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# How Conservative Justices Are Undermining Our Democracy (or What's at Stake in Choosing Justice Scalia's Successor?)

ALAN E. GARFIELD\*

*In this essay, Professor Garfield contends that the conservative justices on the Supreme Court have allowed elected officials to manipulate laws to entrench themselves in office and to disenfranchise voters who threaten their power. The justices' unwillingness to curb these abuses has largely redounded to the benefit of the Republican Party because Republicans control the majority of state legislatures and have used this power to gerrymander legislative districts and to enact voter-suppressive laws such as voter ID laws. With Justice Antonin Scalia's unexpected passing during the administration of a Democratic president, the conservatives' control of the Court has been put into play. While the media and presidential candidates have focused on the implications of a shifting Court majority for individual rights, it is likely that, behind the scenes, politicians are much more focused on the implications of a shifting majority for their ability to hold onto power.*

## INTRODUCTION

Ever since *Marbury v. Madison*,<sup>1</sup> the central question of constitutional law has been how judges should wield their power of judicial review. The answer is complex because judicial review conflicts with democratic self-governance. In a democracy, one expects citizens to set policy through their elected representatives. When unelected justices override the people's representatives, the result is problematic. As Alexander Bickel famously observed, it creates a "counter-majoritarian difficulty."<sup>2</sup>

Of course, this counter-majoritarian check is essential for protecting rights that would otherwise get trampled in a majoritarian political process. Judicial review can protect minority groups and dissenting voices from the tyranny of the majority.<sup>3</sup> It can ensure that those who have little public sympathy, like criminal defendants, are treated fairly. Judicial review also ensures that the Constitution's structural limits on power are respected (*e.g.*, so members of Congress can't triple the lengths of their terms without a constitutional amendment).

But most policy decisions in a democracy should be made by the people and their elected representatives, not nine unelected justices. Otherwise, the people will have ceded to the judiciary their most precious civil liberty: "the freedom to govern themselves."<sup>4</sup>

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1. 5 U.S. (1 Cranch) 137 (1803).

2. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16–18 (2d ed. 1986).

3. *Baskin v. Bogan*, 766 F.3d 648, 671 (7th Cir. 2014) ("Minorities trampled on by the democratic process have recourse to the courts: the recourse is called constitutional law."), *cert. denied*, 135 S. Ct. 316 (2014).

4. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2627 (2015) (Scalia, J., dissenting).

The justices abuse their power when they overturn decisions that are rightfully left to the people. Recognizing this, the justices have created a multitude of doctrines to restrain their power. Sometimes they say that an issue is nonjusticiable and avoid it altogether.<sup>5</sup> Other times, they hear an issue but apply deferential “rational basis” scrutiny to uphold laws, even if they personally believe the laws to be “unwise” or “improvident.”<sup>6</sup> This passivity is not an evasion of judicial responsibility. It simply acknowledges the justices’ limited role in a democracy. As Justice Louis Brandeis wisely said, “[t]he most important thing we do is not doing.”<sup>7</sup>

Yet even in areas reserved to the majoritarian political process, the justices still have a role to play. They should not second-guess the people’s policy choices, but they should intervene when laws prevent the political process from functioning properly. After all, judicial deference to the political process makes sense only if the process is legitimate.<sup>8</sup> The justices need to be on guard for actions that distort the process.

This is John Hart Ely’s “representation-reinforcing” theory of judicial review.<sup>9</sup> Under this theory, judicial intervention is appropriate to ensure the proper functioning of our democracy. For example, democracy works only if people can speak freely and act collectively. Judicial intervention is, therefore, justified to invalidate laws that interfere with freedom of speech or association.<sup>10</sup>

Unfortunately, the conservative justices on the Supreme Court have been using their power of judicial review not to reinforce democracy but to undermine it. They have failed to intervene when intervention has been necessary to protect the integrity of the political process (most notably in failing to correct for extreme partisan gerrymandering and vote-suppressing voter ID laws), and they have misguidedly used their power to strike down laws that improved the democratic process (most notably in invalidating the Voting Rights Act preclearance procedure and laws that curb the influence of money in politics).<sup>11</sup>

Of course, the conservative justices do not always vote in unison. Justice Anthony Kennedy has occasionally joined the Court’s four liberal justices to produce opinions that reinforce democracy. But, more often than not, Kennedy and his conservative colleagues have formed a slim 5/4 majority that has, with disturbing consistency, issued decisions that have undermined our democracy.

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5. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 47–51 (5th ed. 2015).

6. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955).

7. ALEXANDER M. BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS* 17 (1967); *see also* BICKEL, *supra* note 2, at 71.

8. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting that the Supreme Court will give greater scrutiny to “legislation which restricts those political processes which can ordinarily be expected to bring about the repeal of undesirable legislation”).

9. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 87 (1980); *see also* David A. Strauss, *Modernization and Representation Reinforcement: An Essay in Memory of John Hart Ely*, 57 *STAN. L. REV.* 761, 761 (2004) (describing John Hart’s Ely “simple, powerful thesis” that “judges should try to make representative democracy more democratic”).

10. ELY, *supra* note 9, at 93–94, 105–16.

11. *See* Part I; Part II.

Cumulatively, the conservative justices' decisions have eroded our democracy's foundation. Their decisions have permitted politicians to impede the machinery through which political change occurs by allowing elected officials to draw district lines that virtually ensure their reelection and, as if that were not enough, by enacting laws that disenfranchise voters who are likely to oppose them.

What makes the actions of these supposedly neutral justices (the ones who merely "call balls and strikes") so troubling is that they have almost uniformly redounded to the benefit of conservative politicians.<sup>12</sup> That's because Republicans control the majority of state legislatures and have used this control to gerrymander legislative districts and to enact voter ID and other laws that disenfranchise Democratic-leaning poor and minority voters.<sup>13</sup>

With the passing of Justice Antonin Scalia, control of the Supreme Court is now up for grabs. If a liberal justice replaces Scalia, the Court is likely to reverse course and start using its judicial power to reinforce, rather than undermine, our democracy. If a conservative justice replaces Scalia, the Court is likely to continue on its current course.

