

2002

Supreme Democracy: *Bush v. Gore* Redux

Lani Guinier

Follow this and additional works at: <http://lawcommons.luc.edu/lucj>



Part of the [Law Commons](#)

Recommended Citation

Lani Guinier, *Supreme Democracy: Bush v. Gore Redux*, 34 Loy. U. Chi. L. J. 23 (2002).

Available at: <http://lawcommons.luc.edu/lucj/vol34/iss1/3>

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola University Chicago Law Journal by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

Supreme Democracy: *Bush v. Gore* Redux

Lani Guinier*

The Supreme Court's decision in *Bush v. Gore*¹ ostensibly protected the rights of a single political candidate to the equal protection of the laws.² It is consistent, in that sense, with other constitutional law cases that focus on the abstract rights of individuals to something called "equality." Yet, *Bush v. Gore* has secured a place in constitutional jurisprudence without regard to legal doctrines in general or the doctrine of equal protection in particular.

Certainly, its long-term significance is assured because the opinion dramatically resolved a presidential election. Equally significant is the Court's appropriation of the language of the Fourteenth Amendment, enacted after the Civil War to protect the newly freed slaves, to express an aristocratic, albeit inchoate, political philosophy: that hierarchy, ratified by the holding of elections, equals democracy. Animated by a passion for political stability, rather than political equality, the justices in the majority deployed the Equal Protection Clause as a formal tool to accomplish a goal that has little to do with noble ideas of political equality and much to do with an elite-centered political orientation. Indeed, the decision limited, rather than broadened, the concept of equality as the Court sought to avoid its greatest fear: the nightmare of too much democracy.

In *Bush v. Gore*, the majority granted to a single candidate with a privileged pedigree rights that the Court has yet to accord the average voter. The opinion was clear on this distinction—the protections afforded applied only to George W. Bush in this instance.³ Moreover,

* This Essay was initially delivered as an oral presentation at Loyola University Chicago School of Law based on a chapter I wrote in the book, *A BADLY FLAWED ELECTION: DEBATING BUSH V. GORE, THE SUPREME COURT, AND AMERICAN DEMOCRACY* (Ronald Dworkin ed., 2002). I have tried to retain the informal style appropriate to that venue, and with permission of The New Press, have borrowed liberally from the original chapter, which was the source of my oral remarks. Sam Spital, Harvard Law School Class of 2004, has contributed excellent research and editorial assistance. His work has been invaluable to both these projects.

1. *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam).
2. *See id.* at 111 (per curiam).
3. *Id.* at 109 (per curiam) ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.").

there was no comparable right for the voters. As the Court reminded us, there is no constitutional right to vote.⁴ Perceiving its role as the guardian of what Justice O'Connor termed in another voting case "stability and measured change,"⁵ the Court majority vindicated the rights of a powerful individual. Yet, in other contexts, the same majority has ignored the needs of the people as a whole to exercise their power through equal and meaningful participation in political decisions that shape their lives.

The implicit message of the Court's intervention was that democracy is a domain of governing elites, not robust and engaged citizens. Consistent with this view, Professor Richard Pildes sees increasing evidence that the Supreme Court's recent jurisprudence, and not just its decision in *Bush v. Gore*, locates the center of gravity in our political system in unelected federal judges rather than the people themselves.⁶ As Professor Pildes observes, "*Bush v. Gore*, for all its uniqueness, is not an isolated event. It is best understood, instead, as the most dramatic crystallization of a deeper, more enduring pattern in the contemporary relationship between democratic politics and constitutional law."⁷ Pildes labels this phenomenon "the constitutionalization of democracy," meaning that theories of constitutional law have played an increasingly dominant role in shaping our understanding of democracy.⁸ Not surprisingly, such a view asserts a central role for judges, whose intervention is needed to protect the integrity of our political system from excessive factionalism and political chaos. Professor Pildes has uncovered case after case in which the majority of the Court sought to preserve the status quo despite stunning evidence of popular disaffection with current institutional arrangements.⁹ Time and again, the measure of democracy is its stability, not its flexibility; the maintenance of order triumphs over efforts to combat declining levels of citizen participation.

This vision of democracy has two key consequences, which are the focus of this Essay. First, it tolerates inequalities that continue to disadvantage historically marginalized members of the polity, whose role as second-class citizens or three-fifths of a person is part of our

4. *Id.* at 104 (per curiam).

5. *Davis v. Bandemer*, 478 U.S. 109, 145 (1986) (O'Connor, J., concurring).

6. Richard Pildes, *Constitutionalizing Democratic Politics*, in *A BADLY FLAWED ELECTION: DEBATING BUSH V. GORE, THE SUPREME COURT, AND AMERICAN DEMOCRACY* 155 (Ronald Dworkin ed., 2002) [hereinafter Pildes, *Constitutionalizing Democratic Politics*].

7. *Id.*

8. *Id.*

9. *Id.* at 161-76.

governing legacy. Second, it ignores the declining levels of participation even by people who might otherwise identify with the “official portrait of the United States as the standard bearer of democracy and representative government.”¹⁰

Both of these troubling phenomena characterized the 2000 presidential election. In Florida, we witnessed the disenfranchisement of people of color, elderly Jews, and those who had difficulty following written instructions. Extremely low levels of participation across-the-board accompanied this outright exclusion of many voters. Indeed, one of the most striking statistics about our political system is how poorly it fosters participation in democracy’s most basic act: voting. Of the 172 countries in the world that profess to be democracies, 81% have higher levels of voter participation than the United States.¹¹ Our extraordinarily low turnout is especially disturbing since it is fueled by even lower rates of working-class participation. In Europe, the difference between turnout levels among the affluent and low-income voters range from 5% to 10%.¹² In the United States, more than two-thirds of people with annual incomes greater than \$50,000 vote, compared with one-third of those with incomes under \$10,000.¹³

Fewer than half of eligible Americans bother to vote in most elections; levels of turnout are less than 30% in off years.¹⁴ For many, declining to vote is a rational choice based on the fact that the two-party duopoly gerrymanders districts so that electoral outcomes are usually decided before a single ballot is cast. People of color, poor people, and women remain grossly underrepresented in legislative bodies and policy-making influence. Additionally, money plays an unprecedented role in political campaigns and supplies wealthy corporations, interest groups, and individuals with a disproportionate share of political power.

10. ALEXANDER KEYSSAR, *THE RIGHT TO VOTE* 316–17 (2000).

11. See INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, *VOTER TURNOUT: A GLOBAL SURVEY: VOTER TURNOUT FROM 1945 TO DATE: A GLOBAL REPORT ON POLITICAL PARTICIPATION*, at http://www.idea.int/voter_turnout/voter_turnout2.html (last visited Nov. 20, 2002).

12. Lani Guinier, *What We Must Overcome*, AM. PROSPECT, Mar. 12–26, 2001, at 28.

13. *Id.*

14. See, e.g., Derrick Jackson, *Voting for Democracy*, BOSTON GLOBE, Sept. 20, 2002, at A19, available at 2002 WL 4150053. Jackson said “we still hate voting” a year after September 11. *Id.*

Our turn outs, sinking below 20 percent in the primaries and rising to only 50 percent in presidential elections, is nothing compared with elections elsewhere in the world this year. Elections in Macedonia brought out 70 percent of the voters. Slovakia is anticipating a 70 percent turnout this weekend. Lesotho, France, and the Netherlands had respective turnouts of 68, 80, and 79 percent.

Id.

Disaffection with our current political system manifests itself in individual isolation or withdrawal. However, dissatisfaction can supply the impetus for social movements that provide an outlet for political commitments, bring citizens together, and reverse the trend toward declining turnout levels. Examples include the flourishing of voter initiatives and the burgeoning of support for third political parties and independent candidates.¹⁵ These developments, especially those that inspire interactive experiments in community organizing and political involvement, have a complex set of causes and consequences, but on the whole, they strike me as positive interventions to be encouraged rather than crushed. Thus, the evidence of increasing discontent comes in divergent forms: apathy and alienation on the one hand, citizen activism on the other. Legal rules that enshrine the existing structure promote the former and risk suppressing the latter, with potentially devastating consequences for our democracy. As Judge Damon Keith writes in regard to other government actions that attempt to leave the people outside of the decision-making process, "Democracies die behind closed doors."¹⁶

Yet in the Court's constitutional canon, democracy seems to function best when decisions are made behind closed doors to hold ordinary people at bay. Going out of its way to protect the rights of the already powerful, the Court rejects fusion candidates, ballot access for third parties, or debates that are not limited to the two major parties and are designed to address some of the sources of voter disaffection.¹⁷ The Court promotes democracy simply as the act of holding elections that function as a test to narrow the electorate to those who are qualified, i.e., those who successfully maneuver through the complex machinery, the untrained poll workers, and the inconvenient polling hours to actually cast a vote. Even if only a few people manage to or care to vote, they are the ones qualified to act vicariously for everyone else. The few can act and the many are simply urged to place their confidence in traditions based on hierarchy and privilege, instead of relationships that build trust, share power, and spark innovation.

15. After all, many accuse Ralph Nader of simply losing the election for Al Gore because the 92,000 votes cast for Nader in Florida would have changed the close election into a decisive Gore victory. Sam Howe Verhovek, *An Unrepentant Nader Unveils a New Grass-Roots Project*, N.Y. TIMES, Aug. 6, 2001, at A8, available at LEXIS, News Library, The New York Times File.

16. Detroit Free Press v. Ashcroft, 303 F.3d 681, 683 (6th Cir. 2002).

17. See *infra* Part III.B (discussing proportional representation); see also Editorial, *Third Thoughts*, BOSTON GLOBE, Sept. 30, 2002, at A18, available at 2002 WL 4151475 ("Inclusion is vitally important now, when many people are so turned off by politics that they don't even bother to vote. . . . Debate organizers who limit access marginalize third-party supporters and risk spreading voter apathy.").

In these ways the Court's interpretation of legal rules helps reduce participation to an existential gesture, limiting the role of ordinary people to the act of casting a ballot that may not count.¹⁸ Conveniently enough, this interpretation preempts insurgent social movements from influencing social policy by circumscribing opportunities for citizens to act individually or organize collectively. It also constrains the chance for democracy itself to evolve. And it assumes, rather than earns, democratic legitimacy as it encourages blind faith in a "plutocracy" of "natural leaders" rather than reasoned, contentious, and earnest deliberation among the people themselves. Government by the people becomes government by elites in the name of the people, which assures that alienation thrives while activism is discouraged.

And yet, more accessible voting opportunities would only salvage a small part of democracy's potential. Although the act of voting can be a central means of asserting one's connection to the political system, democracy is not simply about holding open elections where every ballot counts. Rather, it is a "diffuse and urgent hope,"¹⁹ that the people themselves can become moral and political actors in the civic fabric of our society. Indeed, I would argue that we need democracy in our everyday lives and not just on Election Day. We should consider experimenting with even more participatory forms of self-government that foster organizing and collective action at the local level. Unless citizens in a democracy are able to participate over time in a public process that permits them to speak for themselves, articulate their needs, and share their vision, they cannot assume moral agency in public policy debates and will never be equal partners in democratic decision-making.

In addition, as Ian Shapiro notes, "opposition rights are important for democratic politics independently of the value of inclusive

18. Cf. *Holder v. Hall*, 512 U.S. 874, 891 (1994) (Thomas, J., concurring). According to Justice Thomas, Section Two of the Voting Rights Act reaches only state enactments "that limit citizens' access to the ballot" despite the language of the statute, which states that the term "'voting' includes all action necessary to make a vote effective." *Id.* at 893, 919 (Thomas, J., concurring) (citing *Allen v. State Bd. of Elections*, 393 U.S. 544, 566 (1969)). He thus railed against the dominant judicial approach ("a disastrous misadventure in judicial policymaking") that viewed Section Two as a tool to overturn districting or other practices that unfairly dilute the capacity of cohesive minority groups to elect candidates of their choice. *Id.* at 893 (Thomas, J., concurring).

19. CATHERINE ESCHLE, *GLOBAL DEMOCRACY, SOCIAL MOVEMENTS AND FEMINISM* 17 (2001) (quoting a 1992 statement by John Dunn); see also JAMES MORONE, *THE DEMOCRATIC WISH: POPULAR PARTICIPATION AND THE LIMITS OF AMERICAN GOVERNMENT* 5-6 (Yale Univ. Press rev. ed. 1998) (1990).

participation.”²⁰ If we can acknowledge that democracy is a system for structuring power relations, we can begin to reconceptualize our own approach to valuing the interests and voices of the losers, not just those of the winners. We can fortify the greatest resource of any functioning democracy—the people themselves—by building intermediate institutions that restore the link between the people and the act of political decision-making. In other words, it is time to confront the paradox of a democratic system that perpetuates rather than dismantles hierarchy.²¹

Of course, building consensus for structural reforms that give ordinary people a larger voice in the American political system is an ambitious project. Democracy is not susceptible to a single definition, and there is no reason to believe that those who presently enjoy unfettered access to decision-making opportunity will simply agree to share it with others, especially those they deem less qualified. As Dean Michael Fitts observes, it is unlikely we can achieve “a normatively precise theory of democracy” to instruct and resolve heated debates “over the regulation of the electoral process.”²² Yet, as Professor Pildes points out, after *Bush v. Gore*, questioning “the structures, institutions, and ground rules of democracy . . . can no longer be avoided.”²³ When the Supreme Court, with little guidance from prior precedents, acted to stop the counting of ballots and handed one candidate the presidency of the United States, the temporary stability such intervention yielded was by no means permanent. By removing the choice from the voters themselves, the Court’s actions might portend even greater withdrawal of those same voters from all aspects of democratic participation over time.

In sum, the Court’s involvement in George W. Bush’s peculiar ascension to the presidency highlights the “democracy-as-fortress” mentality. Comfortable with the calcified architecture of our system, many pundits, members of the governing elite, and both political parties also advocate for what is familiar rather than what is fair. As a result, the Court is not alone in its disregard for two foundational ideas of a multiracial democracy: (1) that the people themselves are capable of

20. Ian Shapiro, *The State of Democratic Theory*, in *POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE* 235, 240 (Ira Katznelson & Helen Milner eds., W.W. Norton & Co. 2002) (1983).

21. While a hierarchy may be created in democratic ways, “hierarchies have propensities to atrophy into systems of domination, necessitating institutional constraints that shift burdens of proof to those who would defend them.” *Id.* at 262.

22. Michael A. Fitts, *The Hazards of Legal Fine Tuning: Confronting the Free Will Problem in Election Law Scholarship*, 32 *LOY. L.A. L. REV.* 1121, 1139 (1999).

23. Pildes, *Constitutionalizing Democratic Politics*, *supra* note 6, at 157.

governing; and (2) that such capacity requires interactive, engaging, and egalitarian spaces in which the people can become informed, can deliberate, and can eventually influence public decision-making.

Part I of this Essay explores in greater detail a few of the more salient assumptions surrounding the Court's decision in *Bush v. Gore*.²⁴ I suggest that this decision, as flawed as it was, must be understood as one of a series of Court judgments that privilege hierarchical rules over more participatory forms of democratic decision-making. The Court's decision must be understood in the context of a political system that has neither shaken its roots in oligarchy nor offered an equitable voice to people of color, poor people, and women—problems for which the Supreme Court is only partially responsible. Part II explores how the stories of both liberals and conservatives reward, and then justify, rule by the most privileged Americans.²⁵ Part III then examines ways to reconceptualize democratic citizenship to benefit us all.²⁶ I argue that the experience of black voters in Florida showcased the need for such a reconceptualization, and this movement must ultimately tie the experiences of Americans of color to poor and working-class whites. It is only by creating intermediate institutions, which can engage multiracial groups of citizens throughout the political process, that we will begin to see what a richly participatory and more egalitarian democracy might look like. Finally, in Part IV, I respond to criticisms that my analysis wrongly privileges procedural over substantive justice.²⁷ The informal tone of this section tracks the ad hoc exchange I had with Professor Seidman at the February 2002 Conference. There, I argued against paternalistic approaches to justice where an “expert” creates and implements solutions to major social problems. I continue to believe that good social policies will likely emerge if the people themselves are given the opportunity and the resources to help make the decisions that will affect their lives.

I. THE DECISION

Before turning to the hierarchical assumptions underlying the Supreme Court's analysis in *Bush v. Gore*, it is worth briefly noting the

24. See *infra* Part I (analyzing the majority opinion in *Bush v. Gore* and its perpetration of inequality in the voting process).

