Equitable Sharing and the Supreme Court

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I. Introduction

Elsewhere I have argued that a principle of equitable sharing, meaning that the benefits and detriments of social life must be equitably shared among all members of society, inheres in what it means to be a democratic society and is implicit in this society’s founding documents, the Declaration of Independence and the Constitution. I do not contend that a particular version of equitable sharing is set forth in those documents, only that they contain a dimly defined vision of equitable sharing as a fundamental aspect of the democratic society they contemplate, a vision whose particular elements are to be developed as the life of the society proceeds. While the major if not the primary responsibility for effectuating equitable sharing lies with the legislative branch of government, I argue here that the Supreme Court has a legitimate role to play in developing that vision and interacting with the legislative branch to implement it.

The historic role of the Supreme Court has been to superintend the actions or inactions of the legislative branch for compliance with the Constitution, to strike down legislation inconsistent with the Constitution, and to order the legislative branch to act affirmatively when it fails to comply with constitutional mandates. A principal justification for the Court’s playing this role is to protect individual rights, and in particular to protect the minority against the tyranny of the majority. Since by definition in a majoritarian system the majority regularly imposes its will on the minority, the Court

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must identify which circumstances bespeak tyranny and which do not. The Court’s approach has been to declare certain rights as fundamental and the denial of or failure to accord those rights as unconstitutional unless supported by sufficiently strong reasons to warrant the denial or failure to accord.

In discerning fundamental rights the Court has relied on the Constitution, and in particular on the Bill of Rights, as the source of those rights. Here the difficulty is that the meaning of the Constitution is usually far from clear-cut and requires interpretation. The resulting interpretive debates often give rise to charges that judges take advantage of the relative indeterminacy of the Constitution to read their personal policy preferences into the document and that doing so is inherently undemocratic in that the Court is not directly responsible to the people. Within the Court these debates usually concern the meaning of particular constitutional provisions. This is certainly an important part of the interpretive process. What is also needed, from my perspective, is a framework that ties together the particular debates into a coherent whole. Without that framework, it is hard to make sense of the adjudicative process, to adequately explain why some rights are

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3 The Declaration of Independence is not law but a statement of moral principle, and it is not the Supreme Court’s job to enforce it directly. Rather, the Court’s job is to enforce the Constitution. Nevertheless, to the extent that the Constitution implicitly incorporates the moral principles set forth in the Declaration, as I contend it does, the Declaration can and should be used to aid the Court (or anybody else) in interpreting and applying the Constitution. See, e.g., Robert J. Reinstein, Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment, 66 TEMP. L. REV. 361, 363, 410 (1993) (arguing that “the Declaration of Independence was united with the Constitution in the enactment of the Fourteenth Amendment,” and in particular that the purpose of the Equal Protection Clause was to constitutionalize the principle that all men are created equal and establish “equality as an independent right”); Alexander Tsesis, Self-Government and the Declaration of Independence, 97 CORNELL L. REV. (2012) (arguing that “while the Declaration of Independence has no enforcement provisions, it nevertheless sets constitutional obligations to protect life, liberty, and the pursuit of happiness . . . [,] requires all three branches of the federal government to protect inalienable rights on an equal basis . . . [, and] charges an independent judiciary to protect the innate rights of life, liberty, and the pursuit of happiness against tyrannical majorities”). Compare Lee J. Strang, Originalism, the Declaration of Independence, and the Constitution: A Unique Role in Constitutional Interpretation? 111 PENN. STATE L. REV. 413 (2006) (arguing that the Declaration of Independence is not a legally binding norm and does not have a privileged role in interpreting the Constitution).
fundamental and others not, why some reasons for denying fundamental rights are sufficient and others not.

This article proposes a framework for judicial review based on the principle of equitable sharing. Section II argues that the Supreme Court’s relative autonomy from the political process enables it to contribute positively to the societal debate over the rights that flow from equitable sharing, and that the Court’s ties to the political process enable it to do so in a way that is consistent with democratic principles. Section III illustrates that point by applying equitable sharing to several current controversies: the same sex marriage issue likely to come before the Supreme Court in the near future; the race conscious student assignment plans struck down in Parents Involved in Community Schools v. Seattle School District No.1; and the ban on corporate expenditures in elections and the matching fund plan in publicly funded elections overthrown, respectively, in Citizens United v. Federal Election Commission and Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett. Section IV concludes.

II. The Supreme Court and Democratic Principles

4 I see my approach to interpreting and applying the Constitution as much like Balkin’s “living constitutionalism” approach, under which each generation “faithful to the original meaning of the constitutional text and to the principles that underlie the text . . . is charged with the obligation to flesh out and implement text and principle in their own time.” Jack M. Balkin, Framework Originalism and the Living Constitution, 103 NW. U. L. REV. 549, 551-552 (2009). Balkin views the political process as having the primary responsibility to construe the Constitution, with the judiciary playing a secondary and rather passive role. “[P]erhaps the most important role of federal courts in the system of constitutional construction is legitimating and rationalizing the work of the national political process and its constitutional constructions.” Id. at 569. “Courts take on the task of articulating and applying the values of the dominant national coalition, imposing the values of national majorities on regional or local majorities.” Id. at 571. While I agree with Balkin that “political and cultural influences” help ensure that the judiciary’s “work remain in the political and cultural mainstream,” id. at 583-84, I envision that the judiciary could and should at times play a more active role in initiating a dialogue with the political process. To me the judiciary has a viable, albeit constrained, role in saying to the legislative branch on both a national and state level that its actions and failures to act are, in the context of the times, inconsistent with fundamental values and basic principles that inhere in the Constitution.
One might acknowledge that a principle of equitable sharing is implicit in the Constitution, yet contend that the determination of what equitable sharing requires should be left to the political process and that the Supreme Court should confine itself, a la Ely, to a representation enhancing role so as to promote a fair and open process.\(^5\) The argument could be that except for a few substantive rights (like the right to a jury trial) explicitly set forth in the Constitution, the rights that flow from equitable sharing are so irresolvably debatable that Court pronouncements of fundamental substantive rights would amount to judicial legislation by a body insufficiently accountable to the people to justify its playing that role.

While I agree that substantive rights are always contestable, I want to mount a case for the Supreme Court’s playing a potentially positive role, in enunciating fundamental rights and promoting equitable sharing, that is consistent with democratic principles. Although I think the experiment worth the try, I am actually agnostic as to whether the Court can successfully play that role. Worth the try because of examples of Supreme Court rulings that promote equitable sharing. Agnostic because history tells us that the Court’s approach to adjudication changes from time to time—sometimes more liberal sometime more conservative, sometimes more strict constructionist sometimes more evolutionist—and it is difficult to assess whether on balance the Court’s contribution is positive. Agnostic because there are practical impediments to the Court’s playing a progressive role even when it wants to, notably remedial constraints to the

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\(^5\) This was Ely’s argument in his still influential book of a generation ago. John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 87, 92 (1980) (arguing for “a participation-oriented representation-reinforcing approach to judicial review” and that “the original Constitution was principally, indeed I would say overwhelmingly, dedicated to concerns of process and structure and not to the identification and preservation of specific substantive values”).
implementation of its rulings when the political process and public opinion are opposed. Agnostic because moneyed interests have disproportionate, I would say inordinate, political power in this society, and they are able to use that power to forestall progressive change not only through the political process but through the judiciary as well due to their ability to influence who finds their way onto the bench. Agnostic because I think that the changes necessary to achieve a social order in the United States that is fully democratic and conforms with the principle of equitable sharing will ultimately require a mass movement that overcomes the entrenched power of moneyed interests. Nevertheless, if the Court should choose to promote equitable sharing, my point is that it might contribute positively to that end and that it would not be an inherently undemocratic move for the Court to make.

Moreover, even if the Court does not embrace equitable sharing as a guiding principle for adjudication, equitable sharing is still a basis for evaluating the Court’s performance. If the Supreme Court decides individual cases in a way that undermines equitable sharing, then to those of us who believe equitable sharing is a fundamental democratic principle implicit in the Constitution, those decisions would be wrong. If it turns out that on balance the Court’s performance as a whole undermines equitable sharing, then we would have to question whether the Court needs to be restructured if it is to serve our vision of democracy.

The argument for the Court’s embracing equitable sharing is, first, that it can contribute positively to the societal debate over the substantive rights necessary to build a fully democratic society, and, second, that it can do so in a manner consistent with democratic principles. The argument that the Court can play a positive role lies in its
relative independence from the political process. The argument that the Court can do so without violating democratic principles lies in the fact that it is only relatively and not totally independent of the political process.\(^6\)

The asserted advantage of the Court’s relative independence from the political process, in that the justices do not have to run for office and serve for life, is that this enables the Court to protect enduring constitutional values that should not be subject to the short term whims of the political process because they are basic to the maintenance of a democratic society. The problem with this formulation, when dealing with the more open ended provisions of the Constitution and a vague concept like equitable sharing, is that at stake in any given situation is the question of what it is in concrete terms that is supposed to endure. That question will invariably have more than one possible answer about whose correctness reasonable people can disagree. When the Supreme Court decides a case, it simply expresses its opinion of the meaning of the Constitution. If its

\(^6\) Some scholars are skeptical of the judiciary’s capacity to bring about social change. See, e.g., GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 32, 35, 422, 425, 427 (2008, 2d ed.) (arguing that due to the constraints under which they operate, especially their lack of implementation powers, “U.S. courts can almost never be effective producers of significant social reform,” that “courts are a particularly poor tool for changing opinions or for mobilization,” that “[s]uccessful litigation for significant social reform runs the risk of instigating countermobilization” that impedes political reform and is “often more symbolic than real,” and that reliance on litigation strategies wastes resources that would be better devoted to political reform; while acknowledging that courts “may be effective producers of significant social reform when their decisions are announced in a political context of broad elite and popular support for the issue or right in controversy” and “when a great deal of change has already been made”). Rosenberg doesn’t deny that courts can contribute to social change, he just sees them more as followers than as leaders and in general is skeptical of their capacity. While I too have doubts and recognize the judiciary’s limitations, my intent here is to strike a more positive tone regarding the possibilities, particularly as to the Supreme Court’s capacity to contribute to the societal dialogue over issues of constitutional moment. Even if only as a follower, the Court can help solidify social change. The public accommodations laws enacted by Congress have had an enormous impact on social life, and at the time they were highly controversial. In upholding those laws, the Court lent its support to the notion that prohibiting private entities from discriminating on the basis of race and other factors is not inconsistent with, and may even be compelled by, the society’s most basic values. That helped put the issue largely to rest, at least for the time being. And, as I argue hereinafter, there are examples of courts helping to foment at least modest social change when directly confronting legislatures, although I concede that this is only likely to happen when a grass roots movement is already in place and what the courts have to say about the matter resonates with the public.
opinion is worthy of more weight than the legislature’s, or of any weight at all, it must have something to do with the differing nature of the deliberative processes in which courts and legislatures engage.

In an adjudicated case, the Court’s sole focus, ostensibly, is on whether a particular law complies with the Constitution. Arguably that focus enables the Court to develop a greater expertise in interpreting the Constitution than legislatures, which may not be able to devote themselves so fully to delving into the Constitution’s meaning due to other considerations that compete for their attention, like the demands of their constituents or the solution of some immediate problem facing the country. In addition, per the tradition of issuing written opinions the Court explains its rulings, and when there are contrary views the majority and the dissenters debate the proper interpretation of the constitutional provision at stake. Arguably that process, and the debate among scholars and the public that often accompanies controversial cases, contributes to a fuller appreciation of the meaning and importance of constitutional values. But only arguably so, because legislatures are capable of debating the meaning of the Constitution on their own, might pay more attention to constitutional issues if the Court were not involved in the debate, and in that event could conceivably do as well or better in interpreting the Constitution than the Court. Nevertheless, to the extent the Court can make a positive contribution, this helps reconcile its relative independence from the political process with democratic values.

If the Court were totally independent of the political process, a self-perpetuating elite never having to answer to the public, and if its rulings were the final say so and unchangeable except by itself, then it would be operating in an undemocratic manner
even though its members were demonstrably wiser than the general public and its rulings demonstrably correct. Even were it possible, a benign dictatorship of Platonic guardians cannot be democratic, where democracy means equitable sharing, because one of the prime goods of social life is the right to equitably share in the governance of the society. As a practical matter, though, a durable Platonic guardianship is not possible given the fact that power tends to corrupt, that humans are innately fallible, and that correct answers are inherently elusive. So to reconcile with democratic principles the Court’s playing an activist role in promoting equitable sharing, or in ever overriding the legislature when the meaning of the Constitution is uncertain, the Court cannot be totally independent of the political process.

And due to the way it is structured, the Court is not totally independent. That the justices are nominated and approved by elected officials ensures that those who serve will ordinarily be mainstream thinkers not far out of touch with prevailing ways of thinking. Since the Court’s enforcement powers are limited, and especially so when its orders require affirmative action of some type (like passing laws and spending money), it must rely on the willingness of elected officials to comply in order to implement its rulings. The Court has limited ability to force the hand of recalcitrant elected officials. Moreover, the Court’s decisions are reversible either by amending the Constitution or more commonly by waiting for justices to die or retire and replacing them with justices committed to undoing the work of their predecessors. So although the Court has declared itself the final arbiter of the meaning of the Constitution, its rulings have staying power.

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only to the extent that the political process is willing to live with its rulings. These checks on the Supreme Court do not guarantee that its decisions will be more correct or just or more in keeping with the true meaning of the Constitution, for that is not their purpose. Rather the purpose is to ensure that the Court remains within, and is only partially independent of, the political process.

Nevertheless, since it takes time and effort to reverse the Court’s rulings, they do have some staying power. Here, then, is the crux of the case for the compatibility with democratic principles of the Court’s superintendence of the work of the legislative branch for conformity with the Constitution. On the one hand, it lies in the Court’s ability to place onto the agenda and stimulate a public deliberation over fundamental democratic values. On the other hand, it lies in the merit of deliberation, of stretching out the

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8 For other scholars with similar views of the Court’s role in stimulating public deliberation, see, e.g., Jack M. Balkin & Reva B. Siegel, Remembering How to Do Equality, in THE CONSTITUTION IN 2020 93, 101-2 (M. Balkin & R. Siegel, eds. 2009) (“Courts can be catalysts, shaking up existing political coalitions and social practices and requiring legislatures to give reasons and make hard choices when their policies exacerbate inequality and place disproportionate burdens on minorities or the poor. . . . Courts can employ discourse-forcing methods that require the political branches to explain how their policies respond to specific constitutional values. . . . Courts can declare existing policies unconstitutional, explain the constitutional principles at stake, and let the political branches craft a remedy that honors those principles. . . . These strategies share responsibility and make the practice of equality a more dialogic enterprise between the courts and the political branches.”); Barry Friedman, The Importance of Being Positive: The Nature and Function of Judicial Review, 72 U. CIN. L. REV. 1257, 1259, 1272, 1291 (2004) (arguing that “the Supreme Court's exercise of judicial review forces a conversation within the polity about what the Constitution should mean,” and that “the political milieu in which the Supreme Court and the judiciary operate serve as moderating forces” that constrain the Court so as to “ensure[] that judicial review does not pose a threat to democratic principles”); Virginia Mantouvalou, In Support of Legalization in DEBATING SOCIAL RIGHTS 85 (C. Gearty & V. Matouvalou, eds. 2010) (arguing that while legislatures have wider obligations than courts, judicial protection of social rights can contribute to the quest for social justice; and that the appropriate judicial role is to dialogue with the legislature so as to give voice to the poor and marginalized, promote public debate about what government is required to do to advance social justice, and declare when legislatures fail to live up to their obligation to assure a minimum level of social provision but without attempting to decide the content of social rights in detail).
decision making process, of not making certain types of decisions precipitously, in particular decisions that go to the heart of what it means to be a democratic society.\(^9\)

In a democratic society, the will of the people may ultimately control. But the will of the people is hard to pin down, is never static, is always in flux, is always in a process of development. As do individuals in their personal lives, so do societies need time before making decisions to gather information, to reflect and consider alternatives, to ponder and deliberate. The very purpose of constitutionalizing certain values is to delay changing those values for the time it takes to go through the arduous process of amending the Constitution. Thus, the relative independence of the Court, in enabling it to prolong but not completely thwart the political process, arguably contributes to democratic decision making through the deliberative process that the give and take between the Court and the political process fosters. The task for the Court and the legislature, dialoguing with each other and with the public at large, is to develop and give life to the specifics of equitable sharing.

I now proceed to examine how this process conforms with democratic principles. To illustrate the point with actual examples, I want to discuss three types of cases: first, when the Court blocks the legislature from doing something it wants to do; second, when the Court upholds something the legislature has done; third, when the Court prods the legislature to do something it does not want or has declined to do.

**A. Blocking the Legislature**

\(^9\) Similar delays pervade the political process. Once a law is passed, it ordinarily takes time to repeal it even after public sentiment has turned against it. This is because legislatures usually have full plates and must schedule their agendas over time. Once in office, an elected representative ordinarily remains in office until the next election, or at least for the extended time it takes for the rare recall election, even though acting contrary to the will of the people.
Refusing to allow the legislature to do what it wants to do is the most common situation in which the Court invokes the Constitution against the legislature. These are also the easiest cases from a remedial standpoint because the ruling will typically be that the law cannot be enforced, thus essentially wiping it off the books. If the political process still favors the action, its options are to amend the Constitution to reverse the Court’s ruling or when the occasion arises to replace the justices who so ruled with others who will reverse the earlier decision. While the former has happened only rarely, the latter has been a more occurrence.

One example is state intervention in the private market. For several decades leading up to the Great Depression and in the early years of the New Deal, the Court blocked a number of federal and state legislative efforts to regulate the private market and institute welfare state programs. Among other things it struck down protections of child labor, maximum working hour and minimum wage requirements, prohibitions against firing employees for union membership, required worker compensation and pension systems, and the subsidization of private businesses. These rulings gave rise to great


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10 Hammer v. Dagenhart, 247 U.S. 251 (1918) (invalidating federal statute prohibiting the sale of goods produced with child labor in interstate commerce as beyond the scope of the Commerce Clause).
11 Lochner v. New York, 198 U.S. 45 (1905) (invalidating state statute regulating maximum length of work day and work week as impermissibly infringing freedom of contract protected by Fourteenth Amendment); Adkins v. Children’s Hospital of the District of Columbia, 261 U.S. 525 (1923) (invalidating federal statute regulating minimum wages of women and children as impermissibly infringing freedom of contract protected by Fifth Amendment); Carter v. Carter Coal Co., 298 U.S. 238 (1936) (invalidating federal statute mandating pension system for railroad employees as beyond the scope of the Commerce Clause and infringing powers reserved to states under Tenth Amendment).
12 Adair v. United States, 208 U.S. 161 (1915) (invalidating federal statute prohibiting employers from conditioning employment on employees’ agreement not to join union as infringing freedom of contract protected by Fifth Amendment); Coppage v. State of Kansas, 236 U.S. 1 (1915) (invalidating state statute prohibiting employers from conditioning employment on employees’ agreement not to join union as infringing freedom of contract protected by Fourteenth Amendment).
political controversy over the Court’s role and to President Roosevelt’s failed attempt to pack the Court.\textsuperscript{15} Ultimately, however, Roosevelt was able to replace the conservative justices responsible for those rulings with more liberal justices prepared to reverse course and uphold such laws. Some of the Court’s prior rulings were expressly overruled, while others were implicitly overturned as similar or revised laws were upheld. Today, most all of the laws once held unconstitutional are commonplace and an accepted aspect of advanced capitalism.\textsuperscript{16}

Apart from the question of whether the results of the particular cases promote equitable sharing, this example illustrates the deliberative aspect of judicial intervention. State intervention in the private market in the first half of the twentieth century represented an enormous change in the role of government in social life and an enormous challenge to the society’s prevailing ethic of laissez faire capitalism and rugged individualism. The Supreme Court’s efforts to thwart or limit this change slowed it down somewhat, but ultimately failed because the forces in favor of change were stronger than the Court. Nevertheless, Court intervention brought the issue into public attention to a

\textsuperscript{14} United States v. Butler, 297 U.S. 1 (1936) (invalidating federal statute subsidizing farmers agreeing to reduce production as infringing powers reserved to states under Tenth Amendment).
\textsuperscript{16} See, e.g., BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998) (recounting the history of the Supreme Court’s jurisprudential shift over the first half of the Twentieth Century from skepticism toward to acceptance of government intervention in the private market and the growth of federal power, and attributing the shift less to the Court’s succumbing to political pressure and more to the incompatibility of its prior laissez-faire jurisprudence with modern economic and social realities); G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL (2000) (arguing that the Supreme Court’s shift over the first half of the Twentieth Century from acting as a guardian of the private market to deferring to state intervention in the market, while giving stricter oversight of laws impinging on rights deemed foundational to a democratic society, reflected a change from the prior view of the Constitution as prescribing preordained boundaries between public power and a self-regulating private market to a modernist view of the Constitution as a living document that must be adaptable to changing economic and social conditions requiring greater controls over the market by the more politically responsive branches of government).
degree that might not otherwise have happened, leading to the greatest confrontation between the Court and the political process in the country’s history. Perhaps this intervention and the accompanying confrontation helped the society to think through the significance of the changes it was undertaking and to solidify its commitment to proceed. Perhaps the ultimate capitulation of the Court explains why for a half century thereafter it deferred almost totally to the political process with regard to economic matters.

