Money in Political Campaigns and Modern Vote Dilution

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Introduction

The current debate over campaign finance reform typically overlooks a compelling reason why such reform is important: equality of political participation. American representative democracy, the Constitution and its Amendments embrace the principle of equality of political participation. Specifically, there are very important lessons to be learned by reconsidering several revolutionary Supreme Court decisions in the context of campaign finance reform today.

In the early 1960s, the Court declared constitutional principles for dealing with challenges to voting patterns and redistricting.[1] While the Voting Cases are best known for their articulation of the one-person, one-vote doctrine,[2] seen as a whole, they do far more than delineate a formula for the proper drawing of political districts. In these cases, the Court spoke about the broad and deep roots of political equality in the United States. The Fourteenth Amendment Equal Protection Clause served as

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1. *See* Wesberry v. Sanders, 376 U.S. 1 (1964); Reynolds v. Sims, 377 U.S. 533 (1964); WMCA v. Lomenzo, 377 U.S. 633 (1964); Lucas v. Forty-fourth Gen. Assembly of Colo., 377 U.S. 713 (1964); Gray v. Sanders, 372 U.S. 368 (1963). Collectively, I will refer to these cases as the "Voting Cases."

2. *See, e.g., Wesberry*, 376 U.S. at 18; *Reynolds*, 377 U.S. at 568; *Lucas*, 377 U.S. at 736; *Gray*, 372 U.S. at 381.

the legal basis of the decisions, but the Court also considered the nature of the republic itself, the structure of Congress, and the Fifteenth and Nineteenth Amendments.[3] The Court made clear that political power is not to be concentrated in the hands of the few; through the electoral process, all should have a chance to participate on an equal basis.[4] The Constitution and the nation's history demand nothing less.

This Article does not focus exclusively on the specific theme of malapportionment, which can be said to be largely a problem of the past. However, a fundamental problem lingers in a slightly different form today, as political power is concentrated in the hands of the wealthy.[5] In effect, the modern concentration of power is the flip side of the vote dilution coin addressed in the 1960s. The law typically has not considered this approach to the problem, instead focusing on a limited First Amendment analysis, fears of corruption, and market analogies.[6] Such analysis does not recognize the constitutional importance of equality in the political process. The 2003 decision in *McConnell v. Federal Election Commission*[7] seems to offer a new opportunity to reconsider the direction of the prevailing analysis. In this Article, I propose that we apply the Voting Cases and their declaration of equality to campaign finance reform analysis.

The Article will proceed as follows. Part I will begin with a brief review of vote dilution through the historical lens of the Voting Cases.[8] Next, this Article will explore modern vote dilution through the current state of money and politics in America.[9] Specifically, I will discuss the ways in which the current system of political campaigns and governance concentrates power in the hands of the few—those with access to large sums of campaign cash. A brief review of the current law of campaign finance reform

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3. My focus will be almost entirely on the Fifteenth and Nineteenth Amendments, but I occasionally will use the "Voting Amendments" to refer to the collection of vote-related amendments, i.e., the Fifteenth, Seventeenth, Nineteenth, Twenty-fourth and Twenty-sixth Amendments.

4. *See infra* notes 17-33 and accompanying text.

5. *See infra* notes 35-103 and accompanying text. In this article, I will talk about the wealthy as a shorthand for wealthy individuals, and for those who have access to others with wealth who are willing to make major campaign contributions.

6. *See infra* notes 115-152 and accompanying text.

7. 540 U.S. 93 (2003). This widely-anticipated decision reviewed and upheld the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) [hereinafter BCRA].

8. *See infra* notes 17-33 and accompanying text.

9. *See infra* notes 35-103 and accompanying text.

will follow.[10]

Part II explores the doctrinal development of vote dilution, starting with a review of the Court's legal analysis in the Voting Cases, where the principle of equality was pulled from within the pages of the Constitution and the nation's history.[11] I will then discuss how the Voting Amendments speak to principles of equality of participation in the political process.[12] Finally, Part II will review the themes of popular sovereignty, republican government, and representative democracy as reflected in the structure of the United States government and Article I of the United States Constitution.[13] In the end, we will have a clear picture of the commitment to equality of political participation.

After illustrating in Part II the commitment to equality and the fundamental aversion to concentration of power, I will argue in Part III that we need to focus on the political equality that resides in the Constitution and was articulated by the Court four decades ago.[14] Before concluding, the Article will explore the implications of re-conceiving the field in this manner.[15]

Above all, the goal is to link the Voting Cases and their rejection of concentrated power with the problems of campaign finance reform today. Political equality is essential and fundamental; this new approach can help break up the concentration of power in the hands of the wealthy few and redistribute political power to the many.

I. Money, Access, and Concentration of Power: Modern Vote Dilution

In the 1960s, vote dilution took the form of redistricting and voting patterns, which concentrated power into the hands of the few. Today, money in politics has concentrated power and access in the hands of the wealthy few, creating a modern sort of vote dilution.[16] As the wealthy gain power, they attain greater representation; in effect, there is a multi-member district for those with access to money. The flip side of the coin is that the average voter is denied equal participation in the political-governmental process—this is modern vote dilution. Unfortunately, current

10. *See infra* notes 104-114 and accompanying text.
11. *See infra* notes 115-152 and accompanying text.
12. *See infra* notes 153-202 and accompanying text.
13. *See infra* notes 203-227 and accompanying text.
14. *See infra* notes 228-246 and accompanying text.
15. *See infra* notes 247-282 and accompanying text.
16. *See infra* notes 35-103 and accompanying text.

campaign finance reform analysis does not consider this perspective.

A. Historical Vote Dilution: Malapportionment

The Supreme Court addressed vote dilution in the first half of the 1960s in the form of challenges to voting patterns and redistricting.[17] The Voting Cases established that the Fourteenth Amendment Equal Protection Clause demanded both equality of representation and equality of participation in the selection of representatives. Applying equality principles to the reality of malapportionment in state governments, the Court spoke forcefully about the Constitution's rejection of diluted and/or concentrated power.[18] A brief review of these cases follows, while their doctrinal basis will be explored further in Part II.

1. *Gray v. Sanders*

In *Gray v. Sanders*,[19] voters challenged the Georgia "county unit" system, which was used in statewide primary elections.[20] While each person was entitled to one vote, the votes were tallied by county, and each county was weighed by units, not strictly according to population.[21] As a result, rural counties with smaller populations had concentrated power, often equal to an urban county with a far greater population. The votes of citizens in rural regions were concentrated to 99 times the strength of the urban dwellers.[22] The Court found that this concentration of power in

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17. *See* Wesberry v. Sanders, 376 U.S. 1 (1964); Reynolds v. Sims, 377 U.S. 533 (1964); WMCA v. Lomenzo, 377 U.S. 633 (1964); Lucas v. Forty-fourth Gen. Assembly of Colo., 377 U.S. 713 (1964); Gray v. Sanders, 372 U.S. 368 (1963).

18. *See Reynolds*, 377 U.S. at 568:

> We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State.

Id.

19. 372 U.S. 368 (1963).

20. *Id.* at 370.

21. *Id.* at 371-72.

22. *Id.* at 371 ("[O]ne resident in Echols County had an influence in the nomination of candidates equivalent to 99 residents of Fulton County."); *see also Reynolds*, 377 U.S. at 562:

> If a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in disfavored areas had not been effectively diluted.

the hands of the few violated the constitutional mandate of equality.[23] This was the first step in establishing the one-person, one-vote principle.

2. *Wesberry v. Sanders*

In *Wesberry v. Sanders*,[24] Georgia's congressional districting resulted in some districts being less than half or less than a third as large as others, each with the same congressional representation.[25] The Court held that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's . . . . To say that a vote is worth more in one district than in another would . . . run counter to our fundamental ideas of democratic government . . . ."[26] From this perspective on American government, the Court stressed the importance of "complete equality"[27] and struck the Georgia plan.[28]

3. *Reynolds v. Sims*

In *Reynolds v. Sims*,[29] the Court confronted a badly malapportioned legislature and a corresponding challenge to Alabama's legislative districting with geographically-driven districts based on the 1900 census.[30] Since the population had shifted over many decades, the rural counties had markedly fewer residents, but maintained the same number of representatives in

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Id.

23. *Gray*, 372 U.S. at 379-80.

24. 376 U.S. 1 (1964).

25. *Id.* at 2. The complaint in *Wesberry* alleged that voters were deprived of the full benefit of their right to vote, in violation of Art. I, Section 2, of the Constitution. *Id.* at 3. *See also* U.S. CONST. art. I, § 2 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . .").

26. *Wesberry*, 376 U.S. at 8-9. Arguably, after adoption of the Seventeenth Amendment, the same statement can be made about the Senate. *See* U.S. CONST. amend. XVII.

27. *Wesberry*, 376 U.S. at 14.

28. *Id.* at 8-9. In *Wesberry*, voters challenged the lines drawn to create congressional districts in Georgia that had resulted in disparate populations. Because smaller districts had equal congressional representation as larger ones, there was a concentration of power in the lesser-populated districts. *Id.* at 2. "[I]nequality of population means that the Fifth District's Congressman has to represent from two to three times as many people as do Congressmen from some of the other Georgia districts." *Id.*

29. 377 U.S. 533 (1964).

30. The legislature consisted of a 35-member Senate and a 106-member House of Representatives. *Id.* at 537-38. Senate districts ranged in population from 15,417 to 634,864 and the House had districts with populations ranging from 31,175 to 634,864. Sims v. Frink, 208 F. Supp. 431, 440-41 (D.C. Ala. 1962).

government.[31] The effect was that the few had concentrated power, and the many had diluted power. The few with power withstood efforts to change the status quo from which they benefited. This is perhaps the best known of the Voting Cases, and it clearly established the equality-based rationale for one-person, one-vote: "[T]he Equal Protection Clause guarantees the opportunity for *equal participation by all voters* in the election of state legislators."[32]

These Voting Cases established a new standard for resolving the imbalance of power in politics and government.[33] The Court established that vote dilution and concentration of power are incompatible with the Constitution's command of equality.

B. Modern Vote Dilution: Money and Concentrated Power

Those who can give and/or raise large sums of money are extraordinarily important to candidates and campaigns. Elections are growing costlier by leaps and bounds, and because elections for the House of Representatives and the Senate are privately financed, voters who can most efficiently raise large sums have a special value. Thus, the wealthy have special access and influence; power is concentrated in the hands of the few who control money. After the campaigns, the wealthy wield inordinate power, enjoying access to elected officials that others do not.[34]

1. Money is Key in Winning Elections

First, consider the costs of campaigns and the way in which funds are raised. Campaigns cost tens of millions of dollars, and the amounts are increasing rapidly. In the 2000 election cycle,

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31. Wesberry v. Vandiver, 206 F. Supp. 276, 279 (D.C. Ga. 1962).

32. *Reynolds*, 377 U.S. at 566 (emphasis added). The *Reynolds* Court also wrote:

> And the concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. With respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live.

Id.

33. *See also* WMCA v. Lomenzo, 377 U.S. 633, 654 (1964) (holding that "[h]owever complicated or sophisticated an apportionment scheme might be, it cannot, consistent with the Equal Protection Clause, result in a significant undervaluation of the weight of the votes of certain of a State's citizens merely because of where they happen to reside"); Lucas v. Forty-fourth Gen. Assembly of Colo., 377 U.S. 713, 736 (1964) (noting that "[a]n individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of the state's electorate"). *See infra* Part II.

34. *See infra* Part I.B.3.

approximately $4 billion was spent on campaigns.[35] Congressional campaign expenditures, in constant dollars, have more than tripled, rising from $318.5 million to just over $1 billion from 1972 to 2000.[36] There is a strong correlation between money spent and electoral success,[37] which prompts more and more spending, at an ever-increasing rate. "[T]he cost of a competitive House race has doubled during the past decade," and competitive Senate races have increased by 25 to 50 percent.[38] The 2004 race for United States Senator in South Dakota provides a recent glaring example, as the two candidates raised a total of approximately $37 million[39] for a state with a population of 764,309.[40] It seems that everywhere you turn, a new record for spending is being set, with no end in sight.

Because House and Senate races are not funded publicly,[41] these amounts must come from private contributions. But as the costs have soared, it is harder and harder for campaigns to keep up. Because of the need for such large sums of money, the wealthiest contributors are perhaps the most important people in modern politics. Under the Federal Election Campaign Act ("FECA"),[42] individuals can contribute up to $2000 to an individual candidate's campaign in the primary season and another $2000 in the general election.[43] The more that people can write checks of $1000 or $2000 at a time, the more efficiently the campaign's goals can be reached. Accordingly, power, access, and attention flow to people based on their access to money instead of the people represented, constituency spoken for, or ideology espoused.

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35. Candice J. Nelson, *Spending in the 2000 Elections*, *in* FINANCING THE 2000 ELECTION 24, 45 (David B. Magleby ed., 2002).

36. *Id.* at 29. While any given election cycle may show an increase or decrease, looking at the data decade-to-decade shows constant increases. *Id.*

37. *Id.* at 30.

38. *Id.* The cost of running a competitive Senate race has gone from between approximately $3.5 and $4 million to approximately $5 million. *Id.*

39. *Total Raised and Spent: 2004 Race: South Dakota Senate*, Opensecrets.org, *at* http://www.opensecrets.org/races/summary.asp?cycle=2004&id=SDS1 (last visited Feb. 20, 2005).

40. *South Dakota QuickFacts*, U.S. Census Bureau, *available at* http://quickfacts.census.gov/qfd/states/46000.html (last visited Feb. 20, 2005).

41. The presidential election is publicly funded and there is partial public financing for the presidential primaries. *See Presidential Election Campaign Fund (PECF)*, Federal Election Commission, *at* http://www.fec.gov/press/bkgnd/fund.html (last visited Mar. 6, 2005).

42. 86 Stat. 11 (codified as amended at 2 U.S.C. § 431 (main ed. and Supp. 2003)).

43. Federal Election Campaign Act, 2 U.S.C. § 441a(a)(1)(A) (2002) [hereinafter FECA].

Conversely, the individual contributor who cannot give $2000 becomes less and less meaningful in the high-money game.[44]

The 2004 presidential elections were highly instructive.[45] The George W. Bush re-election campaign set up a special system, as the President opted out of the public match financing of the campaign.[46] During the Bush campaign, those who pledged to raise $200,000 were in a special club called the "Rangers," with each person typically targeting one hundred people to "max out," i.e., give the maximum $2000 contribution.[47] The "Pioneers" was

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44. The same applies to an individual contributor who could only give $1000 under the law before BCRA was recently amended to allow contributors to give up to $2000. *See infra* note 54 and accompanying text.

45. While the financing system for the presidential race differs in some respects from House and Senate races, in part they share a common bond of private funding. House and Senate races are privately financed in both primaries and the general election; presidential primaries are funded in whole, or at least in large part, by private money as well.

46. On the Democratic Party side, Howard Dean and John Kerry also opted out. An article in the *Washington Post* noted:

> Two Democratic presidential candidates, Howard Dean and John Kerry, have decided not to accept federal campaign subsidies. Both say they cannot compete with President Bush—who also has opted out of the public campaign financing system—if they accept the matching funds and the spending restrictions that go along with them.

If the System Were Different, Sure, WASH. POST, Nov. 30, 2003, at B4; *see also* Ceci Connolly, *Kerry Spurs Ambitious Fundraising: Democratic Front-Runner Seeks to Offset Bush's $100 Million*, WASH. POST, Feb. 14, 2004, at A1, A7.

> It has become a cliché to characterize campaigns as the most expensive ever. But what makes the 2004 contest unique is that the two major party candidates will be able to raise and spend unlimited amounts of money. That is because for the first time since Congress enacted campaign finance laws in 1974, both the Republican and the Democrat have opted out of the public financing system in the pre-convention season, choosing to reject taxpayer dollars in favor of the much larger sums they expect to raise on their own.

Id.

47. Thomas B. Edsall & Sarah Cohen, *Bush Campaign Raises a Record $49.5 Million; For Their Efforts, Fundraisers Also Gain*, WASH. POST, Oct. 15, 2003, at A1.

> President Bush's reelection campaign yesterday reported raising $49.5 million in the third quarter, a decisive record for a three-month period. Since launching his fundraising effort in May, Bush has collected $83.9 million.
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> The record receipts—more than triple the top Democrat's fundraising for the quarter—were driven in large part by just 285 men and women, who collected $38.5 million or more, which was at least 45 percent of Bush's total take. This fundraising elite, many of whom were beneficiaries of Bush administration policies, included 100 "Rangers," who raised at least $200,000 apiece, and 185 "Pioneers," who collected at least $100,000 each.

Id. On the Democratic side, Senator John Kerry apparently had identified key fundraisers who could raise very large sums as well. *See* Connolly, *supra* note 46, at A1 ("For now, the Kerry team is cultivating the cadre of Democratic fundraisers with the ability to collect $50,000 and $100,000 apiece from their networks.").

another group, established in the 2000 election cycle, when the contribution ceiling was $1000, whose members could raise $100,000 each (presumably finding one hundred people who gave $1000 each).[48] The results were nothing short of phenomenal, as President Bush raised $271.6 million in individual contributions for the primary elections,[49] an amazing sum in its own right, made all the more so when considering the fact that he faced no real Republican primary opposition. The sums are staggering. The question is: where did the funding come from? Most—some 57 percent—was raised in amounts of $1000 or more.[50] Thus, power is concentrated in the hands of Rangers and Pioneers.[51]

The power is even more concentrated now than before. In particular, while the McCain-Feingold law[52] has been heralded as

48. Edsall & Cohen, *supra* note 47, at A1; *see also* John C. Green & Nathan S. Bigelow, *The 2000 Presidential Nominations: The Costs of Innovation*, *in* FINANCING THE 2000 ELECTION 59 (David Magleby ed., 2002). The amount raised by the Pioneers in 2000 was extraordinary: "[T]his figure was roughly equal to the number of $1,000 donations raised by all other major party candidates combined and was nearly three times larger than all such donations to the other GOP candidates." *Id.* at 61. Al Gore and Bill Bradley had similar percentages, but dramatically smaller gross receipts than Bush: Gore raised $21.8 million in $1000 contributions, marking 61 percent of his fundraising; Bradley raised $19.1 million this way, marking 63 percent of his net. *Id.* at 70. John McCain had a very different distribution, with nearly equal total amounts in $1000 donations as from donations in the under $200 range. *Id.* at 62. Gary Bauer, Alan Keyes, and Bob Smith all raised most of their money in sums under $200, largely via direct mail solicitation. *Id.* at 62, 63.