25. See *infra* Part II (discussing the influence of merit-based tests on the equality of voting opportunities).

26. See *infra* Part III (proposing a new vision of democracy based on examples from other nations).

27. See *infra* Part IV (discussing the benefits to social justice as a result of greater participation by individuals in public policy debates).

role of our nation's anti-democratic heritage in making it possible for a candidate who lost the popular vote to accede to the presidency by "winning" the Electoral College. As Yale law professor Akhil Amar argues, the Electoral College was established as a device to boost the power of Southern states in the election of the President.²⁸ The same "compromise" that gave Southern states more House members by counting slaves as three-fifths of a person for purposes of apportioning representation (while giving the slaves none of the privileges of citizenship), gave those states Electoral College votes in proportion to their congressional delegation. Treating non-voting slaves as a political asset shifted power to the Southern states; not surprisingly, Southern slaveholding presidents governed the nation for roughly fifty of the first seventy-two years of our country's existence. As a result, the institution of slavery, and the concept of black inferiority on which it depended, defined the institutions of democracy itself. As Henry Wienczek writes, "With their eyes open, the founders traded away the rights of African-Americans, many of whom had fought bravely in the revolution, so that the national enterprise could go forward."²⁹ The fact that George W. Bush lost the popular vote, yet gained the oval office through this very same Electoral College, is a depressing reminder that the legacy of racism distorts our governing structures to reinforce a tradition of hierarchy.

However, this tradition is complex insofar as concepts that structure and institutionalize inequality co-exist with values of democratic opportunity. The fact that five justices of the United States Supreme Court ultimately decided the closely contested presidential election of 2000, on the grounds of equal protection of the law, simply highlights these contradictions between our rhetoric and our practice. The Court, elsewhere unwilling to enforce a broad view of the rights of individuals of color to equal protection, took an expansive view of the equal protection claim in *Bush v. Gore*. Evoking the fulsome language of the more liberal Warren Court opinions in the early one person, one vote

28. Akhil Amar, *A Constitutional Accident Waiting to Happen*, 12 CONST. COMMENT. 143, 144 (1995).

29. Henry Wienczek, *Yale and the Price of Slavery*, N.Y. TIMES, Aug. 18, 2001, at A15, available at LEXIS, News Library, The New York Times File.

If the founders had such misgivings over slavery, how is it that they allowed slavery to continue? The answer is not that they didn't know any better, but that they kept slavery so the Southern states would join the union. It was a transaction, a deal, just like the deal that put the national capital on the Potomac in exchange for the federal assumption of states' debts

Id.

cases of *Reynolds v. Sims*³⁰ and *Harper v. Virginia State Board of Elections*,³¹ the current Court majority ruled, in the name of George W. Bush's rights to equal protection of the laws, that the recounting of Florida's closely divided votes could not continue.³² In stark contrast to much of its own recent precedent, the Supreme Court boldly entered the political thicket to declare the right of a political candidate—and only one political candidate at that—to have all the votes counted using a single standard.³³

The Court extended the equal protection of the right to vote to an entirely new terrain—to the operation of the ballot counting machinery. Instead of protecting equal and meaningful access to the ballot for all voters, it focused on the “formulation of uniform rules” to determine each voter's intent *after* the ballots were already cast.³⁴ Only at the moment of tabulating votes ballot-by-ballot were specific, uniform standards suddenly practicable; they were also, the Court concluded, “necessary” to ensure “equal application” of the law.³⁵ This formulation ignored idiosyncratic local rules, which made it hard for some voters to cast a ballot in the first place;³⁶ such disparate procedures at the county level caused some who showed up to vote to be effectively disenfranchised. This led to the enormous county-by-county differences in the accessibility or accuracy of voting technology. Yet the Court majority apparently was not moved to consider whether such inequities in access to voting might disturb the “confidence all citizens must have in the outcome of elections.”³⁷

According to many scholars, the Court's failure to examine the widespread inequality in ballot access and technology, while invoking

30. *Reynolds v. Sims*, 377 U.S. 533 (1964) (holding that two plans to apportion seats in the Alabama Legislature violated the Equal Protection Clause).

31. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966) (holding that the Equal Protection Clause prohibited the creation of a poll tax by the State of Virginia).

32. *Bush v. Gore*, 531 U.S. 98, 111 (2000) (per curiam).

33. The Court made sure to assert that its ruling applied only to the circumstances surrounding the election of George W. Bush. *Id.* at 109 (per curiam) (“Our consideration is limited to the present circumstances . . .”).

34. *Id.* at 106 (per curiam).

35. *Id.* (per curiam).

36. See *infra* notes 119–24 and accompanying text (discussing disproportionate rejection of ballots cast by African-Americans).

37. The brief submitted on behalf of Gore pointed out that Florida's sixty-seven counties used four different vote tabulation mechanisms and that “[t]he use of different vote tabulating systems undoubtedly will generate tabulation differences from county to county.” Br. of Resp't Albert Gore, Jr. at 42, *Bush v. Gore*, 531 U.S. 98 (2000) (No. 00-949), available at 2000 WL 1809151. Nevertheless, the Court only addressed the equal protection implications of the supposedly different standards that officials used during the recount.

the Equal Protection Clause at the moment of recounting ballots, created nothing more than a false patina of legitimacy.³⁸ In reality, meaningful democratic equality was not a concern. Rather, a set of anti-egalitarian premises apparently provided the philosophical foundation for the decision to enjoin the democratic process altogether and thus hand Mr. Bush the presidency.³⁹ Black voters, elderly Jewish voters in Palm Beach County, and poor people throughout the state of Florida were disenfranchised and left without a remedy. Principles of meritocracy justified their disenfranchisement.⁴⁰ Essentially, they had to pass a test to have their ballots counted, and the implicit suggestion was that only those who passed this test actually deserve to participate in the democratic process.

That our constitutional democracy would permit the disenfranchisement of thousands—perhaps millions—of voters is a function of the Court’s ambivalence toward basic democratic principles, and its longstanding preference for order over participation. In her concurring opinion in a political gerrymandering case, *Davis v. Bandemer*,⁴¹ Justice O’Connor suggested as much when she asserted that a commitment to stability and measured change is the sine qua non of a functioning democracy.⁴² That is, “the emergence of a strong and stable two-party system in this country has contributed enormously to sound and effective government. The preservation and health of our political institutions, state and federal, depends to no small extent on the continued vitality of our two-party system, which permits both stability

38. For example, Heather Gerken argued that “[the] Court, in announcing a new type of equal protection claim, is simply reverting to one of its worst habits in voting-rights cases: decision-making unmoored from an explicit normative theory.” Heather Gerken, *New Wine in Old Bottles: A Comment on Richard Hasen’s and Richard Briffault’s Essays on Bush v. Gore*, 29 FLA. ST. U. L. REV. 407, 422 (2001) (“The Court’s failure to wrestle with these questions—what does equality mean, and how far should we go to attain it when the twin problems of race and poverty permeate our democratic structures?—gives an unwarranted patina of legitimacy to the election system.”); see also Frank Michelman, *Suspicion, or the New Prince*, 68 U. CHI. L. REV. 679, 693 (2001) (“The justices of the *Bush v Gore* majority might be imagined as Machiavelli’s new prince, a ruler and savior prepared to sacrifice all to save the imperiled republic—probity, reputation, even the salvation of an honored place in history.”).

39. Indeed, in a timely and eerily propitious op-ed analyzing the class war in meritocratic terms, David Lebedoff suggested in August 2000 that the removal of decision-making from the people has become characteristic of the legal system itself. “Increasingly, too, major decisions are made by judges and administrators virtually immune from electoral reproach, let alone removal.” David Lebedoff, *The Class War Gore Could Lose*, N.Y. TIMES, Aug. 27, 2000, § 4, at 15, available at LEXIS, News Library, The New York Times File.

40. For a more in-depth discussion of this point, see *infra* Part III.

41. *Davis v. Bandemer*, 478 U.S. 109 (1986) (plurality opinion).

42. *Id.* at 145 (O’Connor, J., concurring).

and measured change.”⁴³ This preference for mechanical or tradition-bound rules that privilege stability and measured change over genuine and broad-based democratic participation also underlies the Court’s recent jurisprudence in its decisions to: (1) tolerate extreme political gerrymandering that essentially predetermines electoral outcomes when districts are drawn, thus, rendering elections virtually meaningless;⁴⁴ (2) yet apply strict scrutiny to majority-minority districts designed to provide people of color a fair opportunity to elect candidates of their choice;⁴⁵ (3) rule that the First Amendment prohibits campaign expenditure limits and certain other measures designed to limit the role of private money in politics;⁴⁶ (4) privilege the associational rights of the two major parties at the expense of broad-based participation in primaries;⁴⁷ and (5) uphold various devices, such as strict ballot access requirements, that inhibit the possibility of third parties playing a significant role in the political process.⁴⁸

43. *Id.* at 144–45 (O’Connor, J., concurring).

44. In *Bandemer*, the Court ruled that political gerrymandering was justiciable, but the Court’s threshold is so high that only once have plaintiffs successfully brought a partisan vote dilution claim. *Id.* at 132 (plurality opinion); see also *infra* text accompanying notes 86–97 (discussing the effects of political redistricting and the Court’s application of heightened scrutiny).

45. See *Bush v. Vera*, 517 U.S. 952, 958 (1996) (challenging a redistricting plan by the Texas legislature that created three districts in which racial minorities were the majority); *Shaw v. Hunt*, 517 U.S. 899, 904–05 (1996) (rehearing the equal protection claim in *Shaw v. Reno*); *Miller v. Johnson*, 515 U.S. 900, 915 (1995) (alleging that the State of Georgia violated the Equal Protection Clause by creating a new voting district); *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (holding that the State of North Carolina violated the Equal Protection Clause by enacting a redistricting plan that resulted in “segregated” voting districts).

46. See *Colo. Republican Fed. Campaign Comm’n v. FEC*, 518 U.S. 604, 614–15 (1996) (claiming that the First Amendment prohibits the application of the Federal Campaign Act of 1971’s limit on campaign expenditures); *Buckley v. Valeo*, 424 U.S. 1, 17 (1976) (challenging the constitutionality of the limit on campaign expenditures of the Federal Campaign Act of 1971).

47. See *Cal. Democratic Party v. Jones*, 530 U.S. 567, 572 (2000) (alleging that the State of California violated the First Amendment by implementing a “blanket” primary); *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 673–74 (1997) (arguing that the Arkansas Educational Television Commission adhered to the First Amendment when refusing to allow a congressional candidate to participate in a televised debate).

48. While the Court has struck down some of the most egregious laws attempting to deny fair access to third parties, its concerns about destabilizing threats to the two-party system can also be found in opinions on blanket primaries, fusion candidates, and party raiding. See, e.g., *Cal. Democratic Party*, 530 U.S. at 576–78; *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 366–67 (1997) (“destabilizing effects of party-splintering and excessive factionalism” from fusion tickets); *Burdick v. Takushi*, 504 U.S. 428, 439 (1992) (“divisive sore-loser candidacies” might emerge from allowing write-in voting in one-party Hawaii); *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986). Justice Antonin Scalia offered a remarkable defense for the Court’s tolerance of laws that unfairly promote the existing two-party system and the alienation it brings to large segments of the electorate: “The voter who feels himself disenfranchised should simply join the party.” *Cal. Democratic Party*, 530 U.S. at 584; see also Theodore Lowi, *Deregulating the Duopoly: Two Party System Offers Narrow Choice*, *NATION*, Dec. 4, 2000, at 7.

Reflecting upon this pattern, Professors Heather Gerken and Spencer Overton join Professor Pildes in his observation that *Bush v. Gore* was part of the Court's longstanding failure to examine our democratic principles to develop legal rules that foster an energetic and inclusionary vision of democracy.⁴⁹ The elevation of stability and measured change to a preferred status as *the* primary goal of politics disconnects democracy from its participatory ideal.⁵⁰ The combination of a thin and mechanistic view of democracy and a similarly thin and mechanistic view of equality reinforces the ability of the elite within the two major parties to compete among themselves for the reigns of power while manipulating elections to assure the desired outcome. In effect, a symbiotic relationship has developed between judicial commitments to principles of stability and an electoral process that saps voter choice and suppresses voter turnout.⁵¹ The Supreme Court's role in *Bush v. Gore* must be assessed in the light of this phenomenon, which has deep roots in our country's jurisprudential tradition.

Professor Pildes, for example, writes about a Supreme Court case early in the twentieth century in which Justice Oliver Wendell Holmes ruled that the Court was helpless in the face of the elimination of black

49. Gerken, *supra* note 38, at 408.

One of the great oddities in the Supreme Court's voting-rights jurisprudence dating back to the Warren Court is that the Justices often disavow the notion that they are importing a particular theory of democracy into the decision. Their claim to agnosticism is, of course, implausible. And the Court's self-conscious preference for avoiding any discussion of its normative premises has led to the type of decision making we see in the *Bush v. Gore* per curiam: an opinion that articulates the injury in an abstract, formal manner; announces a legal rule with no easily discernible limits; defines equality in mechanical, quantitative terms; and fails to address the hard normative issues embedded in the questions it resolves.

Id.; see also Spencer Overton, *A Place at the Table: Bush v. Gore Through the Lens of Race*, 29 FLA. ST. U. L. REV. 469 (2001).

50. Richard Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695, 707 (2001) (citing *Timmons*, 520 U.S. at 366). Pildes concludes that "[t]he central image in this opinion is not that of invigorated democracy through 'political competition,' but that of a system whose crucial 'political stability' is easily threatened. The word 'stable' (and variations of it) appears a remarkable ten times in the brief majority opinion." *Id.* at 708.

51. For example, as I discuss shortly, radical gerrymandering shifts electoral choices to incumbent politicians and makes elections "sclerotic and immune to change." David Garrow, *Ruining the House*, N.Y. TIMES, Nov. 13, 2002, at 29A, available at LEXIS, News Library, The New York Times File (arguing that election officials and politicians use districting to make elections less competitive, which drives voters from the polls); see also *infra* notes 85–90 and accompanying text (explaining how incumbent politicians design districts and the effect of that design on the voters in the districts). Meanwhile the Court, for the most part, looks the other way. See *infra* note 93 and accompanying text (explaining how few gerrymandering claims succeed).

citizens from political participation in Alabama.⁵² Jackson Giles, “a literate black man and Republican-party activist,” who had a federal patronage job as janitor in the federal courthouse in Montgomery, Alabama, “had registered and voted in Montgomery from 1871 to 1901.”⁵³ Giles, represented by a lawyer hired by Booker T. Washington, challenged the handiwork of the 1901 Alabama Constitutional Convention that disenfranchised him (and countless others) with, in the words of the convention’s president, the explicit purpose “to establish white supremacy in this State.”⁵⁴ In a classic “catch-22,” “Holmes concluded that the very wrong Giles complained of made impossible the relief he sought.”⁵⁵ If the statute were a fraudulent scheme, as Giles suggested, and were the Court to order Giles’s name added to the voter registration list, the Court would itself be party to the very fraud at issue.⁵⁶ The Court also refused, on the grounds of its institutional incompetence, to intervene.⁵⁷ It lacked the enforcement authority to protect Giles’s rights “when the great mass of the white[s]” in Alabama were opposed to his voting.⁵⁸

It is striking how similar the effects of the Supreme Court’s decision in *Bush v. Gore* are with those of *Giles v. Harris*, even as Holmes’s opinion in *Giles*, in Pildes’ words, “has been airbrushed out of the constitutional canon.”⁵⁹ While its reasoning was couched in the language of equal protection, the Court’s ruling in *Bush v. Gore* also

52. Richard Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295, 306 (2000) [hereinafter Pildes, *Democracy, Anti-Democracy, and the Canon*]. The case Pildes discusses is *Giles v. Harris*, 189 U.S. 475, 487–88 (1903).

53. Pildes, *Democracy, Anti-Democracy, and the Canon*, *supra* note 52, at 299.

54. *Id.* at 302 (quoting Hunter v. Underwood, 471 U.S. 222, 229 (1985)).

55. *Id.* at 306 (citing *Giles*, 189 U.S. at 486–87).

56. *Id.* (citing *Giles*, 189 U.S. at 486).

57. *Id.* at 307 (citing *Giles*, 189 U.S. at 488).