Perhaps the Court’s capitulation explains as well why today’s more conservative Court, which has been quite activist in promoting its agenda in non-economic matters, has tread lightly in overriding laws regulating the economy. The upcoming battle over the constitutionality of the recent health care law will test how enduring is the political process’ victory over the Court with regard to economic matters. There is a movement

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17 In recent years the Court has begun to reassert somewhat its authority to police federal economic regulation. See, e.g., New York v. United States, 505 U.S. 144 (1992) (invalidating requirement that states either regulate disposal of or take title to radioactive wastes within their jurisdictions, while acknowledging power of federal government to directly regulate such disposal under the Commerce Clause or to require states to impose regulations as a condition attached to the receipt of federal funds under the spending power); United States v. Lopez, 514 U.S. 549 (1995) (invalidating prohibition against carrying fire arms near schools as insufficiently related to interstate commerce to justify federal regulation); United States v. Morrison, 529 U.S. 598 (2000) (invalidating the Violence Against Women Act’s creation of a private tort action for victims of gender motivated violence as insufficiently related to interstate commerce to justify federal regulation). The greatest test of how far the Court is prepared to go in this regard is likely to be the looming battle over the validity of the new health care law. See infra note 18 and accompanying text.

18 See Thomas More Law Center v. Obama __ F.3d __ (6th Cir. 2011) (upholding under the Commerce Clause the Patient Protection and Affordable Care Act’s requirement that most individuals maintain minimum health insurance coverage or pay a penalty, while holding that the penalty does not fall within the taxing power); Florida ex rel. Attorney General v. U.S. Dept. of Health and Human Services, __ F.3d __ (11th Cir. 2011) (holding that the Commerce Clause does not authorize Congress to require individuals to enter into contracts with private insurance companies and that the penalty for failing to comply with the individual mandate is not a valid tax under the Taxing and Spending Clause). See also Akhil Amar, The Lawfulness of Health-Care Reform at http://ssrn.com/abstract=1856506 (arguing that Obamacare is clearly constitutional); Jack M. Balkin, Commerce, 109 Mich. L. Rev. 1, 45 (2010) (arguing that the individual mandate and the tax imposed for failing to comply “is likely . . . fully constitutional under Congress's powers under the General Welfare Clause . . . [and] is also constitutional as an exercise of Congress's commerce power”); Randy E. Barnett, Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional, 5 N.Y.U. J.L. & Liberty 581 (2010) (arguing that the individual mandate and the penalty for failure to comply violate Supreme Court interpretations of the scope of Congress’ powers under the Commerce and Necessary and Proper Clauses and the taxing power, and that the Court should not extend those powers to uphold the individual mandate because that would amount to
in the society to scale back and even dismantle the social welfare state we have had for going on a hundred years. If the Court were to strike down the health care law, it would likely give some impetus to that movement and would likely stimulate the current public debate over the role of government in social life. That debate is healthy and, in light of the economic difficulties and growing wealth inequalities the country is facing, seems needed at this point in history. I am not suggesting that the Court should for that reason strike down the health care law. I do contend that its doing so would not necessarily end the possibility of health care reform and might contribute to the needed debate. Whether or not that is so can only be judged in retrospect.

A second example, this time of generally liberal justices blocking legislation, only to be replaced by generally more conservative justices who subsequently reversed earlier rulings or upheld similar laws, is government aid to religious schools. These cases are part of a larger debate over the role of religion in public life and of the relationship between church and state. It should not surprise that the schools, both public and private, have been a central focus of the debate due to the influence schooling can have on children’s thinking. If religion is permitted in public schools, parents who are non-believers or adherents of minority religions may fear that the schools will attempt to indoctrinate their children into becoming believers or into the religion of the majority. If religion is not permitted in public schools, parents with strong religious beliefs may fear that the schools will undermine their beliefs, and they may prefer if they can afford it to place their children in private schools that assist them in inculcating those beliefs.

(commandeering the people to perform a federal function in violation of the rights reserved to the people under the Tenth Amendment).
The Supreme Court has been a central player in this debate. A major issue in the public school context has been school prayer. In the early 1960s, the Court struck down mandatory non-sectarian and Christian prayers conducted by school officials, even if students who wished not to participate were excused.\(^{19}\) A sizeable majority of the public disapproved of these decisions,\(^ {20}\) and in response a movement arose to amend the Constitution to allow so-called “voluntary” school prayer.\(^ {21}\) This as yet unsuccessful movement has had the support of a large public majority, although most non-Christians have opposed it.\(^ {22}\) There also arose an effort to mandate a school organized moment of silence at which students are entitled to pray if they so choose. The Court implicitly sanctioned moments of silence in 1985, as long as conducted so as not to encourage prayer.\(^ {23}\) The Court has also made it clear that students are free to pray on their own without the involvement of school officials provided it is done non-disruptively.\(^ {24}\)

\(^{19}\) Engel v. Vitale, 370 U.S. 421 (1962) (holding that recitation of state prescribed non-denominational prayer in schools from which those not wishing to participate are excused violates Establishment Clause); School District of Abington Tp. v. Schempp, 374 U.S. 203 (1963) (holding the laws requiring reading from Bible or recitation of Lord’s Prayer from which those not wishing to participate are excused violate Establishment Clause).


\(^{21}\) See, e.g., ROBERT S. ALLEY, SCHOOL PRAYER: THE COURT, THE CONGRESS, AND THE FIRST AMENDMENT 107-211 (1994) (detailing congressional efforts to adopt a school prayer amendment immediately after the Engel decision through the early 1990s).

\(^{22}\) David W. Moore, Public Favors Voluntary Prayer for Public Schools (2005) at http://www.gallup.com/poll/18136/Public-Favors-Voluntary-Prayer-Public-Schools.aspx (noting Gallup polls in 1983 and 2005 in which 81% and 76% of respondents favored constitutional amendment to allow voluntary prayer in public schools, although in 2005 55% of non-Christians opposed it).

\(^{23}\) Wallace v. Jaffree, 472 U.S. 38, 59 (1985) (overthrowing statute authorizing moment of silence in public schools for “meditation or prayer” as impermissibly endorsing religion in violation of Establishment Clause, while inferring that moment of silence for purposes of meditation in which students are free to pray of their own accord is valid).

\(^{24}\) Santa Fe Independent School District v. Doe, 530 U.S. 290, 313 (2000) (“[N]othing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the school day. But the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer.”)
recent years, a substantial majority of the public, perhaps influenced by the give and take with the Court, has favored a moment of silence or silent prayer over spoken prayers.\footnote{Moore, supra note 22 (noting Gallup polls in 1995 and 2005 in which 70\% and 69\% of respondents favored a moment of silence or silent prayer over spoken prayers).}

In general, although again excluding non-Christians, public sentiment has been that religion has too little a presence in public schools.\footnote{Id. (noting Gallup polls in 1995 and 2005 in which 63\% and 60\% of respondents felt that religion has too little presence in public schools, although in 2005 only 22\% of non-Christians felt that way while 38\% felt religion has too much presence).} This is particularly so as regards the teaching of evolution, which a significant majority now believes should be accompanied by creationism or intelligent design.\footnote{David Masci, Darwin Debated: Religion vs. Evolution (2009) at http://pewresearch.org/pubs/1105/darwin-debate-religion-evolution (noting 2005 Pew Research Center poll in which 64\% of respondents supported teaching creationism alongside evolution).} Here, the Court has stood in the way, invalidating laws prohibiting the teaching of evolution in 1968\footnote{Epperson v. Arkansas, 393 U.S. 97 (1968) (holding that statute forbidding teaching of evolution in public schools violates Establishment Clause).} and a requirement that so-called creation science be taught alongside evolution in 1987.\footnote{Edwards v. Aguillard, 482 U.S. 578 (1987) (holding that statute forbidding teaching of evolution in public schools violates Establishment Clause).} The desire for more religion in the curriculum has undoubtedly been a major factor in parents’ choice to send their children to religious schools. And the fact that they must still pay taxes to support public schools has no doubt been a major factor behind efforts to subsidize private school education. Here, after a series of cases in the 1970s and early 1980s in which the Court struck down various types of subsidies,\footnote{Meek v. Pittenger, 421 U.S. 349 (1975) (holding that loaning of instructional materials and equipment to religious schools and provision of auxiliary services for remedial and educationally disadvantaged students in religious schools violates Establishment Clause); Wolman v. Walter, 433 U.S. 229 (1977) (holding that loaning instructional materials and equipment to and providing field trip transportation for students in religious schools violates establishment Clause); School Dist. Of City of Grand Rapids v. Ball, 473 U.S. 373 (1985) (holding that public provision of classes taught by public school employees in religious schools violates Establishment Clause); Aguilar v. Felton, 473 U.S. 402 (1985) (holding that city’s use of federal} reversing some prior rulings outright and distinguishing others.\footnote{It has since consistently upheld such aid,}}
This shift is largely a result of the presence of more conservative justices on the Court, a change likely impacted by public dissatisfaction with the Court’s rulings regarding the separation of church and state. Beginning with President Nixon’s appointments to the Court, it has progressively become more conservative and it is the conservative bloc on the Court that has pushed for the more lenient approach toward aid to religious schools. These justices have also dissented in cases where the Court has blocked efforts it perceived as promoting religion in public schools. If with future appointments the Court were to move in an even more conservative direction, these rulings would likely be overruled or distinguished and religious activities in public schools found more acceptable.

Overall, I would characterize the Court’s role in this area as one of trying to mediate the competing concerns. In so doing it has engaged in a dialogue with the political process over the meaning of the Constitution’s religious clauses, and it has both influenced and been affected by public opinion. Whether the balance that has been struck in the law between the competing concerns is the proper one is certainly contestable. My point here, though, is that the Court’s participation in the dialogue is not inherently

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32 Zobel, Agostini and Zelman were 5-4 decisions and Mitchell was a 6-3 decision. Justices Rehnquist, Scalia, Thomas, O’Connor and Kennedy formed the core group in the push for more leniency in aid to religious schools.

33 Justices Rehnquist, Scalia and Thomas consistently dissented in the cases limiting religion in public schools, while Justices O’Connor and Kennedy tended to side with the majority in these cases despite their support for greater leniency regarding state aid to religious schools.
undemocratic because freedom of religion is fundamental to a democracy committed to equitable sharing and because there has been a need for a relatively independent mediator as a check against governmental infringement of that right.

B. Upholding the Legislature

Even when the Supreme Court declines to intervene, it can contribute to the public dialogue over the substantive rights democracy requires. When the Court upholds legislative action or inaction, it says in essence that the legislature has behaved in accordance or at least not inconsistent with democratic principles. This may lend support to the legislative majority’s position in the debate over the democratic legitimacy of contested issues. Or it may serve as a rallying cry for those who feel that fundamental values are at stake, inducing them to redouble their efforts to fight what they perceive to be unjust laws and assisting them to mobilize opposition.

An example of the former, again, is the New Deal. When the Court reversed field during the New Deal Era and began to uphold social welfare programs, and routinely rubber stamped such legislation for decades thereafter, it was in essence saying that what were perceived by their opponents as socialistic measures do not offend democratic values and that disputes over social welfare programs are to be resolved in the political process where either outcome, either the passage or defeat of such programs, will conform with the Constitution. That has not ended heated debates over social welfare programs, but it has I think changed the tone of the debates.
When Medicare was adopted in the mid-1960s, it was charged that it amounted to socialized medicine, and the effort to enact it was difficult despite large Democratic majorities in Congress. Once enacted, however, its constitutionality was not challenged. The reason for that is likely not only because of the unlikelihood of a successful challenge, but because challenging it could have been politically risky. Most Americans supported (and continue to support) Medicare, meaning that the charge of socialism was not resonating with them, and to challenge the program’s constitutionality might have backfired at the polls. Currently, the conservative proposal is a “premium-support” or voucher-like system that would subsidize beneficiaries’ health insurance premiums. Although no doubt there are those who would like to abolish Medicare entirely, and those who view the “premium-support” approach as the first step towards ultimate abolition, the rationale is not that Medicare is socialistic but that the subsidization approach will preserve it for future generations. Like social security,

34 See, e.g., SHERI I. DAVID, WITH DIGNITY: THE SEARCH FOR MEDICARE AND MEDICAID 55-58, 79, 82, 102 (1985) (discussing the American Medical Association’s campaign against Medicare as socialized medicine and similar statements of some in Congress).
35 See id. (detailing the history of Medicare’s adoption).
36 See PEW Research Center, Would Americans Welcome Medicare if it Were Being Proposed in 2009? (August 19, 2009) at http://pewresearch.org/pubs/1317/would-americans-welcome-medicare-if-proposed-in-2009 (noting Gallup poll in 1965 in which 63% of respondents favored and only 28% disapproved adoption of Medicare); PEW Research Center, Public Wants Changes in Entitlements, Not Changes in Benefits (July 7, 2011) at http://pewresearch.org/pubs/2051/medicare-medicaid-social-security-republicans-entitlements-budget-deficit (reporting on poll showing that 88% of respondents believe Medicare has been good for the country over the years).
37 House Committee on the Budget, Fiscal Year 2012 Budget Resolution, The Path to Prosperity 46 at http://budget.house.gov/UploadedFiles/PathToProsperityFY2012.pdf (“Future Medicare recipients will be able to choose from a list of guaranteed coverage options, and they will be given the ability to choose a plan that works best for them. This is not a voucher program, but rather a premium-support model. A Medicare premium-support payment would be paid, by Medicare, to the plan chosen by the beneficiary, subsidizing its cost.”); New York Times, Times Topics, Paul Ryan, May 6, 2011 at http://topics.nytimes.com/top/reference/timestopics/people/r/paul_d_ryan/index.html?scp=3&sq=medicare%20vouchers&st=cse (characterizing the Budget Committee’s proposal as a voucher system). With respect to Medicaid the proposal is to convert it to a block grant program. The Path to Prosperity, supra, at 39-40.
38 The Path to Prosperity, supra note 37, at 44-6.
Medicare has achieved public acceptance as a mainstay of the system and how it is characterized has become largely irrelevant.

The opponents of “Obamacare” did trot out the socialism charge, but again it has seemed not to resonate with the public and in fact to look rather foolish in light of the government’s involvement with Medicare and Medicaid. The more serious charges did not attack the democratic legitimacy of universal health care, but were more pragmatic: that the society cannot afford universal health care at present, that it will require cuts in Medicare and Medicaid in order to serve those less deserving or less in need than the elderly and the poor, that the government cannot successfully manage the program, that alternative approaches relying more on the private market would work better. This time the opponents have brought constitutional challenges, hoping perhaps that today’s more conservative Court will put the issue of the democratic legitimacy of social welfare programs on the table again. If it does, that will likely generate a renewed public dialogue and it will indicate that the Court wants to generate that dialogue, although it

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41 See supra note 18.
seems unlikely that the Court will try to block all possible means of instituting universal health care. But if the most conservative Court since before the New Deal upholds “Obamacare” as not inconsistent with the Constitution, that will likely set back challenges to the democratic legitimacy of social welfare programs for some time to come.

An example of heightened political activism as a result of Court decisions upholding legislation is the struggle for gay rights. The effort to abolish laws criminalizing sodomy was a major focus of the gay rights movement. Between 1960 and the mid 1980s, the movement had convinced half the states to repeal or invalidate their laws, and to some the time no doubt seemed right to seek support from the Court. But the Court’s 1986 decision upholding such laws was a severe setback to the movement. The decision meant that the majority was entitled to impose on a sexual minority its moral views of acceptable sexual behavior. However, the decision was a close one, 5 to 4, and the dissenters forcefully argued that such laws were inconsistent with the fundamental value of individual privacy. The issue was joined within the Court itself, with the justices engaging among themselves in a public debate of the

43 Kane, supra note 42, at 214 tbl. 1 (twenty-three states did so by legislation and two by judicial rulings).
45 478 U.S. at 199, 205, 206 (Blackmun, J., dissenting) (“[T]his case is about ‘the most comprehensive of rights and the right most valued by civilized men,’ namely, ‘the right to be let alone.’ . . . The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many ‘right’ ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds . . . The Court claims that its decision today merely refuses to recognize a fundamental right to engage in homosexual sodomy; what the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others.”).
consistency or not of sodomy laws with democratic values.46 In response a half million people gathered in Washington, D.C. to protest the Court’s decision,47 and there was a renewed dedication to overturning the sodomy laws in state legislatures and courts. Seventeen years later, a no less conservative Court reversed the 1986 ruling in the Lawrence case.48 In the interim, eleven more states had repealed their sodomy laws or had them declared unconstitutional by state courts.49 This trend, as well as increasing public support for gay rights, cannot have failed to influence the Court—although, again, it was a close decision, meaning that the issue is still joined within the Court.

The decision in Lawrence lent support to the gay rights movement, just as the Brown decision did to the Civil Rights Movement.50 In its wake attention has turned to same sex marriage. Laws prohibiting it have been repealed or overturned in a number of states, and a majority of the public may now support same sex marriage.51 Before long,

46 478 U.S. at 194, 196 (“The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. . . . There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. . . . Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.”); 478 U.S. at 213 (Blackmun, J., dissenting) (“This case involves no real interference with the rights of others, for the mere knowledge that other individuals do not adhere to one's value system cannot be a legally cognizable interest, . . . let alone an interest that can justify invading the houses, hearts, and minds of citizens who choose to live their lives differently.”); 478 U.S. at 216 (Stevens, J., dissenting) (“the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice”).
49 See Kane, supra note 42 at 214 tbl. 1 (between 1992 and 2002 sodomy was decriminalized in eleven states, three through legislation and eight through judicial rulings).
50 See infra note 61.
51 See infra notes 100 & 101.
the Court will address the issue. If it upholds laws prohibiting same sex marriage, this will likely impel the gay rights movement to continue its fight to change the law at the state level. If the Court overturns the laws, the opponents of same sex marriage might be moved to mobilize against the ruling. More likely, it seems to me, if a generally conservative Court were to rule that laws against same sex marriage undermine democratic values, is that public opinion will support same sex marriage more and more as time passes, just as happened after the Court invalidated laws prohibiting interracial marriage.\footnote{Loving v. Virginia, 388 U.S. 1 (1967) (invalidating anti-miscegenation statute as violating due process and equal protection).} The right to marry is pretty much the last battle in the struggle to achieve equal legal rights for gay people. Ironically, the Court’s decision upholding sodomy laws in 1986 may well have hastened that day.