49. *Presidential Candidate George W. Bush Campaign Money*, Opensecrets.org, *at* http://www.opensecrets.org/presidential/summary.asp?ID=N00008072 (last visited Feb. 20, 2005). This far outpaced his own remarkable goal of raising $170 to $200 million. *See, e.g., Dean Will Have to Quadruple Fundraising Rate to Match Bush Totals*, BULLETIN'S FRONTRUNNER, Jan. 7, 2004 ("Bush's fundraising target during the primary season [is]—$170 million to $200 million . . . ."). John Kerry lagged only slightly, raising nearly $225 million in individual contributions. *Presidential Candidate John Kerry*, Opensecrets.org, *at* *http*://www.opensecrets.org/presidential/summary.asp?ID=N00000245 (last visited Mar. 26, 2005).

50. *Presidential Fundraising from Individual Contributions*, The Campaign Finance Institute, *available at* http://www.cfinst.org/pr/pdf/100404_Table3.pdf (last visited Mar. 26, 2005).

51. I will speak often of Rangers and Pioneers as a shorthand, but of course there are many people who raise large sums of money for all candidates. Note as well that the Democrats also raised money in amounts that are tilted toward the person who maxes out. For example, John Edwards raised 70 percent of his funds in contributions of $1000 or more, as compared to 14 percent of $200 or less; for Richard Gephardt, the figures were 71 percent and 13 percent respectively; for Joe Lieberman, 74 percent and 9 percent respectively. Howard Dean was notably different from the other major Democratic candidates, with 19 percent of his money from the largest contributions and 60 percent from the smallest. *Id.*

52. BCRA, Pub. L. No. 107-155, 116 Stat. 81 (2002).

the most far-reaching campaign finance reform in a generation,[53] it has also increased the concentration of power in the hands of the few. The law raised contribution limits from $1000 to $2000 per person, per election cycle,[54] so that an individual who wants to max out now can donate $4000 to a candidate over a primary-general election cycle.[55] With the contribution levels doubled, candidates can raise more and spend more with the assistance of fewer people.[56] This inevitably will further concentrate power in the hands of the wealthy.[57] President Bush's fundraising strategy gave voice to this concentration. In 2000, the Pioneers existed with the same goal, and in 2004 Bush added the Rangers.[58] With the higher limits, President Bush doubled the goals for the wealthiest; with the new $2000 contribution caps, the same 100 people who max out could give him twice as much money as in the 2000 election—and over 60,000 people maxed out, accounting for nearly half of all money raised.[59] More money raised by the same number of people further concentrates the power in the hands of the few.

2. The Power of Unregulated Money

So far, this Article has analyzed "hard money," contributions to campaigns regulated by FECA limits,[60] but hard money does not pay for all the political spending that fuels campaigns. In order to understand why, we first must understand the current constitutional constraints on regulation, as most notably defined by *Buckley v. Valeo*,[61] which reviewed FECA's basic structure of campaign regulation. To summarize, *Buckley* struck down expenditure limits but upheld contribution limits.[62] But think for

53. *See, e.g.*, Lyle Denniston, *Campaign Finance Law Is Upheld: Supreme Court Says Strict Rules Are Justified*, BOSTON GLOBE, Dec. 11, 2003, at A1 (noting BCRA incorporates the "most sweeping curbs ever on private money in national politics").

54. FECA, 2 U.S.C. § 441a(a)(1)(A) (2002). This provision was upheld in *McConnell v. Federal Election Commission*, 540 U.S. 93, 152 (2003).

55. Or, a couple can max out by giving $8000—$4000 for each person.

56. For example, a Senate race that costs $8 million for both the primary and general election would have required, at a minimum, 4000 people. The same fundraising can be done with 2000 people—half as many—today.

57. *See, e.g.*, Spencer A. Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 152 U. PA. L. REV. 73 (2004).

58. *See supra* note 47 and accompanying text.

59. *2004 Donor Demographics*, Opensecrets.org, *at* http://www.opensecrets.org/presidential/donordems.asp?filter=A&sortby=2 (last visited Feb. 20, 2005).

60. *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 93 (2003).

61. 424 U.S. 1 (1976); *see infra* notes 104-114 and accompanying text.

62. *Id.* at 23 ("[A]lthough the Act's contribution and expenditure limitations both implicate fundamental First Amendment interests, its expenditure ceilings

a moment of any business whose expenses rise but whose income remains relatively flat.[63] As candidates have wanted to spend more and more money, individual contributions have not been able to keep pace. As a result, those with money have found ways to support campaigns through what is called "soft money"—large unregulated sums given by the wealthiest, typically to the political parties, then used to support the candidates.[64] In effect there is now what Supreme Court Justice Anthony Kennedy has called "covert" money[65] flowing in large sums outside the reach of regulation. Now, not only do the wealthiest stand out because they contribute $2000 or $4000 to an individual candidate, but they really stand out by giving tens or hundreds of thousands of dollars—or perhaps even millions—to a political party or group which is used to help the party, the group, and the candidate.

These sums spent on behalf of, but technically outside of, the candidates' campaigns became so large in 2000 that "for the first time in recent history, political advertising by parties and groups outnumbered political ads by candidates in the presidential general election."[66] The wealthiest of the wealthy gave nearly

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impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions."). The Court also upheld public financing of presidential elections and disclosure requirements. *Id.* at 58, 67-68.

63. An interesting Note explores campaign financing, employing a supply-and-demand model analysis. *See* Justin A. Nelson, *The Supply and Demand of Campaign Finance Reform*, 100 COLUM. L. REV. 524 (2000). The author asks, "if the supply side cannot work by itself, what then are we left with? A reform strategy focusing on the demand side while still retaining a modicum of supply-side limits presents the best chance of comprehensive and attainable reform." *Id.* at 526.

64. *See also McConnell*, 540 U.S. at 122-26 (discussing development and growth of soft money). Further, the FEC has issued advisory opinions that have expanded the permissible uses of soft money. *See, e.g.*, FEC Advisory Op. 1995-25 (1995) (allowing use of soft money to defray the costs of 'legislative advocacy media advertisements,' even if the ads mentioned the name of a federal candidate, so long as they did not expressly advocate the candidate's election or defeat).

65. *See* Nixon v. Shrink Mo. Gov't Political Action Comm., 528 U.S. 377, 406 (2000) (Kennedy, J., dissenting) ("[T]he compromise the Court invented in *Buckley* set the stage for a new kind of political speech to enter the political system. It is covert speech. The Court has forced a substantial amount of political speech underground, as contributors and candidates devise ever more elaborate methods of avoiding contribution limits . . . .").

66. Craig B. Holman, *A Narrow and Appropriate Response to Cloaked Electioneering: Measuring the Impact of the 60-Day Bright-Line Test on Issue Advocacy*, BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW 2, *available at* http://www.brennancenter.org/programs/downloads/hill_memo_0301.pdf (last visited Mar. 12, 2005). The sums are often spent on perhaps the most important component of modern campaigns—television advertisements. One extensive survey found that "[t]here were 940,755 airings of

$500 million to the major parties in the 2000 election cycle in soft money.[67] The money—and power—is even further concentrated. Of that nearly one half billion dollars in party soft money, about 62 percent came from only 800 donors; "fifty corporations, unions, and individuals each contributed more than $1 million in soft money."[68]

McCain-Feingold banned much soft money,[69] and that ban was upheld in *McConnell v. Federal Election Commission.*[70] Arguably, this will have the salutary effect of reducing soft money spending that is covert. But, as the Court admonished at the end of the *McConnell* opinion, "money, like water, will always find an outlet. What problems will arise, and how Congress will respond, are concerns for another day."[71] The money will indeed find an outlet; and the power will remain concentrated in the hands of the few, such as the Rangers and the Pioneers.

The rise of so-called "527 organizations" in the 2004 presidential election further illuminates this problem.[72] After the 2004 election cycle, we are quite familiar with 527s like Swift Boat Vets and P.O.W.s for Truth[73] and MoveOn.org Voter Fund,[74] operating outside of the structure of regulated contributions and

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political television commercials over the 2000 calendar year in the nation's top 75 media markets—at a total cost of $672,045,453." *Id.*

67. Thomas E. Mann, *Lessons for Reformers, in* FINANCING THE 2000 ELECTION 248 (David Magleby ed., 2002) ("In the 2000 election cycle about $300 million of the $487 million in party soft money came from only 800 donors.").

68. *Id.*

69. *See* FECA, 2 U.S.C. § 441i (2002).

70. 540 U.S. 93, 173 (2003).

71. *Id.* at 224. The opinion mysteriously fails to cite an important recent article that proposed just such an analogy, and which develops the point very well. *See* Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (1999).

72. *Quick Answers to General Questions: What Is a 527 Organization?*, Federal Election Commission, *available at* http://www.fec.gov/ans/answers.shtml (last visited Mar. 26, 2005). The FEC defines 527s as:

> Entities organized under section 527 of the tax code [which] are considered "political organizations," defined generally as a party, committee or association that is organized and operated primarily for the purpose of influencing the selection, nomination or appointment of any individual to any federal, state or local public office, or office in a political organization. All political committees that register and file reports with the FEC are 527 organizations, but not all 527 organizations are required to file with the FEC. Some file reports with the Internal Revenue Service (IRS).

Id.

73. *Swift Boat Vets and P.O.W.s for Truth, at* www.swiftvets.com (last visited Feb. 20, 2005).

74. *Voter Fund*, MoveOn.org, *at* www.moveon.org/voterfund (last visited Feb. 20, 2005).

expenditures.[75] In the 2004 cycle, they spent over $550 million,[76] and they had a clear impact on the course of the election.[77] By force of their money, 527 organizations also keep disproportionate power in the hands of the few.[78]

3. Money Begets Access

The few who control the financing get much in return; not only are they lavished with attention during the campaign, they get special access and power when the candidates they support are in office. The recent litigation in the *McConnell* case provided full exposure to the system. Judge Kollar-Kotelly, on the three-judge panel that first heard the case,[79] summarized:

> The record demonstrates that large donations . . . to the political parties provide donors with access to Members of Congress. The record is a treasure trove of testimony from Members of Congress, individual and corporate donors, and lobbyists, as well as documentary evidence, establishing that contributions . . . are given with the expectation they will provide the donor with access to influence federal officials, that this expectation is fostered by the national parties, and that this expectation is often realized.[80]

Similarly, Judge Leon provided a detailed account with a heading that says it all: "Party Donation Programs Show that Increased Access Corresponds with Larger Donations."[81] These judicial

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75. *The Major Players Active Advocacy Groups in the 2004 Election Cycle*, Opensecrets.org, *at* http://www.opensecrets.org/527s/527grps.asp (last visited Feb. 20, 2005).

76. *527s in 2004 Shatter Previous Records for Political Fundraising*, The Center for Public Integrity, *available at* http://www.publicintegrity.org/527/report.aspx?aid=435&sid=300 (last visited Feb. 20, 2005). The amount has skyrocketed in recent years from $149.4 million in 2000 to $285.4 million in 2002. *Id.*

77. *See, e.g.*, *id.*; Michael Janofsky, *Advocacy Groups Spent Record Amount on 2004 Election*, N.Y. TIMES, Dec. 17, 2004, at A25. I do not suggest that they turned the election toward one candidate or the other. I suggest instead that they were a dominant force across the country, across the political spectrum.

78. The top 25 individual contributors gave between $2 million and $23.45 million to 527s. *Top Individual Contributors to 527 Committees: 2004 Election Cycle*, Opensecrets.org, *at* http://www.opensecrets.org/527s/527indivs.asp?cycle=2004 (last visited Mar. 28, 2005). Organizations, corporations, and other groups likewise gave in the tens of millions of dollars. *See 527 Committee Activity: Top 50 Federally Focused Organizations*, Opensecrets.org, *at* http://www.opensecrets.org/527s/527cmtes.asp (last visited Feb. 20, 2005).

79. *McConnell* was first heard by a three-judge panel of Judges Henderson, Kollar-Kotelly, and Leon. The court filed a per curium opinion, Judge Henderson filed a concurrence in part, dissent in part, and Judges Kollar-Kotelly and Leon also filed separate opinions. McConnell v. Fed. Election Comm'n, 251 F. Supp. 2d 176, 183-84 (D.D.C. 2003).

80. *McConnell*, 251 F. Supp. 2d at 492 (opinion of Kollar-Kotelly, J.).

81. *Id.* at 860-64 (opinion of Leon, J.). "The record contains substantial

opinions provide the most recent, and by far the most thorough,[82] record ever compiled, exposing the "special access" that large donors receive.[83] A majority on the panel painstakingly detailed, in their findings of fact,[84] the two major parties' programs for ensuring a constant stream of big-dollar soft money contributions, and they discussed the "special access" that is provided in exchange. Judge Kollar-Kotelly wrote about the correlation:

> [L]arge donations to the political parties . . . provide these donors with special access to federal lawmakers. This access is valued by contributors because access to lawmakers is a necessary ingredient for influencing the legislative process . . . . The political parties take advantage of contributors' desire for access by structuring their donor programs so that as donations increase, so do the number and intimacy of special opportunities to meet with Members of Congress.[85]

The findings of special access were detailed by the three judge panel, and the Supreme Court majority opinion favorably cites Judges Kollar-Kotelly and Leon, and then decries this "pervasive" "access peddling."[86] Even opponents of campaign finance regulation understand that campaign contributions buy access.[87] For example, in oral argument in *McConnell*, Justice Scalia, who

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probative evidence that donors . . . receive greater access, both in the amount of time they spend with federal officeholders and in the priority with which their interests are accorded in comparison to nondonors." *Id.* at 856.

82. *See id.* at 176-950. The record spanned 770 pages. *See id.*

83. *Id.* at 488-89 (opinion of Kollar-Kotelly, J.).

84. Judge Henderson, the one judge on the panel who disagreed, conceded these findings to be the majority view. *See id.* at 296 (opinion of Henderson, J., concurring in part and dissenting in part).

85. *Id.* at 488-89 (opinion of Kollar-Kotelly, J.). Judge Leon similarly wrote: "There is ample evidence . . . to support Congress's judgment that the special access and perceived special influence accorded to those large donors have undermined the public's confidence in the independence of its elected representatives from those donors, and thereby giving rise to an appearance of corruption." *Id.* at 785-86 (opinion of Leon, J.).

86. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 151 (2003) (noting that "[s]o pervasive is this practice that the six national party committees actually furnish their own menus of opportunities for access to would-be soft-money donors, with increased prices reflecting an increased level of access").

87. Other researchers who do not seem to support campaign reform nevertheless acknowledge that "money buys access, rather than policy directly . . . . Campaign contributions are one way to improve the chances of getting to see the legislator about matters of concern to the group." Stephen Ansolabehere et al., *Are Campaign Contributions Investment in the Political Marketplace or Individual Consumption? Or "Why Is There So Little Money in Politics?"*, *at* http://itc.mit.edu/itel/docs/2002/Little_Money_Politics.pdf (Oct. 2002) (last visited Mar. 26, 2005).

consistently opposes campaign reform,[88] observed that "members of Congress are going . . . to give time to people who have given money . . . to their campaign."[89]

Further, access may also translate into results. Modifying his statement just quoted, Justice Scalia distinguished a next level of influence: "I mean, access is not votes."[90] On that count, however, the evidence suggests a strong correlation.[91] The

88. *See, e.g,* Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 465 (2001) (Thomas, J., joined by Scalia, J., dissenting); Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 685 (1990) (Scalia, J., dissenting).

89. Oral Argument Transcript, McConnell v. Fed. Election Comm'n, No. 02-1674, Sept. 8, 2003, *available at* http://www.oyez.org/oyez/resource/case/1637/argument-1/transcript (last visited Mar. 22, 2005).

90. The full quotation, for purposes of clarity and full disclosure, is, "I mean, access is not votes. Sure, members of Congress are going—going to give time to people who have given money to people who have given money to their campaign. It doesn't mean they are going to vote that way." *Id.* One researcher has challenged this argument with a thorough study of campaign contributions and their effect on regulatory outcomes. *See* Geoff Edwards, *Does Private Money Influence Regulatory Outcomes? Evidence from the Telecommunications Industry*, Nov. 15, 2003, *at* http://faculty.haas.berkeley.edu/edwards/papers/Strat%20UNE.pdf at 30 (last visited Mar. 12, 2005) (arguing that even if contributions do not buy votes, it would be rash to conclude that they buy nothing). Further, Justice Scalia's point, in searching for a quid pro quo relationship (as demanded in *Buckley*), ignores that there is much more that falls short of bribery that damages the process of government.

91. Some object to this conclusion, with a recent prevalent example being Ansolabehere et al., *supra* note 87. The authors treat campaign contributions as "a form of political participation and consumption." *Id.* at 2. They contend that there is little correlation between political spending and outcomes, and question why corporations donate at all, because the authors view contributions as an inefficient investment. While they make several insightful points, these well-regarded academics fundamentally fail to give full weight to the skew in contributions by ignoring contribution patterns. They divide the net sum of individual contributions to campaigns by the entire number of individuals who give. *Id.* at 7. Thereafter, they rely on what they consider to be an average contribution of $115. *Id.* They ignore the fact that the contribution patterns show a great skew towards very large contributors on one end, a few small contributors on the other end, and very little that could be considered "average" in the middle. They conflate the problem by using the term "average" ambiguously, to signify both some sort of mathematical meaning and to evince a more common-sense, everyday American meaning, i.e., the average voter. The 2004 presidential campaign data point out the folly in their baseline: only 11 percent of both George W. Bush's and John Kerry's contributions were in amounts less than $200; thus, at most, 11 percent of people have made what they call average contributions. To the contrary, 84 percent and 78 percent, respectively, have contributed $1000 or more. *See* Campaign Finance Institute Report, *supra* note 50 (indicating that Democrats and Republicans alike seek out big-money donors). In other words, these scholars ignore the reality of contribution patterns in making their case. Further, their study was presented a year before the *McConnell* case was decided, which they acknowledge. Ansolabehere et al., *supra* note 86, at 5. Hence, the authors have been unable to respond to the extensive findings discussed above. Despite these flaws, their insights are

concentrated power in the hands of the wealthy shapes outcomes during the legislative process.[92] One recent, thorough study cross-referenced numerous votes on financial services legislation[93] against contribution patterns by PACs and interest groups,[94] spread from 1991 to 1998.[95] The unmistakable conclusion was that "interest groups 'buy' legislators' votes with PAC contributions."[96] Another study looked at ten congressional votes on agricultural programs[97] and reached similar conclusions.[98] This study also found that major donors had the ear of members of Congress, and that influence resulted in votes and legislative victories.[99] But for money and the influence it bought, bills would

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interesting. Their work is useful to the extent that it challenges the assumption that money is a good investment. Indeed, their suggestion that political contributions should be seen as consumption, or participation, is useful. Some contributors do expect that there is a direct payoff, but others see contributions as their way of participating in the electoral process.

