds*, BRENNAN CTR. FOR JUST. (Aug. 1, 2019), <https://www.brennancenter.org/blog/voter-purge-rates-remain-high-analysis-finds> [<https://perma.cc/J7FE-T63Y>].

358. BRATER ET AL., *supra* note 337, at 1.

359. *Id.*

360. Morris, *supra* note 357. Up to 1.1 million fewer voters would have been purged between 2016 and 2018 if all counties purged voter rolls at the same rate. *Id.* Previously covered jurisdictions purge at a forty percent higher rate than noncovered jurisdictions. *Id.*

361. Cheney-Rice, *supra* note 351. On December 16, 2019, Georgia purged 300,000 voters from the rolls. *Id.* Fair Fight Georgia, a group formed by former Georgia

Chief Justice Roberts stated that the Fifteenth Amendment is “not designed to punish for the past.”<sup>362</sup> The coverage formula, in his estimation, did precisely that because it failed to reflect “current conditions.”<sup>363</sup> To the contrary, data suggest what Congress knew when it reauthorized the VRA was that “current conditions” justified the continued use of the coverage formula. The millions of now disenfranchised voters in previously covered jurisdictions reflect this sad reality.<sup>364</sup>

### B. Husted v. A. Philip Randolph Institute

Faced with an antiparticipatory policy, the Supreme Court found its way back to legislative deference in *Husted v. A. Philip Randolph Institute*. Coincidence? Causation? The answer is impossible to prove, but as against the trend of aggressive judicial fact finding in the cases examined above, failing to at least acknowledge the correlation is the equivalent of putting one’s head in the sand.

Congress passed the National Voter Registration Act (NVRA)<sup>365</sup> to address both increasing voter registration and removing ineligible persons from the state’s voter registration rolls.<sup>366</sup> The Act requires states to implement a program that makes a “reasonable effort” to remove those from the rolls who either died or changed their residence.<sup>367</sup> It also includes various provisions to ensure that people are not improperly removed.<sup>368</sup> The Act permits a state to remove a voter if a post card is sent to them to confirm their address, the card is not returned, and the voter does not vote in the next two general federal elections.<sup>369</sup> The NVRA “treats the failure to return a card as *some*

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gubernatorial candidate Stacey Abrams, challenged the purge of 120,000 of those voters in response. *Id.* The state re-instated 22,000 voters who were removed from the voting rolls but refused to reinstate the other 98,000. *Id.* The District Court for the Northern District of Georgia upheld this decision on December 27, 2019. Hannah Knowles, *A Federal Judge Will Not Reverse Georgia’s Decision to Purge 100,000 Voters*, WASH. POST (Dec. 28, 2019, 5:34 PM), <https://www.washingtonpost.com/politics/2019/12/28/federal-judge-will-not-reverse-georgias-decision-purge-voters>.

362. *Shelby Cty. v. Holder*, 570 U.S. 529, 553 (2013).

363. *Id.* at 554.

364. On December 6, 2019, the House of Representatives passed the Voting Rights Advancement Act, which “would restore and modernize the core protections of the Voting Rights Act.” Feldman, *supra* note 278. Unless and until that bill is passed, however, states will have near free reign to implement voter suppression laws.

365. National Voter Registration Act of 1993, Pub. L. No. 104-132, 110 Stat. 1317.

366. *See Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1838 (2018).

367. 52 U.S.C. § 20507(a)(4) (2012).

368. § 20507(b)–(d).

369. § 20507(d)(1), (d)(2)(A).

evidence—but by no means conclusive proof—that the voter has moved.”<sup>370</sup> Under Ohio’s “Supplemental Process” law, the Ohio Secretary of State sends letters to registrants who have “not engage[d] in any voter activity” for two consecutive years.<sup>371</sup> These registrants are removed if they do not return the card and “fail[] to vote in any election during the period of two federal elections subsequent to the mailing of the confirmation notice.”<sup>372</sup> The NVRA specifically states that the failure to vote may not serve as the sole predicate for that voter’s removal.<sup>373</sup>

The Court upheld Ohio’s Supplemental Process under a textual analysis and, in doing so, rediscovered its respect for legislative findings. Counsel for the respondents argued that the failure to return a card is worthless as evidence that the addressee has moved because “[s]o many properly registered voters simply discard return cards.”<sup>374</sup> In response, the Court stated it was clear that Congress placed evidentiary value on a voter’s failure to return a card because it was one of only two requirements for voter removal under the NVRA.<sup>375</sup> Justice Alito, in stark contrast to the Court’s lack of legislative deference in *Shelby County*, stated “[w]e have no authority to dismiss the considered judgment of Congress and the Ohio Legislature regarding the probative value of a registrant’s failure to send back a return card.”<sup>376</sup>

Justice Alito criticized the dissenting justices for advancing policy arguments against Ohio and Congress, instead of simply interpreting the statute.<sup>377</sup> His attempt to frame *Husted* as simply a “dry exercise in bureaucratic mechanics and statutory interpretation” is hardly surprising.<sup>378</sup> The Supreme Court has employed this technique time and again, “turn[ing] a blind eye to the motivation behind, and effect of” laws that restrict the right to vote.<sup>379</sup> As a result, those laws upheld by the Court

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370. *Husted*, 138 S. Ct. at 1839.

