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The Structural Constitutional Principle of Republican Legitimacy

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THE STRUCTURAL CONSTITUTIONAL PRINCIPLE OF REPUBLICAN LEGITIMACY

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ABSTRACT

Democracy does not spontaneously occur by citizens gathering to choose laws. Instead, representative democracy takes place within an extensive legal framework that determines such matters as who gets to vote, how campaigns are conducted, and what conditions must be met for representatives to make valid law. Many of the “rules of the road” that operationalize republicanism have been subject to constitutional challenges in recent decades. For example, lawsuits have been brought against partisan gerrymandering—which is partly responsible for the fact that most congressional districts are no longer party competitive, but instead are either safely Republican or safely Democratic—and against onerous voter identification requirements that reduce the voting rates of certain voting populations.

These challenges were based on individual rights claims grounded in equal protection or free speech. This Article’s claim is that the rules of the road also implicate a structural constitutional principle, wholly independent of individual rights-based claims, that to date has gone unnoticed: what I call “Republican Legitimacy.” This Article explains Republican Legitimacy’s source and content, and the costs of failing to recognize it.

Republican Legitimacy’s absence has distorted judicial analyses and led to egregious conduct by members of the state and federal

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legislatures. As to courts, individual rights doctrines have been unable to protect the structural principle of Republican Legitimacy. Republican Legitimacy identifies legally significant facts that are overlooked by rights doctrines that focus primarily on individuals, provides conceptual traction that rights-based doctrines do not, and makes clear why various subdoctrines developed in the individual rights context that limit judicial review have no rightful application with respect to a structural principle like Republican Legitimacy. For these reasons, rights-based doctrines cannot protect the structural principle of Republican Legitimacy.

As to legislatures, Republican Legitimacy's absence has led members of the legislative and executive branches to think that democracy's rules of the road are a part of ordinary politics. Republican Legitimacy makes clear that politicians have a special duty to act with a higher order of care when choosing democracy's rules of the road: they must act in accordance with "tempered" rather than "hardball" politics. As skeptical as one may be of politicians, there is no reason to assume legislators would not take seriously their oaths to uphold the Constitution once they understood it included Republican Legitimacy. Furthermore, there are steps that courts and Congress can take to encourage state legislatures—the institutions presumptively responsible for most of the rules of the road under the Constitution—to act consistently with tempered politics.

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“We are in the business of rigging elections.”

Vieth v. Jubelirer (quoting a North Carolina State Senator)¹

“We are going to shove [the district map] up your f**king ass and you are going to like it, and I’ll f**k any Republican I can.”

Democratic chairman regarding the new districting plan for Democratic-led county board in Illinois²

“[W]e are going to draw the lines so that Republicans will be in oblivion in the state of New York for the next 20 years.”

Malcolm Smith, New York State Senate president³

“It is fair to infer that partisan considerations may have played a significant role in the decision to enact [Indiana’s voter identification law].”

*Crawford v. Marion County Election Board*⁴

“Too often, Members’ first thought is not what is right or what they believe, but how it will affect fundraising. Who, after all, can seriously contend that a \$100,000 donation does not alter the way one thinks about—and quite possibly votes on—an issue?”

Alan Simpson, former United States Senator⁵

“Even a cursory survey of world events over the last 20—or 100—years makes plain that democracies are fragile, that democratic institutions can be undermined from within. Ours are no exception.”

Alexander Keyssar⁶

1. 541 U.S. 267, 317 (2004) (Kennedy, J., concurring) (quoting John Hoeffel, *Six Incumbents Are a Week Away from Easy Election*, WINSTON-SALEM J., Jan. 27, 1998, at B1) (internal quotation marks omitted).

2. JONATHAN WINBURN, *THE REALITIES OF REDISTRICTING 1* (2008).

3. Editorial, *He Probably Didn’t Mean To*, N.Y. TIMES, May 6, 2010, at A32.

4. 553 U.S. 181, 203 (2008) (Stevens, J., plurality opinion).

5. *McConnell v. FEC*, 540 U.S. 93, 149 (2003) (quoting declaration of former U.S. Senator Alan Simpson) (internal quotation marks omitted).

6. Alexander Keyssar, *The Strange Career of Voter Suppression*, N.Y. TIMES, Feb. 13, 2012, at A23.

INTRODUCTION

Representative democracy does not spontaneously occur by citizens gathering to choose laws. Instead, republicanism takes place within an extensive legal framework that determines such matters as who gets to vote, how campaigns are conducted, and what conditions must be met for representatives to make valid law. Many of these “rules of the road” that operationalize representative democracy have been subject to constitutional challenges in recent decades. For example, lawsuits have been brought against “partisan gerrymandering”—which has contributed to most congressional districts not being party competitive, but instead being safely Republican or Democratic⁷—and against onerous voter identification requirements that reduce the voting rates of certain voting populations.⁸

These constitutional challenges were based on individual rights claims that were grounded in equal protection or free speech.⁹ This Article’s core argument is that the rules of the road of representative democracy also implicate a structural constitutional principle, wholly independent of individual rights-based claims, that to date has gone unnoticed: what I call the principle of “Republican Legitimacy.”¹⁰ This Article explains Republican Legitimacy’s source

7. See *Vieth v. Jubiler*, 541 U.S. 267, 271 (2004); see also Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 ELECTION L.J. 179 (2003) (providing exhaustive analysis of gerrymandering of congressional districts); Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 663-64 (2002) (noting that most congressional districts are safely Democratic or Republican). But see Rhodes Cook, *Congressional Redistricting: Is Creating “Safe” Districts a Dying Art?*, SABATO’S CRYSTAL BALL (Mar. 31, 2011), <http://www.centerforpolitics.org/crystalball/articles/frc2011033101> (“[S]afe congressional seats will always be with us, but probably not as many as their most ambitious creators would want.”).

8. See, e.g., *Crawford*, 553 U.S. at 185-87.

9. See, e.g., *id.* at 187; *Vieth*, 541 U.S. at 272, 294.

10. I have learned greatly from the approaches other scholars have taken. Perhaps the closest approach to mine is that of Professor Teachout, who has proposed that the Constitution contains an “anti-corruption” principle. See Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341 (2009). However, as explained in Parts I and II, there are significant differences between anti-corruption and Republican Legitimacy.

Professor Pildes has astutely written about “the constitutional violation ... in the structural harm to representative self-government that results when state legislatures abuse their

and content, the costs of failing to recognize it, and the payoffs of doing so.

Republican Legitimacy's derivation is relatively straightforward. The Constitution establishes a federal government that essentially is a representative democracy—that is, a republican form of government. The Constitution also guarantees a republican form of government to the states. The Constitution's establishment and guarantee of republicanism across the federal and state governments encompass the necessary preconditions for these republican forms of government to successfully and legitimately operate. These preconditions are the contents of the constitutional principle of Republican Legitimacy.

Republican Legitimacy's absence has led to egregious conduct by legislatures and distorted judicial analyses. As to legislatures, look again at the shocking statements collected in the prologue¹¹: legislators acknowledging that they “are in the business of rigging elections,”¹² that “we are going to draw the lines so that Republicans will be in oblivion in the state of New York for the next 20 years,”¹³ and that campaign “donation[s] ... alter the way one thinks about—and quite possibly votes on—an issue.”¹⁴ The harm is not just to individuals, but to republican government itself.

More generally, inattentiveness to Republican Legitimacy has led legislators to think that democracy's rules of the road are a part of ordinary politics. Republican Legitimacy makes clear that politicians have a special duty to act with a higher order of care when choosing the rules of the road: they must act in accordance with

powers under the Elections Clause, Article I, Section 4, and deliberately suppress competitive elections in systematic fashion.” Richard H. Pildes, *The Constitution and Political Competition*, 30 NOVA L. REV. 253, 255 (2006). This Article builds on the insights of Pildes and others concerning structural constitutional harms, but the principle it identifies—Republican Legitimacy—derives from elsewhere and is significantly broader. *See infra* Part II.C.2. Republican Legitimacy applies not only to the districting wrongs Pildes discusses but to all rules of the road that operationalize representative democracy.

11. *See supra* notes 1-6 and accompanying text.

12. *See Vieth*, 541 U.S. at 317 (Kennedy, J., concurring) (quoting John Hoeffel, *Six Incumbents Are a Week Away from Easy Election*, WINSTON-SALEM J., Jan. 27, 1998, at B1) (internal quotation marks omitted).

13. *See He Probably Didn't Mean To*, *supra* note 3.

14. *McConnell v. FEC*, 540 U.S. 93, 149 (2003) (quoting declaration of former U.S. Senator Alan Simpson).

“tempered” rather than “hardball” politics.¹⁵ As skeptical as one may be of politicians, there is no reason to assume legislators would not take seriously their oaths to uphold the Constitution once they understand it includes Republican Legitimacy. Moreover, the courts and Congress can take steps to encourage state legislatures—the institutions presumptively responsible for most of the rules of the road under the Constitution¹⁶—to act consistently with “tempered politics.”¹⁷

As to courts, the individual rights doctrines they have invoked have left the structural interests of Republican Legitimacy vulnerable. Republican Legitimacy identifies legally significant facts that are overlooked by rights doctrines that focus primarily on individuals, provides conceptual traction that rights-based doctrines do not, and makes clear why various subdoctrines developed in the individual rights context that limit judicial review have no rightful application with respect to a structural principle like Republican Legitimacy.¹⁸

This Article’s argument unfolds in four parts. Part I explains the doctrinal source of Republican Legitimacy, as well as its contents. Like the constitutional principles of separation of powers and federalism, Republican Legitimacy is a structural principle that protects and effectuates the republican institutions that are created and guaranteed by the Constitution.¹⁹ Republican Legitimacy secures the necessary conditions in order for decisions of the people’s representatives to legitimately bind the people. Drawing primarily on political theory, Part I explains that Republican Legitimacy has two components: (1) the mechanisms for determining who will be the representatives in a republican form of government (Legitimate-Selection) and (2) the decision-making processes that the representatives use in generating the laws that are to bind the polity (Legitimate-Decisionmaking).²⁰ Part I then anticipates several possible objections and explains why Republican Legitimacy is con-

15. *See infra* Part IV.

16. *See* U.S. CONST. art. I, § 4, cl. 1.

17. *See* Mark D. Rosen, *Implementing Republican Legitimacy: Courts and Tempered Politics* (2012) (unpublished manuscript) (on file with author).

18. *See infra* Part II.C.2.

19. *See infra* Part I.A.

20. *See infra* Part I.B.

ceptually and doctrinally superior to the “anti-corruption” principle that is both found in some case law and discussed by several scholars.²¹

Part II then considers to what extent Republican Legitimacy is already present in the Court’s jurisprudence. It first shows that many Supreme Court decisions have recognized the significance of the two components of Republican Legitimacy.²² Most of these decisions, however, have folded these aspects of Republican Legitimacy into the individual rights doctrines of equal protection and free speech.²³ Part II explains why it is critical that Republican Legitimacy be recognized as a structural constitutional principle that is independent of the individual rights doctrines of equal protection and free speech.

Part III demonstrates Republican Legitimacy’s explanatory power by applying it to three recent Supreme Court decisions. Republican Legitimacy illuminates troublesome features of Indiana’s strict voter identification law that were not treated as legally significant under Justice Stevens’s plurality opinion in *Crawford v. Marion County Election Board*, and explains why a successful challenge would not require a showing of discriminatory intent, pace Justice Scalia’s concurring opinion.²⁴ Part III then uses Republican Legitimacy to critique the *Vieth v. Jubelirer* decision,²⁵ which virtually declared partisan gerrymandering to be nonjusticiable.²⁶ Republican Legitimacy identifies heretofore unrecognized common ground shared by Justice Kennedy’s concurrence and the four *Vieth* dissenters that conceivably could have led to a different result in the case.²⁷

21. See *supra* note 10; *infra* Part I.C.

22. See *infra* Part II.A-B.

23. See *infra* Part II.C.

24. 553 U.S. 181, 190 & n.8 (2008) (Stevens, J., plurality opinion); see *infra* Part III.A.

25. See *infra* Part III.B.

26. See *Vieth v. Jubelirer*, 541 U.S. 267, 316 (2004) (Scalia, J., plurality opinion). Justice Kennedy’s concurrence, which provided the crucial fifth vote, left only a small window open for partisan gerrymandering claims. See *id.* at 317 (Kennedy, J., concurring). The door was kept open in the last Supreme Court case that addressed partisan gerrymandering, *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006), in which the Court’s two newest members reserved the question of whether partisan gerrymandering claims can be justiciable. See *id.* at 492 (Roberts, C.J., concurring in part and dissenting in part).

27. See *infra* Part III.B.

Part III then applies Republican Legitimacy to the Court's divisive decision in *Citizens United v. Federal Election Commission*, which invoked the First Amendment to strike down the provision of the Bipartisan Campaign Reform Act of 2002 that prohibited the use of corporate and union general treasury funds for independent expenditures.²⁸ Republican Legitimacy clarifies the nature and significance of the governmental interest behind the Act's expenditures prohibition.²⁹ Republican Legitimacy provides a more elegant and compelling frame for understanding the welter of policies discussed in Justice Stevens's dissent under the rubrics of "anti-corruption" and "anti-distortion,"³⁰ and Republican Legitimacy's constitutional status explains why these policies satisfy the compelling governmental interest requirement.³¹ Independent of this, Part III also shows that deciding whether corporate and union expenditures should be banned implicates a conflict between competing constitutional principles—free speech and Republican Legitimacy—and argues that Congress's considered resolution of such a constitutional conflict should have been entitled to substantial deference by the Court.³²

Part IV provides a conclusion that also serves as a prologue to a companion article that considers what roles different governmental and societal institutions must play if Republican Legitimacy is to be appropriately guarded.³³ While this Article begins to examine the role that courts must play, a companion article explains that the more political branches—the legislatures and executives at both the federal and state levels—are primarily responsible for fully implementing Republican Legitimacy.³⁴ This conclusion builds on Larry Sager's brilliant demonstration that courts frequently underenforce constitutional commitments and his concomitant argument that complete realization of constitutional commitments accordingly requires action by legislatures.³⁵ While Sager focused attention on

28. See 130 S. Ct. 876, 913 (2010).

29. See *infra* Part III.C.

30. See *Citizens United*, 130 S. Ct. at 961-77 (Stevens, J., dissenting).

31. See *infra* Part III.C.1.

32. See *infra* Part III.C.2.

33. See Rosen, *supra* note 17.

34. See *infra* Part IV.

35. See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced*

Congress's role in complementing judicial underenforcement of constitutional rights, Congress similarly plays an essential role in fully structural constitutional principles as well.³⁶ In short, Republican Legitimacy is yet another structural constitutional principle whose full realization requires the participation of the political branches.

I. TEXTUAL AND CONCEPTUAL DERIVATION OF REPUBLICAN LEGITIMACY

This Part explains the derivation and contents of Republican Legitimacy. It proceeds in three steps. Part I.A explains Republican Legitimacy's constitutional origins. Part I.B explains Republican Legitimacy's contents. Part I.C anticipates and responds to three arguments that may be leveled against the claim that Republican Legitimacy is an independent structural constitutional principle.

A. Republican Legitimacy's Doctrinal Derivation

Republican Legitimacy is a structural constitutional principle that derives from five constitutional provisions that together establish that the federal and state governments are essentially republican in character insofar as governmental power is exercised by representatives who are ultimately answerable to citizens.³⁷ The first provision is Article I's charge that the House of Representatives

Constitutional Norms, 91 HARV. L. REV. 1212 (1978).

36. See Mark D. Rosen, *Congress's Primary Role in Determining What Full Faith and Credit Requires: An Additional Argument*, 41 CAL. W. INT'L L.J. 7, 8-9, 12-28 (2010) (explaining why courts inevitably either underenforce or overenforce the Full Faith and Credit Clause, and arguing that Congress is better situated to properly calibrate the requirements of full faith and credit).

37. To be sure, many different concepts of "republican" can be located among Americans during the Founding Era. See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 276-81 (2005) (demonstrating that many in the Framers' generation treated democracy and republicanism interchangeably); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 48-90, 593-615 (1969) (describing the evolution of the meaning of "republicanism" between the Revolution and 1787). I draw upon Madison's understanding of republicanism in Federalist No. 10. See *THE FEDERALIST NO. 10*, at 81-84 (James Madison) (Clinton Rossiter ed., 1961). This has become the accepted definition today. See AMAR, *supra*, at 276.

“shall be composed of Members chosen ... by the People.”³⁸ The second is the Seventeenth Amendment’s instruction that the Senate be composed of Senators “elected by the people.”³⁹ The third are the constitutional provisions, as supplemented by custom, that establish that the President is essentially popularly elected.⁴⁰ Fourth, the republican character of all these popularly elected institutions is confirmed, and has been deepened, by the Amendments that have expanded the franchise, namely the Fifteenth (race, color, or previous condition of servitude), Nineteenth (women), Twenty-fourth (proscribing poll taxes), and Twenty-sixth (age).⁴¹ Fifth, and finally, the Guarantee Clause provides that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government.”⁴²

Republican Legitimacy’s derivation from the above provisions is straightforward: the Constitution’s establishment and guarantee of republican forms of government include the minimum powers and limitations that are necessary to protect and effectuate these republican institutions. These powers and limitations are themselves of constitutional dimension, and they constitute the independent structural constitutional principle of Republican Legitimacy.⁴³

The Supreme Court has recognized other nonexplicit structural constitutional principles on the ground that they are necessary to

38. U.S. CONST. art. I, § 2, cl. 1.

39. *Id.* amend. XVII.

40. Although Article II only provides that the President shall be elected by “Electors” appointed by the state legislatures, *id.* art. II, § 1, it long has been understood that the federal government is a “government whose essential character is republican, whose executive head and legislative body are both elective.” *Ex parte Yarbrough*, 110 U.S. 651, 657 (1884). The Twenty-Third Amendment strengthens the President’s republican character by guaranteeing that the people residing in the District of Columbia can participate in his election. U.S. CONST. amend. XXIII.

41. U.S. CONST. amends. XV, XIX, XXIV, XXVI.

42. *Id.* art. IV, § 4. My claim that the Guarantee Clause is the source of a constitutional principle binding states and the federal government is unaffected by the Clause’s being held to be a nonjusticiable political question, *see Baker v. Carr*, 369 U.S. 186, 218-20 (1962), because nonjusticiable constitutional questions are still binding, even if they are not judicially enforceable, *see Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004). Further, the Court has held that the Guarantee Clause is enforceable by Congress, *see Baker*, 369 U.S. at 220, and my proposal places primary responsibility for enforcing Republican Legitimacy with Congress, *see Rosen*, *supra* note 17.

43. Jack Balkin has similarly spoken of “democratic self government” as a structural principle. Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 7 (2010).

preserve or effectuate institutions created by, or recognized by, the Constitution. Most of these structural principles function as limitations on expressly granted constitutional powers, but some principles have been the source of affirmative governmental powers.

The two best-known structural principles that operate as constitutional limitations are separation of powers and federalism. In *Morrison v. Olson*, for example, the Court held that Congress can restrict the President's power to remove executive officials only insofar as it "does not interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed.'"⁴⁴ What was necessary to preserve the President's explicitly created constitutional powers thus constituted an implied constitutional limitation on Congress's powers. Similarly, the Court in *New York v. United States* held that Congress could not "commandeer" state legislatures, notwithstanding the absence of an express constitutional provision barring Congress from doing so, because such an anticommandeering rule was necessary to "protect the sovereignty of States."⁴⁵ Republican Legitimacy is similarly derived; it is a constitutional principle that consists of what is necessary to preserve the representative democracy that our Constitution creates vis-à-vis the federal government and guarantees vis-à-vis the states.

Separation of powers and federalism are not the only examples of implied constitutional limitations that protect constitutionally created institutions. Consider the case of *U.S. Term Limits, Inc. v. Thornton*, in which the Court held unconstitutional an Arkansas law establishing term limits for congressmen from that state.⁴⁶ No provision of the Constitution explicitly forbids states from imposing

44. 487 U.S. 654, 689-90 (1988) (quoting U.S. CONST. art. II); see also *id.* at 693-96 (holding that the Ethics in Government Act "taken as a whole" does not "violate[] the principle of separation of powers by unduly interfering with the role of the Executive Branch").

