INDIVIDUAL RIGHTS AND THE POLITICAL PROCESS: A PROPOSED FRAMEWORK FOR DEMOCRACY DEFINING CASES

walter m frank

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ABSTRACT

For more than four decades, since Baker v. Carr, the Supreme Court has been shaping our democracy in important ways. Among other things, it has approved numerous state laws directed against third parties and independent candidacies, accepted incumbent protection as a redistricting principle, ended the movement for term limits for congressional representatives, eliminated most political patronage, prohibited laws aimed at limiting campaign expenditures, and decided a presidential election. These and other democracy defining cases are often decided on the basis of First Amendment and Equal Protection arguments that do not adequately address the democratic tensions in these cases, resulting in opinions that, because they miss the critical choices the cases present, have failed to create a coherent body of law.

This article proposes that the Court should treat democracy defining cases as a discrete category applying heightened scrutiny to state and federal regulations that undermine a framework of specified procedural objectives based on the concept of the freely given consent of the governed. Part I shows why traditional methods of analysis have proved inadequate for these cases. It also describes the proposed framework itself. Part II then critically analyzes important Supreme Court cases, mostly decided over the last fifteen years, addressing issues of ballot access, voter participation in primaries, redistricting, campaign finance, term limits, and debate inclusiveness, to show why the proposed framework would have produced decisions both more pragmatic (because more concerned with practical consequences) and more principled (because based on a recognized set of procedural objectives.)
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Individual Rights and the Political Process: A Proposed Framework for Democracy
Defining Cases

Walter M. Frank

INTRODUCTION

For more than four decades now, since Baker v. Carr, the Supreme Court has molded the character of our democracy. The average citizen knows the result of Bush v. Gore and might be able to identify the “one man, one vote” principle though perhaps unaware it has effectively required every state and federal legislative district in the country to be redistricted at least once every ten years. Less known are cases in which the Court, among other things, has ratified state actions aimed at institutionalizing the collective dominance of the Democratic and Republican parties,

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1 369 U.S. 186 (1962).
4 See, among other cases, Clingman v. Beaver 544 U.S. 581 (2005) prohibiting parties from opening up their primaries to registered members of other parties; Timmons v. Twin Cities Area New Party 520 U.S. 351 (1997) upholding legislation prohibiting fusion candidacies; Storer v. Brown 415 U.S. 724 (1974) upholding legislation preventing independent candidates from appearing on the general election ballot if registered with a political party within a year of preceding primary or if they had voted in the immediately preceding primary; Jenness v. Fortson 403 U.S. 341 (1971) upholding legislation establishing signature filing requirement for an independent candidate of 5% of the total number of registered voters in the prior general election; Rosario v. Rockefeller 410 U.S. 752 (1973) upholding legislation requiring a voter to be registered with a party eight to eleven months prior to a party primary in order to vote in that primary; Munro v. Socialist Workers Party 479 U.S. 189 (1986) requiring a candidate to receive at least 1% of the
ended the movement for term limits for the U.S. House of Representatives and the U.S. Senate, rejected on First Amendment grounds a voter passed initiative establishing a blanket primary system, effectively eliminated patronage as a means of securing party loyalty and party discipline, declared excessive partisan gerrymandering unconstitutional while proving unable over two decades to establish a standard for identifying when such gerrymandering has occurred, approved a mid-cycle redistricting of congressional districts motivated solely by a desire for partisan gain, cast a cloud over the constitutionality of districting aimed at enhancing representation of minorities, accepted incumbent protection as a redistricting principle, and prevented Congress and state legislatures from limiting the amount of money that can be spent on campaigns for federal or state office.

All these decisions have affected in one fashion or another how we go about choosing our elected officials. For purposes of this article, we will refer to these and the many votes cast in a primary for a particular office in order to be placed on the general election ballot for that office; American Party of Texas v. White 415 U.S. 767 (1974) upholding limitation on voters’ participation to one primary and barring voters from both voting in a party primary and signing a petition supporting an independent candidate; and Burdick v. Takushi 504 U.S. 428 upholding Hawaii’s prohibition of write-in voting.

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10 League of United Latin American Citizens v. Perry No. 05-204, slip op. (U.S. Sup. Ct., 2006).
other decisions affecting our electoral process as “democracy” cases.

The Supreme Court does not recognize these cases as a discrete category. This is unfortunate, resulting in a body of decisions that lacks any sense of cohesiveness and individual decisions that are often indifferent to the profound ways in which they affect our democratic system. As one scholar has noted, “When one surveys the past fifty years of judicial efforts to protect the democratic process, the results are chaotic. The Court has been rigorous in settings that cried out for judicial restraint, and permissive in settings that desperately required strict judicial supervision.”

Concerns about our democracy date to the beginning of our Republic. The passionately felt schism that developed between the Federalists and the Republicans in its earliest days reflected deep fears as to the kind of system the other party wanted to impose on the country, the Republicans fearing monarchy and corruption, the Federalists fearing Jacobin anarchy and attacks on property rights.

The 20th century thoughtful has seen observers worrying about the effects of both too much and too little democracy.

In the midst of the great depression, for example, Walter Lippman worried that politicians might become too

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responsive to the wishes of the people. Today uneasiness about our democracy seems to center on the opposite fear -- that the connection of the government to the people has been so attenuated under a system of gerrymandered legislative districts, big money, and special interest lobbying that the larger public interest is the last thing on the legislative agenda.

Recently, Justice Breyer offered this challenge:

“Why should the Courts try to answer difficult federalism questions on the basis of logical deduction from text or precedent alone? Why not ask about the consequences of decision-making on the active liberty that federalism seeks to further? Why not at least consider the practical effects on local democratic self-government of decisions interpreting the Constitution’s principles of federalism -- principles that themselves seek to further that very kind of government?” (author’s emphasis)

This article attempts to answer a similar challenge for democracy defining cases.

Part I argues that in democracy cases individual rights, such as free speech and equal protection, need to be evaluated in the context of the wider political system which is supposed to preserve those rights; that in these cases individual rights are not purely personal but derive from the roles that individuals and groups play in our system as voters, candidates, parties, interest groups, supporters, and contributors; that traditional tools such as resort to text and framers’ intent as well as deference to legislative majorities, are

\footnote{In THE METHOD OF FREEDOM (1934) Lippmann wrote: “The mechanism of representation exerts a mighty pressure to make the politician the servant of the voters who elect him. When, therefore, he goes to the capital city and has the power to initiate expenditures, to propose pensions, public works, subsidies, doles, grants-in-aid, and tariffs, his constituents at home will expect him to exercise his initiative.” (p. 83).}

\footnote{STEPHEN BREYER, ACTIVE LIBERTY 63 (2005).}
rarely helpful in resolving the real democratic tensions in these cases; and that democracy perceived as a system of politics based on the freely given consent of the governed can be the basis of a framework for decision-making that will lead to both more pragmatic and principled decisions. Part I establishes three critical objectives for assuring the assurance of that consent—specifically, an environment that fosters the right of opposition to established power, that encourages citizen participation in the electoral process, and that allows for a dynamic political process that can respond as quickly and fully as possible to ongoing events. Part II examines a number of key Supreme Court decisions over the last 40 years to show how they might have been better served by the proposed framework. A brief conclusion follows.

PART I.

A. Democracy defining cases require a framework of principles in substantial part because (i) the Constitution does not define such principles; (ii) political rights function within a system whose requirements need to be defined to measure the boundaries of those rights; (iii) the intent of the framers (and thus originalist modes of interpretation) is not of much assistance in deciding these cases and (iv) the impulse to give deference to legislative judgments is inappropriate.

1. Lack of Authoritative Text. There is no portion of the constitutional text that defines or elucidates democratic principles. For years this did not matter very much because the Supreme Court could largely avoid difficult democracy
issues by treating them as non justiciable.\textsuperscript{17} Once, however, it announced such an overarching principle as one man one vote and extended it to effectively eliminate all state legislative bodies not based on that principle,\textsuperscript{18} the Court had intruded so deeply into the political system as to make future claims of judicial modesty extremely difficult. The result has been that the Supreme Court has become the arbitrator of last resort for deciding what are essentially process questions arising within the democratic system without the benefit of a specific text to guide it.

2. Special Nature of Political Rights. Process questions arising within the democratic system can affect individual and even group substantive rights but those rights, being essentially political in nature, must be examined in the context of the political system as a whole. There are many actors in the political system – voters, parties, candidates, contributors, interest groups, active participants, passive participants, the media. Their rights interact with each other in complex ways in part because the assertion of a right by one actor often involves the limitation on the rights of another actor. Balancing these rights requires the Court to consider them within the framework of an agreed set of objectives since only then can the implications of its decisions for the system as a whole be understood and the rights properly balanced.

Put another way, since in democracy defining cases, individuals are not just individuals but players their

\textsuperscript{17} Colegrove v. Green 328 U.S. 549 (1946).
respective rights depend upon their roles in the system. Consequently, all political rights, whether they arise under the First Amendment, the due process clause or the equal protection clause, are circumscribed by the demands of the political system as a whole, our political system being the foundation of our entire structure of rights.

3. No Guidance in Original Intent. If the constitutional text does not point toward a framework of principles for democracy defining cases, perhaps we can find guidance in the political attitudes of the framers and the historical context in which the constitution was written and ratified.

Unfortunately, not only did political parties, the foundation of today’s democratic system, not exist at the time the Constitution was written, but, to the extent they envisioned “factions”, the framers viewed them primarily as threats to democracy. In fact, one group of prominent scholars has asserted that the Constitution “was expressly constructed to preclude the rise of political parties.” \(^{19}\) In addition to political parties, the other mechanisms of our democratic process that have given rise to constitutional controversies – the primary system, mandatory redistricting, minority voting districts, the campaign finance system, the initiative and ballot access – could not even have been imagined by the framers.