371. *Id.* at 1840.

372. OHIO REV. CODE ANN. § 3503.21(B)(2) (West 2020).

373. 52 U.S.C. § 20507(b)(2).

374. *Husted*, 138 S. Ct. at 1845.

375. *Id.* at 1845–46.

376. *Id.* at 1846.

377. *Id.* at 1848.

378. *The Supreme Court 2017 Term: Leading Case: Federal Statutes: National Voter Registration Act—Statutory Interpretation—Election Law—Husted v. A. Philip Randolph Institute*, 132 HARV. L. REV. 437, 442 (2018) [hereinafter *Supreme Court 2017 Term*].

379. *Id.* Justice Sotomayor similarly argues that the majority “entirely ignores the history of voter suppression against which the NVRA was enacted and upholds a program that appears to further the very disenfranchisement of minority and low-income voters that Congress set out to eradicate.” *Husted*, 138 S. Ct. at 1865 (Sotomayor, J., dissenting).

have “serve[d] as models for states interested in restricting the franchise.”<sup>380</sup> *Husted* is simply the latest example of this practice.<sup>381</sup>

*Husted* is best understood in the context of America’s “history of voter suppression.”<sup>382</sup> Post-ratification of the Fifteenth Amendment, blacks were voted into local and federal office in record numbers.<sup>383</sup> During Reconstruction, voters elected over one thousand black men, including the first sixteen black congressmen.<sup>384</sup> Their success was short lived.<sup>385</sup> The end of Reconstruction led to a “a new era of voter suppression.”<sup>386</sup> States used legal methods such poll taxes and literacy tests to deny blacks the right to vote.<sup>387</sup> Blacks also faced “extrajudicial violence,”<sup>388</sup> which states “tacitly condoned.”<sup>389</sup> These practices “dramatically decreased black voter registration and turnout.”<sup>390</sup>

Even though voting restrictions such as poll taxes and literacy tests were obviously designed to disenfranchise blacks,<sup>391</sup> “the Supreme Court upheld them by focusing on their facial neutrality.”<sup>392</sup> For example, the Court upheld a literacy test in *Williams v. Mississippi*<sup>393</sup>

380. *Supreme Court 2017 Term, supra* note 378, at 442.

381. *Id.* On September 6, 2019, Ohio purged 182,000 voters from its rolls. The state purged 158,000 of those voters for voter inactivity under the Supplemental Process. Rick Rouan, *Vast Majority of the 180,000 Ohio Voters Purged Because They Didn’t Vote*, COLUMBUS DISPATCH (Sept. 30, 2019, 7:13 PM), <https://www.dispatch.com/news/20190930/vast-majority-of-180000-ohio-voters-purged-because-they-didnt-vote> [<https://perma.cc/WEF2-XCDU>].

382. *Supreme Court 2017 Term, supra* note 378, at 442.

383. *Id.*

384. *Id.*

385. *Id.* at 442–43.

386. *Id.*

387. *Id.*

388. *Id.* at 443.

389. See Zanita E. Fenton, *Disarming State Action; Discharging State Responsibility*, 52 HARV. C.R.-C.L. L. REV. 47, 52–53 (2017) (discussing how state officials during the Reconstruction era inequitably enforced firearms laws to intentionally leave black citizens vulnerable to lynch mobs).

390. *Supreme Court 2017 Term, supra* note 378, at 443.

391. *Id.* at 442–43. See generally TOVA ANDREA WANG, *THE POLITICS OF VOTER SUPPRESSION: DEFENDING AND EXPANDING AMERICANS’ RIGHT TO VOTE* 17–20 (2012) (describing how Southern states in the Reconstruction era intentionally implemented poll taxes and literacy tests to suppress poor and uneducated black voters and administered the poll taxes and literacy tests discriminately to white and black citizens).

392. *Supreme Court 2017 Term, supra* note 378, at 443; see, e.g., MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 141 (2004) (“The decision in *Williams v. Mississippi* (1898) rejected a facial challenge to a literacy test . . . on the ground that the legislative motive was irrelevant to constitutionality.”).

