Article

How the Liberal First Amendment Under-Protects Democracy

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INTRODUCTION

The primary constitutional commitment in 1789 was to a form of government in which the people would govern themselves. The First Amendment underwrites that foundational commitment. By barring the government from "abridging the freedom of speech, or of the press" or intruding on "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances," its provisions secure vital channels for influencing public policymaking, demanding responsiveness, and ensuring political accountability.[1]

First Amendment doctrine, however, frequently operates to the detriment of democracy. For all the lofty rhetoric about the First Amendment's principal democratic function,[2] the Court consistently under-protects political conduct essential for influencing public policymaking. Lies, pornography, hate speech, and violent video games receive near-absolute protection.[3] But the First Amendment rights of protesters and voters are shockingly weak. The doctrine undermines democratic self-governance further by over-protecting speech in domains constitutionally reserved for democratic decision-making.

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1. U.S. CONST. amend. I. This Article does not address the First Amendment's protections for religious freedom or the ways they may fit within this account.

2. *See* Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 994 (2011) ("[T]he most prominent and widely accepted theory of free speech is [one] . . . which emphasizes its role in self-governance.").

3. *See* United States v. Alvarez, 567 U.S. 709, 729–30 (2012) (plurality opinion) (striking down a law criminalizing false claims of military service as unconstitutionally restricting individuals' speech rights); Ashcroft v. Free Speech Coal., 535 U.S. 234, 256 (2002) (finding simulated depictions of child pornography to be a form of speech protected by the First Amendment); United States v. Playboy Ent. Grp., 529 U.S. 803, 807 (2000) (holding that legislation blocking television broadcasting of pornographic material at certain times of the day violated the freedom of speech); Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 799 (2011) (invalidating, as a violation of the First Amendment, a California statute regulating the sale of violent video games to minors); R.A.V. v. City of St. Paul, 505 U.S. 377, 395–96 (1992) (striking down a city ordinance that prohibited burning a cross as a form of viewpoint discrimination).

This is ironic given the prevailing consensus that enabling self-governance is a core purpose of the First Amendment. The original views of the Founders are often "as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh,"[4] but that they shared a commitment to a republican form of government, or that the First Amendment secures that underlying commitment, is not.[5]

What, then, explains this distortion of priorities? The prevailing construction is a product of two theoretical mistakes: first, the Court's unwillingness to embrace the furtherance of self-governance as the driver of First Amendment doctrine; and second, the Court's attachment to a thin, discursive conception of democracy.

The principal setback to the self-governance theory of the First Amendment was that its original formulation implied that speech without obvious and direct pertinence to politics would not be covered.[6] Robert Bork stoked the fire in the early 1970s by fully embracing this conclusion, arguing that "[t]here is no

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4. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring). Evidence of the Founder's views, like the text of the Constitution, are invoked throughout this Article because they are important to understanding the First Amendment, *not* because they are determinative. The argument is not originalist. It does not maintain that the original intent or public meaning of the First Amendment, if we could ascertain it, ought to permanently fix constitutional meaning. Instead, my methodological view aligns with Philip Bobbitt—what makes a constitutional interpretation sound is its comportment with sociological conventions of interpretation. *See* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 163 (1991). Moreover, my general perspective is realist—interpretations stick when they are successfully adopted by courts at the behest of social movements. *Cf.* STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT (2008) (describing how the conservative movement funded a range of law school initiatives that helped to develop a cadre of elite young lawyers and their elevation to positions of professional prominence).

5. *See, e.g.*, Lee Drutman, *Elections, Political Parties, and Multiracial, Multiethnic Democracy: How the United States Gets It Wrong*, 96 N.Y.U. L. REV. 985, 986–87 (2021) (describing the Framers' vision of a system of self-government); Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 482 (2011) ("[T]he best possible explanation of the shape of First Amendment doctrine is the value of democratic self-governance.").

6. The seminal articulation of the self-governance theory was Alexander Meiklejohn's. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 25–26 (1948).

basis for judicial intervention to protect any other form of expression, be it scientific, literary . . . obscene or pornographic."[7] This naïve articulation of the scope of the First Amendment's self-governance interest has made the theory extremely controversial. Few today deny that enabling self-governance is *a* core purpose of the First Amendment, but most deny it should drive doctrinal choices.

The origins of the Court's thin conception of democracy are harder to explain. But what is clear is that, over time, the Supreme Court has given the Speech Clause primacy over the Amendment's other provisions.[8] Driven by the misconception that democracy is a product of political discussion rather than political participation, the Court has reduced a multifaceted Amendment protecting the political process writ large into a singular protection for free *expression*.[9]

This preoccupation with speech in First Amendment jurisprudence is a mistake.[10] When combined with the Court's hesitancy to declare the primacy of the self-governance interest, the

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7. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971).

8. Most First Amendment scholars have followed the Court's lead, focusing entirely on the freedom of speech. *See, e.g.*, THE FREE SPEECH CENTURY (Lee C. Bollinger & Geoffrey R. Stone eds., 2019) (compiling First Amendment essays solely focusing on the free speech doctrine); Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004) (discussing the scope of the freedom of speech); *see also* THE OXFORD HANDBOOK OF FREEDOM OF SPEECH (Adrienne Stone & Frederick Schauer eds., 2021) (defining the freedom of speech as the cornerstone of liberal democracy).

9. In a forthcoming article based on an analysis of every reference to the press in the Court's opinions since 1784, RonNell Andersen Jones and Sonja R. West find that starting in the 1960s, the Court "began increasingly to refer to . . . the 'freedom of expression,'" abandoning the "depiction of press freedom . . . [as a] power independent from or coequal to freedom of speech." This followed a spike in references to press freedoms in the 1930s. *See* RonNell Andersen Jones & Sonja R. West, *The Disappearing Freedom of the Press* (Univ. of Utah College of Law, Rsch. Paper No. 4, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4036592. The authors demonstrate, further, that in recent years the Court has simply stopped mentioning the Press Clause. *See id.*; *see also* JOHN D. INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY 62 (2012) (noting that the Supreme Court has not rested a case on the Assembly Clause since at least 1983).

10. In recent decades, a handful of scholars have criticized the Court's failure to independently examine the provisions of the First Amendment. *See, e.g.*, ASHUTOSH BHAGWAT, OUR DEMOCRATIC FIRST AMENDMENT 7–9 (2020) (arguing that it is time to recognize how "the Speech, Press, Assembly, and Petition

singular preoccupation with expression obscures the value of political participation as conduct, thereby undermining the First Amendment's role as the underwriter of self-governance.

The Supreme Court fails to shield conduct that is vital to political accountability and responsiveness—even when that conduct is explicitly protected. At the same time, it increasingly allows corporate actors to use the Speech Clause to evade run-of-the-mill market regulations. Such expansive protection of speech threatens the basic constitutional promise that contested questions of policy will be left to democratically accountable bodies—bodies whose decisions are constitutionally designed to be subject to democratic revision. This, too, is a strike against self-governance.

This Article challenges the prevailing construction by advancing a theoretical account of the First Amendment that stresses its role as the underwriter of a republican form of government. It argues that, consistent with its classic liberal commitments, the First Amendment can be construed to protect the democratic process and to promote democratic self-governance. But it requires three critical pivots derived from a more nuanced account of the processes and purposes of self-governance. First, the Court must shed its singular preoccupation with speech. The First Amendment shields *all* political processes equally. Second, the First Amendment must be construed to foreclose political, social, and cultural entrenchment. The essence of self-governance is the absence of entrenched power. A strong anti-entrenchment norm is well-established in existing free speech doctrine in the prohibition on viewpoint discrimination.[11] This strong anti-entrenchment norm must be extended beyond the marketplace of ideas. The First Amendment precludes uses of state power to

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Clauses together enable . . . democratic citizenship."); Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1057 (2011) (lamenting the "constitutional underprotection" of "an incapacitated Press Clause"); Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543, 547 (2009) [hereinafter Abu El-Haj, *Neglected Right of Assembly*] (criticizing "[c]ourts and academic commentators" for "fail[ing] to appreciate the significance . . . of the right of assembly itself" or its "political origins and functions").

11. *See, e.g.*, Williams-Yulee v. Florida Bar, 575 U.S. 433, 470 (2015) (Scalia, J., dissenting) ("[T]he First Amendment is a kind of Equal Protection Clause for ideas.").

make it difficult or impossible for citizens to resist social, cultural, and political power.[12] Third, we must recognize that First Amendment rights—speech rights in particular—must sometimes be limited to protect the legislative prerogative to govern.

The account starts from the premise that the First Amendment's primary purpose is to underwrite the foundational constitutional commitment to a republican form of government. Unlike previous accounts, however, the theory does not turn on the privileging of political speech (as older theories have) and does not result in a cramped conception of First Amendment rights.

It is, nevertheless, a radical break from most theories of the First Amendment. First, it calls for strong protection for political conduct. This follows from the recognition that the First Amendment's role is to police the openness of the domain of politics writ large—to ensure that the processes for demanding and achieving self-governance are open.

Speech has never been the primary mechanism for demanding responsiveness, nor the most effective means for holding officials responsible for their choices. Democratic accountability and responsiveness, like social and political change, depend on political participation as *conduct*. Robust political discourse does not get politicians elected or policies enacted. Translation of public opinion into election results and policy shifts requires votes, petitions, and lobbying. Indeed, citizens can only effectively influence public decision-making by *exercising* their political rights. They must volunteer on campaigns, run for office, and join political associations. And they must organize between elections, make calls, sign petitions, and, occasionally, protest.

The text of the First Amendment recognizes this. The enumerated protections single out political practices and institutions that are vital to achieving democratic accountability and responsiveness: public assembly, petitioning, the free press, and the public sphere. It bars the government from "abridging the freedom of speech, or of the press," but also from intruding on "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances"—political conduct.[13]

The Court also recognizes this. It has extended First Amendment protections to the freedom of association—another form of

12. PAUL STARR, ENTRENCHMENT: WEALTH, POWER, AND THE CONSTITUTION OF DEMOCRATIC SOCIETIES 105 (2019) ("Democracy is supposed to prevent the entrenchment of power.").

13. U.S. CONST. amend. I.

political conduct.[14] And it has recognized a right to vote under the First Amendment.[15] In both instances, however, the Court is ambivalent, as manifested in its insistence on characterizing these political practices as forms of voice, not conduct.

A clear-eyed conception of the First Amendment would abandon this speech-centered approach, recognizing that First Amendment protection extends to *all* political processes that further self-governance—not just public discourse. This means political conduct too.

The second pivot underscores *why* the First Amendment prohibits burdens on vital channels for influencing public policymaking. Self-governance only exists if political, economic, social, and cultural change is possible: "The democratic idea presumes power is temporary, conditional on continued public favor, and reversible at elections."[16] Efforts to make political institutions resistant to change are antithetical to this basic commitment.[17]

The First Amendment must, therefore, be construed to foreclose orthodoxies in the marketplace of ideas, but equally to preclude political entrenchment. Only if political leaders are sufficiently insecure in their continued power will they seek "to make the government responsive and accountable to the people."[18] A properly theorized self-governance interest thus demands a strong anti-entrenchment norm—one capable of explaining why efforts at political entrenchment, like those seeking to entrench particular views, must be struck down.

The final theoretical move is equally controversial. And it is this: The First Amendment is unique among constitutional provisions because its rights exist to enable democratic decisionmaking, not to limit it.[19] Its negative liberties are not ends in themselves. They are an instrument to the end of *positive* liberty.

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14. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958).

15. Burdick v. Takushi, 504 U.S. 428, 441–42 (1992).

16. STARR, *supra* note 12, at xiii (noting, however, that constitutional rules establishing institutions are an exception to the presumption).

17. *Cf. id.* at xii (defining entrenchment as "a type of change structured, intentionally or not, so as to be difficult to reverse" because it is "resist[ant] to stress").

18. *Id.* at 105.

19. The conception of positive liberty as the commitment to self-governance is distinct from the call for positive individual rights—either the right "to *enable individuals* to take control of their lives," or the duty of the state to provide

As Professor Deborah Hellman has explained, "[t]he liberty of citizens in a democracy has two components—the negative liberty to be let alone and the positive liberty of self-government."[20] The Revolution was primarily fought for the latter.[21] When Patrick Henry declared "but as for me, give me Liberty or give me death!," the liberty he and his fellow revolutionaries sought was the liberty *to* set the terms of governance with their fellow men.[22] The revolutionary call was not "No Taxation," but "No Taxation Without Representation."[23]

The First Amendment seeks to underwrite the conditions that make *positive* liberty possible. It thus impacts the legislative domain differently than other constitutional rights. It does not primarily function, like the Reconstruction Amendments, to remove certain topics from legislative consideration. Instead, it seeks to maintain the integrity of a domain of governance by ensuring that legislative and executive bodies are open, permeable, and accessible as they make policy. The First Amendment obviously does bar some legislative actions toward this end. But, properly construed, its limits extend only to those legislative actions that seek to impede the openness of the processes for influencing policymaking, demanding responsiveness, and ensuring democratic accountability. The paradigmatic example would be the criminalization of seditious speech or censoring of the press.