Presidential candidates and the popular media have focused on the implications of a Scalia replacement for individual rights. Conservatives have warned that the people's right to bear arms and to exercise religious freedoms will be jeopardized if a liberal replaces Scalia.<sup>14</sup> Liberals have warned that a conservative appointment could threaten rights to an abortion and same-sex marriage.<sup>15</sup>

But the fierce political battle between President Obama and Senate Republicans over replacing Scalia may have less to do with social issues and more to do with the political ramifications of the new appointment. Matters like campaign financing, partisan gerrymandering, voter ID laws, and the scope of the Voting Rights Act dramatically affect who gets to hold onto power in Washington and in state capitals. Given these stakes, it's hardly surprising that Senate Republicans have refused to even consider Merrick Garland, President Obama's nominee to replace Justice Scalia.<sup>16</sup>

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12. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before S. Comm. on the Judiciary*, 109th Cong. 55–56 (2007) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States).

13. *2014 State and Legislative Partisan Composition*, NAT'L CONF. OF ST. LEGISLATURES (June 9, 2014), [http://www.ncsl.org/documents/statevote/legiscontrol\\_2014.pdf](http://www.ncsl.org/documents/statevote/legiscontrol_2014.pdf) [<https://perma.cc/2LYT-E95S>].

14. David Sherfinski, *Supreme Court is One Liberal Justice Away from Killing Second Amendment: Cruz*, THE WASH. TIMES (Feb. 19, 2016), [http://www.washingtontimes.com/news/2016/feb/19/cruz-1-liberal-justice-away-killing-2nd-amendment/?utm\\_source=RSS\\_Feed](http://www.washingtontimes.com/news/2016/feb/19/cruz-1-liberal-justice-away-killing-2nd-amendment/?utm_source=RSS_Feed) [<https://perma.cc/QA36-8QLL>] (quoting presidential candidate Ted Cruz as saying country is one justice away from losing its right to bear arms and its religious freedom).

15. See, e.g., Nina Liss-Schultz, *Scalia's Death Might Have Saved Abortion Rights*, MOTHER JONES (Feb. 17, 2016), <http://www.motherjones.com/mojo/2016/02/texas-abortion-supreme-court-hb2-scalia-death> [<https://perma.cc/9X2L-HGKV>].

16. Editorial, *The Senate's Confirmation Shutdown*, N.Y. TIMES (June 9, 2016), <http://www.nytimes.com/2016/06/09/opinion/the-senates-confirmation-shutdown.html> [<https://perma.cc/D2PF-AF2M>]; David M. Herszenhorn, *G.O.P. Senators Say Obama Supreme Court Pick Will Be Rejected*, N.Y. TIMES (Feb. 23, 2016),

This essay will explain how the conservative justices have used their power of judicial review to undermine our democracy. It will then discuss how Scalia's death neutralized the conservative justices' ability to do further damage in the Supreme Court's most recent term. It will conclude with thoughts about what is at stake in choosing Scalia's successor.

#### I. FAILING TO INTERVENE WHEN INTERVENTION IS NECESSARY TO ENSURE A HEALTHY DEMOCRACY

Sometimes legislators abuse their power to enact laws that distort the political process for personal and partisan advantage. Two of the most troublesome contemporary examples are extreme partisan gerrymandering and voter ID laws. The former creates "safe" seats for incumbents so they don't have to face viable competitors in general elections. The latter suppresses voter turnout, especially of the poor, the disabled, and the elderly, under the guise of preventing voter fraud.

These laws call out for judicial intervention. The liberal justices have been prepared to use their power of judicial review to check these abuses. The conservative justices have been content to let the abuses continue. Fortunately, the Court has produced some democracy-reinforcing decisions when Justice Kennedy has aligned with the liberal justices.

##### A. Failing to Limit Extreme Partisan Gerrymandering

Partisan gerrymandering is not the only cause of political dysfunction in federal and state legislatures. The United States Senate has been torn by partisanship even though Senate seats are not subject to gerrymandering.<sup>17</sup> And many legislative districts would be safe seats even without gerrymandering because citizens have self-segregated into communities with politically like-minded residents.<sup>18</sup>

Nonetheless, many observers believe that extreme partisan gerrymandering has produced a hyperpartisanship in legislatures that prevents the type of cross-party collaboration required for government to function effectively.<sup>19</sup> When so many districts are gerrymandered into safe seats—it's estimated that only 15 out of the 435 House districts are currently competitive—it makes general elections meaningless

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[http://www.nytimes.com/2016/02/24/us/politics/supreme-court-nomination-obama.html?\\_r=0](http://www.nytimes.com/2016/02/24/us/politics/supreme-court-nomination-obama.html?_r=0) [<https://perma.cc/6BYK-28AZ>].

17. Norman J. Ornstein, *The Pernicious Effects of Gerrymandering*, NAT'L J. DAILY, Dec. 3, 2014.

18. *Id.* (referring to journalist Bill Bishop's term, the "big sort," for this tendency of Americans to live in communities with like-minded people); see also *Political Polarization in American Public Life*, PEW RES. CTR. (June 12, 2014), <http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/> [<https://perma.cc/G2P6-KA8K>] (liberals prefer denser, walkable communities whereas conservatives prefer larger homes in more spread-out communities).

19. Noah Litton, Note, *The Road to Better Redistricting: Empirical Analysis and State-Based Reforms to Counter Partisan Gerrymandering*, 73 OHIO ST. L.J. 839, 841–42 (2012).

and primaries all-important.<sup>20</sup> This enhances the power of ideological hardliners in both parties, who have disproportionate influence in primaries.<sup>21</sup> The result is dysfunctional federal and state legislatures composed of politicians who are afraid to compromise for fear of alienating their party base.<sup>22</sup>

Nothing prevents state legislators from using neutral instead of partisan criteria to draw district lines. But this is a situation that the political process is incapable of fixing itself. After all, what incumbent would trade a safe district for a competitive one? As President Obama rightfully said in his 2016 State of the Union address, “we’ve got to end the practice of drawing our congressional districts so that politicians can pick their voters, and not the other way around.”<sup>23</sup>

If extreme partisan gerrymandering is harming our democracy and if the political process is incapable of fixing it, the situation is ripe for judicial intervention. The justices could conclude that extreme judicial gerrymandering violates the Equal Protection Clause.