393. 170 U.S. 213 (1898).

because “it has not been shown that [the literacy test’s] actual administration was evil.”<sup>394</sup> Other states were encouraged by the Court’s “initial willingness to permit voter suppression.”<sup>395</sup> For example, months after the Court decided *Williams*, Democrats in North Carolina “organized an election day coup d’état” in which whites murdered “scores of black men, women, and children.”<sup>396</sup> The leaders of the coup declared that they would “no longer be ruled and will never again be ruled, by men of African origin.”<sup>397</sup> “By 1908, every ex-Confederate state had implemented” voter suppression laws.<sup>398</sup> The Court routinely upheld these laws on technicalities rather than address the discriminatory intent behind the legislation.<sup>399</sup>

In the 1903 decision *Giles v. Harris*,<sup>400</sup> the Court upheld Alabama’s Constitution, which was devised to exclude blacks from the political process.<sup>401</sup> The Court held that the plaintiffs could seek relief from their state government or Congress, but not the federal courts.<sup>402</sup> In *Lassiter v. Northampton County Board of Elections*,<sup>403</sup> the Court upheld North Carolina’s literacy test.<sup>404</sup> North Carolina justified the test as a way to prevent fraud.<sup>405</sup>

On the heels of *Shelby County* and *Husted*, Republican-controlled states have found “new ways to prevent minority voters from reaching the polls.”<sup>406</sup> Like the voter suppression laws of the past, the new laws are “cloaked with benign justifications like preventing fraud or ensuring faith in the democratic process.”<sup>407</sup> They are “couched in racially neutral terms,” even though they target black voters.<sup>408</sup>

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394. *Supreme Court 2017 Term, supra* note 378, at 443 (quoting *Williams*, 170 U.S. at 225).

395. *Id.* at 443.

396. *Id.*; see also Adrienne LaFrance & Vann R. Newkirk II, *The Lost History of an American Coup D’État*, ATLANTIC (Aug. 12, 2017), <https://www.theatlantic.com/politics/archive/2017/08/wilmington-massacre/536457>.

397. *Supreme Court 2017 Term, supra* note 378, at 443 (quoting HARRY HAYDEN, THE STORY OF THE WILMINGTON REBELLION 10 (1936), <http://core.ecu.edu/umc/wilmington/scans/ticketTwo/hayden.pdf> [<https://perma.cc/MB3W-42NU>]).

398. *Id.*

399. *Id.*

400. 189 U.S. 475 (1903).

401. *Supreme Court 2017 Term, supra* note 378, at 443–44.

402. *Id.* at 444.

403. 360 U.S. 45 (1959).

404. *Id.* at 53–54.

405. *Supreme Court 2017 Term, supra* note 378, at 444.

406. *Id.*

407. *Id.* (footnote omitted).

408. *Id.*

Disenfranchisement of black voters is “a feature, not a bug” of these new laws.<sup>409</sup> The Court, much like it did during the Jim Crow era, has “all but given its blessing to voter suppression.”<sup>410</sup> By invalidating the VRA’s coverage formula for preclearance in *Shelby County*, the Court invited previously covered jurisdictions to continue to restrict minority voters’ “access to the polls.”<sup>411</sup> In *Abbot v. Perez*,<sup>412</sup> the Court upheld racially gerrymandered district maps in Texas.<sup>413</sup> The Court used “hyper-technical language about jurisdiction and statutory construction.”<sup>414</sup> However, the decision effectively gave election map drawers the green light to design maps that infringe upon the voting rights of minorities.<sup>415</sup> In *Gill v. Whitford*,<sup>416</sup> the Court “manufactured a procedural dodge” to uphold Wisconsin’s gerrymandered maps, despite clear evidence that the legislature gerrymandered the districts to dilute minority voting power.<sup>417</sup>

*Husted’s* textual interpretation may be defensible, much like the facially neutral poll tax and literacy laws could be defended on textual grounds.<sup>418</sup> Ignoring the broader context of voter suppression throughout the nation’s past when interpreting new facially neutral voting laws disregards the struggle of generations who risked their lives for voting rights.<sup>419</sup> Like previous decisions that upheld voter suppression laws, *Husted* provides a “roadmap” for other states interested in suppressing minority voters.<sup>420</sup> At least twelve Republican-controlled state legislatures have signaled their plans to enact similar voter purge laws.<sup>421</sup>

In *Shelby County*, the Roberts Court invalidated overwhelmingly bipartisan legislation intended to protect minority voters.<sup>422</sup> The Court did this despite extensive Congressional fact finding that indicated the

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409. *Id.*

410. *Id.* at 445.

411. *Id.*

412. 138 S. Ct. 2305 (2018).

413. *Id.* at 2313–14.

414. *Supreme Court 2017 Term, supra* note 378, at 445 (quoting Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Abbot v. Perez, Race, and the Immodesty of the Roberts Court*, HARV. L. REV. BLOG (July 31, 2018), <https://blog.harvardlawreview.org/abbott-v-perez-race-and-the-immodesty-of-the-roberts-court> [<https://perma.cc/TNT6-YZBY>]).

415. *Id.*

416. 138 S. Ct. 1916 (2018).

417. *Supreme Court 2017 Term, supra* note 378, at 445.

418. *Id.*

419. *Id.* at 445–46.

420. *Id.* at 446.

