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ELECTORAL SILVER LININGS AFTER *SHELBY, CITIZENS UNITED* AND *BENNETT*

CIARA TORRES-SPELLISCY*

I. Introduction

Many election law scholars, myself included, have read the recent decisions from the Supreme Court holding their breath, perhaps thinking that while, "damage has been done, it could have been worse." Yet despite these recent setbacks in the Court, I will argue in this short paper that the glass is still half full in election law jurisprudence.

According to public opinion polling, a growing share of the American public disapproves of the U.S. Supreme Court.[1] A possible explanation for the Court's dip in popular support is its recent conservative election law jurisprudence typified by 5-4 decisions over fiery dissents.[2] In particular, the Court has displayed tone-deafness for real world power relations[3] when it

* Ciara Torres-Spelliscy is an associate professor at Stetson University College of Law and Brennan Center Fellow. She is a graduate of Harvard University and Columbia Law School. The author would like to thank David H. Gans, Professors Daniel P. Tokaji, Tamara Piety, and Glynn Torres-Spelliscy for their feedback on an earlier draft.

[1] Gallup, *Supreme Court, Do You Approve of the Way the Supreme Court is Handling its Job?* http://www.gallup.com/poll/4732/supreme-court.aspx (updated Sept. 7, 2014) (showing in 2014 44% approve and 48% disapprove).

[2] Richard H. Pildes, *Is the Supreme Court a "Majoritarian" Institution?*, 2010 SUP. CT. REV. 103, 105 ("Judged in any number of ways, *Citizens United* appears to be the most counter majoritarian act of the Court in many decades."); Gary Langer, *Many Criticize Voting Rights Ruling; Partisan Splits on Gay Marriage Continue*, ABC NEWS, July 3, 2013, http://abcnews.go.com/blogs/politics/2013/07/many-criticize-voting-rights-ruling-partisan-splits-on-gay-marriage-continue/ (citing *ABC News / Washington Post* poll finding Democrats disapprove of the *Shelby Cnty.* decision by a 28-point margin while independents disapproved by 22 points); David R. Dow, *Why Is the Supreme Court So Unpopular?*, DAILY BEAST, June 9, 2012, http://www.thedailybeast.com/articles/2012/06/09/why-is-the-supreme-court-so-unpopular.html ("*New York Times–CBS News* poll …[found] that three out of four Americans believe Supreme Court justices have their decisions influenced by their personal and political beliefs"); Dan Eggen, *Poll: Large Majority Opposes Supreme Court's Decision on Campaign Financing*, WASHINGTON POST, Feb. 16, 2010, http://articles.washingtonpost.com/2010-02-16/politics/36773318_1_corporations-unions-new-limits ("Eight in 10 poll respondents say they oppose the high court's Jan. 21 decision [*Citizens United*]…").

[3] 2013's *Shelby* is similar in its formalism to *Giles v. Harris,* where Justice Oliver Wendell Holmes refused to come to the aid of black voters who were being purged from the voter rolls in Alabama. Giles v. Harris, 189 U.S. 475, 488 (1903) ("relief from a great political wrong, if done, as alleged,

invalidated Section 4 of the Voting Rights Act (VRA),[4] poked holes in Arizona's public financing law,[5] and expanded the ability of corporations to spend in American elections.[6]

The culmination of these decisions from the high court is an unstable electoral landscape where moneyed interests and racism might combine to harm whole categories of vulnerable voters.[7] A vision of what's to come can be seen in North Carolina where big money appears to be behind voter suppression legislation.[8] If we care about electoral fairness[9] we must worry that the Supreme Court has done some real harm in these decisions to the democratic process.[10] And the truly troubling thing is that the Court does not appear to have any end point in sight for its methodically unraveling good election laws case by case.[11]

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by the people of a state and the state itself, must be given by them or by the legislative and political department of the government of the United States.").

[4] Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013).

[5] Arizona Free Enter. Club's Freedom Club PAC v. Bennett, 131 S.Ct. 2806 (2011).

[6] Citizens United v. Federal Election Commission, 558 U.S. 310, 130 S.Ct. 876 (2010).

[7] Laleh Ispahani, *The Most Powerful Tool to Defend Minority Voting Rights Is Gone*, Open Society Foundations, July 3, 2013, http://www.opensocietyfoundations.org/voices/most-powerful-tool-defend-minority-voting-rights-gone ("Together with unprecedented efforts to suppress the minority vote and the flood of money into state judicial elections, the *Shelby* decision also underlines the need to keeping our state courts fair and impartial and to keep the interests of a wealthy few from suppressing the votes of racial minorities.").

[8] Katrina Vanden Heuvel, *The Third Koch 'brother' hits North Carolina*, WASHINGTON POST, June 11, 2013, http://articles.washingtonpost.com/2013-06-11/opinions/39883018_1_koch-brothers-north-carolina-citizens-united; Chris Kromm, *Art Pope-backed lawmaker leads push for new voting restrictions in NC*, FACING SOUTH, Apr.3, 2013, http://www.southernstudies.org/2013/04/art-pope-backed-lawmaker-leads-push-for-new-voting-restrictions-in-nc.html.