45. 505 U.S. 144, 161, 181, 188 (1992); see also *id.* at 177 ("In determining whether the Tenth Amendment limits the ability of Congress to subject state governments to generally applicable laws, the Court *has* in some cases stated that it will evaluate the strength of federal interests in light of the degree to which such laws would prevent the State from functioning as a sovereign; that is, the extent to which such generally applicable laws would impede a state government's responsibility to represent and be accountable to the citizens of the State.").

46. 514 U.S. 779, 837-38 (1995).

term limits. The Court nonetheless found an implied constitutional limitation, justifying it, *inter alia*, on the ground that it was necessary to protect the constitutionally created institution of the House of Representatives: “The Constitution thus creates a uniform national body representing the interests of a single people. Permitting individual States to formulate diverse qualifications for their representatives would result in a patchwork of state qualifications, undermining the uniformity and the national character that the Framers envisioned and sought to ensure.”⁴⁷

The Court also has found implied constitutional *powers* on the ground that they were necessary to effectuate constitutionally created institutions. Consider first the executive privilege. The Court held in *United States v. Nixon* that “[n]owhere in the Constitution ... is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President’s powers, it is constitutionally based.”⁴⁸ The Court’s conclusion that the executive privilege is a constitutional power rested on pragmatic reasoning: “The privilege is fundamental to the operation of Government” because “[a] President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.”⁴⁹ There must be “candid, objective and even blunt or harsh opinions in Presidential decisionmaking.”⁵⁰

The Court also has found that Congress has implied constitutional powers. Although the Constitution does not expressly grant Congress the power to investigate, the Court held in *McGrain v. Daugherty* that Congress has constitutional investigative powers because such powers are a prerequisite to effective legislation.⁵¹ Congress “possess[es] not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective.”⁵² In determining what “auxiliary” powers were necessary to “make

47. *Id.* at 822.

48. 418 U.S. 683, 711 (1974).

49. *Id.* at 708.

50. *Id.*

51. 273 U.S. 135, 180 (1927).

52. *Id.* at 173.

the express powers effective,” the Court once again utilized pragmatic reasoning:

A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed.⁵³

In short, separation of powers and federalism jurisprudence, as well as the *Thornton*, *Nixon*, and *McGrain* decisions, all reasoned that powers and limitations that were necessary to protect or effectuate expressly created or recognized constitutional institutions were themselves of constitutional status. Republican Legitimacy can be derived on the same basis—the Constitution expressly establishes a republican federal government and guarantees that the states similarly will have republican governments, and these constitutional institutions and guarantees include the minimum conditions that are necessary to protect and effectuate these republican forms of government.

* * *

That the Court has found implied constitutional powers, and limits, in other contexts does not, on its own, mean that it should do so *here*. The Article’s next Parts explain why Republican Legitimacy is another appropriate constitutional inference. Part I.B draws on political theory to explain why there must be a principle such as

53. *Id.* at 175. The Court also noted that congressional investigative powers had a long historical pedigree. *See id.* But the Court used the longstanding historical practice as confirmation of the legislature’s pragmatic need of such a power, not as a prerequisite to finding the constitutional power. *See id.* (“All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry—with enforcing process—was regarded and employed as a necessary and appropriate attribute of the power to legislate—indeed, was treated as inhering in it. Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised.”).

Republican Legitimacy if republican institutions are to be well functioning and stable. This analysis permits the construction of a framework that fleshes out Republican Legitimacy's concrete contents. Parts II.A and II.B show that many of the components of Republican Legitimacy already have been recognized in case law.

Parts I.B and II.A-B are mutually reinforcing. Parts II.A-B provide a doctrinal basis for Part I.B's theoretical discussion. Further, Part II serves as inductive support for Part I.B's theoretical reasoning.⁵⁴ In the other direction, Part I.B's analytical framework offers critical insights into the Court's jurisprudence. It makes clear that case law that until now has been thought to address disparate subjects, such as limitations on the franchise, term limits, and campaign finance, actually is part of a single whole: the jurisprudence of Republican Legitimacy.

Part I.B's framework also identifies two shortcomings in the case law. First, some matters that the Court has treated as "compelling interests" are actually part of Republican Legitimacy and hence are of independent constitutional status. Second, some matters that the Court has treated under the rubric of individual rights are instead aspects of the *structural* constitutional principle of Republican Legitimacy. Part II.C explains why it is important that Republican Legitimacy be understood as an independent constitutional principle that is structural rather than rights-based.

B. Republican Legitimacy's Contents

The contents of Republican Legitimacy are best identified by asking the following question: what conditions must be met for decisions of the people's representatives to legitimately bind the people? When political philosophers speak of legitimacy, they refer to the government's moral right to exercise political power.⁵⁵ "[L]egitimacy is a weaker notion than justice,"⁵⁶ meaning that "[p]olitical power may be legitimately exercised in ways that are unjust, unfair, or otherwise unjustifiable."⁵⁷ While a government's

54. See *infra* note 242.

55. See, e.g., Simon Căbulea May, *Religious Democracy and the Liberal Principle of Legitimacy*, 37 PHIL. & PUB. AFF. 136, 137-38 (2009).

56. *Id.* at 148.

57. Simon Căbulea May, *Democratic Legitimacy, Legal Expressivism, and Religious*

failure to operate justly is deeply unfortunate, a governmental system's inability to satisfy the demands of legitimacy is more deeply destabilizing. In fact, it would seem that a governmental system that cannot provide adequate answers as to why the powers it exercises are legitimate cannot be both free and stable over time.

Jeremy Waldron expertly sets up the issue of legitimacy:

We imagine a decision being made by a certain process and we imagine a citizen C_n —who is to be bound or burdened by the decision—disagreeing with the decision and asking why she should accept, comply, or put up with it. Some of those who support the decision may try to persuade C_n that it is right in its substance. But they may fail, not because of any obtuseness on her part, but simply because C_n continues (not unreasonably) to hold a different view on this vexed and serious matter. What then is to be said to C_n ? A plausible answer may be offered to her concerning the process by which the decision was reached. Even though she disagrees with the outcome, she may be able to accept that it was arrived at fairly. The theory of such a process-based response is the theory of political legitimacy.⁵⁸

Waldron concludes that there are two components to a theory of political legitimacy. First, there must be an appropriate mechanism for selecting which individuals will make the community's political decisions, such as who will be the representatives in a republican form of government.⁵⁹ I shall call this the "Legitimate-Selection" component. Second, the representatives must themselves utilize an acceptable decision-making procedure when creating laws.⁶⁰ I call this component "Legitimate-Decisionmaking." In short, Legitimate-Selection addresses the integrity of *electoral* results, whereas Legitimate-Decisionmaking concerns *legislative* results.⁶¹

Establishment, 15 CRITICAL REV. INT'L SOC. & POL. PHIL. 219, 220 (2012).

58. See Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1387 (2006).

59. See *id.*

60. See *id.*

61. Sanford Levinson uses a similar two-part framework. See SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 27 (2006).

1. *Legitimate-Selection*

The constitutional principle of Republican Legitimacy comprises the minimum requirements of the two aforementioned components. The Legitimate-Selection component encompasses what Waldron helpfully calls “the theory of fair elections to the legislature, elections in which people like C_n were treated equally along with all their fellow citizens in determining who should be privileged to be among the small number participating” in the law making that will bind C_n and all other citizens.⁶² Pace Waldron’s formulation, though, there is not a *single* “theory of fair elections,” but instead multiple legitimate contenders. For example, there are strong arguments on behalf of both majoritarian and proportional electoral systems.⁶³

Reasonably controversial aspects of fair elections are not part of the *constitutional* requirement of Republican Legitimacy, although they may well be included in Waldron’s first component of political democracy. Instead, Republican Legitimacy comprises matters about which there can be no reasonable disagreement—matters that are veritable *sine qua nons* of a republican system, such as the requirement of competitive elections for important governmental officials. For example, a political system where citizens vote only for or against a single candidate for their country’s chief executive—as in the former Soviet Union and Saddam Hussein’s Iraq—categorically falls outside the scope of a republican form of government. Encompassed within Legitimate-Selection are such matters as who has the franchise; how votes are cast, which in turn includes voter registration and the mechanics of voting; and how votes are aggregated, which includes such things as whether districts are used and, if so, how they are drawn. I will have much more to say about Legitimate-Selection in Part III.

2. *Legitimate-Decisionmaking*

The contents of the second component of Republican Legitimacy, Legitimate-Decisionmaking, are difficult to specify. For example,

62. Waldron, *supra* note 58, at 1387.

63. For a useful discussion, see Arend Lijphart & Bernard Grofman, *Choosing an Electoral System*, in CHOOSING AN ELECTORAL SYSTEM 3 (Arend Lijphart & Bernard Grofman eds., 1984).

although majority rule might be considered to be a part of the second component, there are strong reasons to resist this conclusion.⁶⁴ Probably the most important aspect of Legitimate-Decisionmaking derives from the fact that virtually all theories of democracy incorporate a requirement that, when government acts, it act for the purpose of promoting the “public good, somehow defined” and, conversely, that “self-interested behavior by government officials” is illegitimate.⁶⁵

Indeed, “public good” requirements are a central component of the theories of many of the most important political theorists, past and present. A central concern of Western political theory is to explain why the state can justifiably compel individuals against their will, and the limits of that power.⁶⁶ Public good requirements have played a central role in answering these crucial questions.⁶⁷

64. Waldron provides a brief but spirited defense of the principle of majority decision, but his claim that majority decisionmaking is necessary to political legitimacy is doubtful. See Waldron, *supra* note 58, at 1388. Majority rule, in fact, is normatively controversial. See AMARTYA K. SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE 161-63 (1970); ADRIAN VERMEULE, MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN WRIT SMALL 7 (2007); John O. McGinnis & Michael B. Rappaport, *Majority and Supermajority Rules: Three Views of the Capitol*, 85 TEX. L. REV. 1115, 1119 (2007). Further, some aspects of the Constitution, such as the Treaty Clause, explicitly demand a supermajority, see U.S. CONST. art. II, § 2, cl. 2, and it has been persuasively argued that our Constitution’s bicameralism and presentment requirements effectively operate as a supermajority requirement, see McGinnis & Rappaport, *supra*, at 1116.

65. See also VERMEULE, *supra* note 64, at 34 (“Disagreement about the uniquely best definition of impartiality need not prove an embarrassment to the limited ambitions of real-world democratic design, which are fully satisfied by identifying a set of decisions that all competing definitions of impartiality condemn.”); *cf. id.* at 4-5. For example, Simon May interestingly argues that self-interested legislation is illegitimate because it violates the “principle of equal respect [which] states that government may only exercise political power in ways that treat citizens as equals.” May, *supra* note 57, at 219; see also *id.* at 222 (using the principle to explain why legislators “have no moral right” to enact laws that increase the value of only their own property).

66. See, e.g., GERALD GAUS, THE ORDER OF PUBLIC REASON: A THEORY OF FREEDOM AND MORALITY IN A DIVERSE AND BOUNDED WORLD 2 (2011) (“The question that has occupied liberal political theory—whether free and equal persons can all endorse a common political order even though their private judgments about the good and justice are so often opposed—is the fundamental problem of a free moral order.”); JOHN STUART MILL, ON LIBERTY 59 (Elizabeth Rapaport ed., Hackett Publ’g Co. 1978) (1859) (discussing “the nature and limits of the power which can be legitimately exercised by society over the individual,” which for Mill includes both state power and nonlegal customs); JOHN RAWLS, POLITICAL LIBERALISM 217 (1993) (“[W]e ask: when may citizens by their vote properly exercise their coercive political power over one another when fundamental questions are at stake?”).

67. Indeed, public good requirements can be traced back to Aristotle and Aquinas. See

According to John Locke, for example, the legislature has power to enact laws only because “the public has chosen and appointed” the legislature.⁶⁸ This consent is the *sine qua non* of law’s legitimacy for Locke: what is “absolutely necessary to ... a law” is that the law has emanated from a body that has “the consent of the society; over whom nobody can have a power to make laws, but by their own consent, and by authority received from them.”⁶⁹ Legislative power, accordingly, can only extend to the powers granted by the people to the legislature. And this principle determines the outer limit of legislative power; because “nobody can transfer to another more power than he has in himself,” the legislature can have no more power than “those persons had in a state of nature before they entered into society, and gave up to the community.”⁷⁰ Locke understands man’s powers under the law of nature to extend only to “the preservation of himself and the rest of mankind,” and so Locke accordingly concludes that the legislature’s “power, in the utmost bounds of it, is limited to the public good of the society,” which he defines as the preservation of himself and mankind.⁷¹ Locke consistently contrasts pursuit of the “public good” with the illegitimate exercise of “power for [a ruler’s] private ends of their own”⁷² and with a ruler’s “distinct and separate interest from the good of the community.”⁷³

Public good requirements are also central to Jean-Jacques Rousseau. Rousseau thought the state’s legitimate powers extend only to “authentic act[s] of the general will,” meaning “the common good” or “the common interest.”⁷⁴ For Rousseau, the “general will”

Eduardo M. Penalver & Lior Strahilevitz, *Judicial Takings or Due Process?*, 97 CORNELL L. REV. 305, 325 n.81 (2012).

68. JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 158 (Ian Shapiro ed., Yale Univ. Press 2003) (1690).

69. *Id.*

70. *Id.* at 159.

71. *Id.* (emphasis added). Locke also argues that the executive’s “prerogative” power gives him the power to “act according to discretion for the public good, without the prescription of the law, and sometimes even against it.” *Id.* at 172. But the executive’s prerogative power, like the legislature’s power, is limited to that which is “for the public good.” *Id.*; see also *id.* at 173.

72. *Id.* at 172.

73. *Id.* at 173.

74. JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 75-77 (Maurice Cranston trans., Penguin Books 1968) (1762).

consists only of those desires of an individual that are shared by all other citizens in his polity.⁷⁵ For this reason, when the state identifies and enforces the general will, it does not compel a citizen against his will. To the contrary, limiting state power to the general will assures that the citizen need “obey nobody but [his] own will.”⁷⁶ It follows that when lawmakers legislate, they must aim to advance only the common good, and that they cannot act parochially “towards any particular and circumscribed object.”⁷⁷ This is yet another public good requirement.

Although contemporary political theorists largely reject Locke’s assumption of actual consent⁷⁸ and Rousseau’s assumption that laws constitute the overlap of citizens’ wills,⁷⁹ most theorists continue to embrace public good requirements.⁸⁰ John Rawls, for example, states that “[o]ur exercise of political power is proper only when we sincerely believe that the reasons we would offer for our political actions—were we to state them as government officials—are sufficient, and we also reasonably think that other citizens might also reasonably accept those reasons.”⁸¹ He dubs this the “criterion of reciprocity” and concludes that such reciprocity is a requirement of “political legitimacy.”⁸² Furthermore, in apparent contradistinction to the stricter notion of Rawlsian “public reason,” the criterion of reciprocity applies to “particular statutes and laws enacted.”⁸³ Self-interested “naked

75. See DAVID M. ESTLUND, *DEMOCRATIC AUTHORITY* 103 (2008) (explaining Rousseau’s “general will” as being “whatever is common to the will of all citizens”).

76. See ROUSSEAU, *supra* note 74, at 77.

77. *Id.* at 75.

78. For example, though Rawls falls within the contractarian tradition, his approach does not rest on citizens’ actual consent but instead aims to describe by means of the original position what political structure reasonable persons *hypothetically* would consent to. See generally Cynthia A. Stark, *Hypothetical Consent and Justification*, 97 *J. PHIL.* 313, 313 & n.1 (2000). For the unusual example of a modern theorist who retains the requirement of actual consent, see RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* 11-31 (2004).

79. See, e.g., JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* 115-16 (1999).

80. Notable exceptions are the public choice theorists, who posit that politics is a forum, no different from the marketplace, where people aim to advance their individual interests. I discuss these theorists below. See *infra* text accompanying notes 97-98.

81. See RAWLS, *supra* note 66, at 137.

82. *Id.*; see also *id.* at 149 (writing of “the idea of legitimacy and public reason’s role in determining legitimate law”).

83. *Id.* at 137. Public reason, by contrast, only applies to “fundamental political questions,” which Rawls tells us comprises “constitutional essentials and matters of basic justice.”

preferences”⁸⁴ cannot satisfy the criterion of reciprocity, which accordingly operates as a public good requirement.⁸⁵

A public good requirement also features in the powerful work of Brown University philosopher David Estlund. Estlund aims to explain the legitimacy of democratic decision-making processes without relying on citizens’ consent, because most citizens have not given their actual consent to those processes or to the authority of the government.⁸⁶ His answer is that it is not sufficient that the democratic procedure be “fair,” for if that *were* sufficient, then we should be willing to “flip a coin” to make political decisions insofar as coin flipping is perfectly random and hence fair—something that no one is willing to do.⁸⁷ Estlund concludes that, beyond being fair, democratic procedures must have “some epistemic value,” that is to say, they must have “a tendency to make correct decisions.”⁸⁸

Estlund generates an illuminating, involved argument that people would be morally obligated to consent to a democratic procedure with these characteristics, and that actual consent accordingly is unnecessary just as moral obligations are binding without consent.⁸⁹ The notion of “epistemic proceduralism”—that democratic law making must utilize procedures that have a tendency to make correct decisions—thus stands at the center of Estlund’s claims.⁹⁰ Though he does not go into the details of institutional design,⁹¹ his

Id. at 133. Somewhat confusingly, Rawls sometimes seems to suggest that public reason’s constraints also apply to ordinary law making, not just to fundamental political questions. For example, Rawls writes that public reason “has five different aspects,” one of which is the application of a “family of reasonable political conceptions of justice ... in discussions of coercive norms to be enacted in the form of legitimate law for a democratic people.” *Id.* Rawls also states that public reason limits the types of reasons that properly can be drawn upon when “exercis[ing] final political and coercive power over one another in enacting laws and in amending their constitution.” *Id.* at 214. No more need be said about the scope of public reason for present purposes because the less exacting “criterion of reciprocity” applies to ordinary legislation and constitutes a public good requirement, as discussed above.

84. See Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1690 (1984).

85. See *id.*; see also RAWLS, *supra* note 66, at 16-17.

86. See ESTLUND, *supra* note 75, at 3, 9.

87. *Id.* at 6.

88. *Id.* at 7-8. Crucially, the procedure’s epistemic value also must be “publicly recognizable”; that is to say, the procedure’s tendency to generate correct decisions must be “generally acceptable [to citizens] in the way that political legitimacy requires.” *Id.* at 8.

89. See *id.* at 10, 117-35.

90. See *id.* at 7-10.

91. See *id.* at 2.

theory implies the existence of some sort of public good requirement, because democracy's epistemic requirement cannot be satisfied if lawmakers are permitted to pursue self-serving goals when acting in their official capacities.⁹²

* * *

Legitimate-Decisionmaking's public good requirement means that certain motivations behind governmental action are illegitimate. Accordingly, the second component of Republican Legitimacy invites serious inquiry into the type of motivations and reasons that legislators properly may rely upon—and those that they *cannot*—when they legislate. This will receive further consideration later in this Article.⁹³

C. Anticipating Three Arguments Against Republican Legitimacy

Three arguments may be asserted against the claim above that Republican Legitimacy is a constitutional principle. First, against the claim concerning Legitimate-Decisionmaking's public good requirement regarding legislators, it might be argued that, regardless of what political theorists past and present may have thought, any such requirement is inconsistent with the Madisonian system that was adopted in *our* Constitution. Second, it might be argued that the many well-known deficits in democracy that were present during the Founding Era—best illustrated by the exclusion of women, African Americans, and non-property-holding whites from voting—undermine the claim that there is a constitutional principle of Legitimate-Selection. Third, it might be argued that what I call Republican Legitimacy is already, and better, addressed by what some cases and commentators have called “anti-corruption.” I develop, and refute, each of these arguments below.

92. Indeed, Estlund alludes to such a conclusion at one of the few places in his book where he briefly considers his theory's concrete institutional implications. *See id.* at 20 (“[I]f points of view get their influence on public conclusions by virtue of the wealth they have at their disposal, public reasoning will be seriously distorted unless this irrational element of power can somehow be countervailed in creative political practice.”).

93. *See infra* Part III.C.1.b.