Important consequences for the scope of First Amendment rights flow from this recognition. A proper construction of the First Amendment depends on drawing a distinction between a *domain of politics* and a *domain of governance*—however difficult.[24] In the domain of politics, which includes public discourse,

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certain goods. Kai Möller, *Two Conceptions of Positive Liberty: Towards an Autonomy-Based Theory of Constitutional Rights*, 29 OXFORD J. LEGAL STUD. 757, 758 (2009) (emphasis in original).

20. Deborah Hellman, *Resurrecting the Neglected Liberty of Self-Government*, 164 U. PA. L. REV. ONLINE 233, 233 (2016).

21. Tabatha Abu El-Haj, *"Live Free or Die"—Liberty and the First Amendment*, 78 OHIO ST. L.J. 917 (2017).

22. *Id.* at 919 (quoting Patrick Henry, Give Me Liberty or Give Me Death, Declaration at the Virginia Convention (Mar. 23, 1775)).

23. *Id.* at 920.

24. In somewhat similar terms, Robert Post has observed that First Amendment jurisprudence can be explained by a similar distinction, between the domain of governance (where free speech rights are strong) and the managerial domain (where speech rights are weaker). ROBERT C. POST, *Between Governance and Management*, *in* CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 199, 265–66 (1995). While there is some conceptual overlap

but also various forms of political participation (associating, protesting, petitioning, and voting), First Amendment rights must be robust. This is necessary to prevent political, social, and cultural entrenchment.

But in the domain of governance, First Amendment rights must be limited to respect the foundational commitment to self-governance. Hard and contested moral and policy choices are reserved for democratically accountable bodies in our constitutional system. First Amendment rights should not encroach on the domain of governance—on legislative judgments about how to regulate the economy, promote public health, safety, and our constitutional commitment to equality, or generally achieve the good *even when those judgments impact speech or association.* The First Amendment, in other words, does not per se prohibit the regulation of speech or association.

Roughly speaking, this line is between democratic inputs and outputs. Efforts to compromise the integrity of *political inputs*, broadly construed, must be subject to scrutiny to underwrite the legitimacy of the products of the political domain. But the *outputs of politics* must be given a presumption of constitutionality, even when they arguably burden speech or association, in order to respect the constitutional commitment to democratic self-governance. This, of course, depends on the outputs being the product of a democratic system that is free of entrenchment. A properly construed First Amendment would underwrite the political openness necessary to ensure that democratic outputs reflect (not distort) popular will and that elected officials can be ousted when they do not.

This is a radical break from most theories of the First Amendment, which have followed the Court in adopting an intellectualist conception of democracy in which discourse, not the rough-and-tumble of politics, takes center stage. Even scholars who have stressed the Amendment's critical role in promoting self-governance are saddled with the Court's decidedly discursive account of democracy. They too emphasize political discussion over political participation.[25] Robert Post's seminal articulation of the self-governance interest, for example, defines

between Post's domains and mine, they are distinct for reasons that will be explained in Part IV.

25. *See, e.g.*, GREGORY MAGARIAN, MANAGED SPEECH: THE ROBERTS COURT'S FIRST AMENDMENT, at xiv (2017) (setting out to systematically evaluate the universe of the Roberts Court's decisions involving free speech doctrine);

political participation as the right of citizens to share views and shape public discourse.[26]

But the theory of the First Amendment advanced in this Article promises a significant payoff. This account vindicates a vision of the First Amendment that actually protects democracy in all its facets. And, in doing so, it offers a way to diffuse the significant pressure on the First Amendment arising out of recent political, socio-economic, and cultural changes. Younger Americans, more appreciative of the country's diversity, increasingly eschew the conventional calculation of previous generations that the benefits associated with the guarantee of free speech outweigh the harms associated with racist, misogynistic, and exclusionary speech.[27] Current theories of the First Amendment, with their blind commitment to an unfettered marketplace of ideas, are unable to meaningfully address the underlying equity concerns of these youth activists.[28] The vision of the

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see also Tabatha Abu El-Haj, *Friends, Associates, and Associations: Theoretically and Empirically Grounding the Freedom of Association*, 56 ARIZ. L. REV. 53, 61 (2014) [hereinafter Abu El-Haj, *Friends, Associates, and Associations*] ("First Amendment scholars, influenced by classic theoretical work on the relationship of state and society, have tended to focus on the formation of public opinion through discourse rather than the manifestation of public opinion in action.").

26. CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT, *supra* note 24, at 134–35 (grounding the First Amendment in the importance of public discourse); *id.* at 184–88 (emphasizing First Amendment law as the protector of debate about public affairs, while deemphasizing voting or other mechanisms for instantiating public opinion). Alexander Meiklejohn, by contrast, offered an institutional account of democracy with a focus on democratic participation defined narrowly in terms of voting. MEIKLEJOHN, *supra* note 6, at 22–23.

27. *Cf.* Christina E. Wells, *Free Speech Hypocrisy: Campus Free Speech Conflicts and the Sub-Legal First Amendment*, 89 U. COLO. L. REV. 533, 538–46 (2018) (describing student frustration with university administrators' responses to incidents of hateful speech on campus). Indeed, under pressure from its younger lawyers, even the ACLU—the most prominent advocate of near absolute and viewpoint neutral free speech rights—has begun to struggle with the cost to equality of a traditional view of First Amendment liberty. For a succinct summary of the recent internal struggles of the ACLU, see Michael Powell, *Once a Bastion of Free Speech, the A.C.L.U. Faces an Identity Crisis*, N.Y. TIMES (June 6, 2021), https://www.nytimes.com/2021/06/06/us/aclu-free-speech.html [https://perma.cc/S66U-RBQ6].

28. *Cf., e.g.*, Matthew Berkman, *Episode 2.5: Hate Speech: The Case Against Censorship*, THE ANDREA MITCHELL CTR. PODCAST (Oct. 5, 2020), https://mitchellcenter.libsyn.com/website/episode-25-hate-speech-the-case-against-censorship-nadine-strossen [https://perma.cc/5KY9-WQFL] (downloaded from hosting site) (featuring Nadine Strossen, former president of the

First Amendment developed here promises more traction by emphasizing the First Amendment's role in supporting *positive liberty* and the constitutional commitment to leave contested questions of policy—including the need for, and appropriate means of, addressing the long history of social and economic injustice—to democratically accountable bodies.

An approach to the First Amendment that values positive liberty as much as negative liberty offers a principled basis for deferring to a broader swath of legislative judgments, including those that favor egalitarian norms. A statute that forbids employers from asking applicants about their prior wage history would be presumptively constitutional, as would a public accommodation law that requires commercial bakers to serve all customers regardless of sexual orientation, even when creating a custom wedding cake. Similarly, while it would not allow regulation of hate speech, it would offer clearer protections from true threats—and a clearer justification for that distinction.

This Article begins with a critique of existing First Amendment jurisprudence, laying out how the Court's preoccupation with speech has culminated in a construction of the First Amendment that under-protects political conduct in the domain of politics and over-protects speech in the domain of governance. The Article then develops a new theory of the First Amendment and its relationship to self-governance—one that better protects democracy while remaining consistent with its classic liberal roots.

I. THE FIRST AMENDMENT AS UNDERWRITER

The First Amendment underwrites the constitutional promise of a republican form of government. It secures the openness of those political practices and institutions that enable people to demand democratic accountability and responsiveness. It polices the establishment of orthodoxies in the marketplace of ideas, and it forecloses political entrenchment. But its negative liberties are a means to *positive* liberty—the positive liberty of self-governance. They are not ends in themselves.

ACLU, who argues that equity can only be achieved through uncensored and minimally regulated speech).

The Constitution was established to ensure that "the people" were sovereign and could govern themselves.[29] Indeed, the Constitution "guarantee[s] to every State in this Union a Republican Form of Government."[30] The Framers, of course, were not democrats. They had a very narrow conception of who counted as "the people"—excluding, for the most part, anyone who was not white, male, and a property holder. They also aspired to form a government in which legislators would govern according to their best judgment, rather than at the behest of their constituents. Still, the original commitment to republicanism (over democracy) should not be confused with a distaste for either elections or popular political participation: "[T]he free choice by the people of representatives in Congress . . . was one of the great purposes of our Constitutional scheme of government."[31]

Political participation and an active citizenry were central to the Founders' conception of republicanism.[32] Periodic elections were specified to ensure that Congress would remain dependent on and responsive to the people.[33] They were established to mitigate the threat of unaccountable politicians by providing a means to check elected representatives who acted out of self-interest or at the behest of special interests.[34] As James Madison

29. *Cf.* McCutcheon v. FEC, 572 U.S. 185, 238 (2014) (Breyer, J., dissenting) (reviewing historical sources from the Founding to demonstrate that "the constitutional effort [was] to create a democracy responsive to the people—a government where laws reflect the very thoughts, views, ideas, and sentiments, the expression of which the First Amendment protects"). *See generally* GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION (1991) (analyzing how the American Revolution re-oriented American society towards social and political equality).

30. U.S. CONST. art. IV, § 4.

31. United States v. Classic, 313 U.S. 299, 316 (1941).

32. For accounts of the founding generation's conception of political participation, see LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2005) (viewing the concept of popular sovereignty through a historical lens) and Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. REV. 1, 10, 15–16 (2011) [hereinafter Abu El-Haj, *Changing the People*] (describing range of post-revolutionary political practices).

33. *Cf.* THE FEDERALIST NO. 52, at 268 (James Madison) (Ian Shapiro ed., 2009) (assuring that Congress would "have an immediate dependence on, *and an intimate sympathy with, the people*" and "a common interest with the people") (emphasis added).

34. THE FEDERALIST NO. 53, at 272 (James Madison) (Ian Shapiro ed., 2009) ("Where annual elections end, tyranny begins."); *see also* ROBERT C. POST, CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION 13–14 (2014) (recounting the Federalists' position that frequent elections would serve

would assert in 1800: "Let it be recollected . . . that the right of electing the members of the Government constitutes more particularly the essence of a free and responsible government."[35]

The men who founded this country, as politicians themselves, understood the importance of collective political conduct more generally. They knew first-hand that checking abuses of government power and effectively influencing the political process requires political acts: meeting, voting, petitioning, assembling.[36] They understood—and this is a key point—that an "unfettered interchange of ideas" is not enough to ensure that legislative bodies act in the public interest, let alone to "bring[] about . . . political and social change[] desired by the people."[37] The Federalist Papers may be the quintessential example of public debate in the process of self-governance, but the upshot of that debate was a concession to protect critical forms of political conduct and the free press (an institution) in order to secure the votes of the Anti-Federalists for the Constitution.[38]

The text of the First Amendment thus enumerates protection for speech but also for peaceable assembly, petitioning, and a free press.[39] Each of its provisions preserves the possibility for political accountability, responsiveness, and change.[40] The free-

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to keep elected officials responsive). For an account of the Founders' fear of corrupt and distant elected officials, see THE FEDERALIST NO. 51 (James Madison) (Ian Shapiro ed., 2009). *See also* Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 669 (2011) (outlining how the Founders helped to reinforce constitutional rights through the Constitution's electoral structure).

35. JAMES MADISON, THE VIRGINIA REPORT OF 1799–1800, at 227 (J.W. Randolph ed., 1850).

36. Abu El-Haj, *Changing the People*, *supra* note 32.

37. Connick v. Myers, 461 U.S. 138, 145 (1983) (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

38. *See* SAUL CORNELL, THE OTHER FOUNDERS 32–34 (1999) (highlighting the Anti-Federalists' role in shaping the discourse surrounding individual rights).

39. U.S. CONST. amend. I. As noted above, this Article does not engage with the religion clauses. For a compelling defense of why it is appropriate to consider the political and religion clauses separately, see BHAGWAT, *supra* note 10, at 7–9 (arguing that the religion clauses are conceptually and grammatically distinct from other First Amendment clauses).

40. *Cf.* Stephen Breyer, Active Liberty: Interpreting Our Democratic Constitution, Tanner Lectures on Human Values at Harvard University 20 (Nov. 17–19, 2004), https://tannerlectures.utah.edu/_resources/documents/a-to-z/b/

dom of speech allows for an open debate on matters of public concern, including in the lead up to elections and legislative votes. It also protects a level of individual expression and autonomy because a certain degree of individual autonomy—freedom of conscience and self-formation—is itself a pre-requisite for that open debate.[41] The right of peaceable assembly affords Americans the liberty to collectively air their grievances—demand recognition, check government abuses, and influence legislative agendas.[42] The right of petition provides a direct path to responsiveness (traditionally legislative), and the freedom of the press provides for constant vigilance against government abuses of power.[43]

By protecting not only speech, but also political practices and institutions, the First Amendment's provisions work together to ensure the capacity of the people to achieve self-governance. The Amendment essentially reflects the structural point that self-governance requires a functioning democratic process, one in which political change is possible.[44] It thus forecloses political entrenchment.[45] As the Court has said on numerous occasions, "[t]he very purpose of the First Amendment is to

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Breyer_2006.pdf [https://perma.cc/96RL-DDTW] (describing the Framers' commitment to create a Constitution capable of "furthering active liberty . . . a form of government in which all citizens share the government's authority, [and] participat[e] in the creation of public policy.").