And the differences do not end there. The men themselves (and of course only men back then, another distinctive

difference) and their views as to the nature and purpose of politics also set them apart from our own time. One constitutional scholar has noted “the great gulf in world view between us and the founders” adding:

“Their fears led to an intense distrust of partisan political conflict that we today consider strange and dangerous to civil liberty.”

An eminent historian, Gordon Wood, speaking of the founding generation, has written:

“The revolutionary leaders were not modern men. They did not conceive of politics as a profession and of office holding as a career as politicians do today.”

The simple fact is that most democracy defining cases today implicate in one way or another the role to be played by political parties in our modern democratic system and the way in which political parties and the electoral system interact with one another and with our guarantee of individual rights. To seek to locate the answers to these questions (questions largely inconceivable at the time the Constitution was written) in the imagined opinions of the Founding Fathers is simply to invite individual justices to project their own predilections on to the past.

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21 Id.
4. No Majoritarian Deference Incumbent legislators, acting in their capacity as architects of the election process, have a strong interest in skewing the process in their favor. For this reason, all legislation affecting elections needs to be approached with real skepticism. Legislation endorsed by both parties that affects the ability of independent candidates and third parties to compete effectively belongs in a suspect classification all its own.23

The major parties will take full advantage of whatever latitude the Court gives to further their own interests in the name of a stable two party system. For example, following the decision in Jenness v. Fortson24 upholding burdensome signature requirements for minor party and independent candidacies, State legislatures “toughened ballot access laws in almost half the states….confident that the new restrictions would not be overturned in Court.”25 The breadth of the cases previously described in note 4 illustrates the many ways that the two parties work to help themselves.

This tension between the State as regulator and the instinct of incumbents as career politicians and representatives of the interests of the two major parties to make life as easy for themselves as possible explains why deference to the legislature is simply inappropriate when it comes to democracy defining cases. Simply put, there is an inherent

23 For an excellent summary of the many ballot access cases decided by the Supreme Court, see Dmitri Evseev, A Second Look At Third Parties: Correcting the Supreme Court’s Understanding of Elections, 85 B.U.L. Rev. 1277 at 1287 to 1302 (2005).
conflict of interest when legislators make the rules for the contests in which they must take part. It is worth recalling that due process itself originates in the notion that the king should not be a judge of his own case.26

This does not mean that the Court should be the only arbiter of our democratic process – quite the contrary, as we will discuss shortly. But skepticism of legislative judgments in these cases is simply common sense, the recognition of a basic reality that when legislators set the rules for our electoral process they don’t suddenly lose sight of their own personal and political self interest. More controversially, it may also suggest that when it comes to laws regulating the electoral process, legislation passed through the initiative process should enjoy a stature that it may not possess in other contexts, particularly when the voters seem to be responding to perceived abuses within the electoral system in ways that do not tread on individual rights.

B. American democracy is best seen as a process whose ultimate objective is to legitimate authority through the freely given consent of the governed. That consent can only be given in a system that fosters opportunities for opposition, encourages widespread participation of the citizenry and leaves the political process as free as possible to work through differences, subject to rights of minorities and other vulnerable groups

1. **Democracy as a procedural process.** Our first task in this section is to underscore the distinction between democracy, as a procedural process, and democracy as a way of life expressive of our most cherished human values.

A framework which tries to create a priority of democratic values to guide the Court will inevitably fail because nine justices will inevitably have nine different views of the proper mix of liberty, autonomy, and equality, among other ideals, such a framework would require. The concepts in any event are too abstract to be meaningfully applied to the kind of fact sensitive, concrete choices that democracy cases often require.

But when democracy is viewed as a procedural process, a workable framework becomes imaginable. This should not be surprising. As one political theorist has noted, a “procedural” definition of democracy is more “precise” than a “values” definition exactly because it relates to a “set of procedures.”

27 J. ROLAND PENNOCK, DEMOCRATIC POLITICAL THEORY, 6 (1979).

Courts are used to dealing with processes and to evaluating tensions within those processes, even when highly prized constitutional rights are at issue. The ever present tension between the right to a fair trial and the demands of a free press come immediately to mind as just one illustration.

The problem of value, of course, cannot be avoided completely. Democracy, even conceived as simply procedural, must be in the service of something, and that “something” needs to encapsulate its purpose.
A framework that defines that purpose and then sets forth the intermediate objectives needed to accomplish that purpose will encourage the Court to be both pragmatic (because it will require the Court to focus on the consequences of its decisions) and principled (because it will be in furtherance of a defined set of objective conditions).

The current situation, where there is no such framework and therefore no approach binding on the Court, is particularly troubling when one considers that Supreme Court justices are themselves the products of the political system; indeed, they are today the most political and highly charged appointments a President makes. A framework for adjudicating democracy defining cases would hopefully lead the Court to decisions that represent more than a collection of subjective preferences about how our democracy should operate.

2. The Proposed Standard. It has been observed that “a democratic state is one in which the basic decisions of government rest upon the freely given consent of the governed.” 28 This is as clear a statement of democratic purpose as I can conceive and certainly one consistent with our history and traditions. Our framework, therefore, needs to identify those intermediate objectives that a Court can use as benchmarks to evaluate whether a given governmental regulation seriously undermines that overall purpose. These objectives constitute the ecological

conditions of our democracy. For purposes of our framework, I would define that ecology as one in which:

(1) opposition in the broadest sense to governmental policies, including replacing the persons making those policies, can thrive; (we will henceforth generally refer to this element as the “opposition fostering” element);

(2) the active participation of the citizenry is encouraged; (henceforth the “citizen participation” element); and

(3) the political process is allowed to respond as fully and fluidly as possible to the issues of the day, including emerging issues in the political system itself (henceforth the “electoral responsiveness” element);

Our framework for deciding democracy cases would subject to strict or heightened scrutiny those laws or practices undermining any of the elements of the framework, the level of scrutiny depending on the nature and extent of the threat to the affected elements.

The objectives forming the backbone of our framework are only one of many possible descriptions but they do embrace a comprehensive view of the democratic process. They are concededly not a product of logic as much as basic common sense. In their defense, I would offer the following statement of John Rawls: “…the political culture of a reasonably stable democratic society normally contains, at least implicitly, certain fundamental intuitive
ideas from which it is possible to work up a political conception of justice suitable for a constitutional regime.**29

3. Justifying the Standard. From its earliest moments our democracy has incorporated the concept of the freely given consent of the governed, our Declaration of Independence asserting that by imposing laws enacted without such consent, the English had created the conditions justifying the decision for independence. The concept of consent of the governed properly ties our electoral process to our governing process because the two are in fact inseparable just as the term ‘self- government’ implies. It is no accident that the Supreme Court justified its imposition of “one man, one vote”, on the need to assure “fair and effective representation”**30 just as the rallying cry for independence was ‘No taxation without representation.’

When we articulate a set of objectives based upon assuring that our officials are elected in accordance with the freely given consent of the governed, we are not creating a new set of constitutional values. Rather, we are seeking to assure that the most fundamental procedural principle of our democracy remains intact.

The founding fathers worried about the fragility of our democratic system. While today’s system might have evolved in ways they never anticipated, they would surely recognize the validity of maintaining the basic conditions necessary to assure laws based upon the freely given

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29 JOHN RAWLS, COLLECTED PAPERS, Samuel Freeman, editor, 475 (1999)
consent of the governed. They would also have recognized the merit of each of the objectives articulated in our framework.

Certainly, “freely given consent” to governmental decisions cannot occur if a realistic opportunity to oppose those measures is lacking. The best opportunity for opposing those decisions, of course, comes with the chance to replace the officials making those decisions. The electoral process also gives those in power the chance to legitimize their decisions by the indirect ratification of their own re-election. The democratic process, however, is not just about one election. It is also about the ability to slowly develop support for initially unpopular views over a period of time. This means giving third party viewpoints an opportunity to be heard and to develop an influence strong enough to either win elections outright or have some of their positions incorporated by the major parties. Laws that undermine these possibilities should be subject to a heightened scrutiny. The framers of the Constitution would understand this need because they were greatly worried about the possibility of governing elites manipulating the rules of democracy to assure their own continuation in power.31 Thus, they would be very comfortable with the opposition fostering element that places such a high value on creating an atmosphere in which potential opposition is able to incubate and eventually thrive just as the opposition to British rule and the desire for independence did in their time.

31 See, for example, THE FEDERALIST No. 57 at 385 (James Madison) (Benjamin F. Wright, ed., 1961).
Inherent in the freely given consent of the governed is also a belief in the importance of all citizens fully participating in the democratic process, for all citizens are subject to the state’s lawmaking power. This condition not only makes sense in the abstract, it also resonates with a political history constituting one long expansion of citizen participation in the electoral process. That expansion has not only included the enlargement of voting rights to previously excluded groups but also the direct election of U.S. Senators and presidential electors and the development during the progressive era of such mechanisms as the party primary, initiative, referendum and recall.

In terms of the electoral responsiveness element, the framers understood that elections were intended to provide responsiveness to the concerns of the people and accountability for government performance.\(^{32}\) Implicit in that understanding is a corollary belief in a robust, open, political process leaving as much decision-making as possible in the hands of the people themselves and their representatives but always mindful of the ability of those in power to manipulate the system for their own benefit.

\(^{32}\) See THE FEDERALIST No. 53, at 364 (James Madison) (Benjamin F. Wright ed., 1961)
To give a fuller picture of how our proposed framework could be applied and why the Court has not adequately addressed the needs of our democratic system, we now examine eight Supreme Court cases. The first three—Arkansas Educational Television Commission v. Forbes\textsuperscript{33} Storer v. California, \textsuperscript{34} and Clingman v. Beaver\textsuperscript{35} -- address cases in which the Court has dealt particularly poorly in addressing the rights of independent and third party candidacies. The next three address difficult subject areas that the Court has been dealing with in one context or another for a long time – California Democratic Party v. Jones (primaries), \textsuperscript{36}League of Latin American Voters v. Perry (redistricting), \textsuperscript{37} Randall v. Sorrel\textsuperscript{38} (campaign finance). For these cases and one other case, U.S. Term Limits v. Thornton\textsuperscript{39} – I try and show how the Court’s reasoning was not only flawed but forced it to make broadly sweeping decisions when our proposed standard – particularly its electoral responsiveness element – would have encouraged narrower more nuanced opinions.