1. *The Argument Against Legitimate-Decisionmaking: Madison and "Our Constitution"*

It might be argued that regardless of what the niceties of political theory might suggest, *our* Constitution's Madisonian compromise is inconsistent with the claim that Legitimate-Decisionmaking is a constitutional principle. In the Federalist Papers, Madison famously wrote that men are not "angels,"⁹⁴ that the Constitution accordingly relies on the principles that "[a]mbition must be made to counteract ambition," and that "the private interest of every individual may be a sentinel over the public rights."⁹⁵ Quoting this, Professor Adrian Vermeule argues that Madison believed that "suppressing self-interest at its source is infeasible," and that Madison instead chose to "leav[e] self-interested motives in place while constricting the opportunities available to self-interested decisionmakers" and to thereby "control[] the effects rather than the causes of self-interest."⁹⁶ Similarly, it has been argued that Madison's ideas are a foundation for, if not a precursor of, public choice theory,⁹⁷ which posits that politics is a forum where individuals simply ought to pursue their individual interests.⁹⁸

Any such Madisonian critique of public good requirements is unavailing for several reasons. First, it relies on a partial reading, if not a misreading, of Madison.⁹⁹ Madison's discussion of "ambition ... counteract[ing] ambition" occurs in the context of his explanation of how "the necessary partition of power among the several departments as laid down in the Constitution" are to be maintained.¹⁰⁰ Madison, thus, was discussing how the powers of the three branches of the federal government were to be kept distinct. Madison's

94. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) ("If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.").

95. *Id.*

96. VERMEULE, *supra* note 64, at 36.

97. See DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 10 (1991).

98. See, e.g., Henry W. Chapell, Jr. & William R. Keech, *Electoral Institutions in The Federalist Papers: A Contemporary Perspective*, in THE FEDERALIST PAPERS AND THE NEW INSTITUTIONALISM 39, 39-41 (Bernard Grofman & Donald Wittman eds., 1989).

99. For a similar argument, see Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 38-45 (1985).

100. THE FEDERALIST NO. 51, *supra* note 94, at 320 (James Madison).

solution was to “giv[e] to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.”¹⁰¹ So Madison’s discussion of “personal motives” is not a license for legislators to pursue their *individual* preferences when legislating, but instead refers to the powers and motivations for members of each branch to guard against, what Madison deemed to be, problematic encroachments from the other branches.¹⁰²

Indeed, Madison repeatedly spoke of the legislature’s pursuit of the “public good” and “public weal,”¹⁰³ and argued that representative democracy is more apt than direct democracy to pursue the public good:

[T]he delegation of the government ... to a small number of citizens elected by the rest ... [will] refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern *the true interest of their country* and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.¹⁰⁴

Madison made a related argument in *Federalist No. 57*:

The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess the most wisdom to discern, and most virtue to pursue *the common good of the society*; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust.¹⁰⁵

These are not the words of someone who wants or expects legislators to pursue their individual interests when they legislate. To the contrary, Madison’s expectation seems to be that legislators would be better suited than citizens to pursue the public good.

101. *Id.* at 321-22.

102. For a critical discussion of Madison’s view that each department’s powers were to be kept distinct, see Mark D. Rosen, *From Exclusivity to Concurrence*, 94 MINN. L. REV. 1051, 1052-57 (2010).

103. See, e.g., THE FEDERALIST NO. 10, *supra* note 37, at 82 (James Madison).

104. *Id.* (emphasis added).

105. THE FEDERALIST NO. 57, at 350 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).

There are other reasons why Madison's views, whatever they might be, should not be seen as a refutation of the necessity of a "public good" requirement. Madison was addressing the best way of structuring an alternative to monarchy, and why the proposed constitution should be ratified. The public good requirement, however, concerns something very different: an account of why, and under what conditions, republican governments can legitimately coerce their citizens. Although political theorists before Madison labored to justify the legitimacy of the exercise of governmental power,¹⁰⁶ this was not Madison's task, most likely because it was not the core issue on the minds of the American people at the time of the Constitution's ratification. After all, *some* form of democracy was surely better than monarchy, and that was sufficient to recommend it as the desired political form.¹⁰⁷

Moreover, questions concerning the legitimacy of a democracy's exercise of power over its citizens may not have had much resonance at that time, given that only a fraction of citizens had the right to vote or hold office.¹⁰⁸ By contrast, questions of legitimacy are pressing in the modern era in which democracy is widespread, monarchy is rare, the concept of political equality among citizens is entrenched, and there is pervasive recognition that people will probably never converge on what constitutes the "good life."¹⁰⁹ In this environment, the question of what legitimates the majority's exercise of power over a dissenting minority is pressing. Modernity permits, if not invites, the progressive refinements of enduring governmental institutions that were created in a relatively short period of time by people who had limited experience with democracy and access to no models of large democratic institutions for guid-

106. For example, explaining the legitimacy of governmental power was central to both Locke and Rousseau, as discussed above. *See supra* notes 68-77 and accompanying text. Indeed, during debates concerning the scope of the franchise in the aftermath of the Revolutionary War, a handful of Americans made this argument as well. *See* ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 10-12 (rev. ed. 2009).

107. This should not be surprising, for Madison was not a systematic political theorist. Robert Dahl demonstrates the profound theoretical inadequacies of Madison's political theories, concluding that Madison's *Federalist Papers* are better understood as an "ideology" that was designed to serve the political purpose of finding common ground to facilitate ratification. *See* ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 4-33 (rev. ed. 2006).

108. *See* KEYSSAR, *supra* note 106, at 3-21 (describing the limited franchise at that time).

109. *See, e.g.*, GAUS, *supra* note 66, at 2; RAWLS, *supra* note 66, at 178-83.

ance.¹¹⁰ We should welcome, not denigrate, the opportunity to refine aspects of our democratic system that did not receive considered attention from the Founders.

The previous paragraph may resonate with “living constitutionalists,” but would it be acceptable to originalists? The next subsection explains why it should be.

2. The Argument Against Legitimate-Selection: The “Democracy-Deficit Refutation”

Significantly more than half of the adult population did not have the franchise in 1789; all states except New Jersey withheld the franchise from women,¹¹¹ most states had property qualifications,¹¹² slaves could not vote, and several states excluded even free blacks.¹¹³ As a matter of principle, it is impossible to square such widespread disenfranchisement with Legitimate-Selection.¹¹⁴ As a doctrinal matter, however, the Founding Era’s democracy deficit does not undermine this Article’s claim that Legitimate-Selection is a constitutional principle for three reasons.

110. See ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* 8-9 (2d ed. 2003) (“It is no detraction from the genius of Leonardo da Vinci to say that given the knowledge available in his time he could not possibly have designed a workable airplane The knowledge of the Framers—some of them, certainly—may well have been the best available in 1787. But reliable knowledge about constitutions appropriate to a large representative republic was, at best, meager. History had produced no truly relevant models of representative government on the scale the United States had already attained, not to mention the scale it would reach in the years to come.”).

111. See KEYSSAR, *supra* note 106, at 43-44. New Jersey ultimately disenfranchised women in 1807. *See id.*

112. Only Vermont, New Hampshire, Pennsylvania, and Georgia had no property requirements. *See id.* at 306-07 tbl.A.1. New Hampshire imposed a poll tax, whereas Pennsylvania and Georgia required the voter to pay public taxes prior to the election. *See id.* Every other state had property requirements. *See id.*

113. Georgia, South Carolina, and Virginia formally extended the franchise only to whites. *See id.* However, the number of states that excluded blacks “rose steadily from 1790 to 1850.” *Id.* at 44.

114. Though beyond the scope of this Article, some contemporary exclusions might be indefensible as well. *See Richardson v. Ramirez*, 418 U.S. 24, 54-56 (1974) (upholding felony disenfranchisement).

a. History

History provides the first reason. As Akhil Amar explains, much happened “in the nation’s first eighty years to give rise to a more robustly egalitarian and nationalistic conception of republican government than had prevailed in the 1780s,” including a “dramatic expansion of suffrage rights, at least among white men.”¹¹⁵ When Congress undertook acts in the nineteenth century that were predicated on the Guarantee Clause, Congress relied upon its more robust contemporary understanding of republicanism and not that of the Framers.¹¹⁶ For example, Congress “judg[ed] local republicanism by applying dynamic democratic standards in the course of admitting new Western states,” ensuring that the new states “met contemporary standards of republicanism.”¹¹⁷ Further, influential members of the Reconstruction Congress, including Senator Charles Sumner and Representative John Bingham, justified Congress’s refusal to readmit the southern states following the Civil War on the ground that those states’ disenfranchisement of free blacks rendered them unrepublican.¹¹⁸ As Amar notes, “[b]y 1865, any state that automatically disenfranchised a quarter or more of its freemen—as did each ex-rebel state—was out of the American mainstream *in a way that it would not have been in 1787*.”¹¹⁹ In other words, it was the prevailing understanding of republicanism in 1865, not the Framers’ understanding, that was the basis for refusing automatic readmission of the southern states after the Civil War.

This historical record gives rise to the first reason why the democracy-deficit refutation is without force: our understandings of Republican Legitimacy should not be limited by the rules of the road that were in place at our nation’s founding.¹²⁰ Rather, requirements of republicanism are appropriately determined on the basis of contemporary understandings. A dynamic approach to understand-

115. AMAR, *supra* note 37, at 370.

116. *See id.* at 370-71.

117. *Id.* at 371.

118. *See id.* at 370-76.

119. *Id.* at 370 (emphasis added).

120. To be clear, I do not mean to suggest that Professor Amar necessarily would agree with this Article’s conclusion that Republican Legitimacy is a constitutional principle. Professor Amar’s methodology does provide, however, resources for countering the possible counterarguments to my constitutional claim that are anticipated above in the text.

ing republicanism is consistent with longstanding historical practice.

Two possible counterarguments may be asserted. First, the fact that Congress understood republicanism dynamically does not mean this was correct; perhaps Congress acted for unprincipled self-serving reasons¹²¹ or simply made a mistake. Second, in the alternative, such dynamic interpretation may be appropriate for Congress, but not for courts. These two counterarguments, however, are refuted by the second reason, discussed immediately below, as to why the democracy-deficit refutation is without force.

b. Meaning Versus Application

The democracy-deficit refutation has maximal traction under originalist premises. After all, whereas Legitimate-Selection requires widespread franchise, the Founders countenanced a system of widespread disenfranchisement at both the state and federal levels.¹²² And this disenfranchisement was not a result of oversight but instead was an outgrowth of a theory of politics under which voting was seen as a “privilege” rather than a right, where only those with a “stake in society” were “sufficiently attached to the community and sufficiently affected by its laws to have earned the privilege of voting,” and where women were legally merged into their husbands, who were thought to virtually represent them through their votes.¹²³ Though our country’s early democracy deficit might be troubling even to those who do not label themselves “originalists”—for even they think history and tradition are relevant to constitutional interpretation¹²⁴—those who do not self-identify as originalists rely on other considerations that allow for changing constitutional interpretations.¹²⁵ The Founding Era democracy deficit, however, might appear to be an intractable obstacle for an

121. For such a claim, see BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 106-07 (1998). For Amar’s response, see AMAR, *supra* note 37, at 375, 604-05 & n.44.

122. See *supra* notes 108-13 and accompanying text.

123. See KEYSSAR, *supra* note 106, at 8.

124. See, e.g., STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 8 (2005).

125. See, e.g., *id.* at 8-9.

originalist to conclude that Legitimate-Selection is a constitutional principle that requires widespread franchise.

But this is not the case. Let us assume that an originalist were to agree with the textual and structural claims advanced in this Part, that there must be a constitutional principle of Republican Legitimacy. Modern-day originalists could easily conclude that our country's early democracy deficit does not defeat the meaning of Republican Legitimacy advanced here. This is because most contemporary originalists draw a distinction between constitutional *meaning*, which they believe is binding, and actual or expected *applications* of the Constitution, which they believe are not binding.¹²⁶ This distinction allows them to conclude that a specific view or practice that coexisted with a constitutional enactment—say the “views or expectations of some individuals at the time [of the Fourteenth Amendment’s adoption] that the [Fourteenth] Amendment’s principle did not extend to segregated education”—was a nonbinding “application” or “mistake[.]” that is distinct from the binding original meaning of the Fourteenth Amendment.¹²⁷

126. See, e.g., Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 622 (1999) (distinguishing “semantic” from “expectations” originalism and concluding that “how the relevant generation of ratifiers expected or intended their textual handiwork would be applied to specific cases” is relevant only as “circumstantial evidence of what the more technical words and phrases in the text might have meant to a reasonable listener”); Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s “Moral Reading” of the Constitution*, 65 FORDHAM L. REV. 1269, 1284 (1997) (“Mainstream originalists recognize that the Framers’ analysis of particular applications could be wrong, or that circumstances could have changed and made them wrong.”); Michael Stokes Paulsen, *How to Interpret the Constitution (and How Not To)*, 115 YALE L.J. 2037, 2059 (2006) (rejecting a description of originalism as being a “version of crude intentionalism that focuses on the specific subjective intentions or expectations of individuals as to how a provision might be applied ... rather than focusing on the objective linguistic meaning of the words of a text (taken in historical context)”); Lawrence B. Solum, *We Are All Originalists Now*, in ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 1, 11 (2011) (“[I]t is the public meaning of the text (the linguistic meaning) that provides binding law. Expectations about the application of the text to particular cases or general types of cases provide relevant evidence of linguistic meaning, but it is only evidence.”). It is worth noting that the meaning/application distinction also is important for some nonoriginalists. See, e.g., James Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523, 1539 (2011) (“The Constitution, properly understood, is not frozen in time and inextricably linked to the concrete expectations of the framers or ratifiers. But neither does its meaning change.... What can change, however, is the application of those principles over time, based on technological, economic, and cultural changes.”).

127. Paulsen, *supra* note 126, at 2060 & n.43.

Mark Greenberg and Harry Litman provide the most important theoretical explanation for the distinction between binding meaning and nonbinding applications, and it is useful to work through their analysis to demonstrate more precisely why an originalist could conclude that our country's early democracy deficit is a nonbinding application of republicanism rather than a binding meaning.¹²⁸ Like many other commentators, Greenberg and Litman understand "meaning" to refer to a word's more abstract, general articulation and understand "application" to refer to the concrete particulars that fall within a word's "meaning."¹²⁹ Greenberg and Litman then argue that applications are the result of a meaning's interaction with factors extrinsic to meaning. In their words, "application may not be a reliable guide to meaning,"¹³⁰ because "meaning is only one determinant of the things to which the speaker would apply the word."¹³¹ Greenberg and Litman go on to claim that a "speaker's *substantive beliefs*" may affect application,¹³² and conclude that "disagreement over whether a term applies in a particular case can be, *and generally is, a substantive disagreement*, rather than a

128. See Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569, 586-88 (1998). Mitch Berman has commented that Greenberg and Litman's article "demolished" the proposition that "expected applications of constitutional provisions are binding on present-day interpreters." Mitchell N. Berman, *Originalism and Its Discontents (Plus a Thought or Two About Abortion)*, 24 CONST. COMMENT. 383, 385 (2007). I concur as to the article's depth and importance, though I do not agree with all of its analysis. I nonetheless rely on Greenberg and Litman's article for present purposes because it has been influential for originalists and it aims to show that originalists have reasons internal to their commitments to reject the democracy-deficit refutation. My approach is similar to the Rawlsian idea of reasoning from conjecture. See RAWLS, *supra* note 66, at 155-56 (defining conjecture as arguing "from what we believe, or conjecture, are other people's basic doctrines" even though "we do not assert [that is to say, personally accept or believe] the premises from which we argue, but ... we proceed as we do to clear up what we take to be a misunderstanding on others' part").

129. See Greenberg & Litman, *supra* note 128, at 586-91; see also Solum, *supra* note 126, at 149 ("The linguistic meaning of [a] phrase is the more general meaning."). This is not the only way that one can understand meaning. For one brief critique, see Robert W. Bennett, *Originalism and the Living American Constitution*, in CONSTITUTIONAL ORIGINALISM: A DEBATE, *supra* note 126, at 78, 113 (critiquing the underlying assumption of many who distinguish between meaning and application that "the meaning of vague or general language must itself be general"). A work-in-progress of mine builds on Wittgenstein's theory of meaning to criticize and limit Greenberg and Litman's argument. See Mark D. Rosen, *Stop the Beach and Originalism* (2012) (unpublished manuscript) (on file with author).

130. Greenberg & Litman, *supra* note 128, at 591.

131. *Id.* at 588.

132. *Id.* at 588-89 (emphasis added).

misunderstanding about the word's meaning, because what a word is applied to depends not only on meaning but also on substantive views."¹³³

For example, Greenberg and Litman note that the Founders would not have expected that the Contract Clause would operate with respect to a married woman's contract.¹³⁴ But this was because, during the Founding Era, a married woman was not thought to be able to enter into her own contracts; her legal personality was conceptualized as having merged with her husband's.¹³⁵ Greenberg and Litman plausibly conclude that the Founders' expectations concerning married women's contracts are a nonbinding application and thus are not part of the meaning of the Contract Clause.¹³⁶ The Founders' expectation that the Contract Clause would not apply to married women's contracts, say Greenberg and Litman, was due to a substantive belief external to the meaning of the Contract Clause, namely that married women could not create valid contracts.¹³⁷ Accordingly, that expectation is nonbinding, and an originalist could conclude today that the Contract Clause applies to contracts made by married women.¹³⁸

Similarly, it seems plausible to say that our country's early democracy deficit, or many aspects of it, at least, was due to substantive beliefs extrinsic to the meaning of republicanism; for instance, the views that women could be virtually represented by their husbands, that a woman's proper place was only in the domestic sphere, that women and non-whites did not have the requisite intelligence or moral attributes to participate in politics, or that only property holders had a stake in society.¹³⁹ All of these are "substantive beliefs" that are extrinsic to the meaning of republicanism, and the concrete applications they produced accordingly would not be binding on Greenberg and Litman's account. For this reason, even originalists can reject the democracy-deficit refutation.

133. *Id.* at 590 (emphasis added).

134. *Id.* at 585.

135. *See id.* at 585 & n.73.

136. *Id.*

137. *See id.*

138. *See id.*

139. *See* KEYSSAR, *supra* note 106, at 8.

Michael McConnell, professor and former judge, has put forward another reason for distinguishing between meaning and application. McConnell states that “[m]ainstream originalists recognize that the Framers’ analysis of particular applications could be wrong, or that circumstances could have changed and made them wrong.”¹⁴⁰ McConnell presents a more limited justification than Greenberg and Litman, because on the latter’s account, applications can properly shift as substantive beliefs change even if the earlier substantive belief was not necessarily wrong.¹⁴¹ But even McConnell’s more limited understanding concerning the distinction between binding meaning and nonbinding applications would suffice for present purposes; my guess is that most originalists would concede that our country’s early widespread franchise exclusions were either “wrong,” or that “circumstances ... have changed and made them wrong” vis-à-vis what republicanism requires. If so, originalists’ understanding of the constitutional principle of Republican Legitimacy need not be limited by virtue of our country’s early democracy deficit. And this is yet another reason why originalists can reject the democracy-deficit refutation.

Finally, it is worth noting that the accounts of both McConnell and Greenberg and Litman provide theoretical justifications for Congress’s dynamic approach to understanding what republicanism requires, as documented by Amar. These accounts also provide a retort to the possibility raised at the conclusion of the last subsection that *only* Congress properly has this power; there is no reason to conclude that courts would not have a role in sorting out binding meanings from nonbinding applications.

c. Post-Guarantee Clause Amendments

There is a final reason to reject the democracy-deficit refutation. As Professor Amar has forcefully argued, and as many originalists agree, the Constitution’s text should be read holistically, taking into account not only the original Constitution, but its amendments as well¹⁴²:

140. McConnell, *supra* note 126, at 1284.

141. See, e.g., Greenberg & Litman, *supra* note 128, at 584.

142. See Akhil Reed Amar, *The Supreme Court 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 29 (2000) (“The American People ratified the Philadelphia

Each amendment aims to fit with, and be read as part of, the larger document. Indeed, because the People have chosen to affix amendments to the end of the document rather than directly rewrite old clauses, a reader can never simply look to an old clause and be done with it. Rather, *she must always scour later amendments to see if they explicitly or implicitly modify the clause at hand.*¹⁴³

Accordingly, it would be incorrect to interpret the original Constitution's "republican form of government" clause without taking account of the many amendments that have "expanded our democracy by making citizens of former slaves, expanding the right to vote to include women and eighteen year-olds[,] ... abolishing the poll tax[,] ... [and] increas[ing] the voice and power of ordinary citizens by allowing for the direct election of senators."¹⁴⁴ Amar relies on these Amendments to conclude that the Guarantee Clause should be read "broadly" and "dynamically" such that exclusions from the franchise that were acceptable during the Founding Era would not be constitutional today¹⁴⁵: "We the People today must be expansive even if We the People at one time were less so."¹⁴⁶ Amar's reasoning is not limited to the question of franchise but extends more generally to the circumstances that must obtain for republican government to be both legitimate and stable—that is, to Republican Legitimacy.¹⁴⁷

3. Republican Legitimacy or Anti-Corruption?

It might be argued that Republican Legitimacy is an unnecessary concept because it merely duplicates what some cases and scholarly writing have dubbed "anti-corruption."¹⁴⁸ This criticism fails because

Constitution not clause by clause, but as a single document. Later generations of Americans have added amendments one by one, but no amendment stands alone as a discrete legal regime." For a ringing endorsement of Amar's originalist methodology by an important originalist, see Paulsen, *supra* note 126, at 2037.