58. *Id.* at 306 (citing *Giles*, 189 U.S. at 488). In fact, there is some evidence that a majority of whites actually voted against the disfranchising constitution, and that it only passed because the votes of blacks, who never appeared at the polls, were nevertheless counted as supporting their own disfranchisement. (“The disfranchising constitution was approved with only 57% of the vote (a margin of 26,879 votes)” and in fifty-four of the state’s sixty-six counties, the total vote was actually against the constitution. Approval only came with the 36,224 to 5471 vote for the constitution in twelve Black-Belt counties where three times as many votes were cast for the constitution as the number of white men eligible to vote.) *Id.* at 315–16. The elite landowners, who used their control of the Democratic Party to discourage alliances between poor whites and blacks, engineered the voting. *Id.*

59. Pildes, *Democracy, Anti-Democracy, and the Canon*, *supra* note 52, at 297. For example, Justice Frankfurter cites *Giles v. Harris* in *Colegrove v. Green*, 328 U.S. 549, 552, 573 (1946), where he coined the now infamous terminology “political thicket” and cautioned that the Court must stay out of it, *id.* at 556. Yet the same case, *Giles v. Harris*, does not receive any mention in four of the leading Constitutional Law casebooks. Pildes, *Democracy, Anti-Democracy, and the Canon*, *supra* note 52, at 297.

upheld the rights of a majority of white people to choose the President of the United States;⁶⁰ meanwhile, many blacks (and others) were disenfranchised in Florida, as were all blacks and many poor whites almost 100 years earlier in Alabama.⁶¹ Holmes's putative commitment to majority rule was hardly democratic since it failed to consider the protection and inclusion of the minority; this same lesson is clearly still relevant in the context of the Court's failure in *Bush v. Gore* to value the discarded votes of Americans of color. Similarly, Holmes's contorted, or in Pildes' term "repellant," logic and the *Bush v. Gore* per curiam's opinion both value disingenuous uniformity and the appearance of stability over genuine equality in democratic participation.⁶² In these ways, the five member majority in *Bush v. Gore* continues the benighted trajectory of opinions in which the Supreme Court simultaneously "remov[es] [genuine] democracy from the agenda of constitutional law,"⁶³ while it intervenes to uproot democratic innovations that threaten the status quo.

As the political scientist Alex Keyssar points out:

[T]he very unpretty election of last November emerged from deep currents in American political life. Although we don't like to acknowledge it, there have always been strong anti-democratic forces in the United States. Large numbers of Americans, throughout our history, have not believed in universal suffrage and have acted accordingly.⁶⁴

Keyssar emphasizes elsewhere, in his treatise on the right to vote, a factor crucial to understanding our democratic ambivalence: those opposed to universal suffrage were members of the founding elite.⁶⁵ Their influence disenfranchised vast numbers of our population from the very beginning of our constitutional democracy; their assumptions

60. Bush was able to poll a majority of the votes cast by whites, including many working-class whites, to make the contest in Florida close. This was also true nationwide. Even the so-called gender gap is only apparent when the votes of black women are also included. When only white women's voting patterns are observed, a small plurality preferred Bush. See Marjorie Connelly, *The Election; Who Voted: A Portrait of American Politics, 1976-2000*, N.Y. TIMES, Nov. 12, 2000, § 4, at 4, available at LEXIS, News Library, The New York Times File. Gore did, however, score impressive wins among voters from union households. *Id.*

61. Of course, it is important to note that unlike Mr. Giles's attorney, Mr. Gore's lawyers did not raise the disenfranchisement issue on the grounds of race. Indeed, the disenfranchisement was subtler and not universal. Nevertheless, the burdens fell heavily on those voters most easily confused, discouraged, and traditionally disadvantaged.

62. Pildes, *Democracy, Anti-Democracy, and the Canon*, *supra* note 52, at 298.

63. *Id.* at 296.

64. Alex Keyssar, *Reform and an Evolving Electorate*, N.Y. TIMES, Aug. 5, 2001, § 4, at 13, available at LEXIS, News Library, The New York Times File.

65. *Id.*; see also KEYSSAR, *supra* note 10, at xxi-xxii, 67-70, 78-80.

that the elite should rule helped contract not only the right to vote but also the right to cast an effective vote. The Americans who harbored such ambivalence continued beyond the early years of our country's history to include, at different stages, the leadership of both the Democratic and Republican Parties. Both political parties have cooperated, some might even say conspired, to constrict the electorate in order to insure their own dominance.

This highly anti-democratic impulse has had devastating consequences for disadvantaged individuals of all races. Few among us are familiar with the way the leaders of the Democratic Party, for example, orchestrated the disenfranchisement of blacks *as well as* masses of poor whites throughout the South during the late 1800s and early 1900s.⁶⁶ According to Professor Pildes, "the framers of disfranchisement were typically the most conservative, large landowning, wealthy faction of the Democratic Party, who were also seeking to entrench their partisan power and fend off challenges from Republicans, Populists, other third parties, as well as the more populist wings of the Democratic Party."⁶⁷ Their goal was to remove the less educated and impoverished whites who might be inclined to join forces with the even more impoverished blacks to challenge the Democrats' one-party rule.⁶⁸ The Democratic Party was "the organized vehicle of white supremacy" and it "regained control of the legislature and governor's office by framing politics around issues of race rather than economics or class."⁶⁹ The Democratic Party aimed to thwart the conditions that made for genuine multi-party competition and greater participation by poor and uneducated whites as well as blacks. And these tactics were extraordinarily successful. By the early 1900s, a combination of poll taxes, literacy tests, and other devices that discouraged the uneducated from voting had stripped roughly three-quarters of the Southern male population—black and white—of the right to vote.⁷⁰

The unseemly role of the Democratic Party in the South at the beginning of the twentieth century foreshadowed more contemporary complaints that some in the Republican Party orchestrated, or at least

66. FRANCES FOX PIVEN & RICHARD A. CLOWARD, *WHY AMERICANS DON'T VOTE* 78–80 (1988).

67. Pildes, *Democracy, Anti-Democracy, and the Canon*, *supra* note 52, at 302.

68. See J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS* 238–65 (1974).

69. Pildes, *Democracy, Anti-Democracy, and the Canon*, *supra* note 52, at 313–14 (describing events in North Carolina, where "a fusion coalition of Republicans and Populists . . . controlled the state legislature" through 1898, with black and white support).

70. PIVEN & CLOWARD, *supra* note 66, at 80–84.

benefited from, the massive disenfranchisement of Florida's voters in Election 2000. Moreover, in part due to the aforementioned bias in voting technology, even when poor people do go to the ballot box, their votes are three times more likely to go uncounted than the votes of their affluent white counterparts.⁷¹ And, if this differential participation rate were not enough, the exceptional importance of private money in American politics, by international standards, provides the country's elites with an additional lever to influence policymaking. Efforts to disenfranchise voters, in other words, are not limited to idiosyncrasies of either the current conservative Supreme Court majority or one political ideology. Nor have these exclusionary tactics always been based on race or even class.

After New Jersey passed a law barring even property-holding women from voting in 1807, "women everywhere in the nation were barred from the polls."⁷² Elites employed the ideology of virtual representation—suggesting that women were represented by their husbands, brothers and fathers⁷³—to deny women the franchise in most of the country until the ratification of the Nineteenth Amendment in 1920. During this period, the Supreme Court, influenced by the founders, refused to intervene in yet another voting case. In 1874, the Court unanimously rejected a claim by Virginia Minor that Missouri's gender-based disenfranchisement violated the First and Fourteenth Amendments.⁷⁴ The Court ruled that

suffrage was not coextensive with citizenship; and thus that states possessed the authority to decide which citizens could and could not vote. Bringing an end to debates that had surfaced periodically for decades, the Court formally ratified the severance of national citizenship from suffrage that the late-eighteenth-century authors of the Constitution had devised as a solution to their own political problems.⁷⁵

What is significant, therefore, is not simply the disconcerting parallel between the disenfranchisement of blacks at the turn of the

71. David Stout, *Study Finds Ballot Problems Are More Likely for Poor*, N.Y. TIMES, July 9, 2001, at A9, LEXIS, News Library, The New York Times File. Another study revealed that, in total, poor voting technology contributed to four to six million votes being uncounted for the presidential election, and that the incidence of uncounted ballots rose to even higher levels for other contests. See Guy Gugliotta, *Study Finds Millions of Votes Lost; Universities Urge Better Technology, Ballot Procedures*, WASH. POST, July 17, 2001, at A1, available at 2001 WL 23181142.

72. KEYSSAR, *supra* note 10, at 54.

73. *Id.* at 174.

74. *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 178 (1874).

75. KEYSSAR, *supra* note 10, at 181 (citing *Minor*, 88 U.S. (21 Wall.) at 163).

twentieth and twenty-first centuries. For blacks, women, and poor whites, Supreme Court decisions that avoid engaging basic democratic principles affect our larger understanding of democracy itself. The real significance of the aftermath of the 2000 presidential election is the way that the disenfranchisement of blacks in Florida highlights the country's history of tolerating disenfranchisement across the board.⁷⁶

The effective disenfranchisement of a major portion of our citizenry continues over 200 years after the founding of the Republic. Over four million Americans, 2.1% of the country's voting age population, are literally disenfranchised because of state laws limiting ballot access to felons and ex-felons.⁷⁷ The great majority of those barred from voting are not incarcerated; they are either ex-felons or on parole or probation.⁷⁸ Many states with the harshest voting restrictions trace their laws directly to the Jim Crow period, when Southern elites first sought to use them as part of a comprehensive strategy of black disenfranchisement.⁷⁹ Moreover, given the disproportionate numbers of blacks and Latinos who are prosecuted and then imprisoned (frequently for the commission of crimes comparable to those committed by whites who nevertheless escape prison time), these laws continue to have a devastating impact on African-Americans.⁸⁰ Over 6% of black adults

76. Efforts to ameliorate the absurd levels of voter disenfranchisement are haphazard and often ineffective despite the media scrutiny evoked by the 2000 election. The state spent over \$30 million in new voting technology; yet, because it failed to train poll workers or test the new machines in advance, Florida's 2002 Democratic Primary Election was characterized by the effective disenfranchisement of numerous voters in South Florida: "Electronic ballot devices with glitches replaced hanging chads. Problems with perforated ballot cards replaced problems with butterfly ballots. But the result was all the same: disenfranchised voters, hand-counted ballots and delayed results." Dana Canedy, *Again, Sunshine State in Dark a Day After the Vote*, N.Y. TIMES, Sept. 12, 2002, at A18, available at LEXIS, News Library, The New York Times File. Faulty equipment forced polling officials to turn away hundreds of voters in Liberty City, a predominately black neighborhood in Miami. Dana Canedy, *Vote System Chaos Triumphs Again in Florida Election*, N.Y. TIMES, Sept. 11, 2002, at A28, available at LEXIS, News Library, The New York Times File.

77. ELIZABETH SIMSON, JUSTICE DENIED: HOW FELONY DISENFRANCHISEMENT LAWS UNDERMINE AMERICAN DEMOCRACY, at v (Americans for Democratic Action Educ. Fund 2002), available at <http://www.adaction.org/lizfullpaper.pdf> (last visited Nov. 20, 2002).

78. *Id.* at 24–25.

79. *Id.* at 16.

80. Prosecution for drug offenses is an area where this racial bias in the criminal justice system is particularly dramatic. Blacks represent 15% of drug users; yet, they constitute 33% of drug arrests, 55% of drug convictions, and 74% of those sentenced to prison for nonviolent drug offenses. LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 264 (2002). Other studies have documented racial bias in other areas, notably including pre-textual traffic stops and pre-trial negotiations. See MARC MAUER, *RACE TO INCARCERATE* chs. 7–8 (1999). Moreover, the type of activities legislatures choose to make felonies has a significantly adverse impact on Americans of color. Drunk driving is responsible for as many deaths as deaths related to the drug trade. *Id.* at 134–35.

nationwide are legally forbidden to vote.⁸¹ In both Florida and Alabama, which along with eleven other states *permanently* disenfranchise felons,⁸² 31% of black men are denied the right to cast a ballot.⁸³ Note also that this practice is unique among the world's democracies.⁸⁴

Other political procedures that effectively disenfranchise even greater numbers of Americans are more subtle but no less effective. Through the extreme political gerrymandering that now characterizes every new round of redistricting, the two-party duopoly divides voters in such a way as to ensure that elections are essentially decided before a single vote is cast. Incumbent politicians design districts looking for voters, and they capture voters who are likely to vote for them.⁸⁵ For example, Matthew Dowd, President Bush's pollster, accurately predicted that the latest round of redistricting would give each party almost 200 safe congressional seats out of a total of 435. Experts for both parties estimated that only twenty-five to fifty congressional races would be genuinely competitive in 2002.⁸⁶ In the 1990s, the juggernaut of radical gerrymandering meant that almost 75% of United States House seats did not change hands once, and the parties appeared to have eliminated even more competitive seats in their quest to maximize incumbent

Nevertheless, drunk drivers are "generally charged as misdemeanants and receive sentences of fines, license suspension and community service." *Id.* at 135. Seventy-eight percent of those arrested for drunk driving are white males. *Id.*

81. SIMSON, *supra* note 77, at v.

82. *See id.* at 25–26 (listing states that permanently disenfranchise felons).

83. *Id.* at 29.

84. *Id.* at 38.

85. In most states, state legislatures conduct the decennial redistricting for both state legislative and congressional districts. A significant minority of states has created redistricting commissions, whose compositions and precise role in the redistricting process vary significantly by state. Only a handful of states have completely removed the role of the legislature. Moreover, while redistricting commissions may in some cases have better partisan balance than the state legislature, representatives of the two-party duopoly generally dominate their memberships. *See* Jeffrey C. Kubin, Note, *The Case for Redistricting Commissions*, 75 TEX. L. REV. 837, 841–45 (1997). While Kubin concludes that redistricting commissions "offer a viable means of restoring a degree of efficiency, fairness, and finality to a state's decennial gerrymander," he acknowledges that they are "no panacea." *Id.* at 838. Moreover, note that whatever the merits of independent redistricting commissions, they in no way guarantee equitable representation for people of color. *See* Adela de la Torre, *Arizona Redistricting: Issues Surrounding Hispanic Voter Representation*, 6 TEX. HISP. J.L. & POL'Y 163 (2001); Symposium, *Drawing Lines in the Sand: The Texas Latino Community and Redistricting 2001*, 6 TEX. HISP. J.L. & POL'Y 1, 77–79 (2001) (statement of Will Harell).

86. Ronald Brownstein, *Close House Races Go the Way of Rotary Phones, Newt Gingrich*, L.A. TIMES, Apr. 15, 2002, at A13, available at 2002 WL 2468600.

protection in the 2000 round of redistricting.⁸⁷ The voters who are consistently on the losing side in these safe seats are only represented virtually—they are represented by a candidate they didn't vote for, but who many of their neighbors did, just as women in the nineteenth century were supposedly represented by officials they did not vote for but who their male relatives and neighbors chose.

As bad as this situation is with regard to congressional elections, it is even worse at the state level. In over 40% of state legislative elections in 2000, only one of the two major parties placed a candidate on the ballot.⁸⁸ Think about that for a second: four out of ten times that Americans go to vote for their representative in the legislative body of our powerful state governments, they essentially have no more choices on the ballot than did voters in the Soviet Union or other countries across the world where authoritarian regimes continue to hold single-party “elections.”⁸⁹ Once again, the Supreme Court's preference for political stability, even at the expense of genuine democratic participation, is clear in its approach to districting.

In *Davis v. Bandemer*, the Court ruled that political gerrymandering could give rise to a justiciable equal protection claim.⁹⁰ However, as this doctrine has evolved, courts have set an extremely high bar for plaintiffs to succeed in meeting the *Bandemer* plurality's conclusion that “unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole.”⁹¹ Essentially, one of the two major parties must demonstrate that the districting process has virtually eliminated its capacity to elect officials statewide.⁹² This burden has proved almost impossible; in the sixteen

87. *Id.*; see also Garrow, *supra* note 51 (arguing that election officials and politicians use districting to make elections less competitive); *infra* note 152 and accompanying text (discussing manipulation of voting districts by incumbents of both major parties).

88. DOUGLAS J. AMY, REAL CHOICES/NEW VOICES 86 (2d ed. 2002) (1993) [hereinafter AMY, REAL CHOICES/NEW VOICES].

89. Some authoritarian regimes continue to control political power by allowing only members of the ruling party—or approved non-partisan candidates—to contest elections. For instance, in February of this year, Laos conducted elections for its 109-member National Assembly. The ruling communist party won 108 seats, and one approved non-partisan candidate was also elected. Elections Around the World, *Elections in Laos*, at www.electionworld.org/election/laos.htm (last visited Sept. 29, 2002).

90. *Davis v. Bandemer*, 478 U.S. 109, 113, 143 (1986) (plurality opinion).

91. *Id.* at 132 (plurality opinion).