Professor Sunstein has suggested that “certain forms of minimalism can be democracy-promoting, not only in the sense that they leave issues open for democratic

\begin{footnotes}
\item[33] 523 U.S. 666 (1998)
\item[34] 415 U.S. 724 (1974).
\item[37] No. 05-204, slip op. (U.S. Sup. Ct., 2006).
\item[38] No. 04-1528, slip op. (U.S. Sup. Court 2006)
\end{footnotes}
deliberation but also and more fundamentally in the sense that they promote reason-giving and ensure that certain important decisions are made by democratically accountable actors.”\(^4^0\) A bias toward minimalism is not out of place in the context of our proposed framework. While our framework does require the Court to some extent to work within a theory laid down in advance, something which Minimalists do not generally like,\(^4^1\) it also encourages the Court to “pay close attention to the particulars of individual cases, to think analogically and by close reference to actual and hypothetical problems”\(^4^2\) and to avoid flights of deductive reasoning, tendencies which, as we shall see, our framework also encourages.

I conclude with an eighth case, Richardson v. Ramirez\(^4^3\), to establish the boundaries of our framework.

\textit{Arkansas Educational Television Commission v. Forbes}\(^4^4\)

In Arkansas Education Television v. Forbes the Court upheld the action of a state-owned television in limiting a candidates’ debate that it sponsored to representatives of the two major parties. The excluded candidate, Ralph Forbes, had claimed a violation of his First Amendment rights.

The facts of the case were straightforward. In June 1992 the Arkansas Education Television Network (AETC), a state owned

\(^{40}\) CASS R> SUNSTEIN, ONE CASE AT A TIME, 5 (1999)
\(^{41}\) Id. at p. 9.
\(^{42}\) Id.
public television broadcaster, invited the two major party candidates for Arkansas’ Third Congressional District to participate in a televised debate scheduled for October 22, 1992. In mid August Ralph Forbes was certified as an independent candidate qualified to appear on the November ballot. Shortly thereafter, he wrote to the AETC requesting to appear in the debate. That request was denied on September 4. For some reason, Mr. Forbes waited until October 19 before filing a request for a preliminary injunction mandating his inclusion in the debate. The District Court and the Eighth Court of Appeals both denied his request. Following the election, which Mr. Forbes lost, a trial was held in which the District Court, as a matter of law, found that the debate was a non public forum. The jury determined that the decision to exclude Forbes was not the result of viewpoint discrimination and the District Court entered judgment for AETC. The Eighth Circuit, however, reversed, finding that the Station had created a public forum for all candidates running for the Third Congressional District seat thereby requiring that Mr. Forbes’ exclusion be subject to strict scrutiny. Assessment of his political viability, the Court concluded, was neither a compelling interest nor a narrowly tailored means for excluding him from the debate.

In a 6 to 3 decision, the Supreme Court, Justice Kennedy writing for the majority, reversed the Eighth Circuit judgment. Justice Kennedy concluded that the station had created a non public forum because it had limited the debate to the two major party candidates. On that basis, the Court affirmed the AETC decision finding it reasonable since “AETC excluded Forbes because the voters lacked interest in his candidacy, not because AETC itself did.”

What allowed Justice Kennedy to subject the station’s decision to minimal scrutiny – the decision to exclude a candidate – is precisely the fact that would have triggered heightened scrutiny

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46 523 U.S. at 683.
under our proposed framework, for even Justice Kennedy acknowledged the “exceptional significance in the electoral process”\textsuperscript{47} of candidate debates as well as the fact that “A majority of the population cites television as its primary source of election information.”\textsuperscript{48} 

The real problem with the Court’s decision, in addition to its tautological reasoning (the decision to exclude providing the basis for the low level of scrutiny that easily rationalizes the decision to exclude) is its failure to give sufficient weight to the educational role debates play in the democratic process and to recognize that minor party and independent candidates develop support over a time frame not limited to just one election. Moreover, by failing to focus on the specific facts of this case, the Court implicitly endorsed a rather tenuous proposition – namely, that a candidate may be excluded from a critical debate on the basis of lack of popular support shortly after qualifying for the general election ballot and before the fall campaign has even begun.\textsuperscript{49} 

To exclude a candidate at the beginning of a campaign from a debate scheduled for the end of the campaign because he lacks popular support seems a bit premature, particularly given that the candidate was well known in the State and had received 46.88% of the vote in a Republican primary for Lieutenant Governor held just two years earlier.\textsuperscript{50} Such an early decision might itself have seriously undermined the candidate’s campaign by making it harder to raise money and encouraging potential supporters to go elsewhere. 

The Court also made no inquiry as to why the Station’s viewers would be best served by excluding Mr. Forbes from the debate. 

\textsuperscript{47} 523 U.S. at 675. \textsuperscript{48} Id. at 676. \textsuperscript{49} The Station made its decision to exclude Mr. Forbes from a debate scheduled for October 22 on September 4 based on his lack of popular support. See \textsuperscript{50} Id. at 684.
Justice Kennedy did offer the general observation that debates might not be held at all if all candidates had to be invited, citing the fact that in the 1988, 1992 and 1996 Presidential elections no fewer than 19 candidates appeared on the ballot in at least one State. 19 candidates for a debate would admittedly be excessive and unworkable but that simply wasn’t the set of facts presented to the Court in this case. This debate involved the request of one candidate to appear, not nineteen, and Mr. Forbes, as already noted, had been a serious contender for the Republican nomination for Lieutenant Governor in 1986 and in 1990.

Even if we assume for the moment that Mr. Forbes had no chance of actually winning the election at the time the station made its decision, the Court should not have ignored that even a losing candidate might contribute significantly to public discussion of the issues. In fact, with little to lose, he might have wanted to raise issues that both the major party candidates would have preferred to avoid.

There is no sense in Justice Kennedy’s opinion or the dissent of Justice Stevens that there are any stakeholders in the Court’s decision other than the candidates themselves and the television station’s employees and their degree of editorial discretion. But clearly there are stakeholders with an enormous investment in this kind of case, including potentially any person or party, other than 51 Id. at 681.
52 The dissent is equally unimpressed by the political context of the case. Indeed, Justice Stevens bases his dissent on the fact that the station had no objective criteria for excluding candidates from the debate. Therefore, “The ad hoc decision of the staff of the Arkansas Educational Television Commission raises precisely the concerns addressed by ‘the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective and definite standards to guide the licensing authority, is unconstitutional.” Thus, for Justice Stevens, as for Justice Kennedy, no special analysis or consideration is demanded by the potential implications of the case for the electoral process. It is just another First Amendment case in which the majority turns to forum analysis to support its decision and the dissent turns to licensing cases involving the First Amendment.
the major parties, who might seek to enter the political fray in the future.53

In this case the Court effectively adopted a rule providing a safe harbor for any decision by a state-owned television station to limit a televised debate to those candidates with a reasonable chance of winning the election. Of course, following this line of reasoning and given the lack of competitiveness in the vast majority of our congressional districts, a station would be within its rights to allow most incumbents simply to debate themselves.

Had the Court applied the proposed framework, it would have had to acknowledge the seriousness of any candidate exclusion and would have subjected the Station’s decision to a heightened scrutiny. The Court would have had to deal with troublesome facts, particularly the timing of the station’s decision and the lack of any finding as to how the inclusion of one additional candidate would have affected the value of the debate.

Unlike the other cases we will be considering, this case involved an administrative decision, not a state or federal law. For this reason, a Court trying to deal with the real world importance of candidate debates should, applying our framework, have wanted to render a decision providing real guidance to similarly placed officials in the future. Instead, it inadvertently declared a rule with profound implications for the system, effectively insulating the major parties from debating anyone but themselves, on the basis of a rigid, formalistic First Amendment analysis that took no account of the overall needs of the political system.

53 The majority and the dissent also don’t consider another reason that underscores why statements justifying candidate exclusion must be viewed with some skepticism, namely that the inclusion of a third party or independent candidate usually benefits one or the other of the major party candidates because the third candidate is usually likely to draw more votes away from one major party candidate than the other.
That the Supreme Court’s decisions over the past four decades have benefited the major parties at the expense of potential third parties and independent candidacies has been well documented. Storer seems, however, particularly egregious in upholding a statutory scheme that affects both voters and potential candidates in profoundly anti-democratic ways.

In Storer, the Supreme Court upheld a California statute which prevents an independent candidate from appearing on the general election ballot if he or she has voted in the immediately preceding primary or if he or she is affiliated with a qualified political party at any time within one year prior to the immediately preceding primary election. The statute also barred any candidate defeated in a party primary from appearing on the ballot as an independent or as the candidate of another party.

If the California statute had been in effect in Connecticut in the 2006 election, its voters would have been statutorily barred from returning Senator Lieberman to office after he lost the Democratic Party primary. If the scheme had been embodied in a federal statute, Theodore Roosevelt would have been prevented for running for President in 1912 after he lost the Republican nomination to President Taft and the 4,119,207 voters and 88 electors who voted for him on the Bull Moose ticket would have been effectively disenfranchised; parenthetically, President Taft received 8 electoral votes on the Republican line. It is difficult to imagine results more at odds with the principles embodied in our proposed framework.