41. *See infra* notes 215–25 and accompanying text.

42. *See generally* Abu El-Haj, *Neglected Right of Assembly*, *supra* note 10 (outlining the scope of the right to assemble).

43. *Cf.* West, *supra* note 10 (exploring the unique functions of the First Amendment's Press Clause).

44. To be sure, the Constitution does not define the "Republican Form of Government" the First Amendment guarantees. Nevertheless, no one seriously disputes that a polity incapable of responsiveness or change is not republican by any measure. *Cf.* Reynolds v. Sims, 377 U.S. 533, 560 (1964); *see also* Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103, 114 (2000) ("There are many systems of representation that would satisfy the Republicanism requirement. But at a minimum, the Clause must mean that a majority of the whole body of the people ultimately governs."). Indeed, as Paul Starr has aptly observed, democracies entrench constitutional rules and norms in order to create stress resistant institutions that prevent existing powerholders from manipulating institutional rules "to insulate themselves from challenge." STARR, *supra* note 12, at 105.

45. *Cf.* THE FEDERALIST NO. 53*, supra* note 34 (arguing that incumbents should not be able to shield themselves from public criticism by criminalizing sedition because "a culpable administration will easily evade the responsibility" when voters lack "the knowledge of the comparative merits and demerits of the

foreclose public authority from assuming a guardianship of the public mind."[46] This anti-entrenchment norm is key to a proper construction of the First Amendment.

Indeed, when read as a whole, it is clear that the Amendment's primary purpose is to underwrite the foundational commitment to a republican form of government. It is the embodiment of Justice Stone's instinctive reservation, in *Carolene Products* Footnote 4, about "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation."[47] Justice Stone did not anchor the New Deal Court's theory of judicial review in the First Amendment—or any text. But the cases he cites are telling.[48] All but two involved First Amendment challenges to "restrictions on

candidates for public trust" to meaningfully use elections to hold officials accountable).

46. Thomas v. Collins, 323 U.S. 516, 545 (1945) (Jackson, J., concurring); *see also, e.g.*, W. Va. State Board of Educ. v. Barnette, 319 U.S. 624, 641 (1943) ("Authority here is to be controlled by public opinion, not public opinion by authority."); United States v. United Foods, Inc., 533 U.S. 405, 410 (2001) ("Just as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views.").

47. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). My thesis is importantly different from that of Nicholas O. Stephanopoulos. His primary focus is on the Roberts Court and how it has rejected all three prongs of *Carolene Products*' theory of judicial review. *See* Nicholas O. Stephanopoulos, *The Anti-*Carolene *Court*, 2019 SUP. CT. REV. 111, 114–17. My argument, by contrast, is that one particular strand of *Carolene Products* Footnote 4's defense of judicial review is actually a coherent theory of the First Amendment.

48. This Article offers a theory of the First Amendment. It is not a defense of judicial review *per se*. Nevertheless, it does address certain criticisms of John Hart Ely's work. Most importantly, it offers an implicit response to those who have complained that John Hart Ely's democracy reinforcing view of judicial review, like Justice Stone's, lacks textual support. While I share Professors Doerfler and Moyn's worry that liberals, under the influence of John Hart Ely, idealize the judiciary and overvalue judicial review, "political solutions to democratic ills" are "only available through the democratic process" if that democratic process is responsive to political action. Ryan D. Doerfler & Samuel Moyn, *The Ghost of John Hart Ely*, 75 VAND. L. REV. 769, 776–77 (2022). The point here is that one can construe the First Amendment to support the search for political solutions to our democratic ills by limiting its enforcement to situations where the openness of the political process is threatened.

the political process[]."[49] The two exceptions involved challenges to blatant racial "restrictions upon the right to vote."[50]

But while the First Amendment serves as underwriter of the constitutional commitment to self-governance, it is also distinctive: Its negative liberties are not ends in themselves. They are, instead, a means to the *positive* liberty of self-governance.

The First Amendment's principal function is to secure the conditions that make it possible for the fullest range of policy choices to make it *to* the legislative table, rather than to take certain choices *off* the legislative agenda. The marketplace of ideas, like the political process, must be free if democratic outputs are to reflect popular will and elected officials are to be ousted when their constituents are unhappy. But constitutional restrictions on burdens in this "domain of politics" are established in order to *maintain* the integrity of the policy space our constitutions grant to legislatures—not to undercut that policy space.

In other words, unlike other constitutional rights, First Amendment rights do not primarily take legislative options off the table. Instead, they restrict certain choices in an effort to guarantee the opportunity for any policy option to be considered, even those that are illegal, unconstitutional, or reprehensible.

The First Amendment must have limits to serve this function. A properly and classically liberal theory of the First Amendment demands a doctrine that does not encroach on the legislative prerogative to govern. The First Amendment must restrain legislative choices that restrict the political process, broadly conceived to include public discourse and a certain level of individual autonomy, but also elections, political parties, and public protest. But it must not undermine the Constitution's republican guarantee.

Hard political decisions about the economy, society, and public health, safety, and welfare must be left to the rough-and-tumble of political compromises. As Justice Stone recognized in

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49. 304 U.S. at 152 n.4.

50. *See* Nixon v. Herndon, 273 U.S. 536, 541 (1927) (striking down a Texas statute that precluded African American voters from participating in party primaries as a violation of the Equal Protection Clause of the Fourteenth Amendment); Nixon v. Condon, 286 U.S. 73, 104–05 (1932) (finding the Equal Protection Clause had been violated where Texas responded to *Nixon v. Herndon* by passing a statute delegating to political parties authority to make the rules controlling access to the state-run party primary, and the Democratic Party chose once again to exclude African Americans).

Carolene Products Footnote 4, the default rule in our constitutional system is that the hard-fought compromises of the democratic process should prevail.[51] The First Amendment's negative liberties underwrite this basic constitutional commitment to leave provisional decisions on contested values to our democratic institutions.

Important doctrinal consequences follow from the above, and they will be explored in Parts IV and V. First, however, it is important to lay out how the Court has gone astray, and how its preoccupation with speech has culminated in a construction of the First Amendment that operates to the detriment of democracy.

II. THE COURT'S THEORETICAL MISSTEPS

The Court has long recognized that the First Amendment seeks to ensure self-governance.[52] But it has resisted committing to the interest as an organizing principle for the doctrine. This is because early accounts of the self-governance theory advocated for a doctrinal order that left large swaths of speech and expression outside First Amendment protection.

As originally conceived, declaring the primacy of self-governance limited First Amendment coverage to speech or association of clear political import.[53] Alexander Meiklejohn, for example, argued that the First Amendment guaranteed protection "only to speech, which bears, directly or indirectly, upon issues with which voters have to deal—only, therefore, to the consideration of matters of public interest."[54] The obvious problem with this formulation is that it leads to too little protection, because much speech that is important to political, social, and cultural change is not directly pertinent to voting. Indeed, even Meiklejohn came to worry his early formulation resulted in too narrow a scope for First Amendment rights.[55]

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51. 304 U.S. at 152–53 n.4.

52. *See supra* note 4 and accompanying text.

53. Bork, *supra* note 7, at 20 (arguing that First Amendment "protection should be accorded only to speech that is explicitly political," defined as speech "concerned with governmental behavior, policy or personnel").

54. MEIKLEJOHN, *supra* note 6, at 94.

55. Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 245–46 n.4.

The result is that while few deny that enabling self-governance is *a* core purpose of the First Amendment,[56] the notion that the First Amendment's primary aim is self-governance has become extremely controversial. Instead, especially since the 1960s, First Amendment scholars have embraced the proposition that the First Amendment protects a plurality of co-equal interests, such as ensuring a competitive marketplace of ideas and protecting individual autonomy.[57] And the Court has followed suit.[58]

This itself is a problem, but to make matters worse, the Court latched on to a thin, discursive conception of self-governance in which voice and ideas are considered the drivers of political change. Early precedent recognized that the First Amendment protects the "fundamental principle of our constitutional system" that government ought to "be responsive to the will of the people."[59] But it assumed that all that was necessary to ensure political responsiveness was "[t]he maintenance of the opportunity for free political discussion."[60]

Self-governance is thus misunderstood as a product of the free exchange of ideas.[61] *Connick v. Myers* is characteristic of this conviction. The Court explained that "[t]he First Amendment was fashioned to assure *unfettered interchange of ideas* for the bringing about of political and social changes desired by the people."[62] It further asserted that "*[s]peech concerning* public affairs

56. *E.g.*, Mills v. Alabama, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.").

57. *See, e.g.*, William P. Marshall, *The Truth Justification for Freedom of Speech*, *in* THE OXFORD HANDBOOK OF FREEDOM OF SPEECH 45, 55–56 (Adrienne Stone & Frederick Schauer eds., 2021); C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 131 (1992).

58. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (introducing the notion that freedom of speech is necessary to protect a "marketplace of ideas").

59. Stromberg v. California, 283 U.S. 359, 369 (1931).

60. *Id.*

61. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 339 (2010) ("The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.").

62. Connick v. Myers, 461 U.S. 138, 145 (1983) (emphasis added) (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

. . . is the essence of self-government."[63] Chief Justice Roberts recently endorsed this same proposition in *McCutcheon v. FEC*, noting that the First Amendment is "designed and intended to remove governmental restraints from the arena of *public discussion*."[64]

With a conception of self-governance that emphasizes political discussion over political participation, the New Deal and Warren Courts collapsed the repertoire of rights protected by the First Amendment's text into a single freedom of expression doctrine—assuming it would be costless.[65] It is not. The thin, discursive conception of self-governance obscures the critical role of political participation *as conduct* to democratic politics. Accordingly, disruptive assemblies get less protection than disruptive speech, and the Court is blind to the First Amendment interests in its most important election law cases.

A. PUBLIC ASSEMBLY

The Court's ambivalence toward First Amendment protection for assembly *as conduct* emerged during the civil rights era. While the Warren Court repeatedly struck down Southern efforts to repress peaceful civil rights marches,[66] it never squarely held that the right to peaceably assemble protects disorderly

63. *Id.* (emphasis added) (quoting Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964)).

64. McCutcheon v. FEC, 572 U.S. 185, 203 (2014) (emphasis added) (involving a challenge to the constitutionality of cumulative limits on campaign contributions).

65. For an early articulation of this critique, see Abu El-Haj, *Friends, Associates, and Associations*, *supra* note 25, at 61 (arguing that "this focus on the importance of a free exchange of ideas has crowded out other equally important dynamics of self-governance").

66. *See, e.g.*, Edwards v. South Carolina, 372 U.S. 229 (1963); Cox v. Louisiana, 379 U.S. 536 (1965); *cf.* Gregory v. City of Chicago, 394 U.S. 111, 122 (1969) (striking down a Northern effort to repress a protest against school segregation); Hess v. Indiana, 414 U.S. 105 (1973) (per curiam) (involving a reversal by the Burger Court of an antiwar demonstrator's conviction for disorderly conduct). *But see* Walker v. City of Birmingham, 388 U.S. 307, 318, 321 (1967) (upholding contempt convictions of civil rights protesters, who violated an injunction enjoining them from protesting without a permit, on grounds that the protesters had failed to challenge the injunction through proper judicial procedures); Adderley v. Florida, 385 U.S. 39, 48 (1966) (upholding protesters' convictions for trespass on a nonpublic jail driveway). Many of the decisions rested on concerns about vagueness and overbreadth.

gatherings absent evidence of an imminent risk of violence to persons or property—the governing rule for speech.[67]

Edwards v. South Carolina is illustrative of the Court's reticence to protect disruptive protesters. There, 187 African American students challenged their convictions for refusing to obey a dispersal order during a civil rights protest on the grounds of the State House. Stressing that "[t]here [had been] no violence or threat of violence on their part," the Court vacated the breach of the peace convictions.[68] In justifying its decision, however, it relied on the Speech Clause, explaining that the "*freedom of speech* . . . protects against censorship or punishment, *unless* shown likely to produce *a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest*."[69]

The *Edwards* Court equivocated on whether the same principle applies to the freedom of assembly. In a telling passage, the Court indicated that it likely would have upheld the criminal convictions had there been "evidence that [petitioners] had violated a law regulating traffic, or had disobeyed a law reasonably limiting the periods during which the State House grounds were open to the public."[70] It thus implied that it would have upheld the convictions if marchers had acted illegally, even if they had remained nonviolent and posed no "clear and present danger of a serious substantive evil" beyond "public inconvenience, annoyance, or unrest."[71]

The Court went further in *Cox v. Louisiana*. The case arose out of protests against segregated lunch counters. The morning protests were meticulously peaceful. Attention was even paid to ensure that traffic was not obstructed.[72] At lunchtime, however, Reverend Mr. B. EltonCox, a local civil rights leader, encouraged the participants to demand lunch in violation of the state's segregation laws. The police used this call to lawlessness to justify their dispersal order.[73]

While the Court vacated Cox's convictions. it once again refused to endorse a broad construction of the right of assembly.[74]

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67. Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).
68. Edwards v. South Carolina, 372 U.S. 229, 236 (1963).
69. *Id.* at 237 (emphasis added).
70. *Id.* at 236.
71. *Id.* at 237.
72. Cox v. Louisiana, 379 U.S. 536, 539–41 (1965).
73. *Id.* at 542–43.
74. *Id.* at 552.