[9] John Paul Stevens, *The Court & the Right to Vote: A Dissent*, N. Y. REV. OF BOOKS, Aug. 15, 2013, http://www.nybooks.com/articles/archives/2013/aug/15/the-court-right-to-vote-dissent/ ("Not only is Congress better able to evaluate the issue than the Court, but it is also the branch of government designated by the Fifteenth Amendment to make decisions of this kind.").

[10] Spencer Overton, *A Setback for Local Democracy*, MOYERS & CO., July 1, 2013, http://billmoyers.com/groupthink/voting-rights-act/a-setback-for-local-democracy/; Samuel Issacharoff, *So the VRA Is Gutted. Here's How to Still Fight Voter Discrimination*, THE NEW REPUBLIC, June 28, 2013, http://www.newrepublic.com/article/113672/voting-rights-act-overturned-how-still-fight-voter-discrimination; Andrew Cohen, *On Voting Rights, a Decision as Lamentable as* Plessy *or* Dred Scott, THE ATLANTIC, June 25, 2013, http://www.theatlantic.com/national/archive/2013/06/on-voting-rights-a-decision-as-lamentable-as-plessy-or-dred-scott/276455/; Adam Cohen, *Viewpoint: Voting-Rights Decision Spells the End of Fair Elections*, TIME, June 25, 2013, http://ideas.time.com/2013/06/25/voting-rights-decision-spells-the-end-of-fair-elections/.

[11] David H. Gans, *Roberts at 10: Campaign Finance and Voting Rights: Easier to Donate, Harder to Vote*, CONSTITUTIONAL ACCOUNTABILITY CENTER (2014), http://theusconstitution.org/sites/default/files/briefs/Roberts-at-10-Easier-to-Donate-Harder-to-Vote.pdf ("John Roberts has started down that path, rewriting our Constitution's system of

That's the bad news. But is there any good news hidden among the three decisions *Shelby County v. Holder* (invalidating Section 4 of the VRA); *Arizona Free Enter. Club's Freedom Club PAC v. Bennett* (invalidating sections of Arizona's public financing system); and *Citizens United v. FEC* (invalidating sections of the BCRA and FECA to allow corporate money into elections)? There is. The silver linings of these cases lie in the parts of the opinions where most of the statute under scrutiny was upheld through severability. This short paper will review some of the progressive aspects of election laws that remain viable for States and Congress despite the Supreme Court picking apart these laws.

A. *Shelby* Left the Voting Rights Act Intact

After *Shelby* was decided, Professor Heather Gerken lamented to *NPR* that "[t]he Supreme Court has just struck down the crown jewel of the Voting Rights Act…"[12] While some banner headlines in the press in the summer of 2013, bemoaned the fall of the Voting Rights Act in *Shelby*,[13] the Court's ruling was actually narrow in scope.[14] In *Shelby County v. Holder*, while the Supreme Court invalidated the coverage formula in the Voting Rights Act's Section 4, which determines which states and localities are covered by Section 5 preclearance,[15] the Court left Section 5 preclearance intact.[16] As

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democracy to give outsized influence to corporations and the wealthy while undercutting our Constitution's promise of a multiracial democracy open to all.").

[12] Nina Totenberg, *Supreme Court: Congress Has To Fix Broken Voting Rights Act*, NPR, June 25, 2013 4:20 PM ET, http://www.npr.org/2013/06/25/195599353/supreme-court-up-to-congress-to-fix-voting-rights-act (quoting Heather Gerken).

[13] Jess Bravin, *Court Upends Voting Rights Act*, WALL ST. J., June 25, 2013, http://online.wsj.com/article/SB10001424127887323469804578521363840962032.html; Kevin Drum, *Supreme Court's Gutting of Voting Rights Act Unleashes GOP Feeding Frenzy*, MOTHER JONES, July 26, 2013, http://www.motherjones.com/kevin-drum/2013/07/supreme-court-voting-rights-act-north-carolina; Steven Hill, *So the Voting Rights Act Is Gutted—What Can Protect Minority Voters Now?*, THE ATLANTIC, June 25, 2013, http://www.theatlantic.com/politics/archive/2013/06/so-the-voting-rights-act-is-gutted-what-can-protect-minority-voters-now/277232/; Andrew Koppelman, *The Supreme Court's Naïve Reasoning for Gutting the Voting Rights Act*, NEW YORK MAGAZINE, June 25, 2013, http://nymag.com/daily/intelligencer/2013/06/supreme-courts-voting-rights-blunder.html; Sahil Kapur, *Supreme Court Guts The Voting Rights Act*, TALKING POINTS MEMO, June 25, 2013, http://tpmdc.talkingpointsmemo.com/2013/06/supreme-court-voting-rights-act-ruling.php.