92. *Cf. Badham v. March Fong Eu*, 694 F. Supp. 664, 670 (N.D. Cal. 1988) (holding that the Republican Party had not stated a cause of action under *Bandemer* despite an electoral map that consistently left Republicans underrepresented in congressional seats compared with their proportion of the statewide vote because “[t]here are no allegations that California Republicans

years since *Bandemer*, only once has a political gerrymandering claim succeeded.⁹³

In marked contrast to its unwillingness to enter the “political thicket” in these gerrymandering cases, the Court has taken a remarkably interventionist stance in striking down districts designed to allow people of color to elect candidates of their choice. Despite what the advocates of colorblindness would like us to believe, voting remains highly correlated with race in our country.⁹⁴ Blacks and whites generally prefer different candidates and platforms. To ensure that blacks and other people of color have a chance to elect candidates in our winner-take-all district elections, the Voting Rights Act and its amendments encouraged the creation of majority-minority districts under certain circumstances.⁹⁵ In the 1990s, the Supreme Court ruled in case after case that districts drawn primarily on the basis of race are subject to strict scrutiny under the Equal Protection Clause.⁹⁶ In one case involving a single congressional district in North Carolina, the case went up and down to the Supreme Court four times within one districting cycle.⁹⁷

In short, the Supreme Court’s approach to districting—like its decision in *Bush v. Gore*, its use of the First Amendment to strike down campaign finance laws, and its toleration of various devices designed to create barriers to new parties seeking to disrupt the current duopoly—

have been ‘shut out’ of the political process”), *aff’d*, 488 U.S. 1024 (1989). Bernard Grofman had called the plan at issue in the case “the most egregious gerrymander of the decade.” Bernard Grofman, *An Expert Witness Perspective on Continuing and Emerging Voting Rights Controversies: From One Person, One Vote to Partisan Gerrymandering*, 21 STETSON L. REV. 783, 816 (1992).

93. See *Republican Party of N.C. v. Martin*, 980 F.2d 943 (4th Cir. 1992) (finding that the plaintiff Republican Party had stated a cause of action in alleging that North Carolina’s use of state-wide elections for superior court judges—an “essentially” local office—had resulted in only one Republican being elected superior court judge in approximately 220 elections between 1968 and 1992). After a trial, the district court ordered elections to be conducted on a district-basis rather than statewide. The Court of Appeals, however, later vacated this injunction in light of 1994 elections in which all eight Republicans seeking statewide election to superior court won. *Republican Party of N.C. v. Hunt*, 77 F.3d 470 (4th Cir. 1996) (per curiam) (unpublished table decision), available at 1996 WL 60439, at **4.

94. See, e.g., Bernard Grofman et al., *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383, 1400–01 (2001) (finding that “a clear pattern of racial bloc voting exists” in congressional elections in the South in the 1990s).

95. See Voting Rights Act, 42 U.S.C. §§ 1971–1974(e) (2000).

96. See, e.g., *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995).

97. The district I am referring to was North Carolina’s 12th Congressional District. See *Easley v. Cromartie*, 532 U.S. 234 (2001); *Hunt v. Cromartie*, 526 U.S. 541 (1999); *Shaw v. Hunt*, 517 U.S. 899 (1996) [hereinafter *Shaw II*]; *Shaw v. Reno*, 509 U.S. 630 (1993) [hereinafter *Shaw I*].

represents the imposition of the majority justices' incongruous vision of democracy. On the one hand, they are committed to "stability and measured change." This position leads them to decline to exercise judicial power, in cases like *Giles v. Harris*⁹⁸ or even *Davis v. Bandemer*,⁹⁹ where the Court deferred to the preferences of the majority, even when the majority, as in *Bandemer*, is artificially manufactured. On the other hand, they aggressively supervise the conduct of elections—overruling the decisions of state legislative bodies—when the majority implements measures to reform electoral politics in ways that conflict with the aesthetic vision of certain justices. This inconsistent approach means elites continue to rule and efforts, even those supported by local majorities, to include or foster the participation of more people of color, poor people, and women are frequently interrupted.

Consider for a moment why changes are needed to facilitate the equitable representation of these groups. Despite having one of the world's most active women's movements, women comprise only 13.8% (a record high) of the 107th United States Congress.¹⁰⁰ In Western Europe, women make up 23.9% of the average national parliament.¹⁰¹ Worldwide, the United States ranks forty-fifth in its representation of women in national legislatures or parliaments.¹⁰² Considering its long history as a multiracial, polyethnic society, the United States also continues to be exceptionally poor at including people of color in politics. African-Americans, the country's largest racial minority, comprise slightly over 12% of the population but only 6.7% of the 107th Congress.¹⁰³ In New Zealand, people of Maori descent—whose situation "[i]n terms of demographics and socioeconomic status . . . is remarkably similar to that of African-Americans in the United

98. *Giles v. Harris*, 189 U.S. 475 (1903); see also *supra* notes 52–58 and accompanying text (discussing the decision in *Giles*).

99. *Davis v. Bandemer*, 478 U.S. 109 (1986) (plurality opinion); see also *supra* notes 41–43, 90–91 and accompanying text (discussing the decision in *Bandemer*).

100. MILDRED L. AMER, CONG. RESEARCH SERV., MEMBERSHIP OF THE 107TH CONGRESS: A PROFILE CRS-1, available at <http://usinfo.state.gov/usa/infousa/politics/congress/prof107.pdf> (last modified Jan. 10, 2001).

101. Calculations from table in MICHAEL GALLAGHER ET AL., REPRESENTATIVE GOVERNMENT IN MODERN EUROPE: INSTITUTIONS, PARTIES, AND GOVERNMENTS 322 (3d ed. 2001).

102. Beverly Neufeld, Editorial, *Finally, Big Women on Campus*, N.Y. TIMES, Sept. 10, 2001, at A28, available at LEXIS, News Library, The New York Times File.

103. See AMER, *supra* note 100, at CRS-5.

States”¹⁰⁴—represent 14.5% of the population and hold 13.3% of the seats in parliament.¹⁰⁵ In South Africa, the white minority represents 15% of the population and a full 32% of the national legislature.¹⁰⁶

In the 2000 election, most women and people of color voted for the losing candidate as did a majority of all those who cast ballots in the presidential race. Despite our rhetorical commitments to majority rule, a candidate favored by a relatively privileged minority became President. Certainly, the Supreme Court’s decision in *Bush v. Gore* serves as a continuing reminder that some of the nation’s most powerful institutions are governed by disturbingly elitist principles. However, *Bush v. Gore* is really just the tip of the iceberg in this nation where, in stark contrast to our liberal, democratic, collective self-image, the voices of those less privileged are systematically discounted and half of the population does not vote at all.

The Supreme Court’s role, albeit key, is not alone responsible for our nation’s reliance on an impoverished conception of democracy that camouflages widening inequality. After all, both liberals and conservatives manage to justify the idea of rule by an elite. Their elite is sometimes differently defined: it is a meritocracy for most liberals; a plutocracy for many conservatives. Yet, the end result is similar. In a country where deep, structural inequalities prevent everyone from succeeding on tests of “knowledgeable voting,” the importation of meritocracy into the electoral arena fundamentally undermines the values of democratic participation.¹⁰⁷ As a result, those who are already privileged retain their power, and egalitarian terminology increasingly substitutes for meaningful representation or popular involvement in our democratic experiment. It is to these meritocratic justifications underlying the disturbing elitism at the heart of our democracy that I now turn.

104. SUSAN A. BANDUCCI ET AL., MINORITY REPRESENTATION, EMPOWERMENT, AND PARTICIPATION IN NEW ZEALAND AND THE UNITED STATES 6 (rev. ed. 1999), available at http://www.nzes.org/papers/wpsa99_revised.pdf (last visited Nov. 20, 2002).

105. Visitor Services, Parliament, *Maori Members of Parliament from 1868*, at <http://www.ps.parliament.govt.nz/educate/indexes/texts/maorimp.htm> (last visited Nov. 20, 2002).

106. ANDREW REYNOLDS ET AL., THE INTERNATIONAL IDEA HANDBOOK OF ELECTORAL DESIGN 70 (2d ed. 1997), at <http://www.idea.int/esd/publications.cfm> (last visited Oct. 19, 2002) [hereinafter IDEA HANDBOOK].

107. In the aftermath of the Florida debacle, there was widespread contempt in some quarters for those low-income or elderly voters who “lost their votes . . . because of rotten ballot design. The elitists said if these voters were too dumb or uneducated to use the equipment right, they deserved to lose their ballots. E.J. Dionne, *D.C. Gives a Lesson in Voting*, WASH. POST, Sept. 17, 2002, at A21, available at 2002 WL 100082603.

II. RULE BY PRIVILEGE

On the presumption that they could discern a merit-based approach to voting, the conservative majority stopped the recounting of votes in Florida. During oral argument in *Bush v. Gore*, Justice Sandra Day O'Connor grilled Al Gore's lawyer, David Boies, about what vote-counting standard could properly be used in terms of determining the intent of the voter: "Well, why isn't the standard the one that voters are instructed to follow, for goodness sakes? I mean, it couldn't be clearer. I mean, why don't we go to that standard?"¹⁰⁸ As a result of the Court's decision to stop the recount, those voters who were unable to follow "the rules" simply failed to file a legal vote when they cast their ballot. Their citizenship rights were only as strong as their county's voting machine's ability to discern their intent.

This "merit-based" approach to democracy—just like the "merit-based" approach to admissions in other institutions—systematically privileges wealthy, white Americans over poor people and people of color. The Court found in 1970, for example, that the use of tests or devices to "discern merit" can perpetuate racialized inequities in educational opportunity; they can and did also depress voter registration and participation by poor whites. Indeed, the Voting Rights Act of 1965 explicitly prohibited the use of literacy tests as a precondition to voting, a ban extended nationwide in 1970 and unanimously upheld by the Supreme Court.¹⁰⁹

The current Court seems in thrall of the illusion that merit is easily testable and an acceptable basis on which to distribute democratic opportunity. This perception is consistent with the story the term meritocracy was designed to tell. The term was coined in 1958 by a

108. Tr. of Oral Argument, Dec. 11, 2000, *Bush v. Gore*, 531 U.S. 98 (2000) (No. 00-949), available at 2000 WL 1804429, at *58. Justice O'Connor's query echoes the position of Joseph Klock (the lawyer arguing on behalf of Florida Secretary of State Katherine Harris). Responding to Justice Souter's question about what a uniform standard would be for counting ballots, Klock said:

I'll try to answer that question. You would start, I would believe, with the requirements that the voter has when they go into the booth. That would be a standard to start with. The voter is told in the polling place and then when they walk into the booth that what you are supposed to do with respect to the punch cards, is put the ballot in, punch your selections, take the ballot out, and make sure there are no hanging pieces of paper attached to it. The whole issue of what constitutes a legal vote, which the Democrats make much ado about, presumes that it's a legal vote no matter what you do with the card. And presumably, you could take the card out of the polling place and not stick it in the box and they would consider that to be a legal vote.

Id. at *28–29.

109. *Oregon v. Mitchell*, 400 U.S. 112 (1970).

British sociologist, writing a parody of privilege and power.¹¹⁰ A meritocracy was a device by which those who already had power defined a system that enabled them to retain their status, encouraging the winners to believe they earned their victory and the losers to believe that they too deserved their lot in life.¹¹¹ Admissions to elite colleges are a perfect example: although the original application of the meritocracy concept to the college admissions process was done in the name of extending access to students beyond the confines of the New England private preparatory schools, it, too, has become a vehicle for codifying and camouflaging social hierarchy.¹¹² Our preoccupation with meritocracy has become a preoccupation with the sorting-and-ranking behavior that awards scarce places in higher education on the basis of timed tests that favor those possessing the resources to prepare for the test.¹¹³ The resulting test scores become the building blocks of a testocracy, and are then deemed the most important evidence of an individual's visible, rankable worth or "merit."¹¹⁴

Still, within each race and ethnic group, aptitude test scores rise substantially with parental income.¹¹⁵ When public institutions use "merit-based" tests to allocate democratic opportunity, those already privileged benefit the most. At the University of California at Berkeley, for example, in 1997, 42% of the white freshman came from families who earned more than \$100,000 a year, even though this is a public institution financed by all taxpayers.¹¹⁶ At the University of Texas, when a standardized test-centered approach determined admission, 75% of the freshman class came from 10% of the state's 1500 high schools. The middle- and upper middle-class suburban high schools dominated

110. MICHAEL YOUNG, *THE RISE OF THE MERITOCRACY 1870-2033* (1958).

111. *Id.*

112. NICHOLAS LEMANN, *THE BIG TEST* 343-50 (1999).

113. Indeed, these standardized test scores tend to correlate better with parental income (and even grandparents' socioeconomic status) than actual student performance in college or graduate school. See Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 987-92 (1996).

114. The term "testocracy" highlights the ways in which selection policies are heavily dependent on standardized aptitude testing. See *id.* at 968. "Testocracy" "refer[s] to test-centered efforts to score applicants, rank them comparatively, and then predict their future performance." *Id.* However, in this Essay, I limit the discussion of testing to aptitude tests (as opposed to achievement tests).

115. *Id.* at 989.

116. See Mindy Kornhaber, *Reconfiguring Admissions to Serve the Mission of Selective Public Higher Education* (January 14, 1999) (unpublished typescript, on file with author). In 1997, nearly 42% of white freshman at Berkeley had parental incomes over \$100,000 a year, as did 27% of Asians. *Id.* In contrast, 14% of African-Americans and 10% of Chicanos had family incomes at that level. *Id.*

the admissions process at Texas' public universities and some poor, predominantly white rural counties did not send a single resident to either of the state's two flagship schools. The use of standardized tests, in other words, disadvantages poor whites as well as blacks and Latinos. When the admissions process strongly favors white, upper middle-class students, very few of whom pursue careers devoted to the public interest, it is not surprising that the new meritocracy breeds resentment among those who are excluded.¹¹⁷ What is surprising, however, is that despite significant evidence that aptitude tests fail to predict anything beyond first-year college grades (and even then the relationship is extremely modest), an array of explanations justifies the exclusion of those who do not do as well on what have become 'class-based' criteria for determining merit. In fact, studies show that the aptitude tests more accurately measure parental socioeconomic status than first-year college grades.¹¹⁸

This phenomenon of normalizing inequitable outcomes applies in politics as well. Tracking conventional forms of "meritocratic" selection, the baseline for "admission" is a single uniform standard. The only difference is whether the applicant's performance, as measured by that standard, entitles her to admission to college or deems her capable of casting a legal vote. Such a standard purports to be objective and fair in identifying who deserves admission. Just as entrance to highly selective colleges is supposedly based on visible, rankable merit, participation in a democracy becomes synonymous with measurable ability—arbitrarily evaluated at the micro level of ballot counting not ballot voting—to cast a "legal vote."

But as the 2000 election made painfully clear, such purportedly merit-based tests contain a bias toward existing privilege, which has a

117. As it has evolved, the notion of contributing to the community has also taken a back seat in the equation. Many of those admitted based on their test scores come to believe that their merit justifies their continued privilege. Thus, they are not burdened even by notions of *noblesse oblige* in terms of public service, self-sacrifice for the common good, or acts of public charity. Indeed, 59.8% of college students cite the "likelihood of making money" as a very effective motivating factor, whereas only 38.6% are motivated by opportunities to "give back to the community." INST. OF POLITICS, HARVARD UNIV., ATTITUDES TOWARD POLITICS AND PUBLIC SERVICE: A NATIONAL SURVEY OF COLLEGE UNDERGRADUATES: TOP LINE DATA 4 (2000), available at <http://www.ksg.harvard.edu/iop/survey-data.pdf> (last visited Nov. 26, 2002).

118. Sturm & Guinier, *supra* note 113, at 971–72. The correlation between aptitude test scores and parental income should not surprise us, given the role that high-priced coaching techniques play in raising test scores. *Id.* at 991. But what may surprise some is just how weak the relationship is between high test scores and what the tests claim to predict (i.e., first year college or law school grades). *Id.* Studies suggest that nationwide the aptitude test for law schools (LSAT) is between 9% and 14% better than random in predicting first year grades. *Id.* at 971.

major impact at the earliest stage of the voting process—at the ballot box. Rules that limit time in the voting booth to five minutes even when ballots are long and complex, fail to provide adequate help to illiterate voters, and deny voters a chance to cast a ballot for their first choice candidate, without jeopardizing their second choice candidate's election, all combine to privilege participation by the better-educated members of the electorate. Presumably fair and objective, these voting rules define the “legitimate” or deserving voters, restricting ballot access to those who are educated, and for that matter, who can afford to take time off from work to vote. Yet, this inequality in access to the ballot is apparently constitutionally irrelevant, while inequality during a recount is dispositive evidence of a constitutional violation. Even worse, in Florida and many other states, disparate ballot technology makes the voting process the most complicated for the poorest and least well-educated members of society, especially those who are also descendants of slaves or treated as such.