Rather than deciding that the crowd's loud, boisterous, and disruptive conduct fell within the Amendment's shield for peaceable assembly, the Court vacated the breach of the peace conviction on freedom of speech grounds.[75] Parsing the words Cox spoke, it held that Cox had merely *advocated* lawbreaking and thus was protected by the First Amendment's Speech Clause.[76]

In *Cox,* the Court's institution of a conduct discount to the First Amendment is explicit. While reviewing a separate conviction for obstructing passages, the Court "emphatically reject[ed] the notion . . . that the . . . Amendment[] afford[s] the same kind of freedom to those who would *communicate ideas by conduct* such as patrolling, marching, and picketing on streets and highways, as . . . [is] afford[ed] to those who *communicate ideas by pure speech*."[77] Indeed, it proceeded to ridicule the notion that an assembly obstructing passage is constitutionally protected:

> One would not be justified in ignoring the familiar red light because this was thought to be a means of social protest. Nor could one, contrary to traffic regulations, insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech or assembly.[78]

When applied to assemblies that pose no imminent threat of violence to persons or property, the conduct discount contradicts

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75. *Id.* at 551–52; *cf.* Rollins v. Shannon, 292 F. Supp. 580, 591 (E.D. Mo. 1968), *vacated on other grounds*, 401 U.S. 988 (1971) (noting that the "essential fault" of the breach-of-the-peace statutes held unconstitutional in *Edwards* and *Cox* were "their ability to be applied to prohibit peaceful conduct").

76. *Cox*, 379 U.S. at 545, 551 ("[O]ur independent examination of the record . . . shows no *conduct* which the State had a right to prohibit as a breach of the peace.") (emphasis added).

77. *Id.* at 555 (emphasis added); *see also* Walker v. City of Birmingham, 388 U.S. 307, 334–35 (1967) (Douglas, J., dissenting) (noting that public assemblies "may be regulated as to the times and places of the demonstrations" because "they *involve more than speech itself* and implicate street traffic") (emphasis added). *See generally* RONALD J. KROTOSZYNSKI, JR., THE DISAPPEARING FIRST AMENDMENT 203–08 (2019) (emphasizing that the Court's holdings relied on the fact that "the charges in [these cases] were largely, if not completely, based on speech").

78. *Cox*, 379 U.S. at 554 (emphasis added). The Court's analysis in *Hess v. Indiana* is consistent. Hess v. Indiana, 414 U.S. 105 (1973) (per curiam). Hess stipulated that he said "'We'll take the fucking street later,' or 'We'll take the fucking street again.'" *Id.* at 106–07. The Court held that there was no evidence that Hess "appear[ed] to be exhorting the crowd to go back into the street [or even] that he was facing the crowd . . . when he uttered the statement." Thus, his statement could not reasonably be construed as incitement under *Brandenburg*. *Id.* at 107–09.

the plain text of the First Amendment. For one, the text explicitly protects public assemblies (a form of political conduct). For another, consistent with the seminal *Brandenburg* standard—which construed the Speech Clause to protect disruptive and contemptible speech in the absence of an intent to incite violence—the text implicitly draws a line between peaceable (protected) and violent (unprotected) assemblies.[79]

Nevertheless, the Court has consistently refused to embrace *Brandenburg* as the constitutional limit for the right of assembly. Instead, in the mid-twentieth century, it balked at every invitation to hold that an imminent risk of violence is a prerequisite for authorities to disperse and arrest those gathered in public.[80] This reluctance to embrace *Brandenburg* as the constitutional limit for the right of assembly was driven by the Court's misconception that the First Amendment privileges "pure speech."[81]

Ignoring the unique attributes of public assembly as a political act, the Court construed the First Amendment to protect disorderly expression, but not disorderly conduct at political gatherings—a settlement that arises from its discursive conception of self-governance. Justice Douglas' assessment in *Gibson v. Florida Legislative Investigation Committee* is telling: "Assembly, like speech, is . . . essential 'in order to maintain *the opportunity for free political discussion,* to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means.'"[82] Douglas did not mince his words: Public assembly is a vehicle "*through which views and opinions* are expressed, *opinion is mobilized*, and social, economic, religious, educational, and political *programs are formulated*."[83]

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79. Brandenburg v. Ohio, 395 U.S. 444, 447–49 (1969) (per curiam) (establishing further that incitement requires a tangible likelihood of imminent violence).

80. It similarly avoided resolving the question of whether "the mere refusal to obey a policeman's order" can constitute the basis for a disorderly conduct conviction. *See* Gregory v. City of Chicago, 394 U.S. 111, 122 (1969) (Black, J., concurring) (observing that "[i]t is not necessary for the Court to resolve [the] issue[] in the present case").

81. *Cox*, 379 U.S. at 555.

82. 372 U.S. 539, 562 (1963) (Douglas, J., concurring) (emphasis added) (quoting De Jonge v. Oregon, 299 U.S. 353, 365 (1937)).

83. *Id.* at 563 (emphasis added).

Public assemblies, however, mobilize people, not opinions. Indeed, public assemblies are decidedly imperfect venues for political deliberation, let alone the formulation of policy.[84] Their efficacy lies elsewhere. A large crowd, whether it comes to listen to a speaker or to stand in silence, claims for itself a tangible public political presence. Bringing a city to a standstill—as we saw throughout 2020—makes elected officials take notice.[85] As Jeremy Waldron has observed, "something about a demonstration—*any* demonstration—seems to convey at least to its targets and opponents that things *might* get out of hand if its demands are not listened to. Patience is evaporating, it seems to say."[86] It is this unique power of the crowd that secures a seat at the legislative table for those typically not invited.[87]

In the absence of an account of the unique value of public assembly to our system of self-governance, the constitutional rights of disorderly participants in public assemblies have been left to the mercy of law enforcement, as we shall see in Part III.

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84. The Occupy movement's signature General Assemblies, which debated both political demands and administrative concerns associated with the tent cities, is the exception that proves the rule. *See* Tabatha Abu El-Haj, *Defining Peaceably: Policing the Line Between Constitutionally Protected Protest and Unlawful Assembly*, 80 MO. L. REV. 961, 981 (2015).

85. *See generally id.* at 980–85 (arguing for increased tolerance of disruptive outdoor assemblies, which compel attention to political issues).

86. Jeremy Waldron, *What Demonstrations Mean*, 11, 19 (N.Y.U. Pub. L. Rsch. Paper, Working Paper No. 20-41, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3664849 (arguing, further, that what is on display is "politics of presence"—a demonstration that we exist "standing there, walking there," and making demands).

87. Protests, especially when large and persistent, propel issues onto the legislative agenda. 2020 is illustrative. The protests against George Floyd's murder at the hands of police shifted attention from the immediate public health crisis of the pandemic to long-standing and pervasive racism in policing and throughout society. Public assembly also provides a face-to-face experience of citizenship that often generates in individuals a sense of political agency and compensates for the limits of elections as civic and political experiences. The successes of the Floyd protests in 2020, moreover, built off the political engagement and organizational infrastructure Black Lives Matter demonstrations against Michael Brown and Eric Garner's deaths in 2014 had generated. *See generally* Tabatha Abu El-Haj, *Breathing Room for the Right of Assembly*, 28 WM. & MARY J. RACE GENDER & SOC. JUST. 29 (2021) (exploring the legal and political ramifications of the protests following the murder of George Floyd).

B. ELECTIONS AND A MEANINGFUL RIGHT TO VOTE

The second casualty for democracy has been the Court's approach to securing the integrity of the electoral process. The focus on an unfettered marketplace of ideas as the guarantor of democratic accountability and responsiveness rendered the Warren Court blind to the First Amendment interests in its most important election law cases. That Court's entire conception of its institutional role turned on addressing political entrenchment.[88] Yet, it repeatedly rejected the notion that the First Amendment was implicated in election cases. As with the right of assembly, its missteps derived from its narrow construction of the First Amendment as exclusively a guardian of unencumbered discourse.

The seminal cases that secured constitutional protection for the electoral process were comprehended as equal protection claims.[89] The framing came effortlessly. The Court's first entrée into policing the political process involved a panoply of racial exclusions from the franchise. The White Primary cases are illustrative. Each involved the next iterations of the Texas Democratic Party's effort to exclude African American voters.[90] Thus, when the Warren Court finally decided to enter the political thicket to address malapportionment, the Equal Protection Clause was an easy pivot. The famous malapportionment cases arose from state legislatures' refusal to redraw voting districts, despite years of population growth and urbanization. The Court chose to characterize the resulting distortion as a form of "invidious discrimination" under the Equal Protection Clause, thereby sidestepping the question of whether to make the Guarantee Clause judicially enforceable.[91] It probably did not hurt that racial discrimination was never far from the surface of these one-person, one-vote cases.

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88. *See* Pamela S. Karlan, *Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 4 (2012) (explaining Chief Justice Warren viewed *Baker v. Carr* as "'the most important case' of *his* 'tenure on the Court'" because it "set in motion . . . [the] centerpiece of the Warren Court's 'participation-oriented, representation-reinforcing approach to judicial review'").

89. *See* Reynolds v. Sims, 377 U.S. 533, 566 (1964); Baker v. Carr, 369 U.S. 186, 209 (1962).

90. *See, e.g.*, Nixon v. Condon, 286 U.S. 73, 81–82 (1932); Nixon v. Herndon, 273 U.S. 536, 539–40 (1927).

91. *Baker*, 369 U.S. at 243–45 (Douglas, J., concurring); *see also Reynolds*, 377 U.S. at 560 (proclaiming "[o]ur Constitution leaves no room for *classification* of people in a way that unnecessarily abridges" the right to vote) (emphasis added); *see also* McConnell, *supra* note 44, at 114 (arguing that had the Court

Unfortunately, the easy pivot to equal protection meant that the Court lost an opportunity to construe the First Amendment as a vehicle for curbing political entrenchment in the electoral sphere. Indeed, it simply did not see these cases as raising any First Amendment concerns.

Nor did the Warren Court fare better conceptually when it faced claims challenging direct burdens on individuals seeking to vote. When the Court stepped in to protect the right to vote in *Harper v. Virginia Board of Elections*, it explicitly avoided the First Amendment, refusing to "stop to canvass the relation between voting and political expression."[92] Instead, the Court declared the right to vote to be a fundamental right under the Equal Protection Clause.[93] The Court doubled down on this view a few years later, by adding the right to vote to the list of fundamental rights subject to heightened scrutiny under equal protection doctrine.[94]

There is no question that Justice Warren understood the nexus between voting and democracy. He famously proclaimed that "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society."[95] He even characterized "the political franchise of voting . . . as a fundamental political right, because [it is] preservative of all rights."[96]

The problem was the Court's narrow understanding of the First Amendment's function, as "[t]he maintenance of the opportunity for free political discussion to the end that government

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allowed "the litigation [to] proceed[] under the Republican Form of Government Clause," the result would have been more doctrinally and conceptually coherent).

92. 383 U.S. 663, 665 (1966) (rejecting argument that the "right to vote in state elections . . . is implicit[ly grounded] . . . by reason of the First Amendment").

93. *Id.* at 670 (striking down Virginia's cumulative poll tax on equal protection grounds because "the right to vote is too precious, too fundamental to be so burdened or conditioned").

94. Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 628 (1969).

95. *Reynolds*, 377 U.S. at 555.

96. *Harper*, 383 U.S. at 667 (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)); *accord Kramer*, 395 U.S. at 626 (arguing that strict scrutiny of voting eligibility rules "is necessary because statutes distributing the franchise constitute the foundation of our representative society," and "[a]ny unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government").

may be responsive to the will of the people."[97] Voting, as conduct, fit uncomfortably within this conception and the Court's emerging freedom of expression doctrine.