[14] *Testimony of Professor Justin Levitt, Loyola Law School, Los Angeles Before the United States Senate Committee on the Judiciary From Selma to* Shelby County*: Working Together to Restore the Protections of the Voting Rights Act,* July 17, 2013, http://www.judiciary.senate.gov/pdf/7-17-13LevittTestimony.pdf; *United States House of Representatives Committee on the Judiciary Subcommittee on the Constitution and Civil Justice Hearing on the Voting Rights Act After the Supreme Court's Decision in Shelby County Testimony of Spencer Overton, Professor of Law, The George Washington University Law School,* July 18, 2013, http://judiciary.house.gov/hearings/113th/hear_07182013/Overton%20%207-18-13.pdf.

[15] Shelby Cnty. v. Holder, 133 S. Ct. at 2631. ("Congress could have updated the coverage formula at that time, but did not do so. Its failure to act leaves us today with no choice but to declare §4(b)

Chief Justice Roberts wrote for the Court, "We issue no holding on § 5 itself, only on the coverage formula."[17]

The Supreme Court left the door open to Congress to fix the coverage formula in Section 4.[18] As the *Shelby* Court admonished:

> Congress may draft another formula based on current conditions. Such a formula is an initial prerequisite to a determination that exceptional conditions still exist justifying such an "extraordinary departure from the traditional course of relations between the States and the Federal Government." Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.[19]

At the time that this piece is being written, Congress has failed to act to fix the VRA and without the coverage formula, there is no preclearance process.[20]

The Court also left Section 2 alone, which allows plaintiffs to litigate discrimination in election and voting procedures.[21] And finally, the Court did not have occasion in *Shelby County* to disturb Section 3's "bail-in" provisions.[22] Section 3 allows plaintiffs and/or the DOJ to bail-in jurisdictions to preclearance if discrimination is demonstrated.[23] While somewhat rare, the bail-in procedure is not unprecedented.[24] Texas is now the subject of a "bail in" lawsuit.[25]

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unconstitutional. The formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance.").

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* (internal citations omitted).

[20] Dana Liebelson & Ryan J. Reilly, *This Is What Happened Because Congress Didn't Fix The Voting Rights Act*, HUFFINGTON POST, Nov. 4. 2014, http://www.huffingtonpost.com/2014/11/04/voter-id_n_6103634.html.

[21] Shelby Cnty., 133 S. Ct. at 2619. ("[VRA] Section 2 is permanent, applies nationwide, and is not at issue in this case."); *Id.* at 17 ("Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2.").

[22] Lyle Denniston, *Preclearance Requirement Sought for Texas on Voting*, SCOTUSBLOG, July 25, 2013, http://www.scotusblog.com/2013/07/preclearance-sought-for-texas-on-voting/ ("That could only be done now, in the wake of the Supreme Court's ruling last month in *Shelby Cnty. v. Holder*, by having a court apply the so-called 'bail-in' provision of the 1965 law's Section 3. That provision was left intact by the Supreme Court.").

[23] 42 USC § 1973a(c) (also known as "Section 3 bail-in").

[24] David H. Gans & Elizabeth B. Wydra, *The Voting Rights Act Is In Jeopardy, But It Shouldn't Be: A Close Look at* Shelby County v. Holder, AMERICAN CONSTITUTION SOCIETY, 15 (Feb. 2013),

The *Shelby* majority never addressed the issue of severability of the law;[26] it merely excised Section 4 applying a power that the Court has held in reserve since *Marbury v. Madison* to strike one portion of a federal law.[27] So while the loss of Section 4 is troubling,[28] the rest of the Voting Rights Act stands and provides some meaningful avenues to police discriminatory bad actors.[29] Namely, instead of the administrative pre-clearance process,

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http://www.acslaw.org/sites/default/files/Gans_and_Wydra__A_Close_Look_at_Shelby_County_v._Holder_0.pdf ("Likewise, bail-in has been used to impose certain preclearance obligations on a number of jurisdictions who have engaged in a host of discriminatory voting practices. For example, in the last 25 years, federal courts bailed in Arkansas and New Mexico – two states in which there has been a lot of litigation to enforce the nationwide provisions of the Voting Rights – as well as numerous local governments, including Los Angeles County, California, Bernalillo County, New Mexico, Buffalo County, South Dakota, Charles Mix County, South Dakota, and the City of Chattanooga, Tennessee.").

[25] Texas v. Holder, Civil Action No. 1:11-cv-1303 (RMC-TBG-BAH) (Defendant-Intervenors' Motion For Leave To File Amended Answer And Counterclaim), (D.D.C. July 3, 2013), http://electionlawblog.org/wp-content/uploads/241-motion-sec-3redux.pdf ("Movants seek an order from this Court subjecting the state of Texas to a preclearance requirement, under Section 3(c), 42 U.S.C. § 1973a(c), for all voting-related changes enacted by the state—a remedy that is necessary to protect minority voters in the state from the pattern of discriminatory actions persistently taken by the State in attempt to disenfranchise and diminish the voting strength of voters of color."); U.S. Statement of Interest at 6-22, Perez v. Perry, 5:11-cv-360 (W.D. Tex. July 25, 2013) (Dkt. No. 827); Attorney General, Eric Holder Delivers, Remarks at the National Urban League Annual Conference, July 25, 2013, http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130725.html ("the Justice Department will ask a federal court in Texas to subject the State of Texas to a preclearance regime similar to the one required by Section 5 of the Voting Rights Act. This request to 'bail in' the state – and require it to obtain 'pre-approval' from either the Department or a federal court before implementing future voting changes – is available under the Voting Rights Act when intentional voting discrimination is found. Based on the evidence of intentional racial discrimination that was presented last year in the redistricting case, *Texas v. Holder* – as well as the history of pervasive voting-related discrimination against racial minorities that the Supreme Court itself has recognized – we believe that the State of Texas should be required to go through a preclearance process whenever it changes its voting laws and practices"); Jillian Rayfield, *Why the DOJ Picked Texas First*, SALON, July 25, 2013, http://www.salon.com/2013/07/25/why_the_doj_picked_texas_first/.