In excusing the statute’s restrictions, Justice White writes:

55 See Evseev, supra note 23 at 1287 to 1302.
“It is true that that a California candidate who desires to run for office as an independent must anticipate his candidacy substantially in advance of his election campaign, but the required foresight is little more than the possible eleven months examined in Rosario, and its direct impact is on the candidate, and not voters.” 57 (bold italics are author’s emphasis)

Justice White’s assertion that a restriction that has a debilitating effect on potential candidacies does not directly impact the potential voters for that candidate seems intuitively wrong. Also deeply troubling is the manner in which Justice White concedes but glosses over how the statute “requires an independent” to “anticipate his candidacy substantially in advance of his election campaign”. Justice White identifies no state interest, compelling or otherwise, for requiring such anticipation, a requirement wholly antithetical to the fluidity and responsiveness to events that are so valuable a part of the democratic process,

How did Justice White ultimately justify a decision so apparently at odds with democratic practice? He did it by projecting for the statute a theory about general elections for which there is certainly no support in the Court’s own prior precedents or the academic literature:

“The general ballot is reserved for major struggles; it is not a forum for continuing intraparty feuds….the people, it is hoped, are presented with understandable choices and the winner in the general election with sufficient support to govern effectively.”

Notwithstanding Justice White’s statement, were Theodore Roosevelt or Senator Lieberman really “continuing an intraparty feud” in continuing their bids for elective office? Aside from

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57 415 U.S. at 734.
58 415 U.S. at 735.
unfairly belittling their motivations, such a characterization hardly seems accurate when one considers that the only way that a defeated primary candidate can actually win a general election is if his candidacy can transcend the intra-party feud and make the general election into something which has a broader meaning for the electorate.

California’s regulatory scheme is undemocratic in another fundamental way since it puts voters, particularly independent minded voters, to a Hobson’s choice. Recall that an independent candidacy (or third party candidacy) is forbidden to any person registered with a political party within twelve months of the immediately preceding primary election. Now consider that California also restricts voting in party primaries to registrants of that party. In such a regulatory scheme, a politically minded person, even one of completely independent views, would likely affiliate with the party that at least represented most closely his thinking, in order to have some influence on the political process. That such an act should seriously limit one’s right to run for public office is completely inconsistent with the democratic objectives of encouraging citizen participation in the electoral process and creating a climate conducive to opposition set out in our proposed standard.

Under the California statute, a Republican disturbed about events in Iraq or a Democrat dissatisfied with his party’s position on the war who decided in July of 2003 (having voted in their most recent party primary) that they wanted to run for Congress as an independent could not have actually appeared on the ballot as an independent until November 2006. There seems to be no state interest that can countenance such a result, even under a rational basis standard, much less the much higher scrutiny our proposed standard would require.
In Storer, a number of state interests were proferred for limiting ballot access: “preventing inter-party raiding, avoiding overcrowded ballots, requiring a preliminary showing of support, and generally preserving the stability of the political system.” But in the absence of evidence showing how the statutory scheme advanced these goals, the Court’s “uncritical acceptance of the state’s proferred interests” and its cramped view of petitioner’s interest, made the Court’s supposed balancing of interests in Storer illusory.

A Court applying our proposed standard would have been forced to recognize the important ways in which the California regulatory scheme discouraged potential opposition, discouraged voters from participating in party primaries, and undercut the potential responsiveness of the electoral process to ongoing events. With that discipline imposed, it is doubtful that the Court could have upheld the California statute on the basis of the flimsy justifications offered in its defense.

_Clingman v. Beaver_61

Clingman v. Beaver, a supposedly neutral decision based on a First Amendment rationale, is in reality a highly political decision that allows the two major parties to prohibit third parties from attracting registered Democrats and Republicans to its primaries while preserving an earlier decision that (properly in this writer’s judgment) constitutionally protects the right of major parties to attract independents to its primaries.

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59 Evseev, _supra_ note 23 at 1292.
60 Id.
“Nearly every State in the Nation now mandates that political parties select their candidates for national or statewide office by means of primary elections.” 62 The importance of party primaries in our democratic process cannot be over-emphasized.

Twenty years ago in Tashjian v. Republican Party of Connecticut, 63 the Supreme Court ruled that a political party could not be prohibited by Connecticut law from opening its primary, if it so chose, to independent voters. Much more recently, however, in Clingman v. Beaver, the Court sustained an Oklahoma law prohibiting political parties from opening their primaries to voters registered with another political party.64

In both cases, the ultimate issue involved the extent to which a voter’s registration choice should preclude that voter from participating in a primary of a party with which the voter was not affiliated. In both cases, the party challenging the statute wished to broaden its appeal by inviting non-party affiants into its primary.

To sustain the Oklahoma statute in Clingman without overruling Tashjian, the majority opinion by Justice Thomas subtly shifted the basic constitutional question.

The decision in Tashjian was rooted in a political party’s right of association. A state law that limited that right was deemed unconstitutional. Justice Thomas, in Clingman, poses the question differently. “The question,” he writes, “is whether the Constitution requires the voters who are registered in other parties be allowed to vote in the LPO’s primary.”65 He finds that there is no such right,

62 See concurring opinion of Justice O’Connor in Clingman v. Beaver 544 U.S. 581 at 599.
63 479 U.S. 208 (1986).
64 In between these two decisions, the Court declared unconstitutional a California law adopted by the initiative process that would have required the major parties to open their primaries to any voter regardless of party affiliation, a decision that will be discussed later.
65 544 U.S. at 587.
ignoring the more fundamental question whether the two major parties acting in concert and clearly in their mutual self-interest should have the right to prevent a minor party from an opportunity to seek to broaden its appeal when a constitutional right to just such an opportunity was deemed crucial by Justice Marshall in Tashjian.

In Tashjian, Justice Marshall wrote:

“The Party’s [Republican] attempt to broaden the base of public participation in and support for its activities is conduct undeniably central to the exercise of the right of political association.” 66 (author’s emphasis)

He also minimized the extent to which a voter’s registration choice should weaken the Party’s desire to broaden its base. “Considered from the standpoint of the Party itself, the act of formal enrollment or public affiliation with the Party is merely one element in the continuum of participation in Party affairs, and need not in any sense be the most important.”67 Justice Marshall concluded:

“The State thus limits the Party’s associational opportunities at the critical juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.”68

The broadening of opportunities for the Republican Party deemed crucial in Tashjian was ignored in Clingman while the voter’s registration decision deemed insignificant in Tashjian was crucial in Clingman.

66 479 U.S. at 214.
67 Id. At 215.
68 Id. At 216.
Our proposed standard would dictate a different result in Clingman since in evaluating the impact of the Oklahoma statute on the potential for opposition forces to develop, the Court would have been forced to recognize that, in a winner take all, single district representational system already skewed to maintain a two party system, a minority party must reach out to members of the two major parties if they are to have any impact on the political scene. Thus, if opening its primary to broaden its base was deemed a constitutional right of one of the major parties, how much more should that right be deemed applicable to a minor party.

Clingman and Tashjian taken together reveal in a particularly telling way the bias of the Courts against third parties in favor of the two major parties.

This is not a bias that the Court denies. In Timmons v. Twin Cities Area New Party, in upholding Minnesota’s ban on fusion candidacies, Justice Rehnquist, for the majority, wrote that States “have a strong interest in the stability of their political systems” that “permits them to enact reasonable election regulations that may, in practice, favor the traditional two party system.” While our proposed standard does not preclude the Court from considering the interest of the state in a stable two party system as a factor in its decisions in an appropriate case, it does not allow such interest to take precedence where state regulations would seriously limit the ability of third parties and independents to compete for popular support.

70 Justices Stevens, Ginsburg and Souter dissenting
71 520 U.S. at 366.
72 520 U.S. at 367.
In California Democratic Party v. Jones, we come to a case where the opposition promoting element of our framework and the citizen participation element seem at odds. The case poses a difficult question: what happens when the individual interest of the voter, as a participant in the democratic process, and the interest of political parties in promoting their separate identities, clash?

In this case, the voters of California had adopted Proposition 198 changing California’s primary system for most federal and state offices from a closed primary (where only members of the party can vote in that party’s primary) to a blanket primary (where all voters, regardless of how registered, are entitled to vote for any candidate for each office regardless of the candidate’s political affiliation). The two major parties and two minor parties (the Libertarian Party of California and the Peace and Freedom Party) challenged the new law.

In a seven to two decision, Justice Scalia, for the majority, held the law unconstitutional as a violation of a political party’s right of association. “In no area,” wrote Justice Scalia, “is the political association’s right to exclude more important than in the process of selecting its nominee.”74 Pointing to polling evidence that showed 37% of Republicans planning to vote in the 1998 Democratic gubernatorial primary and 20% of Democrats planning to vote in the Republican U.S. Senate primary, the majority found a real potential danger that a party could have its party nominee

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74 Id. at 575 (2000).
“determined by the opposite party.”75 “There is,” he concludes, “simply no substitute for a party’s selecting its own candidates.”76

A noteworthy aspect of Justice Scalia’s opinion is his rejection of the motivation behind the enactment of Proposition 198. Proponents of Proposition 198 had made clear that one of its primary goals was to encourage both major parties to nominate more centrist candidates. Justice Scalia found this to be an impermissible motivation: “In effect, Proposition 198 has simply moved the general election one step earlier in the process, at the expense of the party’s ability to perform the basic function of choosing their own leaders.”77 (Interestingly, as one scholar has noted, “The parties did surprisingly little to oppose Proposition 198, despite their belief that the new form of primary would hurt them.”)78

In dissent, Justice Stevens switched the argument to one of federalism (“In my view principles of federalism require us to respect the policy choice made by the State’s voters…”)79 and also challenged Justice Scalia’s view of a First Amendment violation (“…the First Amendment does not inhibit the State from acting to broaden voter access to state-run, state-financed elections. When a State acts not to limit democratic participation but to expand the ability of individuals to participate in the democratic process, it is acting not as a foe of the First Amendment but as a friend and ally.”)80

75 Id. At 578.
76 Id. At 581.
77 Id. At 580.
78 See Richard L. Hasen, Parties Take the Initiative (And Vice Versa), 100 Colum. L. Rev. 731 at 747 (2000). Professor Hansen notes (p. 747) that the Republicans spent only $48,899 opposing Proposition 198 and the Democrats $4,630. This failure might have been the result of a game of chicken, neither party wanting to take the lead in opposing a popular initiative that both were opposed to.
79 Id. At 591.
80 Id. At 595-596.
Both the majority and dissenting opinions reflect the difficulty of integrating First Amendment concerns with issues of democratic process in the absence of some framework for evaluating the critical objectives of that process.