92. There always will be a debate as to whether contributions follow positions or positions follow contributions. Thomas Stratmann, *Can Special Interests Buy Congressional Votes? Evidence from Financial Services Legislation*, 45 J.L. & ECON. 345, 349 (2002) [hereinafter Stratmann, *Financial Services*]; *see also, e.g.*, Gary C. Durden & Jonathan J. Silberman, *Determining Legislative Preferences for the Minimum Wage: An Economic Approach*, 84 J. POL. ECON. 317 (1976) (suggesting a strong correlation between contributions and voting patterns). *But cf.* Henry W. Chappell, Jr., *Campaign Contributions and Congressional Voting: A Simultaneous Probit-Tobit Model*, REV. ECON. & STAT. 77 (1982) (taking the opposite position and specifically refuting Durden and Silberman); Ansolabehere et al., *supra* note 87 (arguing that campaign contributions are not a wise investment; rather, they are a form of political participation). *Cf.* Jeffrey Milyo et al., *Corporate PAC Campaign Contributions in Perspective*, 2(1) BUS. AND POL. 75 (2000) (while acknowledging a wide literature establishing the money-votes correlation and equating it with bribery, the authors nonetheless challenge the true effectiveness of corporate political contributions). The Supreme Court in *Nixon v. Shrink Missouri Government Political Action Committee* observed that while there are differing perspectives, "there is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters." 528 U.S. 377, 395 (2000).

93. *See* Stratmann, *Financial Services*, *supra* note 92, at 13-17, 27.

94. The researchers examined a legislative area where candidates had not necessarily previously articulated positions. The absence of a prior position statement helps illustrate the problem better, because contributors will not have given money based on a prior position. Therefore the researchers can better determine whether the candidate takes a position that follows the money. *Id.* at 5-6.

95. *Id.* at 13-17.

96. *Id.* at 27.

97. *See* Thomas Stratmann, *Campaign Contributions and Congressional Voting: Does the Timing of Contributions Matter?*, REV. ECON & STAT. 127, 129 (1995) [hereinafter Stratmann, *Timing*].

98. *Id.* at 135 ("The results confirm the qualitative and quantitative importance of campaign contributions.").

99. The distribution of contributions is no accident. Other research has shown how there are economies at work where interested PACs seek the best way to

not have been passed.[100] Further in-depth research shows that on issues ranging from NAFTA to defense spending to gun control, major contributors seek and get targeted access[101] and move votes.[102] These studies reinforce the proposition that money concentrates power in the hands of the few, and not only helps provide access, but also influences voting patterns and ultimate legislative success.[103] As a result of well-placed campaign contributions, the few have many members of Congress working for them, while the many see their power diluted.

C. *Status Quo:* Buckley v. Valeo *and Judicial Review of Campaign Finance Reform*

Campaign finance reform measures have been enacted at all levels of government in response to this concentration of power and in order to counterbalance the influence of money in politics. Dozens of states and well over 100 localities have enacted major

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distribute their resources to committee members who can be helpful to their causes. The researchers effectively show the selection process for the most influential committee members, as a means to ensure the most bang for the campaign buck. "As each member of the House Banking committee develops his reputation through time (hence reduces uncertainty), the sources of PAC contributions become more concentrated . . . ." Randall S. Kroszner & Thomas Stratmann, *Interest-Group Competition and the Organization of Congress: Theory and Evidence from Financial Services' Political Action Committees*, 88 AMER. ECON. REV. 1163, 1183 (1998).

100. Stratmann, *Timing*, *supra* note 97, at 127 ("[W]ithout campaign contributions farm interest would have lost in five of the seven votes that were won."); *see also* Christopher Magee, *Campaign Contributions, Policy Decisions, and Election Outcomes, A Study of the Effects of Campaign Finance Reform*, 64 JEROME LEVY ECON. INST. OF BARD C. PUB. POL'Y BRIEF 7, 37 (2001) (making a similar finding that in terms of "House support for NAFTA, cuts in defense spending, and gun control . . . PAC money appeared to be decisive on those issues").

101. Magee, *supra* note 100, at 37 ("Evidence consistent with that hypothesis is that business groups gave more money to members of the Ways and Means and Commerce Committees, labor groups targeted contributions to members of the Education and Labor Committee, and defense PACs heavily supported members of the National Security Committee."); *see also* BROOKS JACKSON, HONEST GRAFT 298 (1988). Jackson writes:

> The pernicious effect of narrow factions can be seen clearly in the way Congress set up housing-subsidy programs that aid wealthy developers more than they help poor families. It showed itself in a tax code that allowed 'investors' to profit from coal-mining ventures that mined no coal. It was at work, as tax shelter syndicators grew rich through deals that drained the Treasury without producing any tangible product.

Id.; *see also* Stratmann, *Timing*, *supra* note 97, at 132 (finding that farm interest "campaign contributions are positively related to . . . membership in the House Agriculture Committee").

102. *See* Magee, *supra* note 100, at 10-30.

103. A recent study shows that regulatory successes also can be obtained via well-placed contributions. *See* Edwards, *supra* note 90, at 30 (arguing that "campaign finance contributions . . . influence policy outcomes").

campaign finance reform measures.[104] In enacting these measures, proponents have made clear their desire to counter the concentration of power in the hands of the wealthy.[105] Such laws are almost always subject to vigorous challenge,[106] and while the ensuing analysis typically strikes certain themes, it often misses the larger constitutional point.

Since it was decided in 1976, *Buckley v. Valeo*[107] has been the beginning and end of the debate in virtually all analyses,[108] including the recent *McConnell* decision.[109] Ritualistic adherence to *Buckley* treats campaigns first and foremost as speech exercises. In *Buckley*, the Court held that campaign contributions and

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104. *See Local Campaign Finance Reform*, National Civic League, Feb. 2002, *at* http://www.ncl.org/npp/lcfr/inventory.html (last visited Mar. 12, 2005).

105. For example, the Colorado legislature declared: "[L]arge campaign contributions to political candidates allow wealthy contributors and special interest groups to exercise a disproportionate level of influence over the political process." COLO. REV. STAT. ANN. § 1-45-102 (West 2002); *see also* 1997 Vt. Acts, No. 64, §1, §1(a)(2) (finding that "[s]ome candidates and elected officials . . . respond . . . to contributors who make large contributions in preference to those who make small or no contributions."); SEATTLE, WASH., MUN. CODE §2.04.450(A) (1978); Seattle v. State, 668 P.2d 1266, 1274 (Wash. 1983) (stating that Seattle's public financing law is "clearly intended to express in general terms . . . that in the electoral process the public interest expressed through the ballot box should prevail over special and private interests"); Homans v. City of Albuquerque, 160 F. Supp. 2d 1266, 1273 (D.N.M. 2001) (noting that City sought to ensure "ordinary citizens, not just the very wealthy, can run for office in Albuquerque without having to receive large sums of money from special interest groups"). *See generally* DANIEL ORTIZ, THE FIRST AMENDMENT AT WORK: CONSTITUTIONAL RESTRICTIONS ON CAMPAIGN FINANCE REGULATION, CAMPAIGN FINANCE REFORM: A SOURCEBOOK (1997).

106. For a discussion of such challenges, see, e.g., Mark C. Alexander, *Campaign Finance Reform: Central Meaning and a New Approach*, 60 WASH. & LEE L. REV. 767, 821-23 (2003).

107. 424 U.S. 1 (1976).

108. *See, e.g.*, Kruse v. Cincinnati, 142 F.3d 907, 911 (6th Cir. 1998) ("Any judicial consideration of the constitutionality of campaign finance reform legislation must begin and usually ends with the comprehensive decision in *Buckley*."); *see also* Citizens for Responsible Gov't State Political Action Comm. v. Davidson, 236 F.3d 1174, 1186-87 (10th Cir. 2000); Right to Life of Mich., Inc. v. Miller, 23 F. Supp. 2d 766, 767 (W.D. Mich. 1998).

109. The majority opinion cited *Buckley* dozens of times, in nearly every paragraph of its analysis. The Court also tellingly observed:

> We are also mindful of the fact that in its lengthy deliberations leading to the enactment of BCRA, Congress properly relied on the recognition of its authority contained in *Buckley* and its progeny. Considerations of *stare decisis*, buttressed by the respect that the Legislative and Judicial Branches owe to one another, provide additional powerful reasons for adhering to the analysis of contribution limits that the Court has consistently followed since *Buckley* was decided.

McConnell v. Fed. Election Comm'n, 540 U.S. 93, 137 (2003). This is reminiscent of a famous line in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 844 (1992): "Liberty finds no refuge in a jurisprudence of doubt." Justice O'Connor is the only co-author in both of these opinions.

expenditures are core speech activities, deserving of First Amendment protection.[110] Because political speech is core First Amendment activity, strict scrutiny is required.[111] The Court famously held that even though political contributions could be seen as speech, they are distinguished from expenditures.[112] The *Buckley* Court held that the corrupting influence of money in politics could provide a sufficiently powerful justification for government regulation of contributions-as-speech,[113] but political expenditures could not be capped.[114] Unfortunately, the *Buckley* analysis treats campaigns as if they are pure debating exercises, in an almost theoretical market of ideas, rather than in the context of politics and the election of actual individuals to serve as representatives in government. And as a result, this paradigm ignores the questions presented and addressed in these pages. We should understand the egalitarian values of the Voting Cases as compelling governmental interests when engaging in *Buckley's* balancing act.

II. Vote Dilution, Concentration of Power, and One-Person, One-Vote

In the first half of the 1960s, the Supreme Court was often asked to rule on questions involving voting and political power in the United States.[115] The concentration of power today raises questions similar to those confronted in the 1960s. In the Voting Cases, aggrieved voters brought actions pursuant to the Equal Protection Clause of the Fourteenth Amendment. In resolving these matters, the Court not only interpreted the Fourteenth

110. *Buckley*, 424 U.S. at 14, 16-17, 19.

111. *Id.* at 16.

112. *Id.* at 21 ("A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support.").

113. *Id.* at 26-27 ("To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined."). The Court held that either actual corruption or the appearance thereof would provide a sufficiently compelling governmental interest to justify restrictions. *Id.* at 27.

114. *Id.* at 14, 16-17. The Court stated:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.

Id. at 19.

115. *See, e.g.*, *infra* notes 125-126 and accompanying text.

Amendment, it looked to several other constitutional sources: the Fifteenth and Nineteenth Amendments,[116] the general history and republican structure of government and its keystone, popular sovereignty, and the structure of the Constitution and the promise of Article I. The Court considered these various sources holistically and rejected the concentration of power that had resulted from malapportionment.[117] Specifically, the Court announced a one-person, one-vote rule, but there was much more than that. These Warren Court decisions fit within the greater context of a progressive Court in a progressive social era—the Second Reconstruction.[118] Through an integrated reading of the

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116. While the Twenty-fourth and Twenty-sixth Amendments also expand the right to vote, the Voting Cases were decided in the first half of the 1960s, before and contemporaneously with the adoption of those amendments. *See infra* note 156. The decisions consider only the Fifteenth, Seventeenth, and Nineteenth Amendments. *Id.*

117. One leading scholar also takes a holistic approach, considering the Fourteenth-Fifteenth Amendment connection:

> If the future of the [F]ifteenth [A]mendment is to be anything more than bleak, we must retreat from the brittle formalisms which have dictated that the political incorporation of racial minorities be treated as a question of neutrality to be achieved in the impossibly stacked game of one-person-one-vote competition suggested by the equality model of the [F]ourteenth [A]mendment.

Emma C. Jordan, *The Future of the Fifteenth Amendment*, 28 HOW. L.J. 541, 563 (1985).

118. In order to understand fully the vote dilution cases, we must also remember their context. These Warren Court cases were decided in the first half of the 1960s, in the midst of great societal change, during which time the Court had been speaking about the importance of political, social, and societal equality in other cases. While the Court sometimes discussed voting rights per se, it made clear the fundamental role of equality of citizenship in America. *Brown v. Board of Education,* for example, stressed the importance of education as "the very foundation of good citizenship." 347 U.S. 483, 493 (1954). The *Brown* Court observed that such fundamental training "must be made available to all on equal terms." *Id.* The Court interpreted the Fourteenth Amendment as encompassing certain rights which reflect the overriding importance of constitutional equality in cases like *Loving v. Virginia*, declaring Virginia's antimiscegenation statute unconstitutional. 388 U.S. 1, 12 (1967). Further, the Court in *Burton v. Wilmington Parking Authority* found that there was state action when a building in which a private restaurant was located was financed by public funds, and effectively sided with the sit-in protesters at lunch counters, providing an effective tool for affecting desegregation. 365 U.S. 715, 723-24 (1961). Also, the *Burton* decision pre-dates the Civil Rights Act of 1964, so the Court's ruling was particularly helpful, strategically speaking, to the civil rights movement. Thus, we find the vote dilution cases in the midst of a broader reconception of society and the Court in the 1960s. The era produced a wave of groundbreaking cases outside the Fourteenth Amendment context as well, notable in their broad declarations of the individual rights of Americans and collective responsibilities of American society. *See, e.g.,* Miranda v. Arizona, 384 U.S. 436, 444 (1966) (providing specific constitutional protections to criminal suspects subject to interrogation, under the Fifth Amendment); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (finding

text and the Amendments, the Justices found that the Constitution endorsed a principle of equality of political participation for all Americans. While not explicit in the text, unquestionably there is a national commitment to this vision of equality, located in the penumbras of the great document as amended.[119] This section will review the Voting Cases, followed by an in-depth discussion of the specific texts that supported the Court's decisions. The constant refrain is that because of a commitment to equality, the Constitution rejects the concentration of power in the hands of the few.

A. The Voting Cases: The Court Rejects Concentrated Electoral Power

The Court looked to many sources in resolving the Voting Cases. Its conception of political equality and its specific response to vote dilution grew out of various parts of the nation's history and the Constitution, including the Fourteenth Amendment's Equal Protection Clause, the Fifteenth and Nineteenth Amendments, and notions of representative government and popular sovereignty. In this section, I will discuss how each was interpreted to resolve the Voting Cases, and expand on the legal implications of each in further detail.

1. The Fourteenth Amendment and Equal Protection

First, these cases were brought under the Fourteenth Amendment's Equal Protection Clause, which provides its own statement of equality: government shall not "deny to any person within its jurisdiction the equal protection of the laws."[120] While other constitutional provisions addressed other voting questions,[121]

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privacy right in the "marital bedroom" to protect contraceptive use); N.Y. Times v. Sullivan, 376 U.S. 254, 270 (1964) (declaring, in the context of the First Amendment, a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

119. *See infra* notes 120-202 and accompanying text.

120. U.S. CONST. amend. XIV, § 2 ("Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state . . . ."). The Fourteenth Amendment provided its own political equalizer, as it eliminated the following three-fifths clause from Article I, Section 3:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

U.S. CONST. art. I, § 3.

121. *See, e.g.*, U.S. CONST. amend. XV; U.S. CONST. amend. XVII; U.S. CONST.

the Court found that the Equal Protection Clause encompassed an overarching demand for equality of participation in the political process.[122] In *Gray v. Sanders,* for example, the Court expounded:

> [A]ll who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be . . . . This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of "we the people" under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State . . . underlies many of our decisions.[123]

Similarly and most succinctly, in *Reynolds v. Sims* the Court held: "The Equal Protection Clause guarantees the opportunity for *equal participation by all voters* in the election of state legislators."[124] Having derived a principle of equal *participation* from within the Fourteenth Amendment, the question remained as to its application to the facts of the case.

Applying the theory to the reality of malapportionment in state governments, the Court spoke forcefully about the Constitution's rejection of diluted or concentrated power.[125] As political power was expanded for some and contracted for others, the Constitution was violated. The Court in *Wesberry v. Sanders* clearly stated the issue as follows: "The apportionment statute

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amend. XIX; U.S. CONST. amend. XXIV; U.S. CONST. amend. XXVI.

122. Jamin Raskin and John Bonifaz contend that "equal protection requires an inquiry into whether all citizens enjoy sufficient equality in the political field to participate meaningfully in public elections as voters, speakers, and candidates whenever they so desire." Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160, 1164 (1994) [hereinafter Raskin & Bonifaz, *Constitutional Imperative*].

123. 372 U.S. 368, 379-80 (1963). The Court continued: "The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions." *Id.* at 380.

124. 377 U.S. 533, 566 (1964) (emphasis added). The *Reynolds* Court also wrote:

> And the concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. With respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live.

Id. at 565.

125. The Court stated:

> We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living on other parts of the State.

Id. at 568.

thus contracts the value of some votes and expands that of others. If the Federal Constitution intends that when qualified voters elect members of Congress each vote be given as much weight as any other vote, then this statute cannot stand."[126] The Voting Cases thus established that the Fourteenth Amendment Equal Protection Clause demanded equality of representation and equality of participation in the selection of representatives.[127]

2. Interpreting the Voting Amendments

But the Court did not simply state that the Fourteenth Amendment demanded equality and that therefore one-person, one-vote would be the rule. The Court also drew upon the Voting Amendments in reaching its conclusions supporting principles of equality of political participation.[128] For example, in finding the

126. 376 U.S. 1, 7 (1964). The *Reynolds* Court wrote that "*Wesberry* clearly established that the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State." *Reynolds,* 377 U.S. at 560-61.

127. In *WMCA v. Lomenzo*, the Court reviewed New York State's method of election of state representative and district-drawing, and concluded:

> The result of applying this complicated apportionment formula is to give the populous counties markedly less senatorial representation, when compared with respective population figures, than the less populous counties .... Thus, a citizen in a less populous county had, under the 1953 apportionment, over 1.5 times the representation, on the average, of a citizen in a populous county, and, under the apportionment based on the 1960 census, this ratio will be about 1.7-to-1.