[26] Instead severability is only brought up by Justice Ginsburg's dissent as another reason why a facial challenge was inappropriate in this case. Shelby Cnty., slip op at 34 ("The VRA's exceptionally broad severability provision makes it particularly inappropriate for the Court to allow Shelby County to mount a facial challenge to §§ 4(b) and 5 of the VRA…").

[27] David H. Gans, *Severability as Judicial Lawmaking*, 76 GEORGE WASHINGTON L. REV. 639, 639 n.1 (Apr. 2008) ("The severability [doctrine] is implicit in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), which invalidated one particular section of the Judiciary Act of 1789, ch. 20, 1 Stat. 73, leaving the remainder in place.").

[28] Rev. William Barber, *'Moral Monday' leader: Dropping Section 4 of VRA is 'troubling'*, MSNBC, June 25, 2013, http://tv.msnbc.com/2013/06/25/moral-monday-leader-dropping-section-4-of-vra-is-troubling/ ("The avalanche of attacks on voting rights remain a constant reminder of that fact. That's why the Supreme Court dropping Section 4 of the Voting Rights Act in a decision Tuesday is so troubling.").

[29] Wendy R. Weiser, *Before the Senate Judiciary Committee Hearing on "From Selma to Shelby County: Working Together to Restore the Protections of the Voting Rights Act"*, July 17, 2013,

litigation will become the primary tool to mitigate racial and language discrimination in elections.[30] This is problematic, in part, because bad actors can frequently out maneuver the courts' plodding procedures.[31] In the future, voting rights litigation will likely suck up more resources of the victims of discrimination who have lost the prophylactic protections of preclearance.[32] Hopefully, foundations and legal nonprofits will have the resources to pay for VRA litigations necessary to keep discrimination at bay.[33]

B. *Bennett* Left Public Financing Intact

The VRA has had a considerable impact on who can vote and under what conditions.[34] Meanwhile another key ingredient in the democratic soup is who can afford to run for office.[35] Two Supreme Court decisions in the last three years have changed the campaign finance calculus for candidates. The first is the widely criticized *Citizens United* decision[36] and the other is the barely noticed *Bennett* decision.[37] *Citizens United* allows independent groups

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http://www.brennancenter.org/analysis/senate-testimony-working-together-restore-protections-voting-rights-act.

[30] Atiba R. Ellis, *Shelby Cnty. v. Holder: The Crippling of the Voting Rights Act*, ACS BLOG, June 27, 2013, http://www.acslaw.org/acsblog/shelby-co-v-holder-the-crippling-of-the-voting-rights-act ("With Section Five now ineffective, all bets are now off. The door is now open to more voter suppression, more voting wars, more racial balkanization in voting -- rather than less. And Voting Rights Act litigants would be left with only Section Two litigation, which, in comparison to the government's ability to proactively supervise election laws, will prove costly and time consuming to plaintiffs and will rely on retroactive court decisions that come long after the harm.").

[31] Shelby Cnty., 133 S. Ct. at 2634. (Ginsburg, J., dissenting) ("Congress learned from experience that laws targeting particular electoral practices or enabling case by case litigation were inadequate to the task.").

[32] *United States House of Representatives Committee on the Judiciary Subcommittee on the Constitution and Civil Justice Hearing on the Voting Rights Act After the Supreme Court's Decision in* Shelby County *Testimony of Spencer Overton, Professor of Law, The George Washington University Law School*, July 18, 2013, http://judiciary.house.gov/hearings/113th/hear_07182013/Overton%20%207-18-13.pdf ("Litigation [Is] More Expensive: …Litigation shifts the burden to affected citizens—who must employ experts and lawyers who fish for information during drawn-out discovery processes. This drives up the cost of compliance to the Department of Justice, to affected citizens, and to jurisdictions.").

[33] Niki Jagpal, *Philanthropy's Opportunity to Protect the Right to Vote*, NATIONAL COMMITTEE FOR RESPONSIVE PHILANTHROPY BLOG, June 28, 2013, http://blog.ncrp.org/2013/06/philanthropys-opportunity-to-protect.html ("In addition to Congress needing to reinstate the key provisions of the VRA, it is imperative that nonprofits working on voting rights issues be provided with the kinds of support they need to complement the hoped-for statue.").

[34] For a historical overview *see* ACLU, *Voting Rights Act Major Dates in History* (2013), http://www.aclu.org/timeline-history-voting-rights-act.