The case for voting as a First Amendment right should have been obvious, especially for a Court that readily eschewed textualism and originalism.[98] It flows directly from the First Amendment's primary guarantee: openness in the processes for influencing public policymaking (the domain of politics). Those processes, as Madison recognized in the Virginia Resolutions, include elections: "The right of electing the members of the government, constitutes . . . the essence of a free and responsible government."[99] The fact that voting is conduct and elections are run by institutions is immaterial.[100]

Even for a Court attached to textualism and originalism, the case for First Amendment protection for voting is not hard. A lack of enumeration has never been a deal breaker when it comes to the First Amendment, even for jurists committed to those interpretive schools. Indeed, textualism, like originalism, has never been the measure of First Amendment rights.

The freedom of association is not explicitly protected by the First Amendment.[101] Yet, conservative Justices are among the

97. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (citing Stromberg v. California, 283 U.S. 359, 369 (1931)).

98. *Cf.* Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (observing that the Court has recognized a number of unenumerated rights, from the right of association to "[t]he right to educate a child in a school of the parents' choice—whether public or private or parochial" and to study a "particular subject or . . . foreign language"); *see also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35, 35 n.78 (1973) (recognizing that like "[e]ducation . . . [which] is not among the rights afforded explicit protection under our Federal Constitution," "the right to vote, *per se*, is not a constitutionally protected right," but noting that some right to vote is "implicit in our constitutional system").

99. JAMES MADISON, *Report on the Alien and Sedition Acts*, *in* WRITINGS 608, 655 (Jack N. Rakove ed., 1999); *see also* Vincent Blasi, *The Classic Arguments for Free Speech 1644–1927*, *in* THE OXFORD HANDBOOK OF FREEDOM OF SPEECH 20, 26 (Adrienne Stone & Frederick Schauer eds., 2021) (noting that the right to vote, like others Madison mentions in the essay, are not enumerated but arise from "the structure of accountability specified by the constitutional text").

100. *See supra* notes 34–49 and accompanying text.

101. *Griswold*, 381 U.S. at 482 (noting that "[t]he association of people is not mentioned in the Constitution nor in the Bill of Rights," yet "the First Amendment has been construed to include [it]"); *see* Roberts v. U.S. Jaycees, 468 U.S. 609, 617–18 (1984) (explaining that the Court's precedent had recognized a right to associate "for the purpose of engaging in those activities protected by the First Amendment"); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460

staunchest advocates for strong associational rights.[102] Similarly, despite conclusive evidence that the Framers opposed political parties as the very factions that the Constitution was intended to thwart, political parties have been granted robust First Amendment rights without hesitation.[103] Indeed, Justice Scalia was one of the strongest advocates of near absolute First Amendment rights for political parties.[104] The fact is there is an overabundance of inconvenient, originalist First Amendment facts, from George Washington's efforts to suppress Democratic-Republicans from associating in political clubs to the Sedition Act's criminalization of speech critical of the government.[105] This

(1958) (finding it "beyond debate" that freedom of association is part of the liberty assured by the Fourteenth Amendment, "which embraces freedom of speech"); Williams v. Rhodes, 393 U.S. 23, 38–40 (1968) (Douglas, J., concurring) (arguing that the First Amendment right of freedom of association guarantees minority political parties full ballot access); *see also* BHAGWAT, *supra* note 10, at 53–55.

102. *See* Steven J. Heyman, *The Third Annual C. Edwin Baker Lecture for Liberty, Equality, and Democracy: The Conservative-Libertarian Turn in First Amendment Jurisprudence*, 117 W. VA. L. REV. 231, 275–78 (2014) (arguing that with *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), a conservative majority has extended its "conservative-libertarian approach . . . to [cases] involving freedom of association," establishing "a strong right *not* to associate with people one dislikes or disapproves of").

103. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2512 n.1 (2019) (Kagan, J., dissenting) ("[A]ny originalist argument[s] would have to deal with an inconvenient fact. The Framers originally viewed political parties themselves (let alone their most partisan actions) with deep suspicion, as fomenters of factionalism and 'symptom[s] of disease in the body politic.'").

104. *See, e.g.*, Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 462–71 (2008) (Scalia, J., dissenting) ("States may not use election regulations to undercut political parties' freedoms of speech or association."); Rutan v. Republican Party, 497 U.S. 62, 92–115 (1990) (Scalia, J., dissenting) (defending the constitutionality of party patronage as against the First Amendment claims of individual government employees on the grounds that it is "a necessary evil if you want a strong organization, because the patronage system permits of discipline, and without discipline, there's no party organization").

105. *See* BHAGWAT, *supra* note 10, at 18–23, 58–60 (summarizing history). For a more detailed account, see Robert M. Chesney, *Democratic-Republican Societies, Subversion, and the Limits of Legitimate Political Dissent in the Early Republic*, 82 N.C. L. REV. 1525 (2004). This may explain why Justice Thomas increasingly argues that the relevant original public meaning for "the scope of free-speech rights incorporated against the States" is that in 1868, when the Fourteen Amendment was adopted. *See* Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2059 (2021) (Thomas, J., dissenting); *see also id.* at 2053 n.14 (Alito, J., concurring) (considering evidence from both the Founding and Reconstruction periods).

makes strict adherence to those methods of constitutional interpretation difficult.

To be sure, the conventional wisdom is that the federal Constitution does not affirmatively grant citizens a right to vote.[106] The fact that "the Constitution of the United States does not confer the right of suffrage upon any one," as *Minor v. Happersett*[107] asserts, does not, however, resolve the question of whether the First Amendment, properly construed, protects the right of suffrage.[108]

This supposed wisdom confuses positive and negative rights. The First Amendment also does not grant the freedom of speech or religious liberty. Those rights come from the customs of the English constitutional tradition as interpreted and expanded upon by American state constitutions and courts.[109] The First Amendment only prevents Congress from impinging on religious freedom or "abridging the freedom of speech."[110]

The right to vote is no different. It is a privilege and immunity of citizenship derived elsewhere. The original federal Constitution recognized its existence and importance, affording those citizens granted suffrage by their states a right to vote in federal elections.[111] Since then, the Constitution has been amended to bar discriminating against voters on the basis of race, sex, age, or ability to pay a poll tax.[112]

Construing the First Amendment—the underwriter of the constitutional promise of a republican form of government—to

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106. SAMUEL ISSACHAROFF, PAMELA S. KARLAN, RICHARD H. PILDES & NATHANIEL PERSILY, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 15 (5th ed. 2016) (noting that "neither the original Constitution nor the Fourteenth Amendment secured even the basic right to vote").

107. 88 U.S. 162, 178 (1874).

108. *See* United States v. Classic, 313 U.S. 299, 315 (1941) ("[T]he right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted at Congressional elections.").

109. *See* Adam Winkler, *Voters' Rights and Parties' Wrongs: Early Political Party Regulation in the State Courts, 1886–1915*, 100 COLUM. L. REV. 873, 881 n.29 (2000) (noting that "[t]hroughout the nineteenth century, and well into the twentieth, the right to vote was lodged in state constitutional guarantees, protected either explicitly by language recognizing the 'right to vote' or implicitly by provisions for 'free and fair elections'").

110. U.S. CONST. amend. I.

111. U.S. CONST. art. I, § 2 (providing that "the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature").

112. U.S. CONST. amends. XV (race), XIX (sex), XXIV (poll tax), XXVI (age).

prohibit burdens on the right to vote is not an illicit, made-up proposition.[113] It follows from a recognition that burdens on the right of suffrage pose a risk to the Constitution's primary guarantee of a republican form of government—at both the federal and state level.[114] As the Court itself has recognized, "the right to vote is inherent in the republican form of government envisaged by Article IV, Section 4 of the Constitution"—notwithstanding the "large gaps in the Constitution" with respect to "voting rights."[115] It is no different than granting protection to the unenumerated right of association.

Indeed, without explicitly rejecting the conventional wisdom, the Court has recognized a First Amendment right to vote.[116] Still, as we will see next, the Court's speech-centered conception of the Amendment drives continued ambivalence about the scope of that right. Moreover, lacking a coherent theory of the First Amendment as underwriter, the Court fails to construe the First Amendment as a vehicle for curbing political entrenchment in the electoral sphere. This is because it struggles with how to incorporate the First Amendment's anti-entrenchment norm beyond the marketplace of ideas.

III. UNDER-PROTECTION OF POLITICAL CONDUCT

The Court's singular preoccupation with speech has culminated in a construction of the Amendment that under-protects political conduct in the domain of politics. For all its lofty rhetoric about the First Amendment's principal democratic function, the Court fails to shield forms of political participation that are vital to political accountability, responsiveness, and change—

113. *Cf.* Christopher S. Elmendorf, *Undue Burdens on Voter Participation: New Pressures for a Structural Theory of the Right to Vote?*, 35 HASTINGS CONST. L.Q. 643, 649 (2008) (suggesting "[c]onservative jurists" view "the generic right to vote as an illicit, a-textual 'right' that exists only because the Warren Court made it up").

114. *See* United States v. Classic, 313 U.S. 299, 315 (1941) (holding that "the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted at Congressional elections").

115. Baker v. Carr, 369 U.S. 186, 242 (1962) (Douglas, J., concurring).

116. *See* Anderson v. Celebrezze, 460 U.S. 780, 786 n.7 (1983) (listing cases in which the Court has recognized that restrictions on the eligibility of voters and candidates implicate First and Fourteenth Amendment rights); Burdick v. Takushi, 504 U.S. 428, 433 (1992) (recognizing the right to vote is fundamental to the constitutional structure, although subject to reasonable regulation).

from political protest to elections. What's more, the Court recently balked when invited to strike down efforts by political parties to entrench their electoral power through redistricting.[117]

The year 2020 perfectly encapsulated the shortcomings of this warped construction of the First Amendment. In the midst of a tumultuous year, the First Amendment offered little constitutional cover for Americans, who were met with tear gas, rubber bullets, extended curfews, and arrest, when they took to the streets in the tens of thousands to demand police accountability and call out ongoing racial inequalities.[118] Meanwhile, when voters turned to the courts seeking enhanced access to the polls as an accommodation during the COVID-19 pandemic, their concerns fell on deaf ears.[119]

A. LIMITED PROTECTION FOR DISRUPTIVE PROTESTERS AND ASSEMBLIES

The Court has long held that the government may not proscribe words in the absence of a credible and imminent risk of violence.[120] But it has never made a similar declaration with respect to public assemblies. This refusal to create parity between

117. Rucho v. Common Cause, 139 S. Ct. 2484, 2507 (2019) (holding "that partisan gerrymandering claims present political questions beyond the reach of the federal courts").

118. Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/MM6W-2DGR].

119. *See, e.g.*, Tex. Democratic Party v. Abbott, 978 F.3d 168 (5th Cir. 2020) (rejecting a challenge to the constitutionality of a state statute requiring voters under age sixty-five to prove a disability in order to vote by mail, as applied during the COVID-19 pandemic); *accord* Tully v. Okeson, 977 F.3d 608, 611 (7th Cir. 2020) (rejecting voters' challenge to Indiana's limited absentee ballot provisions on the grounds that "the fundamental right to vote does not extend to a claimed right to cast an absentee ballot by mail" and that "the right to vote is not at stake" unless the state has made "it harder to cast a ballot at all"). Professor Joshua Douglas published an analysis of the outcomes in the federal appeals courts where voters sought enhanced access to the franchise in the 2020 election. His study found that only seven of thirty-two cases resulted in judgments favoring voters seeking easier access to the polls. Joshua Douglas, *Table of 2020 Pre-Election Day Cases in Federal Appeals Courts*, https://drive.google.com/file/d/15xC1qbr_IZH7p363hKHrjAZBW2Uuu4hG/view [https://perma.cc/F87H-E6SW].

120. Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (per curiam); *see also* Noto v. United States, 367 U.S. 290, 298 (1961) (holding that members of the Communist Party may only be prosecuted if they are actively intending to violently overthrow the government).

the freedom of speech and that of peaceable assembly leaves individuals seeking to exercise their constitutional right to gather in public vulnerable to official caprice.

The scope of First Amendment protection for disruptive assemblies under current law is a balancing act. On the one hand, existing First Amendment precedent precludes the government from prohibiting speech in parks or public streets (so-called quintessential public fora) unless it can show that the prohibition is narrowly tailored to a compelling state interest.[121] On the other hand, it permits advanced regulation of the time, place, and manner of assemblies.[122]

The balance is reasonable in theory but proves under-protective in practice. Although technically subject to intermediate scrutiny, time, place, and manner, restrictions are routinely permitted by courts.[123] Formally, such restrictions are only constitutional if the justification for the requirement is not content-based, serves a significant governmental interest, and leaves open ample alternative channels for communication.[124] In practice, however, courts routinely defer to local officials' asserted interests, including preventing traffic jams and maintaining the aesthetics of lawns and gardens.[125] Moreover, their speech-centered conception of the First Amendment drives an assumption

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121. *See* Occupy Columbia v. Haley, 866 F. Supp. 2d 545, 558 (D.S.C. 2011).