377 U.S. 633, 644 (1964). The Court continued:

> Further, under a proposed formula and the 1960 census figures, the problem would have remained: under the current apportionment, applying 1960 census figures, the citizen population-variance ratio between the most populous and least populous Assembly districts is about 21-to-1, and a similar ratio in the Senate is about 3.9-to-1. If the Assembly were reapportioned under the existing constitutional formulas, the most populous Assembly district would have about 12.7 times as many citizens as the least populous one, and a similar ratio in the Senate would be about 2.6-to-1.

Id. at 648. Echoing previous case law and offering very little further reasoning, the Court held that "[h]owever complicated or sophisticated an apportionment scheme might be, it cannot, consistent with the Equal Protection Clause, result in a significant undervaluation of the weight of the votes of certain of a State's citizens merely because of where they happen to reside." *Id.* at 654. The case was decided on the same day as *Reynolds* and *Lucas v. Forty-fourth General Assembly of Colorado,* thus providing hundreds of pages of reasoning in the varying opinions, concurrences, and dissents.

128. The Court relied most heavily on the Fifteenth and Nineteenth Amendments, and on the Seventeenth Amendment to a lesser extent. *See Gray,* 372 U.S. at 371, 381. The Twenty-fourth Amendment was, in effect, contemporaneous with these decisions, having passed the Congress on August 27, 1962 and having been ratified by the State on January 23, 1964. The Twenty-sixth

Georgia "county unit" system unconstitutional in *Gray v. Sanders*,[129] the Court specifically noted that the Fifteenth and Nineteenth Amendments command voting equality and superimposed the same value on its own analysis under the Fourteenth Amendment:

> The Fifteenth Amendment prohibits a State from denying or abridging a Negro's right to vote. The Nineteenth Amendment does the same for women. If a State in a statewide election weighted the male vote more heavily than the female vote or the white vote more heavily than the Negro vote, none could successfully contend that that discrimination was allowable. How then can one person be given twice or ten times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county?[130]

The Court responded with a broad, sweeping statement, arguably one of political philosophy, drawing heavily on historical texts and the Voting Amendments. The Court held, "[t]he conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."[131]

Nowhere in the text of those Amendments do we find the phrases "political equality" or "one person, one vote."[132] Neither do the Declaration of Independence or the Gettysburg Address contain those terms.[133] The Court was declaring that there was an *implicit* message in these texts, in these amendments, and above all, in the political and constitutional history of the United States of America.[134] That history and tradition embodied the principle of

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Amendment was passed and ratified in 1971, after these decisions. *See* THE CONSTITUTION OF AMERICA ANALYSIS AND INTERPRETATION 41 n.16, 43 n.18 (George A. Costello et al. eds., 1996).

129. *Gray*, 372 U.S. at 371, 381; *see supra* Part I.A.1.

130. *Gray*, 372 U.S. at 379.

131. *Id.* at 381.

132. *See* U.S. CONST. amend. XV; U.S. CONST. amend. XVII; U.S. CONST. amend. XIX.

133. Among the phrases in the Gettysburg address that may have been most relevant are first, the reaffirmation of "the proposition that all men are created equal" and the conclusion "that government of the people, by the people, for the people, shall not perish from this earth." Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), *reprinted in* 12 WEST'S ENCYCLOPEDIA OF AMERICAN LAW 470 (2d ed. 2005). The Declaration of Independence famously states: "We hold these Truths to be self-evident, that all men are created equal." THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

134. The *Reynolds* Court also favorably cited *Gray's* interpretation of the Fifteenth, Seventeenth, and Nineteenth Amendments. Reynolds v. Sims, 377 U.S. 533, 558 (1964).

political equality, which translated into a rule of one-person, one-vote.[135] Thus, the Equal Protection Clause and the Voting Amendments embraced political equality and rejected the dilution of political power.

3. The Nature of the Republic and Popular Sovereignty

In addition to the Fourteenth Amendment and the Voting Amendments, the Court discussed the fundamental nature of American government itself. Again, it found a commitment to equality of political participation. For example, the complaint in *Wesberry* alleged that voters were deprived of the full benefit of their right to vote, in violation of Article I, Section 2, of the Constitution.[136] Accordingly, the Court carefully considered the nature of representative government, specifically as reflected in the choice of a republic and in the manner of selection of members of the Legislative Branch. The Court considered how to apply principles of representative government, as reflected in the Constitution, to the problem of concentrated and diluted power that resulted from malapportionment:

> We hold that, construed in its historical context, the command of Art. I, § 2, that Representatives be chosen "by the People of the several States" means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's .... To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected "by the People," a principle tenaciously fought for and established at the Constitutional Convention. [137]

Because of this analysis of American democracy, and its focus on "complete equality,"[138] the Court struck down Georgia's plan.[139]

In *Reynolds v. Sims*,[140] the Court also drew upon the theory of representative government, specifically as reflected in Article I, for guidance. Chief Justice Warren started with a declaration of

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135. The *Reynolds* Court linked the Voting Amendments as a sign of general expansion of rights to civil rights legislation passed in 1957 and 1960. *Id.* at 555 ("And history has seen a continuing expansion of the scope of the right of suffrage in this country.").

136. Wesberry v. Sanders, 376 U.S. 1, 3 (1964); *see also* U.S. CONST. art. I, § 2 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States ...."); *supra* Part I.A.2.

137. *Wesberry*, 376 U.S. at 7-8. Arguably, after adoption of the Seventeenth Amendment, the same statement can be made about the Senate.

138. *Id.* at 14.

139. *Id.* at 8-9; *see also supra* note 28 and accompanying text.

140. *See supra* Part I.A.3; *see also supra* note 30 and accompanying text.

political-governmental theory: "The right to vote freely for the candidate of one's choice is of the essence in a democratic society, and any restrictions on that right strike at the heart of representative government."[141] The Court connected popular sovereignty and representative government, again stressing the centrality of equality of participation in the political process.[142] Voting, the specific question before the Court, was emblematic of this equality, but the Court's words speak to an even broader importance of equality of political participation:

> [R]epresentative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them. Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature. Modern and viable state government needs, and the Constitution demands, no less.[143]

On the specific facts, therefore, the Court articulated the one-person, one-vote rule.[144] But by employing phrases like "inalienable right to full and effective participation in the political processes"[145] and "equally effective voice,"[146] the opinion declared an even broader notion of equality, growing from the political-theoretical roots of American representative government. Thus the Court stressed themes of political equality in its Voting Case opinions.[147]

Taken as a whole, these cases represent a political

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141. Reynolds v. Sims, 377 U.S. 533, 555 (1964); *see also id.* ("And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.").

142. *Id.* at 561-62.

143. *Id.* at 565.

144. The *Reynolds* court heavily emphasized the path that had been worn in the previous terms, but it was required to take another step, to announce the controlling standards for implementation. *Id.* at 559 ("Of course, in these cases we are faced with the problem not presented in *Gray*—that of determining the basic standards and stating the applicable guidelines for implementing our decision in *Baker v. Carr*."); *see also id.* at 557-58, 568-69 (emphasizing the importance of political equality and past judicial support in *Gray* and *Baker*).

145. *Id.* at 565.

146. *Id.*

147. Along these lines, recall that the *Gray* Court wrote "[t]he concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications." Gray v. Sanders, 372 U.S. 368, 379-80 (1963).

reconstruction, as the Court announced a philosophy of equality of participation in political processes.[148] The Court rejected the concentration of power in the hands of the few and the concomitant dilution of the power of the many. On the facts, it announced specific holdings and rules collectively known as the one-person, one-vote rule,[149] but indeed the Court was undertaking so much more.[150] The Court was asked to interpret the Fourteenth Amendment in the context of malapportionment and vote dilution, and it consistently responded with one theme: equality.[151] However, it was not just equality derived from the language of the

148. This generated criticism, both on the Court and off. *See generally* Philip B. Kurland, *Foreword: Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government*, 78 HARV. L. REV. 143 (1964); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); *cf.* Charles L. Black, Jr., *The Lawfulness of the Segregation Decision*, 69 YALE L.J. 421 (1960); Louis Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959). But the Justices did not just pull this idea out of thin air. While some objected to broad philosophical statements outside the exact letter of the law or Constitution, the Court properly identified the thread that ran throughout so many of the core declarations about the right to vote. That was a principle of equality, and in the 1960s cases, the Court explicitly turned to the Equal Protection Clause and its mandate of equality, while also paying homage to a long history of equality in the voting context. Dissenting voices complained most strenuously about a lack of roots, charging that the majority improperly was making a broad political statement, not rendering justice based on a strict reading of the Constitution and its Amendments. Most typically, Justice Stewart's *Lucas* dissent to "[t]he Court's draconian pronouncement" lamented, "what the Court has done is to convert a particular political philosophy into a constitutional rule." Lucas v. Forty-fourth Gen. Assembly of Colo., 377 U.S. 713, 746, 748 (1964) (Stewart, J., dissenting). Indeed, as the series of apportionment cases rolled forward, they reflected the Warren Court's broad assault on prior judicial approaches. As discussed earlier, during this era the Court aggressively attacked social problems and painted with a broader political and philosophical brush than many had been used to. *See supra* note 118 and accompanying text. And along with that came charges that the Court was overstepping its bounds, for example in landmark cases like *Brown v. Board of Education*, 347 U.S. 483 (1954). There, the Court pointedly looked forward, noting that "[i]n approaching this problem, we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation." *Id.* at 492-93. And the Court spoke of law, politics, and philosophy: "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." *Id.* at 495.

149. *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 852-57 (2d ed. 2002).

150. One author effectively "argues that a direct role for courts in reviewing and, indeed, in defining the nature of the protection afforded under the [F]ifteenth [A]mendment is supportable." Jordan, *supra* note 117, at 545.

151. *See* Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1392 (1994) ("The 'one person-one vote' rule exemplifies the commitment to political equality.").

Equal Protection Clause. The Court read a mandate of equality of participation in the political process from within the Fifteenth, Seventeenth,[152] and Nineteenth Amendments. It also made clear that the structure of American government was centered upon a promise of popular sovereignty and representative democracy that demanded equality. The next two sections will further elucidate the Court's reasoning.

B. Voting and Political Equality in the Amendments

Even though the Congress, as created, reflected popular sovereignty, there still were many features of American government that could be called elitist. The anti-egalitarian nature of the Constitution was clear, in large part because the document itself excluded so many from participation in the political process. Originally, the power of political participation—the power to rule—was placed in the hands of the few: white, male, propertied citizens held the power.[153] But through the

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152. The Seventeenth Amendment did not expand the protection of the vote in such a grand fashion as did the Fifteenth and Nineteenth Amendments, but it made a very important statement about the vote that had an impact on even more people than those other two sweeping changes. "The Senate of the United States shall be composed of two Senators from each State, *elected by the people* thereof . . . ." U.S. CONST. amend. XVII (emphasis added). It was passed by Congress on May 13, 1912 and ratified on April 8, 1913. The Amendment modified Article I, Section 3, which read: "The Senate of the United States shall be composed of two Senators from each State, *chosen by the Legislature* thereof for six Years; and each Senator shall have one vote." U.S. CONST. Art. I, § 3 (emphasis added). By providing for the direct election of Senators, the Seventeenth Amendment provided every American voter with an additional opportunity to exercise the franchise. (Seven years passed before women enjoyed this benefit upon the ratification of the Nineteenth Amendment in 1920.) And in doing so, it brought the upper chamber closer to the people and made its members directly responsive to the people. The Seventeenth Amendment thus spoke volumes about equality by changing the structure of the Constitution and the Senate to allow the people's vote to determine the composition of not only the House, but the Senate as well.

153. The definition of the individual participant in the political process has expanded, so that far more people can vote today than when the Constitution was ratified. The founding-era idea of a white, male, freeholder as voter does not comport with the modern day notion. One commentator has observed:

> If one were to equate "the People" in the newly-created American republic with those persons who actually voted for their representatives in state legislatures and Congress, the source of sovereign power in the new nation was not widely dispersed. Women did not vote. Most blacks did not vote. In most states eligibility for suffrage was conditioned on the possession of freehold land . . . or the possession of other property valued over a certain amount. Although these suffrage conditions broke down over time, for a good portion of the nineteenth century they had the effect of limiting the suffrage to freehold-owning white males.

G. Edward White, *Reading the Guarantee Clause*, 65 U. COLO. L. REV. 787, 796 (1994). As we will see, the Fifteenth Amendment, prohibiting denial of the vote

Amendment process, that power and right has been changed, perhaps more than any other, and the importance of the vote has grown and become more clearly enmeshed in the fabric of the great document. This expansion reflects not only the importance of the vote itself[154] but also a principle of equality. Taken as a whole, the Voting Amendments reflect the nation's desire to bring more people, as participants, into the political-governmental process.[155] In examining this doctrinal development in greater depth, we will see that it reflects principles of equality and popular sovereignty, as well as a growing conception of broader political participation for the many, as opposed to concentrating power in the hands of the few. We now consider the Fifteenth and Nineteenth Amendments.[156]

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based on race or previous condition of servitude, erased one of the exclusive aspects of the original constitutional scheme. *See* U.S. CONST. amend. XV. The Nineteenth Amendment brought in the excluded half of the country by extending the vote to women. *See* U.S. CONST. amend. XIX. The Twenty-fourth Amendment stripped the class-based aspects of the former exclusivity, by prohibiting poll taxes. *See* U.S. CONST. amend. XXIV. This principle was extended to the states in a series of Supreme Court decisions. *See* Phoenix v. Kolodziejski, 399 U.S 204 (1970); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969); Cipriano v. Houma, 395 U.S. 701 (1969); Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966). The Twenty-sixth Amendment effectively brought down the voting age, to include eighteen year-olds in the political process. *See* U.S. CONST. amend. XXVI. These fundamental alterations to the nation's governing document reflect the consensus, now enshrined in the Constitution, that almost all Americans should be extended the right to vote.

154. *See* Wesberry v. Sanders, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.").

155. Other scholars have also seen these amendments as related. *See, e.g.*, Edward Hartnett, *A "Uniform and Entire" Constitution; Or, What if Madison Had Won?* 15 CONST. COMMENT. 251, 276 (1998) ("The Fifteenth, Nineteenth, Twenty-fourth, and Twenty-sixth Amendments each expand the franchise by eliminating a traditional basis for denying people the ability to participate in political life: race, sex, poverty, and youth. They belong together, and a Madisonian approach to the process of constitutional amendment would put them together.").

156. While this Article focuses on the Fifteenth and Nineteenth Amendments, the Twenty-fourth and Twenty-sixth Amendments also extended equality principles and shed further light on our discussion. While the Fifteenth Amendment had so broadly expanded the right to vote for African Americans, the vote did not flow freely to its prime intended beneficiaries. *See, e.g.*, Jordan, *supra* note 117, at 563 (noting, in the Fifteenth Amendment context, the "unavoidably political setting for insuring effective political participation by racial minorities who have been discouraged, by violence, oppression, and economic duress, from entering the political life of the country," and a "history of prior racial violence and torture" to stop full enforcement of the Amendment). The poll tax stood as one clear obstacle to preventing achievement of full political equality, most notably employed in the South as a way to keep low income African Americans from voting. *See* Ronnie L. Podolefsky, *The Illusion of Suffrage: Female Voting Rights and the Women's Poll Tax Repeal Movement After the Nineteenth Amendment*, 7 COLUM. J.

1. The Fifteenth Amendment

The Fifteenth Amendment embraces the importance of equality of participation in American society, as represented in the vote. Most simply, the Fifteenth Amendment can be seen as a federal constitutional guarantee of the right to vote to newly freed slaves who had been denied the franchise when the Constitution was ratified in 1789.[157] After the Civil War and the Emancipation Proclamation, slavery was abolished.[158] But that is too simple and incomplete—it took constitutional amendment to complete the sweeping change in the nation's fundamental structure, as detailed in its governing document.[159] Thus, the Thirteenth Amendment abolished slavery.[160] The Fourteenth Amendment declared equality of rights for all Americans.[161] And the Fifteenth

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GENDER & L. 185, 191 (1998). In the midst of a broad national movement for civil rights in the 1960s, Congress passed the Twenty-fourth Amendment abolishing poll taxes in national elections in the summer of 1962, and it was ratified in 1964. The abolition of the poll tax advanced the political equality sought by the removal of income or wealth class from the ballot box. While the Twenty-fourth Amendment applied to federal elections, a series of cases applied the Equal Protection Clause to extend the prohibition to state elections. See cases noted *supra* note 153. In 1971, the Twenty-sixth Amendment effectively lowered the voting age from 21 to 18. *See* U.S. CONST. amend. XXVI. The amendment passed the Congress on March 23, 1971 and was ratified by the States on July 1, 1971. No other amendment has moved as quickly from congressional passage to ratification. The main argument for this amendment was that if an eighteen year-old could be drafted, fight, and possibly die for his country, he ought to be able to vote for those who run it. RICHARD C. REMY, UNITED STATES GOVERNMENT: DEMOCRACY IN ACTION 273 (104th Cong. ed., 1996); *see also* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1164 n.152 (1991) [hereinafter Amar, *Bill of Rights*] ("Even more recently, the Twenty-Sixth Amendment extending the franchise to eighteen-year-olds grew out of the perceived unfairness of any gap between the Vietnam draft age and the voting age.").

157. At that time, 10 percent of the population of the United States was African American, most of whom were enslaved and had little to no political voice. REMY, *supra* note 156, at 271.

158. The Emancipation Proclamation, issued in preliminary form on September 22, 1862, went into effect on January 1, 1863. Emancipation Proclamation (issued Sept. 22, 1862), *reprinted in* 12 WEST'S ENCYCLOPEDIA OF AMERICAN LAW 307 (2d ed. 2005).

159. *See generally* Xi Wang, *Black Suffrage and the Redefinition of American Freedom, 1860-1870*, 17 CARDOZO L. REV. 2153, 2153 (1996) ("One of the most important outcomes of the Civil War was the establishment of a new constitutional order.").

160. U.S. CONST. amend. XIII ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

161. U.S. CONST. amend. XIV (providing, in part, that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws").

Amendment prohibited the deprivation of the right to vote "on account of race, color, or previous condition of servitude."[162] As a sweeping statement of political equality, the Fifteenth Amendment could be said to be the most important of the Civil War Amendments.[163] It marked the end of one long period of struggle[164] for social equality which was rewarded and verified by the constitutional grant of a key political equality.