The majority opinion ignores that none of the states providing for party registration allow parties to set qualifications for the right to register as a member of that party. Consequently, political parties, at least for voting purposes, do not have the ability to define themselves by excluding those they don’t like as do private organizations. Thus, when Justice Scalia supports his opinion by noting that “a corollary of the right to associate is the right not to associate”,81 he is assuming a set of facts that simply don’t describe our modern political parties. Voting in a primary election is not the same thing as marching in a parade82 and political parties are not the Boy Scouts of America.83 84

Justice Scalia’s opinion also does not offer any reasons why the people of California should not be allowed to shape the primary process in a way that encourages the kind of candidates it would like to see on the ballot in the general election so long as no particular viewpoint is discriminated against.

81 Id. At 574.
84 Justice Scalia’s reasoning also indicates a constitutional logic placed at the service of his own political prejudices. As noted, the evidence showed that the proponents of Proposition 198 were not happy with the kinds of choices they were presented with in the general election and one of their aims was to encourage the success of more centrist candidates in both major parties. Justice Scalia’s claim that this made the primary tantamount to a general election suggests a preference for ideologically oriented candidates. To say that the primary has now become the general election strongly implies that there are no essential differences between centrist candidates of the two major parties because that choice is obviously still available to the voters in November. It also bears mentioning that, while dangers of malicious cross over voting were dismissed by virtually all the experts in the case, such voters would more than likely vote for the most ideologically extreme of the candidates on the theory that such candidate would be most easy for his party to beat in the general election. Thus, the blanket primary to the extent Justice Scalia’s fears about cross over voting were realized, could just as easily result in the victory of ideological candidates as centrists.
On the other hand the invocation of federalism in the dissent of Justice Stevens seems misplaced. If the right to political association were violated no principle of federalism would bring it within constitutional boundaries. Moreover, given that the Court has never held that there is a First Amendment guaranteed right to vote, it is difficult to see how there can be a strong First Amendment interest (as opposed to a principled democratic interest) in widening the vote.

In the absence of a recognized framework for adjudicating democracy defining cases, the litigants must litigate and the courts therefore decide on the basis of First Amendment jurisprudence that is not an entirely satisfactory surrogate for resolving the real democratic tensions in the case.

The value of our proposed framework is that it would enable the Court to confront these tensions more directly and with greater flexibility.

Applying our proposed standard, the Court would first need to note how the case puts the first two elements of our standard – the opposition promotion element and the citizen participation element --at cross purposes. The Court would undoubtedly recognize the critical role that political parties play in organizing democratic opposition and thus be particularly concerned about laws that might undermine that role. The fact that both major and minor parties opposed this measure could itself have some significance. On the other hand, the Court would also recognize that one of the motives behind Proposition 198 was to widen voter participation in the democratic process and that this would in fact be a likely result of Proposition 198. If it was being perfectly candid, the Court would have also had to recognize that the motives of the voters in creating a system designed to foster more centrist candidates was itself consistent with its own view of the parties as essentially non-
ideological organizations whose very lack of ideology helps contribute to the stable two party system the Court so highly values. 85 Whether this still describes our major parties is, of course, debatable.

Our proposed standard should have led the Court to a simple question: Does the threat to the shaping of party identity potentially posed by Proposition 198 outweigh the potential benefits of widening citizen participation and promoting a voter choice in November more in tune with the wishes of the majority?

As noted, this was a case in which both major and minor parties objected to the law. But, as Justice Stevens worried in his dissent, if the blanket primary is unconstitutional, how does one constitutionally justify the open primary in which independents (and sometimes even members of other parties) can cross over and vote in any primary they choose. 86

While a First Amendment analysis really allows for little distinction between blanket and open primaries since non-party members can determine the outcome in both instances, our proposed standard would provide a meaningful basis for a distinction. The fact is that the kind of blanket primary enacted by Proposition 198 goes very far in the direction of minimizing the central role of political parties. It provided that for each office, the ballot would simply list all candidates and their party affiliation; the candidate of each party winning the most votes would be that party’s nominee. The voter could vote for a Republican in the gubernatorial primary, a Democrat in a Senatorial primary, and a minor party candidate for Congress.

85 See, for example Rosario v. Rockefeller in which Justice Powell in a dissent joined by Justices Douglas, Brennan and Marshall, wrote “political parties in this country traditionally have been characterized by a fluidity and overlap of philosophy and membership…” 410 U.S. at 752 at 769 (1973); see also the statement of Justice Thomas in Col. Republican Fed. Campaign Comm. V. Federal Elections Comm’n 518 U.S. 604, 647 (1996) that “American political parties, generally speaking, have numerous members with a wide variety of interests, features necessary for success in majoritarian elections.”

86 California Democratic Party 530 U.S. at 598.
There is no question but that, in a modern democracy, political parties are the vehicle for turning individual preferences into electoral aggregates. And recall the Court’s statement in Tashjian that the primary is the “critical juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.” Given this reality, a primary system that does not even require a voter to choose in which party primary he or she will participate (the open primary does require such a choice) arguably denigrates too severely the role of political parties. Since an open primary process would appear to accomplish many of the objectives of the proponents of Proposition 198, while better preserving party identity, Proposition 198 would be vulnerable for not being narrowly tailored to accomplish its intended purpose.

We can not leave this case without commenting upon one other aspect of the majority’s opinion because it again illustrates the kinds of blinders that justices all along the political spectrum occasionally don to justify their views. Towards the close of his opinion, Justice Scalia asserts that the proponents of Proposition 198 could have achieved all of their goals with “a non-partisan blanket primary” in which “the State determines what qualifications it requires for a candidate to have a place on the primary ballot” and “the top two vote getters (or how many the State prescribes) then move on to the general election.” Such a system would be satisfactory, according to Justice Scalia, because it “has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party’s nominee.”

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87 See Tashjan, supra, note 58.
88 California Democratic Party  530 U.S. at 585
89 Id. At 585-586.
Justice Scalia is correct but only because party identification itself is obliterated in a non-partisan primary. How Justice Scalia disapproves one statute because it fails to recognize a party’s right to choose its own candidate while embracing, as an acceptable alternative, a statute embodying a primary system in which parties have no identity at all is not clear. While a party can nominate a candidate to appear on a non-partisan ballot, there is no reason why a party couldn’t also nominate a candidate to appear on a Proposition 198 primary ballot as well. Yet this latter possibility did not save Proposition 198.\footnote{The non-partisan primary embraced by Justice Scalia where the top two vote-getters go on to the general election could also end up eliminating a major party candidate from even appearing on the general election ballot. Consider a non-partisan primary ballot consisting of an incumbent of one major party facing no opposition and two highly popular members of the other party vying to appear on the general election ballot. It is entirely possible that the intense vote interest in the highly contested struggle would make the incumbent a third place finisher. Under this scheme, the incumbent would actually have lost the general election in the primary, a somewhat ironic result given Justice Scalia’s concern that Proposition 198 had moved the general election up to the primary.}

\textit{Randall v. Sorrell}\footnote{No. 04-1528, slip op. (U.S. Sup. Ct. 2006).}

No legislation has raised more constitutional controversy than campaign finance reform. The reason is not difficult to discern, for this issue poses the kind of value questions that are exceedingly difficult to resolve on any principled legal basis. As Professor Fiss wrote in a slender but highly thoughtful volume, The Irony of Free Speech,\footnote{OWEN M. FISS, THE IRONY OF FREE SPEECH (1959).} political expenditure (along with other issues like pornography and hate speech) “forces the legal system to choose between transcendent commitments – liberty and equality – and yet the Constitution provides no guidance as to how that choice should be made.”\footnote{Id. at 13.} The choice between liberty and equality is exactly the kind of choice that our proposed framework
emphasizing democracy as a procedural process was intended to avoid. Nonetheless, the proposed framework would still provide a better tool for analyzing this area of the law, particularly on the difficult issue of limitations on campaign expenditures, than the Court has devised to date.

In Randall v. Sorrel addressing Vermont’s campaign finance law, a splintered Supreme Court reaffirmed the constitutional distinction, originally advanced in Buckley v. Valeo94, between laws imposing expenditure limits (a violation of the First Amendment under any of the proposed rationales) and contribution limits (constitutional but subject to independent judicial scrutiny for careful tailoring). While six separate opinions were filed in the case, six justices adhered to the Buckley opinion on expenditures and seven justices to the position on contributions95

In between Buckley and Randall the Court upheld most of the provisions of the Bi-partisan Campaign Reform Act of 2006 in McConnell v. Federal Election Commission96 but continued to adhere to Buckley’s position on expenditure limits.97

95 Justices Thomas and Scalia reaffirmed their opposition to Buckley’s distinction between expenditure and contribution limits and would have subjected both restrictions “to strict scrutiny, which they would fail.” Justice Stevens would also overrule Buckley but for the opposite reason, opening up expenditure limits as well as contribution limits to possible legislative regulation. Justice Kennedy, in a rather puzzling opinion, seemed to express dissatisfaction with the legal universe the Court has created but essentially concurred with the approach taken by Justice Breyer. Justice Breyer, writing for himself, Chief Justice Roberts and Justice Alito, declined to examine the expenditure limits in detail relying on Buckley v. Valeo, and finding that “circumstances” had not changed “so radically as to undermine Buckley’s critical factual assumptions.” It should be noted that Justice Alito declined to join Justice Breyer’s ode to the importance of stare decisis, perhaps for fear of compromising a possible future position on Roe v. Wade. Justice Souter, in an opinion joined by Justices Ginsburg and Stevens, would have affirmed the contribution limits and remanded the case for further fact finding on the fundraising demands on candidates before ruling on the expenditure limitations.