122. *See* Cox v. New Hampshire, 312 U.S. 569, 571–72 (1941) (upholding constitutionality of a "state statute prohibiting a 'parade or procession' upon a public street without a special license"); Hague v. Comm. for Indus. Org., 307 U.S. 496, 515–16 (1939) ("The privilege . . . to use the streets and parks . . . may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order.").

123. Cases like *Occupy Fresno v. County of Fresno*, in which plaintiffs successfully challenged the impact of an array of ordinances on their ability to assemble and speak, are outliers. *See* 835 F. Supp. 2d 849, 853, 870–71 (E.D. Cal. 2011) (demonstrating the stringent requirements that plaintiffs must meet to succeed on these claims).

124. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)). *See generally* Abu El-Haj, *Neglected Right of Assembly*, *supra* note 10, at 548; TIMOTHY ZICK, SPEECH OUT OF DOORS 54 (2009).

125. *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 296 (1984) ("It is also apparent to us that the regulation narrowly focuses on the Government's substantial interest in maintaining the parks in the heart of our Capital in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence."); *see also* Occupy Minneap-

that the availability of the Internet or television are adequate alternatives to assembling in a particular place.[126] The result is that permit requirements are generally upheld, regardless of their breadth. Indeed, even requirements enacted in response to specific protests have been upheld.[127] Meanwhile, blanket prohibitions to access to public highways for purposes of assembly are simply assumed to be constitutional.[128]

The resulting volume of constitutionally permissible regulation governing access to, and use of, public spaces virtually guarantees that a large gathering will run afoul of some law. Authorities routinely disperse nonviolent crowds, exploiting the fact that the Court has never squarely held that nonviolent disruptive assemblies cannot be dispersed for merely unlawful acts.[129]

What is more, there is very little case law delineating when the First Amendment prohibits law enforcement from arresting individuals exercising their First Amendment rights under

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olis v. County of Hennepin, 866 F. Supp. 2d 1062, 1070 (D. Minn. 2011) ("Notably, the Court agrees with the County that it has a significant interest in 'controlling the aesthetic appearance of' the Plazas."); Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022, 1042 (9th Cir. 2006) (holding that regulating traffic flow was a significant governmental interest).

126. *See e.g.*, Geller v. De Blasio, No. 20cv3566, 2020 U.S. Dist. LEXIS 87405, at *12 (S.D.N.Y. May 18, 2020) ("The plaintiff is free to express her discontent online, through media, and by protesting in public on her own. For now, these are acceptable alternatives to public group protests."); Nylen v. City of Grand Rapids, No. 1:17-CV-716, 2019 U.S. Dist. LEXIS 233707, at *19 (W.D. Mich. Mar. 28, 2019) (noting that "internet-based platforms" provided alternative channels for the plaintiff to air his grievances); *see also* Bl(a)ck Tea Soc'y v. City of Boston, 378 F.3d 8, 14 (1st Cir. 2004) (claiming that television, press, internet, and radio are viable expressive alternatives to physical protest).

127. *See* Watters v. Otter, 955 F. Supp. 2d 1178, 1183, 1187 (D. Idaho 2013) (upholding a ban on camping on state grounds despite evidence that it was passed in response to Occupy Boise's tent city, while emphasizing that the state has a substantial interest in maintaining its grounds in an attractive and intact condition). *But see* Occupy Columbia v. Haley, 922 F. Supp. 2d 524, 532 (D.S.C. 2013) (arguing that the plaintiffs were wrongly arrested for trespass under a time and place rule invented in response to their protest).

128. *Cf.* Ashutosh Bhagwat, *Judge Johnson and the Kaleidoscopic First Amendment*, 71 ALA. L. REV. 755, 759, 767–71 (2020) (noting how unusual Judge Johnson's decision to grant protesters access to the highway for the March on Selma was, even at the time).

129. ZICK, *supra* note 124; *see also* Ronald J. Krotoszynski, Jr., *Our Shrinking First Amendment: On the Growing Problem of Reduced Access to Public Property for Speech Activity and Some Suggestions for a Better Way Forward*, 78 OHIO ST. L.J. 779, 796–803 (2017).

catch-all public order offenses.[130] This too provides cover for law enforcement to arrest individuals, including those exercising their First Amendment rights in an unquestionably nonviolent manner, for an array of disorderly conduct-type charges. In 2020, 17,000 people across fifty cities were arrested for nonviolent misdemeanors during the first two weeks of the George Floyd protests.[131] While the vast majority of these charges (even felony charges for unlawful assembly and riot) were quickly dropped,[132] the First Amendment harm remained: When people are prevented from exercising their constitutional rights, even arrested for doing so, it makes others fearful of exercising those same rights. It creates a First Amendment chill.

In sum, the Court's failure to clearly articulate that nonviolent disruptive assembly is constitutionally protected, when combined with rote acceptance of advance regulation of outdoor assembly and the sheer volume of regulation governing access to and use of public spaces, renders the scope of the right of peaceable assembly today shockingly thin. Indeed, constitutional protections for assembly today are akin to the period in American history when speech could be suppressed on a mere tendency to produce a bad result.[133]

The Court's disinterest in the right of assembly is so thorough that plaintiffs rarely invoke the Assembly Clause when they raise First Amendment challenges. Still, 2020 could have provided an opportunity for boldness in the lower courts. Nearly seventy-three cases were filed by individuals who were tear gassed, pepper sprayed, and bombarded with sound cannons while exercising their First Amendment rights nonviolently.[134]

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130. *See generally supra* Part II.

131. Meryl Kornfield, Austin R. Ramsey, Jacob Wallace, Christopher Casey & Verónica Del Valle, *Swept up by Police*, WASH. POST (Oct. 23, 2020), https://www.washingtonpost.com/graphics/2020/investigations/george-floyd-protesters-arrests [https://perma.cc/Z4JX-J2MZ]; *see also* KROTOSZYNSKI, *supra* note 77, at 194–200.

132. Neil MacFarquhar, *Why Charges Against Protesters Are Being Dismissed by the Thousands*, N.Y. TIMES (Nov. 19, 2020), https://www.nytimes.com/2020/11/19/us/protests-lawsuits-arrests.html [https://perma.cc/EL7N-8DMU]; Kornfield et al., *supra* note 131.

133. *Cf.* Whitney v. California, 274 U.S. 357, 371–72 (1927); *see also* David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514, 534 (1981).

134. *See* Alsaada v. City of Columbus, 536 F. Supp. 3d 216, 251 (S.D. Ohio 2021) (noting seventy-three cases arising out of the Floyd protests have raised First or Fourth Amendment challenges).

But federal district courts balked—refusing to clarify whether the First Amendment bars police from dispersing crowds absent an imminent and credible threat of violence to persons or property.[135] Two courts came close, but neither went all the way.

The U.S. District Court for the District of Columbia recognized that if the plaintiffs could prove that they "were engaged in a peaceful protest" on Lafayette Square in Washington D.C. at the time of their dispersal with tear gas, pepper spray, rubber bullets, and flash bangs, they would have "alleged an unconstitutional restriction *on protected speech*."[136] It reasoned that police would have offended the First Amendment by constructively closing Lafayette Square—a quintessential public forum—to all expressive activities "by violently clearing all of the peaceful protestors."[137] Moreover, the District Court found that this was a clear constitutional rule: "[A]ny reasonable officer would have been aware that *it is a violation of foundational First Amendment rights to forcibly end a peaceful protest in a traditional public forum without any legitimate justification for doing so*."[138] While this ruling is significant,[139] it is important to note that the court characterized the potential violation as "an unconstitutional restriction on protected speech," *not assembly*.[140] Two federal district courts, channeling Justice Douglas, went further, stating: "Organized political protests *is a form of* '*classically political speech.*'"[141]

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135. *See, e.g.*, Don't Shoot Portland v. City of Portland, 465 F. Supp. 3d 1150 (D. Or. 2020) (leaving the First Amendment challenge unresolved). A measure of how weak existing precedent is on this point is that plaintiffs in cases arising out of the Floyd protests raised a different First Amendment claim: unconstitutional retaliation. They argued police dispersed protesters using excessive force in retaliation for their views. One district court went so far as to characterize the right "guaranteed by the Constitution" as a right to "the freedom of assembly *without fear of retaliation or disruption* by . . . police," who "disagree with the content of the *speech*." Black Lives Matter Seattle-King Cnty. v. City of Seattle, 466 F. Supp. 3d 1206, 1211 (W.D. Wash. 2020) (emphasis added).

136. Black Lives Matter D.C. v. Trump, 544 F. Supp. 3d 15, 44 (D.D.C. 2021) (emphasis added).

137. *Id.* at 44.

138. *Id.* at 45 (emphasis added).

139. The district court has yet to resolve the question of whether the government indeed lacked a legitimate reason to clear the square. Defendants in the case argued that "the clearing of [Lafayette] Square was justified by a significant government interest—the national interest in presidential security." *Id.* at 45.

140. *Id.* at 44–48.

141. Alsaada v. City of Columbus, 536 F. Supp. 3d 216, 268 (S.D. Ohio 2021)

Meanwhile, a federal District Court in Ohio defined "nonviolent protestors" to include "individuals who are chanting, verbally confronting police, sitting, holding their hands up when approaching police, *occupying streets or sidewalks*, *and/or passively resisting police orders*."[142] The order is significant insofar as it implies that violent protesters are exclusively those who pose an actual and imminent threat of physical harm or property destruction. Still, despite tepid support for the department's decision to disperse protesters—who were, "[a]t most, engaging in minor property crime and offered only passive resistance" to police—the court stopped short of questioning the constitutionality of a dispersal order based on traffic concerns and minor property damage.[143] Instead, it grounded this aspect of the order in the Fourth Amendment.[144]

The irony of this settlement—strong constitutional protection for the freedom of speech but weak protection for the right of assembly—cannot be overstated. The text of the First Amendment explicitly protects "the right of the people *peaceably* to assemble."[145] The clear implication is that the right does not cover gatherings of the people that are the opposite of peaceful, namely violent.[146] There is no similar explicit outer limit for free speech. Moreover, there is no question that "the right of peaceable assembly was considered by the Framers of our Constitution to lie at the foundation of a government based upon the consent of an

(emphasis added) (quoting Don't Shoot Portland v. City of Portland, 465 F. Supp. 3d 1150, 1155 (D. Or. 2020)). So dominant is the speech-frame that some courts have analyzed cases involving assemblies using the *expressive conduct* doctrine. *See, e.g.*, Occupy Boston v. City of Boston, No. 11-4152-G, slip op. at 11–13 (Mass. Super. Ct. Dec. 7, 2011) (emphasis added) (observing that First Amendment protection depended on whether the "occupation and habitation of Dewey Square is *expressive conduct* and a symbol" of economic inequality).

142. *Alsaada*, 536 F. Supp. 3d at 225.

143. *Id.* at 266 (quoting Black Lives Matter Seattle-King Cnty. v. City of Seattle, 466 F. Supp. 3d 1206, 1215 (W.D. Wash. 2020)).

144. *Id.* at 265–68, 275–76 (arguing that "these traffic concerns cannot legitimize the application of force when it is not otherwise justified").

145. U.S. CONST. amend. I (emphasis added).

146. This follows from basic principles of linguistic communication made explicit by philosopher of language, Paul Grice. Neo-Gricean linguistic theory recognizes unexpressed contrasts among the implicatures frequently necessary to distill meaning from language. For a summary of Paul Grice, see John Mikhail, *The Constitution and the Philosophy of Language: Entailment, Implicature, and Implied Powers*, 101 VA. L. REV. 1063, 1071–76 (2015) (noting that Grice's unique insight was that people "often communicate by means of implication rather than overt statement").

informed citizenry."[147] By contrast, the Framers were decidedly ambivalent about the scope of the freedom of speech.[148] Indeed, historical accounts of the period show significant constitutional accommodation for unruly and disruptive crowds,[149] but only limited protection for speech critical of the government[150] and no protection for blasphemy, obscenity, or speech that actively encouraged political subversion.[151]

B. UNDER-PROTECTING VOTING AND THE INTEGRITY OF THE ELECTORAL PROCESS

Voters fare only slightly better than protesters. Despite rhetoric extoling the importance of free and fair elections, the Court's election law jurisprudence is riddled with inconsistency, stemming from its failure to recognize that the "core of our electoral process" is not "[c]ompetition in ideas."[152] Political practices

147. Bates v. City of Little Rock, 361 U.S. 516, 522–23 (1960).

148. *See* Roth v. United States, 354 U.S. 476, 482–84 (1957) (reviewing early rejection of constitutional protection for obscenity or libel).

149. *E.g.*, JOHN PHILLIP REID, IN A DEFIANT STANCE 129–31 (1977) (describing examples in which the colonial governments failed to prosecute rebellious protesters over constitutional concerns); *see also* Abu El-Haj, *Neglected Right of Assembly*, *supra* note 10, at 561–64 (describing high tolerance for unruly assemblies in the late eighteenth and early nineteenth centuries).