First, the amendment speaks symbolically to the past to refute the original position of the African-American vote and ratifies the results of the Civil War. The Great Compromise, in establishing the Constitution and the nation, resulted, even in the face of unity, in a north-south divide over the issue of slavery and states' rights.[165] The division never truly disappeared,[166] and after

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162. U.S. CONST. amend. XV.

163. *See* Wang, *supra* note 159, at 2153 ("Of the three amendments, the Fifteenth Amendment was the most revolutionary product of Reconstruction politics. By conferring on black Americans the right to vote, an essential right enabling a citizen to be politically accountable in a democracy, the amendment redefined the meaning of American freedom and democracy.").

164. The struggle predates the formation of the United States of America, and was in some ways memorialized in the Constitution.

165. *See generally* U.S. CONST., art. I, § 2, cl. 3. *See also* PAUL BOYER, TODD & CURTI'S THE AMERICAN NATION 147 (1995) ("This Great Compromise granted each state, regardless of size, an equal voice in the upper house. In the lower house, representation would be according to population."); Bruce A. Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 7-13 (1999) (providing an interesting discussion of "The Tainted Origins of the 'Direct Tax' Clauses," connecting it to the Great Compromise); Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39, 68-69 (1991) ("[R]ace and slavery, although never explicitly mentioned [in the original Constitution], cemented the Great Compromise between the Southern slave-holding states and the Northern states together like a bloody glue."); James E. Viator, *Give Me that Old-Time Historiography: Charles Beard and the Study of the Constitution Part II*, 43 LOY. L. REV. 311, 336 n.125 (1997) (discussing legal history and the contributions of Charles Beard and in particular, providing an interesting note on scholarly interpretation and debate over the Great Compromise).

166. For example, the debates over the admission of new states constantly included questions of which states were to be free states and which were to be slave states. The Missouri Compromise, in 1819, was intended to resolve this conflict. By virtue of the Compromise, Congress admitted Missouri as a slave state but prohibited slavery north of the 36,30' latitude. Act of Mar. 6, 1820, ch. 23, § 8, 3 Stat. 545, 548. But *Dred Scott v. Sanford* held that slaves were considered "as a subordinate and inferior class of beings, who had been subjugated to the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them." 60 U.S. (19 How.) 393, 404-05 (1856). The Court further declared the Missouri Compromise unconstitutional. *Id.* While the Court might have thought it was making a final declaration on the matter, this decision became the focal point in the debate over slavery, and in turn a precipitating factor in the Civil War. *See generally* CHEMERINSKY, *supra* note 149, at 666-67.

75 years, the nation was at war with itself. With President Lincoln's Emancipation Proclamation, the Gettysburg Address, and ultimately, the Union triumph on the battlefields, the abolitionist position prevailed. The Thirteenth, Fourteenth, and Fifteenth Amendments affirmed the change, effectively refuting the original constitutional position on slavery and African-American (in)equality.[167]

Second, the Fifteenth Amendment may also be seen in instrumental terms, as a tool to help AfricanAmericans achieve even greater long-term success politically. "Black suffrage was the most important issue at the National Convention of Colored Men held in Syracuse, New York in October 1864. [Frederick] Douglass and other black leaders welcomed the proposed Thirteenth Amendment, but they warned that without the right to vote, blacks could not permanently maintain their freedom."[168] And indeed, as the States granted blacks the right to vote,[169] these new voters used it to their political advantage, for example, in winning ratification of the Fourteenth Amendment.[170] Instrumentally, the Fifteenth Amendment advanced political equality.[171]

In a different instrumental sense, the Fifteenth Amendment was a political tool for Radical Republicans who wanted to cement their power.[172] "For them, the most effective means by which to

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167. "The idea of equality as pronounced by the Declaration of Independence was the main ideological source for Reconstruction politics, and the Civil War and Emancipation had generated enormous dynamics for materializing that idea." Wang, *supra* note 159, at 2222.

168. *Id.* at 2171.

169. The First Reconstruction Act statutorily mandated the right to vote for African Americans. Act of Mar. 2, 1867, ch. 153, § 6, 14 Stat. 428, 429. But a statutory grant—by whatever authority—of the vote to African Americans was limited; without a constitutional guarantee, the vote could easily be taken away.

170. *See* Wang, *supra* note 159, at 2213 ("Blacks constituted a majority in Mississippi, South Carolina, Louisiana, Alabama, and Florida. It was the solid black votes that secured the Southern ratification of the Fourteenth Amendment, and other congressional conditions.").

171. Emma Coleman Jordan provides a useful perspective on the way in which the Fifteenth Amendment speaks instrumentally to power. *See* Jordan, *supra* note 117, at 562. Jordan writes:

> True equality of political participation can best be achieved by preserving meaningful access for racial and ethnic minorities. In fact, one group of political scientists have [sic] recognized that the political incorporation of minorities will be achieved if: excluded groups move toward political equality: [by achieving three goals] 1. 'They must get elected.' 2. 'They must become part of a coalition.' 3. 'The coalition must be dominant.'

Id.

172. Founded in the early 1850s, the Republican Party became a national party only in 1856; thus, establishing a power base was no small task. *See The Republican Party—GOP History*, The Republican National Committee, *at*

safeguard the results of the war was to turn the military power that black soldiers possessed during the war into a political muscle in the postwar period."[173] Newly-freed slaves were seen as a treasure trove of such votes. "It became clear that black votes were crucial to Grant's [1868] election. He won a plurality of only about 300,000 in the election at which an estimated 500,000 blacks cast their votes for the Republicans."[174] African-American suffrage was used as a tool to benefit Republicans, but it was more than shrewd Republican politics, it was also African-American political empowerment. In addition, by adding hundreds of thousands of voters immediately, and millions more in the years to come, the Fifteenth Amendment provided federal protection of the right to vote and diluted the concentrated power that had rested in virtually all white hands, redistributing it so as to include African Americans.

Finally and most importantly, the Fifteenth Amendment speaks to the need to ensure equality of participation in political life in the United States.[175] For example, as Congress debated voting rights as part of full emancipation and freedom, one member argued: "We have attempted to set up and maintain a government upon the doctrine of the equality of man, the universal right of all to participate in the Government. In accordance with that theory we must accept the ballot upon the principle of equality."[176] Historian Wang Xi has thoroughly examined the amendment's roots and concluded: "This Amendment

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http://www.rnc.org/gopinfo/history/default.aspx (last visited Feb. 8, 2005).

173. Wang, *supra* note 159, at 2175. The military service-citizenship-voting link is found elsewhere. Akhil Reed Amar has insightfully demonstrated a consistent pattern linking military service (and other indicia of full participation in American life) and voting rights, which coincides with this Article's attempt to view common themes in the Voting Amendments. *See* Akhil Reed Amar, *The Supreme Court 1999 Term, Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 128 (2000) [hereinafter Amar, *Supreme Court 1999*]. Amar writes:

> Later Amendments tighten the linkage between military service and voting as paired political rights. Thus, Section 2 of the Fourteenth Amendment defines a state's presumptive electorate in a fashion roughly akin to its militia base of adult males; the Fifteenth Amendment confers suffrage on black men in part as a reward for their military service in the Civil War; and the Twenty-Sixth Amendment gives those old enough to fight the right to vote, too.

Id.

174. Wang, *supra* note 159, at 2215.

175. *Id.* at 2222 ("The idea of equality as pronounced by the Declaration of Independence was the main ideological source for Reconstruction politics, and the Civil War and Emancipation had generated enormous dynamics for materializing that idea.").

176. CONG. GLOBE, 39th Cong., 1st Sess. 309 (1866).

constitutionally recognized the principle of political equality between black and white male Americans. . . . More importantly, the Amendment added new substance to the meaning of American freedom."[177] The additional substance is equality, encompassing more than just the actual vote itself. Legal scholars offer similar perspectives. Akhil Reed Amar persuasively argues that "the promise of the Fifteenth Amendment [is] that Americans of different races must come together—at the polls, in the legislature, on the jury—as democratic equals in self-government."[178] The Fifteenth Amendment incorporates values that lie at the core of representative democracy, and this is where the Constitution begins to speak explicitly about those values. Emma Coleman Jordan posits that "the [F]ifteenth [A]mendment is the primary repository of the constitutional value of preserving the political access and participation of blacks and other racial minorities."[179] Thus understood, the Fifteenth Amendment was designed not only to help newly-freed slaves participate equally in the American political-governmental sphere, but also to declare broader principles of political equality.

In these various ways the Fifteenth Amendment speaks to political equality and reflects and reinforces the Court's pronouncements in the Voting Cases.[180]

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177. Wang, *supra* note 159, at 2221-22.

178. Amar, *Supreme Court 1999, supra* note 173, at 63. Elsewhere, he has argued

> that the best interpretation of the Fifteenth Amendment would read it as encompassing a cluster of political rights; the Amendment protects not only the right to vote, but also the right to hold office, the right to be voted for, the right to vote in a legislature, the right to serve on a jury, and even the right to serve in the military.

Akhil Reed Amar, *The Fifteenth Amendment and "Political Rights,"* 17 CARDOZO L. REV. 2225, 2225 (1996).

179. Jordan, *supra* note 117, at 561-62.

180. Even with these lofty goals, the Fifteenth Amendment only marked a new chapter, and certainly not the end in the struggle for political equality, as blacks were consistently denied the vote for another century, until the Voting Rights Act interceded to protect the right with the imprimatur of the federal government. *See* Wang, *supra* note 159, at 2223 ("The compromises continued after black suffrage was memorialized in the Constitution. Thus, while black American males were proclaimed equal voters, the battle to maintain and effectuate their voting rights had just begun."). We must be realistic in ascribing absolute power to the Fifteenth Amendment as an insurer and supporter of political equality. Emma Coleman Jordan writes:

> [V]iewed from the historical vantage point of the [F]ifteenth [A]mendment, minority electoral participation is different. The difference is in the unavoidably political setting for insuring effective political participation by racial minorities who have been discouraged, by violence, oppression, and economic duress, from entering the political life of the country with any real expectation of success. Therefore, we cannot ignore the history of

2. The Nineteenth Amendment

After the Fifteenth Amendment, political power remained largely concentrated in the hands of men. A long time coming, the Nineteenth Amendment addressed this problem.[181] I suggest several ways to understand the Nineteenth Amendment, contributing ultimately to the broad call for political equality embodied in the Voting Amendments.[182]

In its most straightforward sense, the Nineteenth Amendment, by prohibiting the denial of the vote on the basis of sex, can be seen as a limited declaration of equality between the sexes.[183] Women, who were citizens in other respects,[184] were not deemed as equals. The Nineteenth Amendment as an attack on inequality[185] was geared toward achieving a particularly important

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> prior racial violence and torture, which, although perhaps not in the nature of original sin, is surely entitled to be taken into account in adjusting the rights and opportunities of racial and ethnic minority citizens.

Jordan, *supra* note 117, at 563. While this statement speaks of disappointment, it also reflects the fact that the Fifteenth Amendment marked a beginning.

181. *See* U.S. CONST. amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.").

182. Not only do I suggest multiple meanings at this point in time, but also that the vote had no single meaning to the suffragists. As Aileen Kraditor states: "The woman suffrage movement had no official ideology. Its members and leaders held every conceivable view of current events and represented every philosophical position." Aileen Kraditor, *quoted in* Sarah B. Lawsky, *A Nineteenth Amendment Defense of the Violence Against Women Act*, 109 YALE L.J. 783, 787-88 (2000).

183. The Equal Rights Amendment was passed by the Congress and ratified by 35 states, but not the requisite 38, so it was not adopted. It provided: "Equality of Rights under the law shall not be denied or abridged by the United States or any state on account of sex." *Equal Rights Amendment: Hearing on S. J. Res. 61 Before a Subcomm. of the Comm. on the Judiciary*, 79th Cong. 1 (1945). The Canadian Constitution notably has a fuller declaration of equal rights for men and women: "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons." CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 28.

184. *See* Minor v. Happersett, 88 U.S. 162, 162 (1874) ("In that sense, women, born of citizen parents within the jurisdiction of the United States, have always been considered citizens of the United States, as much so before the adoption of the [F]ourteenth [A]mendment to the Constitution as since."). *Id.*

185. Reva Siegel writes, "suffragists also attacked status inequality directly." Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 990 (2002). She continues:

> [F]ollowing the traditions of the antislavery movement, [suffragists] often used the language of the American Constitution to do so. Male suffrage, Susan B. Anthony bluntly explained to the House Judiciary Committee in 1880, "establishes between the sexes that hateful thing of inequality; . . . it makes all men sovereigns and all women subjects; . . . it makes all men, politically, superiors and all women inferiors" and inflicts "not only political degradation, but . . . also social, moral, and industrial

measure of equality, "not only as a means to improve women's lives, but also because it would symbolize recognition of women's 'equal personal rights and equal political privileges with all other citizens.'"[186] It reflected the changing conception of who was to be a full member of society, with rights of participation in the political process. As one member of Congress urged:

> In the past the restriction of the right of suffrage to the male population was not contrary to democratic philosophy, because under the old order of civilization women derived their social status from their men and were economically dependent upon them.
>
> For the past half century a change in this regard has been taking place in the social structure, particularly in the last generation . . . . This status by women having been achieved, participation in political affairs is a necessary corollary.[187]

This evolving conception of equality operated to increase participation in politics and government.

The Nineteenth Amendment can also be seen as a means to spread political power more evenly. As the Fifteenth Amendment had challenged—and changed—the concentration of political power in white hands, the Nineteenth Amendment attacked the concentration of power in the hands of men. Women had been denied the vote, in large part based on arguments that their husbands served their interests at the ballot box.[188] Thus

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degradation" on women.

Id.

186. Jennifer K. Brown, *The Nineteenth Amendment and Women's Equality*, 102 YALE L.J. 2175, 2178 (1993). Brown continues: "As the first right of a citizen, suffrage *meant* citizenship; it was the very substance of self-government." *Id.* Another author writes, "[t]o justify women's suffrage both women and men asserted the equality of the sexes." Jacob Katz Cogan, *The Look Within: Property, Capacity, and Suffrage in Nineteenth Century America*, 107 YALE L.J. 473, 487 (1997) (citing examples from the Massachusetts and Ohio constitutional conventions in the 1850s).

187. 56 CONG. REC. 788 (1918) (statement of Rep. Lehlbach); *see also* Siegel, *supra* note 185, at 1007 ("[D]ramatic changes in the ways Americans understood women's position in the family in turn produced changes in the common sense application of democratic principles to the question of their voting.").

188. Fathers and brothers and even sons also performed this function. This argument was pressed for many decades. *See* CONG. GLOBE, 39th Cong., 1st Sess. 3035 (1866) (statement of Sen. Henderson) ("[The ballot] is not given to the woman, because it is not needed for her security. Her interests are best protected by father, husband, and brother."); CONG. GLOBE, 39th Cong., 1st Sess. 2962 (1866) (statement of Sen. Poland) ("The theory is that the fathers, husbands, brothers, and sons to whom the right of suffrage is given will in its exercise be as watchful of the rights and interests of their wives, sisters, and children who do not vote as of their own."); CONG. GLOBE, 38th Cong., 1st Sess. 2243 (1864) (statement of Sen. Howe) ("I am willing to deprive those who are not males of the right of suffrage, because they exercise it by proxy, as we all know. Females send their votes to the ballot-box

understood, denial of the franchise was more complex than was readily apparent, by directly taking the power of the vote—the power of political participation—from one set of hands and vesting it in others.[189] But such concentration was challenged[190]—and changed—by adding the formerly excluded half of the population to the voter rolls.

The attack on the concentration of power in male hands also ties in with the preservation of the central principles of self-government and popular sovereignty.[191] Men "representing" women in this fashion violated sacrosanct principles of popular sovereignty, as power was concentrated in the hands of less than half of the nation's citizens, so self-governance was a mere shibboleth.[192] The Nineteenth Amendment embraced the notion that political power should be entrusted to the hands of the many, not concentrated in the hands of the few.[193] Thus, not only was

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by their husbands or other male friends."). *But see* CONG. GLOBE, 39th Cong., 2d Sess. 57 (1866) (statement of Sen. Cowan) ("I know it has been said that the woman is represented by her husband, represented by the male; and yet we know how she has been represented by her husband in by-gone times; we know how she is represented by her barbarian husband"); CONG. GLOBE, 39th Cong., 2d Sess. 55 (1866) (statement of Sen. Anthony) ("Nor is it a fair statement of the case to say that the man represents the woman in the exercise of suffrage, because it is an assumption on the part of the man; it is an involuntary representation so far as the woman is concerned."). Plus, during the debate on the Nineteenth Amendment, one member of Congress argued: "The suggestion has been made here to-day that woman has only to rely upon the stalwart oak that stands beside her and have faith in the chivalry of men. The record of this country and the record of the world does not sustain that doctrine." 52 CONG. REC. 1437 (1915) (statement of Rep. Bryan). *See generally* Lawsky, *supra* note 182, at 791; Siegel, *supra* note 185, at 986.

189. Women were deemed to have a role of daughter, wife, and mother, all within the confines of domestic life, but not outside. Jacob Cogan suggests that anti-suffragists in the nineteenth century "assert[ed] that women and men had different capacities: one public and political, the other private and familial." Cogan, *supra* note 186, at 489.

190. *See, e.g.*, CONG. GLOBE, 40th Cong., 3d Sess. 710 (1869) (statement of Sen. Pomeroy) ("Do not tell me that the rights of one class of citizens are safe in the hands of another, that the men will take care of the rights of the women.").

191. *See* Siegel, *supra* note 185, at 990 ("In using the language of 'self-sovereignty' and 'self-government,' the woman's rights movement quite consciously employed American traditions of individualism to challenge relations of gender status.").

192. This phrase is borrowed from Justice Thurgood Marshall, who used it in the First Amendment context: "When there are no effective means of communication, free speech is a mere shibboleth. I believe that the First Amendment requires it to be a reality." Lloyd Corp. v. Tanner, 407 U.S. 551, 586 (1972) (Marshall, J., dissenting).

193. *See* 52 CONG. REC. 1418 (1915) (statement of Rep. Lafferty) ("The ultrarich, feeling that the power of the ballot is a menace to them in the hands of only half the population, very naturally oppose its extension to the other half."); CONG. GLOBE, 39th Cong., 1st Sess. 3035 (1866) (statement of Sen. Henderson) ("It is only where political power is in the hands of a favored few that oppression can be

concentration of power a problem, it undercut principles of American representative government.[194] In effect, to the extent that men cast "their" women's votes, men became their unelected representatives. But such an arrangement and status contradicted the constitutional organizing principle of popular sovereignty.[195]

Recent scholarly attention offers a nuanced and comprehensive understanding of the Nineteenth Amendment, placing the push for woman's suffrage in the context of the post-Civil War Amendments and the push for equality for African Americans, and seeing it as a call for broad equality.[196] For example, Reva Siegel persuasively delineates the history of the Nineteenth Amendment,[197] from the drafting and adoption of the

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practiced. It is only where oppression exists that the agents of a superior power are needed for protection.").