The racial effects of applying a so-called merit-based approach to voting in Florida were striking: automatic machines rejected 14.4% of ballots cast by African-Americans, but only 1.6% of ballots cast by others.¹¹⁹ Although blacks made up 16% of the voting population, they cast 54% of the machine-rejected ballots.¹²⁰ Ballots cast by African-Americans were almost ten times more likely than the ballots of whites to be rejected.¹²¹ Furthermore, counting machines rejected punch card ballots in predominantly African-American precincts in Miami-Dade County at twice the rate they rejected ballots in predominantly Latino precincts, and four times the rate they rejected ballots in predominantly white precincts.¹²² Black precincts also lacked the

119. See Katharine Q. Seelye, *Divided Civil Rights Panel Approves Election Report*, N.Y. TIMES, June 9, 2001, at A8, available at LEXIS, News Library, The New York Times File (reporting on a study conducted by Allan J. Lichtman, a history professor at American University and an elections expert); see also *U.S. to Look into Possible Irregularities at the Polls*, CHI. TRIB., Dec. 4, 2000, § 1, at 9, available at 2000 WL 29782894 [hereinafter *Possible Irregularities at the Polls*] (“The Washington Post reported Sunday that a computer analysis had found that the more black and Democratic a precinct, the more likely a high number of presidential votes was not counted.”).

120. See U.S. COMM’N ON CIVIL RIGHTS, *VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION 2* (2001).

121. See *id.*

122. See Josh Barbanel & Ford Fessenden, *Racial Pattern in Demographics of Error-Prone Ballots*, N.Y. TIMES, Nov. 29, 2000, at A25, available at LEXIS, News Library, The New York Times File. The potential magnitude of the difference in technology “is evident in Miami-Dade County, where predominantly black precincts saw their votes thrown out at twice the rate as Hispanic precincts and nearly four times the rate of white precincts. In all, 1 out of 11 ballots in predominantly black precincts were rejected, a total of 9,904.” *Id.* Moreover, “64 percent of the state’s black voters live in counties that used the punch cards while 56 percent of whites did so.”

technology that helped handle overflow crowds in white and some Latino (Cuban/Republican) precincts. Compounding the problem were flaws in the registration lists and state law prohibiting from voting those who have served their time in prison and repaid their debt to society.¹²³ Researchers estimate that if Florida did not disenfranchise over 200,000 felons and over 500,000 ex-felons, Gore would have carried the state by some 80,000 to 90,000 votes.¹²⁴

Indeed, this merit-based approach to ballot counting (that ignores blatant inequities in access to the act of voting itself) is hauntingly reminiscent of devices, like literacy tests and grandfather clauses, imposed systematically throughout the South following Reconstruction to disenfranchise black voters.¹²⁵ Just as in the Jim Crow South, the realities of Florida balloting demonstrate that, despite its purported objectivity, this merit-based approach primarily benefits those already enjoying power. While obsessing about partisan motives that potentially compromise the integrity of the ballot, the proponents of a merit-based system elevate concerns about fraud over concerns about participation. In the name of “ballot integrity,” the legacy of race-based disenfranchisement continues to haunt our nation.

The rhetoric of meritocracy also undermines the capacity of those who have been disenfranchised to organize for change. The populist promise of this rhetoric is cabined by a commitment to election structures that discourage grassroots collective action and dissuade

Id.; see *Possible Irregularities at the Polls*, *supra* note 119 (“In Miami-Dade, the state’s most populous county, about 3 percent of ballots were excluded from the presidential tally. But in precincts with a black population of 70 percent or more, about 10 percent were not counted.”); Kim Cobb, *Black Leaders Want Action on Florida Vote Complaints*, HOUS. CHRON., Nov. 30, 2000, at A24, available at 2000 WL 24530801 (“U.S. Rep. Corrine Brown, D-Jacksonville, said that 16,000 of the 27,000 ballots left uncounted in Duval County were from predominantly black precincts.”). *But see* Stephen Ansolabehere, *Voting Machines, Race, and Equal Protection*, 1 ELECTION L.J. 61 (2002) (arguing that nationally, no significant correlation exists between race and punch card machine-rejected ballots, and that racial disparities are explained by a higher percentage of less reliable punch card technology in African-American precincts). By contrast, the voices of certain groups of (primarily Republican) voters received preferential counting treatment. A complicated political and legal strategy helped ensure that canvassing boards accepted 41% of flawed absentee military ballots compared to 30% of flawed absentee civilian ballots. David Barstow & Don Van Natta, Jr., *How Bush Took Florida: Mining the Overseas Absentee Vote*, N.Y. TIMES, July 15, 2001, § 1, at 1, available at LEXIS, News Library, The New York Times File.

123. Mireya Navarro & Somini Sengupta, *Arriving at Florida Voting Places, Some Blacks Found Frustration*, N.Y. TIMES, Nov. 30, 2000, at A1, available at LEXIS, News Library, The New York Times File; see also Gregory Palast, *Florida’s “Disappeared Voters”*: *Disenfranchised by the GOP*, NATION, Feb. 5, 2001, at 20 (describing the flawed lists used by the state to purge a disproportionate number of blacks in Florida).

124. SIMSON, *supra* note 77, at 33.

125. *Id.* at 16.

multiracial political activity by organized groups. As Professor Overton notes, “[a]lthough the Court’s facially neutral merit-based criteria focus on individual responsibility, they interfere primarily not with individual rights, but with the ability of groups of voters like African-Americans to identify with one another as a political community, to create alliances with others of different backgrounds, and to use the vote to enact political change.”¹²⁶

But, no matter: in *Bush v. Gore*, the conservative majority continues to see voting as an individual right and reminds us that “[t]he individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college.”¹²⁷ While the state cannot overtly fence out a group of voters to arbitrarily deny them an opportunity to cast their ballots, the state may establish voting rules that covertly accomplish the same exclusion.¹²⁸ This means that those who are functionally illiterate (as are more than forty million adults in this country)¹²⁹ or who live in poor counties, without access to the technology necessary to confirm registration status and ease lines at the polling place, simply do not enjoy the same “ability” to cast legal votes. Even when such citizens manage to cast their ballots—because of the vagaries of state law, antiquated voting technology, as well as the

126. Overton, *supra* note 49, at 473. I thank Professor Overton for his insightful analysis of the way that conventions of meritocracy apparently informed the Court’s analysis: “*Bush v. Gore* rejected the more inclusionary assumptions about democracy articulated in other cases, but . . . the Court embraced merit-based assumptions that conditioned political recognition on an individual voter’s capacity to produce a machine-readable ballot.” *Id.* at 472; *see also* Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from Shaw v. Reno to Bush v. Gore*, 79 N.C. L. REV. 1345, 1365 (2001) (“There is credible evidence that systems that disproportionately reject votes both have a racially disparate impact and are more often used in the populous jurisdictions in which minority voters are concentrated. Thus, the newest equal protection once again vindicates the interests of middle-class, politically potent voters, while ignoring the interests of the clause’s original beneficiaries.”).

127. *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam). Citizens have no federally mandated or constitutionally sacrosanct right to vote. It is up to the various state legislatures to determine whether to vest the right to vote in the people, and only then does the right become fundamental and protected based on rights to equal protection. *Id.* (per curiam). This requirement means that the rights of voters are only triggered once the ballot is made available; when the state accedes to allow voters to vote, then it is up to the state to establish the rules for voting so that a ballot is in fact tabulated. *Id.* (per curiam).

128. “[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.” *Id.* at 105 (per curiam) (quoting *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665 (1966)).

129. For detailed analysis and statistics about illiteracy in the United States, see the National Institute for Literacy’s website at <http://novel.nifl.gov/nifl/faqs.html#literacy%20rates> (last visited Nov. 20, 2002).

delegation of enormous discretion to local polling officials—some citizens' votes are still not counted.

III. RECONCEPTUALIZING DEMOCRATIC CITIZENSHIP

A survey released December 7, 2000, by the Harvard Vanishing Voter Project indicated that large majorities of the American people believed the election procedures had been “unfair to the voters.”¹³⁰ Not surprisingly, nationwide, those most likely to feel disenfranchised were blacks. Moreover, one out of ten blacks reported that they or someone in their family had trouble voting, according to a national report produced by Michael Dawson and Lawrence Bobo of the Center for the Study of Race, Politics and Culture and the W.E.B. DuBois Institute. The alienation of the black community was also evident in the reaction of the Congressional Black Caucus, which alone raised formal objections in the House of Representatives to Florida's slate of Bush electors. In a poignant column for the *Boston Globe*, James Carroll asked: “What does it say that even the most left-wing of white congressmen and senators have adjusted themselves to the problematic Bush election, while the Congressional Black Caucus has not?”¹³¹ He concluded, “Those who sit atop the social and economic pyramid always speak of love, while those at the bottom always speak of justice.”¹³²

One thing is certain to those of us who have studied the structure, not just the mechanics, of our election system: reforms for the tabulation of ballots alone will not resolve the deep alienation that pervades our democracy and causes people to not even vote. Turnout in 2000 was up in Florida and other contested states, primarily as a result of grassroots efforts to increase participation. In Election 2000, for example, members of union households (13% of the workforce) were more likely to vote and to also vote Democratic.¹³³ The key explanatory factor was not the political preferences of union leaders who announced early for Gore. It was the grassroots organizing of the

130. Press Release, The Vanishing Voter, The Joan Shorenstein Center on the Press, Politics and Public Policy at John F. Kennedy School of Government, Harvard University, As Election Contest Drags On, Americans' Dissatisfaction Grows (Dec. 7, 2000), available at <http://www.vanishingvoter.org/releases/12-07-00.shtml> (last visited Nov. 20, 2002).

131. James Carroll, Editorial, *Black Caucus Sends a Message About Justice*, BOSTON GLOBE, Jan. 9, 2001, at A19, available at 2001 WL 3914134.

132. *Id.*

133. University of Delaware, *Exit Poll Results—Election 2000*, at <http://www.udel.edu/poscir/road/course/exitpollsindex.html> (last visited Nov. 20, 2002). This statistic also demonstrates that people in unions have higher turnout rates because union members represent 16% of the electorate, whereas they represent only 13% of the adult population. *See id.*

rank and file.¹³⁴ But a report from the Committee for the Study of the American Electorate (“CSAE”), a nonprofit research organization, suggested that such efforts will not increase turnout in future elections.¹³⁵ As more and more power gravitates to a permanent set of political elites, a process that discourages their active involvement has increasingly marginalized many Americans.

Last year, the registration of Democrats continued a thirty-six-year decline and registration for third parties and independents streamed upward. Upgrading voting equipment and creating uniform ballot counting procedures will not do much to alter these demographic changes, which suggest the withdrawal of many citizens from our current two-party system. “The root of the turnout problem is motivational” and not technical, the CSAE report said.¹³⁶ In other words, the skewed incentive structure of our current two party duopoly—with its candidate-centered, elite driven set of rules—discourages a large number of people from participating in the most basic aspects of our political process.

It is the political process itself that needs fixing. On this point, John Dewey had it exactly right: “[t]he cure for ailments in democracy is more democracy.”¹³⁷ We need to imagine systems that encourage greater levels of voter participation, that lead to a higher degree of confidence in election results and the related policy outcomes, and that encourage ordinary citizens to join together more effectively to play a role in the process of self-government beyond just voting. Indeed, we might jumpstart a different kind of conversation by examining the systems adopted by other mature democracies as well as those countries that had the benefit of building on other’s mistakes.

For example, a 1995 survey of twenty industrialized democracies revealed a number of practices other countries have implemented to restrict the role of private money in legislative elections. Canada and Great Britain, for instance, both limit legislative candidates’ campaign spending to under \$25,000.¹³⁸ Perhaps more practically, the United

134. For a sample discussion of some of these grassroots union activities in the last two elections, see AFL-CIO, *Election Day Difference—New Working Family Voters!!* (2000), at http://www.aflcio.org/news/2000/1026_voterreg.htm (last visited Nov. 20, 2002), and AFL-CIO, *Labor '98 Mobilized Members Around Working Family Issues* (1998), at <http://www.aflcio.org/labor98/mobil.htm> (last visit Nov. 20, 2002).

135. *Voter Turnout Rose in 2000, But No Lasting Impact Is Seen*, N.Y. TIMES, Aug. 31, 2001, at A12, available at LEXIS, News Library, The New York Times File.

136. *Id.*

137. John Dewey, *quoted in* MORONE, *supra* note 19, at 322.

138. Steven Hill, *For Campaign Finance Laws that Work, Look Abroad*, CHRISTIAN SCI. MONITOR, Feb. 28, 1995, at 19.

States could follow other democracies in providing greater public financing of elections and requiring media organizations to provide equal, free advertising access. It is worth noting that fifteen of the twenty democracies surveyed “prohibit paid political advertisements as a way of keeping the playing field even.”¹³⁹ A comparative analysis also supplies insights to revitalize American democracy in other areas. Turnout could be increased by voting on a weekend or holiday rather than a workday,¹⁴⁰ as most democracies do, and weighing the benefits of mandatory voting,¹⁴¹ as a few countries have. The most important lesson other countries have to teach the United States, however, involves changing our electoral system to promote the political efficacy of local grassroots organizations.

Before describing a range of comparative examples that might help inspire a broad, multiracial and progressive coalition committed to reviving American democracy, let me set forth several assumptions on which this exploration proceeds. First, blacks already possess a high level of group consciousness and understand many of the systemic biases that render the country more oligarchic than meritocratic, which means they must play an active role for any pro-democracy movement to be successful. However, this movement would obviously also reach out to other people of color, poor whites, young people, organized labor and, of course, other potential allies such as the middle- and upper-class progressives that currently form the backbone of the Green Party. Its members would be identified by their politics and their willingness to link their fate to those currently most disadvantaged.

Second, a pro-democracy movement might start with basic reforms such as twenty-four hour voting on a national holiday, but it must not stop there. Uniform national standards, imposed top-down, do little to change the incentive structure for participation. Giving people a reason to vote is by far the most vital element of a democracy movement. Still, merely voting is not even enough. People need to be given opportunities to participate and contribute between elections in order for the seeds of meaningful democratic change to take root. Such opportunities require intermediate institutions that help educate, organize, and mobilize grassroots involvement in the conversation of democracy.

139. *Id.*

140. Indeed, the recent Electoral Reform Commission chaired by former Presidents Ford and Carter proposed just such a reform.

141. While this may initially seem to violate personal autonomy, it is not a greater civic burden than, for instance, requiring eighteen-year-old-males to register for the draft.

Finally, the short-term prospects for fundamentally transforming American politics along the lines I outline below are admittedly quite low. The recent experience of the Greens suggests that without structural changes in our winner-take-all rules, it is difficult to field candidates at the national level who will alter the debate and gain an institutional foothold in the forums of representative democracy. Many third parties have tried and failed to become legitimate contenders in American politics over the last hundred years. On the other hand, alternative strategies for advancing a progressive political agenda have also failed in the electoral arena where efforts to move the Democratic Party leftwards have often had the opposite effect.¹⁴²

Therefore, the goal of this thought experiment is much more modest. I hope simply to demonstrate once again just how poorly the country currently represents the interests of poor and working-class people of all races—both by normative and comparative standards. With that lesson in mind, committed reformers working in various institutional settings could redouble their efforts to learn from the experience of people of color in order to effect the fundamental change necessary to provide all Americans with equitable political and social citizenship. Here are three approaches to re-invigorate, at the very least, a deeper discussion of the failings of our democracy so that the reforms pursued in the wake of Election 2000 go beyond cosmetic changes merely involving the mechanics of voting.

A. *The Emergence of Grassroots and Locally-Based Parties*

First, a new party could seek political influence to mobilize and organize at the grassroots level rather than to start out as a force in national politics. What might set such a new political party apart from past attempts along these lines is if it were to begin by (1) fielding candidates primarily in majority-minority districts and then (2) organizing a new political movement based on the experiences and interests of people of color and other under-represented groups.¹⁴³ Such a strategy would have real potential if the party persuaded at least some

142. Joel Rogers, *The New Party—Now More than Ever: Rogers Replies*, 18 BOSTON REV. (Jan.–Feb. 1993), available at <http://bostonreview.mit.edu/BR18.1/revive.html> (last visited Nov. 20, 2002). On the other hand, it might be useful to study the example of the Christian Right, which started at the grassroots level, gradually got elected to school boards and city councils and developed a much louder voice within the Republican Party precisely because they provided important local organizing to win elections.

143. An interesting side note is that, according to the Supreme Court's current, confused jurisprudence regarding majority-minority districts, the new party could seek to draw majority-minority districts more easily than the traditional parties because it would clearly be doing so primarily for political rather than racial motives. See *Easley v. Cromartie*, 532 U.S. 234 (2001).

of the current (Democratic) representatives of these districts to switch party affiliation. The feelings of profound alienation voiced by many black and Latino elected officials—even in relation to their fellow Democrats—suggests this is not an entirely implausible scenario.¹⁴⁴ Moreover, as the example of the British Labour Party proves, progressive third parties can achieve electoral breakthroughs even in winner-take-all electoral systems such as ours.

In the late 1800s, two parties, the Conservatives and the Liberals, dominated British politics.¹⁴⁵ The Liberals were the more progressive of the two parties, and they had enjoyed strong union support as well as the electoral backing of most workers. However, by the early years of the new century, many union activists became dissatisfied by their inability to influence the Liberal platform to any significant degree, and they decided to form a new Labour Party.