421. *Id.*

422. *Shelby Cty. v. Holder*, 570 U.S. 529, 556–57 (2013).



continued need for the coverage formula and preclearance.<sup>423</sup> There, the Court showed no deference, at all, to Congress's judgment. In *Husted*, however, the Court was willing to defer to legislative judgment. According to Justice Alito, the Court had "no authority to dismiss the considered judgment of Congress and the Ohio Legislature," even though the link between moving and failing to return a letter is tenuous at best.<sup>424</sup>

When faced with a law that expands democratic participation, like the VRA, the Court is unlikely to defer to legislative judgment that the law is necessary. When faced with a law that restricts democratic participation, the Court will have no problem deferring to legislative judgment. The combined effect of these judicial policies has had, and will continue to have, a devastating effect on our democracy.

### C. *Rucho v. Common Cause*

The Court struck its most recent blow to democracy in *Rucho v. Common Cause*.<sup>425</sup> This case dealt with partisan gerrymandering in Maryland and North Carolina, where the map drawers did not bother to hide their insidious motives.<sup>426</sup> In Maryland, the Democratic-controlled legislature moved approximately 360,000 voters out of a traditionally Republican area with the explicit goal of "flipping" the district.<sup>427</sup> In North Carolina, the Republican-controlled legislature gerrymandered the entire Congressional election map.<sup>428</sup> Representative David Lewis, a districting committee co-chair stated, "I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country."<sup>429</sup> The district courts in both cases struck down the gerrymandered maps as unconstitutional under the First Amendment and the Equal Protection Clause.<sup>430</sup> The Supreme Court granted certiorari, consolidated the cases, and reversed.<sup>431</sup>

The Court held that partisan gerrymandering claims present a nonjusticiable political question because the Court lacks "judicially

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423. *Id.* at 565–66 (Ginsburg, J., dissenting).

424. *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1846 (2018).

425. 139 S. Ct. 2484 (2019).

426. Adam Liptak, *Supreme Court Bars Challenges to Partisan Gerrymandering*, N.Y. TIMES (June 27, 2019), <https://www.nytimes.com/2019/06/27/us/politics/supreme-court-gerrymandering.html>.

427. *Rucho*, 139 S. Ct. at 2493.

428. *Id.* at 2491.

429. *Id.* (quoting *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 809 (M.D.N.C. 2018)).

430. See *Benisek v. Lamone*, 348 F. Supp. 3d 493, 498 (D. Md. 2018), *vacated*, 139 S. Ct. 2484 (2019); *Common Cause*, 318 F. Supp. 3d at 799–801, *vacated*, 139 S. Ct. 2484 (2019).

431. *Rucho*, 139 S. Ct. at 2508.

discoverable and manageable standards” to resolve such claims.<sup>432</sup> Chief Justice Roberts, writing for the majority,<sup>433</sup> argued that partisan gerrymandering claims require judges to determine a “fair” amount of political representation for a party.<sup>434</sup> However, federal courts do not have a “‘clear, manageable and politically neutral’ test for fairness.”<sup>435</sup> Fairness might be defined in different ways that lead to different results.<sup>436</sup> The Court held that selecting a definition of fairness is “beyond the competence of the federal courts” because it “poses basic questions that are political, not legal.”<sup>437</sup> Even if courts did have a “neutral baseline” from which to measure fairness, they would still lack a “discernible and manageable standard[] for deciding” the “determinative question: ‘How much is too much?’”<sup>438</sup>

The Court also used originalist reasoning in support of its holding. The Framers, who were well aware of partisan gerrymandering, assigned districting to the state legislatures subject to Congressional regulation through the Elections Clause.<sup>439</sup> Therefore, the Framers never envisioned the federal courts playing any role in districting, according to the majority.<sup>440</sup> Federal courts, the majority held, have no authority to “reallocate political power between the two major political parties.”<sup>441</sup>

The Court acknowledged that partisan gerrymandering is “incompatible with democratic principles.”<sup>442</sup> This does not mean, however, that “the solution lies with the federal judiciary.”<sup>443</sup> Instead, affected voters can rely on state statutes and constitutions to “provide standards and guidance for state courts” in partisan gerrymandering

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432. *Id.* at 2496 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1961)).

433. Justices Thomas, Alito, Gorsuch, and Kavanaugh joined the majority opinion. *Id.* at 2490.

434. *Id.* at 2499–500.

435. *Id.* at 2500.

436. *Id.* The Court noted that if “fair” means having competitive districts, then a close election could lead to one party taking all the seats, even though it won the popular vote by a slim margin. *Id.* If “fair” means achieving roughly proportional representation, then there will likely be fewer competitive districts. *Id.* If “fair” means adhering to “traditional” districting criteria, such as protecting incumbents, keeping communities of interest together, and respecting the natural geography, then the resulting maps may still lead to packed and cracked districts. *Id.*

437. *Id.*

438. *Id.* at 2501, 2505.