But the conservative justices, with the exception of Kennedy, have adamantly opposed such judicial intervention.<sup>24</sup> They have insisted that they lack “manageable standards” for identifying unconstitutional partisan gerrymanders and have declared the issue to be a nonjusticiable “political question.”<sup>25</sup>

The Court’s four liberal justices have been willing to place limits on abusive partisan gerrymandering and have proposed standards for identifying illegal gerrymanders.<sup>26</sup> Justice Stephen Breyer, for example, has said that the Court could find an equal protection violation when “purely political ‘gerrymandering’ [fails] to advance any plausible democratic objective while simultaneously threatening serious democratic harm.”<sup>27</sup>

Justice Kennedy has refused to join the other conservative justices in declaring partisan gerrymandering nonjusticiable.<sup>28</sup> But he has also never ruled a partisan gerrymander unconstitutional. Kennedy believes that the Court has not yet developed

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20. Carl Hulse, *Seeking to End Gerrymandering’s Enduring Legacy*, N.Y. TIMES (Jan. 25, 2016), <http://www.nytimes.com/2016/01/26/us/politics/seeking-to-end-gerrymanderings-enduring-legacy.html> [<https://perma.cc/Y4BN-KFCZ>].

21. Litton, *supra* note 19, at 841–42.

22. *Id.*

23. President Barack Obama, State of the Union Address (Jan. 13, 2016).

24. *Vieth v. Jubelirer*, 541 U.S. 267, 305 (2004) (stating that “neither Article I, §2, nor the Equal Protection Clause, nor . . . Article I, §4, provides a judicially enforceable limit on the political considerations that the States and Congress may take into account when districting”).

25. *Id.* at 281 (stating that “no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged”).

26. *Id.* at 317–42 (Stevens, J., dissenting), 343–55 (Souter, J., dissenting), 355–68 (Breyer, J., dissenting).

27. *Id.* at 355 (Breyer, J., dissenting).

28. *Id.* at 313 (Kennedy, J., concurring in the judgment) (stating that the Court should not prematurely declare all partisan gerrymandering nonjusticiable in case “suitable standards with which to measure the burdens a gerrymander imposes on representational rights” ultimately emerge).

an adequate test for identifying an unconstitutional gerrymander, but he has left a glimmer of hope that the Court someday will.<sup>29</sup>

Fortunately, voters in states with a public referendum can use that device to bypass state legislators and transfer the redistricting process to an independent commission. This has occurred in California and Arizona.<sup>30</sup> However, during the Supreme Court's 2014 term there was a danger that the Supreme Court would bar voters from using this salutary corrective.<sup>31</sup>

The issue was whether the "Elections Clause" in Article I, Section 4, Clause 1 of the Constitution delegates the redistricting power exclusively to state legislators so that any delegation of this power to the people would be unconstitutional.<sup>32</sup> Four of the Court's conservative justices, led by Chief Justice Roberts, wanted to hold that the Constitution prohibits such a delegation and thus denies voters the ability to prevent gerrymandering by self-interested legislators.<sup>33</sup> Thankfully, Kennedy joined the liberal justices who interpreted the Constitution to permit redistricting by any lawmaking procedure a state allows, including public initiatives.<sup>34</sup>

Thus, with the exception of the swing-voting Kennedy, the conservative justices have refused to use their power to check the abuses of extreme partisan gerrymandering and were even prepared to block voters from addressing this abuse themselves.

#### *B. Failing to Invalidate Voter ID Laws that Suppress Voter Participation*

A healthy democracy fosters voter participation. It also prevents fraudulent voting.

Voter identification laws lie at the crossroads of these two goals. Proponents say the laws are essential to prevent voter fraud.<sup>35</sup> Opponents say voter fraud is exceptionally rare and that the real effect of these laws is to disenfranchise poor, elderly, and disabled voters who lack proper identification and the resources to get it.<sup>36</sup>

The evidence suggests that voter suppression, not voter fraud, is the driving force behind these laws. The states that have most aggressively enacted voter ID laws tend to be controlled by Republicans who stand to benefit from disenfranchising poor (and

29. *Id.* at 317 (Kennedy, J., concurring in the judgment) (stating that "[i]f workable standards do emerge," then "courts should be prepared to order relief").

30. Ornstein, *supra* note 17 (noting this process occurred in Arizona in 2000 and in California in 2008).

31. *Id.*

32. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658–59 (2015).

33. *Id.* at 2692 (Roberts, C.J., dissenting) (stating that the Elections Clause does not permit the people of Arizona to address their concerns about the state's redistricting process "by displacing their legislature").

34. *Id.* at 2677 (concluding that the Election Clause does not hinder the ability of Arizona voters "to restore 'the core principle of republican government,' namely, 'that the voters should choose their representatives, not the other way around'" (citations omitted)).

35. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008).

36. *Id.* at 212, 226–29 (Souter, J., dissenting).

often minority) voters.<sup>37</sup> In Pennsylvania, the Republican House Majority Leader boasted that the state's new voter ID law would ensure that Mitt Romney, not Barack Obama, would win Pennsylvania in the presidential election.<sup>38</sup> The Republican-controlled Texas state legislature revealed its partisan hand with its quirky rules for which types of identification satisfy the law: concealed-weapon permits (Yes!), student ids (No!).<sup>39</sup> As Henry David Thoreau observed, “[s]ome circumstantial evidence is very strong, as when you find a trout in the milk.”<sup>40</sup>

If voter ID laws are truly aimed at suppressing voters for partisan advantage, then judicial intervention to curb this abuse is warranted. But the Court's one decision on a voter ID law upheld the law, and, if most of the conservative justices have their way, the Court is unlikely to find these laws unconstitutional anytime soon. By contrast, the liberal justices are prepared to intervene.

The leading case is *Crawford v. Marion County Election Board*, a 2008 decision involving a challenge to an Indiana voter ID law.<sup>41</sup> The justices did not break cleanly along liberal and conservative lines. Justice John Paul Stevens joined the conservative justices to uphold the law.

Stevens's opinion was narrowly focused on the record before him. He acknowledged that voter ID laws could serve a legitimate interest in bolstering public confidence “in the integrity and legitimacy of representative government.”<sup>42</sup> And he found the record lacking in evidence that the Indiana law was disenfranchising voters. “[O]n the basis of the record that has been made in this litigation,” he concluded, “we cannot conclude that the statute imposes ‘excessively burdensome requirements’ on any class of voters.”<sup>43</sup>

Scalia wrote separately to reject the premise that a law could be unconstitutional because it “‘imposed a special burden on’ some voters.”<sup>44</sup> Unless a law imposed a severe burden on all voters or there was evidence of purposeful discrimination against a suspect class, the law should be upheld. “It is for state legislatures,” he said, “to weigh the costs and benefits of possible changes to their election codes, and their

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37. See Stephen Ohlemacher, *GOP Gerrymandering Creates Uphill Fight for Dems in House*, PBS NEWSHOUR (Mar. 31, 2014), <http://www.pbs.org/newshour/rundown/gop-gerrymandering-creates-uphill-fight-dems-house/> [<https://perma.cc/NP8Y-HB7N>].

