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Paul S. Berman

George Washington University Law School, pberman@law.gwu.edu

Neal S. Mehrotra

Kathryn S. Sadasivan

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DEMOCRACY AND DEMOGRAPHY

Paul Schiff Berman,* *Neal S. Mehrotra*** & *Kathryn C. Sadasivan****

INTRODUCTION

American democracy is under siege. This is so because of the confluence of three trends: (1) demographic change and residential segregation, which increasingly have placed more racially diverse Democratic Party voters in cities and suburbs, while rural areas have become more white and Republican; (2) a constitutional structure—particularly the Electoral College, the composition of the Senate, and the use of small, winner-take-all legislative districts—that gives disproportionate representation to rural populations; and (3) the willingness of this rural Republican minority to use its disproportionate power to further entrench counter-majoritarian structures, whether through extreme partisan gerrymandering, increased voter suppression efforts, court-packing, or outright rebellion against the results of democratic elections.

These three trends together pose an existential threat to the whole idea of democratic self-governance. Indeed, the very viability of the Republican Party as a national political force now depends almost completely on counter-majoritarian structures. Democrats have won the popular vote in seven of the past eight presidential elections¹ and easily won the popular vote in the 2020 election by more than seven million votes.² Yet, Donald Trump came within 45,000 votes in three states from winning the Electoral College

* Walter S. Cox Professor of Law, The George Washington University.

** Law Clerk, U.S. District Court for the Middle District of Alabama.

*** Redistricting Counsel, the NAACP Legal Defense Fund.

1 See Nicholas Riccardi, *Democrats Keep Winning the Popular Vote. That Worries Them.*, AP NEWS (Nov. 14, 2020), <https://apnews.com/article/democrats-popular-vote-win-d6331f7e8b51d52582bb2d60e2a007ec> (“Democrats won the popular vote in this year’s presidential election yet again, marking seven out of eight straight presidential elections that the party has reached that milestone.”).

2 See Drew Desilver, *Biden’s Victory Another Example of How Electoral College Wins Are Bigger Than Popular Vote Ones*, PEW RSCH. CTR. (Dec. 11, 2020), <https://www.pewresearch.org/fact-tank/2020/12/11/bidens-victory-another-example-of-how-electoral-college-wins-are-bigger-than-popular-vote-ones/> [<https://perma.cc/5X2B-DUHF>] (“Biden received. . . more than 7 million more votes than Trump.”).

anyway.³ In the Senate, the 50 Republican Senators collectively received 41.5 million votes fewer than the 50 Democratic Senators,⁴ and a vote in Wyoming is worth over three times more than a vote in California in the Electoral College.⁵ Further, one demographic study predicts that by 2040, 70% of the population will reside in only fifteen states, which will permit only 30% of the population to elect 70 out of the 100 senators.⁶ Meanwhile, for the first time in U.S. history, four of the current U.S. Supreme Court justices were appointed by presidents who did not win the popular vote and a controlling majority were confirmed by Senators who themselves did not represent a majority of the popular votes cast for Senate.⁷ Finally, Republicans are using gerrymandered majorities in state legislatures to create new rules making it harder to vote,⁸ to restrict the use of popular

3 The three states are Wisconsin, Georgia, and Arizona. Elaine Kamarck & John Hudack, *How to Get Rid of the Electoral College*, BROOKINGS INST. (Dec. 9, 2020), <https://www.brookings.edu/blog/fixgov/2020/12/09/how-to-get-rid-of-the-electoral-college/> [https://perma.cc/7EAP-RLGD].

4 See Ian Millhiser, *America's Anti-Democratic Senate, by the Numbers*, VOX (Nov. 6, 2020), <https://www.vox.com/2020/11/6/21550979/senate-malapportionment-20-million-democrats-republicans-supreme-court> [https://perma.cc/9GWV-6SF5] (“If the two Georgia seats go to Democrats, the Senate will be split 50–50, but the Democratic half will represent 41,549,808 more people than the Republican half.”).

5 *Representation in the Electoral College: How do States Compare?*, USAFACTS (Aug. 13, 2020), <https://usafacts.org/visualizations/electoral-college-states-representation/> [https://perma.cc/M9MP-KG7R] (“One way to think about electoral representation is to consider how many people each electoral vote represents, based on a state’s population. According to 2018 population estimates, one electoral vote in Wyoming accounts for around 193,000 people, while a vote in Texas or California accounts for over 700,000.”).

6 UNIV. OF VA. WELDON COOPER CTR. FOR PUB. SERV., DEMOGRAPHICS RSCH. GRP., *National Populations Projections* (2018), <https://demographics.coopercenter.org/national-population-projections> [https://perma.cc/4EFR-GV4P]; Philip Bump, *In About 20 Years, Half the Population Will Live in Eight States*, WASH. POST (July 12, 2018), <https://www.washingtonpost.com/news/politics/wp/2018/07/12/in-about-20-years-half-the-population-will-live-in-eight-states/> [https://perma.cc/4UXT-UPD4] (“[B]y 2040 or so, 70 percent of Americans will live in 15 states. Meaning 30 percent will choose 70 senators.”).

7 See Adam Cole, *The Supreme Court is About to Hit an Undemocratic Milestone*, VOX (Sept. 28, 2020), <https://www.vox.com/21456620/supreme-court-scotus-undemocratic-milestone-minority-rule> (“For the first time since senators were directly elected, a controlling majority of the Court will have been put there by senators whom most voters didn’t choose. (And, of course, the last three will have been nominated by a president who lost the popular vote by nearly 3 million votes.)”).

8 See Alex Tausanovitch & Danielle Root, *How Partisan Gerrymandering Limits Voting Rights*, CTR. FOR AM. PROGRESS (July 8, 2020), <https://www.americanprogress.org/article/partisan-gerrymandering-limits-voting-rights/> [https://perma.cc/DVN2-QGZ2] (“[S]tate legislators who won their elections due to gerrymandering are making it harder for Americans to vote.”).

referenda,⁹ to place election administration in the hands of political partisans,¹⁰ to allow the legislature to ignore the vote count altogether,¹¹ and to change state court elections so that judges are elected based on legislative district so as to extend Republican gerrymandered advantages to judicial elections as well.¹²

Thus, we face the very real prospect that for the foreseeable future a mostly white rural Republican minority wields disproportionate, structurally locked-in, power over a more diverse urban and suburban Democratic majority.¹³ A democracy cannot survive long under those conditions.

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- ⁹ Popular initiatives are also referred to as ballot initiatives and referenda, among others. *See, e.g.,* Reid Wilson, *GOP Targets Ballot Initiatives After Progressive Wins*, THE HILL (Feb. 20, 2021), <https://thehill.com/homenews/state-watch/539654-gop-targets-ballot-initiatives-after-progressive-wins> [<https://perma.cc/UT2V-7XFU>] (referring to popular initiatives as “ballot initiatives” and “referenda”).
- ¹⁰ *See, e.g.,* Quinn Scanlan, *10 New State Laws Shift Power Over Elections to Partisan Entities*, ABC NEWS (Aug. 16, 2021), <https://abcnews.go.com/Politics/dozen-state-laws-shift-power-elections-partisan-entities/story?id=79408455> [<https://perma.cc/UK5P-YF3S>] (identifying “at least eight states, including battlegrounds Arizona and Georgia, that have enacted 10 laws so far this year that change election laws by bolstering partisan entities’ power over the process or shifting election-related responsibilities from secretaries of state”).
- ¹¹ *See* Matt Vasilogambros & Ethan Edward Coston, *Contentious Fringe Legal Theory Could Reshape State Election Laws*, PEW (Mar. 18, 2022), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/03/18/contentious-fringe-legal-theory-could-reshape-state-election-laws> [<https://perma.cc/KMJ5-VW63>].
- ¹² *See* Patrick Berry, *The Wrong Way to Reform Judicial Elections*, BRENNAN CTR. FOR JUST. (Feb. 7, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/wrong-way-reform-judicial-elections> [<https://perma.cc/W975-XF3B>] (“The bill, H.B. 196, would have voters elect supreme court justices to 10-year terms by district rather than statewide.”).
- ¹³ Data from the last two decades shows that the Democratic Party maintains a wide and long-standing advantage among Black, Hispanic and Asian American registered voters. *See Trends in Party Affiliation Among Demographic Groups: Continuing Racial and Ethnic Divisions in Leaned Partisan Identification*, PEW RSCH. CTR. (Mar. 20, 2018), https://www.pewresearch.org/politics/2018/03/20/1-trends-in-party-affiliation-among-demographic-groups/2_3-14/ [<https://perma.cc/3DNZ-PFZB>] (displaying statistic on which political party is most popular among various demographic groups). National exit polling data tells a similar story, with a majority of white voters consistently favoring Republican candidates in presidential elections over the last 40 years, while Black voters have solidly supported the Democratic contenders. *See* Ruth Igielnik & Abby Budiman, *The Changing Racial and Ethnic Composition of the U.S. Electorate*, PEW RSCH. CTR. (Sept. 23, 2020), <https://www.pewresearch.org/2020/09/23/the-changing-racial-and-ethnic-composition-of-the-u-s-electorate/> [<https://perma.cc/YS3P-C8KJ>] (“[T]he Democratic Party maintains a wide and long-standing advantage among Black, Hispanic, and Asian American registered voters. Among White voters, the partisan balance has been generally stable over the past decade, with the Republican Party holding a slight advantage.”). Hispanic voters have also historically been more likely to support Democrats than Republican candidates,

Indeed, it is perhaps not surprising that Republicans appear to be less and less committed to majoritarian democracy altogether.¹⁴

In order to rescue the possibility of democratic self-government, we need an all-hands-on-deck response, and part of that response relies on the judiciary. In particular, we argue that both state and federal judges must begin to apply heightened scrutiny to legislation or executive action that seeks to entrench the political power of a rural electoral minority or that discriminates against urban and suburban populations. Such legislative and executive action defiles the democracy and impedes political participation by locking in the power of a minority faction of the country.

This Article therefore makes the case for heightened judicial scrutiny in order to protect democratic processes against partisan and discriminatory entrenchment. In making this argument, we seek to revive the political process rationale for heightened judicial scrutiny that has long been associated with constitutional scholar John Hart Ely and his interpretation of Chief Justice Stone's famous footnote 4 of the decision in *United States v. Carolene Products Company*.¹⁵ Ely's *Democracy and Distrust*¹⁶ is rightly considered

though their support has not been as consistent as that of Black voters. *See id.* ("Black voters have solidly supported the Democratic contenders. Hispanic voters have also historically been more likely to support Democrats than Republican candidates, though their support has not been as consistent as that of Black voters.").

¹⁴ See Zack Beauchamp, *The Republican Revolt Against Democracy, Explained in 13 Charts*, VOX (Mar. 1, 2021), <https://www.vox.com/policy-and-politics/22274429/republicans-anti-democracy-13-charts> [<https://perma.cc/734Y-XFCJ>] ("The Republican Party is the biggest threat to American democracy today. It is a radical, obstructionist faction that has become hostile to the most basic democratic norm: that the other side should get to wield power when it wins elections.").

¹⁵ *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938):

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities, whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry (internal citations omitted).

¹⁶ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

one of the classics of twentieth century jurisprudence.¹⁷ Starting from this footnote in an otherwise unremarkable Supreme Court decision, Ely built “a participation-oriented, representation-reinforcing approach to judicial review.”¹⁸ His approach provided a convincing answer to the so-called “counter-majoritarian difficulty”¹⁹ inherent in having unelected judges overturn legislation and executive action initiated by democratically elected government officials. According to Ely, judicial review could actually enhance, rather than supplant, democratic decision making if courts intervene particularly “when the political process is undeserving of trust or judicial deference.”²⁰ Thus, he focused on judicial review in cases when either “(1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out” or “(2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.”²¹ Scholars have labelled these two justifications for judicial intervention “an antientrenchment and an antidiscrimination rationale” for heightened judicial scrutiny.²²

Both Chief Justice Stone, in *Carolene Products*, and Ely, in *Democracy and Distrust*, were particularly focused on the potential ways the political system was skewed to deny Black people effective political representation, as well as the many circumstances through which de jure racial discrimination denied racial minorities equal rights. But there is no reason that the *Carolene Products* theory as elaborated by Ely needs to be confined only to this context. To the contrary, the whole point of Ely’s theory of judicial review is that it contemplates judicial intervention *whenever* the prevailing political system is systematically disadvantaging one group in order to lock in political advantages to another group. In such circumstances the democratic process

17 See, e.g., Michael C. Dorf, *The Coherentism of Democracy and Distrust*, 114 YALE L.J. 1237 (2005) (“A quarter of a century after its publication, *Democracy and Distrust* remains the single most perceptive justificatory account of the work of the Warren Court and arguably of modern constitutional law more broadly.”).

18 ELY, *supra* note 16, at 87.

19 304 U.S. 144 (1938).

20 Kathleen M. Sullivan & Pamela S. Karlan, *The Elysian Fields of the Law*, 57 STAN. L. REV. 695, 697 (2004).

21 ELY, *supra* note 16, at 103.

22 Sullivan & Karlan, *supra* note 20, at 697.

is not functioning properly, and judicial intervention is not a *threat* to democracy, but a necessity in order to *preserve* democracy.

In this article, we argue that our current political moment calls for a robust application of the *Carolene/Ely* principles of judicial review because we are facing precisely the sort of entrenched power problem that Ely argued was a core rationale for strict scrutiny by judges. Indeed, in this case the need for judicial scrutiny is arguably even stronger because this entrenched power is not being wielded by the majority against a “discrete and insular” minority.²³ Instead, it is an electoral *minority* that is seeking to lock in its power against an urban and suburban *majority*.²⁴ Accordingly, it is even more important that heightened judicial review be applied to prevent counter-majoritarian gambits from undermining democratic self-government altogether.

This counter-majoritarian entrenchment, because it disadvantages urban populations, also works to disadvantage and disenfranchise communities of color, implicating Ely’s discrimination concern as well. Most of America’s population resides in urban centers in just over a dozen states. Currently, population growth in urban centers is overwhelmingly powered by millennial Black and brown Americans.²⁵ At 44% diversity, millennials are the most ethnically diverse generation in American history.²⁶ By the mid-2040s, racial and ethnic minorities are projected to make up over half of all Americans and a significantly larger share of America’s urban residents.²⁷ Despite their growing numbers—numbers that are even larger than official census figures capture²⁸—these urban voters face structural impediments to effectuating their relative political power.