439. *Id.* at 2495.

440. *Id.* at 2496.

441. *Id.* at 2507.

442. *Id.* at 2506 (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2658 (2015)).

443. *Id.*

cases.<sup>444</sup> Alternatively, the Court held, states may choose to adopt independent commissions to control the districting process.<sup>445</sup> The Court also noted that Congress is free to reform partisan gerrymandering through the Elections Clause.<sup>446</sup>

Justice Kagan posed a simple question in her blistering dissent: “Is this how American democracy is supposed to work?”<sup>447</sup> Elections are supposed to reflect the sovereignty of the people over their representatives, she argued.<sup>448</sup> Partisan gerrymandering, however, turns that idea on its head by allowing representatives to “cherry-pick voters to ensure their reelection.”<sup>449</sup> The result: Election Day is rendered “meaningless.”<sup>450</sup>

Justice Kagan acknowledged that partisan gerrymandering has been a part of American elections since the country’s earliest days. However, advances in data science and technology ensure that modern gerrymandering—like the kind seen in North Carolina and Maryland—is far more effective than the “crude linedrawing of the past.”<sup>451</sup> Both map drawers used advanced statistical models to create

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444. *Id.* at 2507. North Carolina Democrats have filed a lawsuit challenging the constitutionality of their congressional map as a partisan gerrymander under the state constitution. Rick Hasen, *Democrats File New Lawsuit Challenging North Carolina Congressional Districts as Unconstitutional Partisan Gerrymandering Under the State Constitution; Too Late?*, ELECTION L. BLOG (Sept. 27, 2019, 9:56 AM), <https://electionlawblog.org/?p=107497> [<https://perma.cc/D4TP-NQVL>].

445. *Rucho*, 139 S. Ct. at 2508.

446. *Id.* at 2495. Chief Justice Roberts noted that Congress has introduced “dozens” of bills aimed at curbing partisan gerrymandering over the years. *Id.* at 2508. As Justice Kagan points out in her dissent, “what all these *bills* have in common is that they are not *laws*.” *Id.* at 2524 (Kagan, J., dissenting).

447. *Id.* at 2509.

448. *Id.* at 2511.

449. *Id.* at 2512.

450. *Id.*

451. *Id.*

“voter-proof map[s].”<sup>452</sup> “These are not your grandfather’s—let alone the Framers’—gerrymanders,” she argued.<sup>453</sup>

Justice Kagan further contended that federal courts are capable of adjudicating partisan gerrymandering claims and that the District Court decisions are proof of this.<sup>454</sup> These courts used their state’s own districting criteria, “apart from partisan gain,” as a neutral baseline from which to measure partisan gerrymandering.<sup>455</sup> Then, the courts used a three-prong test for vote dilution to determine intent, effects, and causation—an “utterly ordinary” test for a lawyer to apply.<sup>456</sup> The majority, oddly, claimed that federal courts are incapable of adjudicating these claims but that voters may turn to state courts for relief.<sup>457</sup> Justice Kagan noted this inconsistency, asking “[i]f [state courts] can develop and apply neutral and manageable standards to identify unconstitutional gerrymanders, why couldn’t we?”<sup>458</sup>

According to Justice Kagan, the majority’s decision is a stunning abdication of the Court’s duty under *Marbury v. Madison*<sup>459</sup> to “say what

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452. *Id.* at 2511–13. Justice Kagan noted that Dr. Thomas Hofeller, a Republican districting specialist, used “sophisticated technological tools and precinct-level election results selected to predict voting behavior” to ensure Republicans won ten out of the thirteen North Carolina congressional seats. *Id.* at 2510. Dr. Hofeller also helped gerrymander maps for the Republicans in Texas, Missouri, Virginia, Alabama, Florida, and West Virginia. David Daly, *GOP Racial Gerrymandering Mastermind Participated in Redistricting in More States than Previously Known, Files Reveal*, INTERCEPT (Sept. 23, 2019, 3:13 PM), <https://theintercept.com/2019/09/23/gerrymandering-gop-west-virginia-florida-alabama> [<https://perma.cc/C3WC-54TY>]. According to reporter David Daly, some of Hofeller’s now unearthed documents show that he and other Republican mapmakers “experimented with using race as the primary factor in drawing districts in [Alabama, Florida, and West Virginia]—a tactic ruled unconstitutional under the 14th Amendment’s [E]qual [P]rotection [C]ause.” *Id.*

453. *Rucho*, 139 S. Ct. at 2513 (Kagan, J., dissenting).

454. *Id.* at 2516; see also Zachary Roth, *The Supreme Court Won’t Stop Partisan Gerrymandering. Now What?*, TALKING POINTS MEMO (June 28, 2019, 3:41 PM), <https://talkingpointsmemo.com/caf/scotus-gerrymandering-ruling-what-now> [<https://perma.cc/25WH-5S4V>] (noting that “five different federal courts, relying on the work of respected political scientists, have had little trouble coming up with manageable standards to strike down partisan gerrymanders in Wisconsin, North Carolina, Ohio, Michigan, and Maryland”).