[35] Lee Drutman, *Why Money Still Matters*, SUNLIGHT FOUNDATION BLOG, Nov. 15, 2012, http://sunlightfoundation.com/blog/2012/11/15/why-money-still-matters/.

[36] Citizens United v. Federal Election Commission, 558 U.S. 310, 130 S. Ct. 876 (2010).

[37] Arizona Free Enter. Club's Freedom Club PAC v. Bennett, 131 S.Ct. 2806 (2011).

including multinational corporations to spend unlimited amounts of money on political ads attacking or boosting a candidate.[38] Meanwhile, *Bennett* changed the structure of public financing in Arizona.[39]

Before the *Bennett* decision, publicly financed "clean" candidates in Arizona that were either running against a deep-pocketed privately-funded opponent or were targeted by privately-funded negative ads, were given matching public "rescue" funds so that they could keep up with the privately-funded attacks.[40] The Court found Arizona's "triggered matching funds" unconstitutional in *Bennett*.[41]

But this case did not invalidate public financing in Arizona or elsewhere.[42] In fact the Supreme Court in *Bennett* made clear that public financing was constitutional.[43] Reaffirming *Buckley v. Valeo*, which upheld presidential public financing in 1976, Chief Justice John Roberts wrote for the *Bennett* majority, "We have said that governments 'may engage in public financing of election campaigns' and that doing so can further 'significant governmental interest[s],' such as the state interest in preventing corruption."[44]

Although the Court unceremoniously removed the triggered matching funds from Arizona's public financing law, neither the majority nor the dissent discussed the severability of the law at issue.[45] *Bennett* had a limited impact because only a few states and cities at the time had public financing that were structured exactly like Arizona's.[46] Consequently only a few

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[38] Ciara Torres-Spelliscy, *Corporate Political Spending & Shareholders' Rights: Why the US Should Adopt the British Approach* in RISK MANAGEMENT AND CORPORATE GOVERNANCE (2011).
[39] Monica Youn, *Small-Donor Public Financing in the Post*-Citizen United *Era*, 44 J. MARSHALL L. REV. 619 (2010-2011).
[40] Kenneth N. Weine, *Triggering the First Amendment: Why Campaign Finance Systems That Include "Triggers" Are Constitutional*, 24 J. LEGIS. 223 (1998).
[41] Arizona Free Enter. Club's Freedom Club PAC v. Bennett, 131 S.Ct. 2806, 2813 (2011) ("We hold that Arizona's matching funds scheme substantially burdens protected political speech without serving a compelling state interest and therefore violates the First Amendment.").
[42] Brennan Center for Justice, *Arizona Free Enterprise Club v. Bennett*, June 27, 2011, http://www.brennancenter.org/legal-work/arizona-free-enterprise-club-v-bennett.
[43] Arizona Free Enter. Club's Freedom Club PAC, 131 S.Ct. at 2828.
[44] *Id.* (citing Buckley, 424 U. S., at 57, n. 65, 92–93, 96).
[45] The dissent did have lots to say about the logical flaws in the case. For example, Arizona Free Enter. Club's Freedom Club PAC, 131 S.Ct. at 2835 (Kagan, J., dissenting) ("If an ordinary citizen, without the hindrance of a law degree, thought this result an upending of First Amendment values, he would be correct… [T]o invalidate a statute that restricts no one's speech and discriminates against no idea—that only provides more voices, wider discussion, and greater competition in elections—is to undermine, rather than to enforce, the First Amendment.").
[46] Jessica A. Levinson & Smith Long, *Mapping Public Financing in American Elections*, Center for Governmental Studies, Jan. 2009, http://www.policyarchive.org/handle/10207/bitstreams/95926.pdf.

jurisdictions had to retrofit their laws in response to *Bennett*.[47] In fact, in Connecticut in the 2014 general election, both candidates for governor and over 80% of legislative candidates utilized that state's public financing system.[48]

The good news for campaign finance reformers is *Bennett* leaves the door wide open for public financing to be adopted across the country, [49] including at the federal level.[50] On the heels of corruption scandals in Albany,[51] New York State's legislature came tantalizingly close to passing a public financing bill in 2013.[52] In the wake of this legislative defeat, Gov. Andrew Cuomo appointed the Moreland Commission to Investigate Public Corruption to gather information about campaign finance flaws in New York.[53] This issue is still a live one in New York.[54]