97 We should note at the outset that the Court has consistently tried to assure that a lack of money does not limit participation in the political process at its most elemental levels. Thus, the Court has outlawed the poll tax 97 and also prohibited a state from charging a filing fee for political office.97 These ‘barrier to entry’ cases reflect a consensus that the Constitution does not allow a State to erect threshold obstacles based on a lack of resources to political participation. (“Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax.” Harper v. Virginia Board of Elections 383 U.S. 663 (1966)). 97 While these
In Buckley v. Valeo the Court found that (i) contribution limits were only a “marginal restriction upon the contributor’s ability to engage in free expression”\textsuperscript{98} because the contributor was still “free to discuss the candidates and issues”\textsuperscript{99} while (ii) expenditure limits were much more serious because they would “reduce the quantity of expression by reducing the number of issues discussed, the depth of their exploration, and the size of the audience reached.”\textsuperscript{100}

Buckley had kept the door to expenditure regulation slightly open because it held that no sufficient governmental interest for such regulation had been suggested, not that one could not exist. Randall v. Sorrell, however, seemingly closed that door when Justice Breyer rejected the argument that Buckley needed to be revisited because of emerging evidence that contribution limits were not sufficient to deter corruption or, as a separate basis, because of the emerging need to protect candidates from spending too much time raising money: “We cannot find in the respondents’ claims any demonstration that circumstances have changed so radically as to undermine Buckley’s critical factual assumptions.”. Thus, for the foreseeable future, legislatures are without power to impose expenditure limitations but can still impose reasonable contribution limits.

The Court’s bright line distinction between contribution and expenditure limitations based on the view that limits on contributions are only a marginal restraint is difficult to justify in theory. While a contribution limit leaves the individual free to discuss the issues, it is still a severe limitation on the individual’s ability to express that support effectively. A direct contribution to a

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\textsuperscript{98} Buckley 424 U.S. at 20-21
\textsuperscript{99} Id.
\textsuperscript{100} Id. At 19.
candidate is, after all, the most effective way of expressing one’s support for a candidate because a candidate can use a direct contribution however he or she sees fit. A limit on contributions leaves the candidate in less control of his own campaign and leaves the individual with the burden of crafting, either on his own or with others, a message which might in fact not be the message that the candidate wants to convey or the issue he wants to emphasize.\(^{101}\)

Without a framework that integrates First Amendment concerns with concerns about how the political system functions as a whole, the Court’s theoretical analysis as to the force of the First Amendment simply becomes a sterile debate over whether money in politics should be viewed as “conduct” or “speech.” Justices Thomas and Scalia treat political contributions and expenditures as a form of political speech. Having connected those dots, there is no state interest, in their minds, that can survive the strict scrutiny that regulation of such highly valued speech would require. Justice Stevens, on the other hand, views the limits on expenditures and contributions as limitations on conduct “far more akin to time, place and manner restrictions than to restrictions on the content of speech”.

However one defines the role of money in politics, the tension between liberty and equality is ever present in any attempt to regulate that role, bringing us back to the dilemma raised by Professor Fiss that “the Constitution provides no guidance as to how that choice should be made.”\(^{102}\) In his book, Professor Fiss actually offers a way out, suggesting that, contrary to those who

\(^{101}\) It should also be noted that recent research strongly suggests that people’s attitude toward corruption in politics is based on personal factors and attitudes having little to do with the existence of contribution limits. See Nathaniel Persily and Kelli Lammie, Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law, 153 U. Pa. L. Rev. 119 (2004-2005). Avoiding the perception of corruption was an important part of the state interest found sufficient to justify contribution limits in Buckley.

\(^{102}\) FISS, supra note 92 at 13.
see any regulation of speech by the State as infringing the First Amendment, some regulation of speech might actually be in the service of the First Amendment. “Sometimes,” he writes, “we must lower the voices of some to hear the voices of others.”\textsuperscript{103} This will in turn “prevent distortions in the public debate.”\textsuperscript{104} This approach, of course, is a way around the liberty v. equality dilemma because it puts the regulation of speech on the side of liberty.

It is not completely clear what Professor Fiss means by preventing “distortions of public debate” but clearly it envisions some role for the state in regulating those forces in civil society that can influence the outcome of the electoral process, minimizing the impact of some (presumably the wealthy) to maximize the role of others (the less wealthy). Is this a permissible role for the state?

Our proposed standard raises a host of red flags warning against expenditure limitations since limiting expenditures prevents citizens from maximizing their impact on the political process and raises the same problem that exist for contribution limits, namely that they can be made so low as to make it difficult or impossible for challengers in particular to succeed. Given the importance in our framework of an environment friendly to potential opposition, this is a very serious problem.

And there is a deeper problem as well. The State may have a role to play in regulating hate speech or pornography, two other areas of speech analyzed by Professor Fiss, because of their impact on vulnerable elements in society, but money in politics is ultimately about winning elections and to say that the state has a role in silencing some individuals or groups so that others can be more clearly heard comes dangerously close to allowing the State to shape elections to favor particular outcomes. That role, most would

\textsuperscript{103} Id. at 18.
\textsuperscript{104} Id. at 20.
agree, is not a permissible one. Moreover, there are many other much less constitutionally questionable ways of leveling the electoral playing field to reduce the role of the wealth without infringing on the rights of individuals with wealth to make their voice heard, public financing of campaigns being the most obvious and potentially most effective, a second being reasonable regulations aimed at assuring that one party or candidate cannot monopolize the airwaves in the closing days of a campaign by wholesale purchases of media time. Mandatory debates have also been proposed as an effective means of limiting the importance of money in general in campaigns.\footnote{105}

I should add here an important postscript. The fact that Professor Fiss’s analysis does not provide a satisfactory basis for expenditure regulation does not mean that a sufficient state interest in such regulation does not exist. In fact, I believe a limited one does exist. It goes back to the concept of fair and effective representation which the Court relied upon in establishing the one man one vote principle. Certainly, if fair and effective representation means anything it means electing representatives who are able to concentrate on their work. The people, after all, do have an enormous interest in trying to assure that elected representatives can spend most of their time on the public’s business, not raising money for their campaign coffers. Notwithstanding Justice Breyer’s protestations to the contrary in Randall v. Sorrell,\footnote{106} the


\footnotetext{106}{In his opinion, Justice Breyer wrote, “In our view it is highly unlikely that fuller consideration of this time protection rationale would have changed Buckley’s result.” (see page 11 of Justice Breyer’s opinion) Justice Breyer’s assertion rested in substantial part on statements made in briefs in Buckley addressing the constitutionality of public financing of presidential campaigns to the effect that public financing would free presidential candidates from the rigors of raising campaign funds. The time protection rationale, however, for Congress is arguably much stronger. No President, once in office, has ever considered resignation because of fund raising duties, nor have such duties been thought to detract significantly from his ability to perform his job. The frustrations that Congressional incumbents often feel about the continuous need to raise campaign funds is well known.}
Court has never directly confronted whether expenditure limits designed to deal with this problem might pass muster.

An act addressing a time protection concern would still be subject to rigorous scrutiny under our framework. One clear problem would be whether and how to differentiate between incumbents and challengers. The rationale for the legislation relates to how incumbents spend their time, not private citizens. And even an incumbent would have to be allowed to use an unlimited amount of his own funds (after all how much time does it take to raise money from yourself).

League of United Latin American Citizens v. Perry107

To say the least, the Supreme Court has not enjoyed its finest hour in dealing with the issue of gerrymandering. Gerrymandering comes in two flavors – partisan gerrymandering in which one party controls all the relevant levers of power and is able to secure more legislative or congressional seats than it would otherwise be likely to win and incumbent protection gerrymandering in which the parties share control of the government and more often than not come to a mutually satisfactory arrangement geared to the one interest both have in common – protecting their incumbents. Even in partisan gerrymandering, the creation of numerous non-competitive districts occurs as the majority party often tries to pack as many minority party voters as possible in as few districts as possible while still creating as many safe districts for itself as it possibly can.

The Supreme Court has taken the position that extreme partisan gerrymandering can state a justiciable constitutional claim.108 The

107 No. 05-204, slip op. (U.S. Sup. Ct., 2006).
Court, however, has never been able to agree on a standard for identifying when partisan gerrymandering has gone too far. In a recent case, four justices suggested that the Court simply admit failure and not entertain such cases in the future.\textsuperscript{109} As to redistricting with the aim of protecting incumbents, the Court sees no constitutional problem, Justice Scalia having gone so far as to call it “a traditional and constitutionally acceptable” principle.\textsuperscript{110}

Looking at the Court’s gerrymandering jurisprudence from the perspective of our proposed standard, the Court seems to have gotten things exactly backward. Incumbent protection gerrymandering attacks the whole purpose of having elections in the first place since it seeks to render incumbents invulnerable even before they have to present themselves to the voters.\textsuperscript{111}

Since incumbent protection gerrymanders are aimed at negating the possibility of effective opposition and clearly discourage citizen participation (why participate in a game that has already been decided?), they would have rough sledding under our proposed standard.

In League of United Latin American Citizens v. Perry, the Court was forced to consider, among other issues, whether a redistricting plan adopted by the Texas legislature in 2003 after the Republicans gained complete control of the redistricting process was constitutional. The plan replaced a Court ordered plan adopted after the prior legislature had been unable to agree on a plan. Plaintiffs had argued, among other things, that the conceded fact that the sole purpose of the gerrymander was to increase the number of Republican legislators meant that the plan violated the equal protection clause.

\textsuperscript{110} Id. at 298.
\textsuperscript{111} For an article questioning the constitutionality of incumbent protection as a redistricting principle, see Walter Frank, \textit{Help Wanted: The Constitutional Case against Gerrymandering to Protect Congressional Incumbents}, 37 Ohio Northern University Law Review 227 (2006).
The case underscores the inevitability of the Court acting as a kind of policy making body in democracy defining cases. It also underscores the difficulty of defining fairness for gerrymandering purposes.