455. *Rucho*, 139 S. Ct. at 2516 (Kagan, J., dissenting). Justice Kagan notes that using a state’s own districting criteria as a neutral baseline ensures that judges do not come up with baselines out of thin air, as the majority fears. *Id.*

456. *Id.* at 2516–17.

457. *Id.* at 2515, 2524.

458. *Id.* at 2524.

459. 5 U.S. 137 (1803).

the law is.”<sup>460</sup> Indeed, the majority balked at the idea of “unelected and politically unaccountable” federal judges intervening in partisan politics.<sup>461</sup> What the Court failed to account for, however, is that judicial review is not necessarily undemocratic or counter-majoritarian. As John Hart Ely argued in *Democracy and Distrust*, judicial review can actually be “representation reinforcing” when courts strike down undemocratic practices or statutes.<sup>462</sup> *Baker v. Carr*<sup>463</sup> and *Reynolds v. Sims*<sup>464</sup>, which established the one-person-one-vote principle, are clear examples of how judicial review can be representation reinforcing.<sup>465</sup> Michael C. Dorf argues that “[c]ourts ought not, in the name of democracy, defer to legislatures in the drawing of district lines when the very complaint at issue charges that the lines they have drawn disrespect democratic principles. In such cases, an intervening court acts as the protector of democracy and majoritarianism.”<sup>466</sup>

The *Rucho* Court’s legislative deference, therefore, is wholly inappropriate. The Court purports to protect the political process from judicial arbitrariness in defining a “manageable standard.”<sup>467</sup> In doing so, however, the Court fails to protect that process by effectively green-lighting partisan gerrymandering,<sup>468</sup> a practice that the majority acknowledges is “incompatible with democratic principles.”<sup>469</sup> As Michael C. Dorf puts it, the Court “thr[ew] out the baby with the bathwater.”<sup>470</sup> Voters who live in states without ballot initiatives or independent districting commissions are now forced to rely on their representatives—the ones who stand to benefit the most from partisan gerrymandering—for reform.<sup>471</sup>

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460. *Rucho*, 139 S. Ct. at 2524–25 (Kagan, J., dissenting) (quoting *Marbury*, 5 U.S. at 177).

461. *Id.* at 2507.

462. Michael C. Dorf, *U.K. Supreme Court Prorogation Judgment Exemplifies Representation-Reinforcing Judicial Review*, JUSTIA: VERDICT (Oct. 2, 2019), <https://verdict.justia.com/2019/10/02/u-k-supreme-court-prorogation-judgment-exemplifies-representation-reinforcing-judicial-review> [<https://perma.cc/5U2G-6RZH>] (quoting JOHN HART ELY, *DEMOCRACY AND DISTRUST* 87 (1980)).

463. 369 U.S. 186 (1961).

464. 377 U.S. 533 (1964).

465. Dorf, *supra* note 462.

466. *Id.*

467. *Rucho v. Common Cause*, 139 S. Ct. 2428, 2491 (2019).

468. Dorf, *supra* note 462.

469. *Rucho*, 139 S. Ct. at 2506 (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2658 (2015)).

470. Dorf, *supra* note 462.

471. As Justice Kagan notes, under these circumstances the “chances for legislative reform are slight.” *Rucho*, 139 S. Ct. at 2524 (Kagan, J., dissenting).

As this Article has discussed, the Roberts Court is not always so hesitant to overturn legislative judgment.<sup>472</sup> The underlying theme in these cases is that the Court will defer to the legislature when faced with an antiparticipatory policy. Thus, partisan gerrymandering, a practice that clearly threatens voter participation, earned the Court's deference. *Rucho*, therefore, falls squarely within the *Shelby County*, *Citizens United*, and *Husted* trend.<sup>473</sup> These cases demonstrate that the Roberts Court "simply do[es]n't believe that political equality—the idea that Americans must be able to participate in the political process on a more or less equal footing—is a crucial value to be upheld."<sup>474</sup>

#### CONCLUSION

The Court's persistence throughout the past decade in overturning "outputs of the political process" has weakened American democracy. The deterioration began with the Court's blockbuster decision in *Citizen's United*, which bestowed upon already influential corporations the power to shape American democracy with limitless largesse.<sup>475</sup> This decision had the decisive effect of quieting the voices of American citizens who seek to choose their elected representatives, a foundational right afforded to all Americans. The effects of *Citizens United* are enduring.