C. *Citizens United* Left FECA Intact

[47] *See* Maine Commission on Governmental Ethics and Election Practices*, Invitation to Comment on Maine's Clean Election Program*, July 18, 2011, http://www.maine.gov/ethics/pdf/agenda2.pdf.
[48] Gregory B. Hladky, *Record Campaign Finance Awards Handed Out*, HARTFORD COURANT, Oct. 20, 2014, http://www.courant.com/politics/elections/hc-campaign-finance-final-20141020-story.html (quoting Joshua Foley, "80 percent or more of the candidates [running this year] are receiving public financing[.]"); David Duhalde, *Citizens' Election Program Remains Strong in Connecticut*, PUBLIC CAMPAIGN VOTER BLOG, Nov. 5, 2014, http://publicampaign.org/blog/2014/11/05/connecticut-public-financing-winners ("This year, a resounding 84% of winners in Connecticut state races used the [public financing] program.").
[49] Dan Froomkin, *Supreme Court Strikes Down Arizona Law But Leaves Public Financing Intact*, HUFFINGTON POST, June 27, 2011, http://www.huffingtonpost.com/2011/06/27/supreme-court-mccomish-bennett-arizona-public-financing_n_885200.html.
[50] H.R. 269 Fair Elections Now Act was introduced in the House by Rep. John Yarmuth (D-KY) on January 15, 2013. This bill would provide public financing to Congressional candidates.
[51] Editorial, *Corruption in Albany*, NEW YORK TIMES, May 6, 2013, ("For all the talk among Gov. Andrew Cuomo and other leaders about cleaning up New York's rancid state government, it is the F.B.I. that is doing the cleaning — indictment by indictment.").
[52] Press Release, Office of the Assembly Speaker, *Assembly Passes 2013 Fair Elections Act Measure Includes Public Financing System and Appointment of Independent Fair Elections Counsel*, May 7, 2013; *but see* Paul Blumenthal, *New York State Campaign Finance Reform Amendment Fails*, HUFFINGTON POST, June 21, 2013, http://www.huffingtonpost.com/2013/06/21/ny-campaign-finance-reform-fails_n_3476221.html.
[53] Press Release, Andrew Cuomo, *Governor Cuomo Appoints Moreland "Commission to Investigate Public Corruption," with Attorney General Schneiderman Designating Commission Members as Deputy Attorneys General*, July 2, 2013, http://www.governor.ny.gov/press/07022013-new-moreland-commission-named.
[54] The Moreland Commission announced its first public hearings on July 23, 2013, *see* Moreland Commission to Investigate Public Corruption's webpage, http://publiccorruption.moreland.ny.gov/.

Finally, the Grand Poobah award for outrageous election law decisions has to go to *Citizens United*,[55] a case so imprecise, it was argued twice.[56] Here the Supreme Court undid federal laws going back over sixty years and state laws going back over a century that had banned corporate involvement in elections.[57] In particular, the Court invalidated 2 U.S.C. § 441b's restrictions on corporate independent expenditures.[58] And after *Citizens United*, outside spending in Congressional races spiked upwards.[59] This sea change of a decision did leave one important thing intact: the rest of the Federal Election Campaign Act (FECA).[60] Again, this might not be clear from the text of the decision, since it purports to reject an invitation to sever the law according to the Congressional back-up definitions in the law,[61] and then goes ahead and blue pencils the statute in an entirely different way not contemplated by Congress.[62]

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[55] Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 COLUMBIA L. REV. 1138, 1139 (2011) ("Take the Supreme Court's decision in Citizens United v. Federal Election Commission, one of its most unpopular and consequential decisions in decades."); Greenberg Quinlan Rosner Research, Common Cause, Change Congress, Public Campaign Action Fund, *Strong Campaign Finance Reform: Good Policy, Good Politics* 2 (Feb. 8, 2010), http://www.greenbergresearch.com/articles/2425/5613_Campaign%20Finance%20Memo_Final.pdf ; Greenberg Quinlan Rosner & Democracy Corps, *Voters Push Back Against Big Money Politics*, Nov. 13 2012 http://www.democracycorps.com/National-Surveys/voters-push-back-against-big-money-politics-full-report/; Liz Kennedy, *Citizens Actually United: The Bi-Partisan Opposition to Corporate Political Spending And Support for Common Sense Reform*, DEMOS, Oct. 25, 2012, http://www.demos.org/publication/citizens-actually-united-bi-partisan-opposition-corporate-political-spending-and-support.

[56] Citizens United v. Federal Election Commission, THE OYEZ PROJECT AT IIT CHICAGO-KENT COLLEGE OF LAW, July 31, 2013, http://www.oyez.org/cases/2000-2009/2008/2008_08_205 (containing the audio of the oral argument and the re-argument in *Citizens United* at the U.S. Supreme Court).

[57] Roger Parloff, *Why the outcry over 'Citizens United'*, CNN MONEY, Feb. 12, 2010, http://money.cnn.com/2010/02/11/news/companies/supreme_court_citizens_united.fortune/ ("The ruling struck down the 62-year-old Taft-Hartley restrictions on independent expenditures, …and invalidated up to 24 state laws, several dating back to the 1890s.").

[58] Citizens United, 130 S.Ct. at 917.

[59] Daniel P. Tokaji & Renata E. B. Strause, *The New Soft Money Outside Spending in Congressional Elections* (2014), http://moritzlaw.osu.edu/thenewsoftmoney/wp-content/uploads/sites/57/2014/06/the-new-soft-money-WEB.pdf ("express advocacy spending by non-party groups remained fairly modest for around three decades, hovering under $50 million per cycle. In the last two election cycles, however, spending on express advocacy has skyrocketed, going to just over $200 million in 2010 and over $450 million in 2012.").

[60] Ciara Torres-Spelliscy, *Has the Tide Turned in Favor of Disclosure? Revealing Money in Politics After Citizens United and Doe v. Reed*, 27 GA. ST. U. L. REV. 1057 (Summer 2011).