C. Prodding the Legislature

Ordering a legislature to act when it is reluctant to do so is far more problematic for the Court than invalidating a legislative act. This situation is most likely to arise when the Court finds that some substantive right expressly set forth or implicit in the Constitution—like, for example, a right to equal educational opportunity—is not being provided, and when the Court orders the legislature to act affirmatively to provide it.

Problematic, first, because such an order smacks much more of legislating from the bench than a refusal to enforce a law found to be unconstitutional. For this reason, rather than ordering a legislature to take particular actions to comply with its constitutional obligations, the Court will typically allow it to choose a course of action as long as it fulfills the duty. This can lead to an extended remedial process if the legislature
continues to enact measures, as it may have an incentive to do, that do not conform to the Court’s reading of the Constitution. However, as noted above, there is a positive side to such an extended deliberative process in focusing public attention on the issue and connecting the Court to the political process.

Second, is the difficulty of forcing the hand of a recalcitrant legislature. To the extent that the legislature’s reluctance to act reflects public sentiment, a legislator who votes to comply with an order of the Court risks being voted out of office and for that reason may refuse to comply. If the legislature as a whole refuses to comply, the Court’s remedies are as a legal and practical matter limited. Even if it could do so without violating the constitutional separation of powers, which is doubtful, the Court is unlikely to place the legislature under receivership and appoint an unelected administrator to pass laws and raise taxes.\textsuperscript{53} To do so would feed to the charge that the Court is acting undemocratically, and would undermine the public respect that is central to its ability to win acceptance of its decisions even when initially unpopular. Holding a unit of government and its legislators in contempt for refusing to carry out an order to take action needed to bring itself into compliance with the Constitution is permissible in some circumstances.\textsuperscript{54} But for similar reasons, the Court is likely to be willing to invoke such a

\textsuperscript{53} See, e.g., Milliken v. Bradley, 433 U.S. 267, 291 (1977) (holding that District Court order requiring state to fund compensatory education programs to remedy effects of past intentional segregation does not violate state’s Tenth Amendment rights nor principles of federalism where “[t]he District Court has neither attempted to restructure local governmental entities nor to mandate a particular method or structure of state of local financing”); Missouri v. Jenkins, 495 U.S. 33 (1990) (holding on grounds of comity that while District Court may require school district to raise and expend funds necessary to remedy constitutional violation, in this case the intentional segregation of public schools, it may not directly fix the district’s tax rate, at least without assuring itself that there is no other viable alternative).

\textsuperscript{54} Spallone v. United States, 493 U.S. 265 (1990) (holding that District Court may not hold individual city council members in contempt for refusing to vote for ordinance necessary to comply with Court’s order to act affirmatively to remedy constitutional violation, in this case the construction of public housing in white

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remedy very rarely, and I would say never against a state legislature or Congress. Even when the legislature complies with the Court’s order, it may be able to effectively negate the impact through other avoidance tactics. For example, the legislature might fund a court order to provide some benefit to the poor by taking funds out of other programs for the poor. In the final analysis, if the Court cannot convince a recalcitrant legislature to comply, it may have no choice but to back off at least on the enforcement end.

This is not to say that the Court has no ability to enforce its rulings against a recalcitrant legislature. To the extent that the Court commands public respect for itself as a coequal branch of government, a legislature’s bare refusal to comply may hurt it politically. The legislature will likely have to try to convince the public that, while legislatures should ordinarily comply with court orders, this is an exceptional case because the Court has overstepped its bounds and is acting undemocratically. In one sense, when the legislature is reluctant to comply, the Court and the legislature are engaged in a public negotiation in which sometimes one prevails, sometimes the other, and sometimes a compromise is reached. In a larger sense, since both sides’ power ultimately depends on the support of the public, the Court and the legislature are engaged in a dialogue in which the public is also a participant. The Court speaks and by tradition must speak primarily through its opinions, while the legislature speaks in all the ways (from public hearings to stump speeches) in which legislators speak. Probably the legislature has the advantage here, particularly when Congress is involved.

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neighborhoods so as to remedy past actions intentionally promoting racial segregation, without first proceeding unsuccessfully against the city).
All these remedial constraints that impact the Court, along with the other factors discussed above that tie it to the political process, bolster the affirmative case that the Court can play a positive role, consistent with democratic principles, in articulating the fundamental rights that flow from a constitutional commitment to equitable sharing. Even if the remedial constraints force the Court to back off in enforcement, its rulings can have significance. An unenforceable ruling still stands as a statement that in the Court’s opinion the society is not living up to its highest ideals, and that statement may contribute to an on-going dialogue that ultimately moves the society closer to those ideals. In a sense the Court is preaching to the society. Perhaps preaching is needed at times to keep democracy on the right track, as long as the preacher is of the society and not lording over it.

Probably the foremost example that illustrates the points made in this section is the Supreme Court’s decision in Brown v. Board of Education55 and subsequent cases attempting to enforce Brown. In 1954, the Court declared the forced separation of the races in public schools unconstitutional.56 That left the question of what it would take to remedy the situation. One possibility was to order school authorities to assign children to school in a colorblind way, and to leave it at that even if a colorblind approach produced segregation in fact. Another possibility was to order that the schools actually be integrated. The Court postponed answering the question until the late 1960s, no doubt thinking that a period of time was needed to gain public acceptance of a decision that would have such a dramatic impact of the South’s way of life. In the interim the great

56 Id.
Civil Rights Movement of the 1960s blossomed, the leadership of the Movement was decidedly integrationist as epitomized in Martin Luther King, Jr.’s I Have a Dream speech, the Civil Rights Bills of the mid 1960s were enacted, and King was assassinated the day after oral arguments in the case in which the Court began to push for integration in school desegregation plans.

We can’t know for sure, but it seems highly doubtful that the South would still be practicing enforced segregation if the Court had upheld the practice in Brown. Nonetheless, the Court’s decision, declaring the forced separation of the races to violate the society’s most fundamental values, almost certainly contributed to the growth of the Civil Rights Movement and to a gradual shift in public sentiment from mixed views to strong support for school integration at least in principle. Likewise, the Movement’s

58 Martin Luther King, Jr., I Have a Dream (1963), reprinted in A DOCUMENTARY HISTORY OF THE UNITED STATES 411 (Richard D. Heffner ed., 2002).
60 See The King Center, Biography at http://thekingcenter.org/DrMLKingJr (noting King’s date of death as April 4, 1968); Green v. County School Board of New Kent County, Va., 391 U.S. 430 (1968) (argued April 3, 1968, holding freedom of choice plan resulting in continued segregation inadequate as desegregation remedy and ordering development of alternative plan designed to achieve a non-racial school system).
61 See BLOOM, supra note 57, at 120-54 (crediting the Brown decision and the Montgomery bus boycott as key events in giving impetus to a more aggressive Civil Rights Movement); MICHEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 363-442 (2004) (arguing that, while the Brown decision gave impetus to the Civil Rights Movement, its major impact was to stimulate white resistance to desegregation and that the resultant violence raised national consciousness of the oppression of African Americans which in turn led to the passage of the civil rights laws of the 1960s).
62 See Black Issues in Higher Education, Most believe integration improved education for Black students, poll finds (May 20, 2004) at http://findarticles.com/p/articles/mi_m0DXK/is_7_21/ai_n6143484 (reporting on polls showing that nearly 75% of respondents believe integration has improved education for Black students as compared with 40% in 1971, that half believe integration has improved education for White students as compared with one quarter in 1971, and that 80% of parents with school-age children prefer
forceful case for integration almost certainly influenced the Court’s choice to push for it. The Court did not go so far as to say that the Constitution demands integration in all instances, and it forbade the use of racial quotas, but it did implicitly require that where feasible desegregation plans actually produce some degree of integration. As a result of these rulings, as well as of the federal government’s enforcement efforts, the nation’s schools became more integrated for a time. However, by the mid 1990s the schools began to resegregate and nationwide are now about as segregated as at the time of Brown.

The resegregation of America’s public schools is a by-product of the remedial constraints the Court faces in implementing a ruling requiring affirmative action to change the society’s way of life. Resistance came in the political process from state legislatures and local school authorities attacking the Court for overstepping its bounds in an effort to turn public opinion against the Court, refusing to comply with court orders (in some instances until federal officials were brought in to force compliance), and generally


63 Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 24 (1971) (allowing District Court to use mathematical ratios as a starting point in shaping a school desegregation remedy, while stating that an order requiring a particular degree of racial balancing is constitutionally impermissible and that “[t]he constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole”). See also Grutter v. Bollinger, 539 U.S. 306, 334 (2003) (allowing race to be used as a factor in law school admission practices, while forbidding the use of a quota system).

64 See, e.g., Gary Orfield & Chungmei Lee, UCLA Civil Rights Project, Historic Reversals, Accelerating Resegregation, and the Need for New Integration Strategies (2007), at http://www.civilrightsproject.ucla.edu/research/deseg/reversals_reseg_need.pdf (documenting the decreasing percentage of whites and the increasing percentage of poor children in public schools, increasing racial segregation since the early 1980s following a period of increased integration beginning in the early 1960s, and the confluence of segregation by race and poverty with the average black and Latino attending a school more than half poor, and the general inferiority of minority schools).
dragging their feet in devising satisfactory desegregation plans. Resistance also came from the public as whites who opposed integration placed their children in private schools that discriminated against or were beyond the means of African Americans, or moved to communities from which African Americans were effectively excluded through fear of retaliation if they moved there or zoning laws and deed restrictions that pushed the price of housing beyond what they could afford. Finally, in the mid 1990s the Court itself pulled back from its integrationist push as the logistics of achieving integration became more difficult due to the avoidance tactics, as many within both the white and black communities disfavored measures (such as forced busing) that were needed to achieve integration, and as more conservative justices came to the Court as a result of a political shift to the right due in large part to a backlash to the Civil Rights Movement.

So the legacy of Brown and the forty year dialogue it generated lies mostly in its moral statement that the forced separation of the races is inconsistent with democratic
principles and in its erasing those laws from the books. That moral statement likely contributed to the passage of monumental civil rights laws. But the Court was unable to bring about integration in fact because the society as a whole was not sufficiently supportive of that effort and because the factors that tie it to the political process limited how far it could go. Not only are the schools largely segregated by race, they are largely segregated by class as well, and in general minority and poor children receive an inferior education due to financing schemes that favor the richer communities from which the poor and generally less well off minorities are effectively excluded. To equalize educational opportunities for minority and poor children requires attending to issues of economic inequality that the Court has declined to address, particularly exclusionary zoning and school finance.

These issues—the presence in this society of better off, predominantly white communities with superior education and greater access to jobs and, on the other hand, less well off, disproportionately and in some instances almost entirely minority, communities with inferior education, a lack of jobs and severe social problems—deeply implicate the principle of equitable sharing. But even if the Court had taken on these issues, the experience of the state courts that have addressed them shows that it would have faced remedial constraints similar to Brown.

68 See, e.g., Thomas Kleven, Federalizing Public Education, 55 VILL. L. REV. 369, 389-96 (2010) (discussing the detrimental impact on equal educational opportunity of the substantial reliance on local control and financing of schools and the attendant racial and class segregation, and advocating federal financing of education as a means of addressing wealth inequalities among school districts and states); Orfield & Lee, supra note 64.

69 San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) (holding that education is not a fundamental constitutional right, and that state’s substantial reliance on local financing of schools is justified by a policy of local control despite substantial inequalities among school districts); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) (holding local government land use practices that effectively exclude African Americans from community not unconstitutional absent proof of purposeful discrimination).
Reforming exclusionary zoning requires at a minimum ordering communities to revamp their zoning ordinances to make it possible to build housing within the means of lower income people. But well off people wanting to isolate themselves from the less well off might try to achieve the same result as exclusionary zoning ordinances through private deed restrictions that similarly push up housing costs beyond what lower income people can afford. Private cities with privatized governance and even with their own independent school districts can be established in this manner. So a court intent on opening up communities to lower income people would have to address this issue as well, as by finding private cities to be the functional equivalent of public cities and therefore subject to the same constitutional constraints. But developers might not be willing to build lower cost housing in exclusive locales where they can profit more from building expensive housing. Then the court would have to address that issue by requiring either the enactment of laws mandating developers to include lower cost housing in their developments or government subsidization of lower cost housing in those locales.

Similarly, a court intent on reforming school finance would have to order states to redistribute funds from richer to poorer school districts or to take over the financing of education entirely. One possible avoidance tactic for the legislature would be to

70 See, e.g., Robert E. Lang & Dawn Dhavale, Metropolitan Inst. at VA. Tech, Reluctant Cities? Exploring Big Unincorporated Census Designated Places 7 tbl.1 (2003), at http://www.mi.vt.edu/Census2000/PDFFiles/Reluctant_Cities_Census_Note_final.pdf (identifying forty-one locales in the U.S. with populations of more than 50,000 that are not incorporated cities and are governed by private homeowners associations).
71 See Marsh v. Alabama, 326 U.S. 501 (1946) (holding privately owned company town to be subject to First Amendment freedom of speech protections in its public areas on the ground that it is functionally similar to a public entity). See also Gregory S. Alexander, Dilemmas of Group Autonomy: Residential Associations and Community, 75 CORNELL L. REV. 1 (1989) (advocating judicial oversight of residential association rules pursuant to a reasonableness standard so as to police overly exclusionary restrictions).
subsidize poorer school districts to bring them up to the level of the richer districts, and, instead of raising taxes on the well off, to cut or decline to enhance other programs benefiting the poor like food stamps or Medicaid. Another would be to finance education through a voucher program providing every child with the same amount of money, the effect of which, if parents were entitled to supplement the voucher, might be to replicate the inequalities of the prior financing system by channeling the less well off who could not afford more than the voucher to schools providing an inferior education relative to the more expensive schools the better off could afford.\footnote{See, e.g., James S. Liebman, \textit{Voice Not Choice}, 101 \textit{Yale L.J.} 259, 284 (1991) (book review) ("[A]lthough educationally and politically viable plans probably would have to provide all students with a benefit sufficient to purchase a minimally adequate education, such plans, by assumption, would not restrict private school tuitions to that benefit or to any other amount. The consequence of such plans would be the segregation of schools, like other consumer markets, on the basis of class. If we assume only that the market works—educational consumers get what they pay for—and that wealthy families can and will pay more on average than less wealthy families, we can be sure that uncapped plans will distribute learning, beyond some ‘minimally adequate’ amount, on the basis of wealth."); James A. Ryan & Michael Heise, \textit{The Political Economy of School Choice}, 111 \textit{Yale L.J.} 2043, 2099 (2002) (arguing that vouchers are likely to result in limited improvement in educational opportunity “not only because there is a limited supply of private schools generally, but also because voucher programs have not been—and likely will not be—sufficiently generous to allow voucher students to attend expensive private schools").}

Due to the complexities of the remedial process, most commentators have concluded that state courts attempting to address exclusionary zoning and school finance have by and large not had much success.\footnote{See, e.g., Laurie Reynolds, \textit{Uniformity of Taxation and the Preservation of Local Control in School Finance Reform}, 40 \textit{U.C. Davis L. Rev.} 1835, 1871 (2007) (arguing that even when successful school finance reform litigation has not succeeded in equalizing funding for schools due to the continued reliance on local property taxes, and advocating as the most viable solution “a uniform statewide property tax redistributed to local districts on the basis of the educational needs of their children”); James E. Ryan, \textit{Standards, Testing, and School Finance Litigation}, 86 \textit{Tex. L. Rev.} 1223, 1250 (2008) (tracing the history of school finance litigation since the 1960s, characterizing the results as of mixed success, arguing that “comparability of resources . . . should become the guiding [principle] for determining the constitutional sufficiency of funding schemes,” and noting that comparability might require spending more on educating the poor and disadvantaged); Henry A. Span, \textit{How the Courts Should Fight Exclusionary Zoning}, 32 \textit{Seton Hall L. Rev.} 1 (2001) (arguing that, to date, the few state court and legislative efforts to combat exclusionary zoning have had only modest success and have resulted in minimal racial or socio-economic integration, that the solution must be primarily a political one due to courts’ inability to manage the issue remediably, but that in light of the political obstacles to reform, courts should more aggressively try to force legislatures to address the issue).} Nevertheless, there are examples of at least
modest success that demonstrate the ability of courts to contribute positively to the solution of issues related to the requirement of equitable distribution while remaining true to democratic principles.

The New Jersey Supreme Court has probably been the most aggressive in attacking exclusionary zoning. In 1975, it held exclusionary zoning to violate the State Constitution, and required that communities provide in their zoning ordinances for their fair share of regional housing needs for low and moderate income people. Seventy-five Eight years later the Court established a panel of judges to specialize in exclusionary zoning cases and implement the initial ruling much like an administrative agency, while indicating that it would defer to a legislative solution if the legislature saw fit to enact one. Seventy-six Two years later the New Jersey legislature passed the Fair Housing Act, which adopted the Court’s fair share standard and created an administrative agency to implement it. Seventy-seven In 1986, the Court upheld the statute and transferred all pending cases to the agency, while indicating its willingness to intervene again if the legislative approach should fail to work. Seventy-eight The bottom line in evaluating this exercise is how much low and moderate income housing was actually built in dispersed locales, and on that score the evidence seems mixed. Seventy-nine

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79 See Nico Calavita et al, Inclusionary Housing in California and New Jersey: A Comparative Analysis, 8 HOUSING POLICY DEBATE 109, 125-35, 137 (1997) available at http://www.knowledgeplex.org/kp/text_document_summary/scholarly_article/reftex/hpd_0801_calavita.pdf (concluding that the Mount Laurel decisions were highly successful as an impetus to the development of lower cost housing in suburban areas during the housing boom of the late 1980s; that most of the beneficiaries were already suburbanites, that relatively few were minorities, and that most of the units were acquired by moderate income people and were beyond the means of 75% of the eligible recipients; that the effectiveness diminished in the 1990s as developers shifted from large-scale townhouse to smaller single family developments, as enforcement moved from the judiciary to the political/administrative process, and as developers and suburban communities satisfied their fair share obligation through financial contributions for the construction of lower cost housing in urban areas; and, despite criticisms of their ability to bring
Nevertheless, this is an example of a court’s ability, in a manner I would say is quite consistent with democratic principles, to initiate a discourse with the legislature over an issue whose ultimate solution lies in the political process and to prod the legislature to acknowledge its obligation to address the issue.