143. Amar, *supra* note 142, at 29-30 (emphasis added).

144. Ryan, *supra* note 126, at 1549.

145. Amar, *supra* note 142, at 49-51.

146. *Id.* at 51.

147. *See id.* at 49. To be clear, the argument above extends Amar's reasoning but does not claim that Amar agrees with its conclusion. I have not asked him.

148. *See, e.g.,* Teachout, *supra* note 10, at 342.

Republican Legitimacy is a doctrinally and conceptually superior framework for two main reasons.

First, there is more solid textual grounding in the Constitution for concluding that Republican Legitimacy is an independent constitutional principle than there is for anti-corruption. Constitutional text—the Guarantee Clause—speaks explicitly about republicanism, but no constitutional provision mentions corruption.¹⁴⁹ Though the Guarantee Clause only extends its reach to states, it is hard to imagine that the federal government would have been charged with the responsibility of guaranteeing states a republican form of government if the federal government itself were not republican in form. And, of course, the Constitution explicitly *creates* a republican form of government at the federal level by having the people elect Congress¹⁵⁰—something that Madison trumpeted in the Federalist Papers.¹⁵¹ Once it is accepted that the Constitution establishes and guarantees republican forms of government at the federal and state levels, the conclusion that Republican Legitimacy is itself of constitutional stature readily follows: the Constitution’s creation and guarantee of republican forms of government includes the minimum conditions that are necessary to ensure the stability and effectiveness of these institutions.¹⁵²

It is harder to show that anti-corruption is an independent constitutional principle. Indeed, all but one of the proponents of anti-corruption treat it as a compelling government interest,¹⁵³ not

149. Another phrase akin to Republican Legitimacy, “democratic integrity,” also has appeared in some case law. *See, e.g.*, *FEC v. Wis. Right to Life*, 551 U.S. 449, 522 (2007) (Souter, J., dissenting). While I view the phrase “democratic integrity” as being virtually interchangeable with Republican Legitimacy, I prefer the latter for three reasons: (1) “republican” is more accurate because the Justices invoking “democratic integrity” have been referring to law making by representatives rather than the people themselves; (2) “legitimacy” more accurately describes the idea that appropriately informs its contents than does “integrity” insofar as political theorists use “legitimacy” to refer to the conditions that must pertain for a polity’s laws to be morally binding on citizens, *see* May, *supra* note 55; and (3) “republican” facilitates recognition that Republican Legitimacy is an independent constitutional principle, for reasons explained above in the text. I recognize—and criticize the fact—that the proponents of “democratic integrity” have not treated it as a constitutional principle but instead as a compelling governmental interest. *See infra* Part II.C.1.

150. *See supra* Part I.A for a full discussion of how the Constitution creates a republican form of government vis-à-vis both Congress and the President.

151. *See* THE FEDERALIST NO. 10, *supra* note 37, at 82-83 (James Madison).

152. For the complete argument, *see supra* Part I.A-B.

153. While my proposal at present may be subject to the same criticism, *see infra* Part II.C

as a stand-alone constitutional principle.¹⁵⁴ Professor Teachout has provided an elegant and illuminating argument that anti-corruption rises to the level of a constitutional principle. Although I am very sympathetic to her project, her constitutional argument is subject to a fundamental critique from which Republican Legitimacy is immune. Teachout grounds her constitutional conclusion in two virtually unassailable premises: (1) the Founders were concerned with the corruption of republican governments and (2) many provisions of the Constitution were directed at countering corruption.¹⁵⁵ But her conclusion—that a stand-alone constitutional anti-corruption principle exists—does not follow from these premises. The fact that many constitutional provisions are designed to counter corruption hardly establishes that there also exists a free-floating constitutional anti-corruption principle alongside these constitutionally created anti-corruption features. After all, it could equally, or, arguably, even more persuasively, be said that the specific institutional features that the Constitution establishes to counter corruption exhaust the Constitution’s anti-corruption provisions.

Second, Republican Legitimacy is conceptually superior to anti-corruption insofar as it better indicates its appropriate content than does anti-corruption. My critique of *Citizens United* in Part III demonstrates this proposition at length.¹⁵⁶ The explanation of Republican Legitimacy’s conceptual superiority can begin here, though, with a critical analysis of Professor Teachout’s definition of

(noting that the case law addressing aspects of Republican Legitimacy has treated them as compelling governmental interests, not as a stand-alone constitutional principle), the doctrinal arguments for elevating Republican Legitimacy to a constitutional level are stronger than those for elevating anti-corruption.

154. Indeed, Professor Issacharoff’s recent article considers what understanding of corruption could justify campaign finance regulations vis-à-vis free speech challenges but does not argue that anti-corruption constitutes an independent constitutional principle. See Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 119-21 (2010). Supreme Court case law likewise has treated political corruption as a compelling governmental interest. See *infra* Part II.C.1. But see Teachout, *supra* note 10, at 343 (arguing that anti-corruption is a “freestanding constitutional principle”).

155. She rightly observes that “[t]he size of the [House of Representatives and the Senate], the mode of election, the limits on holding multiple offices, the limitations on accepting foreign gifts, and the veto override provision were all considered in light of concerns about corruption, and designed to limit legislators’ opportunities to serve themselves.” Teachout, *supra* note 10, at 354. Teachout also relies on prohibition on titles of nobility, the treaty-making power, and the jury requirement in federal courts to ground her thesis. See *id.* at 355.

156. See *infra* Part III.C.

political corruption. She says that political corruption is (1) “the use of [the] public forum to pursue private ends” and that (2) its “centerpiece ... is intent.”¹⁵⁷ From the vantage point of Republican Legitimacy, the first part of Teachout’s definition is accurate but incomplete; it correctly points to Legitimate-Decisionmaking, but problematically omits Legitimate-Selection. To illustrate the costs of Teachout’s conception, it provides no basis for criticizing partisan gerrymandering by stalwart Republicans who aim to minimize the number of elected Democrats, not for the pursuit of “private ends” but because they earnestly believe the Democrats’ agenda to be bad for the country. Republican Legitimacy, by contrast, provides a basis for concluding that such partisan gerrymandering is wrong even if the gerrymanderers were not pursuing “private ends.”¹⁵⁸ Likewise, whereas anti-corruption has nothing to say about the gaming of voter registration requirements to suppress voting for partisan advantage, such activities fall squarely within the purview of Republican Legitimacy.

The second part of Teachout’s definition—the intent requirement—is flatly wrong from the perspective of Republican Legitimacy. The legitimacy of the republican system can be undercut by negligence, oversight, and even well-intended actions. Actions that threaten Republican Legitimacy, accordingly, should be deemed unconstitutional regardless of intent. Although corruption without wrongful intent might well be an oxymoron, intent’s irrelevance makes perfect sense within the conceptual framework of Republican Legitimacy.

Interestingly, Professor Issacharoff’s recent *Harvard Law Review* article *On Political Corruption*, a masterful explication of corruption, actually strengthens the case for Republican Legitimacy. This is so because the conception of “political corruption” that Issacharoff ultimately champions is virtually identical to Republican Legitimacy. Look carefully at Issacharoff’s analysis:

Any constitutional test resting on corruption as the evil to be avoided begs for a definition of the good, or, in this case, the

157. Teachout, *supra* note 10, at 382; *see also id.* at 374-77 (defending the “understanding of corruption [that] focuses the discussion on the intent” of the actors).

158. *See infra* Part III.B (discussing partisan gerrymandering from the perspective of Republican Legitimacy).

uncorrupted. As in many areas of law in which the good state resists simple definition, the first insight may come from process questions—which campaign finance procedures are *likely to promote desirable forms of democratic governance* and which are likely to promote *infirmities in democracy*?¹⁵⁹

Since Issacharoff is discussing campaign finance, it is clear that when he speaks of “democratic governance” he actually means “*representative* democracy.” And representative democracy, of course, is interchangeable with republicanism. If Issacharoff’s purpose is to generate legal tests that “promote desirable forms of [representative] democratic governance” and avoid “infirmities in [representative] democracy,” it would seem that “corruption” does not perform any real analytical work.¹⁶⁰ Standing at the center of Issacharoff’s analysis, instead, are considerations of what makes republican forms of government work well—considerations that are more accurately captured by the term Republican Legitimacy. It is better to use the more accurate terminology because, as will be explained shortly, the term “corruption” is misleading.¹⁶¹

II. THE CASE LAW BEARING ON REPUBLICAN LEGITIMACY

Having derived Republican Legitimacy through textual and structural analysis of the Constitution, and elucidated Republican Legitimacy’s contents through political theory, I show in this Part to what extent Republican Legitimacy can be said to be already present in the case law. To provide a quick overview, the two cases discussed in Part II.A provide some basis—albeit an inadequately theorized one—for concluding that Legitimate-Selection is a constitutional principle. Part II.B shows many other cases where the Court has recognized the components of Republican Legitimacy.

These decisions are exceedingly helpful for three reasons: they help flesh out the contents of Republican Legitimacy; they authenticate, for those who put trust in inductive reasoning, the conclusions of Part I.B’s top-down, deductive reasoning; and they provide a precedential foothold for this Article’s claim. But the case law does

159. Issacharoff, *supra* note 154, at 126-27 (emphasis added).

160. *Id.* at 125-27.

161. *See infra* Part III.C (critiquing *Citizens United*).

not give Republican Legitimacy its full due, and, hence, it does not qualify as decisive precedent for this Article's claim, for two reasons. First, most of the cases treat the preservation of conditions necessary to maintain the legitimacy of republicanism as sufficiently important governmental interests to justify regulation, but not as having independent constitutional status. Second, most of the cases have assimilated the preservation of the conditions necessary to maintain republicanism into individual rights doctrines instead of recognizing them as aspects of a structural constitutional principle. Part II.C explains why these two limits of the case law are significant. In so doing, Part II establishes why it is important to recognize Republican Legitimacy as (1) a stand-alone constitutional principle that is (2) structural rather than rights based.

A. The Most Direct Precedent for the Proposition that Republican Legitimacy Is an Independent Constitutional Principle

One Supreme Court case squarely recognized that the prerequisites of representative democracy themselves can have constitutional status. An earlier case arguably held so as well. It makes sense to discuss the cases chronologically because the second case relied on the first.

Powell v. McCormack invoked the “fundamental principle of our representative democracy” as a guide to interpreting a constitutional grant of power to Congress.¹⁶² The question was whether the provision in the Constitution that “[e]ach House shall be the Judge of the ... [q]ualifications of its own Members”¹⁶³ gave the House the power to exclude a duly elected member on separate grounds from the three requirements—age, citizenship, and residency—specified elsewhere in the Constitution.¹⁶⁴ The Court held that “the Constitution does not vest in the Congress a discretionary power to deny membership by a majority vote,” relying, *inter alia*, on “an examination of the basic principles of our democratic

162. 395 U.S. 486, 547-48 (1969).

163. U.S. CONST. art. I, § 5, cl. 1.

164. *Id.* § 2, cl. 2 (“No person shall be a Representative who shall not have attained to the age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.”); *see also Powell*, 395 U.S. at 489.

system.”¹⁶⁵ A congressional power to discretionarily exclude duly elected congresspersons, continued the Court, would violate the “fundamental principle of our representative democracy” that “the people should choose whom they please to govern them.”¹⁶⁶

Powell's principle of “representative democracy” is synonymous with the contemporary understanding of republicanism.¹⁶⁷ *Powell*'s principle is an aspect of Legitimate-Selection, the first component of Republican Legitimacy. And *Powell* is surely correct that a discretionary congressional power to exclude properly elected congresspersons would undermine the legitimacy of our representative process, bottomed as it is on the commitment that the citizens of each district have the power to choose their representative. For these reasons, *Powell* is strong precedent in support of Republican Legitimacy, or at least its first component.

But there are two important caveats. First, *Powell* does not explain where its crucial decisional principle comes from but merely asserts it *ipse dixit*. The derivation provided earlier in this Article, however, provides solid grounding for *Powell*'s principle of “representative democracy.”¹⁶⁸ Second, *Powell* did not necessarily hold that its principle of “representative democracy” has constitutional status; *Powell* used representative democracy as an interpretive rule for construing a constitutional text, and interpretive rules do not necessarily themselves have the status of a constitutional principle.¹⁶⁹

Notwithstanding the two caveats above, the Supreme Court treated *Powell*'s “fundamental principle” as a full-fledged constitutional principle in *U.S. Term Limits, Inc. v. Thornton*.¹⁷⁰ *Thornton* struck down an amendment to Arkansas's constitution that set term limits for that state's federal representatives.¹⁷¹ *Thornton*'s self-proclaimed “most important[.]” ground for its decision¹⁷² was that term limits violated the “fundamental principle of our representative democracy ... [that] the people should choose whom they please

165. *Powell*, 395 U.S. at 547-48 (emphasis added). The Court also considered the Framers' intent “to the extent it [could] be determined.” *Id.* at 548.

166. *Id.* at 547 (citation omitted).

167. See *supra* note 37 and accompanying text.

168. See *supra* Part I.B.2.

169. See *Powell*, 395 U.S. at 548.

170. 514 U.S. 779 (1995).

171. See *id.* at 837-38.

172. *Id.* at 806.

to govern them.”¹⁷³ In doing so, *Thornton* treated *Powell*’s principle as a constitutional principle, for *Thornton* considered it a sufficient basis for overturning the Arkansas law.¹⁷⁴ “Representative democracy” is synonymous with republicanism, and *Thornton*’s holding squarely concerned republicanism, striking down an aspect of the electoral system that the Court believed interfered with the process by which the people select their representatives. *Thornton*, accordingly, is solid precedent for the proposition that Legitimate-Selection is a constitutional principle.

But there are gaps in *Thornton*’s analysis. First, *Thornton* did not give a satisfactory explanation of the source of the “fundamental principle of our representative democracy”; it merely cited to *Powell*, which in turn merely asserted it.¹⁷⁵ Second, *Thornton* provided little guidance as to its constitutional principle’s appropriate scope. Fortunately, this Article’s earlier analysis in Part I.A and B addresses both of these gaps.

B. Additional Cases that Address the Two Components of Republican Legitimacy

Many cases have recognized the significance of considerations that fall under the two components of Republican Legitimacy.

1. The First Component: Legitimate-Selection

Let us first consider case law that has addressed matters that fall under Legitimate-Selection, the first component of Republican Legitimacy. The 1969 decision of *Kramer v. Union Free School District* concerned the constitutionality of a statute that barred an adult who lived with his parents from voting in a school board election¹⁷⁶: “[S]tatutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representa-

173. *Id.* at 783 (quoting *Powell*, 395 U.S. at 547) (internal quotation marks omitted).

174. *Id.*

175. *See id.*

176. 395 U.S. 621 (1969).

tive government.”¹⁷⁷ The Court in *Kramer* struck down the statute, but on equal protection grounds.¹⁷⁸ The Court did not recognize the concerns above to be an independent constitutional principle.

The per curiam decision in *Purcell v. Gonzalez* also addressed Legitimate-Selection when it tied its reasoning to the conditions that are necessary for republicanism to successfully operate.¹⁷⁹ *Purcell* vacated an interlocutory injunction and thereby allowed state and county officials to apply Arizona’s new voter identification rules.¹⁸⁰ The Court explained that “[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.”¹⁸¹ But *Purcell* held that “preserving the integrity of [a state’s] election process” constituted a “compelling interest,”¹⁸² not an independent constitutional principle.

The most extensive discussion of the considerations that fall under the rubric of Legitimate-Selection is found in campaign finance case law. *McConnell v. Federal Election Commission* used the concept of Legitimate-Selection to frame its discussion of a century of federal campaign regulations:

More than a century ago the ‘sober-minded Elihu Root’ advocated legislation that would prohibit political contributions by corporations in order to prevent ‘the great aggregations of wealth, from using their corporate funds, directly or indirectly,’ to elect legislators who would ‘vote for their protection and the advancement of their interests as against those of the public.’ In Root’s opinion, such legislation would ‘strick[e] at a constantly growing evil which has done more to shake the confidence of the plain people of small means of this country in our political institutions than any other practice which has ever obtained since the foundation of our Government.’ The Congress of the United States has repeatedly enacted legislation endorsing Root’s judgment.¹⁸³

177. *Id.* at 626.

178. *Id.* at 630-33.

179. 549 U.S. 1 (2006).

180. *See id.* at 5.

181. *Id.* at 4.

182. *Id.*

183. 540 U.S. 93, 115 (2003) (quoting *United States v. Int’l Union United Auto. Workers of Am.*, 352 U.S. 567, 571 (1957)) (internal citations omitted).

Supreme Court Justices also have relied on considerations of Legitimate-Selection when striking down campaign finance regulations. In *Randall v. Sorrell*, the Court found unconstitutional a state campaign finance statute that imposed a \$200 per-candidate, per-election contribution limit for candidates running for state office.¹⁸⁴ Justice Breyer, joined by Chief Justice Roberts and Justice Alito, explained that, although contribution limits are not per se unconstitutional, courts must “recognize the existence of some lower bound” because “[a]t some point the constitutional risks to the democratic electoral process become too great.”¹⁸⁵ Contribution limits that are too low can “harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability.”¹⁸⁶ Though Breyer’s reasoning reflected structural concerns, his plurality opinion grounded its holding in the First Amendment.¹⁸⁷

2. *The Second Component: Legitimate-Decisionmaking*

Concerns that are part of Legitimate-Decisionmaking, the second component of Republican Legitimacy, also have been recognized by the Supreme Court. But before turning to that case law, three preliminary observations are in order. To date, the Court’s analysis has been institution specific, with each case focusing on the branch of government—the legislature, the judiciary, or the executive—whose actions were the subject of the litigation. This is sensible insofar as each institution is genuinely distinctive¹⁸⁸ with respect to both its vulnerabilities to improper decisionmaking and as to what constitutes improper decisionmaking; for instance, a greater degree of objectivity is expected of courts than of legislatures. Nonetheless, that the Court recognized a category of wrongful decisionmaking vis-à-vis all three branches confirms the proposition that

184. 548 U.S. 230, 236 (2006).

185. *Id.* at 248 (Breyer, J., plurality opinion) (emphasis added).

186. *Id.* at 249.

187. *See id.* at 261-62.

188. For an extended analysis of how the different institutional characteristics of each branch of government should influence constitutional doctrine, see Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513 (2005).

Legitimate-Decisionmaking is a meaningful category with respect to governmental action as a general matter.

a. The Legislature

Proceeding to the case law, the Court long has recognized Legitimate-Decisionmaking vis-à-vis legislatures. In *United States v. Wurzbach*, a unanimous opinion authored by Justice Holmes upheld a statute that barred members of Congress from receiving contributions for “any political purpose whatever” from any other federal employees.¹⁸⁹ The Court upheld the statute on the grounds of Legitimate-Decisionmaking: “Congress may provide that its officers and employees” shall not be “*subjected to pressure for money for political purposes*, upon or by others of their kind, while they retain their office or employment.”¹⁹⁰

Consider as well the recent decision in *Nevada Commission on Ethics v. Carrigan*.¹⁹¹ Nevada law prohibits state and municipal legislators from “vot[ing] upon or advocat[ing] the passage or failure of” any “matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by ... [h]is commitment in a private capacity to the interests of others.”¹⁹² The Court upheld Nevada’s law against a First Amendment challenge because, inter alia, such “generally applicable conflict-of-interest recusal rule[s]” have been “commonplace for over 200 years” in both Congress and state legislatures.¹⁹³ For example, within a week of the United States House of Representatives having obtained a quorum, it enacted a rule that “[n]o member shall vote on any question, in the event of which he is immediately and particularly interested.”¹⁹⁴ And although “[t]he first Senate rules did not include a recusal requirement, ... Thomas Jefferson adopted one

189. 280 U.S. 396, 398-99 (1930).