The Labour Party wisely coordinated its efforts closely with the Liberals in its early years. Eager not to divide the “progressive” vote in Britain’s electoral system that, like our own, is based on single-member plurality district elections, the Liberals gave Labour a free hand against the Conservatives in a number of constituencies. By 1910, Labour won 6% of the nationwide vote and forty seats in the House of Commons. The Labour Party gained more and more votes as Britain’s political structure continued to be transformed in the wake of technological advancement, social movements, and the dislocations and reforms that resulted from two world wars. Within a half century of its creation, Labour stormed to an impressive electoral victory that allowed it to implement dramatic sociopolitical reforms.

The experience of British Labour is far from unusual internationally. Indeed, although a number of countries conduct elections based

144. As described above, it is often the black elected officials who stand alone to protest obvious injustices, while their white Democratic colleagues, though sympathetic, sit back, constrained to follow the rules. Carroll, *supra* note 131. There is great potential for a third party with roots in majority-black districts since so many members of the Congressional Black Caucus already serve as caseworkers for members of marginalized communities in general rather than simply the district from which they are elected. For instance, in 1995, a full 30% of all calls seeking assistance from Congresswoman Cynthia McKinney of Georgia came from individuals outside her district, and 80% of these persons were “low-income minority individuals.” Lisa A. Kelly, *Race and Place: Geographic and Transcendent Community in the Post-Shaw Era*, 49 *VAND. L. REV.*, 227, 284 n.179 (1996).

145. There is a rich literature that analyzes the rise of the British Labour Party. Readers interested in exploring this topic in greater detail might consult the following: GREGORY LUEBBERT, *LIBERALISM, FASCISM OR SOCIAL DEMOCRACY* (1991); HENRY PELLING, *THE ORIGINS OF THE LABOUR PARTY 1880–1900* (1965); MARTIN PUGH, *THE MAKING OF MODERN BRITISH POLITICS, 1867–1939* (1993); DUNCAN TANNER, *POLITICAL CHANGE AND THE LABOUR PARTY, 1900–1918* (1990).

on winner-take-all districts, G. Bingham Powell, Jr., reported in his comparative study of twenty industrialized democracies that the complete two-party dominance in the United States is unique. “[O]nly in the United States did the two largest parties consistently win more than 90 percent of the vote in legislative elections.”¹⁴⁶ While the Supreme Court decisions mentioned in Part I of this Essay place additional barriers on the formation of politically significant third parties in the United States, they certainly do not create insurmountable obstacles. In the mid-1960s—despite tremendous legal and political discrimination—the Mississippi Freedom Democratic Party mounted an impressive challenge to the Democrats and Republicans. This progressive party, dedicated to promoting the full citizenship rights of black Americans, fielded candidates in elections for the United States Congress who won the support of a majority of black voters.¹⁴⁷ Imagine the potential such a party could have now with the advent of majority-minority districts.

However, another equally important question remains. Even if a progressive party were to overcome the admittedly significant barriers to entry in our current political system and won as many as say two dozen seats in Congress, could it really have enough influence to foster significant advancements in social and political citizenship in this country? There are at least three reasons why the answer might be a plausible yes. First, a political organizing effort that began in communities of color could track other cultural cross-over movements to give voice to the extreme alienation of the poor and young voters of all races who care little about the major issues emphasized in recent campaigns, such as tax relief for the middle and upper classes and prescription drug plans for the elderly. As Mary Eakle, 25, a \$7-an-hour assistant deli manager put it during the 2000 presidential contest: “None of what they’re saying is about us.”¹⁴⁸ Local political organizations, developed in conjunction with issues of concern in the community, would encourage participation through local forums, door-knocking campaigns, and face-to-face contact on issues of concern as defined by the people in the communities themselves.

146. G. BINGHAM POWELL, JR., ELECTIONS AS INSTRUMENTS OF DEMOCRACY: MAJORITARIAN AND PROPORTIONAL VISIONS 90 (2000); see also *id.* at 28–29 (describing how the number of parties winning votes generally declines in countries with single-member election rules).

147. Dan Nicolai, *The Law and the Struggle for the Soul of the Democratic Party* 26 (Dec. 20, 2000) (unpublished manuscript, on file with author).

148. Dale Russakoff, *Cut Out of Prosperity, Cutting Out at the Polls*, WASH. POST, Oct. 24, 2000, at A1, available at 2000 WL 25424189; see also Dale Russakoff, *Young Voters See Little in It for Them*, WASH. POST, Nov. 2, 2000, at A1, available at 2000 WL 25425871.

Second, the party could use municipalities, counties, or even states where it gained sufficient influence as laboratories of democracy in promoting individuals' social and political rights through the implementation of policies ranging from a living wage to proportional representation. Successful experiments would serve as models and encourage the two major parties to promulgate similar national (or statewide) reforms. The experience of Canada's National Democratic Party ("NDP")—the country's only significant party advocating social democracy—teaches relevant lessons in this respect. While never winning more than 20% of the vote in a federal election, NDP provincial governments implemented progressive labor and health care reforms that were so popular that the federal government eventually extended their basic principles throughout the nation. This example was most notably the case in the development of Canada's universal, single-payer health care system, which was first promulgated by the NDP provincial government of Saskatchewan.¹⁴⁹

Third, the existence of a locally-initiated third party might pressure the Democratic Party to advocate more progressive policies because Democrats would no longer be able to take the support of black voters for granted.¹⁵⁰ However, the experience of the initial alliance between the Liberals and Labour in Britain suggested that local, progressive political parties would have to work with, rather than against, the Democrats. Such a strategy would avoid splitting the black, brown or progressive vote and throwing elections to conservative Republicans—a danger few are likely to underestimate after the 2000 presidential election.¹⁵¹

149. Peter Dreier & Elaine Bernard, *Kinder, Gentler Canada*, AM. PROSPECT, Winter 1993, at 85, available at <http://www.prospect.org/print/V4/12/dreier-p.html> (last visited Nov. 20, 2002); see also Elaine Bernard, *The Difference a New Party Would Make*, 18 BOSTON REV. (Jan.-Feb. 1993), available at <http://bostonreview.mit.edu.BR18.1/revive.html> (last visited Nov. 20, 2002). Bernard's piece is in the context of a series of articles about the New Party, a political party founded in the early 1990s and with quite similar goals to the objectives of the hypothetical Progressive Party. In my view, a crucial difference is that the New Party—while clearly demonstrating an admirable interest in racial justice and working with black elected officials—does not focus to the same degree on the grassroots involvement of poor people of color as the Progressive Party would. Nevertheless, the New Party is a step in the right direction that could coalesce with the Progressive Party to advocate transformative democratic change.

150. For a theoretical discussion of this point, see POWELL, *supra* note 146, at 198.

151. Therefore, this coordination should also appeal to Democrats as long as these locally-grounded, grassroots organizations could reasonably threaten to run viable candidates in a number of constituencies. Attracting some black incumbents to the party at the local level would immediately lend credibility to this threat. On the other hand, as Professor Heather Gerken reminded me, third-party candidates would in fact sometimes result in Democratic losses. Indeed, for third parties to have any effect, the threat of defection must be credible, which means that there will be short-term costs.

In other words, a third-party might force the Democrats to alter their policies; it might also force them to become advocates for citizens to exercise their political clout. On the other hand, incumbents of all races generally have a vested interest in the hierarchical status quo. Many black incumbents have had to work hard to curry favor with wealthy (black and white) constituents and businesses in order to accumulate the war chests necessary to run for office; as a result, they have an important disincentive to joining a new grassroots political organization. Thus, a scenario that seeks to disrupt hierarchy or at least to minimize it may need to be accompanied by more dramatic structural changes that elevate the role of political issues and political engagement rather than rely solely on the sympathies of political candidates. It is to these structural changes that I now turn.

B. Proportional Representation

Some might say that 225 years after the American Revolution, it is time for the United States to consider the advantages of democratic models that do not stem from the legacy of British rule. A second thought experiment is to imagine that a pro-democracy movement generates activity around the issue of structural reform, including the adoption, via referenda or initiative, of proportional representation (“PR”) systems starting at the local level and then expanding statewide. As more people become aware of the “sclerotic” effects on voter choice from incumbent-driven gerrymandering of election districts, reformers may be able to generate renewed interest in PR, which allows voters to “district themselves” by the way they cast their ballots.¹⁵²

The most common type of PR is the party list system. The basic principle behind party list systems is that each party offers a list of

152. Incumbent politicians are increasingly able to use districting to make elections less competitive. Drawing district lines to create safe seats for incumbents of both major parties suppresses voter turnout and saps democratic choice. See *supra* notes 86–93 and accompanying text (discussing the effects of political redistricting and the Court’s application of heightened scrutiny). As the 2002 House of Representative elections demonstrate, the two parties often cooperate to manipulate electoral outcomes. In 2002, seventy-eight of the House races had only one major party candidate; only four incumbents lost to non-incumbent challengers. Email from Rob Richie, Center for Voting and Democracy to Lani Guinier (Nov. 18, 2002, 13:35:50 EST). Similarly, Robin Toner writes in the *New York Times* soon after the election:

[T]his year, redistricting became, in many states, an exercise in protecting incumbents. As a result, [independent analyst] Charles Cook listed just 45 races—out of 435 in the House—as competitive in October; at the same time 10 years ago, there were 151 competitive races. Only 25 incumbents won with less than 55 percent of the vote, according to another independent analyst, Rhodes Cook.

Robin Toner, *In the House at Least, Moderation is No Virtue*, N.Y. TIMES, Nov. 17, 2002, § 4, at 3, available at LEXIS, News Library, The New York Times File.

candidates in each constituency. Seats are then awarded to each party in proportion to its support in the constituency, and individuals fill the available seats based on their position on the list—for example, if a party wins 30% of the vote and earns three of ten city council seats, only the top three persons on that party's list will gain places in the council. How the order of the list is determined is just one of the several important variations possible in party list systems.¹⁵³

Because list systems tend to use districts with large numbers of seats, they are generally the best arrangements to ensure proportionality between votes cast for, and legislative seats won by, political parties. By placing emphasis on parties rather than individual candidates, party list systems also promote campaigns based on issues and platforms. This focus helps to ensure that the substantive needs of more citizens are addressed in the political arena. Party list systems also encourage grassroots social movements to spawn electorally-oriented political parties, because such parties need capture a far smaller share of the electorate than their counterparts in a winner-take-all system to win a council or school board seat. Moreover, PR promotes greater grassroots mobilization within the confines of the major political parties. Because PR encourages parties to emphasize policies rather than candidates, different constituencies have a strong incentive to organize their supporters in order to influence the party platform on the issues that matter most to them. The order of names on party lists is an issue around which constituencies can mobilize and negotiate without resulting in all-or-nothing victories of one faction or another as occurs in political systems in which each party runs just one candidate per contest. As a result, women and racial minorities often fare better in party list systems.¹⁵⁴

Cross-national comparisons of West European nations reveal that roughly twice as many women are elected to parliament in countries that use party list systems.¹⁵⁵ Similarly, the use of party list systems in

153. The major variations among party list systems are: (1) the formula used to award seats at the constituency level; (2) whether there is a formula to correct any imbalances in the proportionality of representation from the constituency level; (3) whether lists are closed, meaning their order is determined entirely by the party, or open, allowing voters to influence which candidates, not just which parties, gain representation; and (4) the existence and level of a minimum threshold for legislative representation. GALLAGHER ET AL., *supra* note 101, at 309.

154. DOUGLAS J. AMY, BEHIND THE BALLOT BOX: A CITIZEN'S GUIDE TO VOTING SYSTEMS 88–89 (2000) [hereinafter AMY, BEHIND THE BALLOT BOX]; IDEA HANDBOOK, *supra* note 106, at 62–63.

155. GALLAGHER ET AL., *supra* note 101, at 322. Not only do the countries with party list systems vastly outperform the single-member district systems used by Britain and France, they also fare vastly better than Ireland and Malta, the two countries that currently use Single-

democracies with deep racial divisions like South Africa and Namibia has resulted in impressively diverse national legislatures, even when race continues to shape voting preferences and party affiliation.¹⁵⁶ However, PR is considered a radical alternative here in the United States, even though most western democracies, other than former colonies of Great Britain, use some form of it and, in a modified form, it was used for 100 years in Illinois. Among the most common criticisms of party list systems in particular, and PR in general, are that their high level of proportionality results in an excessive number of parties and thus legislative gridlock. These concerns reflect our preference for election systems that promote stability and measured change over robust, participatory forms of democracy. Critics depend upon supposedly paradigmatic cases, which conclusively illustrate the havoc that PR can wreak on political systems. Some students of both present-day Israel and Weimar Germany have suggested that the type of PR used in these two states fostered an excessive number of parties that in turn promoted high levels of government instability and paralysis, and ultimately—at least in the case of interwar Germany—devastating consequences. However, a deeper analysis of the two cases challenges the idea that they offer a general indictment against all electoral systems based on proportional representation.

Israel and Weimar Germany both conducted elections using particular variants of PR that allow a great number of parties to be represented in the national legislature. The type of PR used in Weimar Germany promoted the multiplication of political parties because as long as a party won at least 30,000 votes in one of the thirty-five constituencies, it could count on roughly proportional representation in the Reichstag.¹⁵⁷ What the critics really objected to was the combination of PR with a tiny entry threshold that permitted very small

transferable voting (“STV”), a more candidate-centered form of PR, to elect their parliaments. *Id.* It is, however, worth noting that in Australia, women fare far better in elections to the Senate, which use STV, than they do in contests for the House of Representatives, which are based on single-member districts. AMY, BEHIND THE BALLOT BOX, *supra* note 154, at 107; *see also infra* note 165 (discussing STV).

156. IDEA HANDBOOK, *supra* note 106, at 62–63, 70.

157. E.J. FEUCHTWANGER, FROM WEIMAR TO HITLER: GERMANY, 1918–1933, at 42 (1993). That the multiplication of political parties corresponded to interwar Germany’s bitter sociopolitical cleavages was in part a function of the very small threshold for representation of each party. Post-war Italy is another country that opponents of PR often cite as a paradigmatic case of the havoc wreaked by the multiplication of small parties PR supposedly promotes. Like Weimar Germany and Israel, for most of the post-war period, Italy used a system of PR with an extremely low threshold of exclusion.

parties to enjoy disproportionate power.¹⁵⁸ However, our winner-take-all system might have made matters even worse. In 1933, in the last “free” election of interwar Germany, the Nazis were by far the largest party with 44% of the vote, yet they only won 288 of the 647 parliamentary seats. “Goering said at his trial that under the British [winner-take-all] system that election would have given the Nazis every seat in the country, and he cannot have been far wrong.”¹⁵⁹

In Israel, the entire country serves as one district to elect 120 members of parliament, and the threshold of exclusion is a mere 1.5%.¹⁶⁰ Simply instituting a 5% threshold of exclusion would reduce the number of parties in the 2002 legislature from fifteen to seven.¹⁶¹ Israel also presents a problematic case for comparison because it is a religious rather than a secular democracy, which increases and intensifies the social cleavages that underlie Israeli politics.¹⁶² On the other hand, PR does allow the number of political parties in the Israeli parliament to be more fully representative of the range of opinions within the country. In an ironic, but revealing, paradox, Palestinians rate Israeli democracy higher than American winner-take-all democracy. “The reason,” says Jon B. Alterman, an analyst at the United States Institute of Peace, “is that they see American democracy as beholden to interest groups, whereas Israeli democracy reflects what the Israeli people want.”¹⁶³

158. Such a 5% threshold would have been enough to keep the Nazis out of the Reichstag as late as the elections of 1928. While a winner-take-all system would have achieved a similar result in 1928, it would have probably grossly *over-represented* the Nazis in the national legislature beginning in 1930, when, with 18.3% of the national vote, the Nazis became the second largest party. *Id.* at 42, 326.

159. ENID LAKEMAN, *POWER TO ELECT: THE CASE FOR PROPORTIONAL REPRESENTATION* 68 (1982). Among other obstacles, the anti-Nazi parties faced press censorship, prohibition of meetings, and police intimidation and violence during this “free” election. FEUCHTWANGER, *supra* note 157, at 313–14.