²³ United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938); see also William H. Frey, *The Millennial Generation: A Demographic Bridge to America’s Diverse Future*, BROOKINGS INST. (Jan. 2018), https://www.brookings.edu/wp-content/uploads/2018/01/2018-jan_brookings-metro_millennials-a-demographic-bridge-to-americas-diverse-future.pdf [https://perma.cc/Q98B-FNU5] (discussing the increasing size of the diverse millennial generation as a percentage of the population as a whole).

²⁴ For a comprehensive discussion of the roots and causes of this problem, along with comparisons to other democracies around the world, see generally JONATHAN A. RODDEN, *WHY CITIES LOSE: THE DEEP ROOTS OF THE URBAN-RURAL POLITICAL DIVIDE* (2019).

²⁵ Frey, *supra* note 23.

²⁶ *Id.*

²⁷ *Id.*

²⁸ See Tara Bahrapour, *2020 Census Undercounted Latinos, Blacks, Native Americans, Bureau Estimates Show*, WASH. POST (Mar. 10, 2022), <https://www.washingtonpost.com/dc-md-va/2022/03/10/2020-census-undercount-report/> [https://perma.cc/6Z48-EZQC].

Of course, some elements that contribute to this anti-democratic state of affairs are beyond the capacity of the judiciary to remedy because, for example, some reforms would require a constitutional amendment or a change to the structure of the judiciary itself.²⁹ However, the state and federal judiciary can play a significant role in policing harmful consequences of this structural counter-majoritarianism. In particular, we argue that when an Executive without a popular mandate or a legislature that does not reflect the majority of citizens enacts policies or laws that target and disadvantage the very populations that are being structurally denied their ability to participate in the political process, those policies or laws should be subject to heightened scrutiny.³⁰ In this article we provide examples of such situations where heightened judicial review is appropriate. We also discuss a pernicious theory—recently entertained by four U.S. Supreme Court justices—that would allow gerrymandered state legislatures to enact rules further disenfranchising voters or even changing election results without being

²⁹ Alicia Bannon & Zachary Laub, *Court Reform Gets New Attention: Controversy Surrounding Judicial Nominations Has Pushed Questions about the Federal Courts' Structure and Powers onto the Agenda*, BRENNAN CTR. FOR JUST. (Dec. 30, 2020), <https://www.brennancenter.org/our-work/research-reports/court-reform-gets-new-attention> [<https://perma.cc/HB9D-H77M>].

³⁰ U.S. CONST. amend. XIV (“No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”); U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law . . .”). Although the Fourteenth Amendment, by its terms, applies only to the states, the U.S. Supreme Court has repeatedly applied the principles of equal protection contained in the Amendment against the federal government as well, through the so-called “reverse incorporation” doctrine. *See, e.g.*, *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (stating that “it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government” than it does on a State to afford equal protection of the laws). Likewise, the heightened scrutiny called for in *Carolene Products* has frequently been used to strike down federal governmental action. *See, e.g.*, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 216–17 (1995) (summarizing cases); *see also* Kenneth Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C. L. REV. 541, 554 (1977) (“In case after case, [F]ifth [A]mendment equal protection problems are discussed on the assumption that [F]ourteenth [A]mendment precedents are controlling.”). Even those who resist the incorporation doctrine of *Bolling* tend to recognize that the Fourteenth Amendment’s equal protection guarantee should still apply to the federal government through the Amendment’s Citizenship Clause. U.S. CONST. amend. XIV (“All persons born and naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside.”). *See, e.g.*, *United States v. Vaello Madero*, 142 S. Ct. 1539, 1547 (2022) (Thomas, J., concurring) (“[T]he Citizenship Clause could provide a firmer foundation for *Bolling*’s result than the Fifth Amendment’s Due Process Clause.”); *see also* Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 VA. L. REV. 493, 501 (2013) (arguing that the Citizenship Clause “was adopted against a longstanding political and legal tradition that closely associated the status of ‘citizenship’ with the entitlement to legal equality”).

constrained by state or federal constitutional limitations. This so-called “independent state legislature” theory represents the worst sort of textual literalism, unmoored from context, historical understanding, or constitutional structure. It is also contrary to recent U.S. Supreme Court precedent and requires precisely the opposite reading of state and federal constitutional rights that we pursue here.

Part Two of this Article summarizes the heightened scrutiny rationale articulated by Ely, building from the *Carolene Products* footnote of Chief Justice Stone; it also tackles criticisms of Ely’s theory and argues that even if those criticisms might be valid in general, they do not apply to the sorts of legislative and executive acts targeted in this Article. Part Three argues that heightened scrutiny should apply to laws and policies that disfavor urban and suburban voters, because such voters constitute discrete and insular populations facing structural, locked-in barriers to effectuate repeal of legislative and executive policies that harm them. Part Four examines categories of laws that weaken the political power of urban residents and that should therefore draw strict judicial scrutiny. This section goes on to propose measures to ensure heightened scrutiny is applied only in circumstances truly warranting judicial review and intervention, guided by relevant U.S. Supreme Court jurisprudence and general principles of constitutional law. Finally, this Part uses the democracy-protecting approach advocated in this Article to criticize the “independent state legislature” theory because it would allow minority factions to further disenfranchise the majority of the population by severely reducing, if not eliminating, the possibility for meaningful judicial review by state or federal courts.

I. THE RATIONALE FOR HEIGHTENED JUDICIAL SCRUTINY TO PROTECT DEMOCRATIC PROCESSES

As noted in the Introduction, Ely built his approach to judicial review from footnote four in *United States v. Carolene Products*, a footnote that constitutes the “first—and maybe only—attempt to say, systematically, when the courts should declare laws unconstitutional.”³¹ In *Carolene Products* the Court ruled that although the federal Filled Milk Act was likely a protectionist concession to the condensed milk industry, the Court would nevertheless let the act stand. According to Chief Justice Stone, it was not

³¹ David A. Strauss, *Is Carolene Products Obsolete?*, 2010 U. ILL. L. REV. 1251, 1254.

the Court's role to reexamine economic legislation passed by Congress and therefore such legislation need only have a rational basis.³² However, Stone then dropped his famous footnote, in which the Court described a variety of cases in which this presumption of constitutionality would *not* apply: (1) laws that violated the clear command of a specific prohibition in the Constitution, such as those in the Bill of Rights; (2) laws restricting political processes that can bring about repeal of unpopular legislation; or (3) laws that disadvantage particular religious or national minorities or reflect "prejudice against insular and discrete minorities."³³ For these categories of laws, judges should provide careful review to ensure that the proper conditions for democracy are in place: (1) the rule of law, (2) formal access to democratic processes, and (3) adequate and non-dismissive representation of out-groups by elected representatives.³⁴

Thus, the Court, responding to criticism of the activist decisions that marked the so-called *Lochner* era,³⁵ made clear that most regulatory activities should be left to the politically elected branches of government.³⁶ Crucially, bad policy judgments or misguided regulatory aims would not be sufficient to justify court intervention in legislative or executive branch action because state legislatures, governors, Congress, and the President are the ones responsible for deciding contentious policy issues. Thus, the footnote sought to overcome the concern that courts might thwart democracy and the will of the people.³⁷

Nevertheless, the footnote deliberately sought to preserve areas where the courts *would* be justified to intervene. And though misguided policy choices would not be sufficient, failures in the political process itself could justify court action. In particular, courts could step in when defects in the political process prevent its functioning so that the views of all are incorporated.³⁸

³² *Id.* at 1252–1253 (citing *United States v. Carolene Products*, 304 U.S. 144, 154 (1938)).

³³ William N. Eskridge Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 *YALE L.J.*, 1279, 1281 (2005) (citing *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938)).

³⁴ *Id.* (citing ELY, *supra* note 16, at 73–77, 87–103).

³⁵ *See* *Lochner v. New York*, 198 U.S. 45 (1905) (ruling that a state minimum hour law violated the Fourteenth Amendment by interfering with freedom of contract).

³⁶ *See* Strauss, *supra* note 31, at 1254.

³⁷ *See id.*

³⁸ *See id.* at 1254 (citing Felix Gilman, *The Famous Footnote Four: A History of the Carolene Products Footnote*, 46 *S. TEX. L. REV.* 163, 176–79 (2004)).

Significantly, although the first exception in the footnote focuses on potential violations of fundamental rights enshrined in the Constitution, the second and third exceptions are process-based justifications that define the scope of judicial review not in terms of the value of specific rights, but rather by their susceptibility to abuse of power by factions.³⁹ The second justification responds to the concern that representatives in political office may conspire to entrench themselves, and by doing so defeat the democratic processes that presumably makes the acts of legislatures more valid than acts of judges in the first place.⁴⁰ Thus, Chief Justice Stone wrote that “more exacting judicial scrutiny” would be applied to “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation.”⁴¹ Examples of such legislation in the footnote include restrictions on voting, on dissemination of information, on political organization, and on peaceable assembly.⁴² The point, however, is that incumbents should not be allowed to control the apparatus of politics in order to keep others perpetually out.⁴³ And while the political process is usually self-correcting because bad laws will lead to backlash, if people are not allowed to vote, or hear information, or organize in opposition to policies, the self-correcting process fails.⁴⁴ Indeed, as Robert Cover has pointed out, the footnote was written in 1938, when authoritarian governments abroad were deliberately locking certain populations out of majoritarian processes.⁴⁵ In response, the heightened scrutiny articulated in *Carolene Products* envisions courts acting only to eliminate political blockage, ensuring that judicial review enhances, rather than undermines, democratic governance.⁴⁶

While exception two is about the twisting of democratic government to entrench power, exception three focuses on what constitutes a legitimate democratic purpose.⁴⁷ In particular, it identifies discrimination against racial

³⁹ See Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287 1292 (1982) (“The second and third paragraphs of the footnote accept the general terms of the counter-majoritarian difficulty, extending the scope of judicial review not in terms of the special value of certain rights but of their vulnerability to perversions by the majoritarian process.”).

⁴⁰ *Id.* at 1292.

⁴¹ *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938).

⁴² *Id.*

⁴³ Cover, *supra* note 39, at 1293.

⁴⁴ Strauss, *supra* note 31, at 1257–58.

⁴⁵ Cover, *supra* note 39, at 1293–94.

⁴⁶ Strauss, *supra* note 31, at 1256.

⁴⁷ Cover, *supra* note 39, at 1294.

minorities as a pitfall of pure majoritarian rule that was apparent in 1938.⁴⁸ Discrete and insular minorities are often not only perpetual losers in the political process, but also scapegoats and the objects of prejudice.⁴⁹ Minorities are discrete when they are identifiable in some way that makes it easier to single them out.⁵⁰ Insular means that other groups interact with them less and are therefore less willing to form coalitions with them due to prejudice.⁵¹ Their insularity makes them less understood and therefore easier to target, and the political processes do not work for them.⁵² Footnote four supplies two reasons for protection of minorities. First, discrete and insular minorities cannot expect that majority-controlled politics will protect them as it protects others.⁵³ Second, prejudice and hatred are political levers in politics that tend to keep racial minorities locked out because racial demagoguery is often politically effective.⁵⁴ Thus, the footnote seeks to distinguish these types of minorities, who are structurally locked out of the process because of discrimination, from ordinary losers in the political process. After all, one of the key lessons of the *Lochner* era was that there are legitimate winners and losers in a democracy, and the losers should not rely on courts to reverse their losses. So, if the manufacturers of filled milk cannot organize to defeat legislation that harms them, that is simply majoritarian democracy in operation.⁵⁵ But if democracy cannot work because of structural discrimination in the political process itself, then heightened scrutiny is democracy-reinforcing.

In elaborating on *Carolene Products*' footnote four, Ely starts from the premise that the Constitution was designed to be fully representative.⁵⁶ Quoting *Federalist No. 39*, Ely notes that it is “essential to [self-]government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it”⁵⁷ And *Federalist No. 57* eloquently elaborates:

48 *Id.* at 1296.

49 Strauss, *supra* note 31, at 1257.

50 *Id.*

51 *Id.*

52 Cover, *supra* note 39, at 1296.

53 *Id.* at 1297.

54 *Id.*

55 Strauss, *supra* note 31, at 1257.

56 ELY, *supra* note 16, at 5.

57 *Id.* at 6 (quoting THE FEDERALIST NO. 39, at 280–81 (B. Wright ed. 1961) (Madison)).

Who are to be the electors of the federal representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscurity and unpropitious fortune. The electors are to be the great body of the people of the United States. They are to be the same who exercise the right in every State of electing the corresponding branch of the legislature of the State.⁵⁸

Of course, the Constitution at the founding emphatically did not live up to this lofty ideal, most obviously excluding Blacks and women from political participation. However, Ely pointed out that the constitutional trajectory has been towards expanding the scope of such participation: “[e]xcluding the Eighteenth and Twenty-First Amendments—the latter repealed the former—six of our last ten constitutional amendments have been concerned precisely with increasing popular control of our government.”⁵⁹ And five of those six specifically extended the right to vote.⁶⁰ According to Ely, “[o]ur constitutional development over the past century therefore has substantially strengthened the original commitment to increasing popular control of the majority of those governed.”⁶¹

In such a system, Ely acknowledged, we must be careful not to over-inflate the role of judges because there is no assurance that they will share the values of the majority of society and their life tenure insulates them from popular influence.⁶² Thus, having justices make the majority of value-laden judgments is at odds with our carefully wrought constitutional design, which gives control to the people.

Nevertheless, seizing on the *Carolene Products* footnote, Ely succinctly explained the rationale for a more active role in certain areas:

Paragraph two suggests that it is an appropriate function of the Court to keep the machinery of democratic government running as it should, to make sure the channels of political participation and communication are kept open.⁶³ Paragraph three meanwhile mandates that the Court should also concern itself with what majorities do to minorities, particularly in passing laws ‘directed at’ religious, national, and racial minorities and those infected with prejudice against them.⁶⁴

58 *Id.* (quoting THE FEDERALIST NO. 57, at 384 (B. Wright ed. 1961) (Madison)).

59 *Id.* at 7.

60 *Id.*

61 *Id.*

62 *Id.* at 44.

63 *Id.* at 76.

64 *Id.* at 76.