194. Siegel, *supra* note 185, at 990-91 ("[F]ollowing the traditions of the antislavery movement, [suffragists] often used the language of the American Constitution, . . . '[A]s Elizabeth Cady Stanton put it . . . . You have granted titles of nobility to every male voter, making all men rulers, governors, sovereigns, over all women.'"); *see also* Lawsky, *supra* note 182, at 791 ("Suffragists also emphasized the republican notions of the importance of the common good and of the virtue of political participants.").

195. Siegel forcefully asserts the argument: "Whether suffragists argued their case in the language of individualism or in the language of status hierarchy, one message was clear: men could not and did not represent women." Siegel, *supra* note 185, at 991.

196. Going back to 1848, while the country debated over the freedom of enslaved African Americans, women began to gather at places like Seneca Falls to discuss their rights and freedom. *See* REMY, *supra* note 156, at 271 ("On July 19, 1848, women assembled at the Seneca Falls Convention, in New York, to begin the fight for equal rights."); *The Seneca Falls Convention*, Library of Congress, American Treasures of the Library of Congress, *available at* http://www.loc.gov/exhibits/treasures/trr040.html (last visited Mar. 26, 2005).

197. *See* Siegel, *supra* note 185, at 974 n.76. She writes:

> The woman suffrage amendment was first introduced in this form in 1869. There seems to have been no alternative language proposed until 1880 . . . . The Senate Committee on Woman Suffrage incorporated this proposal into S. 19, the version of the amendment it proposed for adoption in 1884. In the House, however, Representative White proposed an amendment providing that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." The Senate began to consider this version of the amendment—the version that ultimately became the Nineteenth Amendment—in February 1885.

Id. (citations omitted). Further, many members of Congress debated woman suffrage during debates on extending the vote to blacks. *See, e.g.*, CONG. GLOBE, 39th Cong., 2d Sess. 54-66 (1866). But, as one proponent argued, change was not to come at that time, it would come in the future. Senator Anthony predicted that woman suffrage "is coming with the progress of civilization and the general amelioration of the race, and the triumph of truth and justice and equal rights." CONG. GLOBE, 39th Cong., 2d Sess. 56 (1866).

Fourteenth Amendment until the adoption of the Nineteenth, framing it in a larger sociohistoric context that stresses the importance of equality to its proponents.[198] Further, Akhil Reed Amar argues for a holistic reading of the Constitution and its amendments and urges that the Nineteenth Amendment means that women were entitled to full political and other citizenship rights, not only the right to vote.[199] This broader theoretical construct speaks to fundamental notions of equality that lie at the heart of these amendments.[200]

Taken together, these various points culminate in a moment just as significant as the Fifteenth Amendment. The Nineteenth Amendment meant more than that the vote would be protected for women by constitutional decree. It righted wrongs of the past, eradicated the concentration of political power that had rested in the hands of the few, affirmed the equality of women,[201] and reinforced the Constitution's promise of representative democracy.[202]

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198. Siegel, *supra* note 185, at 968-1006.

199. Amar, *Bill of Rights, supra* note 156, at 1202-03. Amar persuasively argues that the amendment "affirms a very different and more robust vision of women as full and equal members of the political People who govern America." Amar, *Supreme Court 1999, supra* note 173, at 52.

200. There has been a recent spate of such attention, including the articles by Siegel and Amar, *supra* notes 185 and 199 respectively, and several well-researched and thought-provoking student notes. *See, e.g.*, Brown, *supra* note 186; Cogan, *supra* note 186; Lawsky, *supra* note 182, at 790.

201. *See also* Lawsky, *supra* note 182, at 790. She writes:

> More narrowly, suffragists believed the vote would allow women to participate, as full citizens, in community life. Women were of course citizens before the Nineteenth Amendment, but, as the Supreme Court had announced in 1874, women were not full, political citizens. That is, while women were "citizen[s] from . . . birth, and entitled to all the privileges and immunities of citizenship," their citizenship did not include the right to vote. Suffragists were determined to move beyond this second-class citizenship, referring to the ballot as providing "political recognition" and "political equality." The political equality imagined by the suffragists involved full and equal participation in the public sphere. As Jane Addams argued, the ballot would provide women with "natural participation in civic life." Suffragists believed that the ballot would take women out of the private sphere of the family and make them "member[s] of the community."

Id. (citations omitted).

202. *See also id.* at 791 ("Historically, then, the Nineteenth Amendment is 'fundamentally about women's political participation.' This is consistent with the republican idea that being a political citizen means more than just casting a vote; it means active deliberation and participation in civic life."). Lawsky persuasively argues that themes of republicanism were prevalent in the debate over adoption of the Nineteenth Amendment. *See id.* at 788-92.

C. Vote Dilution, Popular Sovereignty, Representative Government, and Article I

In Part II.A,[203] we saw the way in which the Court interpreted the Equal Protection Clause to discover and articulate a principle of one-person, one-vote. The Voting Cases thus held that vote dilution violates the Constitution. The Court relied not only on the specific command of the Constitution's Amendments, but held that vote dilution violates the principles of popular sovereignty and representative democracy.[204] Those principles were intentionally incorporated into the government the Framers created. This section discusses the ways in which Congress embodies popular sovereignty and how that driving principle is undercut by the concentration of power in the hands of the few.

In order to affect the will of the people as a whole, popular sovereignty demands that each voting member have an equal voice; all members must have an equal input.[205] If political power is concentrated in the hands of the few, popular sovereignty is thwarted. Several central features in the American republic[206] embody popular sovereignty, pointing to the essential vision of political equality in governance and rejecting concentration of power and vote dilution. First and foremost, in a republic the power derives from the people[207] and is effectuated by elected representatives in government. In *The Federalist No. 39*, Madison wrote:

> [W]e may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure for a limited period, or during good behavior. It is *essential* to such a government that it be derived from the great body of

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203. *See supra* notes 120-152 and accompanying text.

204. *See also infra* Part III.B.3.

205. As held in the Voting Cases, each person gets one vote. If each person has the same number of votes, voting equality is created.

206. The Framers created a government which often goes by the names "representative democracy" and "republic." I use both terms in these pages. The Framers also were not clear on the separation of the terms. *See* Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 758 (1994) [hereinafter Amar, *Central Meaning*] ("In debates over the Constitution, republican government was regularly contradistinguished from monarchy and aristocracy, but rarely from democracy.").

207. *See, e.g.*, THE RANDOM HOUSE COLLEGE DICTIONARY 1121 (6th rev. ed. 1988) (defining a republic as "a state in which the supreme power rests in the body of citizens entitled to vote and is exercised by representatives chosen directly or indirectly by them").

> the society, not from an inconsiderable proportion or favored class of it . . . . It is *sufficient* for such a government that the persons administering it be appointed, either directly or indirectly, by the people . . . .[208]

Rejecting other forms of government and drawing on numerous examples,[209] the Framers chose a republic as the form of government that left power in the hands of the people.[210]

The people retain power through their selection of representatives who use their best judgment to represent the people,[211] while the people affirm or reject their representatives' actions at regular intervals at the ballot box.[212] As elected officials

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208. THE FEDERALIST NO. 39, at 241 (James Madison) (Clinton Rossiter ed., 1961).

209. *See, e.g.*, THE FEDERALIST NO. 14, at 100-01 (James Madison) (Clinton Rossiter ed., 1961) (reviewing "modern Europe"); THE FEDERALIST NO. 39, at 240 (James Madison) (Clinton Rossiter ed., 1961) (looking for "the distinctive characters of the republican form [in] . . . Holland . . . Venice [and] Poland"); JOHN ADAMS, *Novanglus*, *in* THE POLITICAL WRITINGS OF JOHN ADAMS 43-44 (George A. Peek ed., 1954) [hereinafter ADAMS, *Novanglus*] (considering France and Spain and Great Britain). Ancient civilizations were also considered. *See, e.g.*, THE FEDERALIST NO. 18, at 122 (James Madison with Alexander Hamilton) (Clinton Rossiter ed., 1961) (examining ancient Greek examples); JOHN ADAMS, *A Defense of the American Constitutions*, *in* THE POLITICAL WRITINGS OF JOHN ADAMS 121 (George A. Peek ed., 1954) [hereinafter ADAMS, *Defense*] (reviewing ancient German governments); THE FEDERALIST NO. 9, at 71 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (examining "the history of the petty republics of Greece and Italy").

210. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 433 (Jonathan Elliot ed., 2d ed. 1881) [hereinafter 2 ELLIOT'S DEBATES] (statement of James Wilson). James Wilson explained:

> There are three simple species of government—monarchy, where the supreme power is in a single person; aristocracy, where the supreme power is in a select assembly, the members of which either fill up, by election, the vacancies in their own body, or succeed to their places in it by inheritance, property, or in respect of some *personal* right or qualification; a republic or democracy, where the people at large *retain* the supreme power, and act either collectively or by representation.

Id. *See also* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 328 (Jonathan Elliot ed., 2d ed. 1881) (statement of Charles Pinckney). The North Carolina debates also provide an example of the emphasis placed on the power of the government deriving from the people. *Id.* at 9-11; *see also id.* at 11 (statement of Iredell) ("The people are avowedly the fountain of all power."); *id.* at 10 (statement of MacLaine) ("The people here are the origin of all power.").

211. *See* THE FEDERALIST NO. 14, *supra* note 209, at ("[I]n a democracy the people meet and exercise the government in person; in a republic they assemble and administer it by their representatives.").

212. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 562 (1964) ("As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system."); Luther v. Borden, 48 U.S. (7 How.) 1, 30 (1849) (noting that "the people are the source of all political power" but that, as the exercise of governmental powers immediately by the people themselves is impracticable, they must be

serve the people, the principles of popular sovereignty are served.[213] Thomas Jefferson wrote: "[A] government is republican in proportion as every member composing it has his equal voice in the direction of its concern . . . by representatives chosen by himself . . . ."[214] In sum, popular sovereignty demands a government which dervies power from, and effectively remains in, the hands of the people via elected representatives.[215] Such a

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exercised by representatives of the people; the basis of that representation is suffrage).

213. John Adams wrote that the "Representative Assembly . . . should be in miniature, an exact portrait of the people at large. It should think, feel, reason, and act like them." JOHN ADAMS, THOUGHTS ON GOVERNMENT (1776), *reprinted in* 4 PAPERS OF JOHN ADAMS 86-93 (Robert J. Taylor et al. eds., 1977), *available at* http://press-pubs.uchicago.edu/founders/documents/v1ch4s5.html (last visited Mar. 12, 2005). The Supreme Court has reinforced this over its history. *See, e.g., In re Duncan*, 139 U.S. 449, 461 (1891) (noting that the republican form of government is distinguished by "the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves . . . ."). *Id.* Recently, Justice O'Connor discussed the importance of voting rights and her concern about situations in which "the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." Bush v. Vera, 517 U.S. 952, 990 (1996) (O'Connor, J., concurring). For scholarly discussion and agreement, see, e.g., WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 22-23 (1972) (explaining that popular sovereignty reflects the principle "that government is founded on the consent of the governed and therefore should reflect the will of the people. . . . [T]he people are the source of all power."); Amar, *Central Meaning, supra* note 206, at 749 ("The central pillar of Republican Government, I claim, is popular sovereignty."); Deborah Jones Merritt, *Republican Governments and Autonomous States: A New Role for the Guarantee Clause*, 65 U. COLO. L. REV. 815, 816 (1994) ("Most scholars would agree that a republican government is, at the very least, one in which the people control their rulers."). Some will respond that this theoretical vision overlooks the clearly exclusive means and methods of the American government. What of the three-fifths clause, property requirements, and the exclusion of women from the franchise, as just the most clear examples? The Framers created a *structure* that depended upon participation within the context of a society that did not yet extend the vote widely. While the group of those who participated was limited, as the nation has grown, fortunately prevailing norms, beliefs, and attitudes have changed. Accordingly, through constitutional amendment, the document now is highly inclusive in terms of its participants. *See supra* Part II.B. But, the basic structure of inclusion remains the same. In other words, the wisdom of the inclusive, participatory *structure* remains intact, but the ignominious aspects of exclusion have been shed.

214. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), *in* THOMAS JEFFERSON, POLITICAL WRITINGS 211 (Joyce Appleby & Terence Ball eds., 1999) [hereinafter JEFFERSON WRITINGS].

215. This sentiment was repeated in the debate over the Fifteenth and Nineteenth Amendments. *See* CONG. GLOBE, 39th Cong., 2d Sess. 57 (1866) (statement of Sen. Williams) ("To pretend to have a Government founded upon the consent of the governed . . . and then to deny millions of citizens in this country any part of that consent . . . is an inconsistency upon which a republican Government

system cannot thrive if the people's power is diluted.

More than theory, the reality of American government is instructive. Only one of the three branches of government—the legislative branch—embodies the spirit of representative democracy. Article I and the Seventeenth Amendment call for the direct election, by the people of the individual states, of members to the House[216] and Senate,[217] respectively.[218] By guaranteeing the direct election of representatives by individual citizens, the Constitution not only secures power in the hands of the people, but also allows the people to delegate that authority to their elected representatives. With its nearly equipopulous districts, the House of Representatives embodies this principle even more than the malapportioned Senate, because each State is represented equally, regardless of population.[219] Nonetheless, in choosing their senators, the people have equally distributed power, particularly since the Seventeenth Amendment mandated direct election of senators.[220]

Ironically, we can see Article I's representative nature more clearly by seeing where it is absent from the structure of government. Article II and the Twelfth Amendment, which outline the election process for the executive, remove power from the hands of the people.[221] The Electoral College stands between

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can hardly stand."). For the same basic perspective nearly fifty years later debating women's, right to vote, see 52 CONG REC. 1437 (1915) (statement of Rep. Bryan).

216. U.S. CONST. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second year by the People of the several States . . . .").

217. U.S. CONST. amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof . . . .").

218. U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. amend. XVII. Article I, Section 2 calls for apportionment of Members of Congress according to population. U.S. CONST. art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . ."). Particularly after the Seventeenth Amendment provided for the direct election of Senators, this is even more clear. *See* U.S. CONST. amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof . . .") (modifying U.S. CONST. art. I, § 3.).

219. The *Reynolds* Court observed that the unique situation by which the colonies and original states were "sovereign entities" brought together through "compromise and concession" made this situation unique, not violative of the principles announced in the Voting Cases. Reynolds v. Sims, 377 U.S. 533, 574 (1964). Justice Stewart, dissenting in *Lucas*, pointed out this irony in relation to the Voting Cases. Lucas v. Forty-Fourth Gen. Assembly of Colo., 377 U.S. 713, 747-48 (1964) (Stewart, J., dissenting).

220. *See* U.S. CONST. amend. XVII.

221. *See* U.S. CONST. art. II, § 1; U.S. CONST. amend. XII (creating and detailing

the people and direct election of the president,[222] which can have a

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the function of the Electoral College by using a malapportioned voting scheme based on House and Senate representation).

222. *See* U.S. CONST. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress."). All but two states choose electors on a winner-take-all basis. As the majority controls all the Electoral College votes for that state, this winner-takes-all aspect of the Electoral College moves the presidency farther from the people. *See* ENCARTA ENCYCLOPEDIA, "Electoral College" (2003), *available at* http://encarta.msn.com/encyclopedia_761576768/Electoral_College.html (last visited Mar. 12, 2005).

> As of 2000, the District of Columbia and all states except Maine and Nebraska had adopted the winner-take-all system. Under the winner-take-all system, the electors assigned to the candidate who won most of the vote in their state are all represented in the electoral college. Maine and Nebraska, however, employ the district system. Under this system, two electors are awarded to the winner of the statewide popular vote, and the remaining electors are awarded to the popular vote winner in each of the state's congressional districts.

Id.; *see also* Congressman James E. Clyburn, *Electoral College Needs Reform*, CAPITOL COLUMN, *available at* http://www.house.gov/clyburn/cols/col111700a.htm (Nov. 17, 2000) (last visited Mar. 12, 2005).

> Whoever wins the popular vote in the state, in turn gets all of its electoral college votes. And that is true whether or not the highest popular vote-getter wins by a margin of one vote or one million votes. . . . There are two states that have made an exception to this rule—Maine and Nebraska. The legislatures in these states have determined that electors will be apportioned based on who wins each Congressional district in the state.

Id. In addition, the Electoral College grants individual votes of different states disproportionate weights. As the majority controls all the Electoral College votes for that state, this winner-takes-all aspect of the Electoral College moves the presidency farther from the people. To determine the political weight of a single vote cast, an equation can be developed from the number of Electoral College votes given to a particular state, divided by the number of voting-age citizens in said state (in millions). This would effectively be creating an Electoral College scale for measurement. Thus, the higher the political weight, the more power that is held in the hands of the individual state's voter. For example, in 2000, each citizen in California, which has 55 electoral votes, had a political weight of 2.22, but each citizen of Wyoming, which has 3 electoral votes, had a political weight of 8.57. For population statistics from 2000, see U.S. Census, Reported Voting and Registration of the Total Voting-Age Population, By Age, for States: November 2000, *available at* http://www.census.gov/population/socdemo/voting/p20-542/tab04b.pdf (last visited Mar. 6, 2005). *See also* John F. Banzhaf III, *One Man, 3.312 Votes: A Mathematical Analysis of the Electoral College*, 13 VILL. L. REV. 304, 324-25 (1968); Michael Herz, *Votes and Voices: Reevaluations in the Aftermath of the 2000 Presidential Election: How the Electoral College Imitates the World Series*, 23 CARDOZO L. REV. 1191, 1194 (2002). Herz writes:

> [V]otes would only be of equal weight if electoral college votes were *exactly* apportioned among the states, and then on the basis of those actually casting ballots rather than population. But in fact electoral votes are allocated by populations, which are not perfect multiples of 435; the rates of registration and of voting vary from one state to another; each state, regardless of size, gets two electoral votes (corresponding to its two Senators) in addition to the electoral votes allocated by population (corresponding to its Representatives). The result, as has often been pointed out, is a wide variation in the weight of individual votes and a

particularly cruel relation to representative democracy when implemented. This was most recently evidenced in the 2000 presidential election when the president did not receive a majority of the popular vote.[223]

Article III removes the judicial branch even further from the people. Federal judges are most remote and least responsive to the people, as the president appoints them with the advice and consent of the Senate.[224] This is hardly a criticism; as the federal judges are charged with the responsibility to interpret the Constitution and the laws of the United States,[225] they have a mandate that is not and should not be responsive to popular will and sentiment. None of this is intended to denigrate the executive or judicial branches; rather, it emphasizes that the legislative branch—which, after all, is the law-*making* branch—most clearly reflects the tenets of popular sovereignty and representative democracy.