190. *Id.* (emphasis added).

191. 131 S. Ct. 2343 (2011).

192. *Id.* at 2346 (quoting NEV. REV. STAT. § 281A.420(2) (2007)) (internal quotation marks omitted). The Court understood that the statute barred legislators from “advocating passage or failure [of the proposal in which he has a conflict] during the legislative debate.” *Id.* at 2347.

193. *Id.* at 2348. For more of the majority’s reasoning, see *infra* note 199.

194. *Carrigan*, 131 S. Ct. at 2348 (quoting 1 ANNALS OF CONG. 99 (1789)) (internal quotation marks omitted).

when he was President of the Senate.”¹⁹⁵ It provided that, “[w]here the private interests of a member are concerned in a bill or question, he is to withdraw. And where such an interest has appeared, his voice [is] disallowed.”¹⁹⁶

Interestingly, Jefferson’s Senate rule justified itself by resort to foundational principles of political theory similar to those invoked above in Part I.B:

In a case so contrary not only to the laws of decency, but to the fundamental principles of the social compact, which denies to any man to be a judge in his own case, it is for the honor of the house that this rule, of immemorial observance, should be strictly adhered to.¹⁹⁷

Buttressing this Article’s claim that Legitimate-Decisionmaking is not branch specific but instead is applicable to governmental action in general, the Senate drew upon an analogy from the judiciary, noting that a person may not be a “judge in his own case.”¹⁹⁸ The *Carrigan* decision likewise relied on the fact that “[f]ederal conflict-of-interest rules *applicable to judges* also date back to the founding.”¹⁹⁹

195. *Id.*

196. *Id.* (quoting A MANUAL OF PARLIAMENTARY PRACTICE FOR THE USE OF THE SENATE OF THE UNITED STATES 31 (1801) [hereinafter MANUAL OF PARLIAMENTARY PRACTICE]) (internal quotation marks omitted).

197. MANUAL OF PARLIAMENTARY PRACTICE, *supra* note 196, at 31.

198. *Id.*

199. *Carrigan*, 131 S. Ct. at 2348 (emphasis added). Curiously, Justice Scalia’s majority opinion in *Carrigan* did not uphold Nevada’s law on the ground that it was backed by a compelling governmental interest but instead concluded that no speech rights were implicated for two reasons. First, “legislative power is not personal to the legislator but belongs to the people; the legislator has no personal right to it.” *Id.* at 2350. Second, “the act of voting [by a legislator] symbolizes nothing” and therefore is not an “act of communication” to which the First Amendment applies. *Id.*

The majority’s reasoning is peculiar. Justices Kennedy and Alito each wrote separate concurrences, with which I largely agree, that strongly criticized the majority’s premise that antirecusal laws do not implicate speech. *See id.* at 2352-53 (Kennedy, J., concurring); *id.* at 2354-55 (Alito, J., concurring) (“I do not agree with the opinion of the Court insofar as it suggests that restrictions upon legislators’ voting are not restrictions upon legislators’ speech.”). Further, as to the majority’s first reason, it is in tension with *Citizens United*’s confirmation of *corporations*’ First Amendment rights despite the fact that corporations cannot be said to have “personal” rights. *See Citizens United v. FEC*, 130 S. Ct. 876, 899-900 (2010). It is more plausible to conclude that restrictions on legislators’ ability to advocate and vote indeed restrict speech but that they are not “*impermissible*” restrictions on freedom of

The concern of Legitimate-Decisionmaking is also present in the modern campaign finance case law. Since the landmark 1976 decision of *Buckley v. Valeo*, the Court has held that, “[t]o 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.”²⁰⁰ Behind *Buckley*’s delegitimation of quid pro quo contributions is a theory of Legitimate-Decisionmaking that identifies some motivations behind congressional decisionmaking as being wrongful.

To be sure, the scope of Legitimate-Decisionmaking vis-à-vis Congress has been a matter of deep controversy at the Supreme Court. Many cases have recognized that Legitimate-Decisionmaking demands the satisfaction of strict criteria. For example, in upholding the provision of the Bipartisan Campaign Reform Act of 2002 that banned national parties’ involvement with soft money, the majority opinion in *McConnell v. Federal Election Commission* cited to earlier cases that had recognized the legitimacy of regulations aimed at combating “undue influence on an officeholder’s judgment”²⁰¹ and “the broader threat from politicians too compliant with the wishes of large contributors.”²⁰² *McConnell* also provided the Court’s most expansive discussion to date of its theory of Legitimate-Decisionmaking when it spoke of “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.”²⁰³ However, in the Court’s more recent decision on this issue—the controversial *Citizens United* case—a five Justice majority retreated from *McConnell*’s view, holding instead that quid pro quo exchanges are the only types of illegitimate decisionmaking that Congress can

speech” because there are sufficiently important interests—preserving Republican Legitimacy—to justify them. *Carrigan*, 131 S. Ct. at 2355 (Alito, J., concurring).

200. 424 U.S. 1, 26-27 (1976) (per curiam). This holding has been reaffirmed countless times, including in the Court’s recent decision of *Citizens United*, one which constituted a severe retrenchment of campaign finance laws. See *Citizens United*, 130 S. Ct. at 909-11.

201. 540 U.S. 93, 150 (2003) (quoting *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001)) (internal quotation marks omitted).

202. *Id.* at 143 (quoting *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 389 (2000)) (internal quotation marks omitted).

203. *Id.* at 153.

regulate.²⁰⁴ Justice Stevens's lengthy dissent for four Justices reiterated *McConnell*'s understanding that "undue influence" extends beyond quid pro quo exchanges.²⁰⁵ Justice Stevens said regulations combating such influences serve as "safeguard[s]" to protect the very "legitimacy of our political system" against "threat[s] to republican self-government."²⁰⁶ Yet as important as *Citizens United* is in having cut back the Court's understanding of Legitimate-Decisionmaking, it is important to recognize that all Justices still accept *some* theory of Legitimate-Decisionmaking vis-à-vis Congress insofar as all the Justices deem quid pro quo exchanges illegitimate.

b. The Executive Branch

The Court has also applied Legitimate-Decisionmaking to the executive branch by upholding limits on the political activities of federal executive branch employees. An 1882 case upheld a law prohibiting federal employees "from giving or receiving money for political purposes from or to other employees of the government."²⁰⁷ More recent cases upheld the Hatch Act,²⁰⁸ which bars federal employees from taking an "active part in political management or political campaigns."²⁰⁹ The Court upheld a wide array of statutory

204. See *infra* Part III.C.1.

205. See *Citizens United*, 130 S. Ct. at 961 (Stevens, J., dissenting).

206. *Id.* at 963-64, 968-69.

207. *United Pub. Workers v. Mitchell*, 330 U.S. 75, 96 (1947) (describing the holding of *Ex parte Curtis*, 106 U.S. 371 (1882)).

208. See *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 551 (1973); see also *Mitchell*, 330 U.S. at 93.

209. *Letter Carriers*, 413 U.S. at 554.

prohibitions²¹⁰ on Legitimate-Decisionmaking grounds,²¹¹ crediting Congress's judgment that "an actively partisan governmental personnel threatens good administration."²¹² The Court endorsed Congress's concern regarding the "danger" to the public that "governmental favor may be channeled through political connections" if governmental workers were permitted to engage in the proscribed activities.²¹³ The Court upheld Congress's support for the "principle of required political neutrality for classified public servants" so as to promote "integrity in the discharge of official duties" and to "deal with what many sincere men believe is a material threat to the democratic system."²¹⁴

c. The Judiciary

Finally, as to Legitimate-Decisionmaking in the judiciary, consider the recent decision of *Caperton v. A.T. Massey Coal Co.*²¹⁵ *Caperton* held that a state supreme court justice should have recused himself from a case in which the president and chief executive officer of one of the parties had made substantial campaign contributions for the justice's reelection, at a time when the corporation would likely be seeking review of the trial court's entry of a \$50 million judgment against the corporation.²¹⁶ The Supreme Court grounded its ruling in the proposition that "[a] fair trial in a fair

210. The Hatch Act barred employees of the executive branch from "holding a party office, working at the polls, and acting as party paymaster for other party workers," and Congress also could ban such employees from

organizing a political party or club; actively participating in fundraising activities for a partisan candidate or political party; becoming a partisan candidate for, or campaigning for, an elective public office; actively managing the campaign of a partisan candidate for public office; initiating or circulating a partisan nominating petition or soliciting votes for a partisan candidate for public office; or serving as a delegate, alternate or proxy to a political party convention.

Id. at 556.

211. *See id.* ("[N]either the First Amendment nor any other provision of the Constitution invalidates a law barring this kind of partisan political conduct by federal employees.")

212. *Id.* at 555 (quoting *Mitchell*, 330 U.S. at 97-98).

213. *Id.* (quoting *Mitchell*, 330 U.S. at 98) (internal quotation marks omitted).

214. *Mitchell*, 330 U.S. at 97, 99.

215. 129 S. Ct. 2252 (2009).

216. *Id.* at 2256-57.

tribunal is a basic requirement of due process,”²¹⁷ and held that a judge must recuse himself when “there is an unconstitutional ‘potential for bias’” on the basis of “a realistic appraisal of psychological tendencies and human weakness.”²¹⁸ *Caperton* found this standard to have been met “when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent.”²¹⁹

C. Limitations of the Case Law

The case law surveyed above in Part II.B supports this Article’s claim that Republican Legitimacy is an independent structural constitutional principle, but does not fully establish the Article’s claim for two reasons.

1. Compelling Interests Versus Independent Constitutional Principles

Apart from *U.S. Term Limits, Inc. v. Thornton*, and arguably *Powell v. McCormack*, the case law examined above treats Legitimate-Selection and Legitimate-Decisionmaking as governmental interests—generally “compelling” governmental interests—sufficient to justify governmental regulation, but not as components of a stand-alone constitutional principle. Although useful, that case law does not go far enough because there are four critical differences between a compelling governmental interest and a full-fledged constitutional principle. I sketch these four differences below and fully develop them later in Part III.

First, whereas a compelling governmental interest is a defense for government regulation challenged as infringing a constitutional commitment protected by strict scrutiny, independent constitutional principles also can operate as a sword to *challenge* governmental

217. *Id.* at 2259 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)) (internal quotation marks omitted).

218. *Id.* at 2255, 2263 (quoting *Mayberry v. Pennsylvania*, 400 U.S. 455, 466 (1971) and *Withrow v. Larkin*, 421 U.S. 35, 47 (1975), respectively) (internal quotation marks omitted).

219. *Id.* at 2263-64.

action. For instance, a compelling governmental interest could not have been used to invalidate Indiana's voter identification law in *Crawford v. Marion County Election Board*, whereas a constitutional principle could have.²²⁰

Second, a constitutional interest may motivate legislatures differently than would a compelling governmental interest. Legislators may act more responsibly if they believe their participation is necessary to fully realize a constitutional commitment than if they are told that there is a "compelling governmental interest" that they act in a particular way.²²¹ After all, compelling governmental interests are "mere" policies, whereas constitutional commitments are something more.²²²

Third, the failure to recognize a full-fledged constitutional principle distorts analysis when that principle runs up against a competing constitutional commitment.²²³ In such a circumstance, the failure to recognize the constitutional consideration, treating it instead as "merely" a compelling governmental interest, can erroneously oversimplify the situation, making it appear that only a single constitutional value is at stake. The overlooked constitutional principle might not be given the dignity it deserves when a legislature considers whether to legislate or a court reviews legislation.

Fourth, recognizing that Legitimate-Selection and Legitimate-Decisionmaking implicate constitutional interests, and not merely compelling governmental interests, makes clear that there are situations that present conflicts of competing constitutional commitments.²²⁴ This should have doctrinal consequences for courts. The understanding that a legislature's decision reflects a considered effort to harmonize competing constitutional commitments, rather than a decision that implicates only a single constitutional principle, should generally lead to greater judicial deference to the legislative judgment because legislatures are better suited than courts, on grounds of both institutional competency and democratic legitimacy,

220. See *infra* Part III.A.

221. See generally DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789-1801* (1997) (showing the seriousness with which Congress approached the interpretation and implementation of the Constitution).

222. See Rosen, *supra* note 17.

223. See *infra* Part III.C.2.

224. See *infra* Part III.C.2.

to reconcile competing incommensurable constitutional commitments.²²⁵

For all these reasons, there is a meaningful difference between a compelling governmental interest and an independent constitutional principle.

2. The Distinction Between Individual Constitutional Rights and Structural Constitutional Principles

This Article's claim is that Republican Legitimacy is a structural constitutional principle consisting of the conditions necessary to ensure that both our constitutionally created federal government and those of the states are functional and stable republican governments. With the exception of the *Thornton* and *Powell* decisions, however, the cases have addressed aspects of Republican Legitimacy in the course of analyzing individual rights-based claims based on the Equal Protection and Free Speech Clauses. This is a second respect in which most of the case law has not given Republican Legitimacy its full due; the minimal conditions necessary for Legitimate-Selection and Legitimate-Decisionmaking are facets of constitutional structure, not aspects of individual rights.

But does it really matter whether a constitutional principle is deemed to be individual rights-based or structural? A longstanding scholarly debate addresses this very question. On the one side, Professors Richard H. Pildes, Samuel Issacharoff, and Pam Karlan argue that many election law questions implicate structural constitutional principles, and that attempting to address structural constitutional harms by rights-based constitutional doctrines is problematic.²²⁶ On the other side, Professor Richard Hasen denies the existence of structural constitutional principles in the election

225. See *infra* Part III.C.2.

226. See, e.g., Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 40 (2004) (“Understandings of rights or equality worked out in other domains of constitutional law often badly fit the sphere of democratic politics; indeed, the unreflective analogical transfer of rights and equality frameworks from other domains can seriously damage and distort the processes of politics.”); see also Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 644-45 (1998); Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from Shaw v. Reno to Bush v. Gore*, 79 N.C. L. REV. 1345, 1346 (2001); Pildes, *supra*, at 41-55.

law context.²²⁷ Professor Guy Charles splits the baby, arguing that “it is immaterial whether one casts political rights claims in a structuralist or individualist frame.”²²⁸

This Article falls squarely on, and builds upon, the Pildes, Issacharoff, and Karlan side of the debate. It does so in two ways, both critically and constructively. First, in the subsection immediately below, I critically analyze Professor Hasen’s and Professor Charles’s arguments against structural constitutional principles. The constructive support of structuralism appears after that, in Part III, in which I identify reasons why constitutional rights cannot be counted on to adequately protect structural constitutional principles²²⁹ and show fallout from the Court’s failure to treat Republican Legitimacy as a structural principle.

a. Critiquing Professor Hasen’s Wholesale Rejection of Structural Principles in the Electoral Context

Professor Hasen, among the nation’s leading election law scholars, argues that “structural theories are all about individual and group rights after all.”²³⁰ He “see[s] nothing normatively improper (much less constitutionally intolerable) about a practice that causes no harm to individuals or groups of individuals.”²³¹

The effort to collapse structural concerns into individual and group rights is mistaken for several reasons. First, it is inconsistent with constitutional text. Some constitutional provisions are primarily directed to securing the interests of individuals, whereas others are directed to constituting or securing governmental institutions. It is no surprise that the Fourteenth Amendment’s charges that states shall not “deprive *any person* of life, liberty, or property,

227. See RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* 138-56 (2003).

228. Guy-Uriel Charles, *Judging the Law of Politics*, 103 MICH. L. REV. 1099, 1131 (2005) (reviewing HASEN, *supra* note 227).

229. First, individual rights doctrines primarily focus their attention on individuals and therefore can lead courts to overlook structural harms; it is easy to overlook considerations that doctrine does not indicate are legally significant. See *infra* Part III.A.1. Second, subdoctrines developed in—and sensible in—the context of individual rights may have unintended consequences if applied to structural constitutional values. See *infra* Part III.A.2.

230. HASEN, *supra* note 227, at 156.

231. *Id.* at 152.

without due process of law, nor *deny to any person ... the equal protection of the laws*²³² have been primarily conceptualized as generating individual rights despite the fact that due process and equal protection have downstream consequences as to how governmental institutions operate. Conversely, the requirement that the President “give to the Congress Information of the State of the Union,”²³³ and those of the Bicameralism and Presentment Clauses,²³⁴ are best understood as structural requirements that determine the character of governmental institutions, though they also have downstream effects on individuals.²³⁵

Second, Hasen’s effort to collapse the distinction between structure and individual rights is troublesome because individual rights and structural interests are conceptually distinct. In one direction, individual rights can be violated even if a governmental institution cannot be improved upon. For example, a rogue or absent minded police officer may wrongfully search a citizen’s home despite the fact that a fully adequate governmental policy is in place. In other words, even if there is nothing structurally wrong with a governmental institution or policy, individual rights can be harmed. In the other direction, there can be structural damage even if a governmental action imposes no harm to an individual. Consider, for example, a hypothetical statute giving Congress the power to approve the ambassadors proposed by the President. Because the Constitution grants the President the power to appoint ambassadors with the advice and consent of the Senate,²³⁶ such a statute would enlarge the House of Representatives’ power vis-à-vis ambassadors and, correspondingly, diminish the powers of the Senate and the President. This would impose a structural harm to the governmental system established by the Constitution despite the fact that it would not seem to harm individual citizens.²³⁷

232. U.S. CONST. amend. XIV, § 1 (emphasis added).

233. *Id.* art. II, § 3.

234. *See id.* art. I, § 1; *id.* § 7, cl. 2-3.

235. For example, the State of the Union informs citizens, and the bicameralism and presentment requirements determine what creates federal law that is binding on citizens.

236. U.S. CONST. art. II, § 2, cl. 2.

237. The conclusion would be no different if one were to instead characterize the statute as harming every United States citizen’s right to have an ambassador chosen by the President with the advice and consent of the Senate.

To generalize, much of what the Constitution does is to establish governmental entities and determine the relationships among them. There is no reason to think that there cannot be constitutional harms to these inanimate governmental structures. And, indeed, the Supreme Court has long policed against improper incursions against these institutions by means of the structural constitutional principles known as separation of powers and federalism.

Professor Hasen probably does not deny the existence of structural principles in general but thinks that election law should only be analyzed under the rubric of equality, not structure.²³⁸ Even this more moderate position is untenable, however, because it is not the case that all constitutional concerns in the voting context boil down to equality.²³⁹ Republican Legitimacy, for instance, concerns what is necessary to maintain the legitimacy and stability of the republican forms of government that the Constitution creates and guarantees; these interests are not reducible to “equality.” It does not slight the Equal Protection Clause to recognize that democracy’s rules of the road implicate other constitutional principles as well.

At least part of what drives Professor Hasen is the hope of having “apples-to-apples comparisons” among constitutional principles.²⁴⁰ But an attempt to reduce everything to equal protection is misbegotten if, as this Article’s analysis suggests, multiple constitutional principles are implicated in the rules-of-the-road context.²⁴¹ Analysis unavoidably becomes complex when multiple incommensurable constitutional principles point to different outcomes. The attempt to reduce distinctive, incommensurable constitutional commitments into a single constitutional currency purchases resolvability only at the cost of distortion.

As further evidence that a meaningful distinction between individual rights and structural constitutional interests exists, this distinction already is embedded in much constitutional doctrine.²⁴²

238. See HASEN, *supra* note 227, at 153-56.

239. Professor Hasen summarizes his book as an argument that courts’ sole role is to be the “actor[] of last resort who must referee some high-stakes political battles and protect basic rights of political equality” and closes his book with a chapter entitled “Equality, Not Structure.” *Id.* at 138.

240. *Id.* at 156.

241. These include, specifically, Republican Legitimacy, as well as individual rights principles such as free speech and equal protection.