Another on-going example is the Texas Supreme Court’s intervention in the school finance issue. Although the obvious centrality of education to success in life has induced a number of state courts to tackle the issue, it is a highly complex one. If we assume a constitutional requirement of equal educational opportunity, several complicated questions arise. Is equal opportunity a matter of money? If so, are equal per pupil expenditures required, is it permissible for richer school districts to spend more and if so how much more, must more be spent to educate the disadvantaged and those with special needs and if so how much more? Or is equal opportunity a matter of outcomes? If so, given the practical impossibility of achieving identical outcomes for every student, is the opportunity to reach a minimum level of achievement sufficient and if so what is the minimum level, must every student be educated to his or her maximum potential or a comparable percentage of maximum potential and if so how is that potential to be determined?

After the U.S. Supreme Court found Texas’ school finance system to satisfy the Constitution, the same case was brought in state court and in 1989 the Texas Supreme Court

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about social change, that “the courts have been successful in forcing other branches of government to act”); Damiano Sasso, *The Effect of The Mount Laurel Decision on Segregation by Race, Income and Poverty Status* (2004) at http://www.tcnj.edu/~business/economics/documents/Sasso.tcnj.pdf (concluding that the Mount Laurel decisions and the Fair housing Act had a slight impact at best in reducing economic segregation in the 1980s and none thereafter and has had no discernable impact in reducing racial segregation).

Court held the system to violate its Constitution. The Court focused on educational expenditures, found that the State’s heavy reliance on local taxation to fund schools overly favored richer districts, and ordered the legislature to reform the system so that school districts would have “substantially equal access to similar revenues per pupil at similar levels of tax effort.”

Six years later, in 1995, after rejecting two legislative responses in the interim, the Court upheld a financing system that effectively forced richer school districts to share their tax revenues with poorer districts, that significantly narrowed the disparity between the revenue raising capacity of richer and poorer districts, but that still left in place a significant disparity. Along with the revised financing system, the legislature had also adopted an accreditation system setting performance standards local school districts must meet in order to provide an adequate education. The Court’s rationale for its decision, focusing on outcome as well as expenditures, was that the constitutional requirement is that the legislature provide for “a general diffusion of knowledge,” that the accreditation system met that requirement, and that disparities in revenue raising capacity were permissible as long as the financing system guaranteed sufficient funds to enable districts to meet the accreditation system’s performance standards. However, the Court deferred

81 Edgewood Independent School Dist. v. Kirby, 777 S.W.2d 391 (Tex., 1989) (holding that over reliance on local funding of schools violates the State Constitution’s requirement that in order to ensure “a general diffusion of knowledge” the legislature is obligated “to establish and make suitable provision for the support and maintenance of an efficient system of public free schools”).
82 Id. at 397.
83 Edgewood Independent School Dist. v. Meno, 917 S.W.2d 717, 730-31 (1995) (holding, in light of the fact that the disparity in revenue raising capacity between the richest and poorest districts based on per pupil taxable property had been reduced from 700 to 1 at the time of the initial suit to 28-1 under the bill before it and that the disparity with respect to access to funds necessary to meet state accreditation standards had been reduced to 1.38 to 1, that “[c]hildren who live in property-poor districts and children who live in property-rich districts now have substantially equal access to the funds necessary for a general diffusion of knowledge”).
virtually totally to the legislature’s determination that the performance standards were adequate to provide for a general diffusion of knowledge, and did not examine in detail the data regarding the ability of the poorer districts to meet those standards.84

Ten years later, in 2005, the financing system was challenged again by poorer districts that felt short changed by the system. Although the disparity in revenue raising capacity between richer and poorer districts had increased somewhat in the intervening years, the Court found the system still to be constitutionally adequate, focusing again on outcome.85 The data showed substantial disparities in performance on standardized tests based on economic status and as between whites and minorities, high drop-out rates for Hispanics and African Americans, and low numbers of students meeting college readiness standards as compared with other states.86 Nonetheless, the Court found the financing system adequate on the ground that the great majority of schools met the State’s accreditation standards, that performance on standardized tests had steadily improved over time, and that Texas ranked high relative to other states in performance on

84 Id. at 728-29, 730 (the Court briefly described the accreditation system and then stated: “In Senate Bill 7, the Legislature equates the provision of a ‘general diffusion of knowledge’ with the provision of an accredited education. The accountability regime set forth in Chapter 35, we conclude, meets the Legislature's constitutional obligation to provide for a general diffusion of knowledge statewide.”). Perhaps responding to the dissent’s objection that this approach would allow the State to set the performance standards so low that children in poorer districts would not be guaranteed an adequate education while the richer districts would be able to provide a high quality education, 917 S.W.2d at 766, 768 (Spector, J., dissenting), the Court inferred that it might intervene in the future if the funds available to poorer districts should become insufficient to satisfy the constitutional standard. 917 S.W.2d at 730, note 8 (“This is not to say that the Legislature may define what constitutes a general diffusion of knowledge so low as to avoid its obligation to make suitable provision imposed by [the Constitution]. While the Legislature certainly has broad discretion to make the myriad policy decisions concerning education, that discretion is not without bounds.”).
86 Id. at 768-69
national standardized tests overall and in reducing performance gaps between whites and minorities.\footnote{Id. at 768, 789-90.}

Let’s take stock of the Texas Supreme Court’s foray into school finance. The tenor of the initial ruling in 1989 was that in the name of local control the State could choose to allow school districts to opt for differing levels of educational expenditures as long as it ensures that all districts taxing at particular rates have substantially equal revenues. There are several ways in which to accomplish fiscal equality, and this is a fairly manageable standard for a court to implement in that all it has to do is examine the numbers. If strictly applied, this standard would equalize educational funding as between children living in poorer and richer districts by forcing the state to subsidize the poorer districts up to the funding level of richer districts who tax at the same rate. Since districts are entitled to choose their own tax rates and funding levels, the quality of education among the districts might vary. But the variance would not flow from differences in the districts’ wealth, but from each district’s choice of the quality of education it wishes to furnish its children. Although a district could conceivably set its tax rate so low that it would not be able to provide a decent education, the fact that everyone’s children would suffer the consequences is a safeguard against that. And if some parents prefer a higher level of education than their district provides, they might move if able to another district that has chosen to spend more on education. The advantage of this judicial approach is that it leaves the amount of money to be allocated to education up to the political process and individual choice, while intruding on the political process only to the extent of requiring that the funds be distributed without regard to district wealth so as to avoid
trapping people in poorer districts unable to provide their children with an education
affording them a comparable opportunity to succeed in life.  

In shifting focus to the quality of education in the 1995 and 2005 cases, the Court
departed from strict fiscal equality and approved a financing system that favors richer
districts. The quality of education that equal educational opportunity requires is highly
debatable. One court might say that all children must have a comparable opportunity to
achieve what they are capable of achieving, require school authorities to allocate funds
accordingly, and monitor the process to assure that funds are properly allocated. Such an
approach might require that more resources be devoted to the education of those with
special needs, like the handicapped or those disadvantaged by poverty. But, due to the
multiplicity of factors that affect student achievement and the lack of a straight line
relationship between money spent and educational outcomes, the monitoring process
would be extremely difficult and would involve the court in much second guessing of the
decisions of elected officials and school authorities. Another court might say that equal
educational opportunity requires only a minimum level of education for all children, and
then defer to the political process’ determination of what the minimum level is and what

88 Complications arise with strict fiscal equality when there are those, like the handicapped or the
disadvantaged, who have special needs arguably requiring that more money be spent on their education to
afford them a comparable opportunity. That these are folk whose interests the political process might
neglect due to lack of political power strengthens the case for judicial oversight of the quality of education
they receive in order to ensure equal educational opportunity.
89 See, e.g., Eric A. Hanushek, Spending on Schools, in A PRIMER ON AMERICA’S SCHOOLS 69, 81-82 (Terry
Moe ed., 2001) (citing studies showing “no systematic relationship between resources and outcomes once
one considers families and other factors that determine achievement,” while acknowledging that “[t]he
studies, of course, do not indicate that resources could not make a difference. . . . Instead they demonstrate
that one cannot expect to see much if any improvement simply by adding resources to the current
schools.”); RICHARD D. KAHLENBERG, ALL TOGETHER NOW: CREATING MIDDLE CLASS SCHOOLS
THROUGH PUBLIC SCHOOL CHOICE 82-84 (2001) (citing and discussing studies showing that among family
background, the economic status of one’s classmates and per pupil expenditures, the latter matters least in
determining student achievement).
resources are necessary to provide it, intervening only in cases of obvious abuse. Such an approach might tolerate substantial differences in educational quality along class lines as long as all are provided the minimum.

The Texas Supreme Court’s decisions upholding the school finance law in the 1995 and 2005 cases, despite significant though reduced inequalities, are close to this latter approach. We can’t know how the justices who overthrew the prior law in 1989 would have decided the later cases, although the tenor of that decision seems more activist. One explanation for the more deferential tone of the later decisions may be honest differences of opinion over the meaning of the State Constitution and the appropriate interrelationship between the Court and the legislature. But honest differences of opinion can be affected by the Court’s ties to the political process. The Court is an elected body, and its political composition has changed over the years. In 1989 a majority of the justices were Democrats, in 1995 a majority were Republicans, and in 2005 all were Republicans.\(^90\) The more activist 1989 decision overthrowing the then law was unanimous, and the more deferential 1995 decision upholding the new law was 8-1. Three of the eight were Republicans who replaced Democrats, one of whom authored the 1989 decision, while four (two Republicans and two Democrats) remained on the Court and joined the more deferential 1995 majority. In general, the Republican mantra is to decry perceived liberal activism of courts, so perhaps the changing political winds in Texas impacted the Court. Or perhaps the Court felt it had pushed the legislature as far as it could. This responsiveness to the political process, which occurs

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\(^90\) The Supreme Court of Texas, Line of Succession of Supreme Court of Texas Justices from 1945 at http://www.supreme.courts.state.tx.us/court/sc-justices-1945-present.pdf.
with the U.S. Supreme Court as well through the appointment process, is part of the argument here for the legitimacy of courts’ dialoguing with legislatures over substantive constitutional requirements.

Nevertheless, overall the Texas Supreme Court’s twenty year dialogue with the legislature seems to have contributed at least somewhat to more equal educational opportunities. Although there are still disparities in funding as between richer and poorer districts, the gap has been reduced more than it might have been if the Court had not intervened in 1989 and left the matter totally to the political process. Although there are still disparities in educational outcomes along ethnic and class lines, the gaps have narrowed somewhat. Perhaps the willingness to intervene of the more activist Court in 1989 has contributed to the willingness of the later Courts to continue to play some oversight role. Perhaps even the more deferential 1995 Court would have been moved to overthrow the financing system if there had been no or limited improvement over the years. Perhaps, if in the future the improvement ceases while funding disparities remain or grow worse, the Court will intervene again and keep the dialogue going.

Given the threat to equitable sharing of a lack of mobility and of access to comparable educational opportunities, and given the difficulty that the poor have in advancing their interests in the political process and the remedial constraints the Courts faced, I see the New Jersey and Texas Supreme Courts as having contributed in the

91 See, e.g., American Political Science Ass’n, *American Democracy in an Age of Rising Inequality* 1 (2004) at http://www.apsanet.org/imtest/taskforcreport.pdf (concluding that “[c]itizens with lower or moderate incomes speak with a whisper that is lost on the ears of inattentive government officials, while the advantaged roar with a clarity and consistency that policy-makers readily hear and routinely follow”); Martin Gilens, *Public Opinion and Democratic Responsiveness*, 69 PUB. OPIN. Q’LY. 778 (2005) available at http://poq.oxfordjournals.org/content/69/5/778.full.pdf (finding that “when Americans with different income levels differ in their policy preferences, actual policy outcomes strongly reflect the preferences of the most affluent but bear virtually no relationship to the preferences of poor or middle-income Americans”).

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exclusionary zoning and school finance cases to the advancement of equitable sharing in a manner consistent with democratic principles. The U.S. Supreme Court might have made a similar contribution had it chosen to intervene in those issues.

III. Equitable Sharing Applied

In this section, I want to show how equitable sharing might impact a few cases that have been or are likely to come before the Court. First, I discuss the same sex marriage issue likely to come before the Court in the near future; second, the Seattle case, in which the Court overthrew the use of race in assigning children to school in order to achieve integration; and, third, the Citizen’s United and Arizona Free Enterprise Club cases, in which the Court invalidated laws restricting corporate expenditures in support of political candidates and a public financing law attempting to equalize the funding available to publicly and privately funded candidates.

A. Same Sex Marriage

The United States is in the midst of a societal dialogue over same sex marriage. The decision of the Hawaii Supreme Court in 1993 that prohibiting same sex marriage presumptively violated the State Constitution helped initiate the dialogue.92 Since then at least twelve other courts have weighed in on the issue, with a majority upholding bans on same sex marriage,93 and the issue is likely to come before the U.S. Supreme Court in the near future.

The Hawaii decision helped energize both the proponents and opponents of same sex marriage. Since the decision same sex marriage has been legalized in six states and the District of Columbia, in three instances through judicial intervention and in four instances by statute. In addition, eleven states have passed laws allowing same sex civil unions or domestic partnerships with some or all of the rights and responsibilities of marriage. On the other hand, twenty-nine states have amended their constitutions to ban same sex marriage, and thirty-four expressly ban it by statute. And in 1996 Congress passed the Defense of Marriage Act denying federal benefits to legally married same sex couples. This provision has been declared unconstitutional by a federal district court, and this is one of the cases likely to find its way to the Supreme Court. A second is the decision of another district court holding unconstitutional the provision of the California Constitution banning same sex marriage adopted by the voters in 2008 through the initiative process. Meanwhile, public opinion has been shifting in favor of same sex relationships. One poll found that the percentage of Americans supporting same sex


See Sant’Ambrogio & Law, supra note 92, at 17, 23.

See id. at 21-22, 26-27.


marriage rose from 27% to 44% between 1996 and 2010. Another recent poll found
majority support for same sex marriage.101

As noted, courts have played a prominent role in the dialogue.102 For the most
part the courts have applied rather mechanically the Supreme Court’s approach of
judging laws per different levels of scrutiny depending on what is at stake. While a few
of the courts have treated gender or sexual orientation as quasi suspect classes and
marriage as an important if not fundamental interest, most have purported to employ a
rational basis test. The courts overthrowing same sex marriage bans have found either
that the government’s asserted purpose for the ban was impermissible or that there was
little or no evidence backing up the asserted purpose. The courts upholding the bans have
found the asserted purposes valid and have essentially deferred to the legislative
determination of the need for the bans. While some of the opinions touch on matters
related to equitable sharing, all would benefit from a more explicit and thorough
discussion of the implications of equitable sharing for the banning of same sex marriage.

That the institution of marriage is central to, and that the opportunity to marry is a
highly important benefit of, social life is beyond doubt. Social life in this society has

100 Jeffrey M. Jones, Americans’ Opposition to Gay Marriage Eases Slightly (May 24, 2010) at
for same sex marriage declined for a period, from 42% to 37% support between mid-2004 and mid-2005,
following the decisions of the Supreme Court striking down laws punishing homosexual sex in Lawrence
and of the Massachusetts Supreme Judicial Court striking down the banning of same sex marriage in
Goodridge v. Dept. of Public Health, 798 N.E.2d 941, 440 Mass. 309 (2003). Since then the trend has been
upward. Id.; Patrick J. Egan, et al., Gay Rights in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY
234 (N. Persily et al., eds. 2008).
101 CNN Politics, Americans Split Evenly on Gay Marriage (Aug. 11, 2010) at
102 See supra note 93 and accompanying text.
long been organized largely around the nuclear family.\textsuperscript{103} Although the nature of the nuclear family has changed over time, it has always been a partnership for the purpose of the mutual support of the parties and of raising children. The traditional model of the father as breadwinner and the mother as homemaker, while never fully followed, has altered significantly.\textsuperscript{104} It is far more common now for both partners to share the responsibilities of earning money, doing housework and rearing children. Divorce is far more common than in the past, although it is often followed by another marriage. More couples choose to live together without being married, and the stigma of “living in sin” has diminished substantially, although it still exists to some degree and in some locales more than others. Single parent families are more common, although such families tend to struggle financially far more than two-parent families, especially when headed by a woman. And same-sex couples openly living and raising children together is increasingly common.

It is against this backdrop that people choose to marry, and they do so for a variety of reasons.\textsuperscript{105} One is to legitimize their children in the eyes of others, so that their children will not face the stigma that still exists in some quarters of not having parents who are married. Another reason is to access the many financial benefits of marriage.

\textsuperscript{103} See, \textit{e.g.}, Rose M. Kreider & Renee Ellis, \textit{Living Arrangements of Children}:\textit{2009 Figure 1}(2011) at http://www.census.gov/prod/2011pubs/p70-126.pdf (showing between 80\%-90\% of children living in two-parent families from 1880 to 1970, declining to about 70\% in 1970 and remaining at that level since then); \textbf{MAXINE BACA ZINN} & \textbf{D. STANLEY EITZEN}, \textbf{DIVERSITY IN FAMILIES} 44-46, 52-54 (7th ed. 2005) (discussing the predominance of the nuclear family since colonial times, and the emergence of the modern model of the male as wage earner and female as domestic caretaker following the Revolution and with the transition from an agricultural to industrial economy).

\textsuperscript{104} For histories of the increasing diversity of the American family over the past generation, see, \textit{e.g.}, \textbf{STEPHANIE COONTZ}, \textit{MARRIAGE, A HISTORY} 247-301 (2005); \textbf{ZINN} \& \textbf{EITZEN}, \textit{supra} note 103, at 113-14, 275-77, 394-96, 420-26, 436-47.

\textsuperscript{105} See, \textit{e.g.}, \textbf{LINDA J. WAITE} \& \textbf{MAGGIE GALLAGHER}, \textit{THE CASE FOR MARRIAGE} (2000) (discussing the benefits of marriage).
such as lower income and death tax rates, rights of inheritance, social security survivor benefits, spousal health insurance coverage, and alimony and child support in the event of divorce. These benefits often keep people out of poverty, and can even be a matter of life or death. Finally, there are the psychological benefits, the sense of commitment and sign of affection that many associate with taking marriage vows. For many people, being married is as important a goal as anything in life.

Rather than allowing the benefit of marriage to be shared by all, banning same sex marriage reserves it to the heterosexual majority and deprives an historically disfavored minority from similarly enjoying the benefit. Without sound reasons for doing so, this would seem to clearly violate the principle of equitable sharing. Marriage, or at least monogamous marriage, is not a scarce resource to which access needs to be limited in order to preserve it. It can be made available to everyone without diminishing anyone else’s access to it. If marriage benefits people, if it makes people happier than they would otherwise be, then absent countervailing reasons extending the right to everyone would seem to benefit both the individual and society as a whole.

One justification advanced for banning same sex marriage is that heterosexual marriage is a long-standing tradition and widely held moral value, and that as such society has a right to promote and preserve it.\textsuperscript{106} Tradition and shared values may be important to building a cohesive society. But in a democratic society committed to the right of all to pursue happiness and to the freedom to live one’s life as one sees fit as long

\textsuperscript{106}See, e.g., Sherif Girgis et al., *What Is Marriage?* 34 Harv. J.L. & Pub. Pol. 245, 260-61 (2011) (arguing that recognizing same sex marriages would undermine traditional marriage in that “the law would teach that marriage is fundamentally about adults’ emotional unions, not bodily union or children, with which marital norms are tightly intertwined”).

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as one does not harm others, these are primary values to be promoted and preserved. Such a society must make room for diverse ways of thinking and life styles, and may not prohibit diversity or withhold from minorities the opportunity to equitably share those prime values solely because the majority disapproves of minority traditions and values. This is the essence of the fundamental rights of freedom of association and free exercise of religion. The majority may, and indeed is obligated, to promote basic democratic institutions and values, and it may advocate its particular traditions and values. But it may not attempt to impose them through force of law absent demonstrable harm to others or society as a whole. The weakening of the majority’s traditions and values is not such harm because a democratic society must remain open to change. If, as a result of divergent ideas and practices, people choose to depart from majoritarian traditions and values, then that is simply democracy at work.