38. Aaron Blake, *Everything You Need to Know About the Pennsylvania Voter ID Fight*, WASH. POST (Oct. 2, 2012), <https://www.washingtonpost.com/news/the-fix/wp/2012/10/02/the-pennsylvania-voter-id-fight-explained/> [<https://perma.cc/R85U-KHW9>] (quoting Pennsylvania House Majority Leader Mike Turzai: “Voter ID . . . is going to allow Governor Romney to win the state of Pennsylvania: done!”).

39. See Rebecca Leber, *In Texas, You Can Vote with a Concealed Handgun License—But Not a Student ID*, NEW REPUBLIC (Oct. 20, 2014), <https://newrepublic.com/article/119900/texas-voter-id-allows-handgun-licenses-not-student-ids> [<https://perma.cc/LZ3K-WHVW>].

40. Russell F. Hillard, *Owning Up, Trout in Milk & Other Musings*, NEW HAMPSHIRE BAR ASS'N (Dec. 19, 2003), (citations omitted) <https://www.nhbar.org/publications/archives/display-news-issue.asp?id=1384> [<https://perma.cc/3BMD-RQ92>].

41. 553 U.S. 181.

42. *Id.* at 197 (citation omitted).

43. *Id.* at 202.

44. *Id.* at 204 (Scalia, J., concurring in the judgment).



judgment must prevail unless it imposes a severe and unjustified overall burden upon the right to vote, or is intended to disadvantage a particular class.”<sup>45</sup> Justices Clarence Thomas and Justice Samuel Alito joined Scalia’s opinion.

Justice David Souter wrote a scathing dissent. He said that the law imposed a substantial burden on tens of thousands of poor, elderly, and disabled voters and that the legislature’s insistence on the law’s immediate implementation demonstrated its lack of interest in trying to mitigate this burden.<sup>46</sup> Souter found the State’s competing interest in preventing in-person voter fraud to have no “more than a very modest significance,” particularly since the State had failed to put forth “a single instance of in-person voter impersonation fraud in all of Indiana’s history.”<sup>47</sup> He found it utterly irrational for anyone to risk the severe criminal sanctions for voter impersonation when the only benefit was gaining one more vote for a candidate.<sup>48</sup> Justice Ruth Bader Ginsburg joined Souter’s dissent. Justice Stephen Breyer wrote a separate dissent to say that he thought the Indiana law imposed a “disproportionate burden” upon those who do not have a valid ID.<sup>49</sup>

Five years after writing *Crawford*, the retired Justice Stevens confessed that he “[was not] a fan of voter ID” and that his *Crawford* decision “should not be taken as authority that voter ID laws are always OK.”<sup>50</sup> In fact, he said, “I have always thought that David Souter got the thing correct, but that my own problem with the case was that I didn’t think the record supported everything he said in his opinion.”<sup>51</sup> But “as a matter of actual history,” Stevens said, Souter was “dead right.”<sup>52</sup>

Judge Richard Posner, one of the nation’s preeminent federal court of appeals judges and author of the lower court decision in *Crawford*, has similarly come to believe that voter ID laws suppress voting rights. Several years after his *Crawford* decision upheld the Indiana law, Posner wrote a blistering dissent when the Seventh Circuit refused to grant a rehearing of a panel decision upholding a Wisconsin voter ID law. Posner no longer had any illusions about the real purpose of voter ID laws: “There is only one motivation for imposing burdens on voting that are ostensibly designed to discourage voter-impersonation fraud, if there is no actual danger of such fraud, and that is to discourage voting by persons likely to vote against the party responsible for imposing the burdens.”<sup>53</sup>

Even if Stevens and Posner are correct that voter ID laws are intended to suppress votes, it’s unclear whether the Supreme Court will do anything to curb this abuse. Scalia, Thomas, and Alito made it clear in *Crawford* that they had no interest in striking down voter ID laws. Roberts’s and Kennedy’s positions are less clear because they joined Stevens’s more fact-dependent opinion. But what we do know

45. *Id.* at 208.

46. *Id.* at 212, 236 (Souter, J., dissenting).

47. *Id.* at 226, 230 (Souter, J., dissenting).

48. *Id.* at 227-28 (Souter, J., dissenting).

49. *Id.* at 237 (Breyer, J., dissenting).

50. Jess Bravin, *Voter-ID Laws Worry Jurist*, WALL ST. J. (Oct. 17, 2013), <http://www.wsj.com/articles/SB10001424052702304384104579141701228734132> [<https://perma.cc/6VMG-9H6Y>].

51. *Id.*

52. *Id.*

53. *Frank v. Walker*, 773 F.3d 783, 796 (7th Cir. 2014) (Posner, J., dissenting).

is that the Supreme Court denied certiorari in the case involving the Wisconsin voter ID law and thereby left in place the original Seventh Circuit panel decision upholding the Wisconsin law.<sup>54</sup>

## II. INTERVENING TO INVALIDATE LEGITIMATE EFFORTS TO IMPROVE THE DEMOCRATIC PROCESS

The conservative justices' failure to use their power of judicial review to check legislative actions that harm our democracy is disturbing. It is even more disturbing that these same justices have actively used their power to strike down benign laws that improved our democracy. We had a glimpse of this in the last section, which discussed the conservative justices' efforts to preclude voters from using public referenda to ameliorate the problem of extreme partisan gerrymandering. This section discusses two especially troubling examples of conservative justices invalidating beneficial laws that had made our democracy stronger: their invalidation of Section 4 of the Voting Rights Act and their persistent overturning of regulatory limits on campaign expenditures.

### A. Invalidating the Voting Rights Act's Preclearance Regime

For fifty years, the preclearance rules in Section 5 of the Voting Rights Act provided a critical check against voting laws that disadvantaged minority groups.<sup>55</sup> The rules required that any changes to a state's voting laws be precleared by the federal government before they could be implemented.<sup>56</sup>

In an ideal world, these preclearance rules would apply to election law changes in all fifty states. But the rules apply only to "covered jurisdictions," which were defined through a formula in Section 4 of the Act.<sup>57</sup> These covered jurisdictions consisted mostly of states in the "old South" with a long history of discrimination against African-American voters.<sup>58</sup>

In addition to the preclearance procedure, the Voting Rights Act authorizes lawsuits against any jurisdiction for actions that discriminate against minority voters.<sup>59</sup> These "Section 2" lawsuits can be used to challenge discriminatory voting laws anywhere in the country, but as a practical matter, they are a less effective deterrent than the preclearance procedure because lawsuits are slow and expensive and the burden of proof lies with the challengers.<sup>60</sup> By contrast, the preclearance rules

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54. Frank v. Walker, 768 F.3d 744 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1551 (2015).