This enduring impact was epitomized by the Court in its decision in *American Tradition Partnership, Inc. v. Bullock*, in which it conclusively denied an opportunity to reexamine the Court's *Citizens United* decision.<sup>476</sup> In the eyes of the Court, *Citizens United* was settled law because it said so, period.<sup>477</sup> This basis alone was enough for the Court to refuse to hear oral arguments on the issue and rather summarily declare that the case, in fact, posed an irrefutable issue. The Court similarly rejected an opportunity to endorse a democratically enacted campaign finance system in *Arizona Free Enterprise Club v. Bennett* despite the system's proven ability to promote robust political campaigns.<sup>478</sup> In holding that the matching fund law violated the First Amendment, the

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472. Michael C. Dorf points out that the Roberts Court has been "perfectly happy to overturn outputs of the political process" in the gun control and affirmative action context. Dorf, *supra* note 462.

473. Roth, *supra* note 454.

474. *Id.*

475. *Citizens United v. FEC*, 558 U.S. 310, 340–41, 351 (2010).

476. *Am. Tradition P'ship, Inc. v. Bullock*, 567 U.S. 516, 516–17 (2012) (per curium).

477. Johnstone, *supra* note 119, at 15.

478. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 727–28 (2011) (per curium).

Court triggered the repulsion of public financing systems across the nation—further demolishing the American democratic system.

Faced with yet another opportunity in 2014, in *McCutcheon v. FEC*, to revitalize democratic values in the campaign finance sphere, the Court rejected the idea that aggregate limits target quid pro quo corruption and provided wealthy corporations the power to write blank checks—supplanting the voices of millions of Americans as collateral.<sup>479</sup> While a cap on individual campaign contributions remains in place, if the Court's persistent actions over the past decade are any indication, it is certainly possible that if faced with this issue in coming years, the Court will eradicate all contribution limits.

The Court again failed to admonish quid pro quo corruption—a pervasive issue that continues to plague our democratic institutions—in *McDonnell v. United States*.<sup>480</sup> The Court reinforced the ubiquity of bribery by narrowly defining an “official act” and, in doing so, conferred immeasurable power to lobbyists and anticampaign regulation activists alike.<sup>481</sup>

The Court did not confine its decade long assault on representation-reinforcing values to campaign finance. Rather, the Court dealt blow after blow to voting rights as well. In *Shelby County*, the Court struck down the coverage formula of the VRA, effectively neutering the preclearance provision essential to the Act.<sup>482</sup> The decision immediately impacted voting rights for the worse.<sup>483</sup> Previously covered states enacted voter identification laws, limited early voting, closed polling locations, and implemented various other obstacles to voting.<sup>484</sup> Section 2 remains in place, but it is entirely insufficient to attack the ever-evolving methods of voter disenfranchisement.<sup>485</sup> In the Court's eyes, the coverage formula was outdated and unnecessary because “[o]ur country has changed.”<sup>486</sup> However, 12,000 pages of legislative fact finding in support of this overwhelmingly bipartisan Act suggest otherwise.<sup>487</sup>

The Court continued to undermine representation-reinforcement in *Husted*. This time, the Court confronted an antiparticipatory

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479. *McCutcheon v. FEC*, 572 U.S. 185, 206–09 (2014).

480. *McDonnell v. United States*, 136 S. Ct. 2355, 2371 (2016).

481. *Id.* at 2361.

482. *Shelby Cty. v. Holder*, 570 U.S. 529, 556 (2013).

483. Scott, *supra* note 302, at 123.

484. *See supra* notes 334–38 and accompanying text.

485. *See supra* note 342 and accompanying text.

486. *Shelby Cty.*, 570 U.S. at 557.

487. As Congress noted, between 1982–2006, preclearance prevented over 700 discriminatory voting procedure changes from taking effect. *See supra* notes 268–71 and accompanying text.

policy—Ohio’s voter purge law, the Supplemental Process. The Court upheld the law, and as a result, 182,000 voters have been purged from the rolls.<sup>488</sup> The Supplemental Process uses a voter’s failure to return a mailed card as evidence that the voter had moved.<sup>489</sup> However, as Justice Breyer noted in his dissent, the numbers do not support this legislative judgment.<sup>490</sup> Failing to return a card is essentially worthless as evidence that a voter has moved.<sup>491</sup> Considering the Court’s total lack of deference to the extensive legislative fact finding in *Shelby County*, one might have expected the Court to disregard Ohio’s flimsy justifications here. Not so. The Court about-faced, and rubber-stamped the law, declaring that the Court had “no authority to dismiss the considered judgment” of the legislature.<sup>492</sup> Faced with a law that restricts access to the democratic process, the Court suddenly rediscovered its respect for legislative judgment.

In *Rucho*, the Court faced partisan gerrymandering claims and had yet another opportunity to reinforce representation values and protect the democratic process. Instead of providing that protection, the Court slammed the doors of the federal judiciary to partisan gerrymandering claims, holding that such claims present a nonjusticiable political question.<sup>493</sup> According to Justice Roberts, federal courts lack a “‘clear, manageable and politically neutral’ test for fairness” to determine when partisan gerrymandering has gone too far.<sup>494</sup> The Court held that the solution lies with Congress, state legislatures, or state courts.<sup>495</sup>

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488. See Rouan, *supra* note 381.