The Fourteenth Amendment's Equal Protection Clause provides the most obvious constitutional grounding for Ely's process-based understanding of judicial review.⁶⁵ But Ely also found support for his process theory in the Privileges and Immunities Clause,⁶⁶ which has been interpreted to forbid states from treating out-of-state residents worse than they treat their own residents.⁶⁷ According to Ely, states are not able to discriminate against non-residents precisely because such non-residents are a politically "powerless class."⁶⁸ Likewise, in the context of the so-called Dormant Commerce Clause, the Supreme Court has ruled that a state cannot "subject goods produced out of state to taxes it did not impose on goods produced locally."⁶⁹ Again, the idea is to bind the interests of out-of-state manufacturers to those of local manufacturers represented in the legislature, in order to protect those politically powerless out-of-state manufacturers.⁷⁰ Finally, Ely cited the five constitutional amendments in the twentieth century specifically expanding the right to vote.⁷¹ The Seventeenth provided for the direct election of Senators.⁷² The Twenty-Fourth abolished the poll tax.⁷³ The Nineteenth extended the vote to women.⁷⁴ The Twenty-Third allowed D.C. residents to vote.⁷⁵ And the Twenty-Seventh allowed eighteen-year-old people the right to vote.⁷⁶ Extending the franchise to protect populations from being locked out of the political process has therefore, according to Ely, been a dominant trend in constitutional law.⁷⁷ Thus, he argued, the character of the Constitution has been to make sure that the making of significant

65 U.S. CONST. amend. XIV. The Fourteenth Amendment's Equal Protection Clause has also repeatedly been held to apply to suits against the federal government. *See supra* note 30.

66 U.S. CONST. amend. XIV, § 1. ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.").

67 *See ELY, supra* note 16, at 83.

68 *Id.*

69 *Id.* (citing *Brown v. Maryland*, 25 U.S. 419 (1827)).

70 *See ELY, supra* note 16, at 84. Ely also saw support for his process-based equality approach in various other constitutional provisions as well. *See id.* at 94–98.

71 *Id.* at 99.

72 U.S. CONST. amend. XVII.

73 U.S. CONST. amend. XXIV, § 1.

74 U.S. CONST. amend. XIX.

75 U.S. CONST. amend. XXIII, § 1.

76 U.S. CONST. amend. XXVI.

77 *See ELY, supra* note 16, at 99.

decisions is open to all and that lawmakers take into account the interests of all when making laws that affect everyone.⁷⁸

The U.S. Supreme Court has at least at times applied the *Carolene Products* approach to strike down laws that impact democratic participation. As Chief Justice Warren made clear, writing for the Court in *Kramer v. Union Free School District No. 15*,

[W]hen we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a rational basis for the distinctions are not applicable The presumption of constitutionality and the approval given “rational” classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to fairly represent all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality.⁷⁹

Using a similar rationale, the Court has also intervened in cases involving voter qualifications because the “ins” cannot be trusted to decide who stays out in these cases.⁸⁰ Thus, in *Carrington v. Rash*, the Court invalidated a law denying the franchise to those who moved into the state on military service.⁸¹ And in *Harper v. Virginia Board of Elections*, the Court struck down Virginia’s poll tax.⁸² In both cases, the Court labeled the laws in question irrational, but in neither case was that actually true. After all, as Ely noted, military personnel do tend to move around more than others and may have less commitment to local politics.⁸³ Likewise, it is not completely irrational to think requiring people to pay in order to vote will tend to select for more informed and committed voters.⁸⁴ The real problem with both of these laws, according to Ely, was that they interfered with the democratic process itself, choking off the voice of disadvantaged groups.⁸⁵ Similarly, the one-person, one-vote standard of *Reynolds v. Sims* aims to ensure that the in-group cannot thwart political participation by devaluing the votes of opposing factions.⁸⁶

⁷⁸ *Id.* at 100.

⁷⁹ 395 U.S. 621, 627–28 (1969).

⁸⁰ See ELY, *supra* note 16, at 120.

⁸¹ 380 U.S. 89, 89 (1965).

⁸² 383 U.S. 663 (1966).

⁸³ See ELY, *supra* note 16, at 120.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 124.

Both Ely's democracy-protecting theory of judicial review and the *Carolene Products*' tiers-of-scrutiny approach have been subjected to criticism from both the left and the right. In particular, critics worry that the focus on "discrete and insular minorities" has no obvious limiting principle. For example, Laurence Tribe argues that one cannot escape the need to make judgments about which groups deserve protection under a process approach, and such a judgment inevitably reflects substantive values.⁸⁷ After all, Tribe contends, how do we differentiate arsonists (who presumably do not deserve special judicial solicitude) from, say, homosexuals (who might)?⁸⁸ Relatedly, some worry that determining who counts as a relevant minority group "requires the Justices to be, in a sense, amateur political scientists."⁸⁹ Indeed, some political theory suggests that discrete and insular groups might actually be *more* successful in getting their preferences enacted into law because they do not have the free-rider or collective action problems that large and diffuse majorities face.⁹⁰ In addition, as Richard Posner has argued, the focus on democratic participation will always necessarily be underinclusive because people may wield more political influence for other reasons, such as wealth, age, education, influence in their social circles, and so on.⁹¹ And of course anyone who lives in a district where one political party has little or no chance of winning is effectively powerless.⁹² Thus, Posner argues that simply fixing certain types of democratic participation will not sufficiently remedy all disparities of power.⁹³ Finally, some conservatives have argued that even if there might once have been a need for courts to intervene to remedy systemic imbalances of political power, that time has passed. Most famously, Justice Scalia flipped the *Carolene Products* rationale on its head in the affirmative

⁸⁷ See Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1072 (1980); see also MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 83 (1988) (raising a similar concern).

⁸⁸ Gilman, *supra* note 38, at 176 (citing Tribe, *supra* note 87, at 1075).

⁸⁹ Strauss, *supra* note 31, at 1265.

⁹⁰ Richard A. Posner, *Democracy and Distrust Revisited*, 77 VA. L. REV. 641, 646 (1991); see also Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 723–24 (1985) ("Other things being equal, 'discreteness and insularity' will normally be a source of enormous bargaining advantage, not disadvantage, for a group engaged in pluralist American politics. Except for special cases, the concerns that underlie *Carolene* should lead judges to protect groups that possess the opposite characteristic from the ones *Carolene* emphasizes—groups that are 'anonymous and diffuse' rather than 'discrete and insular.'").

⁹¹ Posner, *supra* note 90, at 648.

⁹² *Id.*

⁹³ *Id.*

action context, arguing that well-organized powerful liberal interest groups had instituted policies to help racial minorities at the expense of “unknown, unaffluent, unorganized” whites.⁹⁴ Nevertheless, his critique simply suggests that conservative jurists have not abandoned the idea that judges owe heightened scrutiny to those locked out of the democratic process; they just disagree as to who is being locked out. Similarly, Justice Thomas, in his dissent in *Kelo v. New London*, cited the footnote for the proposition that those disadvantaged by the Court’s expansive definition of public use in the Takings Clause would be poor communities that are least powerful.⁹⁵ Indeed, he went so far as to say, “If ever there were a justification for intrusive judicial review of constitutional provisions that protect ‘insular and discrete minorities’ surely that principle would apply with great force to the powerless groups and individuals the Public Use Clause protects.”⁹⁶ Thus, even conservative jurists have deployed Ely’s democracy-protecting approach.

Moreover, whatever the merits of these various criticisms might be in general, they do not apply to the current counter-majoritarian entrenchment to which this Article is addressed. For example, although it is true that determining which minority groups deserve judicial attention under Ely’s framework can be difficult, in the case of disempowered urban and suburban populations, we are not even talking about a minority group at all, but rather an electoral *majority* that is being systematically undermined and denied full democratic participation. Courts need not be amateur political scientists to see that urban citizens are disadvantaged; the data is clear and unambiguous. As a result, the potentially difficult line-drawing problems are irrelevant here. In addition, this urban/suburban majority, precisely because it *is* a majority and therefore large and diverse, faces serious collective action obstacles. And even if it did not, this majority still cannot wield its appropriate share of power because of structural barriers that simply prevent the majority from gaining power in anything even close to proportion with its number. Likewise, contrary to Posner’s argument, in this case even if urban and suburban majorities do wield power in other ways—for example, through greater wealth—that power still runs up against structural barriers that, for example, are likely to deprive that majority of its appropriate share of power

⁹⁴ *Johnson v. Transp. Agency*, 480 U.S. 616, 677 (1987) (Scalia, J., dissenting) (citations omitted) (internal quotation marks omitted).

⁹⁵ *Kelo v. City of New London*, 545 U.S. 469, 521 (2005) (Thomas, J., dissenting).

⁹⁶ *Id.* at 521–22.

in the Senate no matter how much wealth it controls. Finally, Justice Scalia's affirmative action concern does not apply because here we are focusing not on providing an extra benefit to urban and suburban populations, but simply applying heightened scrutiny to legislative and executive actions that target them unfairly or discriminate against them.

Of course, there are other theories of democracy beyond Ely's. For example, Ronald Dworkin's moral reading of the U.S. Constitution requires government to treat each citizen with equal concern or respect.⁹⁷ But significantly, like Ely's process theory, Dworkin's approach is aimed at explaining why majorities should not be able to run roughshod over minorities. The problem of U.S. democracy right now and for the foreseeable future, however, does not implicate this fundamental twentieth century problem of judicial protection of minorities against majorities. Instead, we now have an entrenched electoral *minority* wielding structurally locked-in power at the expense of the *majority*. And no plausible theory of democracy can justify that sort of entrenched power. So, if urban/suburban electoral majorities were ever actually to wield power commensurate with their voting strength, then of course Ely's (or Dworkin's) theory would require that the majority could not discriminate against rural minorities or lock them out of power. But we are nowhere near that problem currently, and the structural advantages that rural populations already enjoy in the U.S. constitutional system renders such a concern largely theoretical. Instead, we must treat urban and suburban majorities as a discrete and insular group structurally locked out of power and discriminated against by rural minorities. Accordingly, the question becomes how heightened scrutiny might apply to executive and legislative action that disadvantages urban and suburban populations.

II. URBAN AND SUBURBAN VOTERS AS A DISCRETE AND INSULAR STRUCTURALLY DISEMPOWERED MAJORITY

A. *The New Demographic and Ideological Reality*

Urban voters today face structural impediments to collective action partly because of the Constitution's division of power between the federal

⁹⁷ RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 1-38 (1996).

government and the States, but also because of years of partisan gerrymandering, racialized federal housing policies, globalization, and climate change. By 2040, about 70% of Americans are expected to live in the 15 largest states.⁹⁸ That means that the vast majority of Americans will have a mere “30 senators representing them, while the remaining 30% of Americans will have 70 senators representing them.”⁹⁹ Two decades from now, nine states¹⁰⁰ will be home to half of the country’s population, but represented by less than a quarter of the Senate.¹⁰¹ Without the possibility of translating this political power into a majority in the Senate, urban voters will become more politically crippled as time passes, even as the proportion of Americans who are urban voters swells. Commitment to federalism or a republican form of government is an empty response to the demographic reality facing America over two centuries after the country’s founding.

In addition, urban counties in the United States are increasingly majority minority, meaning non-white Americans command a majority there, while non-Hispanic white Americans command a majority in rural counties.¹⁰² And while urban and suburban areas are growing rapidly, rural counties have made only minimal population gains since 2000, as the number of people leaving for cities and suburbs has outpaced the number of people moving into rural ones.¹⁰³ Adults in urban counties, long aligned with the Democratic Party, have moved even more to the left in recent years, and today twice as many urban voters identify as Democrats or lean Democratic as affiliate with the Republican Party.¹⁰⁴ Further, Republican efforts to minimize the political power of urban centers and their residents comes precisely as these centers are becoming increasingly diverse and have been

⁹⁸ Philip Bump, *By 2040, Two-Thirds of Americans Will Be Represented by 30 Percent of the Senate*, WASH. POST (Nov. 28, 2017), https://www.washingtonpost.com/news/politics/wp/2017/11/28/by-2040-two-thirds-of-americans-will-be-represented-by-30-percent-of-the-senate/?utm_term=.3bda7f406e41 [<https://perma.cc/8UH4-JP5L>].

⁹⁹ *Id.*

¹⁰⁰ *Id.* (listing California, Florida, Georgia, Illinois, New York, North Carolina, Ohio, Pennsylvania, and Texas).

¹⁰¹ *Id.*

¹⁰² Kim Parker et al., *What Unites and Divides Urban, Suburban and Rural Communities*, PEW RSCH. CTR. (May 22, 2018), <https://www.pewresearch.org/social-trends/2018/05/22/what-unites-and-divides-urban-suburban-and-rural-communities/> [<https://perma.cc/68JN-BP6Z>].

¹⁰³ *Id.*

¹⁰⁴ *Id.*

coupled with xenophobic immigration policies and rhetoric regarding the role of immigrants in American society.¹⁰⁵

As these centers become home to the majority of the American population, questions about the Constitution's requirement that the Senate be composed of two Senators from each State with one vote each,¹⁰⁶ have been raised with more frequency and increasing alarm.¹⁰⁷ Giving each state an equal share of representatives irrespective of the relative population in that state has for several decades skewed the political power of rural counties in the country, rural counties that are overwhelmingly composed of white Americans who consistently prefer Republican candidates.

Although nationally non-Hispanic white Americans are the majority, this group is a rapidly shrinking percentage of the American population writ large.¹⁰⁸ By 2050, non-Hispanic white Americans are expected to represent less than half of the U.S. population, as other ethnic groups grow more rapidly. Importantly, non-Hispanic white Americans have been a minority in most urban counties since 2000, while remaining the majority in 89% of rural ones.¹⁰⁹

Urban, suburban, and rural residents have radically different social and political opinions, specifically on issues of race, immigration, same-sex marriage, abortion, and the role of government.¹¹⁰ Unsurprisingly, rural residents are increasingly right-leaning in their political ideology. Over half, (54%) of all rural voters now identify with or lean to the Republican Party, while a shrinking share (38%) lean or identify with the Democratic Party.¹¹¹ Rural residents are far more likely than suburban or urban residents to say that they believe all or most of their neighbors are the same race or ethnicity as they are (69% vs. 53% and 43%, respectively).¹¹² In contrast, urban residents tend to actually value living in a jurisdiction that is racially and ethnically diverse, far more than rural residents: “[Seventy percent] of city dwellers say this is very or somewhat important to them, compared with a

¹⁰⁵ *Id.*

¹⁰⁶ U.S. CONST. art. I, § 3, cl. 1.