55. Shelby Cty. v. Holder, 133 S. Ct. 2612, 2634 (2013) (Ginsburg, J., dissenting) (describing the Voting Rights Act as "one of the most consequential, efficacious and amply justified exercises of federal legislative power in our Nation's history," and in particular highlighting the importance of the Act's federal preclearance procedure).

56. *Id.* at 2620.

57. *Id.* at 2619.

58. *Id.* at 2620.

59. *Id.* at 2619.

60. Nicholas O. Stephanopoulos, *The South After Shelby County*, 2013 SUP. CT. REV. 55, 63–65.

prevent laws from being enacted until they are first approved, and the burden is on states to show that the laws will not have a discriminatory effect.<sup>61</sup>

The preclearance procedure has been a bulwark against discriminatory voting laws. But the regime came crashing down in 2013 when the Supreme Court, in *Shelby County v. Holder*, invalidated the formula for identifying covered jurisdictions.<sup>62</sup> Chief Justice Roberts, who wrote the majority opinion, said the formula was badly outdated and could wrongfully classify states as “covered jurisdictions” even if they were no longer guilty of widespread discrimination against minority voters.<sup>63</sup> Without evidence of current discrimination, Roberts said, Congress had no power to force these states to “beseech” the federal government for permission to change their election laws.<sup>64</sup> Roberts said this was an affront to the “dignity” of the states and, because the rule applied to only to some states, a violation of the “fundamental principle of *equal sovereignty*” among the states.<sup>65</sup> Roberts’s opinion was joined by the Court’s four other conservative justices. All of the liberal justices dissented.

Perhaps Roberts was right that the formula for identifying covered jurisdictions was outdated (although Justice Ginsburg fiercely argued to the contrary in her dissent).<sup>66</sup> But Roberts was wrong to think that the Court needed to overturn the formula in order to protect the rights of states subject to the preclearance rules. This is a perfect example of something that does not require judicial intervention because states are perfectly capable of protecting themselves through the political process. Indeed, the constitutional framework, and particularly the existence of the U.S. Senate, is designed to give states a voice in the political process.<sup>67</sup> Yet when the Voting Rights Act came up for reauthorization in 2006, ninety-eight Senators voted in favor of it and none opposed it.<sup>68</sup> Senators from the covered jurisdictions could have opposed the reauthorization if they thought it was an affront to the “dignity” and “equality” of their states. None did. Perhaps Roberts should have been more concerned with the dignity and equality of voters, whose rights were jeopardized by his decision, than with the dignity and equality of states.

Indeed, by invalidating the formula for identifying covered states, Roberts gave a green light to the formerly covered jurisdictions to start enacting voter-suppressive laws. Texas, Mississippi, Alabama, North Carolina, and several counties in Georgia promptly followed the Court’s lead and enacted a series of laws to deter voting by

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61. *Shelby Cty.*, 133 S. Ct. at 2620 (noting that covered jurisdictions can only obtain preclearance by proving that a change in their election law “had neither ‘the purpose [nor] the effect of denying or abridging the right to vote on account of race or color’” (citation omitted)).

62. *Id.* at 2631.

63. *Id.* at 2625–27.

64. *Id.* at 2624.

65. *Id.* at 2623 (emphasis in original).

66. *Id.* at 2639–48 (Ginsburg, J., dissenting).

67. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550–51 (1985) (stating that “the composition of the Federal Government was designed in large part to protect States from overreaching by Congress”).

68. *Shelby Cty.*, 133 S. Ct. at 2635.

poor and minority voters.<sup>69</sup> Not surprisingly, civil rights leaders called *Shelby* “the single biggest setback” to civil rights since the Voting Rights Act was enacted in 1965.<sup>70</sup>

Fortunately, civil rights lawyers have had remarkable success in challenging some of the more egregious post-*Shelby* laws.<sup>71</sup> Courts have enjoined the implementation of laws in Texas, North Carolina, Wisconsin, North Dakota, and Ohio.<sup>72</sup> Election law scholar Richard Hasen has speculated that these victories might have been short-lived if Justice Scalia was still on the Supreme Court and there was a five-conservative-justice majority willing to overturn these rulings.<sup>73</sup> “A Donald Trump presidency,” Hasen warned, “could lead to the appointment of more justices in the model of Justice Scalia (as Mr. Trump has promised), reversing these gains.”<sup>74</sup>

### *B. Striking Down Laws that Curb the Influence of Money in Politics*

The conservative justices’ repeated invalidation of campaign finance laws is their best-known blow to our democracy’s health. Many fear we are becoming an oligarchy, or at least the best democracy money can buy.<sup>75</sup> Nor is this fear unjustified. Political scientists have recently shown through empirical evidence that affluent Americans have been far more likely to have their legislative preferences enacted into law than lower and middle-class Americans, even though the latter make up the vast majority of the population.<sup>76</sup>

The flaws with the Supreme Court’s campaign finance decisions are not the ones found on liberal bumper stickers. The Court was not wrong to think that corporations sometimes have constitutional rights. If it were otherwise, the government could seize all of Apple’s assets without it being a “taking” of property, and the government could break into Apple’s headquarters without a warrant. Free speech rights would also be in jeopardy if media corporations like *The New York Times* were ineligible for First Amendment protection.

69. Jim Rutenberg, *The New Attack on Hispanic Voting Rights*, N.Y. TIMES MAG., (Dec. 17, 2015), <http://www.nytimes.com/2015/12/20/magazine/block-the-vote.html?partner=IFTTT> [https://perma.cc/S7KF-RJ5K].

70. *Id.*

71. Richard L. Hasen, *Turning the Tide on Voting Rights*, N.Y. TIMES (Aug. 2, 2016), <http://www.nytimes.com/2016/08/02/opinion/campaign-stops/turning-the-tide-on-voting-rights.html> [https://perma.cc/4ED2-D4U4].