A second reason advanced against same sex marriage is that children fare better in heterosexual than in same sex relationships, that they are more well-rounded and competent as adults with both a mother and father figure in the home, and consequently that society would be harmed if same sex marriage were allowed because that would facilitate the raising of children in same sex families. 107 While there is some evidence that in general children benefit from living with their biological parents in a stable

107 See, e.g., Girgis et al., supra note 106, at 257 (arguing that “according to the best available sociological evidence, children fare best on virtually every indicator of wellbeing when reared by their wedded biological parents”). However, most if not all investigators, including those cited by Girgis et al., acknowledge that the available evidence concerning the impact on children of being raised by same sex couples is skimpy and inconclusive. See, e.g., The Witherspoon Institute, Marriage and the Public Good: Ten Principles 18 (August 2008) at http://www.winst.org/family_marriage_and_democracy/WI_Marriage.pdf (acknowledging, although arguing vociferously against same sex marriage, that “no one can definitively say at this point how children are affected by being reared by same-sex couples,” and that “until more research is available, the jury is still out”).


relationship, most children grow up without serious problems whatever the family structure and there is scant evidence regarding same sex families. The notion that mothers and fathers have different and complementary modes of child rearing, as in the mother as nurturer and father as disciplinarian, is, even if true, likely a by-product not of inherent differences between women and men but of the different roles in the traditional family of the mother as homemaker and father as provider. These paradigms are diminishing in modern times, and it is increasingly apparent that women and men are equally capable of all the needed parental roles with the exception of nursing. Women are capable of playing traditionally male roles, men are capable of playing traditionally

108 See, e.g., Kristin Anderson Moore et al., Trends Child Research Brief, Marriage from a Child’s Perspective: How Does Family Structure Affect Children, and What Can We Do about It? 1, 2 (June 2002) at http://www.childtrends.org/files/MarriageRB602.pdf (concluding, based on a review of the evidence, that “children do best when they grow up with both biological parents in a low-conflict marriage,” but that “[t]he majority of children who are not raised by both biological parents manage to grow up without serious problems, especially after a period of adjustment for children whose parents divorce”); Mary Parke, Center for Law and Social Policy, Are Married Parents Really Better for Children? 1-2, 6 (May 2003) at http://www.clasp.org/admin/site/publications_states/files/0086.pdf (concluding, based on a review of the evidence, that “[m]ost researchers now agree that . . . on average, children do best when raised by their two married, biological parents who have low-conflict relationships”; that “the majority of children in single-parent families grow up without serious problems”; that “[a]lthough the research on these families has limitations, the findings are consistent: children raised by same-sex parents are no more likely to exhibit poor outcomes than children raised by divorced heterosexual parents”; and that “there continues to be debate about how much of the disadvantages to children are attributable to poverty versus family structure, as well as about whether it is marriage itself that makes a difference or the type of people who get married”); U.S. Department of Health and Human Services, Family Structure and Children’s Health in the United States: Findings From the National Health Interview Survey, 2001-2007 27 (2010) at http://www.cdc.gov/nchs/data/series/sr_10/sr10_246.pdf (finding that “children living in nuclear families—that is, in families consisting of two married adults who are the biological or adoptive parents of all children in the family—were generally healthier, more likely to have access to health care, and less likely to have definite or severe emotional or behavioral difficulties than children living in nonnuclear families”).

109 See, e.g., COONTZ, supra note 104 (discussing the movement away from the traditional family of the male as breadwinner and female as homemaker to one of more shared responsibilities, and attributing the movement to such factors as the difficulty of supporting a family with one wage earner, the desire of women for and the greater possibilities of financial independence and self-fulfillment, and changing views of marriage from a relationship based on hierarchy and obedience to one of greater intimacy and equality); ZINN & EITZEN, supra note 103, at 189-92, 198-200, 211-15, 296-301 (discussing the movement of women into the work force in greater numbers over the past generation and the changing gender roles and increasing egalitarianism within the family, although noting that women still shoulder a greater share of domestic tasks within the home).
female roles, in a single parent family the mother or father will have to play both roles, and in a two parent family of whatever gender the partners will have to work out how to share the various parental roles. Moreover, given the seeming advantage of growing up in a two parent family, an advantage likely related to the demands of having to be the sole provider and homemaker at the same time rather than to gender, children would seem to be better off if same sex marriages were allowed. To the extent that being married would encourage a same sex couple with children to stay together, that would benefit the children. Or if the couple divorced, the children would benefit from having two people with on-going parental responsibilities.

Even if it were true that heterosexual parenting is generally preferable to same sex parenting, it is questionable whether banning same sex marriage would benefit children. Due to the ban a person wanting to be a parent and preferring a same sex relationship might, nevertheless, opt for a heterosexual marriage because of the legal benefits of marriage both for the person and the children or in order to protect the children from the stigma of being raised in a family whose parents cannot marry. However, that might well be damaging to children due to the unhappiness likely to flow from a marriage contrary to one’s sexual preferences. What seems more likely is that many would opt either to enter a same sex relationship with children but without the benefit of marriage or to be a single parent in order to avoid any greater stigma the children might face in a same sex than single parent family. If so, and if children would fare batter in a same sex than in a single parent family, then allowing same sex marriage would likely benefit children by encouraging same sex over single parent families.
The preceding discussion about the impact of allowing or banning same sex marriage is admittedly speculative, and such speculation is ordinarily within the purview of the legislature. Nonetheless, I think it appropriate for the Court to engage in it in order to signal to the legislature the reasoning process it should go through and the type of evidence needed before it would be permissible to deny to a class of people the rights the majority has conferred upon itself. Without that, the legislative decision smacks of having been prejudged and based on factors inconsistent with democratic principles, like an irrational prejudice against same sex relationships or an attempt to impose the majority’s moral or religious views on all.

In a society committed to equitable sharing, the right to pursue happiness, and the freedom to live as one sees fit, a right like marriage that the majority itself views as fundamental to social life must be available to all, unless there are strong reasons compatible with democratic principles and backed by substantial evidence to deny it to some. Such reasons and evidence do not exist, in my opinion, with regard to same sex marriage, and for me it is not even a close case. The case for judicial intervention against banning same sex marriage is strong, and hopefully the Supreme Court will see it that way when the issue comes before it. Just as the Court helped the society to overcome its irrational prejudice against interracial marriage,110 which was opposed for many of the same reasons as same sex marriage and which is now commonly accepted and practiced, the Court can similarly contribute to the resolution of the same sex marriage issue. Ultimately, the Court will only succeed if the public agrees. But the trend is in that

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direction, and a Court decision prohibiting the banning of same sex marriage might help put the issue to rest.111

B. The Use of Race to Promote School Integration

In Parents Involved in Community Schools v. Seattle School District No.1,112 the Supreme Court by a 5-4 decision struck down as violating equal protection the race conscious student assignment plans adopted by two public school districts for the purpose of promoting integration in elementary and secondary schools. The Court acknowledged that race may sometimes be used in the educational context, in particular in remedying intentional discrimination and in the admissions process in higher education in the interest of diversity but only when individualized determinations are made and race is only one of a variety of diversity factors.113 For the four member plurality, when schools are segregated without proof of governmental wrongdoing, there is no constitutional

111 See Michael J. Klarman, Brown and Lawrence (and Goodridge), 104 Mich. L. Rev. 431 (2005). Klarman wrote in 2005, about two years after the Supreme Court’s decision in Lawrence overthrowing laws banning homosexual sex and of the Massachusetts Supreme Judicial Court in Goodridge overthrowing the banning of same sex marriage. While acknowledging that court rulings can give impetus to reform movements, Klarman’s view (with which I agree) is that the Supreme Court rarely initiates social change and tends to support reform movements only when they have already acquired substantial momentum, which was the case with Lawrence in that public opinion had shifted since Bowers from support to disapproval of laws banning homosexual sex. However, since public opinion did not then support same sex marriage, he argued that Goodridge and the attempt of gay rights activists to push harder for same sex marriage following Lawrence outpaced public opinion and helped to focus public attention on the issue and to fuel a political and legal backlash—in the form of the election of more conservatives opposed to same sex marriage and the passage of constitutional amendments prohibiting it—that would likely delay its recognition. In light of the backlash, Klarman opined that “it seems unlikely that many state court judges will stick out their necks by duplicating the adventurous holding of the Massachusetts high court in Goodridge,” id. at 472; although he acknowledged the likelihood that “one day in the not-too-distant future a substantial majority of Americans will support same-sex marriage,” id. at 484, and that “[a]t some point, the Court is likely to constitutionalize a newly emerging consensus and invalidate bans on same-sex marriage.” Id. at 485. That may occur much sooner than Klarman thought. In fact, two state courts and one federal court did stick their necks out following Goodridge, and a majority of the public may now support same sex marriage. If the Supreme Court strikes down bans on same sex marriage, then in retrospect and despite the short-term backlash the decisions in Lawrence and Goodridge may be seen to have contributed to the debate and to the vindication of the right.

113 Id. at 720-25.
violation and assigning children to school based on race for the purpose of promoting integration is impermissible.\textsuperscript{114} The fifth vote was that of Justice Kennedy,\textsuperscript{115} who would allow some race conscious measures in pursuit of equal educational opportunity as long as students are not assigned to schools based on their race except as a last resort when other measures fail.\textsuperscript{116} The four dissenters would allow race conscious assignment to combat de facto racial segregation in light of evidence that integration produces educational gains for minority students and promotes interracial understanding and cooperation.\textsuperscript{117}

In terms of equitable sharing, \textit{Parents Involved} and related cases raise the question of when the government may, or even must, make distinctions based on ethnicity or take into account the ethnic impacts of its actions or failure to act. The most clear-cut example of when the government may not make ethnic distinctions is when the majority confers rights on itself that it withholds from ethnic minorities for the purpose of advantaging itself or disadvantaging minorities. Equitable sharing requires that rights be equally shared unless there are sound reasons to the contrary, and assigning legal rights solely to advantage the majority over an ethnic minority is not a valid reason. This principle applies as well when an ethnic majority discriminates against its own members—if, for example, a majority were to deny rights it reserves for itself to those of its members who oppose denying rights to minorities.\textsuperscript{118}

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\textsuperscript{114} \textit{Id.} at 729-33.
\textsuperscript{115} 551 U.S. at 782 (Kennedy, J., concurring in part and concurring in the judgment).
\textsuperscript{116} \textit{Id.} at 789-90, 797-98.
\textsuperscript{117} 551 U.S. at 803, 839-44 (Breyer, J., dissenting).
\textsuperscript{118} By way of analogy, \textit{see} Mt. Healthy City School District Bd. of Educ. v. Doyle. 429 U.S. 274 429 U.S. 274 (1977) (holding that teacher cannot win case against school district for refusal to rehire teacher based
Parents Involved is an outgrowth of Brown,\textsuperscript{119} which struck down the forced separation of the races in public schools. Enforced segregation violated equitable sharing in two ways. First, although in one sense everyone’s rights were the same in that the law applied equally to whites and blacks, the purpose of enforced segregation was to promote a social structure designed to advantage whites over blacks and to prevent blacks from equitably sharing in the benefits of social life. Even if the education provided whites and blacks had been of equal quality, which for the most part it was not, separate but equal was inequitable because it signaled that blacks were not worthy of attending school with whites. Second, in a crucial sense enforced segregation did treat people differently based on ethnicity by imposing the will of those who preferred segregation on those who preferred integration. The law protected the interests of whites who controlled the political process and didn’t want their children to attend school with blacks (and incidentally of those blacks who preferred separate schools), while denying the opportunity for an integrated educational experience to both black and white parents who wanted that for their children when it may have been possible to accommodate everyone’s desires. Without sound reasons, advantaging those who prefer segregation over those who prefer integration violates equitable sharing.

As an alternative to striking down enforced segregation in *Brown*, the Court could have vigorously enforced the separate but equal doctrine and insisted that the separate schools for whites and blacks be made equal in terms of educational resources, quality of teachers, and the like. An argument for doing so, even acknowledging that separate but

equal was part of a generally oppressive system, is that strengthening the black community would bring about racial equality more rapidly than would striking down enforced segregation. Since it takes time to undo oppression, strengthening the black community educationally so that it could thrive more on its own even if less so than the white community might enable the black community to more effectively confront the white power structure with demands of equality, while striking down enforced segregation might stall progress toward equality due to the difficulty of overcoming the resistance likely to result from attempting to impose so dramatic a change on the society’s way of life. There is obviously no way to know what would have happened if the Court had taken this path. What we do know is that more than fifty years after Brown there is still a substantial amount of segregation in fact and that on the whole conditions within the black community are well below those in the white community.

Nonetheless, given the oppressiveness of forced segregation and the uncertain outcome of whatever path it took, the Court’s decision to strike down enforced segregation in schools (and other aspects of social life) was not an unreasonable response to what amounted to a system of apartheid. Having done so, the Court had at least two remedial possibilities in Brown: to insist that school authorities operate in a color-blind

120 See, e.g., DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM 20-28 (2004) (presenting a hypothetical Supreme Court opinion sustaining separate but equal but with a requirement of equalized funding for black schools and of black participation in the decision-making process, and opining in retrospect that in light of entrenched racism a more gradualist approach would have had a better chance of “opening opportunities for effective schooling for African Americans”). Several of my students whose parents faced the brunt of enforced segregation and who themselves experienced the aftermath of Brown have made this argument over the years.

manner and to live with the result even if the schools remained largely segregated, or to insist that school authorities act affirmatively to bring about actual integration. The Court chose the latter option,\(^\text{122}\) the effect of which was to force integration on some who did not want it. This raises the question of whether forced integration is akin to or different from forced segregation in terms of equitable sharing. The two are similar in that both thwart associational desires. Forced segregation throttles the desires of those who prefer an integrated education, while forced integration throttles the desires of those who prefer a segregated education. If the former violates equitable sharing, why not the latter?\(^\text{123}\)

Whether forced integration is compatible or not with equitable sharing depends on the circumstances, on whether it promotes or undermines equitable sharing.\(^\text{124}\) In some instances forced association, of which forced integration is one example, can infringe individual liberty. In a free society, people must be free to choose their friendships as they see fit, even if they base their decisions on racial animus. Although rejecting someone as a friend out of racial animus can be extremely hurtful, friendship is so intimate a matter that it would be improper to punish someone for making such a

\(^{122}\) The Court first confronted this choice in *Green v. County School Bd. of New Kent County, Va.*, 391 U.S. 430 (1968). There a southern school district previously segregated by law and having only two schools adopted a freedom of choice plan allowing parents to select the school their children would attend. All the white parents and mostly all of the black parents opted respectively for the previously segregated white and black schools. Despite the facial colorblindness of the plan, the Court rejected it and ordered the district to adopt a plan likely to produce greater integration. The district could easily do so because the housing patterns there were such that a line drawn through the middle of the district would create two racially mixed attendance zones.

\(^{123}\) In theory it might be possible to satisfy everyone’s preferences by having both integrated and segregated schools and allowing people to choose. In *Green*, for example, the Court could have allowed the district to adopt a freedom of choice plan provided it create a third school, with one school for whites, one for blacks, and one for those who preferred integration. Why is that not more consistent with equitable sharing than forced integration?

\(^{124}\) *See*, e.g., Thomas Kleven, *On the Freedom to Associate or Not to Associate with Others*, I TENN. J. LAW & POL. 69, 100-22 (2004) (arguing that evaluating the case for forcing associations, such as racial integration, that some parties want and others don’t or that all parties don’t want requires a balancing of the values of free association and equal opportunity, and that forced associations become more justifiable when necessary to promote equal opportunity).
decision. At times, the maintenance of group identity may entitle groups to exclude others who wish to associate with them. In light of their historical mistreatment, Native Americans have a strong claim to have a degree of sovereignty over tribal lands and to be able to restrict living on those lands to members of the tribe. In other instances, forced association may be warranted, despite its impinging on the liberty of those who don’t want the association, in order to protect the right of all to share equitably in the benefits of social life. An ethnic majority may not without violating equitable sharing act collectively by express or tacit agreement to ostracize an ethnic minority and deny it comparable access to the means of earning a living or places into which the public is otherwise welcome. Laws prohibiting racial discrimination in privately owned workplaces, housing and public accommodations are a form of forced integration, justifiable because when enacted such discrimination was an integral aspect of white supremacy and because access to those facilities is integral to the equal opportunity of all to succeed in and enjoy life.125

Returning to education, context also matters. The Court’s decisions following Brown to require at least some degree of integration in desegregation plans was a justifiable response to the harms caused by forced segregation. But if forced integration were no longer needed to equalize educational opportunities, the case for it would weaken. If some still preferred integrated and some segregated schooling, it would be

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125 The tension between privacy and equality can be seen in the exceptions to such laws, which often exempt intimate associations from their coverage. For example, the federal Fair Housing Act exempts the rental of units in owner occupied buildings with four units or less, and allows religious organizations and certain private clubs to limit occupancy in housing they own or operate to their members provided they do not discriminate on the basis of race or other prohibited categories in their membership practices. 42 U.S.C. §§ 3603(b)(2) & 3607. And Title VII of the Civil Rights of 1964’s prohibition of employment discrimination based on race and other categories exempts businesses with less than fifteen employees. 42 U.S.C. § 2000e(b).
possible to design a system to satisfy everyone’s preferences by having both integrated and segregated schools and allowing people to choose. In a generally egalitarian society where ethnicity is a neutral factor in terms of the opportunity to pursue happiness and succeed in life, and where all schools are of comparable quality and everyone has an opportunity to attend a school that meets their preferences, freedom of choice complies with equitable sharing and forced integration would be of questionable validity because it favors those who prefer integration over those who prefer separation without any countervailing public benefit.

In the early 1990s, obviously impacted by the conservative backlash to which Brown contributed, the Court withdrew from overseeing school desegregation. Its rationale was that the judiciary had dismantled the enforced segregation of schools to the extent practicable, that the remaining segregation resulted largely from demographic factors like self-segregation for which the government is not responsible, and that such de facto segregation was not unconstitutional. The kindest thing I can say about the Court’s contention that the government is not responsible for the de facto segregation and racial inequalities that persist in the United States is that reasonable people can profoundly disagree. That this situation is a by-product of the inequalities the black community faced following several hundred years of government imposed slavery and segregation, and that these inequalities have never been fully remedied and have been perpetuated through government action like exclusionary zoning and school finance systems, is in my view inescapable. Indeed, I think the Court’s unwillingness to

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126 See supra note 67 and accompanying text.
127 Id.
intervene in the exclusionary zoning and school finance issues, along with its withdrawal from school desegregation, has in effect ratified a system that is separate and unequal. Even absent government action, the persistent racial inequalities are hard to reconcile with the principle of equitable sharing that I believe is implicit in the Constitution.¹²⁸

Nevertheless, there may be some plausibility to the notion forty years after *Brown* that the Court had done what it was capable of doing to remedy enforced segregation. If so, further efforts to equalize opportunities for African Americans and other minorities will have to come through the political process. This brings us back to *Parents Involved*, which entails legislative efforts to integrate schools for the asserted purpose of equalizing educational opportunity. Here the question is not whether the Court should affirmatively tackle de facto segregation, but how much deference it should give to legislative attempts to do so.