Justice Stevens, writing in dissent for himself and Justice Breyer, pointed out correctly that the case raised a “unique question of law…not previously addressed”, namely “whether it was unconstitutional for Texas to replace a lawful districting plan ‘in the middle of a decade, for the sole purpose of maximizing partisan advantage’.” Stevens concluded that it was unconstitutional ultimately citing language in Karcher v. Daggett that when the Government adopts rules that “serve no other purpose other than to favor one segment – whether racial, ethnic, religious or political – that may occupy a position of strength at a particular point in time, or to disadvantage a politically weak segment of the community, they violate the constitutional guarantee of equal protection.”

For Stevens and Breyer the absence of a legitimate state interest was enough. Justice Kennedy, however, writing in a portion of his opinion joined by Chief Justice Roberts and Justice Alito, expressed skepticism of “a claim that seeks to invalidate a statute based on a legislature’s unlawful motive but does so without reference to the content of the legislation enacted.” Then he added:

“Even setting this skepticism aside a successful claim attempting to identify unconstitutional acts of partisan gerrymandering must do what appellants’ sole motivation theory explicitly disavows:

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112 League of United Latin American Citizens v. Perry, No. 05-204, slip op. at 11 of Justice Stevens opinion (U.S. Sup. Ct., June 28, 2006).
113 Id.
114 462 U.S. 725 (1983)
115 Id. at 748 (quoted in League of United Latin American Citizens v. Perry, supra, note 93 at 28.
116 League of United Latin American Citizens v. Perry, supra, note 93 at 11 of Justice Kennedy’s opinion.
show a burden as measured by a reliable standard, on the complainants’ representational rights.”\textsuperscript{117}

Who has the better of the argument? In the end neither one is convincing. The language in Karcher that Justice Stevens cites to support his position describes all partisan gerrymandering not just partisan gerrymandering that occurs in mid-cycle. But we know that only excessive partisan gerrymandering is unconstitutional.\textsuperscript{118} So notwithstanding his best efforts, Justice Stevens’ argument seems to founder on the absence of a manageable standard for identifying that gerrymandering. Moreover, the concern about “a politically weak segment of the community” hardly seems appropriate for a Democratic Party that in 1991 engaged in a partisan gerrymander so egregious as to allow it to control a majority of the State’s congressional delegation long after it had ceased to be the majority party in the State. And certainly it would come as a surprise to most minor parties to suddenly be told that equal protection is violated when the strong enact laws aimed at the weak given the many Supreme Court decisions favoring the major over the minor parties.\textsuperscript{119}

On the other hand, Justice Kennedy never explains why the Court must solve the apparently intractable problem of a reliable standard if the offending redistricting legislation had no legitimate state purpose. After all, there was a legally effective plan in place prior to the passage of the offending legislation. Why shouldn’t that pre-existing plan be the legitimate default option?

In all of this, one is reminded again of the wisdom of Justice Breyer’s words, in discussing federalism cases, that logic isn’t always the answer.\textsuperscript{120}

\textsuperscript{117} Id.
\textsuperscript{119} See cases described in note 4.
\textsuperscript{120} BREYER, supra note 16.
Under our proposed framework, the Court would first have had to recognize that it was being asked to address an issue of democratic policy for which neither text, precedent or tradition provided a clear answer. It would then have had to consider the practical ramifications of its decision. Specifically, it would have had to consider possible harm to the democratic system of allowing a continual round of redistricting every time political control in a state changed hands, recognizing particularly how redistricting has “opened up a multi-million dollar industry” involving a universe of “consultants”, “high priced lawyers” and “moonlighting social scientists”.\footnote{Peter F. Galderisi & Bruce Cain, Introduction: Redistricting Past, Present and Future, in REDISTRICTING IN THE NEW MILLENIUM (Peter F. Galderisi, Ed.) at 5 (2005).}

The Court might well have concluded that it was much too early to speculate about the possible impact of a continuing round of redistricting on the political process or whether that such a round could develop. Such realization would probably have encouraged the Court to issue as modest a decision as possible, a result that would certainly have been consistent with the third element of the standard to give the political process itself as much opportunity as possible to resolve problems of democracy.

The most modest resolution for the Court would have been the most fact-based. Certainly, there would be nothing wrong under our proposed standard if the Court had simply held that where there is a history of both parties engaging in severe partisan gerrymandering when given the opportunity, the Court will not intervene because to do so would ultimately amount to taking sides in a political dispute – a kind of clean hands resolution for what is, at its core, an equity question. Such a decision would have allowed the Court to uphold the portion of our standard that encourages giving full play to the political process while still allowing the

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\footnote{Peter F. Galderisi & Bruce Cain, Introduction: Redistricting Past, Present and Future, in REDISTRICTING IN THE NEW MILLENIUM (Peter F. Galderisi, Ed.) at 5 (2005).}
Court more flexibility in the future if mid-cycle redistricting becomes much more prevalent.

U.S. Term Limits v. Thornton\textsuperscript{122}

In terms of practical impact, it is hard to overstate the importance of U.S. Term Limits v. Thornton, for it stopped in its tracks the most significant grass roots democratic reform movement since the progressive era. At the time the Supreme Court decided the case in 1995, twenty-two states had imposed congressional pure term limits or restrictions on ballot access based on length of service, including six states in 1994.\textsuperscript{123}

In 1992, Arkansas voters amended their state constitution to provide that a person previously elected to three or more terms in the House or two or more terms in the U.S. Senate could not have their name placed on the ballot. A bare majority of the Court found that the amendment constituted an impermissible additional qualification for congressional service “since allowing individual states to adopt their own qualifications for congressional service would be inconsistent with the Framers’ vision of a uniform National Legislature representing the people of the United States.”\textsuperscript{124} The dissent reasoned that the amendment was not an impermissible qualification since the Constitution’s qualifications clause did not expressly bar the states from adopting further qualifications and therefore the power was reserved to the people and the states by the 10\textsuperscript{th} Amendment.\textsuperscript{125}

\textsuperscript{122} 514 U.S. 779 (1995).
\textsuperscript{123} 514 U.S. at 917, note 39.
\textsuperscript{124} 514 U.S. at 783.
\textsuperscript{125} 514 U.S. at 845.
Interestingly, the decision has been widely accepted by the most fervent of the Court’s “democracy” critics. Professor Jamin Rankin in his recent work, Overruling Democracy, for example, praised the decision. Defining democracy as “the system in which the government is not permitted to manipulate the sovereignty of the people over the continuing reconstitution of their political leadership”, Professor Rankin found that the “Supreme Court has rightly defended this principle of government neutrality in the context of state efforts to drive incumbents off the ballot.”

Both the majority and dissent see the case the same way in one critical respect: for both of them, it is ultimately an argument over federalism. Both cite historical evidence at great length to support their respective positions. Overall, the evidence, while certainly supportive of the view that the framers did not intend for Congress to adjust their own qualifications, is less clear with respect to the role of the States. And, as so often is the case, beauty is in the eye of the beholder. To cite just one example, the dissent points out that five states imposed district residency requirements, and one state property qualification, on congressional candidates following ratification and that this clearly showed that the States did not deem themselves precluded from adding qualifications to those fixed by the Constitution. In response, Justice Stevens noted that “we consider the number of state imposed qualifications to be remarkably small” particularly given the vast number of qualifications for state and local officials that were not imposed on federal representatives and that this “restraint” by the states

126 JAMIN B. RASKIN, OVERRULING DEMOCRACY (2003)
127 Id. at 93.
128 Id. One suspects that the reason that Professor Rankin so strongly endorses the majority decision is an instinctive belief born out of the civil rights era that any decision that vindicates national power over states’ rights when the subject is elections has to be correct if only because it minimizes the possibility of future abuse by the states.
129 514 U.S. at 904-905.
“supports the conclusion that the States did not believe that they generally had the power to add qualifications.”

By making U.S. Term Limits an argument over federalism, both the majority and dissent essentially avoided the wider implications of the case for the democratic process. One exchange in particular revealed how little concern the Court felt for the political realities that had led to the passage of the Arkansas amendment in the first place.

In his dissent Justice Thomas suggested that the Framers’ distrust of the States had been directed primarily at laws passed by state legislatures, not the people themselves. Justice Stevens, in response, attacked this proposition with some vehemence:

“The novelty and expansiveness of the dissent’s attack is quite astonishing. We are aware of no case that would even suggest the validity of a state law under the Federal Constitution would depend at all on whether the state law was passed by the state legislature or by the people directly through amendment of the State Constitution.”

Justice Thomas was right in noting that State distrust at the time the Constitution was written was directed at state legislatures if only because the whole idea of the people directly passing laws is a twentieth century innovation.

The important point, however, which interestingly Justice Thomas does not make, is not just that the Arkansas amendment was passed by the voters of Arkansas but that it was passed because the political process itself was perceived as having broken down and the voters were clearly skeptical, with obvious justification, that

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130 Id. at 826.
131 Id. at 809.
the legislature would come up with a solution. This is clear from the preamble to the Amendment which read:

“The people of Arkansas find and declare that elected officials who remain in office too long become preoccupied with reelection and ignore their duties as representatives of the people. *Entrenched incumbency has reduced voter participation and has led to an electoral system that is less free, less competitive, and less representative than the system established by the Founding Fathers...*” 132 (my emphasis)

When the political process is not in a position to heal itself, extraordinary interventions are sometimes justified. As Robert Dixon, endorsing Baker v. Carr, noted: “when political avenues for redressing political problems become dead end streets some judicial intervention in the politics of the people may be essential in order to have an effective politics.”133

Ironically, perhaps recognizing that the historical materials could be read more than one way, Justice Stevens also justified the Court’s decision in terms of democratic principles, concluding that the Court’s decision “that States lack the power to impose qualifications vindicates the principle that the people should choose whom they please to govern them.”