72. *Id.*; see, e.g., N.C. State Conference of the NAACP v. McCrory, No. 16-1468, 2016 WL 4053033 (4th Cir. July 29, 2016); Veasey v. Abbott, No. 14-41127, 2016 WL 3923868 (5th Cir. July 20, 2016); One Wis. Inst., Inc. v. Thomsen, No. 15-cv-324-jdp, 2016 WL 4059222 (W.D. Wis. July 29, 2016).

73. Hasen, *supra* note 71.

74. *Id.*

75. Jeffrey Rosen, *Ruth Bader Ginsburg Is an American Hero*, NEW REPUBLIC (Sept. 28, 2014), <https://newrepublic.com/article/119578/ruth-bader-ginsburg-interview-retirement-feminists-jazzercise> [https://perma.cc/NL4B-C5X5] (interview with Justice Ginsburg who says she would overrule *Citizens United* and “the notion that we have all the democracy money can buy strays so far from what our democracy is supposed to be”).

76. See generally MARTIN GILENS, AFFLUENCE AND INFLUENCE (2012).

The Court was also not wrong to say that regulating money implicates the First Amendment. It's true that money is not the same as speech, but money is often needed to communicate. No one would think that the government could tell *The New York Times* editors what to put in their newspaper. But surely it would be equally problematic if the government told the editors not to spend more than \$20,000 on publishing the paper.

None of this is to deny that the reasoning in the campaign finance cases is seriously flawed. The first flaw is the conservative justices' assumption that independent expenditures do not create a risk of corruption. All along, the Court has permitted financial limits on contributions given directly to candidates because these are necessary "to limit the actuality and appearance of corruption."<sup>77</sup> But from the beginning, the conservative justices have assumed that independent expenditures pose no risk of corruption because they cannot be coordinated with a candidate's campaign.<sup>78</sup>

This distinction between independent expenditures and direct contributions might make sense in some make-believe world, but in the real world, it is hopelessly naive. Candidates know which parties make independent expenditures on their behalf, and, as with direct contributors, feel beholden to those parties.<sup>79</sup> And while it may be true that independent expenditures cannot be coordinated with the campaign, it is common knowledge that this coordination happens anyway, even if done covertly.<sup>80</sup> Not uncommonly, the people running the independent PACs formerly worked for a candidate and know full well how to act in lockstep with the candidate's campaign strategy.<sup>81</sup> This type of covert coordination is such an open secret that Stephen Colbert, with the advice a campaign finance lawyer, hired John Stewart to run his independent PAC when Colbert ran for president.<sup>82</sup> The lawyer explained that Stewart could spend unlimited sums on Colbert's behalf as long as the two of them didn't "coordinate."<sup>83</sup> Colbert and Stewart giggled like little boys who suddenly realized they could cheat without getting caught.<sup>84</sup>

The second major flaw is the conservative justices' assumption that leveling the speech playing field can never be a legitimate governmental interest. Their mantra is

77. *Buckley v. Valeo*, 424 U.S. 1, 25 (1976).

78. *Id.* at 47–48.

79. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 965 (2010) (Stevens, J., dissenting) (reviewing factual evidence and concluding that "[m]any corporate independent expenditures . . . had become essentially interchangeable with direct contributions in their capacity to generate *quid pro quo* arrangements").

80. *Id.* at 962 ("Political consultants testify that campaigns are quite aware of who is running advertisements on the candidate's behalf, when they are being run, and where they are being run.").

81. Matea Gold, *It's Bold, But Legal: How Campaigns and Their Super PAC Backers Work Together*, WASH. POST (July 6, 2015), [https://www.washingtonpost.com/politics/here-are-the-secret-ways-super-pacs-and-campaigns-can-work-together/2015/07/06/bda78210-1539-11e5-89f3-61410da94eb1\\_story.html](https://www.washingtonpost.com/politics/here-are-the-secret-ways-super-pacs-and-campaigns-can-work-together/2015/07/06/bda78210-1539-11e5-89f3-61410da94eb1_story.html) [<https://perma.cc/6Q8X-P7ZM>] (noting how presidential super PACs are "run by close associates or former aids").

82. CNN, *Colbert Signs Over Super PAC to Stewart*, YOUTUBE (Jan. 13, 2012), <https://www.youtube.com/watch?v=c8Lzo1n8-mY> [<https://perma.cc/3MHE-VANH>].

83. *Id.*

84. *Id.*

that it is anathema to the First Amendment to limit one party's speech to enhance the relative voice of another.<sup>85</sup> Again, this sounds good in theory. But it makes little sense when ten percent of the American population controls seventy-six percent of the nation's wealth, and when, in the current presidential campaign season, 158 families out of America's 120 million households provided half of the early campaign financing.<sup>86</sup>

In other marketplaces we recognize the dangers of monopoly power and regulate to control it. Perhaps the marketplace of ideas needs similar regulation. But any hope for that was dashed when the conservative justices in *Citizens United* granted corporations a constitutional right to spend unlimited sums of shareholder money on "independent" expenditures.

The liberal justices have consistently dissented in these campaign financing decisions, writing passionate dissents about the destructive influence of money on our political system.<sup>87</sup> But time and again, the conservative justices have used their power of judicial review to invalidate campaign expenditure limits.

### III. JUSTICE SCALIA'S PASSING AVERTED THE RISK OF FURTHER DAMAGE IN THE SUPREME COURT'S LAST TERM

The conservative justices' onslaught on our democratic system was poised to continue in the Supreme Court's last term. But Justice Scalia's passing derailed their agenda. The two cases in which the conservatives were most likely to have done further damage to our democracy are discussed below.

#### A. *Undermining Public Unions under the Guise of Protecting Employee Free Speech*

Conservative pundits liked to say that *Citizens United* was equally beneficial for liberals and conservatives. After all, the Court not only said that corporations could spend unlimited sums on campaign expenditures, but also said that unions could.<sup>88</sup>

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85. *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) (concluding that "restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment"); *see also* *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 921 (2010) (Roberts, C.J., concurring).

86. OECD, *IN IT TOGETHER* 250 (2015), [http://www.keepeek.com/Digital-Asset-Management/oced/employment/in-it-together-why-less-inequality-benefits-all\\_9789264235120-en#page249](http://www.keepeek.com/Digital-Asset-Management/oced/employment/in-it-together-why-less-inequality-benefits-all_9789264235120-en#page249) [<https://perma.cc/ER8M-M9CD>] (chart indicating that the top ten percent of United States households own seventy-six percent of the nation's wealth); Nicholas Confessore, Sarah Cohen & Karen Yourish, *The Families Funding the 2016 Presidential Election*, N.Y. TIMES (Oct. 10, 2015), <http://www.nytimes.com/interactive/2015/10/11/us/politics/2016-presidential-election-super-pac-donors.html> [<https://perma.cc/9GFA-9UUG>].