In sum, the structure of American government speaks to the ideal of participatory equality. Vote dilution and its corollary, concentration of political power, run directly contrary to this ideal. The foundation of popular sovereignty honors equality of participation from the electorate. The Congress is the most responsive and political branch; its members are most clearly accountable to the people. Article I can be most directly tied to the people, and in some ways can be seen as most directly reflecting and reinforcing equality in political participation. Power derives from all the people; it should be distributed evenly and not rest

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particular dilution of individual voting strength in large states. So in 2000 Vermont had 97,931 1/3 voters per elector; New York had 206,727 1/4 voters per elector. In this sense, a Vermonter's vote counted twice as much as a New Yorker's. This also looks odd at best, if not, in the words of Senator Durbin, "undemocratic and unfair."

Id.

223. In addition to President George W. Bush, Presidents John Quincy Adams, Rutherford B. Hayes, and Benjamin Harrison were elected despite losing the popular vote. *See* Wikipedia, *U.S. Presidents Who Did Not Win Majorities in Election*, *at* http://academickids.com/encyclopedia/u/u_/u_s__presidents_who_did_not_win_majorities_in_elections.html (last visited Feb. 8, 2005); University Press of Kansas, *Press Offers Books on Presidents Who Lost Popular Vote*, *available at* http:///www.ur.ku.edu/News/00N/NovNews/Nov16/kspress.html (last visited Feb. 8, 2005).

224. *See* U.S. CONST. art. II, § 2, cl. 2.

225. For the seminal declaration of this power, see Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). In particular, it is important for the judicial branch to exist at the farthest point from political pressure, so that justice can be administered as evenhandedly as possible.

disproportionately in the hands of the few.[226]

From any angle, we see the problem with vote dilution. It concentrates power in the hands of the few, and thus runs counter to the principles announced in the Voting Cases, the Constitution and its amendments, and the fundamental spirit of American representative democracy. First, in terms of Supreme Court precedent, the Voting Cases: (1) rejected vote dilution and the concentration of power that came with malapportionment, and (2) established the one-person, one-vote principle. Further, an in-depth review of the Fifteenth and Nineteenth Amendments reaffirms the Court's holdings and reinforces a principle of equality of political participation. Vote dilution and concentration of power are also offensive to popular sovereignty and representative government, as they contravene the notion of making all the people the ultimate source of power. Unfortunately, as we have seen, when power is concentrated in the hands of the few, the wealthy possess inordinate influence and access in politics and government. [227]

III. A New Equality Approach to Campaign Finance Reform

The current problem of disproportionate power in the hands of the wealthy few can be gainfully compared to the Voting Cases. I propose here that we extend the ideas that supported the one-person, one-vote rule to the problem of wealth-based inequality that we find in campaign finance today. This new paradigm requires a new analysis, with a focus on equality concerns. I shall explore this approach and its implications before concluding the Article.

A. Applying the Voting Cases to the Problem of Modern Vote Dilution

In the beginning of this Article, I discussed the way in which the modern political-governmental system concentrates power in the hands of the few.[228] This, I suggest, is the modern-day equivalent of vote dilution in the 1960s. Although the Voting Cases and their underlying constitutional logic reject dilution and concentration of political power, the question we confront today extends beyond the one-person, one-vote principle to the broader principles that underlie that declaration. In the Voting Cases, the

226. *See supra* note 208 and accompanying text.

227. *See supra* notes 35-103 and accompanying text.

228. *See supra* notes 35-103 and accompanying text.

Court responded to a particular problem and attached the label of vote dilution, but dilution and concentration are two sides of the same coin.[229] In speaking about vote dilution, the Court equally rejected the concentration of power that had previously rested in the hands of the few.[230] Change comes, often slowly,[231] and indeed, after decades of struggle there is greater formal equality and ensuring one-person, one-vote is largely a problem of the past. But the modern vote dilution is just as pernicious. In this section I argue for applying the lessons of the past to the problems of today.

I propose that we apply the Voting Cases and the concomitant supporting principles of equality to the current analysis of campaign finance reform. Today, formally speaking, one-person, one-vote is the law and votes are weighted equally,[232] but the underlying principle is jeopardized. There is a constitutional dimension to the current state of affairs,[233] one that

229. The Court specifically spoke in those terms in *Gray* and *Reynolds*. While the voters in the more populous counties alleged that they had their votes diluted, those in the less densely populated areas enjoyed a concentrated power. *See* Reynolds v. Sims, 377 U.S. 533, 562 (1964); Gray v. Sanders, 372 U.S. 368, 371, 379 (1963).

230. *See supra* notes 120-152 and accompanying text. In addition, before the Voting Cases, malapportioned legislatures could be reelected with impunity; the political process was broken because nobody could break through. The Constitution mandated systemic change, and the Court responded. Ensuring that each person could vote moved the nation forward. As seen in Part I.B, the wealthy maintain disproportionate power, making it possible to monopolize power. *See supra* notes 35-103 and accompanying text; *see also, e.g.*, Owen M. Fiss, *Money and Politics*, 97 COLUM. L. REV. 2470, 2474 (1997). Fiss uses *Reynolds* to illustrate the theory of legislative failure, writing: "Here the problem was not the absolute disenfranchisement of some portion of the electorate but rather self-dealing by legislators. They had used their offices to perpetuate the electoral system that had brought them into power, a system not consistent with democratic principles." *Id.*

231. Achieving equality is like building a cathedral—a glorious project devoted to the highest ideals that always seems to take centuries. The Constitution started it, then came the Fourteenth Amendment and the Voting Amendments, followed by the Voting Cases. But the cathedral is not finished.

232. Questions of chads, technology, and Florida in the 2000 presidential election notwithstanding, this is the case. For a thorough review of many of those issues, see, e.g., *Bush v. Gore Symposium*, 29 FL. ST. L. REV. 325 (2001).

233. I am making a modest claim. I do not argue that the current state of affairs is per se unconstitutional under the Voting Rights cases and the Voting Amendments. Instead, those cases illustrate a deep constitutional commitment to equality in American politics and government. *See supra* notes 120-152 and accompanying text. The current state of campaigns, politics, and government violates that principle, because the few with money maintain a vastly disproportionate power. *See supra* notes 35-103 and accompanying text. This constitutional dimension could indeed form part of a successful claim that campaign finance reform legislation survives strict scrutiny under *Buckley* and its progeny. But more importantly for purposes of this Article, I simply want to highlight the compelling nature of the problem and its constitutional dimension.

is often overlooked. The Voting Cases apply to the basic problem we face today. The *Gray* Court wrote that "one resident in Echols County had an influence in the nomination of candidates equivalent to 99 residents of Fulton County."[234] Similarly, for one person to have ninety-nine times the influence of another by virtue of money offends constitutional values. The problem is not only that elected officials are taking into account others' interests; they are systematically serving the interests of the few at the expense of the many.[235] In the terms of *Gray*, the wealthy have many times the influence of others.[236]

Equality is the common thread connecting the Voting Amendments to the Constitution and the relevant case law. In addition to their firm foundation in these sources, my arguments about vote dilution, concentration of power, and equality grow out of a philosophical principle[237] that, in the ideal, informs all political-governmental systems.[238] Robert Dahl has written:

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234. *Gray*, 372 U.S. at 371.

235. *See supra* notes 80-103 and accompanying text.

236. *See Gray*, 372 U.S. at 371. Exact numbers cannot be determined, but the power concentrated in the hands of the wealthy few is certainly many times that of the rest of the population, perhaps ninety-nine times or more.

237. Edward Foley has written an interesting article making the philosophical claim that such egalitarianism ought to exist, and also specifically making no claim as to whether it does in the context of the U.S. Constitution. *See* Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204 (1994).

238. While I believe that any legitimate political-governmental system must place equality as the utmost priority, that is not enough. For example, Amartya Sen has insightfully argued that simply using the term "equality" is perhaps too facile, and does not solve many problems; instead, we must discuss, as he puts it, "Equality of What?" AMARTYA SEN, INEQUALITY REEXAMINED 4 (1992). Specifically, he argues that

> the major ethical theories of social arrangement all share an endorsement of equality in terms of some focal variable, even though the variables that are selected are frequently very different between one theory and another. It can be shown that even those theories that are widely taken to be "against equality" . . . turn out to be egalitarian in terms of some other focus.

Id. at 3. My concern is not an equality of results—however that may be defined—but rather an equality of access to the political and governmental processes that ultimately control our daily lives. John Rawls and Robert Dahl are among the leading theorists to emphasize the importance of equality in the political process. But that equality is not easily defined and must be more than something as simple as universal suffrage—merely protecting the right to vote does not ensure equality of participation. The search for equality is not merely for equality on a formal plane, but rather in a practical sense as well. *See* John Rawls, *The Basic Liberties and Their Priority, in* EQUAL FREEDOM, SELECTED TANNER LECTURES ON HUMAN VALUES 179 (Stephen Darwall ed., 1995) ("Thus, what is fundamental is a political procedure which secures for all citizens a full and equally effective voice in a fair scheme of representation. Such a scheme is fundamental because the adequate

> [L]et me once again view democracy as, ideally at least, a political system designed for citizens of a state who are willing to treat one another, for political purposes, as *political* equals. Citizens might view one another as unequal in other respects. Indeed, they almost certainly would. But [in the ideal, they should] assume that all citizens possess equal rights to participate, directly or indirectly through their elected representatives, in making the policies, rules, laws, or other decisions that citizens are expected (or required) to obey . . . .[239]

Equality of participation is important not merely because it provides the people with a sense of buy-in at one point in time—i.e., at the voting booth—but it extends throughout the process of governance. The more that people can be involved on an equal footing in the process of governance, the more they can participate in the process of governance. And the more the elected officials witness and feel the participation of the people in the political process, the greater sense they can have of the importance of acting in the interest of the community and nation, rather than in self-interest or in the interest of the few.[240]

John Rawls also aptly argued that "the constitution must take steps to enhance the value of the equal rights of participation for all members of society. It must underwrite a fair opportunity to take part in and to influence the political process."[241] I believe that such is the case with the United States Constitution. Admittedly, the Constitution is far from perfect; it was written, after all, by humans, in an era where societal norms were quite different, under conditions of compromise.[242] But it is

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protection of other basic rights depends on it. Formal equality is not enough."). While formal pronouncements of universal suffrage are powerful components and reminders of the commitment to equality, they are not enough. As Rawls has argued,

> [t]he principle of equal liberty, when applied to the political procedure defined by the constitution, I shall refer to as the principle of (equal) participation. It requires that all citizens are to have an equal right to take part in, and to determine the outcome of, the constitutional process that establishes the laws with which they are to comply.

JOHN RAWLS, A THEORY OF JUSTICE 221 (1971).

239. ROBERT DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 135-36 (2003).

240. As I discussed in Part II.A.3., acting in the interest of the many is at the heart of popular sovereignty and representative democracy. *See supra* notes 136-152 and accompanying text.

241. RAWLS, *supra* note 238, at 224.

242. *See* THE FEDERALIST NO. 85, at 523-24 (Alexander Hamiliton) (Clinton Rossiter ed., 1961). Hamilton wrote:

> I answer in the next place, that I should esteem it the extreme of imprudence to prolong the precarious state of our national affairs, and to expose the Union to the jeopardy of successive experiments, in the

instrumental, and provides a strong framework. Dahl has argued: "I am going to suggest that we begin to view our American Constitution as nothing more or less than a set of basic institutions and practices designed to the best of our abilities for the purpose of attaining democratic values."[243] Similarly, I proceed from such an instrumental approach. As the American legal-constitutional structure has protected against vote dilution, it can be seen as more broadly protecting equality in political participation and rejecting concentrated power.

But mine is far more than just a political-philosophical ideal, for it has firm roots in case law: the Court has held that the Constitution embraces the value of equality of participation and rejects dilution and concentration of political power.[244] The concentration of power in the hands of those with money poses a threat to constitutional values, as articulated in the Voting Cases, and as embodied in the Constitution and its amendments.[245] Money in politics creates inequality in the American representative democracy, but we have seen a commitment to equality in the penumbras of the structure of the republic, the Voting Amendments, and the Equal Protection Clause of the Fourteenth Amendment.[246] A new approach is required to bring

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> chimerical pursuit of a perfect plan. I never expect to see a perfect work from imperfect man. The result of the deliberations of all collective bodies must necessarily be a compound as well of the errors and prejudices, as of the good sense and wisdom, of the individuals of whom they are composed. The compacts which are to embrace thirteen distinct States in a common bond of amity and union, must as necessarily be a compromise of as many dissimilar interests and inclinations. How can perfection spring from such materials?

Id.

243. DAHL, *supra* note 239, at 3; *see also id.* at 119 ("[A]t the very least, isn't it time—well-past time—that we stop thinking of our Constitution as a sacred text and begin to think of it as nothing more, or less, than a means for achieving democratic goals?").

244. *See supra* notes 120-152 and accompanying text.

245. *See supra* notes 120-202 and accompanying text.

246. See *supra* notes 120-152 and accompanying text. This position has been powerfully stated, in only a slightly more limited context, by Emma Coleman Jordan:

> Although the racial vote dilution cases have been justified on the basis of the [F]ourteenth [A]mendment more often than the [F]ifteenth, this is surely wrong. One need only consider that protection from unconstitutional dilution of the vote, characterized as the right to have one's vote count equally with other voters, is a right which had to be implied in *Reynolds v. Sims* from the penumbra of the [F]ourteenth [A]mendment. Thus, one must strain to drive the constitutional justification for the racial dilution cases from the one-person-one-vote line of authority.

Jordan, *supra* note 117, at 561. Of course, not surprisingly, the reference to

this rich analytical tradition to bear on today's problem.

B. *Implications of a New Paradigm: Broadening the* Buckley *Analysis to Include (In)Equality*

Equating the Voting Cases with the problems of today is just the beginning. Having suggested a new approach with roots in the Constitution and case law, the question remains: What are the consequences of such a reconception? It would place questions of equality of participation in governance as a prime inquiry into whether campaign finance reform regulations are constitutional, allowing such measures to target the specific inequalities that present themselves due to the power of money in politics.[247] Before concluding the Article, I will explore several implications of

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penumbras is reminiscent of another highly important case during the same era as the Voting Cases, *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

247. *See, e.g.*, David Cole, *First Amendment Antitrust: The End of Laissez Faire in Campaign Finance*, 9 YALE L. & POL'Y REV. 236, 243-44, 247-48 (1991); Foley, *supra* note 237, at 1212-13, 1225-26; David Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1382-85 (1994). While this Article is primarily concerned with suggesting a new way to conceive of the problems presented, it does not present any specific legislative solutions. The likely first major policy step would be toward public financing, and perhaps spending caps. Raskin and Bonifaz also have aptly characterized a better way to consider public financing. They write:

> This article contrasts two opposing ways of financing the costs of running for public office in a democracy. The first way is to treat such costs as the candidate's personal problem, thereby requiring her either to spend her own (or her family's) money on her campaign or to go to the largely unregulated market in private campaign contributions to seek funds. This is the way campaign costs in congressional elections are currently treated. The second way is to treat the costs of running for office as a public responsibility and make sufficient resources available to each qualified candidate to run a serious and meaningful race.

Raskin & Bonifaz, *Constitutional Imperative*, *supra* note 122, at 1166-67. The government could fund congressional campaigns at reasonable levels, so as to reduce or eliminate the amount of money candidates need to raise. Further, to the extent that people want to contribute to campaigns, the government could provide matching funds so as to maximize the impact of smaller donations and to de-emphasize the impact of larger ones. Furthermore, the ban on soft money must be vigilantly monitored and perhaps extended. But that is the income side. Another fundamental change must come on the expenditure side. If the cost of running campaigns comes down, the need for money also dissipates. Accordingly, one of the most important steps to take is to eliminate the biggest budget line in big campaigns: advertising. The government, through licensing and incentives, should require broadcasters to provide free air time to candidates. Most notably, this would change the nature of campaign financing in terms of television advertising. BCRA has moved us down this path, but there are many large steps to take. The underlying point is that we have seen that money concentrates power in the hands of the few, at the expense of the many. This is our modern-day vote dilution. Changing the nature of campaign financing can change this concentration and dilution of power.

applying the Voting Cases to campaign finance reform and placing the analytical emphasis on (in)equality.

1. Quid Pro Quo Corruption is Not the Only Compelling Governmental Interest

First, of course, I am suggesting a shift in the prevailing analysis of campaign finance reform measures. *Buckley* requires campaign finance regulations to be closely drawn to meet a sufficiently important state interest.[248] *Buckley* set the stage for what has followed,[249] focusing narrowly and almost exclusively on quid pro quo corruption as the quintessential compelling governmental interest: "To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined."[250] *Buckley* held that either actual corruption or the appearance thereof would provide a sufficiently compelling governmental interest to justify restrictions.[251] Accordingly, corruption, in a quid pro quo sense, is the analytical touchstone. But this alone is limiting. There is a far broader concern that can be overlooked under the prevailing framework.

McConnell rejected this narrow vision[252] and opened the door to the possibility of a broader reading of corruption that would satisfy strict scrutiny:

> Just as troubling to a functioning democracy as classic *quid pro quo* corruption is the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder. Even if it occurs only occasionally, the potential for such undue influence is manifest. And unlike straight cash-for-votes transactions, such corruption is neither easily detected nor practical to criminalize.[253]

Building from this point, I suggest an additional meaning and focus on the values that animate campaign finance reform: we

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

249. *Buckley* has held a fast grip on ensuing analysis. *See supra* notes 107-109 and accompanying text.

250. *Buckley*, 424 U.S. at 26-27.

251. *Id.* at 27.