242. This argument is a species of the inductive reasoning that undergirds common law

For example, the distinction between individual rights and structural interests helps explain why some constitutional matters can be waived and others cannot.²⁴³ It is the individual, personal nature of the right against self-incrimination and the Sixth Amendment right against unlawful search and seizure that makes these constitutional matters waivable by individuals. Conversely, as the Supreme Court has explained, federalism's constitutional requirements may not be waived by states because they are structural.²⁴⁴ Likewise, parties to litigation cannot waive Article III's "structural" protections,²⁴⁵ which guard the "role of the independent judiciary within the constitutional scheme of tripartite government."²⁴⁶ Similarly, it is unthinkable that the President or Congress could waive presentment. To generalize, individuals cannot waive structural constitutional requirements because such matters are not "theirs" to waive on account of their structural character. Permitting waiver of structural values would put such interests at risk.

Professor Hasen also argues that structuralism reflects "judicial hubris" and that courts should not "make deeply contested normative judgments about the appropriate functioning of the political process" that structuralism entails.²⁴⁷ This argument fails because "[s]tructuralism is not necessarily juriscentric."²⁴⁸ The question of whether a structural principle exists is wholly distinct from the question of which institution, the courts or the legislatures, is primarily, or exclusively, responsible for implementing it.²⁴⁹ Indeed, several structural constitutional principles are exclusively or prima-

reasoning insofar as it draws a general principle from decisions that were rendered in specific contexts. *See generally* BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 22-23 (1921) ("The common law does not work from pre-established truths of universal and inflexible validity to conclusions derived from them deductively [but i]ts method is inductive, and it draws its generalizations from particulars.").

243. *See, e.g.,* *Peretz v. United States*, 501 U.S. 923, 936 (1991) ("[L]itigants may waive their *personal* right to have an Article III judge preside over a civil trial. The most basic rights of criminal defendants are similarly subject to waivers." (emphasis added) (internal citations omitted)). *See generally* Jason Mazzone, *The Waiver Paradox*, 97 *NW. U. L. REV.* 801 (2003).

244. *New York v. United States*, 505 U.S. 144, 180-83 (1992).

245. *See* *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850-51 (1986).

246. *See* *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 583 (1985).

247. HASEN, *supra* note 227, at 153.

248. Charles, *supra* note 228, at 1113.

249. For example, constitutional principles that are nonjusticiable political questions exist and are implemented by nonjudicial institutions. *See* *Baker v. Carr*, 369 U.S. 186, 198 (1962).

rily the responsibility of Congress; for instance, the Constitution's guarantee that states are to have republican forms of government falls to Congress under current doctrine,²⁵⁰ as does the Tenth Amendment's federalism limitations on Congress's legislative powers.²⁵¹ Similarly, primary responsibility for implementing Republican Legitimacy falls to the legislative branch.²⁵²

b. Critiquing Professor Charles's Claim that the Distinction Between Rights and Structure Is Immaterial

Let us next consider Professor Charles's claim that "it is immaterial whether one casts political rights claims in a structuralist or individualist frame."²⁵³ Charles provides two justifications for his conclusion.

First, Charles argues that "whenever the Court uses rights-speak, the Court is doing so instrumentally *to mask and rectify structural concerns*."²⁵⁴ Unlike rights claims that are grounded in equal protection or free speech, structural claims do not have any clear textual basis and for that reason, says Charles, have an air of illegitimacy. Treating structural principles as rights claims "provides the patina of constitutional legitimacy—the assurance (or illusion) that courts are not simply fashioning doctrine out of whole cloth without regard to the constitutional text."²⁵⁵

I think there is something self-evidently unsatisfying with Charles's claim that rights claims are a ploy to give textual grounding to judicial decisions. But beyond unsavory duplicity, it is unnecessary. Some structural principles are reasonably inferred from constitutional text.²⁵⁶ Moreover, structural inferences are a

250. *See id.* at 218.

251. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985).

252. *See Rosen*, *supra* note 17.

253. Charles, *supra* note 228, at 1131.

254. *Id.* at 1128 (emphasis added).

255. *Id.*

256. For the classic argument, see CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 3-32 (1969). For a more recent articulation, see Amar, *supra* note 142, at 28-30 ("For example, the phrases 'separation of powers' and 'checks and balances' appear nowhere in the Constitution, but these organizing concepts are part of the document, read holistically. Each of the three great departments—legislative, executive, judicial—is given its own separate article, introduced by a separate vesting clause. To read these three vesting clauses as an ensemble (as their conspicuously parallel language and parallel

well-accepted mode of constitutional interpretation, as is demonstrated by the well-accepted doctrines of separation of powers and federalism—both of which are structural principles that are derived by inference, not from explicit constitutional text.²⁵⁷

Charles’s second argument is that “structural claims in law and politics, which generally stem from democratic theory, are often amorphous esoteric ideals that are difficult to domesticate for adjudicative purposes.”²⁵⁸ Individual rights claims remedy this difficulty, Charles asserts, because “[a]n individual rights framework is how courts translate structural values into adjudicatory claims capable of resolution by jurists as opposed to philosophers or policymakers.... An individual rights framework also helps courts think more concretely about structural problems and may direct them toward judicially manageable remedies.”²⁵⁹

There are several problems with this argument. First, the claim that “[a]n individual rights framework ... helps courts think more concretely about structural problems” confuses the benefits of case-by-case adjudication with individual rights.²⁶⁰ It is case-by-case adjudication, not individual rights, that has allowed courts to concretely express what various individual rights require. For example, the contents of and values behind the individual rights of free speech and equal protection were initially amorphous and esoteric because they were difficult to explain,²⁶¹ and were only made concrete over time by the Court’s case-by-case, common law reasoning. Similarly, courts have given concrete expression to structural values, such as separation of powers, through case-by-case adjudication.²⁶²

Second, Charles’s argument fails to explain *how* the use of individual rights “translate[s] structural values” into claims that

placement would seem to invite) is to see a plain statement of separated powers.”).

257. See Amar, *supra* note 142, at 30.

258. Charles, *supra* note 228, at 1126.

259. *Id.* at 1128.

260. *Id.*

261. See, e.g., LEONARD W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 4 (1960) (“The meaning of no other clause of the Bill of Rights at the time of its framing and ratification has been so obscure to us as the Free Speech and Press Clause.”).

262. See, e.g., INS v. Chadha, 462 U.S. 919, 928 (1983).

vindicate those structural values.²⁶³ Professor Pildes has strenuously argued that it is impossible to protect structural values if one begins reasoning from individual rights,²⁶⁴ and Charles's argument does not respond to this. Part III provides several concrete examples of Pildes's general claim as it demonstrates three reasons why individual rights cannot be relied upon to protect structural constitutional values.²⁶⁵

III. REPUBLICAN LEGITIMACY'S EXPLANATORY POWER: REVISITING THREE SUPREME COURT CASES

Republican Legitimacy reworks the analysis of many controversies concerning representative democracy's rules of the road. This Part applies Republican Legitimacy to (1) the voter identification law that was challenged in *Crawford v. Marion County Election Board*, (2) partisan gerrymandering, which was declared a nonjusticiable political question in *Vieth v. Jubelirer*, and (3) the campaign finance regulation struck down in *Citizens United v. Federal Election Commission*. My analysis of *Crawford* and *Vieth* demonstrates two reasons why it is crucial to understand Republican Legitimacy as a structural constitutional principle, rather than assimilating it into an individual constitutional right: (a) individual rights doctrines focus attention primarily on individuals, and in so doing can lead courts to overlook structural harms, and (b) subdoctrines developed in the context of individual rights may have unintended consequences if applied to structural constitutional values. The analysis of *Citizens United* shows why Republican Legitimacy is superior to anti-corruption as a conceptual and doctrinal framework, and demonstrates the significance of recognizing Republican Legitimacy as a stand-alone constitutional principle.

263. Charles, *supra* note 228, at 1128.

264. See Richard H. Pildes, *Competitive, Deliberative, and Rights Oriented Democracy*, 3 ELECTION L.J. 685, 687 (2004) (reviewing RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY (2003)) ("The content of political rights in these cases necessarily derives from a judgment about the proper structural aims to attribute to democracy.").

265. For a brief overview of these reasons, and cross-references to where the arguments are made, see *supra* note 229.

A. Crawford and Voter Identification

Republican Legitimacy alters analysis of the voter identification law challenged in *Crawford* in two fundamental respects. First, by focusing attention on the representative system and not just individuals, Republican Legitimacy shows that the plurality opinions overlooked many legally relevant facts. Second, Republican Legitimacy explains why two doctrines invoked by the plurality opinions that blocked meaningful judicial review of Indiana's statute—the doctrines of facial challenges and discriminatory intent—had no proper application in the case.

1. Overlooked Facts

In 2005, Indiana enacted “one of the [nation’s] most restrictive” voter identification laws²⁶⁶ on a straight party-line vote; it was supported by all Republicans in the state legislature and received no support from Democrats.²⁶⁷ The law required voters to present government-issued identification at the polls.²⁶⁸ Nearly 1 percent of Indiana’s population lacked such identification when the statute passed,²⁶⁹ most of whom were poor or older voters.²⁷⁰

The Supreme Court in *Crawford* upheld a lower court’s dismissal of a challenge to the Indiana statute on a rationale that makes it very difficult to challenge voter identification laws before elections already have taken place.²⁷¹ The six votes upholding the dismissal came in two plurality opinions, one by Justice Stevens, joined by the Chief Justice and Justice Kennedy, the other by Justice Scalia, joined by Justices Thomas and Alito.²⁷² But the only harm both opinions considered was whether the statute violated the “right to vote” under equal protection.²⁷³ Neither the plurality nor the

266. See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 222 (2008) (Souter, J., dissenting); see also *id.* at 240 (Breyer, J., dissenting) (noting that Indiana’s law was the most restrictive in the country).

267. See *id.* at 203 & n.21 (providing vote tally).

268. See *id.* at 185 (Stevens, J., plurality opinion).

269. See *id.* at 187-88 & n.6.

270. See *id.* at 238 (Breyer, J., dissenting).

271. See *id.* at 187-89 (Stevens, J., plurality opinion).

272. See *id.* at 185; *id.* at 204 (Scalia, J., concurring).

273. See *id.* at 198-200 (Stevens, J., plurality opinion); *id.* at 204-05 (Scalia, J., concurring).

dissenting opinions considered whether the statute threatened a structural constitutional harm.

More specifically, no Justice asked whether the Indiana statute, and the circumstances surrounding its enactment, posed a threat to Legitimate-Selection. If that question had been asked, it would have been obvious that numerous facts in the case mentioned in passing were of crucial legal significance. Consider the following: A conservative estimate was that more than forty thousand Indiana voters, about 1 percent of the state's electorate, lacked the requisite identification at the time the statute was enacted,²⁷⁴ and most of these persons tended to vote Democratic.²⁷⁵ Indiana was known to be a swing state in national elections, and it was well understood that only a few hundred voters in another swing state determined the nation's President only five years earlier.²⁷⁶ The Indiana law combated voter fraud in a highly partisan way: the statute targeted a form of fraud in in-person voting—thought to favor Democrats—and left unaddressed a form of fraud in absentee-voting—thought to favor Republicans—despite the fact that the only fraud that *had* been documented in Indiana was in absentee voting.²⁷⁷ Finally, all Republicans in both houses of the Indiana legislature supported the law, and all Democrats opposed it.²⁷⁸ Indeed, Justice Stevens's plurality opinion, which rejected the lawsuit, went so far as to observe that “[i]t is fair to infer that partisan considerations may have played a significant role in the decision to enact” Indiana's law.²⁷⁹ The three dissenting Justices agreed.²⁸⁰

None of the above-mentioned facts evidencing partisanship, however, was legally relevant under Justices Stevens's and Scalia's opinions. This is not surprising. Legal tests are reductive, identifying as legally relevant only a small subset of the infinite facts that characterizes a given circumstance. The above-mentioned facts bear

274. *See id.* at 218 (Souter, J., dissenting).

275. *See id.* at 188 (Stevens, J., plurality opinion).

276. I refer, of course, to Florida in the 2000 presidential election.

277. *Crawford*, 553 U.S. at 195-96 (Stevens, J., plurality opinion); *id.* at 225-26 (Souter, J., dissenting).

278. *See supra* note 267 and accompanying text.

279. *Crawford*, 553 U.S. at 203 (Stevens, J., plurality opinion).

280. *See id.* at 236 (Souter, J., dissenting) (noting that “[w]ithout a shred of evidence that in-person voter impersonation [was] a problem in the State, much less a crisis,” Indiana had enacted “one of the most restrictive photo identification requirements in the country”).

on the question of whether there has been a structural harm to republican government, but do not readily fit into equal protection doctrine, which focuses instead on harm to individual voters. Thus, Justice Stevens's analysis was directed almost exclusively at considering the "voters who may experience a special burden under the statute,"²⁸¹ ultimately rejecting petitioner's challenge because the record did not show "excessively burdensome requirements on any class of voters."²⁸² Likewise, Justice Scalia's concurring opinion focused exclusively on the law's effects on voters.²⁸³

But from the vantage point of the structural principle of Republican Legitimacy, the above facts evidencing partisanship were crucially relevant. A known byproduct of stricter registration requirements is that fewer people to whom the requirements apply will vote. Republicans thought that the law's additional requirements would discourage more Democrat-voting than Republican-voting voters from voting.²⁸⁴ And so did Democrats.²⁸⁵ A purposeful partisan-skewed reduction of the electorate violates Legitimate-Selection, the first component of Republican Legitimacy. That Indiana's voter identification law also aimed to accomplish a legitimate antifraud goal should not provide cover for a legislature to differentially limit the electorate.²⁸⁶

281. *Id.* at 200 (Stevens, J., plurality opinion).

282. *Id.* at 202 (internal quotation marks omitted). The facts evidencing partisanship conceivably could have been relevant to the requirement that the Indiana law be "nondiscriminatory" under Justice Stevens's equal protection analysis. *See id.* at 204. But Justice Stevens did not think the aforementioned partisanship facts relevant to the nondiscrimination inquiry, most likely because he used "discriminatory" in the oddly narrow sense of meaning an "irrelevant" voting requirement. *See id.* at 189 (concluding that the poll taxes struck down in *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1996), "invidiously discriminate[d]" because the taxes were "irrelevant to the voter's qualifications"). There is one other place in Justice Stevens's plurality where the above-mentioned facts conceivably could have been relevant. *See infra* note 286.

283. *See Crawford*, 553 U.S. at 205-09 (Scalia, J., concurring) (discussing what criteria determine "the severity of the burden" that a law imposes on voters).

284. *See Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 954 (7th Cir. 2007) (Evans, J., dissenting) ("Let's not beat around the bush: The Indiana voter photo ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic.").

285. This is presumptively why the law was passed purely along party lines. *See Crawford*, 553 U.S. at 203 n.21 (Stevens, J., plurality opinion).

286. Justice Stevens suggests Indiana's law would have been unconstitutional if "partisan considerations ... had provided the *only* justification" for it. *Id.* at 203 (emphasis added). This is too cramped an understanding of the appropriate constitutional limitations. In Justice

To conclude, exclusive reliance on individual rights doctrines led the parties and the Court to overlook the legal significance of many facts concerning the legitimacy of Indiana's electoral system. And this allows us to generalize an additional reason why Professor Charles is mistaken in claiming it does not matter whether a constitutional interest is denominated as individual or structural²⁸⁷: because (1) legal rules are reductive by nature; (2) individual rights doctrines focus attention on individuals, not structure; and (3) individual rights claims may allow structural harms to be overlooked.

2. *Inapplicable Subdoctrines*

Each plurality opinion in *Crawford* invoked a legal subdoctrine that prevented it from applying heightened review. Republican Legitimacy makes clear why neither subdoctrine properly shielded Indiana's law from careful scrutiny. Both subdoctrines properly apply to rights-based claims but are inapposite to the structural principle of Republican Legitimacy.

a. *The Overlooked As-Applied Challenge*

Justice Stevens's plurality opinion assumed that the petitioners bore "a heavy burden of persuasion" because they advanced a facial challenge.²⁸⁸ The Court has explicitly stated that "[f]acial challenges are disfavored,"²⁸⁹ and it has deliberately designed the doctrine so that facial challenges are much more difficult to win than as-applied challenges. Facial challenges will prevail only if a "law is unconstitutional in all of its applications," and "a facial challenge must fail where the statute has a plainly legitimate sweep."²⁹⁰

Stevens's view, all voter identification laws would pass muster under a facial challenge because all aim to accomplish at least one legitimate goal: combating voter fraud. This shortchanges Legitimate-Selection due to the reasons provided above in the text. That there are legitimate policies behind a genus of election laws should not mean that all possible species of the election law are constitutional. I explain in a companion article what the Court should have done in *Crawford*. See Rosen, *supra* note 17, at 46.

287. See *supra* Part II.C.2.b.

288. *Crawford*, 553 U.S. at 200 (Stevens, J., plurality opinion).

289. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008).

290. *Id.* at 449 (internal quotation marks omitted).

Justice Stevens was surely correct that petitioners' equal protection claims were facial challenges. After all, the election had not yet occurred, and so no Indiana voters had yet been kept from voting. "[C]onsider[ing] only the statute's broad application to all Indiana voters," Justice Stevens quickly concluded that the State's interests in countering fraud were "sufficient to defeat petitioners' facial challenge."²⁹¹

But exclusive focus on a rights claim led the Court and the parties to overlook the as-applied challenge that was also present. Though an individual may not be harmed until she has been barred from voting, a structural harm to the legitimacy of republican government can arise before Election Day. Voter registration laws bear on the structural principle of Legitimate-Selection, and such laws can affect the political activities of people and organizations before elections take place. Because laws that undermine Legitimate-Selection can have effects before elections, as-applied Republican Legitimacy challenges can be brought before Election Day. Laws that allegedly seek to differentially disenfranchise on partisan grounds undermine the legitimacy of the electoral process before even a single elector has been wrongfully kept from voting, and for that reason, can properly be subject to as-applied Republican Legitimacy challenges prior to Election Day.

This is important because, as explained above, facial challenges are far more difficult to win than as-applied challenges.²⁹² Post-election lawsuits asserting as-applied rights claims are not adequate to protect the structural interest of Republican Legitimacy because judicial remedies are limited. For example, courts have only limited institutional capital to cast aside election results and order new elections.²⁹³ Further, because legislatures make frequent modifications to their election laws, allowing only as-applied rights claims effectively insulates these laws from serious judicial review.

We now are in a position to appreciate another reason why Professor Charles is mistaken in arguing that it is irrelevant whether constitutional interests are denominated as individual or

291. *Crawford*, 553 U.S. at 202-03 (Stevens, J., plurality opinion).

292. See *supra* notes 289-90 and accompanying text.

293. Cf. SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURES OF THE POLITICAL PROCESS* 967 (3d ed. 2007) (noting that the "drastic remedy" of setting aside elections is "quite rare").

structural²⁹⁴: rights-based claims can trigger subdoctrines that are not applicable to structural claims. The next subsection gives a second example of this.

b. The Irrelevance of Discriminatory Intent

Republican Legitimacy explains why the doctrinal obstacle to strict judicial review identified in Justice Scalia's concurring opinion—the absence of a showing of intentional discrimination by the Indiana legislature—should not have barred the Court from subjecting Indiana's statute to heightened scrutiny.

Justice Scalia's concurring opinion, which Justices Thomas and Alito joined, cited to *Washington v. Davis*²⁹⁵ and asserted that petitioners' claim failed because they could not show that the Indiana legislature had a discriminatory intent:

[W]eighing the burden of a nondiscriminatory voting law upon each voter and concomitantly requiring exceptions for vulnerable voters would effectively turn back decades of equal-protection jurisprudence. A voter complaining about such a law's effect on him has no valid equal-protection claim because, without proof of discriminatory intent, a generally applicable law with disparate impact is not unconstitutional. The Fourteenth Amendment does not regard neutral laws as invidious ones, *even when their burdens purportedly fall disproportionately on a protected class*. *A fortiori* it does not do so when, as here, the classes complaining of disparate impact are not even protected.²⁹⁶

A discriminatory intent may be sensible vis-à-vis individual rights,²⁹⁷ but it has no place vis-à-vis structural constitutional principles. An equal protection doctrine without a discriminatory

294. See *supra* Part II.C.2.b.

295. 426 U.S. 229, 248 (1976).

296. *Crawford*, 553 U.S. at 207 (Scalia, J., concurring) (citations omitted).