87. *Citizens United*, 130 S. Ct. at 929–82 (Stevens, J., concurring in part and dissenting in part).

88. Hans A. von Spakovsky, *Citizens United and the Restoration of the First Amendment*, HERITAGE (Feb. 17, 2010), <http://www.heritage.org/research/reports/2010/02/citizens-united-and-the-restoration-of-the-first-amendment> [<https://perma.cc/Q5SY-TAYH>] (emphasizing the right of unions to spend money on political campaigns).

This is reminiscent of Anatole France’s famous observation that “[t]he law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.”<sup>89</sup> Union resources have always been miniscule compared to corporate resources.<sup>90</sup> But, making matters worse, union membership has been in steep decline for the past half century.

Fifty years ago, one of every three American nonagricultural workers belonged to a union.<sup>91</sup> Today, one of ten does.<sup>92</sup> Of course, globalization and technological changes have disrupted both corporations and unions. But the manner in which corporations have responded to these changes—outsourcing manufacturing jobs to lower-wage countries and replacing people with machines—has devastated the workforce that formed the mainstay of the labor movement.<sup>93</sup> Hardest hit has been the private sector where only 6.6% of the workforce is currently unionized.<sup>94</sup>

The one bright star in the labor universe is the public sector. Unionization of federal, state, and local government employees remains relatively robust (ranging from 27.5 to 42 percent).<sup>95</sup> But in its most recent term, the Supreme Court threatened to strike a potentially fatal blow to public sector unions in the name of freedom of speech. The case concerned the objections of non-union-member employees to paying for a union’s collective bargaining services.<sup>96</sup>

State and local governments are not required to recognize unions, but most do so if the majority of employees join a union.<sup>97</sup> When this occurs, the law promotes fairness and efficiency by requiring the union to represent all employees in the

89. *Reck v. Pate*, 367 U.S. 433, 446 n.5 (1961) (quoting COUNOS, A MODERN PLUTARCH 27 (1928)).

90. Lee Fang, *The Koch Brothers Spent Twice as Much on the 2012 Election as the Top Ten Unions Combined*, THE NATION (Mar. 7, 2014), <http://www.thenation.com/article/koch-brothers-spent-twice-much-2012-election-top-ten-unions-combined/> [https://perma.cc/5F6D-FCHB] (chart indicating that the Koch Brothers spent \$412 million on the election compared to \$153 million by the top ten unions); see also Charlotte Garden, *Citizens, United and Citizens United: The Future of Labor Speech Rights?*, 53 WM. & MARY L. REV. 1, 12–16 (2011) (noting that corporations have “much more money to spend” than unions and unions are subject to structural limitations on their ability to spend money for political purposes).

91. Quoc Trung Bui, *50 Years of Shrinking Union Membership, In One Map*, NPR.ORG (Feb. 23, 2015), <http://www.npr.org/sections/money/2015/02/23/385843576/50-years-of-shrinking-union-membership-in-one-map> [https://perma.cc/NNS6-ZD98].

92. *Id.*

93. Steven Greenhouse, *Union Membership in U.S. Fell to a 70-Year Low Last Year*, N.Y. TIMES (Jan. 21, 2011), [http://www.nytimes.com/2011/01/22/business/22union.html?\\_r=0](http://www.nytimes.com/2011/01/22/business/22union.html?_r=0) [https://perma.cc/D7TX-49AA].

94. Drew Desilver, *Job Categories Where Union Membership Has Fallen Off Most*, PEW RES. CTR. (Apr. 27, 2015), <http://www.pewresearch.org/fact-tank/2015/04/27/union-membership/> [https://perma.cc/AL42-4CNA].

95. *Id.*

96. *Friedrichs v. Cal. Teachers Ass’n*, No. 13–57095, 2014 WL 10076847 (9th Cir. Nov. 18, 2014), *cert. granted*, 135 S. Ct. 2933 (2015).

97. Brief for the Union Respondents, *Friedrichs v. Cal. Teachers Ass’n*, 136 S. Ct. 1083 (2016) (No. 14-915), 2015 WL 6935529, at \*4–\*5.

bargaining unit.<sup>98</sup> If the union wins higher wages or more generous health benefits, union members and nonmembers alike receive these benefits.<sup>99</sup>

Since nonmembers enjoy the benefits of collective bargaining, many states require them to pay their fair share of the union's costs.<sup>100</sup> In the past, this sometimes meant paying the equivalent of full union dues.<sup>101</sup> But in a landmark decision in 1977, *Abood v. Detroit Board of Education*, the Supreme Court held that this requirement violated the nonmembers' free speech rights.<sup>102</sup>

*Abood* said that nonmembers could be required to pay for a union's collective bargaining expenses.<sup>103</sup> But they could not be forced to pay for other union expenses, especially the costs of a union's political activities.<sup>104</sup> The latter violated the nonmembers' First Amendment rights because it forced the nonmembers to subsidize speech they might not support or might even find objectionable.<sup>105</sup>

This compromise—forcing nonmembers to pay for collective bargaining services but not political activities—has been the guiding principle for almost four decades. But in the case before the Supreme Court, employees who benefited from union representation but did not want to pay union dues were objecting to paying even collective bargaining expenses.<sup>106</sup> They said that collective bargaining by public unions is also a form of political speech because it has profound political ramifications (such as how governments allocate scarce taxpayer money).<sup>107</sup> They contended that forcing them to subsidize this “speech” violates their rights.<sup>108</sup>

After the oral argument in the case, commentators predicted *Abood's* demise. The five conservative justices appeared ready to overrule *Abood* while the four liberals seemed inclined to uphold it.<sup>109</sup>

Overturning *Abood* would have been a body blow to the last remaining vestige of union power. But with Scalia no longer on the Court, the conservatives lost their majority and the Court split 4–4.<sup>110</sup> This did not set any national precedent, and it left in effect the Ninth Circuit decision upholding the California law requiring fee-sharing by non-union employees.

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98. *Id.* at \*5.

99. *Id.*

100. *Id.*

101. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 212 (1977) (non-union members required to pay a service charge that was equivalent to union dues paid by members).

102. *Id.* at 234–37.

103. *Id.* at 236–37.