489. *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1838 (2018).

490. *Id.* at 1850 (Breyer, J., dissenting). Justice Breyer cited certain statistics: “about 4% of *all* Americans . . . move outside of their county each year.” *Id.* at 1856. When Ohio sent out the notices to registered voters, pursuant to the Supplemental Process, about one million—the “vast majority”—of them did not send back a return card. *Id.* These “1 million or so voters accounted for about 13% of Ohio’s voting population.” *Id.* If all these people had actually moved, that would mean “vastly more people must move each year in Ohio than is generally true of the roughly 4% of *all* Americans who move to a different county nationwide (not all of whom are registered voters).” *Id.* Ohio did not offer any reason to suggest that more people move within its state than the rest of the country. The likely explanation, Justice Breyer concluded, is “the human tendency not to send back cards received in the mail,” which is “confirmed strongly by the actual numbers in this record.” *Id.* Therefore, the failure to send back the notice “shows nothing at all that is statutorily significant.” *Id.* at 1856–57. Accordingly, it “cannot reasonably indicate a change of address.” *Id.* at 1857.

491. *Id.*

492. *Id.* at 1846 (majority opinion).

493. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019).

494. *Id.* at 2500.

495. *Id.* at 2506–07.



However, the Court offered no reason why state courts have jurisdiction to adjudicate partisan gerrymandering claims but federal courts are not. Furthermore, the Court failed to consider that modern map drawers use advanced computer programs and data to create “voter-proof map[s].”<sup>496</sup> Incumbent politicians use these maps to “cherry-pick voters to ensure their reelection.”<sup>497</sup> As a result, voters feel a “sense of disenfranchisement,” and lose faith in the American system of representative government.<sup>498</sup>

Over the past decade, the Court’s decisions in both the campaign finance and voting rights contexts have undermined representation-reinforcing values by increasing the concentration of political power in the rich and powerful and, in turn, reducing the role of the average citizen in his or her democracy.

As this Article was in its final edits during April of 2020, just prior to going to print, the Court intervened on the eve of Wisconsin’s primary election, in the midst of a global pandemic, to in the words of Justice Ginsburg, “prevent voters who timely requested absentee ballots from casting their votes.”<sup>499</sup> The Court’s ruling required citizens to do the unimaginable: postmark an absentee ballot, that they had yet to receive, within twenty-four hours.<sup>500</sup>

With a severe backlog of absentee ballot requests that had overwhelmed election officials’ capacity to mail the ballots to voters promptly, the Court made voting a matter of life or health.<sup>501</sup> Voters’ only alternative to time travel? Stand in line, for hours, with hundreds of fellow should-have-been social distancing citizens, in the midst of the pandemic, at one of the few in-person polling locations that had not been preemptively closed due to the virus. Did the burden of this unconscionable choice fall equally on rich and poor? On black voters and white voters? Of course not. Did the Supreme Court’s five-to-four majority turn a blind eye? Of course it did.

Thus it came to pass that on April 7, 2020, just ten years and three months removed from *Citizens United*, voters who wished to exercise the franchise were forced either to mail a timely requested absentee ballot *that they had not yet received*, or risk their health and that of others by voting in person.

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496. *Id.* at 2511 (Kagan, J., dissenting).

497. *Id.* at 2512.

498. *Id.* at 2504 (quoting *Benisek v. Lamone*, 348 F. Supp. 3d 493, 523 (D. Md. 2018), *vacated*, 139 S. Ct. 2484 (2019)).

499. *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, No. 19A1016, slip op. at 1 (U.S. Apr. 6, 2020) (Ginsburg, J., dissenting).

500. *Id.* at 4 (majority opinion).

501. *Id.* at 4 (Ginsburg, J., dissenting).

Voters in Milwaukee, the city with the state's most substantial black population, saw their normal allotment of one hundred eighty polling locations reduced to a mere *five*.<sup>502</sup>

Five polling locations in the city of Milwaukee.

Five votes on the Supreme Court.

And as a coda reflective of the Court's unwaveringly callous role in the *Decade of Democracy's Demise*, it bears noting that, due to health concerns, the Supreme Court had been operating remotely since March.<sup>503</sup> Thus, all nine of the justices' votes were cast remotely—an option the five-member majority effectively and sadly fittingly denied to thousands of voters in Wisconsin.

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502. Linda Greenhouse, *The Supreme Court Fails Us*, N.Y. TIMES (Apr. 9, 2020), <https://www.nytimes.com/2020/04/09/opinion/wisconsin-primary-supreme-court.html>.

503. Laura Basset, *The Supreme Court Just Signed the Death Warrant for Voters*, GQ (Apr. 7, 2020), <https://www.gq.com/story/supreme-court-voting-death-warrant> [<https://perma.cc/6MWU-TAWS>].