Given past history, there is good reason for the Court to carefully scrutinize racial classifications to ensure that assertions of good intentions are not racism in disguise. Even many of those who favored slavery and enforced segregation claimed that those practices were in the best interests of African Americans. But I do not think it appropriate to rule out racial classifications entirely, to insist as Justice Thomas appears to that governmental decision-making be colorblind.¹²⁹ If this country were to fully

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¹²⁸ See, e.g., *Sheff v. O’Neill*, 238 Conn. 1, 678 A.2d 1267 (1996) (holding that the educational disadvantage resulting from de facto racial, ethnic and socioeconomic segregation in schools violates the right of all children to substantially equal educational opportunity deriving from State Constitution’s equal protection clause, prohibition against segregation, and requirement of free public education, and ordering State to act affirmatively to rectify the situation).

¹²⁹ *Parents Involved*, 551 U.S. at 772, 782 (Thomas, J., concurring) (“My view of the Constitution is Justice Harlan’s view in Plessy: ‘Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.’ . . . The plans before us base school assignment decisions on students’ race. Because ‘[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens,’ such race-based decisionmaking is unconstitutional.”).
overcome its racist history, such that people’s opportunities in life were unaffected by their ethnicity, that would strengthen the case for colorblindness in most instances since there would then seem to be little reason for ethnic classifications—although if we ever do fully overcome, it seems unlikely that the issue would even arise. Acknowledging the continued existence of racial injustice, one might still argue for colorblindness on the ground that even well intentioned racial classifications perpetuate racial animus and that colorblindness will hasten racial justice. This is not a nonsensical position. Consequently, I do not think the Court could be faulted if in the remedial stage in Brown it had adopted a colorblind rather than integrationist approach given the uncertain results of whichever path it took. However, when a legislative body wants to experiment with a racial classification as a means of pursuing racial justice, and can demonstrate that it is acting in good faith and has good reason to think that its approach will fare as well or better than other approaches, then the Court should defer to the legislature’s attempt to solve a problem the Court is not willing to address head on.

Still, Court oversight is warranted to ensure good faith and good reason. One relevant factor in scrutinizing racial classifications is the racial composition of the body adopting the classification and of the supporters or opponents of the government action. If a governing body in which a majority ethnic group predominates employs racial classifications in ways that ethnic minorities support, there is less reason to be suspicious than if ethnic minorities oppose it. There is also less reason for suspicion when some in the majority oppose it because, while an ethnic majority may at times treat its own members unfairly, racial animus is not likely to be the explanation. Two school districts were involved in Parents Involved: the City of Seattle, Washington and Jefferson County,
Kentucky. The Seattle schools were about 41% white, 24% Asian-American, 23% African-American, 10% Latino, and 3% Native American, while the population of the City was about 70% white.\textsuperscript{130} The Jefferson County schools were about 34% black and the remainder mostly white.\textsuperscript{131} In both locales those objecting to the assignment plans appear to be white families who preferred their children to attend schools closest to their homes but had them assigned to schools further and in some instances a substantial distance away. Under these circumstances it seems unlikely that racial animus underlay the assignment plans.

A second factor in scrutinizing racial classifications is the strength of the evidence backing up the government action. In light of a legitimate wariness over the government’s use of ethnic distinctions, there is reason for courts to ensure that there is adequate supportive evidence. If there is no credible evidence, then the government’s action smells of having been based on racial animus and not as serving some legitimate purpose. How much judicial scrutiny of the evidence is warranted should depend on the likelihood that bias is at play, the seriousness of the problem the government is attempting to address, the need to use ethnic classifications to address the problem, and the severity of the hardships people are having to endure as a cost of the government action.

As for racial bias, we have seen already that the likelihood of that in Parents Involved is slim. As for the seriousness of the problem, I have argued here and elsewhere that equal educational opportunity is fundamental to equitable sharing.\textsuperscript{132} That access to

\textsuperscript{130} Parents Involved, 551 U.S. at 712.
\textsuperscript{131} Id. at 716.
\textsuperscript{132} See Kleven, supra note 68, at 373-77.
education is central to success in life, and that education contributes in general to people’s happiness and a well functioning democracy, is evident. And that ethnic minorities, in particular African Americans and Hispanics, fare far less well than average in school and in life is also evident.\textsuperscript{133} It is certainly reasonable to believe that a history of discrimination, as well as existing structural inequalities, explain much of these disparities, and that unless this situation is redressed the disparities will persist indefinitely. Under the circumstances I would argue that equitable sharing not only authorizes but mandates school authorities to act to equalize educational opportunities for ethnic minorities. So far the case for allowing the school authorities in \textit{Parents Involved} to proceed with their assignment plans seems strong.

As for the need to use ethnic classifications, one question is whether ethnic integration improves educational opportunities for minorities, a second is whether integration could be achieved without ethnic classifications, and a third is whether there are other ways to equalize educational opportunities for ethnic minorities. There is substantial, though far from conclusive, evidence that integration reduces educational disparities between whites and minorities, especially when accompanied by class integration.\textsuperscript{134} To put it in doctrinal terms, if a rational basis test is used the evidence

\textsuperscript{133} See Kleven, \textit{supra} note 66, at 209-12 (detailing the economic and educational disparities between whites and minorities).

\textsuperscript{134} See, e.g., Kahlenberg, \textit{supra} note 89, at 23-37, 116-35 (citing and discussing studies showing the educational benefits of socio-economic integration to all students); Molly S. Micosic, \textit{The Future of Brown v. Board of Education: Economic Integration of the Public Schools}, 117 HARV. L. REV. 1334 (2004) (arguing, on the basis of studies showing its benefits, that economic integration of schools offers the most promising way to achieve Brown’s goal of equal educational opportunity for all children); Russell W. Rumberger & Gregory J. Palardy, \textit{Does Segregation Still Matter? The Impact of Student Composition on Academic Achievement in High School}, 107 TEACHERS COLLEGE RECORD 1999, 2020 (Sept. 2005) available at http://education.ucsb.edu/rumberger/internet%20pages/Papers/Rumberger%20&%20Palardy--Does%20segregation%20still%20matter%20(TCR%202005).pdf (study concluding that “all students, whatever their race, social class, or academic background, who attended high schools with other students
seems clearly sufficient to justify the assignment plans in *Parents Involved*, whereas perhaps not if strict scrutiny is invoked. Using strict scrutiny in his concurring opinion, Justice Thomas characterized the issue of whether integration benefits ethnic minorities as “hotly disputed” and therefore insufficient to justify the racial classification.135 Using what it called a compelling purpose test but seems closer to rational basis, the dissent noted the disagreement among the professionals but found the evidence supportive of integration “well established and strong enough” to support the school authorities.136

None of the opinions in the case actually analyze the various studies. With rational basis there is little need to analyze the data, at least as long as the data supporting the government’s action is credible, because if it is then a rational person could believe it. With strict scrutiny there is also little need to analyze the data because if reasonable people could disagree about the matter, then the evidence is not compelling. The problem with strict scrutiny, if the supportive evidence must be close to indisputable before the government can act, is that this is rarely if ever the case with scientific research and, consequently, might prevent the government from addressing serious social injustices. The problem with rational basis, if it has no teeth at all, is that this risks allowing the government to act in discriminatory ways or so as to undermine fundamental

135 *Parents Involved*, 551 U.S. at 761, 764 (Thomas, J., concurring) (“In reality, it is far from apparent that coerced racial mixing has any educational benefits, much less that integration is necessary to black achievement. . . . Given this tenuous relationship between forced racial mixing and improved educational results for black children, the dissent cannot plausibly maintain that an educational element supports the integration interest, let alone makes it compelling”).

136 *Parents Involved*, 551 U.S. at 839 (Breyer, J., dissenting) (“the evidence supporting an educational interest in racially integrated schools is well established and strong enough to permit a democratically elected school board reasonably to determine that this interest is a compelling one”).
rights. On the other hand, often it is necessary to develop the evidence, to experiment with various approaches to see what works and what doesn’t.

From my perspective, the Court’s approach to ethnic classifications should depend on the likelihood that racial animus is at play. If there is reason to suspect that it may be, then the Court’s scrutiny of the evidence, regarding both the seriousness of the problem and the approach to attacking it, should be stricter but not so demanding as totally to prevent the government from acting. More appropriate is for the Court to insist on a judicial hearing at which the competing sides present their evidence and question and cross examine witnesses much like in administrative regulation cases. Courts may not be capable of resolving hotly contested scientific disputes on the merits, but they are capable of identifying logical flaws in reasoning and of evaluating the credibility of witnesses and the weight of the evidence. If there is no proof of racial animus, if the evidence supportive of the government’s approach is substantial, and if other ways to address the matter that do not entail racial classifications have been unsuccessful, then the government should be allowed to proceed.

Since racial animus is likely not at play in Parents Involved, I do not think the Court’s oversight need be so rigorous. Unless those opposed to the government’s action want it, a full blown evidentiary hearing seems unnecessary and it should be enough that the supportive evidence is well established and strong. But while I think the dissent in Parents Involved had the better of it, the mere assertion that the evidence is sufficient is not enough, and in order to contribute to the public dialogue the Court (or in this case the dissent) should set forth the competing views and spell out in detail the basis for its conclusion. In any event, in light of the sensitivity of racial classifications, once the
Court allows the government to proceed there should be continuing judicial oversight of whether the approach is working and a willingness to put a stop to it if not.

As for whether ethnic integration could be achieved without racial classifications and whether there are other ways to equalize educational opportunities for minorities, given the sensitivity of ethnic classifications there is reason for the Court to require school districts to consider other possibilities and justify its rejection of them. This is the approach of Justice Kennedy’s opinion in Parents Involved, which supported the right of school districts to combat de facto segregation but concurred with the result on the ground that racial classifications can only be used as a “last resort” and that the districts failed to show that there was “no other way” to achieve the objective than through race-based assignment practices. I find Justice Kennedy’s approach overly strict because of the difficulty of satisfying the “no other way” standard. For me, the strictness of the inquiry should depend on the suspiciousness of the circumstances and the strength of the evidence backing the viability of the districts’ race-based approaches and of other alternatives.

Four possible alternatives seem worth mentioning here. One is to assign students to schools randomly, which in most instances should yield ethnic percentages in every school close to the ethnic breakdown in the district. However, this approach would likely be highly unpopular and inefficient because very few would get their first choice school and most would likely have to travel substantial distances to school. Second, is to spend

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137 Parents Involved, 551 U.S. at 788 (Kennedy, J., concurring in part and concurring in the judgment). (“The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of de facto resegregation in schooling. I cannot endorse that conclusion. To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.”).

138 Id. at 789, 790.
more money in predominantly minority and lower income schools. In general, however, the evidence suggests that while money matters, non-school factors like class and neighborhood environment detract from the ability to improve performance in such schools. Moreover, it would seem politically difficult to pour more money into minority and lower income schools than is spent elsewhere. Third, is a magnet school approach that sprinkles schools with specialized programs throughout the district as a way of inducing students to leave their homogeneous neighborhoods for schools located in areas where other ethnicities predominate. The magnet approach has had some, although generally limited, success in integrating schools. In fact, both school districts in Parents Involved had magnet school plans that still left substantial racial imbalance in their schools. Fourth, are class-based assignment practices, which are likely to be more acceptable to the Court since it does not view most class distinctions as suspect. Due to the overlap in this society between race and class, assigning students to schools based on their class status might achieve racial as well as class integration and seems to have had

139 See supra note 89.
140 See, e.g., Erica Frankenberg & Genevieve Siegel-Hawley, UCLA Civil Rights Project, The Forgotten Choice? Rethinking Magnet Schools in a Changing Landscape (2008) at http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/the-forgotten-choice-rethinking-magnet-schools-in-a-changing-landscape/frankenberg-forgotten-choice-rethinking-magnet.pdf (an analysis of the literature and a study of magnet schools; finding that magnet schools, originally developed as parts of desegregation plans as an alternative to forced busing and as a response to white flight, have had some success in achieving integration particularly in the early years when more attention was paid to policies designed to promote integration but decreasingly so in recent years as the goals have changed and with competition from charter schools; and arguing in the wake of Parents Involved that properly designed magnet programs still have potential for achieving racial diversity and equalizing educational opportunities for minorities).
141 Parents Involved, 551 U.S. at 816-819, 851.
142 San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 25 (1973) (declining to declare wealth a suspect class in the school financing context per “the absence of any evidence that the financing system discriminates against any definable category of ‘poor’ people or that it results in the absolute deprivation of education”).
some success in doing so in places where it has been tried. Moreover, much of the supportive evidence suggests that minority performance improves most when racial and class integration go together. So even when allowing race-based approaches, there may be reason for courts to encourage school districts to take class into account as well, although in some generally poorer locales this may not be viable. An additional reason to encourage class integration is that it will benefit lower income white students, who are also entitled per equitable sharing to an equal educational opportunity.

Whether such alternatives were viable in Parents Involved is difficult to say absent more evidence. Had the Court been more willing to acknowledge the lack and importance of equal educational opportunity for ethnic minorities and lower income people, it could have withheld a final decision on the acceptability of the districts’ plans until they considered other alternatives or presented more evidence about alternatives they had tried or considered. As long as the Court did not impose a decision making process so cumbersome and a burden of proof so high as to effectively thwart the districts’ ability to address an issue of such magnitude, then I would say it could play a positive role in assisting the districts to design their programs in the fairest possible way and in keeping with what I have argued here is the Court’s proper role in promoting equitable sharing.

Finally, there is the question of the hardships that the use of racial distinctions causes. This is a relevant consideration so as to ensure that in promoting equitable

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144 See supra note 134.
sharing for some the government does not undermine what equitable sharing requires for others. Some hardships may be unavoidable in the educational process as school authorities attempt to equalize educational opportunities for all. As long as the hardships are not overly harsh and are equitably shared to the extent feasible, equitable sharing is satisfied.

Here the contrast between the race-based assignment plans struck down in *Parents Involved* and the use of race in the admissions process in higher education upheld in *Grutter* is interesting because the hardship in *Grutter* seems greater than in *Parents Involved*. Because there are a limited number of seats in higher education, those who are not admitted as a consequence of the use of race lose out entirely at that institution and possibly altogether if they can’t get in elsewhere, whereas in *Parents Involved* every student gets to go to school in the district although some get bumped from their preferred school due to the use of race.

In *Parents Involved* the Court attempted to distinguish *Grutter* in part on the ground that under the race-based assignment plans “when race come into play, it is decisive by itself.” But race actually operates similarly in both cases. In the admissions process in *Grutter*, if a minority applicant and a non-minority applicant are otherwise equally credentialed and the minority is admitted because the racial diversity factor tilts the scale in his or her favor, then in that instance race is the decisive factor. The fact that the use of the racial factor results in more minority admittees than if race were not a factor means that in each of those instances race was ultimately the decisive

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145 *Grutter v. Bollinger*, 539 U.S. 306, 333–43 (2003) (allowing race to be used as a factor in law school admissions process for purpose of achieving diversity provided quotas are not used, all applicants are judged on their overall merits, and other diversity factors in addition to race are also considered).

146 *Parents Involved*, 551 U.S. at 723.
factor and it always operates against the non-minority applicants who would have been admitted if race were not considered. On the other hand, since diversity factors other than race are also considered, there may be times when a non-minority applicant is admitted over an otherwise equally credentialed minority based on those other factors.\footnote{\textit{Grutter}, 539 U.S. at 338 (“[T]he Law School actually gives substantial weight to diversity factors besides race. The Law School frequently accepts nonminority applicants with grades and test scores lower than underrepresented minority applicants (and other nonminority applicants) who are rejected. . . . This shows that the Law School seriously weighs many other diversity factors besides race that can make a real and dispositive difference for nonminority applicants as well.”).} Under the assignment plans in \textit{Parents Involved} students select the schools they wish to attend in order of preference. Race is only taken into account when the selection process yields racially imbalanced schools, such that race is not used at all to assign students to school if self selection produces racial balance. If based on students’ first preferences a school would have too many non-minority students, then some non-minority students are assigned to racially balanced schools of lesser preference or possibly not preferred at all; and vice versa for minority students whose first preference is for schools with too many minorities.\footnote{Presumably the selection of students to be assigned to schools of lower preference in order to achieve diversity was done randomly, although the record is not clear. If not done randomly, then Court superintendence of the selection process would be warranted to ensure it is done fairly.} Race is the decisive factor, but sometimes it operates against minorities and sometimes against non-minorities.

A principle objection of the plaintiffs to the assignment plans in \textit{Parents Involved} was that their children were assigned to other than their neighborhood schools, which they preferred because of convenience and because they felt their children would receive a better education there.\footnote{\textit{Parents Involved}, 551 U.S. at 717-18; \textit{Parents Involved} in Community Schools web site at http://piics.org.} There may well be some detriments in having to attend a school some distance from one’s home, such as less time to do homework or participate...
in extracurricular activities and less opportunity for parental involvement in the school. However, it may be possible to ameliorate these detriments, and courts should insist that school authorities consider ameliorative measures and adopt them where feasible. For example, some types of learning activities can take place during bus rides to and from school. Or students assigned to a non-preferred school could be given priority in transferring to a preferred school when openings are available and the transfer would not detract from the integration plan. Or assignments for the purpose of achieving integration could be rotated periodically so that as many students as possible have to attend other than their preferred school for a time. The less severe the hardships and the more they are shared, the less problematic the integration plans are in terms of equitable sharing. But because the plurality in Parents Involved was unreceptive to integration plans to combat de facto segregation, it is difficult to assess the extent of the hardship or the availability of ameliorative measures.

In Parents Involved, one student assigned to other than the preferred school had a disability, and the parents claimed that the non-preferred school’s program was not as responsive to the student’s needs as at the preferred school. 150 If that were true, then there is a problem with equitable sharing. However, the problem is not with the integration plan as such, but with the failure of the school authorities to ensure that students with disabilities receive comparable educational opportunities at whatever school to which they are assigned. 151 At times it may be more effective to have special schools for

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150 Parents Involved, 551 U.S. at 713-14.
151 The Education for All Handicapped Children Act of 1975 (now titled the Individuals with Disabilities in Education Act) requires “free appropriate education” and “full educational opportunity” for children with disabilities and an “individualized education program” geared to the “unique needs” of each child. 20 U.S.C. §§ 1412(1), 1412(2), 1414(d) (2009).
students with special needs, in which case those students may have to endure the hardship of not being able to attend a school close to their homes so that school authorities can comply with the requirement of equitable sharing. That racial integration is not the only context in which hardships are present lends further support to equitably tailored integration plans.

None of the plaintiffs in *Parents Involved* objected to integrated education as such. In fact, the data tends to show that while integration can benefit disadvantaged minorities educationally, especially when race and class integration are combined, it does not detract from the educational performance of the generally more privileged white majority. If integration plans did benefit minorities to the detriment of whites, this would make the situation more problematic in terms of equitable sharing but would not necessarily be fatal to the plans. Per equitable sharing all students are entitled to comparable educational opportunities. If structural factors make it difficult or impossible to provide comparable educational opportunities for the disadvantaged without integrative measures, then not to engage in them might perpetuate inequality of opportunity in violation of equitable sharing. At best, in light of the fact that white children generally come from better off and better educated families than minorities and that family background seems to be a highly important determinant of educational performance, integrative measures are likely to narrow but not eliminate the

152 See supra note 134.
153 See, e.g., KAHLENBERG, supra note 89; Cecilia Elena Rouse & Lisa Barrow, *U.S. Elementary and Secondary Schools: Equalizing Opportunity or Replicating the Status Quo? 16 OPPORTUNITY IN AMERICA* 99, 100, 104 (2006) at http://futureofchildren.org/futureofchildren/publications/docs/16_02_06.pdf (concluding that “a U.S. child’s educational attainment is strongly linked to his or her family background,” and that “[o]verall, the evidence suggests that parental socioeconomic status has a causal effect on children’s educational outcomes”).
performance gap between minorities and whites. Moreover, in light of evidence that integration tends to improve inter-ethnic relationships, particularly in controlled settings like schools, there are potential non-book learning benefits of an integrated educational experience for all students and for society at large.