¹⁰⁷ Parker et al., *supra* note 102.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

narrower majority of those in suburbs (59%) and about half in rural areas (52%).”¹¹³

During the Trump Administration, antagonistic policies towards urban centers carried a particularly blatant anti-immigrant message. The Administration (and Trump himself) repeatedly and falsely linked crimes committed by immigrants both to states with “green light” laws that allow immigrants to obtain a state issued driver’s license without a social security number, and to urban centers with “sanctuary”¹¹⁴ policies that limit cooperation with the national government to enforce federal immigration edicts.¹¹⁵ Trump also attempted to use an Executive Order to coerce sanctuary jurisdictions to adopt his Administration’s anti-immigrant enforcement policy by conditioning a jurisdiction’s receipt of federal funds on its willingness to comply with the federal government with regard to immigration enforcement.¹¹⁶ The Ninth Circuit, however, found the executive branch could not create a new condition of federal funding whereby the government withholds, terminates, or reduces funding based on a jurisdiction’s sanctuary laws and that these sanctuary laws did not conflict with the President’s Executive Order.¹¹⁷

Later, however, in a bid to win re-election, Trump and U.S. Attorney General William Barr escalated their battle with urban jurisdictions providing sanctuary to immigrants by announcing, among other things, lawsuits against the state of New Jersey, as well as the county encompassing Seattle, Washington. According to Barr, “in various jurisdictions, so-called ‘progressive’ politicians are jeopardizing the public’s safety by putting the interests of criminal aliens before those of law-abiding citizens.”¹¹⁸ And in

¹¹³ *Id.*

¹¹⁴ The Sanctuary Movement actually dates back to the 1980s, when churches in the United States provided shelter to Central American refugees in danger of deportation who were facing violence in their home countries as a result of U.S. covert and overt military interventions in the region. *Sanctuary Policy FAQ*, NAT’L CONF. STATE LEGISLATURES (June 20, 2019), <https://www.ncsl.org/research/immigration/sanctuary-policy-faq635991795.aspx> [<https://perma.cc/M235-7UV8>].

¹¹⁵ More specifically, sanctuary jurisdictions do not hold individuals in detention past their release date in order to assist federal immigration enforcement and comply with ICE “detainers.”

¹¹⁶ Exec. Order No. 13768, 82 C.F.R. 8799 (2017).

¹¹⁷ *City & Cnty. of San Francisco v. Barr*, 965 F.3d 754, 761 (9th Cir. 2020).

¹¹⁸ Justine Coleman, *Barr Announces “Significant Escalation” Against “Sanctuary” Localities*, THE HILL (Feb. 10, 2020, 7:22 PM), <https://thehill.com/regulation/court-battles/482425-barr-announces-significant-escalation-against-sanctuary-cities> [<https://perma.cc/LW4J-DF2P>].

his State of the Union address, Trump decried the state of California's sanctuary policy, calling the state "a sanctuary for criminal illegal immigrants—a very terrible sanctuary—with catastrophic results."¹¹⁹

Meanwhile, after the New York legislature decided to allow undocumented persons to apply for a driver's license and refused to turn over this license information to any agency that "primarily enforces immigration law," the Department of Homeland Security ("DHS") issued a policy revoking New York residents' ability to enroll or re-enroll in any Trusted Traveler Program, including Global Entry, SENTRI (Secure Electronic Network for Travelers Rapid Inspection), NEXUS, and FAST (Free and Secure Trade). This executive action contradicted prior congressionally passed legislation, the Intelligence Reform and Terrorism Prevention Act of 2004, which encouraged DHS to establish an international registered traveler program for use by all states and territories of the United States, flowing in part from bi-partisan recommendations from the 9/11 Commission Report. This coercion ultimately prevailed, however: The New York legislature amended its "Green Light Law" to allow for information-sharing of NY motor vehicle records "as necessary for an individual seeking acceptance into a trusted traveler program, or to facilitate vehicle imports and/or exports."¹²⁰ In the same vein, the U.S. Justice Department under Barr sued New York City because of the jurisdiction's decision not to comply with several ICE subpoenas, as part of his effort to circumvent the city's decision not to provide information to the federal government for the purpose of immigration enforcement. Similar subpoenas were also issued to Denver, Colorado for the same purpose.

Federal efforts to target urban centers escalated at the end of the Trump presidency, as the Administration stepped up its executive actions against so-called sanctuary jurisdictions. At Trump's behest, DHS also erected billboards, funded with taxpayer dollars, in so-called sanctuary jurisdictions ahead of the 2020 presidential election, depicting immigrants charged with, but not convicted of, crimes ranging from public intoxication and disorderly

¹¹⁹ Remarks by President Trump in State of the Union Address (Feb. 4, 2020), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-state-union-address-3/> [https://perma.cc/KB42-MW58].

¹²⁰ Scott Neuman, *DHS Restores New York to Trusted Traveler Program, Admits False Statements in Lawsuit*, NPR (July 24, 2020), <https://www.npr.org/2020/07/24/894965662/dhs-restores-new-york-to-trusted-traveler-program-admits-false-statements-in-law> [https://perma.cc/5MMN-KVKN].

conduct to more serious assault charges.¹²¹ The signs showed the mug shots of immigrants alongside the crimes for which they were charged above text stating that “Sanctuary Policies are a REAL DANGER.”¹²²

These claims about increased crime were patently false and simply served to underscore the intent and purpose of anti-urban laws and policies—to disenfranchise and discriminate against urban jurisdictions whose residents are increasingly immigrants and non-white Americans. First, the data is clear—jurisdictions with sanctuary policies have statistically significant lower crime rates than non-sanctuary jurisdictions.¹²³ Second, the economies of sanctuary jurisdictions are stronger than non-sanctuary jurisdictions—sanctuary jurisdictions have a higher median household income, less poverty and less reliance on public assistance, higher labor-force participation, and a higher employment-to-population ratio than non-sanctuary jurisdictions.¹²⁴ Third, sanctuary policies have wide-spread public support: A 2017 study reports that sanctuary jurisdictions account for over 92% of the total U.S. population.¹²⁵ Finally, and unsurprisingly, sanctuary jurisdictions account for 92.2% of the total U.S. population and about 95.3% of the total foreign-born population in the United States.¹²⁶

The increasing demographic sorting of America into diverse Democratic-leaning urban and suburban areas and increasingly white Republican-leaning rural areas would not be problematic if Republicans were committed to majoritarian democracy. If they were, then Democrats would be expected to hold the overall balance of power based on their numbers, with Republicans retaining a substantial enough minority to prevent the most extreme Democratic initiatives. In this scenario, the courts could intervene simply to prevent the Democratic majority from running roughshod over core rights of Republican areas of the country and to ensure equal participation in voting.

¹²¹ U.S. Immigration and Customs Enforcement, *ICE Launches Billboards in Pennsylvania Featuring At-Large Safety Threats* (Oct. 2, 2020), <https://www.ice.gov/news/releases/ice-launches-billboards-pennsylvania-featuring-large-public-safety-threats> [https://perma.cc/693L-ULPT].

¹²² *Id.*

¹²³ Tom Wong, *The Effects of Sanctuary Policies on Crime and the Economy*, CTR. FOR AM. PROGRESS (Jan. 26, 2017), <https://www.americanprogress.org/issues/immigration/reports/2017/01/26/297366/the-effects-of-sanctuary-policies-on-crime-and-the-economy/> [https://perma.cc/U34X-Q9BA].

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

But alas, that is not the reality we see. Instead, by nearly every measure Republicans are becoming less committed to democracy or even the idea that an electoral majority should be allowed to govern legitimately. Indeed, the pervasive fact-free challenges to the 2020 presidential election suggest that Republicans for the foreseeable future will be unwilling to accept the outcome of any election that they lose. For example, a recent University of Washington study of strong Trump supporters found not only near unanimous belief that the 2020 election was stolen, but over 90% oppose making it easier to vote.¹²⁷ A separate study found that nearly 40% of Republicans favored violent resistance to elected leaders if those leaders were not sufficiently defending America,¹²⁸ and a February 2021 survey indicates that nearly 60% of Republicans see Democrats as the “enemy,” as opposed to simply the “political opposition.”¹²⁹

Finally, a detailed study by Vanderbilt professor Larry Bartels shows that substantial numbers of Republicans endorse statements contemplating violations of key democratic norms, including respect for the law and for the outcomes of elections and eschewing the use of force in pursuit of political ends.¹³⁰ Moreover, Bartels’ data shows that “the strongest predictor by far of these antidemocratic attitudes is ethnic antagonism—especially concerns about the political power and claims on government resources of immigrants, African-Americans, and Latinos.”¹³¹ Thus, Bartels concludes that “[t]he strong tendency of ethnocentric Republicans to countenance violence and lawlessness, even prospectively and hypothetically, underlines the significance of ethnic conflict in contemporary U.S. politics.”¹³²

For all of these reasons, it seems clear that as urban and suburban areas grow increasingly diverse and increasingly Democratic, Republicans will see the voting power of these regions as less and less legitimate. As a result, they will see nothing wrong with systematically disenfranchising urban and suburban populations, which they will view as synonymous with disenfranchising non-white populations. Thus, both Ely’s entrenchment and

¹²⁷ Beauchamp, *supra* note 14.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Larry M. Bartels, *Ethnic Antagonism Erodes Republicans’ Commitment to Democracy*, PROCS. OF NAT’L ACADEMY OF SCIS., Sept. 15, 2020, at 1, fig. 1, <https://www.pnas.org/content/117/37/22752>.

¹³¹ *Id.*

¹³² *Id.*

discrimination concerns are implicated, justifying heightened judicial review of such efforts.

B. The Disempowerment of Urban and Suburban Populations

To demonstrate the consequences of urban disenfranchisement, consider the following examples.

Over the last several decades, as a result of frequent, deadly and highly publicized instances of gun violence across the country, particularly in American schools, support for gun safety laws has increased across the partisan divide. Today, an overwhelming majority of Americans favor stricter gun laws, despite their inability to effectuate this desire into legislation. In September 2019, the Pew Research Center found that 88% of all Americans support requiring background checks for all gun sales (not just the federally mandated background checks required only at a licensed gun dealer), 71% support banning high-capacity ammunition rounds, and 69% support banning assault weapons.¹³³ Gun violence, however, does not affect all Americans equally; young people and communities of color—groups that are disproportionately more likely to live in urban areas and vote Democratic—account for a larger percentage of gun-related deaths per capita.¹³⁴

At the national level, meaningful gun safety reform has failed, despite numerous attempts to pass both houses of Congress. And although significant progress towards greater gun safety has occurred in some states, progress has not been equal across the country, particularly in states whose districts have been heavily gerrymandered to favor Republican candidates. For example, despite strong public support for increased gun safety, the legislatures of North Carolina, Michigan, Pennsylvania, and Wisconsin have refused to enact popular gun safety measures.¹³⁵ Indeed, the trend in Republican-controlled states is to move in the opposite direction, as state

¹³³ Katherine Schaeffer, *Share of Americans Who Favor Stricter Gun Laws Has Increased Since 2017*, PEW RSCH. CTR. (Oct. 16, 2019), <https://www.pewresearch.org/fact-tank/2019/10/16/share-of-americans-who-favor-stricter-gun-laws-has-increased-since-2017/> [https://perma.cc/J23H-72KA].

¹³⁴ Alex Tausanovitch et al., *How Partisan Gerrymandering Prevents Legislative Action on Gun Violence*, CTR. FOR AM. PROGRESS (Dec. 17, 2019), <https://www.americanprogress.org/issues/democracy/reports/2019/12/17/478718/partisan-gerrymandering-prevents-legislative-action-gun-violence/> [https://perma.cc/7ZYY-72PL].

¹³⁵ *Id.*

after state is allowing concealed weapons without even a permit requirement.¹³⁶ Many of these states, whose legislatures are controlled by Republicans as a result of partisan gerrymandering despite a majority of state-wide voters supporting the Democratic Party, likely would have enacted stronger gun safety measures but for this partisan gerrymandering designed to deny effective representation to urban and suburban Democratic voters.

Another stark example of urban disenfranchisement was the concerted effort of Republican lawmakers to reduce the availability of voting, other than in-person, in urban centers during the 2020 presidential election. The COVID-19 pandemic made in-person voting particularly dangerous or deadly for certain voters and their families.¹³⁷ As a result, some states increased voters' access to ballot drop-boxes, recognizing that many voters were hesitant to put their ballots in the mail, that severe and unpredictable postal service delays had resulted from the pandemic, and that widespread in-person voting posed a public-health risk.¹³⁸ In Texas, where urban centers are increasingly populated by Black and brown voters who have trended Democratic, Republican Governor Greg Abbott attempted to mitigate the effect of these votes on the overall sway of the state by issuing a directive limiting ballot drop-boxes to one per county.¹³⁹ This was particularly detrimental to voters in Harris County, home to Houston, which has a population of more than 4.7 million people over 1,777 square miles, and increasingly trends toward Democratic candidates.¹⁴⁰ Three other states

¹³⁶ Matt Vasilogambros, *No Permit No Problem: More States Allow Residents to Carry a Hidden Gun*, PEW STATELINE (Dec. 6, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/12/06/no-permit-no-problem-more-states-allow-residents-to-carry-a-hidden-gun> [https://perma.cc/6324-W66W].

¹³⁷ See, e.g., Kirk Johnson & Campbell Robertson, *Coronavirus and 2020 Elections: What Happens to Voting in an Outbreak*, N.Y. TIMES (Mar. 12, 2020) ("In-person voting could present numerous ways for the virus to spread, experts say.") <https://www.nytimes.com/2020/03/09/us/virus-election-voting.html> [https://perma.cc/KA3H-FJVH].

¹³⁸ See also *Voters Should Be Able to Return Absentee Ballots to Polling Places*, BRENNAN CTR. FOR JUST. (Sept. 10, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/voters-should-be-able-return-absentee-ballots-polling-places> [https://perma.cc/B359-TMMA].

¹³⁹ See *Tex. League of United Latin Am. Citizens v. Hughs*, 978 F.3d 136, 137 (5th Cir. 2020) (holding that Texas Governor Abbott's Executive Order limiting ballot drop-off locations to one per county, irrespective of how large or populous, did not violate the First and Fourteenth Amendment because Texas had generally expanded remote voting opportunities as compared to available pre-COVID procedures).

¹⁴⁰ Elaine Povich, *Rise in Use of Ballot Drop Boxes Sparks Partisan Battles*, NAT'L CONF. OF STATE LEGISLATURES (Oct. 23, 2020), <https://www.ncsl.org/research/elections-and-campaigns/rise-in->

controlled by Republican lawmakers—Mississippi, Tennessee and Missouri—did not allow voters to drop off their ballots in person by any means, despite the pandemic.