104. *Id.*

105. *Id.* at 233–37.

106. Brief for the Petitioners, *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016) (No. 14-915), 2015 WL 5261564, at \*1–\*2.

107. *Id.* at \*20–\*28.

108. *Id.* at \*29–\*30.

109. Adam Liptak, *Supreme Court Seems Poised to Deal Unions a Major Setback*, N.Y. TIMES (Jan. 11, 2016), <http://www.nytimes.com/2016/01/12/us/politics/at-supreme-court-public-unions-face-possible-major-setback.html> [<https://perma.cc/7B4Y-B6MQ>].

110. *Friedrichs v. Cal. Teachers Ass'n*, 136 U.S. 1083 (2016).



*B. Construing One-Person, One-Vote to Shift Power from Urban to Rural Areas*

Perhaps the most important democracy-reinforcing decision in Supreme Court history was *Reynolds v. Sims*, which established the rule that state legislative districts had to be apportioned based on the principle of one-person, one-vote.<sup>111</sup> The Court has applied the same rule to congressional districts.<sup>112</sup>

Historically, the states have applied the one-person, one-vote rule by counting all of their residents.<sup>113</sup> In other words, they would take the total number of residents reported in the last decennial census and divide that by the number of legislative districts they needed to create.<sup>114</sup>

But in a case heard by the Supreme Court in its last term, the plaintiffs claimed that one-person, one-vote meant equality of voters, not people.<sup>115</sup> This would mean that, in drawing district lines, states would not count citizens who cannot vote (such as children and ex-felons who had been disenfranchised) or resident aliens who are living in the country legally.<sup>116</sup> Depending on how they defined “voters,” they might not even count citizens who are eligible to vote but not registered.

Which approach—counting all residents or only eligible voters—would best further the democracy-reinforcing purpose of *Reynolds v. Sims*? There is no one right answer. But certainly one would think that the relative weight of any legislative district should account for the fact that there are children and ex-felons living there. Even if these groups do not vote, they are members of the body politic and deserve to have their interests represented.

After the Supreme Court took the case, Richard Hasen warned that the plaintiffs might have been less concerned with finding a principled application of the one-person, one-vote rule than with pulling off a partisan “Republican power grab.”<sup>117</sup> Indeed, if the Court had transformed the *Reynolds* rule from one-person, one-vote to one-voter, one-vote, it would have shifted political power away from more liberal Democratic urban districts, which tend to have more children, aliens, and ex-felons, to more conservative Republican rural areas.<sup>118</sup>

With Scalia off the Court, any possibility of the Court adopting a one-voter, one-vote rule disappeared. The Court instead issued a narrow decision that merely held that states could draw districts based on total population.<sup>119</sup> Justice Ginsburg’s

111. 377 U.S. 533, 568 (1964).

112. *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969).

113. Lyle Denniston, *Argument Analysis: The Choice—Be Bold or Practical*, SCOTUSBLOG (Dec. 8, 2015), <http://www.scotusblog.com/2015/12/argument-analysis-the-choice-be-bold-or-practical/> [<https://perma.cc/7H9H-5JVY>].

114. *Id.*

115. Brief for Appellants, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) (No. 14-940), 2015 WL 4624625, at \*14–\*19.

116. *Id.*

117. Richard Hasen, *Symposium: Ideology, Partisanship, and the New “One Person, One Vote” Case*, SCOTUSBLOG (July 31, 2015), <http://www.scotusblog.com/2015/07/symposium-ideology-partisanship-and-the-new-one-person-one-vote-case/> [<https://perma.cc/B4L2-TLRP>].

118. *Id.*

119. *Evenwel v. Abbott*, 136 S. Ct. 1120, 1132–33 (2016).

opinion for the Court, which was joined by five justices including the conservatives Chief Justice Roberts and Justice Kennedy, concluded that constitutional history, the Court's precedent, and settled practices all supported the propriety of using total population.<sup>120</sup> The Court declined to consider the more incendiary issue of whether states could instead choose to draw district lines to equalize voter population.<sup>121</sup>

Even if Scalia had remained on the Court, it's hard to know how this case would have been resolved. It's quite possible the justices would have punted on the one-voter, one-vote issue, perhaps leaving it to the states to decide. As a practical matter, that might have been the only choice, since basing districts on voters opens a Pandora's Box of intractable problems (*e.g.*, the census doesn't count voters, some states have same-day voter registration, a whole generation of children would become eligible to vote between one census and the next).<sup>122</sup> For now, all we know is that the issue was put off to another day and presumably to a differently constituted Court.

#### CONCLUSION

The Constitution begins with the words "We the People" to emphasize that our nation is based on popular sovereignty. Of course, the Constitution, itself a counter-majoritarian document, places limits on the popular will to protect minority rights. But ordinarily, our system of government is one in which the majority of citizens, acting through their elected representatives, set the nation's course.

Such a system works only if the machinery of democracy is responsive to the popular will. Yet time and again, the conservative justices have allowed lawmakers to tamper with this machinery to entrench themselves in office and to disenfranchise voters who threaten their power. The justices' refusal to correct for these abuses has largely redounded to the benefit of the Republican Party because Republicans control the majority of the state legislatures and have used their power to draw partisan-gerrymandered districts and to aggressively enact voter ID and other laws that disenfranchise poor and minority voters.

The conservative justices have been able to facilitate this partisan manipulation because there has been a reliable majority of five conservative justices on the Supreme Court. But Justice Scalia's unexpected passing during the term of a Democratic president put that control into play. The mainstream media has focused on the implications of a potentially shifting Supreme Court majority for individual rights. But it's hard to imagine that, behind the scenes, politicians are not more focused on the implications of a shifting majority for their ability to hold onto power.

Is it any wonder that Republican Senators interpreted the Constitution's command to give "Advice and Consent" to authorize obstruction and evasion?<sup>123</sup>

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120. *Id.* at 1127–33.

121. *Id.* at 1133.

122. See Nathaniel Persily, *Symposium: Evenwell v. Abbott and the Constitution's Big Data Problem*, SCOTUSBLOG (Aug. 3, 2015), <http://www.scotusblog.com/2015/08/symposium-evenwel-v-abbott-and-the-constitutions-big-data-problem/> [https://perma.cc/93JM-Z9W8].

123. U.S. CONST. art. II, § 2, cl. 2; see also Herszenhorn, *supra* note 16 (Republicans on Senate Judiciary Committee pledged not to hold hearings on a Supreme Court nominee).