150. For the seminal work on this point, see LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 103–08 (1999); *see also* BHAGWAT, *supra* note 10, at 14–24 (reviewing the muddy historical evidence of speech protections from the Founding).

151. *See, e.g.*, Note, *Blasphemy and the Original Meaning of the First Amendment*, 135 HARV. L. REV. 689, 689, 698 (2021) (noting that "[u]ntil well into the twentieth century, American Law recognized blasphemy as proscribable speech" and more specifically that "[a]s originally understood, freedom of speech and of the press afforded no protection to blasphemy"); Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2179–82 (2015) (demonstrating that throughout the eighteenth and nineteenth centuries, the First Amendment was assumed to have provided "almost-absolute protection against the prior restraint of speech or writing but only limited protection against after-the-fact punishment for what [one] uttered or wrote," thus routinely allowing punishment for obscene, profane, and libelous speech); Rabban, *supra* note 133, at 524 ("Courts also punished . . . obscenity, and 'indecent' publications, pointing out that the First Amendment did not abolish preexisting liability at common law.").

152. Williams v. Rhodes, 393 U.S. 23, 32 (1968) (claiming that "competition in ideas" *is* at the "core of our electoral process"); *see also* Citizens United v. FEC, 558 U.S. 310, 339 (2010) (Kennedy, J.) ("Speech is an essential mechanism of democracy, for *it is the means* to hold officials accountable to the people.") (emphasis added).

that the Court can readily view as speech are afforded strong First Amendment protection. Those it cannot—including the right to a meaningful vote—are not.

The Court has no trouble viewing campaign spending as "speech-y."[153] Thus, spending money (political conduct) has secured near absolute protection under the Speech Clause.[154] The following passage from *McCutcheon v. FEC*, a decision that struck down cumulative limits on campaign contributions, is illustrative of the Court's speech-centered approach to political rights under the First Amendment:

> [T]he First Amendment safeguards an individual's right to participate in the public debate through political expression and political association. When an individual contributes money to a candidate, he exercises both of those rights: The contribution "serves as a general expression of support for the candidate and his views" and "serves to affiliate a person with a candidate."[155]

For the Court, "someone who spends 'substantial amounts of money'" in an election is no different from a "lone pamphleteer[] or street corner orator[] in the Tom Paine mold."[156] He has simply opted for a more "'sophisticated' means" of "*communicat[ing his] political ideas*."[157]

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153. *See generally* Part III.B. The Court in *Buckley v. Valeo* did not actually use the phrase "money is speech." That phrase was coined by Justice White in his partial concurrence. Buckley v. Valeo, 424 U.S. 1, 262 (1976) (White, J., concurring in part and dissenting in part) (objecting that "the argument that money is speech and [thus] that limiting the flow of money to the speaker violates the First Amendment proves entirely too much") *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.

154. Limits on campaign contributions (as opposed to expenditures) have been upheld, but there is good reason to believe this will not last with the new Court. *See generally* Bertrall L. Ross II, *Paths of Resistance to Our Imperial First Amendment*, 113 MICH. L. REV. 917, 917 n.2 (2015) (noting that between 2005 and 2014 every challenge to a campaign finance law succeeded). The only exception to Professor Ross's observation since the publication of his study is *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 457 (2015) (upholding constitutionality of a Florida rule preventing judicial candidates from personally soliciting campaign funds, in the interest of promoting public confidence in the integrity of the judiciary).

155. McCutcheon v. FEC, 572 U.S. 185, 203–04 (2014) (Roberts, C.J.) (citations omitted) (quoting *Buckley*, 424 U.S. at 15, 21–22).

156. *Id.* at 203 (quoting FEC v. Nat'l Conservative Pol. Action Comm., 470 U.S. 480, 493 (1985)).

157. *Id.* (emphasis added) (quoting *Nat'l Conservative Pol. Action Comm.*, 470 U.S. at 493).

The Court, similarly, views political parties as *speakers*, not as political organizations.[158] Chief Justice Rehnquist's dissent in *McConnell v. FEC* is revealing:

> The Court fails to recognize that the national political parties *are exemplars of political speech* at all levels of government, in addition to effective fundraisers for federal candidates and officeholders. *For sure, national political party committees exist in large part to elect federal candidates*, *but* . . . they also *promote coordinated political messages* and *participate in public policy debates* unrelated to federal elections, promote, even in off-year elections, state and local candidates and seek to influence policy at those levels, and increase public participation in the electoral process. Indeed, *some national political parties exist primarily for the purpose of expressing ideas and generating debate*.
>
> As these activities illustrate, political parties often foster speech crucial to a healthy democracy and fulfill the need for like-minded individuals to ban together and promote a political philosophy. When political parties engage in pure political speech that has little or no potential to corrupt their federal candidates and officeholders, the Government cannot constitutionally burden their speech any more than it could burden the speech of individuals engaging in these same activities.[159]

Only "[w]hen political parties *engage in pure political speech*" are constitutional burdens apparently worrisome.[160] Discounting the organizational functions and electoral goals of parties, Chief Justice Rehnquist, like the Court, elevates their role in "foster[ing] speech" and "promot[ing] a political philosophy."[161] Indeed, viewed as speakers, political parties, especially the two major parties, receive increasingly absolute protection.[162]

This discursive account of political parties is particularly maddening. The primary way political parties "transform[] . . .

158. *E.g.*, Cal. Democratic Party v. Jones, 530 U.S. 567, 575–76 (2000) (criticizing California's blanket party primary for giving nonparty members a role in selecting the nominee that will shape the party's ideological preferences and policies and ultimately speak for the party itself); Tabatha Abu El-Haj, *Networking the Party: First Amendment Rights and the Pursuit of Responsive Party Government*, 118 COLUM. L. REV. 1225, 1235, 1237–38 (2018) [hereinafter Abu El-Haj, *Networking the Party*] (tracing the theoretical underpinnings of the Court's constitutional protections for political parties).

159. 540 U.S. 93, 352–53 (2003) (Rehnquist, C.J., dissenting) (emphasis added) (citations omitted), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010).

160. *Id.* at 353.

161. *Id.*

162. *See* Abu El-Haj, *Networking the Party*, *supra* note 158, at 1288–89 (noting growing support for the view that regulatory burdens placed on a political party demand strict scrutiny).

voters' will into a government that reflects that will"[163] is by acting. They organize "like-minded individuals to ban together and promote"[164] candidates that run for office, mobilize voters, and win elections. This is what marks political parties as distinct from other political associations.[165]

But it is this discursive framing of both political parties and campaign spending that facilitates the robust constitutional protection which they are afforded. The Court's attitude toward voting is starkly different. As a recent student note in the *Harvard Law Review* astutely observes, "your ballot receives less protection under the Constitution than your checkbook."[166]

The Court's indifference to the First Amendment interests of voters where election rules have been manipulated to entrench partisan power was on full display in *Rucho v. Common Cause*.[167] With a few deft moves echoing Justice Frankfurter's opinion in *Colegrove v. Green*,[168] Chief Justice Roberts declared that partisan gerrymandering claims are nonjusticiable—an odd conclusion given his concession that "excessive partisanship in districting" is "incompatible with democratic principles."[169]

Judicial policing of partisan gerrymanders is undeniably difficult. The absence of a clear baseline for determining a "fair"

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163. Vieth v. Jubelirer, 541 U.S. 267, 357 (2004) (Breyer, J., dissenting).

164. *McConnell*, 540 U.S. at 352–53 (Rehnquist, J., dissenting).

165. *See generally* JOHN ALDRICH, WHY PARTIES? A SECOND LOOK (2011) (arguing for the necessity of political parties); NANCY L. ROSENBLUM, ON THE SIDE OF THE ANGELS: AN APPRECIATION OF PARTIES AND PARTISANSHIP (2008) (articulating the value in contemporary political parties). The Court's freedom of association doctrine similarly discounts civic associations as organizations, ignoring their role in mobilizing political participation. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958) (recognizing a First Amendment right "to engage in association for the advancement of beliefs and ideas").

166. Note, *Of Ballot Boxes and Bank Accounts: Rationalizing the Jurisprudence of Political Participation and Democratic Integrity*, 131 HARV. L. REV. 1443, 1443 (2018).

167. *See generally* 139 S. Ct. 2484 (2019).

168. 328 U.S. 549, 556 (1946) (Frankfurter, J.) (plurality opinion) (refusing to "enter [the] political thicket" because federal courts are neither constitutionally permitted nor institutionally well-situated to determine political fairness).

169. *Rucho*, 139 S. Ct. at 2506 (quoting Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 791 (2015)); *see also id.* at 2512 (Kagan, J., dissenting) (citations omitted) ("The majority disputes none of what I have said (or will say) about how gerrymanders undermine democracy. Indeed, the majority concedes (really, how could it not?) that gerrymandering is 'incompatible with democratic principles.' And therefore what? That recognition would seem to demand a response.").

outcome[170] does make it hard to call constitutional fouls.[171] And then, there is the problem of distinguishing excessive from routine partisanship.[172] "Excessiveness is not easily determined."[173]

Still, the Court's most glaring First Amendment error has been its retreat from policing such efforts at political entrenchment. Partisan gerrymanders are designed to create a bulwark against political change. They defy the basic democratic principle that political "winners . . . accept that any win is also temporary and restrain from using their majority powers to give themselves any permanent advantages" in the political process.[174] Partisan gerrymanders also upend "the core principle of republican government . . . that the voters should choose their representatives, not the other way around."[175] They, thereby, undermine both electoral accountability and policy responsiveness.[176]

Rather than explore how the First Amendment, as underwriter of a republican form of government, might be employed to

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170. Vieth v. Jubelirer, 541 U.S. 267, 291 (2004) (Scalia, J.) (plurality opinion) ("'Fairness' does not seem to us a judicially manageable standard.").

171. *Cf. Rucho*, 139 S. Ct. at 2499–500 (arguing that "federal courts are not equipped to apportion political power as a matter of fairness" because deciding among the myriad possible "visions of fairness . . . poses [a] basic question[] that [is] political, not legal").

172. *But see* Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 351, 403 (2017) (arguing that in other areas of constitutional law—from the First Amendment patronage cases, to one person/one vote, to election administration—the Court has adopted a clear "norm against government partisanship," which turns not on its magnitude, but on the very existence of a partisan purpose).

173. *Vieth*, 541 U.S. at 316 (Kennedy, J., concurring). The line drawing problem arises, at least in part, because partisan data is relevant to the process, so one cannot have a per se rule that districting must be partisan-blind. *Id.*

174. Drutman, *supra* note 5, at 991.

175. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 824 (2015) (internal quotations omitted) (quoting Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 781 (2005)); *accord Rucho*, 139 S. Ct. at 2511 (Kagan, J., dissenting) ("Free and fair and periodic elections are the key [to our political system] . . . The people get to choose their representatives. And then they get to decide, at regular intervals, whether to keep them.").

176. *See Rucho*, 139 S. Ct. at 2509, 2512 ("These gerrymanders enabled politicians to entrench themselves in office as against voters' preferences. They promoted partisanship above respect for the popular will."); *see also* Stephanopoulos, *supra* note 47, at 125–26 (describing evidence that partisan gerrymanders undermine policy responsiveness, not just democratic accountability).

address the problem, the *Rucho* majority denigrated the plaintiffs' claim as one for proportional representation.[177] It thus avoided wrestling with establishing a workable doctrinal test capable of addressing the genuine complexities associated with policing partisan gerrymandering.[178]

Now, some might object that criticizing existing First Amendment jurisprudence for under-protecting a meaningful right to vote based on *Rucho* is unfair given that (as has been conceded) partisan gerrymanders present a host of unique institutional concerns for the Court.[179] But the interests of ordinary voters have fared no better when the burdens have been more traditional.

The Roberts Court's retreat from policing efforts to use election laws to entrench partisan power began with *Crawford v. Marion County Election Board*.[180] The case involved a challenge to a photo identification law adopted by Indiana's Republican legislature.[181] Plaintiffs argued the new requirement imposed an unnecessary and, thus, unconstitutional burden on voters—particularly elderly African American voters who had migrated from the South.[182] Applying a relatively feeble balancing test (rather than strict scrutiny),[183] the Court upheld the requirement as a

177. *See, e.g.*, *Rucho*, 139 S. Ct. at 2499 (quoting Davis v. Bandemer, 478 U.S. 109, 159 (1986) (O'Connor, J., concurring in judgment)) ("Partisan gerrymandering claims *rest on an instinct* that groups with a certain level of political support should enjoy a commensurate level of political power and influence . . . But *such a claim is based on a 'norm that does not exist' in our electoral system*.") (emphasis added).

178. A generous interpretation of Chief Justice Roberts' view is that he does not believe there is a genuine entrenchment issue because he is persuaded that the problem can be addressed at the state level through ballot initiatives or by state courts. *See id.* at 2507 (enumerating the ways that "[t]he States . . . are actively addressing the issue on a number of fronts"); *see also id.* at 2512 (Kagan, J., dissenting) (recognizing that the majority appears to believe "that the political process can deal with the problem—a proposition so dubious on its face that I feel secure in delaying my answer for some time").