Likewise, in Pennsylvania, Trump’s reelection campaign, the Republican National Committee, and Republican congressional candidates and electors challenged the state’s use of ballot drop-boxes for absentee voting during the COVID-19 pandemic,¹⁴¹ claiming that the Pennsylvania Supreme Court had misinterpreted the scope and purpose of aspects of the state election code.¹⁴² The case also highlighted a number of other Republican efforts to suppress the vote in urban counties amongst disadvantaged residents in Pennsylvania.¹⁴³

In neighboring Ohio, Republican Secretary of State Frank LaRose promulgated Directive 2020-16, specifically limiting the number of secure drop-boxes available for the 2020 presidential election to a single drop-box per county, irrespective of county size. Needless to say, any directive like this that is uniform by county, regardless of size, will impact urban areas far more. Although a federal district court halted the enforcement of LaRose’s directive after finding that the law placed a significant burden on the right to vote under the First and Fourteenth Amendments, the Sixth Circuit stayed the district court’s preliminary injunction.¹⁴⁴

In Louisiana, Secretary of State Kyle Ardoin interpreted Louisiana law governing the return of absentee ballots restrictively to ensure that only a limited number of locations were available to voters to drop off their absentee ballots in the November 2020 presidential election. Specifically, the New Orleans City Council sought to increase the number of curbside drop-off locations in the city, but Ardoin claimed that Louisiana Code Section

use-of-ballot-drop-boxes-sparks-partisan-battles-magazine2020.aspx [https://perma.cc/6ADX-8XFB].

¹⁴¹ Donald J. Trump for President, Inc. v. Boockvar, 493 F. Supp. 3d 331 (W.D. Pa. 2020).

¹⁴² Pa. Democratic Party v. Boockvar, 238 A.3d 345 (Pa. 2020).

¹⁴³ In particular, the lawsuit took aim at county procedures for allowing individuals whose ballots had been flagged as potentially containing a signature mismatch—procedural defects that rarely reflect an actual signature mismatch and more often affect Black and brown voters—to “cure” these errors by substantiating their ballot with other personally identifying information. *Id.* at 348.

¹⁴⁴ A. Philip Randolph Inst. v. LaRose, 493 F. Supp. 3d 596 (N.D. Ohio 2020) (granting preliminary injunction to enjoin enforcement of rule finding the directive placed a significant burden on the right to vote in violation of the First and Fourteenth Amendment), *appeal dismissed*, 2020 WL 7980224 (6th Cir. 2020).

18:1308(B)¹⁴⁵ requires ballots be dropped off at a registrar’s office, and as a result the city was not allowed to add additional curbside drop-off locations beyond those associated with a registrar’s office, despite the increased volume of absentee ballots requested as a result of the COVID-19 pandemic. The New Orleans City Council eventually sued the Louisiana Secretary of State in state court for what it called an “unnecessarily restrictive” interpretation of Louisiana law.¹⁴⁶ In a letter to the Secretary, the Council stated,

We see nothing [in Section 18:1308(B)] that mandates delivery to the physical business office of the Registrar or prohibits deputy registrars from accepting ballots at multiple locations. [Indeed, Section 18:1308(B)] does not use the word ‘office’ at all. Rather, it requires only that an absentee ballot be delivered into the custody of the registrar or one of her deputies.”¹⁴⁷

The letter was signed by all seven members of the New Orleans City Council. The council later dropped its request for preliminary injunctive relief.¹⁴⁸ As a result, additional curbside drop-off locations were not available during the November 2020 election. The Secretary’s policy was particularly detrimental in the city of New Orleans, which, like the three other major cities in the state, including Baton Rouge and Shreveport, is majority-

¹⁴⁵ LA. STAT. ANN. § 18:1308(B) (2021) states,

The ballot shall be marked as provided in R.S. 18:1310 and returned to the registrar by the United States Postal Service, a commercial courier, or hand delivery. If delivered by other than the voter, a commercial courier, or the United States Postal Service, the registrar shall require that the person making such delivery sign a statement, prepared by the secretary of state, certifying that he has the authorization and consent of the voter to hand deliver the marked ballot. For purposes of this Subsection, ‘commercial courier’ shall have the same meaning as provided in R.S. 13:3204(D). No person except the immediate family of the voter, as defined in this Code, shall hand deliver more than one marked ballot to the registrar. Upon its receipt, the registrar shall post the name and precinct of the voter as required by R.S. 18:1311.

¹⁴⁶ Verified Pet. for TRO, Preliminary Inj., Permanent Inj., and Declaratory J., Council of New Orleans v. Ardoin, No. 2020-08772 (Civ. Dist. Ct. Parish of Orleans Oct. 14, 2020); Danny Monteverde, *N.O. City Council to Consider Suing La. Secretary of State Over Ballot Drop-Off Dispute*, EYEWITNESS NEWS (Oct. 13, 2020), <https://www.wvlv.com/article/news/local/no-city-council-to-consider-suing-la-secretary-of-state-over-ballot-drop-off-dispute/289-3e3147b3-5aa1-43bb-885d-27e51e0264a6> [<https://perma.cc/E4KJ-NJ4Z>].

¹⁴⁷ Danny Monteverde, *City Council Calls on Sec. of State to Allow More Drop-Off Points for Absentee Ballots*, EYEWITNESS NEWS (Oct. 10, 2020), <https://www.wvlv.com/article/news/local/orleans/city-council-calls-on-sec-of-state-to-allow-more-drop-off-points-for-absentee-ballots/289-2e1d01dd-2488-4ccc-baf9-01b97a90a170> [<https://perma.cc/E4KJ-NJ4Z>].

¹⁴⁸ Press Release, ACLU of La., ACLU of Louisiana Asks Orleans Court to Stop Secretary of State from Blocking Ballot Drop-Off Sites (Oct. 22, 2020), <https://www.laaclu.org/en/press-releases/aclu-louisiana-asks-orleans-court-stop-secretary-state-blocking-ballot-drop-sites> [<https://perma.cc/5PV4-D5FX>].

minority. Indeed, 59.5% of the city of New Orleans is Black.¹⁴⁹ Likewise, Baton Rouge's population is 54.7% Black,¹⁵⁰ and Shreveport's population is 57.1% Black.¹⁵¹ Statewide, however, Black Americans represent only 32.8% of the state's population.¹⁵² By limiting the number of curbside drop-off locations to registrar's offices, Ardoin guaranteed that urban centers generally, and Black Americans specifically, in the state would bear the brunt of the policy's effects.

In congressional legislation, urban disenfranchisement is perhaps even more stark and blatantly partisan. For example, the Republican-backed tax code revisions of 2017¹⁵³ capped state and local income tax deductibility against the federal income tax at \$10,000, which specifically targeted upper-middle-class taxpayers in states with relatively high state and local income taxes.¹⁵⁴ Those states include New York, Connecticut, New Jersey, California, Massachusetts, Illinois, Maryland, Rhode Island, and Vermont. All of those states have solid Democratic majorities, and not one has a Republican Senator.¹⁵⁵ Needless to say, this provision could only be enacted because both houses of Congress were controlled by Republicans and the President himself was a Republican, despite the fact that neither the Republicans in the House, Senate, nor the White House represented majorities of the actual people who voted.

¹⁴⁹ U.S. CENSUS BUREAU, *New Orleans City, Louisiana* (Jul. 1, 2021), <https://www.census.gov/quickfacts/fact/table/neworleanscitylouisiana/PST045219> [<https://perma.cc/53X3-BA2M>].

¹⁵⁰ U.S. CENSUS BUREAU, *Baton Rouge City, Louisiana* (Jul. 1, 2021), <https://www.census.gov/quickfacts/fact/table/batonrougecitylouisiana,LA/PST045219?> [<https://perma.cc/ESK2-GVQP>].

¹⁵¹ U.S. CENSUS BUREAU, *Shreveport, Louisiana* (Jul. 1, 2021), <https://www.census.gov/quickfacts/shreveportcitylouisiana> [<https://perma.cc/LU4D-ZAQA>].

¹⁵² U.S. CENSUS BUREAU, *Louisiana* (Jul. 1, 2021), <https://www.census.gov/quickfacts/LA> [<https://perma.cc/R882-TJCL>].

¹⁵³ Act of Dec. 22, 2017, Pub. L. No. 115-97, 131 Stat. 2504.

¹⁵⁴ Michael C. Dorf, *The New Tax Plan Punishes Blue States: Is That Constitutional?*, JUSTIA (Dec. 27, 2017), <https://verdict.justia.com/2017/12/27/new-tax-law-punishes-blue-states-constitutional> [<https://perma.cc/XN49-A6P2>].

¹⁵⁵ *Id.*

III. THE NEED FOR HEIGHTENED SCRUTINY TO COMBAT EXECUTIVE AND LEGISLATIVE ACTS DISADVANTAGING URBAN AND SUBURBAN POPULATIONS

Courts, empowered by the Fourteenth Amendment, are uniquely positioned to protect the rights of disadvantaged groups when those rights are infringed upon by a political process that imposes higher obstacles for certain classes of persons to engage in that process. For example, the U.S. Supreme Court has held in *Washington v. Seattle School District No. 1* that the Fourteenth Amendment does not tolerate “a political structure that treats all individuals as equals . . . yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation.”¹⁵⁶ Such restructuring, the Court explained in *Hunter v. Erickson*, “is no more permissible than denying [the minority] the [right to] vote, on an equal basis with others.”¹⁵⁷ In both of those cases, the Court explicitly recognized the Ely/*Carolene* political process justification for heightened scrutiny: When the majority reconfigures the political process in a manner that burdens only a racial minority, that alteration triggers strict judicial scrutiny.¹⁵⁸ This doctrine continues to provide an enduring rationale for the Court’s place in the democratic process and could go a long way towards reviving the Court’s image as a non-partisan and critical player in upholding democracy more generally. This is especially true when it is a white rural *minority* faction that is entrenching its power in order to disempower an increasingly diverse urban and suburban *majority*.

A. *The Feasibility of Heightened Scrutiny*

One might be concerned about undue judicial entanglement with the political process if judges were to review every piece of legislation that had disproportionate impact on urban populations. After all, any legislation involves tradeoffs, and there will be winners and losers. For example, tax

¹⁵⁶ 458 U.S. 457, 467 (1982) (internal quotation marks omitted).

¹⁵⁷ *Hunter v. Erickson*, 393 U.S. 385, 391 (1969).

¹⁵⁸ *Schuette v. Coal. Def. Affirmative Action*, 572 U.S. 291, 342 (2014) (Sotomayor, J., dissenting) (“While our Constitution does not guarantee minority groups victory in the political process, it does guarantee them meaningful and equal access to that process. It guarantees that the majority may not win by stacking the political process against minority groups permanently, forcing the minority alone to surmount unique obstacles in pursuit of its goals—here, educational diversity that cannot reasonably be accomplished through race-neutral measures.”).

incentives for installing solar panels disproportionately benefit states with more land and sun, and tax changes resulting in increased tax deductions for dependent children benefit Utah more than other states because Utah's Latter-Day Saint community has more children than other communities.¹⁵⁹

Nevertheless, the quest for a workable limiting principle is not insurmountable. This limiting principle hinges on invidious motivation.¹⁶⁰ And inquiries based on motivation are widespread throughout a variety of different constitutional doctrines. Most obviously, in assessing claims of race discrimination, the U.S. Supreme Court has frequently been called upon to determine whether a legislature acted with constitutionally forbidden discriminatory intent,¹⁶¹ or if a particular legislature demonstrated animus towards an identifiable group of people,¹⁶² or if a legislature had the predominant goal of creating voting districts to dilute the power of racial minorities.¹⁶³ These cases provide guideposts for courts to determine whether a law discriminates on the basis of urban residence.

To take a recent example of judicial search for invidious motive, in *Common Cause v. Rucho*¹⁶⁴ the District Court established the elements of an equal protection partisan gerrymandering claim as (1) discriminatory intent, (2) discriminatory effect, and (3) the lack of a legitimate or neutral explanation, and the court used these three factors to reject the state's election map as "diluted on the basis of invidious partisanship."¹⁶⁵ The court reasoned that when legislative district lines are drawn to subordinate members of one political party and entrench a rival party, it strikes at the heart of the constitutional principle that elected officials cannot enact laws that distort the marketplace of ideas so as to intentionally favor particular

¹⁵⁹ Morgan Jacobsen, *Economists: Large Families Are an 'Ace in the Hole' for Utah's Economy*, DESERET NEWS (Mar. 30, 2016), <https://www.deseretnews.com/article/865651145/Economists-Large-families-are-an-ace-in-the-hole-for-Utahs-economy.html> [<https://perma.cc/K85K-G4XF>].

¹⁶⁰ See Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 526 (2016).

¹⁶¹ See, e.g., *Washington v. Davis*, 426 U.S. 229, 240 (1976).

¹⁶² See, e.g., *Romer v. Evans*, 517 U.S. 620, 632 (1996); see also *United States v. Windsor*, 570 U.S. 744, 771–75 (2013) (striking down a federal statute that had the principal purpose of imposing inequality).

¹⁶³ See, e.g., *Bush v. Vera*, 517 U.S. 952, 959 (1996) (plurality opinion); *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

¹⁶⁴ 318 F. Supp. 3d 777, 860–68 (M.D.N.C. 2018).

¹⁶⁵ *Id.* at 827.

political beliefs, parties, or candidates while disfavoring others.¹⁶⁶ The Republican-controlled North Carolina General Assembly expressly directed the legislators and consultant responsible for drawing the 2016 election map to rely on “political data” from past election cycles—specifying the extent to which particular voting districts had historically favored Republican or Democratic candidates—to draw a districting plan that would ensure Republican candidates would prevail in the vast majority of congressional districts.¹⁶⁷ This scheme resulted in Republican candidates prevailing by safe margins in the overwhelming majority of the State’s thirteen districts.¹⁶⁸ The court held that a plaintiff need not show that an invidious discriminatory purpose be express, and such purpose can therefore be inferred based on the totality of relevant facts.¹⁶⁹ Although, as discussed below, the U.S. Supreme Court ultimately overturned this decision based on an erroneous application of the political question doctrine, the lower court decision provides a trenchant example of how motivation cases can be pleaded and proved.

Judicial decision-making based on invidious motivation is not limited to race-based cases, however. For example, the Court in *American Party of Texas v. White* had no difficulty wading into an inquiry about invidious motivation in upholding various Texas laws requiring smaller political parties to use a nominating convention rather than a primary against a claim that such laws “invidiously discriminated against new and minority political parties, as well as independent candidates.”¹⁷⁰ Likewise, in *Lehnhausen v. Lake Shore Auto Parts Company*, the Court considered whether a provision in the Illinois Constitution that subjected corporations and other entities, but not individuals, to a specific personal property tax violated the Equal Protection Clause.¹⁷¹ In that case, the Court adeptly assessed whether the difference in treatment was the result of “invidious discrimination.”¹⁷² And in *Levy v. Louisiana*, the Court used the same approach to find that a Louisiana law that discriminated between children born in wedlock and those children that the

¹⁶⁶ *Id.* at 800.