297. For present purposes I need not, and do not, take a position on the question of whether intent requirements are ever desirable. See generally Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1149-50 (1989) (concluding that intent doctrine is a misnomer, and that it actually operates so as to allow judges to surreptitiously balance competing interests). For present purposes it suffices to show, as I try above in the text, that structural constitutional principles are meaningfully different from individual rights vis-à-vis intent.

impact requirement may subject too many legitimate laws to heightened scrutiny, thereby striking down too many laws, as a result of what might be called “judicial myopia.” There are political losers in virtually every legislative battle, and this fact of politics ordinarily is not constitutionally problematic. Without a discriminatory intent requirement, such “nonproblematic” political losers can get courts to focus on *their* loss without giving adequate attention to the statute’s overall benefits which, as almost always occurs in politics, comes at the expense of *someone*. Further, the legislation would be subjected to a heightened scrutiny that seldom can be satisfied when “mere politics” is the real reason for their loss. A discriminatory intent requirement is a plausible doctrinal mechanism for correcting such judicial myopia.

Critically, the risk of judicial myopia does not extend to structural constitutional principles. If a statute imposes a structural constitutional harm, then such harm is a sufficient and legitimate basis for triggering heightened judicial review because there is no larger context that could conceivably justify the legislation. Accordingly, a structural harm appropriately triggers heightened judicial scrutiny. And this explains why structural constitutional principles do not contain discriminatory intent requirements. For instance, separation of powers doctrine considers the aggregate effects of a statute on, say, the President’s powers, never inquiring whether Congress *intended* to encroach on presidential power.²⁹⁸ This is true of both so-called formalist and functionalist separation of powers doctrines.²⁹⁹ The Court’s federalism jurisprudence likewise did not include an intentionality requirement in the days when it judicially enforced the Tenth Amendment.³⁰⁰ Nor is there any such intentionality requirement under the Court’s quasi-Tenth Amendment anticommandeering jurisprudence.³⁰¹

298. See, e.g., *Clinton v. Jones*, 520 U.S. 681, 701 (1997) (noting that the legal test is whether allowing a lawsuit against a sitting president “will curtail the scope of the official powers of the Executive Branch” without a discriminatory intent requirement).

299. *Clinton v. Jones* adopted a “functionalist” approach. For an example of a “formalist” approach, which likewise did not include a discriminatory intent requirement, see *Clinton v. City of New York*, 524 U.S. 417 (1998).

300. See *Nat’l League of Cities v. Usery*, 426 U.S. 833, 842-48 (1976).

301. See *Printz v. United States*, 521 U.S. 898, 925-26 (1997); *New York v. United States*, 505 U.S. 144, 161-66 (1992).

That discriminatory intent has no proper application to structural constitutional principles is yet another reason why individual rights doctrines cannot adequately guard structural values.³⁰² Discriminatory intent is exceedingly difficult to establish. Beyond the “many minds” puzzle of which legislators’ intent should matter for purposes of establishing discriminatory intent, legislators tend to have multiple motivations when they vote, and nowadays are sufficiently sophisticated to avoid publicly revealing nefarious intents. Moreover, state legislatures—the institutions that create most of the rules of the road—typically do not publish formal legislative histories that reveal *any* legislative intent. For all these reasons, discriminatory intent is hard to show, and doctrines that require it risk underenforcing the constitutional principle they implement.³⁰³

As applied to the Indiana law, the upshot is the following: showing that the Indiana legislature discriminatorily intended to undermine the legitimacy of the electoral process was not a prerequisite of heightened scrutiny.³⁰⁴ Reliance on individual rights left the structural constitutional interest vulnerable because discriminatory requirements, which are very difficult to satisfy, are not applicable to structural constitutional claims.

B. Vieth and Partisan Gerrymandering

Five Justices dismissed a partisan gerrymandering claim as nonjusticiable in *Vieth v. Jubelirer*.³⁰⁵ Joined by three other Justices, Justice Scalia’s plurality opinion decided that all partisan gerrymandering claims were nonjusticiable political questions because there was no judicially manageable standard.³⁰⁶ In his view, “the mere fact that the[] four dissenters come up with three different standards—all of them different from the two proposed in [the earlier case of] *Bandemer* and the one proposed here by appellants—goes a long way to establishing that there is no constitution-

302. Pace Professor Charles, once again. *See supra* Part II.C.2.

303. *See generally* LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 84-128 (2004).

304. A companion article considers precisely what scrutiny should have been applied to Indiana’s law and other Republican Legitimacy claims. *See Rosen, supra* note 17.

305. 541 U.S. 267 (2004).

306. *Id.* at 281 (Scalia, J., plurality opinion).

ally discernible standard.”³⁰⁷ Justice Kennedy’s concurrence, which provided the crucial fifth vote, dismissed the claim but did not categorically shut the door on partisan gerrymandering claims.³⁰⁸

Republican Legitimacy sheds important light on *Vieth* in two respects. First, it provides a conceptual framework that facilitates identification of overlooked common ground between Justice Kennedy and the four dissenters. The conceptual and doctrinal clarity provided by Republican Legitimacy conceivably could have led to a different outcome in *Vieth*: a five Justice opinion permitting Republican Legitimacy claims against partisan gerrymanders.³⁰⁹

Second, awareness of Republican Legitimacy facilitates recognition of the inadequacies of the individual rights-based approach taken in *Vieth*. The multiple proposed legal tests do not mean there are no “discernible standards” to govern partisan gerrymandering claims as Justice Scalia asserted, but reflect the folly of shoehorning challenges to partisan gerrymandering into an individual rights claim instead of placing them into the structural constitutional claim in which they properly fit. Republican Legitimacy hence shows that Justice Scalia mistook a failure to agree on account of conceptual confusion for the impossibility of agreement.

1. Overlooked Common Ground

The sole constitutional ground asserted by the petitioners before the Supreme Court was that Pennsylvania’s redistricting plan violated the Equal Protection Clause.³¹⁰ This exclusively individual rights-focused approach distorted the way the Justices viewed the case because it left the Justices without a doctrinal and conceptual basis to ground the structural harms that five of the Justices had noted. Consequently, some Justices merely made passing comments about partisan gerrymandering’s structural harms, while others attempted to shoehorn the structural harms, which in fact are aspects of Republican Legitimacy, into individual rights doctrine.

307. *Id.* at 292.

308. *See id.* at 309-14 (Kennedy, J., concurring).

309. *See supra* note 304.

310. *See Vieth*, 541 U.S. at 294 (Scalia, J., plurality opinion) (“Only an equal protection claim is before us in the present case.”).

Republican Legitimacy provides a coherent framework within which these harms could have been housed.

First, consider Justice Stevens's dissent. He thought partisan gerrymandering ran afoul of equal protection, but his conception of the constitutional harm was structural, not rights-based: Gerrymanders "effect a constitutional wrong when they disrupt the representational norms that ordinarily tether elected officials to their constituencies as a whole."³¹¹ They generate a "disruption of the representative process," which imposes a "representational har[m]."³¹² Justice Stevens is describing harms to both components of Republican Legitimacy: gerrymanders distort Legitimate-Selection and undermine Legitimate-Decisionmaking.

To be sure, Justice Stevens labored to tie these structural harms to individuals so as to fit them into equal protection doctrine.³¹³ This is conceptually misbegotten insofar as it focuses attention away from the primary harm and instead onto its secondary consequences. And doing this had significant doctrinal costs because, as shown above, subdoctrines applicable to individual rights-based doctrines frequently are irrelevant to structural principles.³¹⁴ More specifically, Justice Stevens's individual rights analysis triggered an equal protection subdoctrine that shielded the claim from heightened judicial review, as Justice Scalia convincingly showed.³¹⁵ That subdoctrine would have had no application, however, to a structural constitutional claim grounded in Republican Legitimacy.³¹⁶

Even more clearly than Justice Stevens, Justice Breyer's dissent conceptualized the harm of partisan gerrymandering structurally. Unconstitutional gerrymandering occurs when the district plan "fail[s] to advance any plausible democratic objective while simulta-

311. *Id.* at 329 (Stevens, J., dissenting).

312. *Id.* at 330 (alteration in original) (quoting *United States v. Hays*, 515 U.S. 737, 745 (1995)) (internal quotation marks omitted).

313. *See id.* at 321-24.

314. *See supra* Part III.A.2.

315. Justice Stevens analogized partisan gerrymandering to racial gerrymandering. *See Vieth*, 541 U.S. at 321-24 (Stevens, J., dissenting). As Justice Scalia pointed out, however, the level of scrutiny under equal protection turns on the identity of the harmed group, and while race triggers heightened scrutiny, political affiliation does not. *See id.* at 293-94 (Scalia, J., plurality opinion).

316. The level of review appropriate to a structural claim does not turn on whether there has been harm to individuals who fall into a suspect class for equal protection purposes. *See Rosen*, *supra* note 17.

neously threatening serious democratic harm.”³¹⁷ Breyer found “constitutionally mandated democratic requirements”³¹⁸ to be grounded in the Constitution’s opening words.³¹⁹ The contents of these constitutional “democratic requirements” are part of Legitimate-Selection: prohibited is “the *unjustified* use of political factors to entrench a minority in power.”³²⁰ Entrenchment is a “democratic harm” where “democratic values are dishonored” because “voters find it far more difficult to remove those responsible for a government they do not want.”³²¹

To be sure, Justice Breyer ultimately grounded the constitutional harm of partisan gerrymandering in equal protection.³²² This is unsurprising in view of the fact that equal protection was the only claim petitioners had asserted. But Breyer’s structural conception of gerrymandering’s harm suggests he may have been amenable to the principle of Republican Legitimacy.

Justice Kennedy, whose concurrence provided the critical fifth vote for Justice Scalia’s plurality opinion, plausibly could have provided an additional vote for Republican Legitimacy. Justice Kennedy criticized the appellants’ exclusive reliance on equal protection and suggested that an alternative constitutional principle—free speech—may have been more suitable to their challenge.³²³ Openness to an alternative to equal protection suggests that Kennedy might have been open to other grounds as well.

Further, Justice Kennedy wrote of gerrymandering’s impact on “rights of fair and effective representation.”³²⁴ He also explicitly framed his free speech challenge in structural terms, tying his proposed legal test to the structural rationale that “[r]epresentative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among

317. *Vieth*, 541 U.S. at 355 (Breyer, J., dissenting).

318. *Id.* at 356.

319. *Id.* (“We the People, who ordain[ed] and establish[ed] the American Constitution, sought to create and to protect a workable form of government that is in its principles, structure, and whole mass basically democratic.” (internal quotation marks omitted)).

320. *Id.* at 360

321. *Id.* at 361; *see also id.* at 367 (referring to the “risk of harm to basic democratic principle[s]”).

322. *See id.* at 355.

323. *See id.* at 314 (Kennedy, J., concurring).

324. *Id.* at 312.

the electorate candidates who espouse their political views.”³²⁵ Finally, and most tellingly, Justice Kennedy closed his concurrence as follows: “The *ordered working of our Republic, and of the democratic process, depends on a sense of decorum and restraint in all branches of government* Here, one has the sense that legislative restraint was abandoned. That should not be thought to serve the *interests of our political order*.”³²⁶ This is likely Justice Kennedy’s view as to what was the most salient harm, and it is structural in character: trauma to the conditions necessary to sustain the “ordered working of our Republic,” the “democratic process,” and “our political order.”³²⁷ Indeed, these are aspects of Legitimate-Selection.

Justice Kennedy ultimately concurred because of the “failings of the many proposed standards for measuring the burden a gerrymander imposes on representational rights,”³²⁸ but thought the Court “should be prepared to order relief” if workable standards emerge in the future.³²⁹ Would he have joined an opinion that asked a lower court to take account of the structural harms that he himself observed? The fairest answer, I would think, is an enthusiastic “perhaps.” The answer quite likely turns on whether such a harm could be protected by a judicially manageable legal standard. A companion article argues that it can.³³⁰

Justice Souter’s dissenting opinion, joined by Justice Ginsburg, made passing reference to gerrymandering’s structural consequences, noting that “the increasing efficiency of partisan redistricting has damaged the democratic process to a degree that our predecessors only began to imagine.”³³¹ The thrust of Justice Souter’s opinion, however, was that gerrymandering harmed individual voters.³³² But this does not mean that Justices Souter and

325. *Id.* at 314 (quoting *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000)) (internal quotation marks omitted).

326. *Id.* at 316 (emphasis added).

327. *Id.*

328. *Id.* at 317.

329. *Id.*

330. See Rosen, *supra* note 17.

331. *Vieth*, 541 U.S. at 345 (Souter, J., dissenting); *cf. id.* at 343 (emphasizing that gerrymandering interferes with the “right to fair and effective representation” (quoting *Davis v. Bandemer*, 478 U.S. 109, 129-34 (1986) (plurality opinion) (internal quotation marks omitted))).

332. See *id.* at 343 (“The Constitution guarantees both formal and substantial *equality*

Ginsburg would have been unwilling to join an opinion that forthrightly understood partisan gerrymandering as also imposing a structural constitutional harm. It does not seem farfetched to suggest they may have joined an opinion signed by Justices Stevens, Breyer, and Kennedy that analyzed partisan gerrymandering under the structural principle of Republican Legitimacy.

2. Mistaking a Failure to Agree for the Impossibility of Agreement

Republican Legitimacy facilitates recognition of a flaw in Justice Scalia's main argument. Justice Scalia wrote "the mere fact that these four dissenters come up with three different standards ... goes a long way to establishing that there is no constitutionally discernible standard."³³³ This is an unfair conclusion because although all dissenters invoked the same terminology of "equal protection," they had fundamentally different understandings of partisan gerrymandering's harm. Justices Stevens and Breyer conceptualized the harm structurally, whereas Justices Souter and Ginsburg conceptualized individual-based harms.³³⁴ The Justices' different judicial standards are a natural byproduct of their different conceptions of the constitutional harm, but do not indicate that a single conception could not be addressed by a manageable standard. It is possible that the conceptual clarity afforded by Republican Legitimacy could have led to agreement among the Justices. The Justices' lack of conceptual clarity in *Vieth* does not mean that agreement is impossible once clarity is obtained, *pace* Justice Scalia.

C. Revisiting Citizens United

Republican Legitimacy has important implications for *Citizens United v. Federal Election Commission*, the controversial decision that struck down the Bipartisan Campaign Reform Act of 2002's

among voters." (emphasis added)); *id.* (describing gerrymandering as denying "each political group in a State ... the same chance to elect representatives of its choice as any other political group" (quoting *Davis*, 478 U.S. at 124 (plurality opinion))).

333. *Id.* at 292 (Scalia, J., plurality opinion).

334. *See id.* at 317-23 (Justice Stevens's approach); *id.* at 355-66 (Justice Breyer's approach); *id.* at 343-50 (Justices Souter and Ginsburg's approach).

(BCRA) prohibition on corporations and unions from using general treasury funds to make independent expenditures for “electioneering communication” or the express advocacy of the election or defeat of a candidate.³³⁵ Republican Legitimacy illuminates *Citizens United* in two respects. First, as Part III.C.1 explains, Republican Legitimacy clarifies the nature and significance of the governmental interest behind the expenditures prohibition, showing there was a compelling governmental interest. Second, Republican Legitimacy shows that deciding whether corporate and union expenditures should be banned implicated a conflict between two competing constitutional considerations: free speech and Republican Legitimacy. Congress’s considered resolution of this constitutional conflict was entitled to substantial judicial deference.

1. Recognizing a Compelling Governmental Interest

First, Republican Legitimacy clarifies the governmental interest behind the campaign finance regulation. This is doctrinally critical because all Justices accepted that constitutionally protected speech can be regulated when there is a compelling governmental interest and the regulation is narrowly tailored.³³⁶ Among the core disputes in the case was whether the provision in BCRA was supported by a compelling governmental interest.

The Justices believed that the crucial question was whether BCRA’s ban was designed to prevent corruption, or the appearance thereof, of the electoral process.³³⁷ “Corruption” assumed this central role because the earlier case of *Buckley v. Valeo* held that preventing corruption or its appearance was “sufficiently important” to justify campaign finance limits.³³⁸ Of course, the fact that corruption was sufficiently important does not mean that *only* corruption is sufficiently important to justify regulation. But instead of considering whether other sufficiently important governmental interests were present, the lawyers defending BCRA and the Justices tried to shoehorn all governmental interests into the one surefire suf-

335. 130 S. Ct. 876, 887, 913 (2010).

336. *See id.* at 898.

337. *See id.* at 901-11 (explaining the governmental interest in the prevention of corruption).

338. 424 U.S. 1, 25, 29 (1976) (per curiam).

ficiently important interest: corruption. This was unfortunate because, as I explain below, Republican Legitimacy is a far superior framework for analyzing BCRA.

a. The Justices' Understandings of Corruption

To recognize Republican Legitimacy's superiority to corruption, it is first necessary to understand how "corruption" operated in the *Citizens United* opinion. Justice Kennedy's majority opinion held that corruption extended only to "*quid pro quo* corruption," or the direct exchange of "dollars for political favors."³³⁹ The majority concluded that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption,"³⁴⁰ and that BCRA's ban accordingly did not satisfy strict scrutiny.

Justice Stevens's dissent adopted a broader definition of corruption. Drawing on prior cases, Justice Stevens identified nearly a half-dozen ways that union and corporate expenditures could lead to corruption: unregulated expenditures could (1) give corporations "unfai[r] influence in the electoral process"; (2) "distort public debate in ways that undermine rather than advance the interests of listeners ... [by] drowning out ... noncorporate voices"; (3) "generate the impression that corporations dominate our democracy," which could lead citizens to "lose faith in their capacity, as citizens, to influence public policy," to "cynicism and disenchantment," and ultimately to "a reduced willingness of voters to take part in democratic governance"; (4) possibly chill the speech of elected officials, "who fear that a certain corporation can make or break their reelection chances"; and (5) open the door to rent seeking that is "far more destructive than what noncorporations are capable of" due to corporations' lower collective action costs vis-à-vis individuals.³⁴¹

339. *Citizens United*, 130 S. Ct. at 909-11 (quoting *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985)) (internal quotation marks omitted).

340. *Id.* at 909.

341. *Id.* at 974-75 (Stevens, J., concurring in part and dissenting in part) (internal quotation marks omitted).

b. The Superiority of Republican Legitimacy

Republican Legitimacy is a superior framework to anti-corruption for four reasons. First, Republican Legitimacy provides a more conceptually coherent framework that explains how the welter of policies discussed in Justice Stevens's dissent was all part of a single, integrated principle. Second, Republican Legitimacy points to other lines of case law that support the dissent's position. Third, the understanding that BCRA's goal was to secure Republican Legitimacy, rather than to address corruption, sheds a spotlight on two extraordinary logical gaps in the majority's reasoning. Finally, Republican Legitimacy provides a principled basis for concluding that the BCRA was supported by a compelling governmental interest.

i. Conceptual Clarity

First consider the many forms of corruption Justice Stevens identified in his dissent. As presented in his opinion, they seem like a disjointed laundry list. Indeed, it is not without cause that Professor Hasen has written that, although Stevens's analysis contains "many provocative and important ideas," it "as a whole ... does not cohere."³⁴²

Although Stevens's arguments may not "cohere" under an anticorruption rationale,³⁴³ this does not mean that they *cannot* cohere. The coherence problem lies not with Stevens's justifications, but with the organizing rubric of anti-corruption. Republican Legitimacy, by contrast, perfectly captures the potential harms Stevens identified. The apparently disparate list of dangers fall into two categories that by now should be familiar: threats to (1) Legitimate-Selection (rationales 1-3) and (2) Legitimate-Decisionmaking (rationales 4-5).

To see that Justice Stevens was speaking more about Republican Legitimacy than corruption, consider his response to Justice

342. Richard L. Hasen, *Citizens United and the Orphaned Antidistortion Rationale*, 27 GA. ST. U. L. REV. 989, 999 (2011).

343. It is true that Professor Hasen argues that Justice Stevens's explanations did not amount to a coherent anti-distortion (rather than anti-corruption) rationale, but Justice Stevens himself equated anti-corruption with anti-distortion. See *Citizens United*, 130 S. Ct. at 970-71.