In sum, the integration plans in Parents Involved seem to be on firmer ground than the Court was willing to acknowledge. Had it been more understanding of the centrality of equal educational opportunity to equitable sharing, and of the lack of equal educational opportunity for ethnic minorities living in predominantly minority areas disproportionately affected by poverty and associated social problems, it could have played a more positive role in ensuring that the plans were well designed to achieve their goals and in keeping with equitable sharing. As a society we have not yet figured out how best to assure equal educational opportunity for our disadvantaged fellow members. Some experimentation is needed, integration plans may or may not prove to be the most effective approach, and other school districts may wish to try other approaches. If the Court is not prepared to address head on the inequalities resulting from de facto

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154 See, e.g., GROUPS IN CONTACT: THE PSYCHOLOGY OF DESEGREGATION (N. Miller & M. Brewer, eds. 1984) (a series of studies evaluating the conditions under which the “contact hypothesis” holds true, and identifying as particularly important contact under egalitarian circumstances that minimize preexisting status differentials and enable cooperative behavior involving mutual interdependence and intimate interpersonal associations); Linda R. Tropp & Mary A. Prenevost, The Role of Intergroup Contact in Predicting Children’s Interethnic Attitudes in INTERGROUP ATTITUDES AND RELATIONS IN CHILDHOOD THROUGH ADULTHOOD 236, 239 (S. Levy & M. Killen, eds. 2008) (concluding, based on a meta-analysis of other studies, that “school contact between youth from different groups corresponds with more positive intergroup attitudes”).

155 For example, in light of dissatisfaction with the integrationist ideal and the failure of public schools to respond to the needs of minority children, some have touted the benefits of Afro-centric education for black children. See, e.g., Eleanor Brown, Black Like Me? “Gangsta” Culture, Clarence Thomas, and Afrocentric Academies, 75 N.Y.U. L. REV. 308 (2000); Kevin D. Brown, Reexamination of the Benefit of Publicly Funded Private Education for African-American Students in a Post-Desegregation Era, 36 IND. L. REV. 477 (2003). A full analysis of the compatibility of Afro-centric schools with equitable sharing is beyond the scope of this article. Relevant factors include whether attendance at the schools is voluntary or mandatory, whether whites and other minorities are allowed to attend, whether there is evidence supportive of the educational benefits of the approach as compared with other color-blind approaches.
segregation, it should not stand in the way of good faith attempts of school authorities to do so.

C. Regulating the Electoral Process

In Citizens United v. Federal Election Commission,\(^{156}\) the Supreme Court struck down a federal statute prohibiting corporations and unions from using general treasury funds to make broadcast, cable or satellite communications referring to candidates for federal office within 30 days prior to a primary and 60 days prior to a general election. In Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett,\(^{157}\) the Court struck down a state public financing statute that increased the funding of publicly financed candidates to match the funds raised by or spent on their privately financed opponents. These cases relate to the question of the extent to which the freedom of speech limits the ability of legislatures to regulate the electoral process. This question in turn relates to a still broader question of what equitable sharing means in the context of people’s participation in the political process.

Equitable sharing requires that all society’s members have the right to share equitably in the benefits of social life. One of those benefits is the right to participate in governance. Governance, and the political process through which governance occurs, is central to social life. It establishes the rules of permissible and impermissible conduct that govern the right to live one’s life as one sees fit as long as one does not injure others. It establishes the rules of the game for providing and distributing the goods and services, i.e., the social product, in which all have a right to equitably share. Governance is so

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\(^{156}\) 130 S.Ct. 876 (2010).
\(^{157}\) 131 S.Ct. 2806 (2011).
central to social life that in principle all must have a right to participate in it and in the political process on equal terms and with comparable political power.

Realistically, though, comparable political power is a practical impossibility. First, it is difficult to define what comparable political power means and to determine when it is imbalanced. Suppose, for example, the only feasible way most people can exercise political power is through their votes and that a one-person one-vote system is in place. From an individualistic or input perspective, since everyone’s vote counts the same, it could be said that everyone has equal political power. From a collective or outcome perspective, however, to the extent that a majority can impose its will on the minority, it could be said to have greater political power, and especially so in the case of an entrenched majority that continually wins elections and favors itself over the minority once in office.

Second, some inequality in political power is inevitable. To the extent that there are wealth inequalities, those with more money will likely have disproportionate power, disproportionate ability to present their views and influence public opinion and public officials. Even with equal wealth, some may have disproportionate political power because they are more willing to spend their money on and to participate in politics or because they are more able to pool their resources and organize political movements with those of like views. Apart from money, people in leadership positions or otherwise in the spotlight are likely to attract more media attention and thereby have disproportionate ability to influence. Apart from all else, someone with ideas that resonate with others and with unique ability to communicate is likely to have disproportionate influence.
Since imbalances in political power are likely to produce deviations from equitable sharing in all aspects of social life, means of ameliorating these imbalances are necessary. One means is to rely on the various imbalances in political power to counteract each other. For example, working class people might use their greater numbers to organize mass movements to counteract the disproportionate power of moneyed interests. The union movement is an example, although it has declined over the past generation and moneyed interests are trying to use their political power to further weaken unions. There are other ways for workers to organize, as through the creation of a workers’ party or by using their numbers to move one of the major parties to focus more on the interests of workers, although divisions within the working class and the increasing power of moneyed interests due to increasing wealth inequalities have hindered such efforts. Ultimately, however, due to the legal and practical limitations

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158 See David Card et al., *Unionization and Wage Inequality: A Comparative Study of the U.S., the U.K., and Canada* Table 1 (2003), at http://www2.arts.ubc.ca/cresp/dunion.pdf (showing union membership at 30.4% in 1960); Bureau of Labor Statistics, *Union affiliation of employed wage and salary workers by selected characteristics*, at http://www.bls.gov/news.release/union2.t01.htm (showing union membership in 2010 at 11.9%).


160 See, e.g., ROBIN ARCHER, *WHY IS THERE NO LABOR PARTY IN THE UNITED STATES?* (2007) (rejecting as explanations for the absence of a successful labor party in the United States such commonly cited factors as the structure of the electoral process, racial and anti-immigrant hostility within the working class, and the society’s egotistical and individualistic ideologies, and attributing it instead to political and judicial repression of the union movement, the failure of efforts to unionize unskilled and semi-skilled workers, and fear among union leaders that attempting to organize a labor party might cause dissension within the union movement along religious and ideological lines); ERIC THOMAS CHESTER, *TRUE MISSION: SOCIALISTS AND THE LABOR PARTY IN THE U.S.* (2004) (concluding that a viable labor party is unlikely in the United States due to the weakness of the trade union movement and the tendency of unions to focus on short-run
of other ameliorative measures, I would say that mass movements of the disempowered will be necessary to equalize political power. ¹⁶¹

A second means of ameliorating power imbalances is for elected officials to recognize the duty that the requirement of equitable sharing imposes on them to represent all their constituents and to promote equitable sharing. However, it is difficult to create such a culture when officials feel beholden to their supporters for having put them in office, in order to help them win reelection, and because of the perks their supporters provide them. A third means is for the judiciary to check the political process when it wanders from equitable sharing. I argue here that the judiciary has a duty to play such a role, but as noted its ability to do so is constrained by its ties to the political process. A fourth means is for the legislature to adopt measures that equalize political power, measures that limit the power of the overly empowered and enhance the power of the less empowered. The statutes in *Citizens United* and *Arizona Free Enterprise Club* arguably do so, the former by curtailing the voice of overly empowered corporations and the latter by enhancing the voice of less empowered candidates, although as we shall see shortly the Court has rejected equalizing political power as a legitimate justification to infringe free speech.

When the legislature regulates political power, and especially when it impacts political speech, the Court has a responsibility to protect against the legislature’s overreaching, against the legislature’s acting so as undermine the equitable sharing of political power. When one party controls the legislature, it may have an incentive to

¹⁶¹ See Kleven, *supra* note 66, at 238-51 (discussing the need for and possibilities of such a mass movement).
enhance its power as against other parties, as by gerrymandering electoral districts so as to win a disproportionate number of seats relative to its share of the overall vote or by impeding the ability to vote of those likely to vote for other parties. In a two-party system as in the United States, the dominant parties may have an incentive to limit the ability of other parties to challenge their dominance, as by designing the electoral system to make it difficult for other parties to participate in the process or gain seats in the legislature. On the other hand, legislatures may have an incentive to promote the equitable sharing of political power. For example, when it is virtually impossible to win elections without raising large amounts of money and becoming beholden to moneyed interests, legislators who want to govern impartially may be willing to adopt measures

162 See Vieth v. Jubelirer, 541 U.S. 267 (2004) (declining to intervene in political gerrymandering cases). Justice Scalia’s plurality opinion, joined by three others, would hold such cases to be nonjusticiable political questions on the ground that they are not susceptible to judicially manageable standards of review. 541 U.S. at 270. This deferential approach to the legislature’s management of the political process contrasts sharply with the Court’s more interventionist approach in Citizens United and Arizona Free Enterprise Club. And it seems inconsistent with equitable sharing, which would require impartiality in drawing district lines so as to prevent a majority party from manipulating the lines to attain disproportionate power in the legislature or to maintain itself in power when it no longer has the support of a majority of the public.

163 See, e.g., Pam Fessler, NPR, The Politics Behind New Voter ID Laws (July 18, 2001) at http://www.npr.org/2011/07/18/138160440/the-politics-behind-new-voter-id-laws (discussing the efforts of a number of states to enact voter ID and other laws whose opponents charge are designed to impede the ability to vote of groups who tend to support Democrats, i.e., minorities, the poor, students, and the disabled; Sarah Jaffe, AlterNet, 11States Trying Really Hard to Keep Poor, Black, and Student Voters From Voting (July 18, 2011) at http://www.alternet.org/story/151687/11_states_trying_really_hard_to_keepPoor%2C_black%2C_and_student_voters_from_voting/?page=entire (contending that efforts to alter voting laws in a number of mostly Republican states are designed to make it more difficult for groups that normally support Democrats to vote).

164 For example, the districting system that prevails in the United States makes it more difficult for third parties to gain representation than would a system of proportional representation. This fact creates an incentive for the major parties to maintain the districting system, whatever the relative merits of the two systems may be. See, e.g., ROBERT A. DAHLL, DEMOCRACY AND ITS CRITICS 156-60 (1989) (noting the fragmented character of political parties in the U.S. and the argument that districting favors two-party and proportional representation multiparty systems, although also noting Britain’s three-party districting system as a counterexample); DAVID M. FARRELL, ELECTORAL SYSTEMS: A COMPARATIVE INTRODUCTION 161-65 (2001) (concluding, based on an analysis of electoral systems throughout the world, that single-member districts tend toward two-party systems and that proportional representation tends toward multi-party systems). And depending on how it is designed, the public financing of elections could either facilitate third parties or favor the dominant ones. See infra notes 187 & 191, and accompanying text.
that limit the ability of moneyed interests to overly influence the electoral and law making processes. Examples are the regulation of lobbying\(^{165}\) and, arguably, the statutes involved in *Citizens United* and *Arizona Free Enterprise Club*.

Since the opportunity to speak is central to exercising political power, there is reason for the Court to be wary of and to carefully scrutinize limits on political speech. An initial question in *Citizens United* and *Arizona Free Enterprise Club* is the relationship between speech and money. In neither case is the content of speech regulated but rather the means of speaking. Money is not speech but it facilitates speech. As a practical matter, therefore, limiting how much one can spend in order to speak does inhibit speech. Unless one’s voice can be heard there is little point to engaging in speech, and ordinarily with political speech the more people one can reach the better. To allow the legislature to institute whatever spending restrictions it wants would enable it to severely undermine political speech, particularly in a system like the United States that relies heavily on private money in the political process.\(^{166}\) On the other hand, to prohibit the legislature from ever restricting spending might so empower moneyed interests as to undermine the equitable sharing of political power. If it is to help promote equitable

\(^{165}\) See, e.g., Anita S. Krishnakumar, *Towards a Madisonian, Interest-Group-Based Approach to Lobbying*, 58 Ala. L. Rev. 513 (2007) (arguing that Congress has consistently failed to enact effective lobbying reform by making lobbyists rather than public officials the focal point of regulation, and advocating expanding disclosure requirements to include legislative and executive officials and facilitating interest group policing of competitors through fuller disclosure requirements of lobbying activities and structures); William J. Luneberg & Thomas M. Susman, *Lobbying Disclosure: A Recipe for Reform*, 33 J. LEGISLATION 32 (2006) (advocating reforms of existing lobbying regulations to increase the collection of usable data, strengthen enforcement mechanisms, and improve mechanisms for making information more available to the public).

\(^{166}\) In light of the great wealth inequalities in the United States, it could be argued that reliance on private money in the electoral process violates equitable sharing by advantaging those with much money over those with little, and consequently that equitable sharing requires a system of mandatory and exclusive public financing of elections. Such a system would undoubtedly be held unconstitutional today as a violation of freedom of speech. While I think the issue debatable, it is beyond the scope of this article and I do not discuss it.
sharing, the Court’s task is to identify which spending restrictions equalize political power and which create imbalances.

Under the statute at issue in *Citizens United* corporations and unions are generally free to speak in support of or against candidates at all times and in any manner, except that they are prohibited from using general treasury funds to speak through certain broadcast media in a specified period prior to an election. An initial question here is whether artificial entities like corporations and unions have free speech rights at all, or only people. Once a society decides to allow corporations and unions to exist as separate entities, it must treat them as persons for some purposes because they are surrogates for real people. If corporations and unions can be charged with and fined for committing crimes, then they must be accorded due process of law since whatever fines they pay come out of the pockets of real people who are entitled to due process.

This does not necessarily mean that corporations and unions must have all the rights of real people. To deny free speech rights to them would not deny the free speech rights of their surrogates, but it might severely undermine them. Engaging in certain forms of speech, like advertising in the major media, is beyond the means of many individuals whose opportunity to speak could be enhanced by pooling their money so that they can afford access to expensive means of communication. Corporations and unions can be an effective way to pool resources, and at times can serve to equalize the opportunity to speak. The workers for whom unions speak and the disempowered for whom other organizations speak might have little opportunity to be heard if those entities could not speak on behalf of their supporters. If they were prohibited from speaking, while individuals were allowed to speak and to spend freely to speak, that might greatly
favor the ability of moneyed interests to get their point across. So there is an argument that free speech rights for corporations and unions can under some circumstances equalize the opportunity to speak. However, once artificial entities can speak, moneyed interests can also use them to enhance their speech and may be more effective in doing so than when such entities are used to speak on behalf of non-moneyed interests. This is not to say that moneyed interests are monolithic in their interests. Frequently moneyed interests are on both sides of issues, as evidenced by the support moneyed interests give to both the Republican and Democratic parties. Nevertheless, there is one interest that moneyed interests would seem to have in common, and are likely to promote when possible through their ability to speak individually and through artificial entities, namely the preservation of a system that makes it possible to amass wealth in the hands of a few.

Consequently, it seems difficult to say in the abstract whether allowing artificial entities to engage in political speech equalizes the opportunity to speak. And it seems difficult to assess in practice whether the speech of artificial entities is having an equalizing effect or quite the opposite. However, the possibility that such speech might cause severe imbalances in political power may justify attempts to regulate it in ways that on balance promote the equitable sharing of political power. In superintending such regulations, the Court should attempt to evaluate their impact or potential impact on political power. When the legislative purpose seems to be to equalize political power rather than to advance the interests of one or both major parties or of incumbents, the legislation warrants greater deference, and vice versa. When the effect of a regulation

seems to be to create imbalances in political power, there may be reason to suspect a nefarious purpose or that the legislature has misjudged the likely impact. However, in light of the difficulty of discerning the impact in advance or even in practice, the Court should be willing to allow experimentation with what seem to be good faith attempts to equalize political power, although it should be prepared to intervene when evidence mounts that a regulation is not working or is having a perverse effect.

However, the Court has been unwilling to accept the equalization of political power as such, or what it has called the “leveling of the playing field,” as a legitimate objective when free speech is at stake. On the other hand, the Court has accepted as a valid reason to limit speech the prevention of corruption or the appearance of corruption, which, since corruption distorts the political process, is actually a means of equalizing political power. Following the invalidation in Citizens United of the limit on corporate and union expenditures, the status of the law is that limits on direct contributions to candidates are valid per the anti-corruption rationale, while limits on independent expenditures on behalf of candidates are invalid on the ground that the potential for corruption is minimized when there is no direct interaction with the candidate.

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168 Arizona Free Enterprise Club, 131 S.Ct. at 2825 (“We have repeatedly rejected the argument that the government has a compelling state interest in ‘leveling the playing field’ that can justify undue burdens on political speech”); Buckley v. Valeo, 424 U.S. 1, 17 (1976) (holding that the aim of “equalizing the relative ability of all voters to affect electoral outcomes” is insufficient to justify limits on campaign expenditures).  
169 Buckley v. Valeo, 424 U.S. 1, 26-29, 45-48, 51-53 (1976) (upholding limits on campaign contributions for the purpose of preventing corruption or the appearance of corruption, but holding that purpose insufficient to support expenditure limits by or on behalf of candidates).  
170 Buckley, 424 U.S. at 47 (“The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate”); Citizens United, 130 S.Ct. at 908, 910 (“Limits on independent expenditures . . . have a chilling effect extending well beyond the Government’s interest in preventing quid pro quo corruption . . . .
corruption could surely think otherwise. Not only is it difficult to police the interaction with the candidate, but tacit understandings with no interaction at all readily flow from a candidate’s awareness that independent expenditures are likely to dry up fast if he or she does not respond to the supporter’s interests once in office.\textsuperscript{171} Since such tacit understandings are virtually impossible to prove, a reasonable legislator might well think that prophylactic measures are needed to prevent them. Moreover, it seems doubtful that even the appearance of corruption is less with independent expenditures than direct contributions. It seems unlikely that the average viewer of an ad promoting someone’s candidacy pays much attention to who produced the ad. And it seems likely that the average person would be quite skeptical of the claim that the makers of independent expenditures don’t somehow coordinate their activities with candidates.

In \textit{Citizens United}, the Court rejected as a justification for the ban on expenditures the anti-distortion rationale supporting earlier rulings, but overruled in \textit{Citizens United},\textsuperscript{172} that permitted expenditure limitations as applied in particular to business corporations on the ground that those entities are able to amass enormous wealth that could be used to obtain an unfair advantage in the political and law making processes.\textsuperscript{173} The anti-

\textsuperscript{171} \textit{See} \textit{Citizens United}, 130 S.Ct. at 961, 964 (Kagan, J., dissenting) (“Corruption operates along a spectrum, and the majority’s apparent belief that quid pro quo arrangements can be neatly demarcated from other improper influences does not accord with the theory or reality of politics. . . . [W]e have never suggested that such quid pro quo debts must take the form of outright vote buying or bribes, which have long been distinct crimes. Rather, they encompass the myriad ways in which outside parties may induce an officeholder to confer a legislative benefit in direct response to, or anticipation of, some outlay of money the parties have made or will make on behalf of the officeholder.”).