¹⁶⁷ *Id.* at 801.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 861–62.

¹⁷⁰ 415 U.S. 767, 771 (1974) (“At least where, as here, the political parties had access to the entire electorate and an opportunity to commit voters on primary day, we see nothing invidious in disqualifying those who have voted at a party primary from signing petitions for another party seeking ballot position for its candidates for the same offices.”).

¹⁷¹ 410 U.S. 356 (1973).

¹⁷² *Id.* at 359–65.

state considered “illegitimate” evinced invidious discrimination in violation of the Equal Protection Clause.¹⁷³

Beyond its Equal Protection Clause jurisprudence, the U.S. Supreme Court has struck down statutes as running afoul of the Establishment Clause when they are motivated by the impermissible goal of promoting religion.¹⁷⁴ Likewise, the Free Exercise Clause requires strict scrutiny of laws that are motivated by animosity to a particular religion or to religion more generally.¹⁷⁵ In the abortion context, the Court has ruled that regulations on abortion violate due process if their “purpose . . . is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.”¹⁷⁶ Regulatory statutes under the so-called Dormant Commerce Clause incur strict scrutiny when they evince a protectionist purpose.¹⁷⁷ The Court has also used forbidden purpose as a reason for striking down interferences with the right to travel.¹⁷⁸

These sorts of tests could certainly be applied to legislative or executive action that targets urban and suburban populations. Consider the Immigrations and Customs Enforcement Agency under President Trump, which decided to single out urban Democratic areas for deportation raids under the pretext that sanctuary city policies imperil public safety by

¹⁷³ 391 U.S. 68 (1968).

¹⁷⁴ *See, e.g.*, *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (“In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: ‘sponsorship, financial support, and active involvement of the sovereign in religious activity.’” (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 668 (1970))).

¹⁷⁵ *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (“Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.”).

¹⁷⁶ *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016).

¹⁷⁷ *See, e.g.*, *Wyoming v. Oklahoma*, 502 U.S. 437, 454–55 (1992) (“[T]he Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.” (quoting *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1968))).

¹⁷⁸ *See Mem’l Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 263–64 (1974) (striking down as a violation of the Equal Protection Clause an Arizona law that required a year’s residence in a county in order to receive nonemergency hospitalization at the county’s expense, because the law creates an invidious classification impinging on the right of interstate travel by denying newcomers basic necessities of life).

shielding dangerous criminal immigrants.¹⁷⁹ As a result of these raids, thousands of urban dwellers were rounded up, and families were torn apart.¹⁸⁰ Such action could be challenged (though the invidious motivation would need to be weighed against the traditional deference owed to the executive in the immigration context). In addition, if Congress passed legislation that targeted sanctuary cities, the Court could review such legislation under heightened scrutiny. And if there were evidence that an intended purpose of the policy was to target urban, heavily Democratic areas, that could certainly be used to show pretext.

Likewise, if Congress passed legislation requiring that the next census questionnaire ask about citizenship status, the law might receive heightened judicial scrutiny because, among other possible constitutional infirmities, the inclusion of such a question would adversely affect the size of the congressional delegations with large urban populations, such as California, New York, Illinois, and Massachusetts.¹⁸¹ Such a move probably does not have a benign motive that can be ascertained, and a court could examine for pretext.¹⁸² It is important to stress that by doing so, the court would be *enhancing*, not undermining, democracy. Indeed, an important element of our democracy is common community affiliation. If each legislator in Congress acts only with an eye towards benefitting those who voted for her, then American democracy will not survive. Moreover, it is clear that democratic checks against such parochialism are insufficient due to demographic sorting, gerrymandering, and institutional structures that dilute the power of urban voters. Thus, heightened judicial scrutiny is necessary.

Finally, to return to our example of the cap on state and local tax deductions, the question becomes whether the choice to limit the deduction, which clearly disfavors taxpayers in Democratic states with large expensive urban areas, was the result of an illicit motive. Certainly, there are legitimate non-political rationales for capping state and local tax deductions. For example, a resident of a low-tax state is required to pay for services that her

¹⁷⁹ Tanvi Misra, *The Stark Geography of U.S. Immigration Raids*, CITYLAB (Oct. 25, 2018, 5:10 PM), <https://www.citylab.com/equity/2018/10/where-ice-immigration-raids-are-concentrated/573883/> [<https://perma.cc/2TPA-7XUQ>].

¹⁸⁰ *Id.*

¹⁸¹ Paula Dwyer, *Trump's War Against Blue States*, BLOOMBERG BUSINESSWEEK (Aug. 21, 2018, 4:00 AM), <https://www.bloomberg.com/news/articles/2018-08-21/trump-s-war-against-blue-states> [<https://perma.cc/2VMC-UD34>].

¹⁸² *Id.*

state does not provide out of after-tax income, but until the recent tax change the resident of a high-tax state was getting a federal subsidy for state and local taxation that went towards funding the government-provided services in her state. This might potentially provide a legitimate justification for the tax change, but in reality higher-tax states generally contribute far more to the federal government than they recoup from federal investment in the state, while the opposite is true for low-tax states.¹⁸³ Indeed, low-tax states may be able to keep their state taxes low precisely because they receive subsidies from the federal government and therefore do not need high local taxes to pay for services. Thus, this justification is almost surely pretextual and would therefore fail to satisfy heightened judicial scrutiny.

If one is concerned that every economic regulation would then be subject to strict scrutiny, a further limiting principle might be that aggressive judicial scrutiny will only be deployed in cases where one group is advantaged and the other disadvantaged, such as the tax plan, rather than a discretionary benefit being conferred to one group to bring everyone up to the same level, such as broadband subsidies to rural locales. The subset of legislation and executive action that deliberately favors rural voters over urban voters would be a limited and manageable set, not a roving mandate for the judiciary to return to the days of *Lochner*, when judges struck down economic regulation under the Due Process Clause of the Fourteenth Amendment because such regulation was deemed to violate freedom of contract.

To be sure, it is often difficult to know whether a motive is benign or illicit. But difficulty in determining motive should not relieve judges of their role in subjecting to strict scrutiny legislation that disproportionately favors particular populations over others. And, as mentioned above, these challenges have been overcome in myriad contexts. Urban voters represent the modern equivalent of an insular and discrete minority and thus should be treated as such for the purposes of judicial review.

¹⁸³ See Dorf, *supra* note 154 (“[E]lected officials from New York and other high-tax states pointed out that the high-tax states also tend to be net-donor states—that is, they get back less in federal investment than they contribute through taxes—while the lower-tax states tend to be net-recipient states.”).

B. Federalism/Republicanism Concerns

The Constitution originally sought to balance power between free and slave regions in an agricultural economy.¹⁸⁴ However, in an urbanized era where a few areas produce the majority of the wealth and tax revenue, this gives voters in rural states an outsized influence.¹⁸⁵ For example, America's scheme of representation allowed President Trump to seize power with a minority of votes (he lost the popular vote by nearly three million votes) from areas that constitute just 36% of the economy.¹⁸⁶ Today's Electoral College ensures that a voter in Wyoming has over three times the clout in a presidential election as a voter in California, and both states receive the same number of senators.¹⁸⁷ This differential allowed President Trump to carry the election while largely ignoring, or even denigrating, urban voters.

The promise of a republican form of government was certainly integral to the vision of the first founding, and there can be no doubt that the drafters of the Constitution sought to protect counter-majoritarian rural interests by structuring the Senate to give rural and agricultural states even weight to more urban ones in the upper house of congress. However, the Framers did not envision political parties as powerful as they are today, let alone that the urban-rural divide would fall as sharply along political party lines. They certainly did not envision sophisticated gerrymandering, unlimited campaign donations, and career politicians who had limited incentive to respond to the will of the people. Finally, the founders could not have envisioned the distortion of the democratic process that has resulted from perverse anti-majoritarian legislative rules such as the so-called Hastert rule, which Speaker Boehner and Leader McConnell have relied upon over the past

¹⁸⁴ See Will Wilkinson, *Why Do We Value Country Folk More Than City People?*, N.Y. TIMES (June 27, 2018), <https://www.nytimes.com/2018/06/27/opinion/republicans-democrats-trump-urban-rural.html> [<https://perma.cc/SJ2L-VX8V>] (describing the America of the founding as “a thoroughly agricultural economy”).

¹⁸⁵ Mark Muro & Sifan Liu, *Another Clinton-Trump Divide: High-Output America vs. Low-Output America*, BROOKINGS INST. (Nov. 29, 2016), https://www.brookings.edu/blog/the-avenue/2016/11/29/another-clinton-trump-divide-high-output-america-vs-low-output-america/?utm_campaign=Brookings+Brief&utm_source=hs_email&utm_medium=email&utm_content=38499796 [<https://perma.cc/D528-QH2X>].

¹⁸⁶ Wilkinson, *supra* note 184.

¹⁸⁷ See *supra* note 5; see also Justin Davidson, *Cities vs. Trump: Red State, Blue State? The Urban-Rural Divide Is More Significant*, N.Y. MAG. (Apr. 17, 2017), <http://nymag.com/intelligencer/2017/04/the-urban-rural-divide-matters-more-than-red-vs-blue-state.html> [<https://perma.cc/W8GU-CLNK>].

decade to kill popular legislation.¹⁸⁸ Under the Hastert rule, the leader in the House and Senate can refuse to allow a vote to proceed on legislation unless they are confident a majority of the majority backs that legislation.¹⁸⁹ In 2013, this meant that comprehensive immigration reform passed the Senate by a margin of 68–32 and the majority of the House also favored reform, but Republican leadership would not hold a vote on the bill because the majority of the House Republicans did not support it.¹⁹⁰ More recently, the First Step Act, which passed the Senate 87–12, was almost not brought to a vote by Senator Mitch McConnell.¹⁹¹ All of these trends have hobbled democracy and limited the ability of urban citizens to participate equally in the political process.

In addition to the fact that demographic and political circumstances have changed since the drafting of the Constitution, it is also important to remember that the very nature of American federalism is simply different from the way it was envisioned at the founding. In particular, what has been called the second founding¹⁹²—the combination of the Civil War and the Reconstruction Amendments—radically reshaped the balance of power between state and federal governments¹⁹³ and empowered the federal government to ensure the protection of structurally disempowered groups against discrimination, *particularly* discrimination by more agricultural and rural states. Thus, it is clear that the Fourteenth Amendment guarantees to individual citizens protection from disempowering laws and policies enacted with prejudice towards structurally disadvantaged groups, regardless of any federalism considerations.

Of course, the Constitution, even the reconstructed one, still leaves to the states the prerogative of determining the boundaries of legislative districts

¹⁸⁸ Wilkinson, *supra* note 184.

¹⁸⁹ See, e.g., Tara Golshan, *The “Hastert Rule,” the Reason a DACA Deal Could Fail in the House, Explained*, VOX (Jan. 24, 2018), <https://www.vox.com/policy-and-politics/2018/1/24/16916898/hastert-rule-daca-could-fail-house-ryan> [<https://perma.cc/HMV3-3G3W>].

¹⁹⁰ Wilkinson, *supra* note 184.

¹⁹¹ See Andrew Kragie, *Mitch McConnell Appears to Be Killing Bipartisan Sentencing Reform*, THE ATLANTIC (Dec. 9, 2018), <https://nypost.com/2018/12/09/mcconnells-making-a-big-mistake-by-refusing-to-let-first-step-pass/> [<https://perma.cc/2GFB-GRWN>].

¹⁹² See, e.g., ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* (2019).

¹⁹³ See, e.g., Christopher L. Eisgruber, *The Fourteenth Amendment’s Constitution*, 69 S. CAL. L. REV. 47,48 (1995) (arguing that the Fourteenth Amendment fundamentally changed the nature of American self-government).

used at both the state and federal level, through the process of redistricting. However, the increasing strength of political parties, the extreme residential segregation of the population along partisan lines, and the advance of new technology has allowed for unprecedented and sophisticated gerrymandering that deliberately aims to dilute the power of urban voters during the redistricting process.¹⁹⁴ Today, gerrymandering is a multimillion-dollar business with highly paid and highly sought-after political consultants, armies of lawyers, terabytes of data about voters, sophisticated software, and supercomputers. This technology allows politicians, with relative ease, to spread their members throughout a state in such a way as to achieve a majority in as many districts as possible while simultaneously concentrating supporters of the opposing party in as few districts as possible.

When voters are “cracked and packed”¹⁹⁵ in this manner, one party can win a majority of district elections while commanding a smaller share of the vote overall. As a result of partisan-gerrymandering, more than 75% of districts are uncompetitive, with margins of victory greater than ten percentage points.¹⁹⁶ To understand the power of partisan gerrymandering, particularly with the help of modern technology, take for example the redistricting that occurred following the 2010 census. In May 2018, the Center for American Progress found that gerrymandered congressional districts shifted an average fifty-nine seats in the U.S. House of Representatives during the 2012, 2014, and 2016 elections. This means that, solely because of gerrymandering, the lower house of Congress—which the Constitution commits to being representative of the population—has on average fifty-nine members who would not have been elected but for gerrymandering. Accordingly, over one-tenth of the representative body of Congress won their elections simply because the borders of the districts where they were competing were drawn in a way to ensure their advantage. Remarkably, the number of gerrymandered partisan districts described

¹⁹⁴ Vann R. Newkirk II, *How Redistricting Became a Technological Arm's Race*, THE ATLANTIC (Oct. 28., 2017), <https://www.theatlantic.com/politics/archive/2017/10/gerrymandering-technology-redmap-2020/543888/> [<https://perma.cc/KVL2-FZ7N>].

¹⁹⁵ See Olga Pierce, Jeff Larson & Lois Beckett, *Redistricting, a Devil's Dictionary*, PRO PUBLICA (Nov. 2, 2011), <https://www.propublica.org/article/redistricting-a-devils-dictionary> [<https://perma.cc/XT9Q-S9A4>] (defining the process of “cracking” and “packing”).