160. Giovanni Sartori, *The Party-Effects of Electoral Systems*, in *PARTIES, ELECTIONS AND CLEAVAGES: ISRAEL IN COMPARATIVE AND THEORETICAL PERSPECTIVE* 13, 27 (Reuven Y. Hazan & Moshe Maor eds., 2000). Before 1992, the threshold of exclusion was 1%. *Id.*

161. This data is based on a table provided by Reuven Y. Hazan and Moshe Maor. *Id.* at 6.

162. *Id.* at 26. On a 7.0 point-scale designed by Arend Lijphart, Peter J. Bowman, and Reuven Y. Hazan to measure the number and intensity of sociopolitical cleavages in thirty-six democracies since World War II, Israel now scores a 5.0. “This is a remarkably high number compared with . . . the other 35 democratic party systems in the 1945–1996 period, the highest of which is 3.5 and found in only one country (Finland).” By contrast, the United States receives a score of 1.0. Arend Lijphart et al., *Party Systems and Issue Dimensions: Israel and Thirty-Five Other Old and New Democracies Compared*, in *PARTIES, ELECTIONS AND CLEAVAGES: ISRAEL IN COMPARATIVE AND THEORETICAL PERSPECTIVE* 29, 33–37, 48 (Reuven Y. Hazan & Moshe Maor eds., 2000).

163. Elaine Sciolino, *Who Hates the U.S.? Who Loves it?*, N.Y. TIMES, Sept. 23, 2001, § 4, at 1, available at LEXIS, News Library, The New York Times File (quoting Jon B. Alterman who

Critics of party list systems also contend that they do not nourish close ties between constituents and their representatives based on easily observed geographic proximity or identity.¹⁶⁴ However, there exists a representational system that combines the numerous advantages of party list systems while simultaneously promoting strong geographic ties between constituents and their representatives: it is called mixed-member proportional voting (“MMP”).¹⁶⁵ Under MMP, voters make two choices. Their first vote is used to elect individual candidates in single-member district plurality contests, just as in most elections in the United States. The second vote is for a party, and the remaining legislative seats (in general roughly one half) are allocated through a party list system to ensure that each party that meets the system’s minimum threshold of support has proportional representation in the legislature.¹⁶⁶ In recent years, the clear advantages of MMP, first implemented in 1949 by West Germany, has made it quite popular among new democracies and states considering major electoral reform. Even by the elevated standards of Western Europe, under MMP postwar Germany has witnessed high turnout,¹⁶⁷ high levels of proportionality between votes cast and candidates elected, and large numbers of women in parliament.¹⁶⁸ Germany’s 5% threshold of exclusion has also helped prevent a multiplicity of tiny parties, and the government has enjoyed stability without gridlock.¹⁶⁹

has written extensively on the flow of information in the Arab world. “Whenever there is a survey of Palestinians, they always rate Israeli democracy higher than American democracy.”)

164. AMY, BEHIND THE BALLOT BOX, *supra* note 154, at 31.

165. Single-transferable voting (“STV”) is another form of PR that does maintain close constituent-representative ties. However, it remains a candidate-centered system. Therefore, in my view, STV is less desirable than PR systems based on party lists. Still, we should remember Douglas Amy’s admonition that “[t]he primary danger facing the PR movement is not that it might opt for the ‘wrong’ version, but that it could waste valuable time and energy squabbling over which system is best.” AMY, REAL CHOICES/NEW VOICES, *supra* note 88, at 233.

166. AMY, BEHIND THE BALLOT BOX, *supra* note 154, at 90.

167. In its most recent parliamentary elections in September 2002, a full 79.1% of the German electorate turned out to vote, despite poor weather in much of the country. And this impressive participation rate was actually down slightly since the 1998 elections, when turnout was 82.2%. Steven Erlanger, *Germany’s Leader Retains His Power After Tight Vote*, N.Y. TIMES, Sept. 23, 2002, at A1, available at LEXIS, News Library, The New York Times File. This article also provides a helpful overview of Germany’s electoral system for interested readers.

168. GALLAGHER ET. AL., *supra* note 101, at 260, 322. Not surprisingly, German women are three times more likely to win seats through party lists than through single-member districts. This pattern holds in New Zealand and Italy, which recently adopted electoral systems that include the use of both party lists and single-member plurality districts. ROB RICHIE & STEVEN HILL, REFLECTING US ALL: THE CASE FOR PROPORTIONAL REPRESENTATION 16–17 (1999).

169. RICHIE & HILL, *supra* note 168, at 30.

C. *Moving Toward the Twenty-First Century*

The creation of locally-based but politically-networked third or fourth parties and the use of proportional representation are both important sites for engagement and reform. However, they cannot by themselves guarantee the type of grassroots organization I have argued is crucial to re-invigorating American democracy. For instance, women and people of color who gain office under PR can still be token representatives without substantive policy-making influence. Facilitating the electoral success of parties with progressive public policy agendas is a good thing in my view, but the crucial connections between the voters and the decision-making process may lapse without ongoing opportunities for citizen participation. Therefore, it is helpful to imagine the role that local and interactive grassroots experiments can play in promoting broad-based democratic participation independent of the political structure or party system in place.

Perhaps the most unlikely examples of alternative forms of popular engagement come from Brazil.¹⁷⁰ The work of a Brazilian dramatist illustrates that it is possible to provide all citizens not just with a voice to be heard, but also with a real role to play in the democratic decisions that are most important to them. When his theater company lost its funding, Augusto Boal moved to dismantle it in style. He wanted to showcase his troupe in the event that attracted large numbers of local residents—the annual Carnival. To secure a place, he had to find a political party that would share its space with him. One party agreed to give him space if one of his members ran for office on the party list. Boal agreed and ran on the platform, “Vote for me, And Elect My Theater Company.”¹⁷¹ He won two terms as a city councilman. Rather than hiring legislative aides, he hired members of the company to organize his constituents into issue-oriented groups. These groups worked through local public policy concerns using techniques of forum theater and role-plays. Each of the seventeen constituent groups then

170. See generally AUGUSTO BOAL, *LEGISLATIVE THEATRE: USING PERFORMANCE TO MAKE POLITICS* (1998). Boal describes his actual experiences running as Vereador in Rio de Janeiro, Brazil, and getting elected for two terms. During that period he introduced successfully thirteen laws that were drafted by constituency groups using Forum Theater exercises that helped citizens “[d]evelop their taste for political discussion (democracy) and their desire to develop their own artistic abilities (popular art).” *Id.* at 9. Boal hired members of his theater group to function as “jokers” or wild cards who facilitated the development of seventeen constituency groups, each of whom worked through the improvisation of possible solutions to locally generated problems. *Id.* at 46. Those solutions were then converted into bills and introduced into the legislature by Boal. *Id.* at 94.

171. *Id.* at 15 (“For the first time in the history of the theatre and the history of politics, there opened up the possibility of a whole theatre company being elected to parliament.”).

enacted an improvisational play at a theater festival that demonstrated their view of important problems they faced and presented possible solutions. The productions were critiqued and revised based on audience feedback. Several of the proposals were then drafted into bills, which Boal introduced. Some became law. Nevertheless, Boal played his formal role with a more transitive understanding of the representational relationship between him and his constituents; he never once introduced a bill of his own.¹⁷²

The work of Augusto Boal is novel, and it moves us to the beginnings of an alternative vision of democracy—one that does not fetishize the role of a meritorious or otherwise deserving representative but views the representative as one member of an interactive community. It is a radically unfamiliar vision to most Americans, yet it is grounded in the same despair that millions of Americans experienced after the 2000 election. Boal asked a simple question of the other supporters of a Brazilian presidential candidate who won thirty-one million votes and lost by a narrow margin: “We Are 31 Million: Now What?”¹⁷³ Rather than simply relying on technical solutions to fix the winner-take-all character of Brazil’s presidential elections, Boal turned to a local form of citizen engagement.¹⁷⁴ His experiments in what he calls “legislative theater” illustrate the dual power of organizing local residents. He invited their participation in ways that continued even after his election. He also facilitated opportunities for his constituents to generate innovative solutions to longstanding public policy dilemmas.

IV. RESPONSE TO CRITICISM OF THIS ESSAY

Thus far, I have attempted to identify the anti-democratic strains in our political system using some thought experiments to help us reflect on these structural problems. In the last section of this Essay, I would like to explain why I believe in participatory democracy and embrace it not as a tactic to achieve particular substantive ends, but as an end in itself. In a country with such a longstanding rhetorical and symbolic commitment to democracy, it may seem intuitive that more democracy (however defined) is a good thing.

172. *Id.* at 105.

173. Jan Cohen-Cruz, *Theatricalizing Politics*, in *PLAYING BOAL: THEATRE, THERAPY, ACTIVISM* 227, 233 (Mady Schutzman & Jan Cohen-Cruz eds., 1994).

174. Although Boal’s experience may seem improbable by United States standards, there are many local examples of similar efforts. See GUINIER & TORRES, *supra* note 80, at ch. 6; see also Tamar Lewin, *One State Finds Secret to Strong Civic Bonds*, N.Y. TIMES, Aug. 26, 2001, § 1, at 1, available at LEXIS, News Library, The New York Times File (describing the unlikely roles that people without a high school education play in local government in New Hampshire).

However, Professor Louis Michael Seidman has offered an important critique of democratic process that deserves a response.¹⁷⁵ Professor Seidman begins his analysis by pointing out the tremendous inequalities in income and wealth that continue to grow in our country—inequalities that have resulted in high levels of poverty and over one in ten American households not having enough food to eat.¹⁷⁶ Professor Seidman suggests that “the American people would not casually and unthinkingly accept this obscenity unless there were complex and powerful legitimating structures in place allowing them to distance themselves from it.”¹⁷⁷ He then describes four such legitimating structures. The first, which operates at a mass level, is a belief that America is a meritocracy where “people get more or less what they deserve.”¹⁷⁸ Related to this mass belief in meritocracy are two additional legitimating structures that operate on elites: (2) a belief in economic efficiency as requiring as little redistribution and regulation as possible in order to maximize the total pie, and (3) a belief in the rhetoric of impotence—that resource maldistribution results from complex phenomena over which we have little control, and “[e]fforts to deal with it are bound to have unintended and counterproductive consequences.”¹⁷⁹ The fourth legitimating structure, according to Professor Seidman, is democracy itself: “the claim is that the current distribution of power and wealth is justified because it is produced by a political process that is open to all.”¹⁸⁰ This is the most powerful of the four, in part because it operates on both elites and the general population.¹⁸¹

Let me begin by pointing out that I agree with much of Professor Seidman’s analysis. I agree that our country’s (racially-correlated) level of poverty is dangerous and destabilizing. As earlier parts of this Essay make clear, I agree that we must de-construct the meritocracy and demonstrate how it operates to perpetuate the maldistribution of opportunities. I also agree with Professor Seidman’s insightful critique that ideas of economic efficiency and the rhetoric of impotence trump and cabin efforts to redistribute resources.¹⁸²

175. See Louis Michael Seidman, *Democracy and Legitimation: A Response to Professor Guinier*, 34 LOY. U. CHI. L.J. 77 (2002).

176. *Id.* at 77.

177. *Id.* at 77–78.

178. *Id.* at 78.

179. *Id.* at 78–79.

180. *Id.* at 79.

181. *Id.*

182. *Id.*

Where we disagree, of course, is about my belief in democracy. Professor Seidman's main point is that without a substantive vision of social justice, an emphasis on democracy is unlikely to combat the socioeconomic deprivation endured by tens of millions of Americans.¹⁸³ I do not quarrel with this claim and yet I do not believe, as Professor Seidman apparently does, that democratic practice and substantive justice are unrelated, even mutually exclusive.¹⁸⁴

The key differences, perhaps, between Professor Seidman and myself are that Professor Seidman equates democracy with voting, assumes that conservative majorities will out-vote progressive minorities, measures principled political legitimacy in winner-take-all terms, and isolates organizing techniques as distinct from democratic practice.¹⁸⁵ He perceives a zero-sum trade-off between substantive and procedural justice such that just outcomes require "painful, sometimes unprincipled, compromise, postponing demands that cannot in justice be postponed, and carefully constructing coalitions with partners we secretly detest."¹⁸⁶

For me, democracy and substantive justice are dynamic, contingent, and interdependent variables. Substantive justice is rarely sustainable when arbitrarily imposed by fiat or achieved by "painful, sometimes unprincipled, compromise" that unravels over time. Nor can progressives claim victory when we change minds without achieving structural reforms or achieve particular legislative or electoral outcomes simply through the process of counting votes.

Let me be clear. Voting or counting votes does not a democratic practice make. Democratic practices are those that value power-sharing, invite broad participation, engage stakeholders in local decision-making about concrete problems, and yield creative solutions that are nevertheless subject to critical feedback. By providing people with the organizational tools they need to overcome the deep, racialized inequalities that continue to persist in this country, democratic practices educate, motivate, and transform.¹⁸⁷ As Texas organizer Ernesto Cortes says: "We've got to get past the dominant ideology that says we're clients and consumers and that politics is about electronic plebescites We've got to develop a civic culture of conversation

183. *Id.* at 77.

184. According to Professor Seidman, "no amount of tinkering with forms of democracy is likely to achieve social justice." *Id.* at 83.

185. *Id.* at 83-84.

186. *Id.* at 87-88.

187. FRANCESCA POLLETTA, FREEDOM IS AN ENDLESS MEETING: DEMOCRACY IN AMERICAN SOCIAL MOVEMENTS 181, 200 (2002). "Organizing is teaching." *Id.* at 181.

and house meetings and public actions and negotiations and reciprocity.”¹⁸⁸

A commitment to sharing power that invites continuous participation by the relevant stakeholders *over time* is compatible with, and indeed foundational to, a commitment to both democracy and social justice. It is also the essence of good organizing. Democratic practice sustains the kinds of vital social movements that energize political activism and social change. Such movements may be animated by substantive ideas but these movements are most successful when they use democratic means to realize their ends. In the Southern civil rights movement, for example:

[O]rganizers used participatory democracy to school local residents in the practices of politics, thus exploiting the developmental benefits of the form. . . . [The movement] combined practical organizing with a vision of radical social change, sought local gains while exposing to the nation the injustices of Southern apartheid, and treated participatory decision-making both as a strategy and as an end in itself.¹⁸⁹

The relationship between social justice and participatory democracy is being explored systematically in the work of those, sometimes called the “new governance” critics, and elsewhere referred to as democratic experimentalists.¹⁹⁰ These academics evaluate and compare innovative local efforts “to mobilize the contextual intelligence that only citizens possess through mechanisms for community participation in deliberation about problems, in developing and deciding among

188. *Id.* at 176.

189. *Id.* at 2, 199. An exclusive preoccupation with substantive justice misses this core democratic claim, which is rooted in ideas of dignity, self-respect, voice, and the desire to be heard. A focus only on the substantive outcomes also ignores the way the distribution of power helped create the substantive problem in the first place. If the problem is there because of power inequality, then the problem cannot be fixed without acknowledging and addressing that inequality. There are no short cuts around the fundamental challenge that unequal access to power presents. Of course democratic practice often falls short of effectively redressing these inequities; yet, the very relevance of such efforts reflects the substantive and moral content of democratic commitments. I am indebted to Sociologist Marshall Ganz for this formulation.

190. Jennifer Gordon, *New Governance Models, New Roles for Rights: Lessons from the Underground Economy* 4, 43 (Nov. 4, 2002) (unpublished typescript, on file with author); see also Michael Dorf & Charles Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998) (discussing a new form of governance where power is decentralized, enabling citizens to use their local knowledge to find innovative solutions to their circumstances, while coordinating bodies at the regional and national level share this collective knowledge with others facing similar situations).

creative solutions, and in implementing those decisions.”¹⁹¹ Whether the context involves issues of the environment or school reform, local participants are called on “not merely to express an opinion—or demand a solution—but to help formulate and implement solutions.”¹⁹² The new governance scholars conclude that the fallibility of well-intentioned social policy requires opportunities for grassroots participation, experimentation, and benchmarking.¹⁹³

I, for one, don’t necessarily know in advance what the most just policy outcome is in all situations or how to achieve it. Part of the impulse for my belief in democracy is that the people themselves have superior wisdom in so many ways to those of us who have superior book learning. Thus, my argument for democracy draws on the interdisciplinary new governance scholarship, as well as the old school tradition of organizing, to suggest that ordinary people should be empowered to play an active role in public policy debates, where “people’s interests may be transformed through collective reflection and deliberation,” and where they can develop and implement creative strategies to address important issues in their lives.¹⁹⁴

When stakeholders play a vital role in deliberation and decision-making, their involvement also helps sustain public policy reforms long term. At minimum, the inability of civil rights advocates to transform court victories in the 1950s, 1960s, and 1970s into genuine advancement of social justice on-the-ground should make us wary of over-reliance on litigation-based, elite-dominated strategies to promote substantive equality and meaningful opportunity. In *The Hollow Hope*, Gerald Rosenberg persuasively argues that implementation constraints on the judiciary meant that major decisions in areas including

191. Gordon, *supra* note 190, at 5 (citing Charles Sabel et al., *Beyond Backyard Environmentalism*, at <http://bostonreview.mit.edu/BR24.5/sabel.html> (Oct./Nov. 1999), at web page 1).