\textsuperscript{173} \textit{Austin}, 494 U.S. 652, 660 (upholding ban on corporate expenditures supporting or opposing candidates in order to prevent “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas”).
distortion rationale actually follows from equitable sharing, so in rejecting it the Court rejected equitable sharing. Had the Court been willing to analyze the ban in terms of equitable sharing, some of the hypothetical concerns it raises about the ban seem well taken. For one, media corporations, including those owned by business corporations subject to the ban, are exempt from the ban, thereby giving those entities a voice that is denied others.174 For another, the ban does not apply to individual expenditures, thereby potentially giving wealthy individuals an advantage in voicing their views over corporations and unions that might have contrary views.175 For yet another, the ban applies to entities that have not amassed the great wealth of the giant corporations and may be surrogates for those who do not have sufficient resources individually to effectively speak,176 while the interests promoted by wealthy business corporations may have other avenues to express themselves (such as the wealthy individuals they represent and independent political action committees) not subject to the ban.177

In part, these discrepancies in the statute result from the Court’s prior unwillingness to allow restraints on individual expenditures, which in turn results from its rejection of equitable sharing. Because it rejects equitable sharing, its solution to the

174 Citizens United, 130 S.Ct. at 906.
175 Id. at 908.
176 Id.
177 Id. at 897. Although in striking down the ban as to both corporations and unions Citizens United appears on its face to treat them equally, in fact federal law as a whole now favors corporations over unions in that unions are barred from using the dues of dissenting members to politic while corporations may use funds belonging to dissenting shareholders. See, e.g., Benjamin L. Sachs, Unions, Corporations, and Political Opt-Out Rights after Citizens United, 112 COLUM. L. REV. ___ (2012) (arguing that this discrepancy would justify a Supreme Court ruling barring the unequal treatment or a statute similarly restricting the corporate use of dissenting shareholders funds to politic). It is hard to reconcile this discrepancy with equitable sharing. Even, perhaps especially, to one who rejects equitable sharing and the legitimacy of legislative efforts to level the playing field, legislation that tilts the playing field in favor of those with disproportionate political power should be anathema. Since if anything the Court’s decision in Citizens United exacerbates the discrepancy by extending the period of time during which corporations have this advantage over unions, it should in dicta have noted that the discrepancy cannot continue.
possible unfairness of banning corporate but not individual expenditures is to disallow bans on both. This ignores the other possibility, which equitable sharing might permit, of allowing appropriately tailored bans on both. If the Court were willing, as it should be, to adopt equitable sharing as a guiding principle for evaluating regulations of the political and law making processes, then it could have engaged in the intensive analysis of the operation of the ban and its seeming discrepancies that equitable sharing warrants, demanding and evaluating evidence from the legislature regarding the need for and effect of the ban and assisting the legislature to design the ban to comport with equitable sharing. In sum, while I think a strong case exists for somehow limiting the ability of moneyed interests to disproportionately impact the political and law making processes, due to the Court’s rejection of equitable sharing I do not think the record in *Citizens United* is adequate to fully evaluate the merits of the expenditure ban.

In striking down the public financing plan in *Arizona Free Enterprise Club*, the Court engaged in a similar analysis as in *Citizens United*. An initial question in *Arizona Free Enterprise Club* is whether the plan limits the free speech rights of privately financed candidates or their independent supporters. On its face it does not, rather it enhances the voice of publicly funded candidates by increasing their initial funding to match the funds raised and spent by or on behalf of privately funded candidates. Nevertheless the Court found that the free speech rights of privately funded candidates and their supporters were implicated because the impact of the plan might be to discourage them from raising and spending money to speak per the knowledge that their efforts might be negated through the matching funds provided to publicly funded
candidates. Even if this is accurate, it would not in itself pose a problem for equitable sharing if the impact of the plan were to equalize the competition for elective office. But it is a problem for the Court because as in *Citizens United* it rejects equalizing the ability of candidates to speak, which it found to be the primary objective of the matching fund approach, as a valid objective of public financing plans.\footnote{Id. at 2825-26.}

The Court has accepted the prevention of corruption and the undue influence of large private contributions as a valid objective of voluntary public finance plans.\footnote{Id. at 2824.} But since it has not viewed candidates’ expenditures of their own money or independent expenditures on behalf of candidates as sufficiently raising the specter of corruption to justify regulating them, it found the matching fund approach to be a penalty on the protected speech of privately funded candidates and their independent supporters and, therefore, an improper means of encouraging candidates to accept public funding.\footnote{Buckley v. Valeo, 424 U.S. 1, 85-109 (1976) (upholding public financing of Presidential elections).} On the other hand, the Court would have allowed fixed payments to participating candidates equal to the maximum that can be obtained under the matching fund approach on the ground that fixed payments don’t deter speech since they are not made in response to the activities of privately funded candidates and their supporters.\footnote{Id. at 2818-21, 2826-28.} But generous fixed payments in an effort to induce candidates to accept public financing might well deter

\footnote{Arizona Free Enterprise Club, 131 S.Ct. at 2822, 2823 (“The record . . . includes examples of independent expenditure groups deciding not to speak in opposition to a candidate, . . . or in support of a candidate, . . . to avoid triggering matching funds . . . In any event, the burden imposed by the matching funds provision is evident and inherent in the choice that confronts privately financed candidates and independent expenditure groups. . . . [W]e do not need empirical evidence to determine that the law at issue is burdensome.”).}
speech as well, for example by discouraging candidates opposed to public financing from running if they do not feel able to raise enough money to be competitive.

The disallowance of matching funds in Arizona Free Enterprise Club makes it difficult for legislatures to design effective public financing plans, whether the objective is equalization for its own sake or to induce candidates to accept public financing as a way to combat corruption. Whether public financing is a viable way to improve the electoral process is an open question. In order to find out, experimentation with and the evaluation of various approaches is needed. If the Court would acknowledge the equalization of political power as well as the prevention of corruption as valid objectives, it could then play a valuable role in helping to ensure that public financing plans and other regulations of the electoral and political processes are well designed to achieve those objectives.

In a society with great wealth inequalities like the United States, a privatized system of financing elections favors moneyed interests, those who can finance their own campaigns or spend large amounts of money in support of particular candidates or parties. Money doesn’t guarantee success, but money matters, and politicians and participants in the electoral process think it matters, as evidenced by the spiraling cost of elections and the time and effort devoted to raising money.\(^{183}\) It is possible to raise significant funds through small grass-roots contributions, but to do so ordinarily demands an already well funded organization such that moneyed interests and those already in

power have an advantage here as well. Consequently, privatized financing tends to favor incumbents and the two major parties, both of whom rely heavily on moneyed interests. It is difficult for candidates or parties representing the less well off or advocating non-traditional ideas to compete successfully in the electoral process.\footnote{The Tea Party and the Green Party have been the most prominent third parties in recent times, while notably absent from the political scene in the United States is a viable Socialist or Labor Party. The Tea Party has been most successful at the federal level, but although it has a strong grassroots flavor, it also receives substantial funding from moneyed interests. See Members of the Tea Party Caucus at http://bachmann.house.gov/News/DocumentSingle.aspx?DocumentID=226594 (reporting that as of July 12, 2011 there were 50 members of the Tea Party Caucus in Congress); Bruce Drake, Politics Daily, The New House Tea Party Caucus: Where Its Members Get Campaign Cash (August 1, 2010) at http://www.politicsdaily.com/2010/08/01/the-new-house-tea-party-caucus-where-its-members-get-campaign-c-print (reporting that the largest contributors to members of the Tea Party Caucus are the real estate industry, oil and gas interests, health professionals, and retirees, and that members of the Caucus receive higher contributions from these groups than do other members of the House of Representatives); Chris Good, The Tea Party Movement: Who’s In Charge? THE ATLANTIC (Apr. 13, 2009) available at http://www.theatlantic.com/politics/archive/2009/04/the-tea-party-movement-whos-in-charge/13041 (reporting that national level conservative groups, including Freedom Works and Americans for Prosperity, are largely guiding the tea party movement); Jane Mayer, Covert Operations, THE NEW YORKER (August 30, 2010) available at http://www.newyorker.com/reporting/2010/08/30/100830fa_fact_mayer (reporting on the Koch brothers’ support of the Tea Party movement). The Green Party seems to be more of a purely grassroots movement, which may explain why its success has been mostly on the local level. See Green Party of the United States, A Brief History of the Green Party at http://www.gp.org/history.shtml (formed in 1996); Green Party of the United States, Green Officeholders at http://www.gp.org/elections/officelholders/index.php (reporting that as of August 7, 2011 there were 135 Green Party elected officials in the United States, all of them on the local government level). For analyses of why a successful working class party has not emerged in the United States, while it has in other industrialized nations, see supra note 160.}

A properly designed public financing system, although it alone cannot totally equalize political power due to the many ways in which moneyed interests can exercise their power outside the electoral process, might help ameliorate this imbalance in the electoral process and open it to candidates and parties who otherwise would have little chance.\footnote{Predictably, studies of the impact of campaign finance laws reach conflicting conclusions, partially due to the paucity of data in light of the relative newness of the laws, partially to differing approaches to evaluating the available data, and partially it seems to ideological bias. See U.S. General Accounting Office, Campaign Finance Reform: Early Experiences of Two States That Offer Full Public Funding for Political Candidates (2003) at http://www.gao.gov/new.items/d10390.pdf (a study of the 2000 and 2002 elections in Maine and Arizona, the first states to offer full public funding and both of which used the matching fund approach; candidates opting for public funding increased between the two elections with...} One potential issue relates to the eligibility for public financing. Since it is not
feasible to finance the vast number of candidates who might request it if there were no eligibility standards, there will generally be a need for some means of determining candidates’ viability. Common approaches look to the number of votes received in prior elections or the number of signatures obtained on ballot petitions. If set too high, the thresholds can squeeze out first time candidates and candidates not affiliated with a major party. In the Arizona plan, eligibility required a minimum number of five-dollar contributions from voters, ranging from 200 to a candidate for the state legislature to 4,000 for a candidate for governor. On their face these thresholds do not appear overly burdensome.

62% of candidates and 59% of electees in Maine and 49% of candidates and 36% of electees in Arizona receiving funding in 2002; the findings were inconclusive and mixed regarding the increased competitiveness of races, voter turnout, and candidate spending as compared to previous elections, although in both states independent expenditures and the number of third party or independent candidates increased; Allison R. Hayward, Goldwater Institute Policy Report, *Campaign Promises: A Six-year Review of Arizona’s Experiment with Taxpayer-financed Campaigns* (2006) at http://goldwaterinstitute.org/Common/Files/Multimedia/935.pdf (concluding that Arizona’s public funding system has largely failed based on the facts that voter turnout has not improved since the law’s adoption, that incumbency reelection rates increased in the 2004 elections, and that the number of candidates fell in the 2004 primaries, although the number of candidates in the 2004 general election for the legislature actually rose); Kenneth R. Mayer et al, *Do Public Funding Programs Enhance Electoral Competition?* in *The Marketplace of Democracy: Electoral Competition and American Politics* 245 (Michael McDonald & John Samples, eds., 2006) available at http://works.bepress.com/mayer/15 (a study of legislative elections in five states with full or partial public funding from 1990 to 2004; finding increased competitiveness in legislative races in Arizona, Maine and Minnesota in terms of greater numbers of candidates and lower rates of incumbency reelection attributable at least in part to public funding, but little impact in Hawaii and Wisconsin due to low level of public funding).

186 *Arizona Free Enterprise Club*, 131 S.Ct. at 2813.

187 In *Green Party of Connecticut v. Garfield*, 616 F.3d 213, 231-36 (2010), the court rejected a claim that the eligibility standards of Connecticut’s public funding law unfairly discriminate against candidates of minor parties or with no affiliation. Under the qualifying standard at issue a minor party candidate was eligible if the party’s candidate for the same seat in the prior election received at least 10% of the vote for partial funding up to at least 20% for full funding, and similarly for an unaffiliated candidate who personally ran in the prior election. While stating that on its face the standards “come close to the outer edge of the constitutionally impermissible range,” id. at 234, the court upheld them nevertheless based on the facts that one-third of the minor party and unaffiliated candidates qualified at least for partial funding in the most recent election and that minor parties were at least as strong under the law as under the prior privatized financing system. However, the court acknowledged that the evidence regarding the system’s operation was as yet slim, and indicated its willingness to revisit the system’s fairness in the future. Id. at 236. While as a judge I may have resolved the issue differently on the merits, the court’s approach to analyzing the issue exemplifies the approach I advocate here.
A second issue relates to the amount of the public payment. One approach is to make fixed payments to candidates in return for their agreement not to accept private contributions and not to make or to severely limit personal expenditures. But if the fixed payment is too low, candidates who can raise more than the payment privately or can afford to spend more of their own money are likely to opt out, leaving as publicly financed candidates only those who are not so well placed and might be so outspent by the privately financed candidates that they have little chance to win. A high fixed payment might induce more candidates to opt for public financing, but if it is higher than needed as an inducement it might waste resources that could be used to provide other public services. Or, conversely, high fixed payments may lead to escalating costs of elections as moneyed interests intent on outspending their rivals push expenditures ever higher. Since *Citizens United* and earlier rulings prevent controlling cost escalation by limiting privately funded candidates’ personal expenditures or independent expenditures on their behalf, legislatures must seek other means.

A possible way of addressing both the cost escalation and wasted resource problems is a matching fund approach like that struck down in *Arizona Free Enterprise Club*. Since publicly funded candidates’ subsidies increase commensurate with the increased fund raising and spending of their privately funded opponents and their independent supporters, the incentive to continue to raise and spend in order to outspend publicly funded candidates should diminish and privately funded candidates and their supporters may focus more on how much they need to do to adequately get their messages across and then stop. However, the matching fund component has a cap beyond which publicly funded candidates receive no more money even though their
privately funded candidates and supporters exceed the cap. If that happens, the plan limits publicly funded candidates’ expenditures to the amount of the cap, which could still leave privately funded candidates and their supporters with an incentive to engage in a spending war.

At least a few of the elements of Arizona’s matching fund approach raise potential concerns regarding equitable sharing. Since publicly funded candidates totally control the matching funds they receive, whereas privately funded candidates ostensibly do not control the independent supporters whose expenditures count for matching fund purposes, publicly funded candidates arguably have more control over their messages than privately funded candidates. Perhaps the system would be fairer if the matching funds were somewhat less than commensurate with what privately funded candidates and their supporters raise and spend in order to counteract the greater control publicly funded candidates may have over their messages. More troublesome, if I read the law correctly, is that the expenditures of the independent supporters of publicly funded candidates do not count in calculating matching funds, thereby leaving publicly funded candidates better off overall than privately funded candidates. This does not comport with equitable

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188 A.R.S. § 16-941A (prohibiting publicly funded candidates from spending in excess of the adjusted spending limit); A.R.S. § 16-947B.3 (prohibiting publicly funded candidates from accepting private contributions); A.R.S. § 16-952E (limiting the adjusted spending limit to the cap).

189 Except for one statewide race, this appears not to have happened in 2000 and 2002, the first years the matching fund approach was in effect. This was likely due to the level of state funding. For example, in 2000, where the initial distribution to publicly funded candidates for the State House of Representatives was about 25% higher than the average spent in the prior election with the cap being three times the initial distribution, average expenditures for all candidates was slightly higher than the initial distribution and well less than half of the cap. Campaign Finance Reform, supra note 185, at 53, 54 fig. 15. In one statewide race in 2002 a privately funded candidate and supporters spent almost six times the publicly funded candidate. Id. at 58 tbl. 12.

190 See Arizona Free Enterprise Club, 131 S.Ct. at 2819 (“[S]tate money would go directly to the publicly funded candidate to use as he saw fit. That disparity in control—giving money directly to a publicly financed candidate, in response to independent expenditures that cannot be coordinated with the privately funded candidate—is a substantial advantage for the publicly funded candidate.”).
sharing, and the Court would have been on strong ground in insisting that publicly funded candidates’ matching funds be reduced by the amounts expended by their independent supporters just as privately funded candidates get charged with their supporters’ expenditures. Finally, there is reason to inquire as to the impact of the matching fund formula on non-qualifying candidates. If the initial distribution is too high, for example, if it exceeds the amounts likely to be raised and spent absent public funding, then arguably the system strengthens major candidates and parties as against minor ones.\textsuperscript{191} If so, that would violate equitable sharing and the Court should not allow it. But the Court never reached these questions in \textit{Arizona Free Enterprise Club} because of its unwillingness to accept equitable sharing.

Together the decisions in \textit{Citizens United} and \textit{Arizona Free Enterprise Club} greatly advantage moneyed interests in the electoral process in the name of preserving freedom of speech. This is not in keeping with the principle of equitable sharing implicit in the Constitution. Not to apply equitable sharing to freedom of speech entrenches inequalities in the political process and impedes the political process from rectifying inequalities in all aspects of social life. If the Supreme Court is not prepared to affirmatively promote equitable sharing, it should not stand in the way of good faith efforts of the legislature to do so.

\textbf{V. Conclusion}

\textsuperscript{191} This contention was raised in Green Party of Connecticut v. Garfield, 616 F.3d 213, 239–42 (2010). There the initial distribution was based on the average expenditures in prior elections for all seats in a particular body combined. Minor candidates and parties in districts below the average charged that the system advantaged qualifying candidates in those districts and, consequently, hurt their chances of competing successfully. The court rejected the claim on the ground that past expenditures are not necessarily indicative of what candidates would spend on current elections and that it would be overly burdensome to require that the distribution be tailored to individual districts. Since minor candidates and parties are those most in need of judicial protection, I would say this issue warrants a closer inquiry than the court gave it.
Suppose we establish a class of Platonic guardians and authorize them to decide what is best for the society; that we select the initial guardians from a cross section of those among us we deem wisest and most capable of fulfilling their responsibilities in good faith; that we empower the guardians to replace themselves with people they deem wise and responsible; and that we charge the guardians to make decisions without regard to their personal self-interest, to live modestly in relation to the society’s general level of well-being, and to subject themselves to the same standards they apply to the society at large. This would not be a democratic society because we would have disempowered future generations from deciding whether they want to be governed by Platonic guardians, although we might make it more (arguably fully) democratic by reserving to the people the power to disestablish Platonic guardianship at any time. But can there be any doubt, if the guardians were to remain true to their charge, that they would adopt something akin to a principle of equitable sharing and that the benefits and detriments of social life would be far more equally distributed than at present?

The justices on the Supreme Court are not Platonic guardians. While the Court has some independence from and some ability to confront the political process, it is ultimately subordinate to the political process. I have argued that the Constitution contains a principle of equitable sharing and that the Court’s relative independence, coupled with its ties to the political process, enable it to play a viable and valuable role in advancing equitable sharing consistent with democratic principles. Nevertheless, however activist the Court might choose to be from time to time in playing that role, it is unrealistic to expect that it will advance equitable sharing to the extent of the hypothetical Platonic guardians as long as the political process remains as imbalanced as at present in
favor of moneyed interests. This imbalance actually enhances the case for the Court’s actively promoting equitable sharing as a counterweight to the inordinate political power of moneyed interests, so as to impel the political process to address the society’s inequalities more so than it otherwise would. But, as we have seen, the Court is so tied to the political process that it is likely to be able and willing to push the political process only so far. This is why reforming the society to fully conform with the requirements of equitable sharing ultimately requires a mass movement of those disadvantaged by the inordinate power of moneyed interests.