[61] Citizens United, 130 S.Ct. at 891 ("The Government suggests we could find BCRA's Wellstone Amendment unconstitutional, sever it from the statute, … There is no principled basis for doing this without rewriting *Austin*'s holding.").

[62] Citizens United, 130 S.Ct. at 913 ("No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.").

Citizens United is clear that federal disclosure requirements challenged by the plaintiff remain in effect. Picking up on the themes articulated in the Sunlight Foundation's amicus brief before the Court,[63] eight of nine Justices in *Citizens United* stated that disclosure laws are perfectly constitutional.[64] This means that localities, states and Congress have a free hand in drafting campaign finance disclosure laws.[65] And the case was particularly expansive in its discussion of accountability to shareholders, which opens the door to disclosure that is specifically tailored to this constituency.[66]

What's less obvious is that the remainder of federal campaign finance laws outside of the invalidated corporate expenditure ban also remained intact the day *Citizens United* was announced.[67] The corporate ban was just one strand in a fabric of campaign finance regulation created by Congress starting in 1907 that included disclosure laws, aggregate and specific contribution limits for individuals, parties and PACs, public financing for presidential candidates, as well as bans on direct contributions from corporations and union, and bans on money from foreign nationals.[68]

In addition to upholding disclosure laws, the *Citizens United* Court speaks approvingly of *Buckley*'s approach to contribution limits: "*Buckley* first upheld § 608(b), FECA's limits on direct contributions to candidates. The

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[63] Citizens United v. FEC, No. 08-205, Supplemental Brief of the Sunlight Foundation, the National Institute on Money in State Politics and the Center for Civic Responsibility as Amici Curiae in Support of Appellee, July 31, 2009 http://www.cuvfec.com/documents/case-08-205/Supplemental_Question_Amicus_Brief_of_The_Sunlight_Foundation.pdf.

[64] Citizens United, 130 S.Ct. at 917.

[65] Trevor Potter, *The Political Reality of* Citizens United, FRONTLINE, Oct. 30, 2012, http://www.pbs.org/wgbh/pages/frontline/government-elections-politics/big-sky-big-money/trevor-potter-the-political-reality-of-citizens-united/ ("the court said no, disclosure is constitutional. It doesn't limit your right to speak, but it informs the public of who is doing the speaking."); Ciara Torres-Spelliscy, *Transparent Elections after* Citizens United (Brennan Center 2011).

[66] Citizens United, 130 S. Ct. at 916 ("[D]isclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way."); Ciara Torres-Spelliscy, *The SEC and Dark Political Money: An Historical Argument for Requiring Disclosure* (Corporate Reform Coalition 2013).

[67] It should be noted that the Court struck down another part of FECA that imposed aggregate contribution limits in the *McCutcheon* case in 2014, which could indicate that the Supreme Court is just taking its time in dismantling this law. *See* McCutcheon v. FEC, 133 S. Ct. 1434 (2014).

[68] FEC, *The FEC and the Federal Campaign Finance Law* (updated Jan. 2013), http://www.fec.gov/pages/brochures/fecfeca.shtml ("Essentially, the Court's [*Citizens United*] ruling permits corporations and labor organizations to use treasury funds to make independent expenditures in connection with federal elections and to fund electioneering communications. The ruling did not affect the ban on corporate or union contributions or the reporting requirements for independent expenditures and electioneering communications.").

Buckley Court recognized a 'sufficiently important' governmental interest in 'the prevention of corruption and the appearance of corruption.' This followed from the Court's concern that large contributions could be given 'to secure a political quid pro quo.'" [69] And the *Citizens United* Court specifically sidestepped addressing the campaign finance restrictions on foreign nationals.[70]

Conclusion

So while there are some democratic legitimacy problems with the Supreme Court blue penciling[71] Congressional and state statutes—including that what remains is a law that no one in the legislature voted for[72]—this approach does leave in place other parts of beneficial election laws that can help voters and candidates.[73]

As explained in miniature here, many aspects of the Voting Right Act remain in full force and effect to protect voters. As Attorney General Holder said the day the *Shelby* decision was handed down:

> Finally, we need to be clear about what happened today. Part of the Voting Rights Act, but not all of it, was struck down. The constitutionally protected voting rights of all Americans remain fully intact. And the right to vote, free from discrimination based on race or language, requires our vigilant protection. We know from many decades of long, hard struggle that the best way to defend a right is to go out and exercise it. So no one should conclude that today's unfortunate decision has rendered