252. The majority rejected dissenting Justice Kennedy's "crabbed view of corruption, and particularly of the appearance of corruption, [which] ignores precedent, common sense, and the realities of political fundraising exposed by the record in this litigation." McConnell v. Fed. Election Comm'n., 540 U.S. 93, 152 (2003).

253. *Id.* at 153.

must look at equality, as articulated in the Voting Cases, as a compelling governmental interest.

In other words, we need to break out of the *Buckley* box.[254] *McConnell* gives us the chance to do so, and the Voting Cases and the values they articulated will get us there. As discussed in these pages, the Voting Cases contain a constitutional command against the concentration of political power in the hands of the few.[255] The force of money in politics corrupts the system in a fundamental way that is more pernicious than a crabbed reading of *Buckley* would understand. Thus, I suggest a post-*McConnell* equality value to drive reformers, legislators, and courts. Accordingly, any *Buckley* analysis going forward would ask not merely whether the regulation in question was narrowly tailored to prevent corruption or the appearance thereof in a limited quid pro quo sense. The new analysis would also weigh whether the challenged measure appropriately serves the goals of increasing equality and reducing the concentration of power in the hands of the few, as articulated in the Voting Cases.[256]

2. Participation Occurs in the Marketplace of Ideas, Not the Marketplace of Money

This new paradigm poses a challenge to the status quo to the extent that it would re-orient the discussion away from market analyses that feed inequalities based on wealth. The traditional response to campaign finance reform, often leaning heavily on market analyses, reflects a conception of the First Amendment protecting a marketplace of ideas.[257] If speech is given protection, the argument goes, then ideas can flow freely. When ideas can flow freely, the better ones can rise and the lesser ones can fall according to their own merit. The best ones will survive, and the truth—if there is such a thing—will triumph. As Justice Holmes famously argued, "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the

254. I have previously suggested breaking out of the *Buckley* box, arguing that the Guarantee Clause can animate the debate. *See* Alexander, *supra* note 106, at 821-22.

255. *See supra* notes 115-227 and accompanying text.

256. I do not suggest lessening the strict scrutiny required when regulating First Amendment activity, but rather having a different conception of what goes on the governmental interest side of the balance.

257. John Stuart Mill was a leading proponent of this idea, arguing against government regulation, as it could ultimately impede the search for "truth." *See* JOHN STUART MILL, ON LIBERTY 18 (David Spitz ed., 1975).

thought to get itself accepted in the competition of the market."[258] This conception relies on the idea that each person must be allowed to participate freely in this marketplace, leading its adherents to argue against most government regulation of political speech.[259] Not surprisingly, the First Amendment marketplace of ideas metaphor has found its way into many campaign finance reform opinions.[260] Most recently, for example, Justice Thomas dissented in *McConnell*:

> The very "purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." Yet today the fundamental principle that "the best test of truth is the power of the thought to get itself accepted in the competition of the market," is cast aside in the purported service of preventing "corruption," or the mere "appearance of corruption." Apparently, the marketplace of ideas is to be fully open only to defamers . . . pornographers, flag burners, and cross burners.[261]

While the First Amendment analysis is highly valuable,[262] a larger point is lost when we engage the market analogy. This marketplace is one best for ideas, not one for money. To the extent

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258. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

259. For interesting perspectives on this argument, see, e.g., Martin Redish, *The Value of Free Speech,* 130 U. PA. L. REV. 591, 593 (1982); Harry H. Wellington, *On Freedom of Expression,* 88 YALE L.J. 1105, 1130-32 (1979). *Compare* Frederick Schauer, *Reflections on the Value of Truth,* 41 CASE W. RES. L. REV. 699 (1991), *with* Erwin Chemerinsky, *In Defense of Truth,* 41 CASE W. RES. L. REV. 745 (1991) (responding to Schauer's argument that truth and knowledge at times are undesirable).

260. *See e.g.,* Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 646 (1996) (Thomas, J., concurring in part and dissenting in part) ("For instance, if the Democratic Party spends large sums of money in support of a candidate who wins, takes office, and then implements the Party's platform, that is not corruption; that is successful advocacy of ideas in the political marketplace and representative government in a party system."); Fed. Election Comm'n. v. Mass. Citizens for Life, Inc., 479 U.S. 238, 257 (1986) ("Direct corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace."); Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley, 454 U.S. 290, 295 (1981) ("The Court has long viewed the First Amendment as protecting a marketplace for the clash of different views and conflicting ideas. That concept has been stated and restated almost since the Constitution was drafted."); First Nat'l Bank v. Bellotti, 435 U.S. 765, 809-10 (1978) (White, J., dissenting) ("[Corporate] expenditures may be viewed as seriously threatening the role of the First Amendment as a guarantor of a free marketplace of ideas.").

261. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 265 (2003) (Thomas, J., concurring in part and dissenting in part) (citations omitted); *see also id.* at 286 (Kennedy, J., concurring in part and dissenting in part).

262. *See generally* Mark C. Alexander, *Attention Shoppers: The First Amendment in the Modern Shopping Mall,* 41 ARIZ. L. REV. 1 (1999) (analyzing the constitutional rights of free speech in private shopping malls).

that finance dictates what ideas are considered, it is no longer a marketplace of *ideas*. When we discuss ideas as if they are pure commodities to be bought and sold, that takes us away from the ideals of robust political interchange.[263] Thus, my proposal to focus on wealth-based inequalities ideally would help place a greater focus on the value of the ideas themselves, rather than the moneyed interests who believe in and finance such ideas.

Taken from another perspective, consider a lingering tension that stems from the question: What is the great driving force of the United States? Two answers vie for acceptance, and each has great merit. On the one hand, ours is a nation built on free market economics, while on the other, the United States is a prime example of a modern representative democracy. No doubt, both forces are at work and can live in peaceful coexistence, but at times they come into great tension with one another. The tension is greatest when we think about the force of money in politics and government.[264] In the market economy, money talks, and politics and government are no exception.[265] But with all this talk of markets, the debate can gravitate more easily to the conclusion that politics must remain as unregulated as possible, and perhaps only regulated to prevent such evils as bribery of public officials.[266] As a result, this compelling constitutional dimension can get lost. While wealth and market analysis do not necessarily concern themselves with egalitarianism, the re-conception I present would

263. Margaret Radin criticizes commodifcation, i.e., the process by which market analogies dominate analysis of complex problems, including politics and free speech. *See* MARGARET JANE RADIN, CONTESTED COMMODITIES 165 (1996).

264. This has been the subject of various scholarly inquiries. *See, e.g.*, Pamela S. Karlan, *Politics by Other Means*, 85 VA. L. REV. 1697, 1698 (1999) ("My object in this Article is to discuss how talking about politics in market terms usefully illuminates problems in election law and how it obscures or distorts them."); Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 895 (1998) ("Reform arguments all rest on a single fear: that, left to themselves, various political actors will transform economic power into political power and thereby violate the democratic norm of equal political empowerment."); *cf.* Daryl J. Levinson, *Market Failures and Failures of Markets*, 85 VA. L. REV. 1745, 1746 (1999). Levinson writes:

> I fear that politics, like grammar, will resist mixed metaphors. Contests between market and nonmarket metaphors will more likely reenact conflicts in our most deeply held political commitments, and there is no reason to expect that conflicts at this level will resolve themselves dialectically into a stable, incompletely commodified synthesis.

Id.; *see* Raskin & Bonifaz, *Constitutional Imperative*, *supra* note 122, at 1161-62 ("[T]he recurring political impulse toward campaign finance reform in the twentieth century reflects a basic tension between a private market economy and a modern democratic polity.").

265. *See supra* notes 35-103 and accompanying text.

266. *See* Buckley v. Valeo, 424 U.S. 1, 26-27 (1976).

enable a shift in perspective.

3. Power Vacuum: Creating Space for the Power of Meaningful Political Participation

Money is the force of inequality that concentrates power today, similar to the failure to redistrict diluted votes in the first half of the twentieth century. Money drives candidates and agendas.[267] The ideal I am suggesting likely could result in the role of money, as a source of power, being diminished.[268] If the wealthy lose some power, a natural redistribution would follow.[269] The ensuing question would be: Where does the power shift, and is that a problem?

First, let me be clear that no doubt, the wealthy will still have power, and that is not, per se, a problem. The wealthy always have and always will have great power in the United States, often because of their beneficial role and ability to drive and stimulate segments of the economy. But in the political process, the problem is that the wealthy have power that is strikingly disproportionate to their numbers solely *because of* their wealth, for no reason other than that they can write a large check to a candidate or political party. Equating money and speech conflates everything. Having and giving money does express support, but only to a marginal extent.[270] Right now, money generates power and is confused with meaningful political participation,[271] and that is troublesome.

As candidates and elected officials search for those who can help them win elections, doubtless many will try to grab their slice, and more, of the power pie. But if the wealthy no longer control a super-sized portion, the pie will be redistributed to other typical participants. The ideal encourages participation as the touchstone for political power, and those who remain active

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267. *See supra* notes 35-103 and accompanying text.

268. But the impact depends upon how legislators act in response to this proposal, what laws are passed, what arguments are presented in legal challenges, and ultimately how a court would respond to the argument presented in this Article.

269. This is similar to the redistributive effect discussed earlier in the context of the Fifteenth and Nineteenth Amendments. *See supra* notes 157-180 (discussing the Fifteenth Amendment) and 181-202 (discussing the Nineteenth Amendment).

270. In *Buckley* the Court found only a "marginal restriction" on speech activity when restricting contributions, because a "contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." *Buckley*, 424 U.S. at 20-21.

271. *See* Ansolabehere et al., *supra* note 87, at 2 (arguing that donations may be seen as a form of political participation).

participants in the system can be the biggest beneficiaries of any new paradigm. Some will always possess more power than others, but what is required is an equitable basis for their greater power. To the extent that any people or groups *participate*[272] in the electoral process, they will be able to "earn" their own power, not with money, but rather via the participation that is essential to the functioning of a healthy political-governmental system.[273] In sum, if the power of the wealthy is reduced, a redistribution of power will follow, and in the ideal, the beneficiaries will be those who participate the most.[274]

4. A New Equality Argument: Established Precedent for Evaluating Campaign Finance Reform

Finally, egalitarianism is not a new concept, so what is added in these pages? Consider the *Buckley* dictum: "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly

272. Some examples will illustrate. To the extent that seniors, as a group, typically vote at much higher rates than others, they would earn their share of the political pie. And to the extent that they might have greater power under this new conceptualization, others could have an equal chance to gain the same power, by virtue of participation. Any group that has lower voting rates, such as young voters, could effectively "buy in" to their increased power by virtue of greater involvement in the process. Next, consider political organizers and organizations, people who spend their time rallying groups of people around particular causes like the environment, arms control, business development, or campaign reform. To the extent that they organize and speak for people, these individuals perform an informal representative function, effectuating popular sovereignty at the grass roots. To the extent that they fulfill a role as an unofficial representative of people, they too could earn the increased power they may achieve. If they do represent others, ultimately, the power is spread among the many. As another example, unions and their leaders already have much power in politics, and to the extent that they represent people, again, that is fine, if they speak for their membership. Similarly, local elected officials will carry their power perhaps to greater levels, to the extent that the wealthy have less concentrated power. Local elected officials are always a key to the success of federal campaigns, for the weight of their opinion presumably will sway voters. And again, this power is appropriate, as the local elected official enjoys the support of and is the official voice of countless voters. As participation is encouraged, popular sovereignty is aided.

273. As the *Reynolds* Court wrote, "representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political process[ ] . . . ." Reynolds v. Sims, 277 U.S. 533, 565 (1964).

274. I am not claiming that we will achieve some ideally defined utopian equality. The equality that I am stressing is relative and not at all static. But the bigger point is that we must move toward that ideal instead of accepting the status quo that leaves so much power in the hands of the wealthy. The Constitution and government of the United States embody a principle of equality in political participation, and we should encourage and reward such participation.

foreign to the First Amendment . . . ."[275] Opponents of the quality argument might claim that those words reject the equality idea presented in these pages.[276] My response is straightforward: *Buckley* did not even address the issue raised here, as the Court did not consider the Voting Cases establishing the one-person, one-vote rule.[277] While the *Buckley* Court did not accept certain equality principles,[278] the *McConnell* Court opened the door for a broader conception.[279] I propose a different concern that the high court should weigh in the balance.[280]

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275. *Buckley*, 424 U.S. at 48-49. Raskin and Bonifaz, calling that "the most controversial and dubious statement in the Buckley opinion," counter: "the concept which 'is wholly foreign to the First Amendment' is that which says that the First Amendment includes the right to drown out the voices of others." Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL'Y REV. 273, 320, 324 (1993) [hereinafter Raskin & Bonifaz, *Wealth Primary*].

276. Justices Thomas and Scalia, for example, have hung their dissenting hats on that phrase on numerous occasions. *See* Nixon v. Shrink Mo. Gov't. Political Action Comm., 528 U.S. 377, 422 n.8 (2000) (Thomas, J., dissenting); Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 685 (1990) (Scalia, J., dissenting); *see also supra* note 261 and accompanying text (discussing Justice Thomas's *McConnell* dissent).

277. *See Buckley*, 424 U.S. at 49 n.55. The Court was speaking to a specific question of whether the First Amendment required both sides of a debate to be heard more or less equally. The "voting cases" that the Court weighed were those that "invalidat[ed] governmentally imposed wealth restrictions on the right to vote or file as a candidate for public office," i.e., cases striking poll taxes and certain filing fees, but not the Voting Cases discussed in this Article, which were not cited at all by the majority, and only once in the hundreds of published pages of opinions. *See id.*

278. *See Buckley*, 424 U.S. at 48-49. *See also* Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1407 (1986). Fiss aptly argues that the received Free Speech Tradition was the problem in many cases, and that the choice between Liberty and Equality was false, in a sense.

> [A]t issue was not simply a conflict between equality and liberty, but also and more importantly, a conflict between two conceptions of liberty. The battle being fought was not just Liberty v. Equality, but Liberty v. Liberty, or to put the point another way, not just between the [F]irst [A]mendment and the Equal Protection Clause, but a battle within the [F]irst [A]mendment itself.

Id. My argument does not deny this; rather, it also tries to re-define the Liberty v. Equality equation.

279. *See supra* notes 252-256 and accompanying text.

280. From that point, future reform legislation is up to reform advocates, legislators, and judges. Some have attacked an equality-based approach as being driven not by equality but by political motivation and content preferences. *See, e.g.*, Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1051 (1996) (arguing that campaign reform efforts, which "inherently favor certain political elites, support the status quo, and discourage grassroots political activity" ultimately "would have an undemocratic effect on American elections"). That criticism, while perhaps applying to specific proposals, has no foundation here: this Article's goal is not to write a law at all, much less one that favors any individual or party. That is not to say that I do not have preferences for certain policy outcomes. Legislators and

The issue of equality is not new to supporters of reform either. Many writers and reformers have argued for reform from an egalitarian perspective.[281] Raskin and Bonifaz in particular place an additional emphasis on wealth disparities and the Fourteenth Amendment, arguing in one article:

> The real issue is constitutional: whether we will have a more or less democratic government. The purpose of campaign finance reform should be to fashion a system in which electoral and governmental decision-making is based on the participation, deliberation and interests of all citizens rather than on the awesome wealth of the few.[282]

I fully agree, but their work, while compelling, is incomplete. What I bring to the table that other egalitarian scholars have not is the specific call of the Voting Cases and their roots. While philosophers, scholars, judges, and politicians have long debated equality, politics, forms of government, campaigns and reform, this Article adds concrete and well-established precedent to show the compelling nature of this particular equality.

No doubt there are myriad implications of what I am proposing, but these are the primary concerns and responses meriting attention here. In addition, there remains an unknown next layer of implications, for ultimately, I propose a new way of looking at this problem. The analysis of a specific regulation will depend on its contents. In the end, I propose that analysis will consider equality of participation in the political process, with its foundation in the Voting Cases, the Constitution, and its amendments, and in the greater context of representative

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reformers are invited to take up the invitation as they move forward. But my point in these pages is to illuminate the problem of the concentration of power in the hands of the few and to add a new dimension to the analysis of that problem.

281. *See, e.g.*, Burt Neuborne, *Toward a Democracy-Centered Reading of the First Amendment*, 93 NW. U. L. REV. 1055, 1057 (1999) ("Unless and until political equality re-enters the picture as a permissible reform goal, I see no way out of the current, unsatisfactory situation."); Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1392-93 (1994) ("In democratic politics, a norm of equality is important: disparities in wealth ought not lead to disparities in power over government."). For an excellent synthesis of various themes of reform, see Spencer Overton, *But Some Are More Equal: Race, Exclusion and Campaign Finance*, 80 TEX. L. REV. 987, 995 (2002) ("[I]dentifiable themes appear throughout the scholarship of many Reformers. The most important of these themes relate to equality, the relative nature of rights, the uneven distribution of property, and the role of campaign finance in the larger political process.").

282. Raskin & Bonifaz, *Constitutional Imperative*, *supra* note 122, at 1163; *see also* Raskin & Bonifaz, *Wealth Primary*, *supra* note 275, at 279 (declaring that "[t]he purpose of this Article is to demonstrate that the current campaign finance regime is inconsistent with equal protection or, at the very least, warrants congressional action to vindicate equal protection").

democracy and popular sovereignty.

Conclusion

This Article is concerned with the ways in which money in politics concentrates power in the hands of the wealthy few. To demonstrate my point, I reviewed contribution patterns, indicated where the money comes from, and showed that it distorts the political-governmental process.[283] This review of the power of money in politics connected the vote dilution of the 1960s with the concentration of political power in the hands of the wealthy today. In these pages I have proposed a new analogy, and a new way of thinking about that problem. This paradigm starts with the Voting Cases, in which the Supreme Court pronounced the one-person, one-vote rule and rejected the dilution of the vote and its corollary, concentration of power.[284] The Court had been asked to analyze the Fourteenth Amendment's Equal Protection Clause. It did so, and it went beyond, drawing from the structure and theory of government and the Voting Amendments, all of which embrace a concept of equality of participation in the political process.[285] Accordingly, I suggest that there is an undervalued constitutional dimension to the problem of money in politics. Campaign finance reform can help eliminate money as the force of inequality that it is today, but it is most important to shift the way we think about this field. The concentration of power in the hands of the wealthy few has a compelling constitutional dimension that must be incorporated into campaign finance reform analysis.

283. *See supra* notes 35-103 and accompanying text.
284. *See supra* notes 120-152 and accompanying text.
285. *See supra* notes 128-227 and accompanying text.