It is hard, however, to see how a decision that overturns the voice of the people vindicates the voice of the people. It also bears mentioning that U.S. Term Limits v. Thornton is fundamentally inconsistent with Storer v. Brown. Recall that the Court in Storer approved legislation that effectively prohibited a registered member of a party from pursuing congressional office unless he

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132 Id. at 784.
133 ROBERT G. DIXON JR., DEMOCRATIC REPRESENTATION – REAPPORPTIONMENT IN LAW AND POLITICS 8 (1968).
had gained the nomination of that party for that office. Notwithstanding the protestations of Justice Stevens to the contrary,\textsuperscript{134} it is hard to see how a statute that disqualifies certain people from running for office based on the nature of their political activities is any less a qualification for office than a term limit disqualification.

Applying our proposed standard, the Court would have had to take much more serious notice of the fact that it was throttling a grass movement that, as previously mentioned, had already enacted some form of congressional term limits in twenty-two States. It would also have had to consider that term limits themselves were aimed at producing more competitive elections as opposed to the coronations that most of the elections to the House of Representatives were becoming.

The Court would have had to recognize that a clash of democratic principles was involved in this case difficult to resolve as a matter of constitutional logic. Certainly, there is an anti-democratic element in term limits in that it prevents voters, at any given time, from selecting a particular person for congressional office. On the other hand, there is the simple fact that the people of Arkansas were trying to take back control of their own electoral process that was perceived, certainly with some justification, as having been hijacked by the very legislators supposedly responsible to them.

A court more attuned to the problem of applying democratic principles and more concerned about the implications of its decisions for the democratic process should have labored to produce a more modest decision. For example, the Court might have found the Arkansas amendment unconstitutional because it permanently banned persons who had served the maximum term limit from ever appearing on the ballot. Certainly, such amendment

\textsuperscript{134} U.S. Term Limits 514 U.S. at 827 to 829.
is not carefully tailored to achieve its goal since it bars persons from appearing on the ballot long after their advantage of incumbency has vanished. At the same time, however, the Court could have left open the possibility for a more refined approach to term limits.

The Court might also have drawn a distinction between term limits for the House and term limits for the U.S. Senate, noting that redistricting for House representatives had introduced an enormous element of anti-democratic manipulation into the system that simply did not exist in the Senate where no gerrymandering is possible. Given this state of affairs, the Court might then have indicated a predisposition against term limits based on their limitation of voter choice but declared its unwillingness to rule them out categorically in the absence of some showing of a reasonably competitive environment for House races. Such a decision might have encouraged states to make competitiveness itself a redistricting principle.

The Court might have also decided that a limit of three terms for Congress was simply too short while holding open the possibility that a more generous number might pass constitutional muster, in effect achieving a balance between the desire of voters for citizen legislators and the reasonable national expectation of a cadre of experienced legislators in Congress.

Whatever the outcome, the proposed framework would have directed the Court’s attention where it belonged, on the democratic tension presented by term limits in the real world of enormous incumbent advantages.
Richardson v. Ramirez\textsuperscript{135}

Up to now, we have not discussed possible difficulties in identifying democracy defining cases to which our proposed standard would apply.

Richardson v. Ramirez, in which the Court upheld the right of States to disenfranchise felons even after their discharge from the penal system against a challenge on equal protection grounds, forces us to consider this question more closely.

I believe that Justice Marshall was correct in his dissent both in finding the need for a compelling state interest to justify such disenfranchisement and in concluding that the State had failed to articulate one, but it is doubtful whether this should be treated as a democracy defining case to which the proposed standard applies since the case turns on the interpretation of specific language in the 14\textsuperscript{th} Amendment which at a minimum recognizes state disenfranchisement of felons as an operative fact.\textsuperscript{136} Indeed, the essential dispute between the majority and the dissent involved whether the recognition of felony disenfranchisement in Section 2 of the 14\textsuperscript{th} Amendment meant that the equal protection clause in Section 1 of the Amendment can not be read to prevent such disenfranchisement.

As discussed earlier, a category of “democracy defining” cases is required in part because in most of these cases the constitutional text does not provide a basis for a resolution of the problem. Unlike the cases discussed above, however, in Richardson v.

\textsuperscript{135} 418 U.S. 24 (1974).
\textsuperscript{136} The second sentence of Section 2 of the 14\textsuperscript{th} Amendment requires that the number of male citizens over 21 recognized for apportionment purposes for the House of Representatives shall be reduced to the extent their right to vote is abridged, except to the extent the right is abridged “for participation in the rebellion, or other crime….”
Ramirez, there is express language and historical materials to debate that are directly on point.

It is also a fair question whether Richardson v. Ramirez implicates democracy as a procedural process. Determining voter qualifications has historically been a State responsibility. In Richardson, therefore, the issue was not whether the State should or should not be able to create categories of voters and non-voters but whether this particular qualification created an invidious discrimination. Discrimination is clearly an equal protection issue. Our proposed standard does not pretend to address the issue of discrimination not because it is not important (there is nothing more offensive nor inconsistent with democracy perceived as a system of values) but because there is already a well developed body of law to address such claims.

There is, of course, the possibility that felon disqualification or any other voter disqualification could implicate the integrity of the electoral process if enacted or maintained by a desire to keep a certain body of persons from voting based on how they might vote. In Richardson, Justice Marshall in dissent was forced to address earlier Court decisions seeming to uphold voter disqualifications based on how the excluded voters might cast their ballots:

“Although in the last century, this Court may have justified the exclusion of voters from the electoral process for fear that they would vote to change laws considered important by a temporal majority, I have little doubt that we would not countenance such a purpose today. The process of democracy is one of change. Our laws are not frozen into immutable form.”137

Justice Marshall’s statement, if embraced by the Court today, would certainly allow for an attack on felony statutes based on the

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assertion that they are maintained to advantage one party over another. That argument would certainly implicate our standard in a way that a simple discrimination claim does not.

Most of the time, whether a democracy defining case is before the Court should be clear, but there may be cases on the boundaries in which the arguments advanced by the litigants themselves will determine the necessity for and relevance of our proposed standard.138

Conclusion

Discussing how the Supreme Court approaches constitutional issues of democracy, Richard Pildes has written: “A significant

138 Our discussion of individual cases did not include either Bush v. Gore or the Shaw line of cases, supra notes 2 and 11, an omission that requires a brief explanation. Bush v. Gore was an election contest case; it was not about the rules of the game but whether the result of the game had been properly scored. As such, notwithstanding its importance, it is not really relevant to the kinds of cases we have been discussing, except to this extent: our framework does emphasize allowing the political process to play out as fully as possible and a Court mindful of that framework might have hesitated to decide the election on its own. One scholar has pointed out, for example, that when the U.S. Supreme Court halted the Florida recount, it prevented the Florida election process from being completed because Gore’s challenge to the secretary of state’s certification of Bush’s victory in Florida was never actually adjudicated and that this violated “the force of our democratic traditions, rooted as they are in the Constitution” which require courts to “defer in election contest cases to the electorate and the electoral process.”. Louise Weinberg, When Courts Decide Elections: The Constitutionality of Bush v. Gore, 82 B.U.L. Rev. 609 at 664 (2002). It is likely that if the recount process had not been halted, then either Bush would have won anyway because the recount would not have changed enough votes or the election would have been thrown into the House of Representatives with two competing slates of electors. Had the election been thrown into the House of Representatives, the result would have almost undoubtedly been a Bush victory because of the Republican preponderance in state delegations with, however, this possible difference: there is no question that President Bush, once awarded the election by the Supreme Court, paid no heed to the closeness of the election and the fact that he had fewer popular votes than Vice-President Gore. Whether he would have been able as easily to dismiss the extraordinary circumstances surrounding his election had it been thrown into the House is an unanswerable question but it is possible he would have chosen to govern differently in this different set of circumstances, particularly depending upon how events in the House and the country played out. In any event, the Court’s deciding the election as it did certainly prevented other events from going forward that might well have influenced the kind of administration that was formed (it is not difficult to imagine enormous pressure for some kind of unity cabinet for example) and that in turn may have ultimately affected the course of history. As to the Shaw line of cases, while extremely important, they deal a great deal with statutory interpretation; the major constitutional issue being presented by the Court’s determination that redistricting cannot, consistent with the equal protection clause, be motivated primarily by race; this is clearly an argument rooted in equal protection jurisprudence (though perhaps a serious misreading of it) and, like Richardson v. Ramirez, is not one for which the proposed standard provides much assistance.
problem in this body of law, in my view, is not that the Court has the wrong functional view of how democracy ought to be understood; it is that the Court refuses to approach these issues in functional terms at all. Instead, the law of democracy remains one of the last bastions of legal formalism in constitutional law.”

This article implicitly embraces the criticism of Professor Pildes. It has proposed a framework providing a benchmark of procedural objectives intended to assure the legitimacy of governmental decisions based on the freely given consent of the governed. The need for such a framework of democratic objectives is rooted in (1) the special nature of political rights in which individuals and groups are players in a larger system, our electoral system, whose continued success is the foundation of all our rights; and (2) the simple fact that the traditional tools of legal analysis (text and discovery of intent) and modes of interpretation (originalism and deference to legislative majorities) are largely useless in analyzing democracy defining cases. To support our argument, we analyzed a number of key Supreme Court decisions to point out deficiencies in the Court’s treatment of these cases and to show how our proposed standard might have assisted the Court.

Ultimately, of course, the kind of democracy we enjoy and its continued survival depend upon ourselves; that’s what self-government means. But the Supreme Court now plays an important role in helping to define the rules of our democracy. This article has tried to show that a different approach to democracy defining cases is both possible and needed and should over time result in a body of decisions both more principled because animated by an agreed upon view of our political system and more pragmatic because focused on the requirements of that system.