¹⁹⁶ COMM. FOR ECON.DEV. OF THE CONF. BOARD, *Let the Voters Choose: Solving the Problem of Partisan Gerrymandering* (Mar. 13, 2018), <https://www.ced.org/reports/solving-the-problem-of-partisan-gerrymandering> [<https://perma.cc/P2FB-QLZJ>].

above is greater than the number of total districts allotted to California, the largest state in the country, which has fifty-three House members representing a population of nearly forty million people.¹⁹⁷

We can see the same problem with regard to state legislative districts. In Wisconsin, for example, 1.3 million voters backed a Democrat for the state legislature in 2018, compared to 1.1 million ballots for Republicans.¹⁹⁸ Nevertheless, the GOP still managed to retain its 63–36 supermajority in the Assembly and actually even increased its majority in the state Senate.¹⁹⁹ Likewise, in Michigan more people voted for Democratic candidates, yet Republicans maintained an edge in both houses.²⁰⁰ Indeed, Michigan Democrats have won more total votes for the state House in four consecutive elections without it translating into a majority.²⁰¹ Meanwhile, in the state Senate Democrats won 50.4% of the votes, but Republicans won 58% of the seats.²⁰² North Carolina's legislature is similar. In 2018 Democrats received 51% of the vote, but only 45% of the seats.²⁰³ In Ohio, Democrats won 48% of the vote, up over 5% from the last election, but earned zero new seats.²⁰⁴ Republicans ultimately held 75% of the seats despite earning only 52% of the vote.²⁰⁵ Finally, this same problem is beginning to be replicated in state judicial elections. For example, the gerrymandered, Republican-controlled, state legislature in Pennsylvania is seeking to change state law so that elections for State Supreme Court justice will be conducted by legislative district rather than on a statewide basis, which would allow the Republican

¹⁹⁷ Alex Tausanovitch, *The Impact of Partisan Gerrymandering*, CTR. FOR AM. PROGRESS (Oct. 1, 2019), <https://www.americanprogress.org/issues/democracy/news/2019/10/01/475166/impact-partisan-gerrymandering/> [https://perma.cc/8NVQ-C4B6].

¹⁹⁸ David Daley, *It Will Take Many, Many More Blue Waves to Undo the GOP's 2010 Power Grab*, TALKING POINTS MEMO (Nov. 14, 2018), <https://talkingpointsmemo.com/cafe/it-will-take-many-many-more-blue-waves-to-undo-the-gops-2010-power-grab> [https://perma.cc/JHP6-FMTM].

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

minority to bootstrap into the judiciary the same locked-in partisan gerrymandered power they have already created in the legislature.²⁰⁶

The U.S. Supreme Court has described gerrymandering as principally about “partisan” politics rather than racial animus and has therefore placed such practices outside of close judicial scrutiny.²⁰⁷ However, the effect of this interpretation is to insulate from challenge race-based gerrymandering, so long as legislators use only partisan terms to describe their efforts. Given the racially polarized electorate, however, these goals are indistinguishable as a practical matter, and legislatures across the country have been chastened sufficiently to avoid openly discussing race when a focus on partisan affiliation has the same impact but is protected from judicial oversight.²⁰⁸ It is, of course, not only Republicans who engage in partisan gerrymandering,²⁰⁹ but it is primarily a tool employed by the shrinking Republican party to ensure minority rule for years to come. Moreover, it has the ultimate effect of disenfranchising millions of urban voters who are packed into a smaller number of districts, thereby deliberately diluting their voting power. And, of course, the problem is compounded when these gerrymandered legislatures then enact laws that aim to suppress the vote of urban majorities still further. In the face of such extreme entrenched partisan assaults on majoritarian democracy, a mere invocation of federalism or republicanism cannot suffice to shield the efforts from constitutional scrutiny.

C. *The Political Question Doctrine*

The political question doctrine poses another potential obstacle to courts playing the sort of robust democracy-protecting role we envision. This prudential doctrine is frequently justified by courts as necessary so as to prevent unelected judges from encroaching on the domains of the more politically accountable branches of government. The judiciary is understandably reluctant to render outcome-determinative judgments in

²⁰⁶ See Patrick Berry, *The Wrong Way to Reform Judicial Elections*, BRENNAN CTR FOR JUST. (Feb. 7, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/wrong-way-reform-judicial-elections> [https://perma.cc/9DDK-EB72].

²⁰⁷ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2502 (2019).

²⁰⁸ See Scott Lemieux, *In a Divided America, Partisan and Race-Based Redistricting Are Indistinguishable*, THE GUARDIAN (Nov. 12, 2014), <https://www.theguardian.com/commentisfree/2014/nov/12/partisan-race-based-redistricting-supreme-court-alabama> [https://perma.cc/DNW9-ZZPJ].

²⁰⁹ See, e.g., *Benisek v. Lamone*, 348 F. Supp. 3d 493, 497 (D. Md. 2018) (gerrymandering suit brought by members of the Republican party against Democrats from their state).

cases where the people should be making such determinations through the ordinary political courses available to them.

However, this rationale makes no sense when it is precisely those politically accountable branches that have deliberately insulated themselves from true accountability by entrenching their power. Indeed, as discussed throughout this Article, in such circumstances the political process has fundamentally broken down, and the judiciary *must* intervene to ensure that politics can function. Thus, there is absolutely no justification for using the political question doctrine to sidestep cases that are challenging the legitimacy of the political process itself.

Accordingly, the U.S. Supreme Court must, at its first opportunity, overrule its decision in *Rucho v. Common Cause*, in which the Court held that politically motivated gerrymandering is a non-justiciable political question.²¹⁰ As discussed throughout, politically motivated gerrymandering is clearly justiciable under traditional equal protection principles, and courts are not only empowered but required to intervene in order to ensure that the political process can function. Indeed, the whole rationale behind the political question doctrine is nonsensical if courts are deferring to a political process that is deliberately rigged to make meaningful political participation impossible. Absent court intervention, a distinct group of urban and suburban voters, primarily composed of racial minorities, face mounting structural barriers to engaging in the political process at all.

The lack of political accountability that accompanies structural entrenchment of power hurts not only those who are excluded, but it blocks the political feedback loop that is supposed to operate in a democracy. In order to see the problem, consider contemporary politics. In a normal democratic feedback loop, one would expect a political party that has lost the popular vote in seven out of eight elections to adjust its platform or rhetoric in order to become more attractive to a larger proportion of the population. But that is not happening currently because Republicans understand that they do not need to win a majority of the population in order to win elections. Likewise, because of gerrymandering, most members of Congress (and state legislatures) are in “safe” seats, and they therefore need only appeal to their own party’s voters in order to win the primary election. In such circumstances, the political process has broken down, and there is no

²¹⁰ 139 S. Ct. 2484 (2019).

effective accountability mechanism. Therefore, refusing to intervene because courts should defer to the political process is completely purposeless. As one commentator has pointed out, our current problem as a country “isn’t too much polarization, it’s too little democracy.”²¹¹

Moreover, the political question doctrine cannot be invoked simply because the subject of the suit has something to do with voting. To the contrary, *Baker v. Carr*,²¹² the case that comprehensively set forth the Court’s six-factor test for political questions,²¹³ was itself a voting case, and the Court determined that the redistricting question at issue was in fact justiciable. Since then, the Court has addressed controversies surrounding legislative apportionment, including but not limited to inequities in population between districts, under the Equal Protection Clause.²¹⁴ Indeed, it was through these cases that the Court articulated and enforced the “one person, one vote” standard. The Court has also made clear that even when a legislative apportionment scheme does not violate “one person, one vote,” redistricting plans that intentionally diminish the voting power of a suspect class also violate the Equal Protection Clause.²¹⁵ In this vein, the Court considered under the Equal Protection Clause whether a New York redistricting plan that split a Hasidic Jewish community in two in order to create majority-

²¹¹ Ezra Klein, *The Crisis Isn't Too Much Polarization. It's Too Little Democracy*, VOX (Nov. 12, 2020), <https://www.vox.com/21561011/2020-election-joe-biden-donald-trump-electoral-college-vote-senate-democracy> [<https://perma.cc/ZE66-3SZC>].

²¹² *Baker v. Carr*, 369 U.S. 186 (1962).

²¹³ *Id.* at 217 (laying out six factors for evaluating whether a case presents a non-justiciable political question: “a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question”).

²¹⁴ See *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Reno*, 509 U.S. 630 (1993); *Davis v. Bandemer*, 478 U.S. 109 (1986); *Gaffney v. Cummings*, 412 U.S. 735 (1973); *Reynolds v. Sims*, 377 U.S. 533 (1964).

²¹⁵ See, e.g., *Rogers v. Lodge*, 458 U.S. 613, 617 (1982) (explaining that re-districting plans can be in violation of the Equal Protection Clause if such plans are racially motivated); *Mobile v. Bolden*, 446 U.S. 55, 67 (1980) (explaining that when there is purposeful discrimination in a redistricting scheme there can be a violation of the Equal Protection Clause).

minority districts constituted unlawful racial discrimination.²¹⁶ The Court later held that multimember districts that “operate to minimize or cancel out the voting strength of racial or political elements of the voting population” would also raise justiciable constitutional questions.²¹⁷

Based on this line of cases, the Court decided, in *Davis v. Bandemer*,²¹⁸ that political gerrymandering cases are justiciable under the Equal Protection Clause. But the justices in *Bandemer* could not agree on a standard by which politically motivated gerrymandering claims were to be assessed for constitutionality. The plurality decision held that a political gerrymandering claim could succeed only when a plaintiff demonstrates both intent to discriminate against a particular group and that the proposed plan has actual discriminatory effect.

Almost two decades later, in *Veith v. Jubelirer*,²¹⁹ the Court again could not achieve a majority rationale, but Justice Scalia, writing for the plurality, found that the lack of a discernable and manageable standard for adjudicating cases concerning politically motivated gerrymandering claims required such claims to be deemed nonjusticiable. Justice Scalia found that the plurality’s standard in *Bandemer*—that a plaintiff show “both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group”—was not manageable because in practice, the effects prong was difficult to determine and “fairness” created no meaningful guidepost for the Courts, while political “proportionality” is nowhere guaranteed in our constitutional system.²²⁰ Moreover, Justice Scalia reasoned, the Constitution provides a remedy for political gerrymandering by giving the Congress the power to “make or alter”

²¹⁶ *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 152 (1977). The Court stated in *Gaffney v. Cummings*, 412 U.S. 735, 751 (1973) that “[a] districting plan may create multimember districts perfectly acceptable under equal population standards, but invidiously discriminatory because they are employed ‘to minimize or cancel out the voting strength of racial or political elements of the voting population.’” *Id.* (upholding against an equal protection challenge a state legislative single-member redistricting scheme that was formulated in a bipartisan effort to give political parties proportional political representation in the State); *see also* *White v. Regester*, 412 U.S. 755, 756 (1973) (exploring whether “multimember districts provided for [two] [c]ounties were properly found to have been invidiously discriminatory against cognizable racial or ethnic groups in those counties.”); *Whitcomb v. Chavis*, 403 U.S. 124, 127 (1971) (exploring whether specific redistricting was in violation of the Equal Protection Clause).

²¹⁷ *Fortson v. Dorsey*, 379 U.S. 433, 439 (1986).

²¹⁸ *Davis v. Bandemer*, 478 U.S. 109 (1986).

²¹⁹ *Veith v. Jubelirer* 541 U.S. 267 (2004).

²²⁰ *Id.* at 278–80 (plurality opinion).

gerrymandered districts.²²¹ Of course, this is an empty remedy because Congress, and the very congressional candidates who have long benefited from political gerrymandering, have not and will not step in to remedy the challenge to democratic political process. Justice Kennedy, in his concurrence, rejected Scalia's political question conclusion, but agreed that in the particular case at hand plaintiffs' claims failed.

In *Rucho v. Common Cause*,²²² the Roberts Court essentially adopted Justice Scalia's position, abrogated *Bandemer*, and held that partisan gerrymandering—no matter how egregious—presents a non-justiciable political question that cannot *ever* be addressed by the federal courts. According to the 5–4 majority, there cannot be a sufficiently manageable standard for the judiciary to distinguish between a constitutional and an unconstitutional partisan gerrymander. The majority reached this conclusion despite voluminous social science data presented in the case to illustrate just how extreme the districts at issue were and how much they diluted Black urban votes.²²³

However, as Justice Kagan articulated in her dissent, political gerrymandering implicates the Fourteenth Amendment because, as the Court has long recognized, the Equal Protection Clause guarantees “the opportunity for equal participation by all voters in the election” of legislators, a function that political gerrymandering denies minority voters.²²⁴ Moreover, the appropriate standard for the Court “does not use any judge-made conception of electoral fairness—either proportional representation or any other; instead, it takes as its baseline a State's own criteria of fairness, apart from partisan gain. . . . and invalidates the most extreme, but only the most extreme, partisan gerrymanders.”²²⁵

The Court's precedent should have dictated the opposite result, and the *Ely/Carolene Products* political process doctrine supplies the rationale: the affected party is a discrete and insular minority (or even majority) that currently faces insurmountable obstacles in attaining even roughly proportional representation or meaningful political efficacy. In addition, as

²²¹ *Id.* at 275 (plurality opinion).

²²² 139 S. Ct. 2484, 2506 (2019) (“We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts.”).

²²³ *See generally* *Common Cause v. Rucho*, 318 F. Supp. 3d 777 (M.D.N.C. 2018).

²²⁴ *Reynolds v. Sims*, 377 U.S. 533, 566 (1964).

²²⁵ *Rucho*, 139 S.Ct. at 2516 (Kagan, J., dissenting).

this article has argued, there is little meaningful difference between partisan gerrymandering and race-based gerrymandering. They have the same effect and, for many legislators, the same purpose.

Finally, of course, even if the Court continues to deem gerrymandering cases nonjusticiable political questions, that would have no impact on the various other sorts of cases discussed in this Article, where the legislature or executive enact substantive policies designed to target and harm urban and suburban populations or deny them the ability to meaningfully participate in the political process. Such cases would not be governed by *Rucho* and therefore could be decided independent from the gerrymandering line of cases.

D. The “Independent State Legislature” Theory

For all the reasons previously discussed in this Article, robust judicial oversight to protect American democracy has perhaps never been more important. Unfortunately, the U.S. Supreme Court may be poised to move in the opposite direction. Four justices have recently signaled their potential willingness to embrace an obscure and implausible constitutional theory that would prevent federal judges from reviewing any state voting laws, even those that target specific groups or ignore democratic processes altogether. Still worse, this theory would go so far as to block *state* judges interpreting their own state constitutions from doing so. It would even prevent the voters of a state from passing democracy-protecting ballot initiatives. Needless to say, such an outcome would be catastrophic for the future of democracy in America.