[69] Citizens United, 130 S.Ct. at 901.
[70] Citizens United, 130 S.Ct. at 911 ("We need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process. Cf. 2 U.S.C. § 441e (contribution and expenditure ban applied to 'foreign national[s]…'").
[71] Dada v. Mukasey, 554 U.S. 1, 27 (2008) (J. Scalia dissenting) ("Of course it is not unusual for the Court to blue-pencil a statute in this fashion, directing that one of its provisions, severable from the rest, be disregarded.").
[72] Ciara Torres-Spelliscy, *How Much Is an Ambassadorship? And the Tale of How Watergate Led to a Strong Foreign Corrupt Practices Act and a Weak Federal Election Campaign Act*, 16(1) CHAPMAN L. REV. 71, 101 (Spring 2012) ("Consequently, what was left after the Supreme Court's handiwork was a law that no one in Congress had voted for, nor what President Ford signed.").
[73] David Gans, *Severability as Judicial Lawmaking*, 76 Geo. Wash. L. Rev. 639 639 (2008) ("Severability doctrine … allows a court to excise any unconstitutional clauses or applications from a statute, leaving the remainder in force if the legislature would prefer that result to the statute's total invalidation."); *Id*. at 644 ("[Severability] preserves legislative prerogatives, foreclosing the possibility that a statute will be invalidated in toto because of a minor defect.").

> her or his voting rights invalid, or has made attempting to cast a ballot on Election Day futile.[74]

And the Department of Justice has shown that it is taking its role as guardian of voting rights seriously by litigating to 'bail' Texas back in.[75]

Meanwhile rumors of campaign finance's death have been greatly exaggerated.[76] Several important tools remain in place to mitigate the role of private money in elections—including disclosure regulations, contribution limits and bans, as well as public financing.[77] Transparency allows voters to see the source private money in elections and hold politicians accountable. Contribution limits ensure that more than the super-rich can participate in funding campaigns. As Second Circuit Judge Calabresi once put it, contribution limits are needed because of widespread income inequality in America:

> The wider the economic disparities in a democratic society, the more difficult it becomes to convey, with financial donations, the intensity of one's political beliefs. People, who care a little will, if they are rich, still give a lot. People, who care a lot must, if they are poor, give only a little. Jesus's comment about the rich donors and the poor widow says it all. Today, the amount of an individual's campaign contribution reflects the strength of that individual's preferences far less than it does the size of his wallet.[78]

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[74] *Attorney General Eric Holder Delivers Remarks on the Supreme Court Decision in* Shelby County v. Holder, June 25, 2013, http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130625.html.

[75] Editorial, *A New Defense of Voting Rights*, N.Y. TIMES, July 27, 2013 ("This is why Mr. Holder's decision to rely on Section 3 in the Texas case is so significant. Section 3 — also known as the 'bail-in' provision — may be the most promising tool we have to protect voting rights after Shelby. It allows courts to identify jurisdictions that are passing intentionally discriminatory voting laws and then 'bail' them in as needed — that is, require them to get permission before establishing new voting rules.").

[76] David Schultz, *Buckley v. Valeo, Randall v. Sorrell*, *and the Future of Campaign Finance on the Roberts Courts*, 12 NEXUS 153, 153 (2007) ("Rumors of *Buckley v. Valeo*'s death have been greatly exaggerated.").

[77] For an overview of federal campaign finance laws *see* FEC, *Citizen's Guide* (updated Jan. 2013), http://www.fec.gov/pages/brochures/citizens.shtml; For an overview of state campaign finance disclosure laws *see*, Robert Stern, *Sunlight State By State After* Citizens United *How state legislation has responded to* Citizens United, CORPORATE REFORM COALITION, June 2012, http://www.citizen.org/documents/sunlight-state-by-state-report.pdf.

[78] Ognibene v. Parkes, 671 F.3d 174, 199 (2d Cir. 2011) (Calabresi, J., Concurring).

Meanwhile, public financing gives candidates an oasis away from private spending. Much like the voting rights area, money in politics protections are not self-executing. Legislatures and administrative agencies have to act to make these protections real and meaningful. As the New York experience shows, this can be a heavy lift.[79] But like the bail-in suit against Texas, the effort in New York to protect our democratic mechanisms is necessary because the ideals at stake are central to who we are as a people. We need elections where voters feel welcomed at the polls and more than billionaires can run for office.

The alternative is just too bleak to contemplate. We don't want to slide into the corruption of the Gilded Age[80] or the racial Nadir when minority voters were effective shut out of the democratic process for decades.[81] Perhaps, it is mere historical coincidence that massive corruption and massive disenfranchisement of blacks happened at the same time. Let's hope neither despicable practice is resurrected or repeated.

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[79] Reform N.Y., *Campaign Finance Reform Fails to Clear Senate by Two Votes*, MONEY IN POLITICS THIS WEEK, June 25, 2013, http://reformny.blogspot.com/2013/06/money-in-politics-this-week_25.html.

[80] Richard White, *Information, Markets, and Corruption: Transcontinental Railroads in the Gilded Age*, 90 (1) THE J. OF AMERICAN HISTORY 19-43 (2003).

[81] JOEL WILLIAMSON, THE CRUCIBLE OF RACE: BLACK-WHITE RELATIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION 80 (1984); W. Fitzhugh Brundage, *The Darien "Insurrection" of 1899: Black Black Protest During the Nadir of Race Relations,* 74(2) GEORGIA HISTORICAL Q. 234-253 (Summer 1990), http://www.jstor.org/discover/10.2307/40582867?uid=3739600&uid=2&uid=4&uid=3739256&sid=21102547579743.