Kennedy’s argument that corruption extends only to quid pro quo exchanges. Justice Stevens wrote that “[t]here are threats of corruption that are far more destructive to a democratic society than the odd bribe.”³⁴⁴ Stevens’s explanation is more naturally and compellingly conceptualized as addressing the governmental interest in guarding Republican Legitimacy. Stevens spoke of the danger that “private interests are seen to exert outsized control over officeholders solely on account of the money spent on (or withheld from) their campaigns.”³⁴⁵ Officeholders must “decide issues ... on the merits or the desires of their constituencies,’ ... not ‘according to the wishes of those who have made large financial contributions’—or expenditures—‘valued by the officeholder.’”³⁴⁶ Justice Stevens called this the concern that some nonconstituents will have an “undue influence,” or “improper influence[,]” on officeholders’ decisionmaking.³⁴⁷ Furthermore, he wrote:

There should be nothing controversial about the proposition that the influence being targeted is ‘undue.’ In a democracy, officeholders should not make public decisions with the aim of placating a financial benefactor, except to the extent that the benefactor is seen as representative of a larger constituency or its arguments are seen as especially persuasive.³⁴⁸

In short, though Justice Stevens used the terminology of “corruption,” he was actually drawing on a theory of what constitutes illegitimate decisionmaking by elected representatives—that is, what this Article calls Legitimate-Decisionmaking.³⁴⁹

Framing Justice Stevens’s argument as the claim that BCRA aimed to secure Legitimate-Decisionmaking significantly strengthens the argument. In addition to revealing the conceptual unity behind what at first appears to be disparate policies, Republican

344. *Id.* at 962 (Stevens, J., concurring in part and dissenting in part).

345. *Id.*

346. *Id.* (quoting *McConnell v. FEC*, 540 U.S. 93, 153 (2003), *overruled by Citizens United*, 130 S. Ct. at 880).

347. *Id.* at 962-63 & nn.63-65.

348. *Id.* at 962 n.63.

349. Consider, as well, Justice Stevens’s executive summary of the BCRA’s goal: “[T]o safeguard the integrity, competitiveness, and democratic responsiveness of the electoral process.” *Id.* at 975. This is conceptually connected to Republican Legitimacy, not to anti-corruption.

Legitimacy provides a principled reason to conclude that BCRA was supported by a compelling governmental interest. BCRA targeted what Congress believed to be improper influences on legislators' decisionmaking: Congress thought corporate and union expenditures posed a particularly acute risk that legislators would support policies for reasons of illegitimate self-interest. Because maintaining Republican Legitimacy is a constitutional interest, governmental policies that target threats to Republican Legitimacy satisfy the compelling governmental interest test.³⁵⁰

Further, grounding Stevens's argument in Republican Legitimacy invokes the case law and theoretical considerations examined earlier, which explain the need for, and contents of, Legitimate-Decisionmaking.³⁵¹ Government officials must act impartially in the public interest, and "self-interested ways" by government officials³⁵² can be unconstitutional without rising to the level of "corrupt." Consider in this regard the "conflict-of-interest recusal rule[s]" in Congress and "virtually every State" that were canvassed, and upheld, in *Nevada Commission on Ethics v. Carrigan*.³⁵³ The criteria for recusal—when a legislator "is immediately and particularly interested" or a judge has "personal bias or prejudice"—are triggered by circumstances that fall short of "corruption."³⁵⁴ This is so because the recusal criteria are not aimed at corruption, but at maintaining the legitimacy and dignity of government.³⁵⁵

350. The analysis above does not mean that all expenditure restrictions would be constitutional. Regulations still would have to satisfy the narrowly tailored standard, meaning that restrictions that selectively disadvantaged a political party or ideology would be unconstitutional.

351. See *supra* Part I.B.2.

352. See VERMEULE, *supra* note 64, at 4.

353. 131 S. Ct. 2343, 2348-49 (2011). Though *Carrigan* was decided after *Citizens United*, legislative antirecusal rules date back to a week after the First Congress convened. See *id.* at 2348. "[T]he long-recognized need for legislative recusal" is itself powerful evidence of the need's legitimacy. *Id.* at 2347-49. And as explained above in the text, the need for such recusal rules is grounded in Legitimate-Decisionmaking.

354. *Id.* at 2347-48 (internal quotation marks omitted).

355. As noted above—but worth reiterating—the Senate's recusal rules, adopted when Thomas Jefferson was President of the Senate, explain that not having such rules would be "so contrary not only to the laws of decency, but to the fundamental principles of the social compact, which denies to any man to be a judge in his own case." *Id.* at 2348 (quoting MANUAL OF PARLIAMENTARY PRACTICE, *supra* note 196, at 31) (internal quotation marks omitted). The rules continue by stating that "it is for the honor of the house that this rule, of immemorial observance, should be strictly adhered to." *Id.*

In short, like the recusal rules at issue in *Carrigan*, BCRA was an instance of the legislature policing itself. The *Carrigan* Court was substantially deferential to legislative self-policing,³⁵⁶ even when it trenched on legislators' political advocacy; the *Carrigan* majority upheld not only Nevada's voting ban, but also rules that "forbid[] [the legislator] to 'advocate the passage or failure' of the proposal—evidently meaning advocating its passage or failure during the legislative debate."³⁵⁷ The *Citizens United* Court likewise should have been more deferential to Congress's self-policing in BCRA.

ii. Gaps in the Majority's Logic

Republican Legitimacy sheds light on a logical flaw in Justice Kennedy's decision for the majority. Consider Justice Kennedy's argument as to why preventing quid pro quo exchanges of "dollars for political favors" is the only anti-corruption interest that constitutes a compelling governmental interest.³⁵⁸ Kennedy stated that even though corporate and union expenditures may be intended by their donors to secure influence over legislators, "[f]avoritism and influence are not ... avoidable in representative politics."³⁵⁹ Not only can they not be avoided, but they are *desirable* in Kennedy's view:

It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing

356. To be sure, under the *Carrigan* majority's analysis, the Court was not being deferential to legislative self-policing because the recusal rules did not affect constitutionally protected speech. I criticized this reasoning, and explained above why the recusal statutes indeed regulated constitutionally protected speech, but did so in a permissible fashion. See *supra* note 199.

357. *Carrigan*, 131 S. Ct. at 2347.

358. *Citizens United v. FEC*, 130 S. Ct. 876, 909-10 (2010) (quoting *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985)) (internal quotation marks omitted).

359. *Id.* at 910 (quoting *McConnell v. FEC*, 540 U.S. 93, 297 (2010)) (internal quotation marks omitted).

those political outcomes the supporter favors. Democracy is premised on responsiveness.³⁶⁰

In short, “favoritism and influence” are the other side of the coin of representatives’ responsiveness to constituents’ preferences—and responsiveness is a normative *good* in a representative democracy.

When examined through the lens of anti-corruption, Justice Kennedy’s position may seem plausible. After all, one could argue the activities listed in Justice Stevens’s dissent do not really constitute *corruption*. It may not be corrupt for corporations to aim to influence who gets elected and how their representatives vote, or that corporations can spend more money than individuals to influence elections. It may not be corrupt for a legislator to be influenced by the donations of his contributors. Given the amorphousness of corruption, and its usual requirement of bad intent,³⁶¹ there is plausibility to Justice Kennedy’s conclusion that these phenomena do not constitute “corruption.”

Justice Kennedy’s argument looks very different, however, through the lens of Republican Legitimacy. As explained above, Justice Stevens’s position is best understood as the claim that BCRA guarded Legitimate-Decisionmaking.³⁶² Thusly understood, Justice Kennedy’s argument was a non sequitur³⁶³: Justice Kennedy’s truism—that an officeholder invariably favors one policy (and hence voter preference) over another policy (and voter preference)—is irrelevant to whether a class of illegitimate legislative motivations exists. Similarly, that representatives should be responsive to their constituents’ preferences does not mean that there does not exist a category of “illegitimate” or “undue” constituent influence, as Justice Stevens claimed.³⁶⁴ For these reasons, Justice Kennedy’s position does not respond at all to the best understanding of Justice Stevens’s argument.

360. *Id.* (quoting *McConnell*, 540 U.S. at 297) (internal quotation marks omitted).

361. See Teachout, *supra* note 10, at 382 (arguing that bad intent is the “centerpiece” of political corruption).

362. See *supra* Part III.C.1.b.i.

363. Although the idea of illegitimate legislative motivations may be missed under a “corruption” rubric, this idea stands front and center of Republican Legitimacy’s concern with Legitimate-Decisionmaking.

364. See *supra* notes 347-48 and accompanying text.

2. *Recognizing a Constitutional Conflict*

Republican Legitimacy could have had another important implication for BCRA. Republican Legitimacy makes clear that BCRA implicated two competing constitutional principles: speech and Republican Legitimacy.³⁶⁵ Justice Kennedy's opinion for the majority did not analyze BCRA this way: it viewed BCRA as an inexplicable disregard of one constitutional commitment—speech³⁶⁶—not as a resolution of a difficult constitutional conflict. Of course, Congress had not actually realized this, as it had not recognized Republican Legitimacy to be a constitutional principle. But if Congress *had*—if BCRA was the considered judgment of Congress and the President as to how competing constitutional principles should be harmonized—then their judgment should have received significant judicial deference.³⁶⁷

365. While BCRA admittedly limited speech, it also advanced Republican Legitimacy. Striking the ban arguably came at the expense of the constitutional value of Republican Legitimacy.

366. See *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) (“[P]olitical speech must prevail against laws that would suppress it.”). Though Justice Stevens at one point referred to the necessity of “balanc[ing] competing constitutional concerns,” he was referring to the competing First Amendment interests of the speakers—corporations and unions—and the public, not to conflicts among distinct constitutional principles. See *id.* at 969 (Stevens, J., dissenting).

367. Courts and scholars have given surprisingly little attention to conflicts between constitutional principles. Justice Breyer has come closest. When analyzing a campaign finance limitation in one pre-*Citizens United* case, Breyer proposed a deferential standard of review “where constitutionally protected interests lie on both sides of the legal equation.” *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concurring). But the “competing constitutionally protected interests” of which Breyer spoke are not the same as two competing constitutional principles. *Id.* at 402 (emphasis added). Indeed, the cases he cited concerned nonconstitutional governmental interests sufficiently important to justify the regulation of speech, see *id.* at 402-03 (citing *Frisby v. Schultz*, 487 U.S. 474, 485-88 (1988)), such as *Frisby v. Schultz*, which held that a person’s “well-being, tranquility, and privacy of the home” is a “significant government interest,” *Frisby*, 487 U.S. at 484 (quoting *Carey v. Brown*, 447 U.S. 455, 471 (1980)), and circumstances in which two parties had competing speech interests, see *Nixon*, 528 U.S. at 403 (citing numerous such cases). Two recent books, which focus primarily on human rights law and the European Court of Human Rights, address the related issue of how conflicting rights should be adjudicated. See GEORGE C. CHRISTIE, *PHILOSOPHER KINGS? THE ADJUDICATION OF CONFLICTING HUMAN RIGHTS AND SOCIAL VALUES* (2011); LORENZO ZUCCA, *CONSTITUTIONAL DILEMMAS: CONFLICTS OF FUNDAMENTAL LEGAL RIGHTS IN EUROPE AND THE USA* (2007). Though BCRA concerns the different issue of a conflict between a constitutional right and a structural constitutional principle, many of Professor Christie’s ideas are nevertheless applicable. I hope in a future work to provide a comprehensive treatment of the issue of conflicts among constitutional principles.

There are two reasons such deference would have been appropriate. First, there is no objective way to reconcile competing incommensurable constitutional commitments.³⁶⁸ Greater weight must be given to one, and deciding the extent to which one prevails over the other is an unavoidably subjective judgment.³⁶⁹ The political branches are better suited than courts to harmonizing incommensurable constitutional commitments on basic democratic grounds due to harmonization's inescapable subjectivity.³⁷⁰ In fact, the same reasons that democracies place primary responsibility in legislatures to harmonize incommensurable *nonconstitutional* public policies suggest that legislatures also should be primarily responsible for reconciling competing *constitutional* commitments.

Second, legislatures frequently have greater institutional expertise than courts in ferreting out and understanding the empirical judgments that are relevant to reconciling competing constitutional principles. This unquestionably is the case with election regulation. Justice Breyer is right that “the legislature understands the problem—the threat to electoral integrity, the need for democratization—better than [courts] do” and that the Court accordingly should “defer to [Congress’s] political judgment that unlimited spending threatens the integrity of the electoral process.”³⁷¹ So was Justice White’s dissent in *Buckley*, where he observed that

Congress was plainly of the view that these expenditures also have corruptive potential; but the Court strikes down the provision, strangely enough claiming more insight as to what may improperly influence candidates than is possessed by many seasoned professionals who have been deeply involved in

368. That is to say, the two principles cannot be reduced to a common metric that would then allow for an objectively correct decision to harmonize the conflict by choosing the principle with the highest value. See generally CHRISTIE, *supra* note 367, at 167-68 (providing a clear discussion of the incommensurability of constitutional values). In theory, the statement above is not true for an originalist if originalist sources considered and definitively resolved the conflict. In practice, originalist sources seldom if ever do so.

369. See, e.g., *id.* at 167 (concluding that when human rights conflict, judges “are in fact choosing between values”).

370. See Mark D. Rosen, *Why the Defense of Marriage Act Is Not (Yet?) Unconstitutional: Lawrence, Full Faith and Credit, and the Many Societal Actors that Determine What the Constitution Requires*, 90 MINN. L. REV. 915, 967-69 (2006).

371. *Nixon*, 528 U.S. at 403-04 (Breyer, J., concurring).

elective processes and who have viewed them at close range over many years.³⁷²

For these reasons, courts should give significant deference to the political branches' considered judgments as to how competing constitutional commitments should be harmonized. The judicial role should be to "ask[] whether the statute burdens any one such interest in a manner out of proportion to the statute's salutary effects upon the others."³⁷³ Congress's judgment should be judicially overridden only when there may be failures in the political process that undermine faith in the political branches' decisions.³⁷⁴ The usual circumstances that lead to judicial suspicion of the political processes—such as the presence of discrete and insular minorities³⁷⁵—are absent from the instant context of campaign finance. The one concern is whether the congressional judgment was a form of self-dealing that harmed unrepresented outsiders³⁷⁶—people not currently in the legislature who might want to run for election in the future. The most important question for determining the appropriate level of judicial deference is whether a campaign finance enactment had the intention, or effect, of protecting incumbents by making campaigning more difficult for challengers.³⁷⁷ Challengers, after all, are generally less known to the public than incumbents, and challengers accordingly might be more harmed than incumbents by fundraising restrictions.³⁷⁸

If Congress enacted BCRA for the purpose of protecting itself, such a judgment clearly would not be deserving of judicial deference.

372. *Buckley v. Valeo*, 424 U.S. 1, 260-61 (1976) (White, J., concurring in part and dissenting in part).

373. *Nixon*, 528 U.S. at 402 (Breyer, J., concurring). *But see supra* note 367 (discussing the limitations of Breyer's approach in *Nixon*).

374. *Nixon*, 528 U.S. at 402-03; cf. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 73-180 (1980) (arguing that the judiciary's interference with ordinary majoritarian politics is appropriate when there are failures in the democratic process).

375. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938).

376. See ELY, *supra* note 374, at 83-86.

377. Cf. *Randall v. Sorell*, 548 U.S. 230, 248-49 (2006); *supra* notes 184-87 and accompanying text.

378. See Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 *YALE L.J.* 1049, 1072-73 (1996) (arguing that "[c]ontribution limits tend to favor incumbents by making it harder for challengers to raise money and thereby make credible runs for office").

A difficult question would be presented if, even absent any incumbent-protection intent on the part of Congress, campaign finance regulations had the effect of protecting incumbents. Establishing that campaign finance has such an effect, however, ought to require serious empirical analysis, not just armchair theorizing.³⁷⁹ But even if campaign finance could be shown to have some incumbency-protecting effects, thereby diminishing or eliminating judicial deference to the legislature's judgment, such effects should not ipso facto lead to a court's conclusion that the legislation is unconstitutional. Campaign finance regulations conceivably could have sufficiently important countervailing benefits vis-à-vis other aspects of Republican Legitimacy.

Determining what, if any, connection there is between campaign finance and incumbency protection lies beyond the scope of this Article. What *is* relevant is that the constitutional principle of Republican Legitimacy identifies a crucial issue that was almost entirely absent from the Court's analysis in *Citizens United*,³⁸⁰ determining whether campaign finance regulations are a form of incumbent protection is necessary to determining the judicial deference that should be given to the political branches' considered harmonization of the competing constitutional commitments of free speech and Republican Legitimacy.

IV. CONCLUSION (AND PROLOGUE)

First, a brief conclusion. Partisan gerrymandering and burdensome identification requirements that discourage certain populations from voting harm individuals, but they also threaten structural constitutional harms to representative democracy. To date, case law has recognized only the former type of harm: individual

379. The strongest argument that campaign finance regulations protect incumbents was short on empirics. *See id.* at 1072-75.

380. In some of the cases prior to *Citizens United*, Justices Scalia and Kennedy had explicitly accused campaign finance of being an incumbency protection ploy. *See, e.g.,* *McConnell v. FEC*, 540 U.S. 93, 247-50 (2003) (Scalia, J., concurring in part and dissenting in part); *id.* at 306-07 (Kennedy, J., concurring in part and dissenting in part). The more liberal members of the Court have offered up arguments in opposition. *See, e.g.,* *Citizens United v. FEC*, 130 S. Ct. 876, 968-70 (2010) (Stevens, J., dissenting). Although the majority opinion in *Citizens United* did not explicitly invoke the incumbency protection accusation, Justice Stevens's dissent did. *See id.*

rights-based claims grounded in equal protection and free speech. This Article identifies the structural constitutional interest that also is endangered—Republican Legitimacy—and explains why it is important that Republican Legitimacy be recognized as a stand-alone, structural constitutional principle.

Now to the prologue.³⁸¹ While courts have a vital role in implementing Republican Legitimacy—courts should identify Republican Legitimacy as a constitutional principle, define it, and determine what role they and other governmental institutions properly play in securing Republican Legitimacy—they are incapable of fully enforcing it on their own. Inherently political considerations appropriately inform many of the rules of the road of representative democracy. Legislatures have better access to the information that properly informs—and are better institutionally constituted to making the hard tradeoffs among the competing legitimate commitments that invariably lie behind—most of representative democracy’s rules of the road. Further, courts are a poor institutional context for distinguishing between reasonable and unreasonable compromises among legitimate considerations, though they can play an important backup role in policing, and hopefully thereby deterring, egregious violations.³⁸²

This means that the political branches themselves must be primarily responsible for protecting Republican Legitimacy. This can be done if legislatures choose representative democracy’s rules of the road by means of “tempered” rather than run-of-the-mill “hardball” politics. Tempered politics refers to a set of norms that aim to harness politicians’ compromise-seeking and deal-making skills, while ensuring that the legislative outcomes constitute reasonable compromises that do not undermine Republican Legitimacy. Tempered politics mitigates the ordinary rough-and-tumble of politics in two respects: decisions implicating Republican Legitimacy must be (1) bipartisan, rather than deeply partisan, and (2) commonwealth directed, rather than self-interested or party-interested. In short, tempered politics is the higher-order care we expect when politicians consider constitutional amendments. And this is sensible

381. A companion article addresses the issues that follow. *See Rosen, supra* note 17.

382. *See supra* notes 368-74 and accompanying text.

insofar as the rules of the road of representative democracy implicate constitutional matters.

But one may wonder how realistic it is to expect that legislators will self-regulate and act in accordance with the norms of tempered politics. They are the ones, after all, who have harmed Republican Legitimacy in the first place. Fortunately, there are two reasons why reliance on legislatures is not a “self-defeating proposal” that unrealistically asks the legislatures to overcome the very weaknesses that my proposal aims to remedy.³⁸³ First, there is no reason to presume that legislators will not take seriously their oaths to uphold the Constitution once they understand that it contains the principle of Republican Legitimacy. Second, most harms to Republican Legitimacy have been created by *state* legislatures—the institutions that are presumptively, and primarily, responsible under the Constitution for establishing the rules governing both state and federal elections.³⁸⁴ Congress faces different incentives that insulate it from many of the pressures to which state legislatures are subject. There are several legislative strategies Congress can use to encourage states to act consistently with tempered politics. Their detailed elaboration, however, must await another day.

383. For the concept of self-defeating proposals, see Adrian Vermeule, *Self-Defeating Proposals: Ackerman on Emergency Powers*, 75 *FORDHAM L. REV.* 631, 636-40 (2006).

384. See U.S. CONST. art. I, § 4, cl. 1.