192. *Id.* at 4–5.

193. The term “benchmarking” refers to a form of learning by monitoring. It involves the disciplined pooling of information from multiple local sources with the twin goals of (1) establishing expectations of what is possible and (2) ultimately bootstrapping or scaling up local innovations into regional or national reforms that emulate and coordinate best practices. *See* Dorf & Sabel, *supra* note 190, at 287ff; *see also* Gordon, *supra* note 190, at 45 (citing, *inter alia*, Susan Sturm’s analysis of participatory decision-making in the workplace and Archon Fung’s ‘street level democracy’ in the context of school reform and community policing). “Rather than assigning to government the sole responsibility for establishing and enforcing strict rights, the new governance model asks the state to facilitate and finance local experimentation with solutions to complex problems, and then to evaluate and compare the outcomes of the resulting innovations.” Gordon, *supra* note 190, at 4; *see also* GUINIER & TORRES, *supra* note 80, at chs. 4–6.

194. POLLETTA, *supra* note 187, at 200.

de-segregation, voting rights, housing, women's rights, and the criminal justice system were only effective when other important political and community actors supported those decisions.¹⁹⁵ Rosenberg points out that civil rights advocates' dependence on the court sapped precious resources from more direct action forms of advocacy—such as mass demonstrations, sit-ins, boycotts, and freedom rides—that were ultimately more effective vehicles for social change.¹⁹⁶ Even when a court decision has the capacity to foster far-reaching change without the support of other political actors, the failure to mobilize rank-and-file supporters can inhibit effective reform. Consider the context of abortion, where *Roe v. Wade*¹⁹⁷ opened the door for significant social change by invalidating laws in forty-six states and apparently allowing private actors to implement the decision without other political support.¹⁹⁸ Rosenberg demonstrates that, convinced the fight was over, abortion rights advocates significantly scaled back their activities after *Roe*, while the decision simultaneously mobilized their opponents.¹⁹⁹ As a result, in the years following *Roe*, pressure from anti-abortion forces meant that few hospitals would provide abortions, and to exercise their constitutional right to an abortion, hundreds of thousands of women had to travel great distances and/or face significant harassment from protesters.²⁰⁰

The failures that Rosenberg documents took place in a context of a far more liberal federal judiciary, where advocates were at least able to win important legal victories in the first place. With many federal courts now dominated by judges with a very conservative perspective on the substantive rights at stake, progressives find themselves less disappointed by implementation failures and more frustrated by implementation efforts in the other direction.²⁰¹ Notwithstanding this shift in the ideology of the federal judiciary, the key point is that elite-based strategies that focus exclusively or even primarily on using courts

195. GERALD N. ROSENBERG, *THE HOLLOW HOPE* (1991).

196. *Id.* at 133, 339.

197. *Roe v. Wade*, 410 U.S. 113 (1973).

198. ROSENBERG, *supra* note 195, at 175, 195–96.

199. *Id.* at 188, 339–40.

200. *Id.* at 195–96.

201. In a recent opinion piece for the *New York Times*, Bob Herbert pointed out that “[t]he political right has been relentless in its campaign to control the federal courts, and that campaign is getting awfully close to an absolute victory. Seven of the 13 circuit courts are already controlled by Republican appointees, and it is possible that within two years [with more appointments by President Bush] that control will extend to as many as 12, and maybe all 13 circuits.” Bob Herbert, Editorial, *The Right Judge?*, N.Y. TIMES, Sept. 26, 2002, at A29, available at LEXIS, News Library, The New York Times File.

to achieve social change, even when successful, may change certain rules temporarily, but do not go far enough to build broad-based support for those changes to assure their durability.

For example, gay rights activist Tom Stoddard admonishes lawyer-activists to anchor social justice reforms in “culture-shifting” and not just “rule-shifting” approaches.²⁰² Stoddard encourages those who seek lasting change to “connect” with the public by “thinking as concertedly about process as we do about substance.”²⁰³ Sociologist Francesca Polletta also concludes that broad-based participation can enable and sustain a substantive vision. Democratic decision-making, she reports, helps social movements “build solidarity, innovate tactically, secure the leverage of political opinion and develop enduring mechanisms of political accountability.”²⁰⁴

Polletta’s conclusion that democratic practices help secure accountability and leverage public opinion is based on her pioneering study of seven social movements. Similarly, Stoddard’s admonition “to connect” with the public and to pay attention to process as well as substance resonates with a few key lessons from history. After the unanimous Supreme Court ruling *against* constitutionalizing women’s right to vote in *Minor v. Happersett*,²⁰⁵ suffragists launched a massive social movement that ultimately led to the passage and ratification of the Nineteenth Amendment.²⁰⁶ In a similar vein, Theda Skocpol explains that the role of grassroots voluntary associations was crucial in effecting successful social policies throughout United States history: “[A] close look reveals how much the development of each policy owes to social movements and voluntary associations that promoted and shaped it in partnership with elected politicians and government officials.”²⁰⁷

202. Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 N.Y.U. L. REV. 967, 974–77 (1997).

203. *Id.* at 991.

204. POLLETTA, *supra* note 187, at viii.

205. *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874).

206. KEYSSAR, *supra* note 10, at 197–218.

207. THEDA SKOCPOL, *THE MISSING MIDDLE* 32 (2000). Skocpol identifies nineteenth century public education, Civil War benefits, programs to help mothers and children in the 1910s and 1920s, the Social Security Act, and the G.I. Bill, as among the country’s finest social policy achievements. She suggests that each of these systems of social support had the following key features in common: (1) the perception that the program was a return to individuals for service to the community or a preparation for service; (2) the support of broad cross-class coalitions; (3) the support of grassroots voluntary organizations; and (4) the availability of public revenues to support the program. *Id.* at 25–43.

Indeed, until we develop political solutions that educate and motivate people to assume greater moral and political agency, I am quite skeptical that we will come up with something that can fundamentally alter the status quo. How do you motivate people to do something about their situation? You give them hope. You give people a feeling that they have power to make a difference. But, you can't empower people in this way if you tell them, "I already have the solution. I already know what you need. As long as you go along with me, things will be better."

One great example of this is the contrasting experiences of the AFL-CIO and the United Farm Workers ("UFW") in organizing farm workers in the 1960s and 1970s. Both organizing efforts were designed to redistribute resources to protect the interests of those doing back-breaking work in the California fields. The AFL-CIO used a top-down strategy, primarily targeting itinerant white men, for short-term organizing drives designed to influence sympathetic policy-makers. The AFL-CIO had little success and essentially withdrew from its organizing efforts. By contrast, the UFW came up with a very different strategy designed to mobilize the Mexican and Mexican-American farm workers who constituted an increasing segment of the labor force. Drawing upon national, religious and political symbols and practices, the UFW helped these farm workers gain a sense of dignity that mobilized them into action. At regular union board or planning meetings, processes of internal deliberation and the mechanisms of organizational accountability allowed farm workers to play a major role in identifying goals and formulating strategies to accomplish them. It was their power in coming together and working through sustained, grassroots collective action that led to the well-known grape boycott and ultimately raised the level of working conditions for these farm workers.

Thus, when I am talking about democracy, I am really talking about enabling all the relevant stakeholders to participate in decision-making processes that shape their lives. And, of course, we cannot achieve this simply by fixing antiquated voting machines. Although we should all be troubled when the outcome of a presidential election hinges on the disproportionate exclusion of black, working-class, and poor voters, new voting machines will not transform American democracy along the lines I am proposing. After all, voting is a mechanical approach to political participation; universal suffrage is necessary but not sufficient for democracy. Nor is proportional representation itself a panacea. But, as explained above, PR does tend to foster a much more engaged democratic citizenry. A well-organized progressive third party could

have a similar effect. And, probably most important of all, innovative strategies that draw upon the dynamic energy and problem-solving capacities of poor people and communities of color—such as Augusto Boal’s theatre of the oppressed and the UFW organizing campaign—could transform our political system to empower stakeholders.

Also note that this vision of democracy will, I hope, result in the substantive social justice that Professor Seidman and I both worry about. This is not because I am disingenuously proposing democracy as a proxy for social justice; rather, it is because my vision of democracy allows people to play a major role in confronting the problems they face. The UFW improved living standards for poor Latino farm workers by involving the farm workers themselves in creating strategies for change. And this is the point behind the various democratic reforms I propose: cultivating a more politically engaged populace who would have the opportunity to participate in democratic processes that affect their lives.

The preceding discussion not only responds to Professor Seidman’s principal critique that I privilege procedure over substance; I believe it addresses his four more specific objections to my emphasis on democracy as well.²⁰⁸ First, Professor Seidman suggests democracy ignores other legitimating structures.²⁰⁹ In reality, democracy *illuminates* other legitimating structures. Consider the Texas Ten Percent Plan, where the *Hopwood v. Texas*²¹⁰ decision, ending affirmative action, mobilized a coalition of black and Latino activists to respond to the illusions of the meritocracy more directly. These activists ultimately developed new admissions criteria for Texas’s flagship universities that opened up opportunities for students of color as well as poor whites, and in so doing, they forged new coalitions with conservative rural legislators.

Professor Seidman also suggests that emphasizing democratic theory comes at the expense of fighting poverty, homelessness, and other forms of deprivation.²¹¹ In fact, as the experience of the UFW demonstrates, it is the practice of democracy that facilitates the fight against these problems by tapping the creative capacities of those most affected. Of course, Professor Seidman is correct that the farm workers mobilized around substantive issues that affected their lives.²¹² But the

208. Seidman, *supra* note 175, at 78–79.

209. *Id.*

210. *Hopwood v. Texas*, 236 F.3d 256 (5th Cir. 2000), *cert. denied*, 533 U.S. 929 (2001).

211. Seidman, *supra* note 175, at 80, 83.

212. *Id.* at 83.

key point is that the UFW was able to diagnose the problems facing the farm workers and develop effective solutions because its model—unlike that of the AFL-CIO—was more democratic to the extent that it cultivated the participation of the relevant stakeholders.²¹³

Third, Professor Seidman argues that democratic engagement is just not possible without a minimal level of subsistence.²¹⁴ And, this is true to a great extent. It is part of why Election Day should become a national holiday and why reducing the role of money in politics is vital. It also reveals why democracy is more than voting and certainly more than holding periodic elections in which fewer and fewer people vote. Genuine democracy is about organizing relationships so that all people have the power to play an active role in community decision-making, and this active role is only possible when people have a minimal level of subsistence and when the values of community prompt us to provide for the collective “we” and not just for the individual “me.” But the experience of the UFW demonstrates that democratic practices, which promote internal deliberation and organizational accountability, can encourage robust participation even among very poor people, who are emboldened to define and pursue their collective concerns despite limited resources. By rehearsing forms of resistance, participants gain the confidence and the desire to speak out in more public settings. Similarly, Boal’s use of popular theater engaged thousands of impoverished Brazilians who did not have the time or resources to organize a political action committee, but who could contribute to solving the problems that affected their lives when given the opportunity.

A final criticism that Professor Seidman makes is that I am unrealistically optimistic and that the reforms I advocate are not going to happen.²¹⁵ It is, of course, true that my project requires faith that transformative change is possible. But from the beginning, all social movements, including the civil rights movement, have required such faith. And, while “the forces of retrogress”—as Dr. King called them—have defeated many initiatives to advance equality and social justice, civil rights advocates have also won amazing victories against remarkable odds. To illustrate, I’d like to take just one example that is particularly apt in this context.

213. Marshall Ganz, *Resources and Resourcefulness: Strategic Capacity in the Unionization of California Agriculture, 1959–1966*, 105 AM. J. SOC. 1004 (Jan. 2000).

214. Seidman, *supra* note 175, at 79–80.

215. *Id.* at 86.

In December 1964, Dr. King and fellow civil rights advocate Andrew Young met with top administration officials, including President Johnson and Vice President Humphrey, to push for a Voting Rights Act in 1965.²¹⁶ Their pleas fell on deaf ears. The Vice President told them, “We passed the civil rights bill only a few months ago. It’s too soon.” But black Americans in Selma, Alabama, knew it was anything but too soon for a Voting Rights Act. Selma is in majority-black Dallas County where, in 1964, blacks were almost entirely disenfranchised and whites held all the important political positions. Certainly, in 1964, anyone suggesting that disenfranchised, poor blacks in Selma, Alabama, would change the course of American history would have been met with the response: “it’s not going to happen.” And yet that is exactly what happened.

On Sunday, March 7, 1965, an unarmed group of blacks, which included children and senior citizens, quietly marched across the Edmund Pettus Bridge in Selma en route to the state capital, Montgomery, to assert their right to vote. The idea for the march came on the heels of Jimmie Lee Jackson’s murder in neighboring Perry County two weeks earlier. Jackson, a twenty-seven-year-old black pulpwood cutter, had been shot in the stomach by state troopers on February 18, after he tried to protect his mother from the clubs of troopers breaking up a night voter registration vigil. Jackson died a few days later. At his funeral, attorney and civil rights advocate J.L. Chestnut remembered people saying, “Goddamn it, we ought to carry his body over to [then Alabama governor] George Wallace in Montgomery.” These angry sentiments soon evolved into a plan to walk to Montgomery to petition Wallace for the right to vote.

As the marchers approached the bridge on March 7, the troopers sounded a two-minute warning. Then, without more than a few seconds, they attacked. A state trooper’s club hit organizer Mrs. Amelia Boynton on the back of the neck, and she fell to the ground. While she was regaining consciousness, she heard someone ordering her to get up and run or she would be tear-gassed. Former United States Senator Harris Wofford, who came to Selma to join a subsequent march, described Mrs. Boynton’s eyewitness account of what came to be known as “Bloody Sunday”:

Then the tear gas can was dropped next to her head. To a mounted posse, Sheriff Clark shouted, ‘Get those goddamn

216. This account of events surrounding the march from Selma to Montgomery and the passage of the Voting Rights Act is taken from LANI GUINIER, *LIFT EVERY VOICE* 169–82 (1998).

niggers! Get those goddamn white niggers!’ and the horsemen charged with bullwhips. ‘Deputies’ using the electric cattle prods, chase[d] the marchers still on their feet all the way back to Brown’s Chapel.²¹⁷

Films of the event resembled a battle scene, with bombs, smoke, and mass chaos. There was widespread public concern after video clips were shown on national television, interrupting an ABC Sunday night special, *Judgment at Nuremberg*.

Within five months, President Johnson signed the Voting Rights Act of 1965, ensuring that black Americans had the right to vote for the first time since Reconstruction. Johnson later admitted that they passed the 1965 Voting Rights Act on a bridge on March 7, 1965, heading from Selma to Montgomery.²¹⁸

V. CONCLUSION

Consistent with the original terms of our democracy, the debacle in Florida and its unseemly denouement at the hands of our highest court were surprisingly inevitable. They grew from the seeds planted early on in our history in which the capacity of the many was compromised to protect the rights of the few. If we want to build a democracy upon a set of more participatory and egalitarian premises, we have to come to terms with the legacy of slavery as it has shaped our fundamentally unfair current political structures. But we also must let go of notions that a more liberal or egalitarian sounding elite can be trusted with this task. The idea of democracy is the idea that the people shall rule. Draping elitism in meritocratic clothing does not a democracy make. This is not about changing the couture of democracy to a more pedestrian soft brown-toned wardrobe. This is about embracing a fundamentally participatory role for the people themselves. We will know we have shifted paradigms when the grandsons and great granddaughters of former slaves assume their rightful place, not just as token members of a ruling elite but as respected members of a democratic polity where votes are counted, voices are heard, and people are encouraged to participate even after the election. As Henry Wiencek writes in the *New York Times*:

This country was founded upon a bargain for which we continue to pay the price. We compound the mistake by draping a veil of innocence over the transaction. The true beneficiary of the presentism

217. *Id.*

218. *Id.*

defense is not the past but the present—it guards and preserves our fervent wish to have sprung from innocent origins.²¹⁹

Black Americans understand this all too well, and they therefore have much to contribute to the re-invigoration of our democracy.

There are contrasting approaches to democracy that have, as yet, untapped potential to create something egalitarian, issue-oriented, and participatory through innovation and collaboration, both among the people and between people and their representatives. Not only is this presumably the normative goal of democracy, it is a model that has been adapted to at least some degree by many nations throughout the world. It is not implausible to imagine such alternative forms finding their way to our shores. Such an outcome depends upon our coming together to create a vibrant multi-party democracy that considers the voices of the losers as well as the winners, and that builds toward a society governed by a vigorous combination of ideas and engaged citizens rather than an entrenched oligarchy dependent upon pedigree, paper credentials, or money.

219. Henry Wiencek, Editorial, *Yale and the Price of Slavery*, N.Y. TIMES, Aug. 18, 2001, at A15, available at LEXIS, News Library, The New York Times File.