The theory in question has been dubbed the “independent state legislature” theory,²²⁶ and it derives from a wooden ahistorical reading of the words of Article I, Section 4 of the U.S. Constitution: “The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.”²²⁷ Applying this language, so the argument goes, state

²²⁶ Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1, 1 (2020) (“[T]he doctrine teaches that a state constitution is legally incapable of imposing substantive restrictions on the authority over federal elections that the U.S. Constitution confers directly upon a state’s legislature.”).

²²⁷ U.S. CONST. art. I, § 4, cl. 1.

legislatures possess the sole authority to prescribe rules for congressional elections, largely free from any constraints that might be placed on the legislatures by the Fourteenth Amendment's Equal Protection Clause, as well as state courts, state constitutions, or even the state's voters themselves.²²⁸ Likewise, proponents point to Article II, Section 1 of the U.S. Constitution which provides that in presidential elections—"each State shall appoint, in such manner as the legislature thereof may direct" the electors to which the State is entitled.²²⁹ If taken literally, this clause can be read to allow state legislatures to ignore the popular vote in the state altogether and name representatives to the Electoral College that match the legislature's preferences, again regardless of what even the state's own constitution might require.²³⁰

For now, the theory does not seem to be embraced by a majority of the U.S. Supreme Court, which recently rejected attempts by Republicans in Pennsylvania and North Carolina to block new congressional maps drawn by the supreme courts of those states.²³¹ However, there may be at least four votes for the theory. In a statement accompanying the Court's refusal to fast-track a Republican challenge to the 2020 vote-counting process in Pennsylvania, Justice Alito, joined by Justices Thomas and Gorsuch, opined that the federal Constitution conferred "on state legislatures, not state courts, the authority to make rules governing federal elections."²³² Subsequently, in a case involving a federal judge's COVID-19-related modifications to election rules in Wisconsin, Justices Gorsuch and Kavanaugh stated that, "the Constitution provides that state legislatures—not federal judges, not state judges, not state governors, not other state officials—bear primary responsibility for setting election rules."²³³ Most recently, Justice Alito, joined again by Justices Thomas and Gorsuch, dissented from the denial of the Republican request for a stay application in the North Carolina redistricting case, calling the independent state legislature theory an issue of

²²⁸ See Morley, *supra* note 226, at 8–10.

²²⁹ U.S. CONST. art. II, § 1, cl. 3.

²³⁰ See Morley, *supra* note 226, at 8–10.

²³¹ See *Moore v. Harper*, 142 S. Ct. 1089 (2022) (North Carolina case) (denying emergency stay application); *Toth v. Chapman*, 142 S. Ct. 1355 (2022) (Pennsylvania case) (denying emergency application for writ of injunction).

²³² *Republican Party of Pa. v. Kathy Boockvar*, 141 S. Ct. 1 (2020) (Statement of Alito, J.).

²³³ *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 29 (2020) (Gorsuch, J., joined by Kavanaugh, J., concurring in denial of application to vacate stay).

“great national importance.”²³⁴ Justice Kavanaugh largely agreed, stating, “I agree with Justice Alito that the underlying elections clause question raised in the emergency application is important, and that both sides have advanced serious arguments on the merits. The issue is almost certain to keep arising until the court definitively resolves it.”²³⁵ Thus, four justices appear open to entertaining this doctrine as a potential limitation on judicial review of legislative efforts to change election rules, even if those rules potentially disenfranchise a majority of the state’s population.

As scholars have pointed out, this reading of the constitutional text, is almost completely indefensible,²³⁶ and it is not surprising that none of the justices entertaining it was able to offer any historical, structural, or precedential justification for it, other than their own literalist reading of the text.

The reasons to reject the theory are myriad. First, it rests on the idea that a state legislature, which is, after all, a creature of the state constitution, is not itself subject to the provisions of that same constitution. Yet, the whole idea of judicial review is that the judiciary has a *duty* to check whether the legislature is acting within its constitutional powers. Thus, “[w]hen state jurists attend to the state constitution in interpreting state election statutes, these judges are enforcing Article II, not undermining it.”²³⁷

Second, granting this sort of talismanic power to the word “legislature” in these provisions is precisely the kind of wooden literalism that gives textualism a bad name. As former Scalia clerk and now Justice Amy Coney Barrett has made clear, good textually-based analysis is not the same thing as literalism.²³⁸ Indeed, as she has argued, “textual literalism . . . would lead to absurd results.”²³⁹ Here, such absurdity arises from using the bare word

²³⁴ Moore v. Harper, 142 S. Ct. 1089 (2022) (Alito, J., joined by Thomas, J. and Gorsuch, J., dissenting from denial of application for stay).

²³⁵ Moore v. Harper, 142 S. Ct. 1089 (2022) (Kavanaugh, J., concurring in denial of application for stay).

²³⁶ See, e.g., Vikram D. Amar & Akhil Amar, Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish, 2021 SUP. CT. REV. (forthcoming), <https://ssrn.com/abstract=3731755> (dismantling theory as “utterly indefensible”); Hayward H. Smith, History of the Article II Independent State Legislature Doctrine, 29 FLA. ST. U.L. REV. 731 (2001) (disputing doctrine’s historical underpinnings).

²³⁷ Amar & Amar, *supra* note 236, at 10.

²³⁸ See Amy Coney Barrett, *Assorted Canards of Contemporary Legal Analysis: Redux*, 70 CASE WESTERN L. REV. 855, 856–58 (2020) (arguing that textualism is distinct from “literalism”).

²³⁹ *Id.* at 856.

“legislature” to conclude that the framers of the U.S. Constitution intended to draw a distinction between the State that is empowered to appoint electors and that State’s legislature.²⁴⁰ This is akin to interpreting the word “Congress” in the First Amendment to mean that the First Amendment does not apply to the executive branch of government. Given that such a limited reading is unsupported by the history or structure of the U.S. Constitution, there is no justification for such literalism, particularly in light of the historical understanding of the word “legislature” at the time. As Akhil & Vikram Amar have noted, “The public meaning of state ‘legislature’ was clear and well accepted at the Founding: A state’s ‘legislature’ was not just an entity created to represent the people; it was an entity *created and constrained by the state constitution*.”²⁴¹

Indeed, adopting the independent state legislature theory would not only fly in the face of the history and structure of the U.S. Constitution; it also is directly contrary to a 2015 decision of the U.S. Supreme Court, which specifically stated that “the meaning of the word “legislature,” used several times in the federal Constitution, differs according to the connection in which it is employed, depend[ent] upon the character of the function which that body in each instance is called upon to exercise.”²⁴² Accordingly, the Court ruled that the use of an independent redistricting commission was permissible despite the “legislature” language in Article 2 because the commission had been authorized by the voters of the state through a ballot initiative adopted pursuant to the state constitution.

Third, preventing even state judges from reviewing legislative action under their state constitutions would completely undermine the Court’s 2019 ruling in *Rucho v. Common Cause*.²⁴³ As discussed above, in that case the Court determined that federal courts could not adjudicate issues of partisan gerrymandering because they are political questions. However, the majority opinion explicitly pointed out that its ruling applied only to federal courts and that state courts may be better equipped to handle such questions.²⁴⁴ Indeed, according to the Court, because “[t]he States . . . are actively

²⁴⁰ Geoffrey R. Stone, *Equal Protection? The Supreme Court’s Decision in Bush v. Gore*, U. CHI. LIBR. DIGIT. COLLECTIONS [<https://perma.cc/54LA-F5QR>].

²⁴¹ Amar & Amar, *supra* note 236, at 24.

²⁴² *Arizona State Legislature v. Arizona Indep. Redistricting Comm’n*, 576 U.S. 787, 808 (2015) (quoting *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 434 (1932)).

²⁴³ 139 S. Ct. 2484 (2019).

²⁴⁴ *See id.* at 2507.

addressing the issue on a number of fronts,” avenues of judicial review to correct partisan gerrymandering would continue to exist, just at the state level.²⁴⁵ This suggestion led many commentators to look to state constitutions as a viable path to address partisan gerrymandering.²⁴⁶ However, if the Court were to adopt the independent state legislature doctrine, it would shut down the very avenue it proposed when it found that federal courts should stay out of the political thicket of partisan gerrymandering.

Finally, as to federal judges, for all the reasons discussed in this Article, even if state legislatures possess some authority with regard to the conduct of elections, that authority surely cannot be exercised in a way that violates other provisions of the U.S. Constitution, such as the Fourteenth Amendment. Indeed, even the per curiam opinion in the much reviled *Bush v. Gore* decision was grounded in the idea that Florida’s recount procedures violated the Equal Protection Clause.²⁴⁷ Thus, if a state legislature effectively substitutes its judgment for the will of the people by setting up election rules and procedures to systematically disenfranchise specific populations, such rules must be invalidated under the theory of popular democratic participation articulated in *Carolene Products* footnote four and subsequent Equal Protection cases. And this is particularly appropriate if the legislature in question has itself been gerrymandered so that it effectively represents only a minority of the state’s population.

The stakes in this debate could hardly be higher. Currently, the U.S. Supreme Court sits on the precipice of upending settled tenets of American representative democracy as some justices contemplate removing entirely all state and federal judicial oversight concerning federal elections. Meanwhile, Republican-dominated state legislatures—many of which are the product of gerrymandering to give outsized influence to rural populations in their states—are passing laws that severely restrict voting. According to one study,

²⁴⁵ *Id.*

²⁴⁶ See, e.g., Samuel S.-H. Wang, Richard F. Ober Jr. & Ben Williams, *Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymandering*, 22 U. PA. J. CONST. L. 203, 213 (2019) (“[R]eformers should instead follow the examples of Pennsylvania and North Carolina and turn to state courts and state constitutions to achieve their goals.”); Charlie Stewart, *State Court Litigation: The New Front in the War Against Partisan Gerrymandering*, 116 MICH. L. REV. ONLINE 152, 158 (2018) (arguing that state court litigation under state constitutions is “an effective new strategy in the war against partisan gerrymandering due to the potentially positive results, the speed with which it takes place, broad applicability, and its insulation from Supreme Court review”).

²⁴⁷ 531 U.S. 98, 103 (2000).

in 2021 nine states enacted twelve bills that take aim at state courts for their role in ensuring access to vote.²⁴⁸ They do so by making it more difficult for judges to extend how long the polls are open (Georgia), prohibiting judges from suspending state election laws (Kansas, Kentucky, and Texas), and changing how judges are selected, limiting which courts will hear cases involving the state, or making it easier to target state court judges for unpopular decisions. (Illinois, Indiana, Kentucky, Montana, Ohio, and Tennessee).²⁴⁹ Even more dangerous, after the 2020 election, in service of the Big Lie, the GOP in Wisconsin introduced legislation to divide up the electoral votes by deeply gerrymandered congressional districts rather than by a popular vote.²⁵⁰ And states are considering bills that would allow the state legislature to intervene in presidential elections and pick electors if the results are deemed “unclear.”²⁵¹ Under such a scheme, state legislatures, not the people, would choose the outcome of elections, thereby undermining democracy entirely. Yet, under the independent state legislature theory, there would be little room for state or federal judges to interpose either state or federal constitutional constraints on such blatantly anti-democratic schemes.

Instead, state judges must recognize that the legislature only operates—and historically has only ever operated—within the constraints of the state constitution, and both state and federal judges must take seriously the idea that the federal Equal Protection Clause protects not just the right to be free from racial gerrymandering and a poll tax, but also the process of tabulating and counting votes itself. State legislatures that substitute their will for the will of the voters are subject to strict scrutiny because they are tampering with the very foundation of democratic participation itself.

²⁴⁸ Patrick Berry, Alicia Bannon, & Douglas Keith, *Legislative Assaults on State Courts: December 2021 Update*, BRENNAN CTR. (Dec. 14, 2021), <https://www.brennancenter.org/our-work/research-reports/legislative-assaults-state-courts-december-2021-update> [<https://perma.cc/RW5Z-HLKA>].

²⁴⁹ *Id.*

²⁵⁰ Melanie Conklin, *GOP Has Bill to Reallocate Wisconsin's Electoral Votes by Congressional District*, WIS. EXAM'R (Jan. 8, 2021), <https://wisconsinexaminer.com/2021/01/08/gop-eyes-bill-to-reallocate-wisconsins-electoral-votes-by-congressional-district/> [<https://perma.cc/W5WF-SGFE>].

²⁵¹ See Vasilogambros & Coston, *supra* note 11.

CONCLUSION

The demographic and political realities of the United States in the twenty-first century combine to threaten the long-term viability of majoritarian democracy. Our political process has been hijacked by a minority faction that is using its structurally entrenched power to lock in its continued ability to govern, despite not commanding the support of anything close to a majority of Americans. This is an existential crisis requiring a response from every independent source of power in society.

The judiciary, because it is insulated from the day-to-day exigencies of partisan politics, must play an active role in righting the political balance and resisting counter-majoritarian entrenchment and discrimination by this minority faction. Once upon a time, the U.S. Supreme Court took its role as guardian of the political process seriously. As John Hart Ely recognized, the Court created an entire jurisprudence from the *Carolene Products* footnote, subjecting to heightened scrutiny legislative or executive enactments that were the product of discrimination against politically powerless groups or that made it impossible for the political process to operate effectively. Recognizing that some groups were being systematically excluded from meaningful participation in the democracy, the Court worked to counteract partisan and discriminatory entrenchment.

Today, urban and suburban populations are similarly being blocked from full participation in our democracy commensurate with their numbers. Yet, the problem is perhaps even worse in this century than the last because it is not a discrete and insular *minority* being disenfranchised, but the *majority* of Americans. Meanwhile, Republican presidents and members of Congress are not disciplined by democratic accountability because they need only appeal to their base, not a majority of voters. This state of affairs cannot continue for long without the country breaking apart. It simply cannot be that as the country grows ever more diverse and urban a small rural, mostly white, minority can continue to maintain a structural chokehold on American politics.

In the end, the long-term legitimacy of the U.S. Supreme Court depends on its willingness to re-engage in the political process to ensure that blockages to that process are removed and that any legislation or executive action that deliberately disadvantages urban and suburb populations is subjected to heightened scrutiny. And it must also stay out of the way and not interfere

with state judges using state constitutions to protect democracy. Such actions do not require courts to pontificate on fairness or interfere to ensure complete proportionality; only that judges step in to address areas in which the ordinary methods of effectuating political will are not available as a result of intentional entrenchment and discrimination. State and federal judicial intervention of this sort will not subvert democracy but enhance it by ensuring that the political process allows for meaningful participation and therefore meaningful accountability.