179. *See supra* notes 168 and 171, and accompanying text.

180. 553 U.S. 181, 185, 209 (2008) (Stevens, J.) (plurality opinion).

181. *See id.* at 185–88.

182. *See id.* at 186, 199–202 (noting testimony of elderly African Americans describing their difficulties in retrieving the birth records necessary to obtain Indiana identification from states such as Tennessee and North Carolina).

183. Samuel Issacharoff, *Voter Welfare: An Emerging Rule of Reason in Voting Rights Law*, 92 IND. L.J. 299, 308 (2016) (explaining that as applied the *Anderson-Burdick* test applies exacting scrutiny only to barriers to access that

measure to protect faith in the electoral system, emphasizing that the burdens on the First Amendment rights of voters were minimal.[184] It reached this conclusion despite the absence of any evidence of in-person voter fraud in Indiana, *ever*.[185] And it went even further: explicitly rejecting the relevance of evidence that the quest for partisan advantage drove the reform.[186]

As with protesting, the Court's disinterest in burdens placed on voters by election rules is so thorough that plaintiffs rarely raise constitutional challenges. In 2018, for example, the Court sanctioned Ohio's needless purging of voter rolls in *Husted v. A. Philip Randolph Institute*.[187] Plaintiffs had not bothered to bring a constitutional claim, knowing it would likely fail. Instead, they argued their case under the National Voter Registration Act.[188]

The Court's indifference to the so-called "new vote denial" is particularly striking from a First Amendment perspective, given that it is increasingly hard to deny that they are, indeed, efforts at partisan entrenchment (however successful).[189] In the words of Judge Posner, "[t]here is only one motivation for imposing burdens on voting that are ostensibly designed to discourage voter-impersonation fraud, if there is no actual danger of such fraud, and that is to discourage voting by persons likely to vote against the party responsible for imposing the burdens."[190] Indeed, the uncomfortable fact is that these laws have almost uniformly

take the form of a voter qualification, while burdens resulting from "administrative" rules that make voting more inconvenient are left "virtually immune from review" under the test).

184. *Crawford*, 553 U.S. at 200–04.

185. *Id.* at 194 (noting a lack of evidence in the record).

186. *Id.* at 204 (noting that "valid neutral justifications" for "a nondiscriminatory law" cannot "be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators").

187. 138 S. Ct. 1833, 1846–48 (2018).

188. *See id.* at 1841. Voting rights plaintiffs have also had limited success when they have brought their claims under the Voting Rights Act. *E.g.*, Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2330 (2021) (upholding restrictive voting practices in Arizona under the Voting Rights Act). *See generally* Daniel P. Tokaji, *The New Vote Denial*: *Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689 (2006).

189. *Cf.* Carrington v. Rash, 380 U.S. 89, 94 (1965) ("'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible.").

190. Frank v. Walker, 773 F.3d 783, 796 (7th Cir. 2014) (Posner, J., dissenting) (explaining his change of heart on the constitutionality of voter identification laws). Judge Posner voted to uphold the law in *Crawford*.

been adopted by Republican legislatures to discourage Democratic voters from voting—typically singling out Black Democratic voters.[191]

The Roberts Court's ambivalence about protecting voters can, of course, be explained in other (political) ways.[192] But there is little question that the Court's singular preoccupation with speech as the mechanism of self-governance has obscured the First Amendment interests in protecting the right to vote. When it comes to political practices, the strength of First Amendment protection depends on how easily the conduct can be re-characterized as discursive.

Voting falls uneasily into the Court's flawed, speech-centered view of the First Amendment and democracy. Some Justices have viewed the right to vote as a form of voice or speech.[193] Justice Stevens, in particular, argued that "voting is, among other things, a form of speech."[194] He clarified: "Of course, voting is not speech in a pure or formal sense, but then again neither is a campaign expenditure; both are nevertheless *communicative acts* aimed at influencing electoral outcomes."[195] More often, however, the Court views voting as a political act and imposes a conduct discount—a discount arising out of its false impression that democracy is a product of political discussion rather than political participation.

Burdick v. Takushi best illustrates this ambivalence. The case involved a challenge to Hawaii's ban on write-in ballots. The District Court struck the ban down as a significant burden on the "First Amendment right of expression and association."[196]

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191. Kang, *supra* note 172, at 393–97; *see also New Voting Restrictions in America*, BRENNAN CTR. FOR JUST. (Oct. 1, 2019), https://www.brennancenter.org/new-voting-restrictions-america [https://perma.cc/WS3W-7RS5] (tracking these new laws). While the federal circuit courts, at times, have been more receptive to these claims (whether framed as First Amendment challenges or as statutory challenges), they too have been reluctant to directly address the partisan motivations of these regulations. *See* Issacharoff, *supra* note 183, at 311–17, 321–24.

192. *See, e.g.*, Doerfler & Moyn, *supra* note 48, at 802–03 (arguing that judges, no less than legislators, seek to effect their partisan and ideological commitments through their rulings, including when policing the political process).

193. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 425 (2010) (Stevens, J., dissenting).

194. *Id.*

195. *Id.* (emphasis added).

196. 504 U.S. 428, 430 (1992).

The Supreme Court, however, was less sure.[197] Seeking to justify its development of a relatively permissive balancing test—the one used in *Crawford*—the Court pivoted to voting as a form of conduct.

Voting, it observed, is a political act, not a form of free expression. The Court expounded further:

> [T]he function of the election process is to 'winnow out and finally reject all but the chosen candidates' . . . not to provide a means of giving vent to 'short-range political goals, pique, or personal quarrel[s]' . . . Attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently.[198]

The Court is absolutely right. I couldn't agree more: "[T]he purpose of casting, counting, and recording votes is to elect public officials, not to serve as a general forum for political expression."[199] But the fact that voting is *the* most vital form of political conduct to self-governance should elevate, not diminish, the First Amendment interests.

Elevating First Amendment interests does not necessarily require universal application of strict scrutiny to election regulation. That, indeed, would be untenable. Elections do need to be regulated.[200] The key is to settle on a principle for judicial intervention: policing the political process for entrenchment. The reason that the Court should have struck down Hawaii's ban on write-in ballots, as Justice Kennedy noticed, is because it was part of a parcel of election laws that created a lock-up for the Democratic Party in the state at the time.[201] Hawaii's constitutional foul was not that it robbed individual voters of their right to express their preferred candidate on the ballot; it was that it had allowed Democratic elected officials to use their majority powers to undermine the democratic presumption "that power is temporary, conditional on continued public favor, and reversible at elections."[202]

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197. *Cf. id.* at 433 (while "[i]t is beyond cavil that voting is of the most fundamental significance under our constitutional structure[,] [i]t does not follow . . . that the right to vote . . . [or] to associate for political purposes through the ballot are absolute") (internal quotations and citations omitted).

198. *Id.* at 438 (internal quotations and citations omitted).

199. *Id.* at 445 (Kennedy, J., dissenting) (agreeing with the majority).

200. *Id.* at 433 (majority opinion) ("Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections . . . if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.").

201. *Id.* at 445–47 (Kennedy, J., dissenting).

202. STARR, *supra* note 12, at xiii.

Elections are the quintessential process of self-governance, and legislative burdens on their efficacy at securing political accountability and responsiveness deserve scrutiny. The *Buckley* Court was correct to recognize, therefore, that campaign finance laws implicate the First Amendment.[203] The Court was also correct to extend First Amendment protections to political parties. The Court's errors have been its failure to extend similarly robust protections to voters, and its failure to recognize that both campaign spending and party organizing are quintessential forms of political conduct.

These failures derive from the Court's discursive conception of democracy and its mistaken belief that electoral success and failure derive from ideological competition in the marketplace of ideas. This speech-centered conception of the First Amendment also impedes the Court's ability to see the importance of scrutinizing efforts at political entrenchment or the need to extend the Amendment's strong anti-entrenchment norm beyond the marketplace of ideas. And, once again, the consequences for democracy are tangible. The Court's tepid protection of voting is fueling an explosion of brazen efforts to make voting harder for anticipated partisan gain.[204] Legislatures are even branching beyond election regulation in their efforts to entrench partisan power. The North Carolina, Wisconsin, and Michigan legislatures each

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203. For a further elaboration, see Tabatha Abu El-Haj, *Beyond Campaign Finance Reform*, 57 B.C. L. REV. 1127, 1145–46 (2016).

204. *See* Nick Corasaniti, *Voting Battles of 2022 Take Shape as G.O.P. Crafts New Election Bills*, N.Y. TIMES (Dec. 5, 2021), https://www.nytimes.com/2021/12/04/us/politics/gop-voting-rights-democrats.html [https://perma.cc/N79S-F6ZP] (noting that nineteen states passed a total of thirty-three laws limiting voting in 2021, and more have been introduced); Jane C. Timm, *Republicans Advance More Than 100 Bills That Would Restrict Voting in Wake of Trump's Defeat*, NBC NEWS (Feb. 5, 2021), https://www.nbcnews.com/politics/elections/republicans-advance-more-100-bills-would-restrict-voting-wake-trump-n1256821 [https://perma.cc/3WC4-9C24]; Amy Gardner, Kate Rabinowitz & Harry Stevens, *How GOP-Backed Voting Measures Could Create Hurdles for Tens of Millions of Voters*, WASH. POST (Mar. 11, 2021), https://www.washingtonpost.com/politics/interactive/2021/voting-restrictions-republicans-states [https://perma.cc/UGX9-Y29E]. Indeed, politicians are often upfront that their goal is to use election laws to suppress the vote. Aaron Blake, *Republicans Keep Admitting That Voter ID Helps Them Win, for Some Reason*, WASH. POST (Apr. 7, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/04/07/republicans-should-really-stop-admitting-that-voter-id-helps-them-win [https://perma.cc/SW92-8RKL]; Sam Levine, *Trump Says Republicans Would "Never" Be Elected Again If It Was Easier to Vote*, GUARDIAN (Mar. 30, 2020), https://www.theguardian.com/us-news/2020/mar/30/trump-republican-party-voting-reform-coronavirus [https://perma.cc/C64X-7CE7].

voted to strip the governor of key executive powers when voters elected a governor of a different party.[205]

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None of this is good for democracy. Rethinking our account of the First Amendment's role in securing the constitutional promise of self-governance is thus vital.

IV. ORGANIZING PRINCIPLES FOR FIRST AMENDMENT PROTECTION

The First Amendment need not undercut democracy. Consistent with its classic liberal commitments, it can be construed to protect the democratic process and to promote democratic self-governance. But it requires a clear-eyed conception of the processes of self-governance and a deeper understanding of the First Amendment's role as underwriter. There are three essential moves to this re-conception.

First, the Court must shed its singular preoccupation with speech. It must recognize that self-governance requires openness in public discourse but also in the political process. While "[s]peech is an essential mechanism of democracy," it is not exactly "the means to hold officials accountable to the people."[206]

The First Amendment must, therefore, shield *all* political processes equally. There should be no discounting of First Amendment protection when it comes to political conduct. The Amendment must be construed to provide robust protection for public discourse, but equally for political conduct, from assemblies and associations to a meaningful right to vote. The right of peaceable assembly is explicitly protected. The extension is implicit for the remaining forms of political conduct.

Second, First Amendment doctrine must be organized around the principle that the Amendment's core purpose is to underwrite self-governance. Keeping the channels for influencing public policymaking open is not simple. It requires vigilance against the establishment of orthodoxies in the marketplace of ideas. But it also requires guarding against efforts by self-inter-

205. *See* Miriam Seifter, *Judging Power Plays in the American States*, 97 TEX. L. REV. 1217, 1224–27, 1231–36 (2019) (offering a detailed description of recent efforts to "thwart . . . expressions of popular will" most of which have been struck down by *state* courts).

206. Citizens United v. FEC, 558 U.S. 310, 339 (2010).

ested politicians to maintain their lock on political office by restricting political conduct (e.g., voting) or undercutting the political value of that conduct (e.g., through gerrymandering or regulatory taming of public protest). A broad anti-entrenchment norm—one that bars efforts to foreclose political, social, and cultural change—is essential to a proper construction of the First Amendment.

Third, and most controversially, the First Amendment's negative liberties are not ends in themselves. They are an instrument to the end of the *positive* liberty of self-governance.[207] This entails that First Amendment rights must be limited, in certain circumstances, to respect the foundational commitment to leave to our legislatures critical matters of contested public policy. From public health and the economy to education and policing, hard and contested moral and policy choices are reserved for democratically accountable bodies in our constitutional system. First Amendment rights should not encroach on this domain of governance: Legislative judgments about how to regulate the economy, promote public health and safety, or achieve social and economic equality should be respected, *even when those judgments impact speech* or *association.*

A. POSITIVE AND NEGATIVE LIBERTIES

First Amendment bars, unlike other rights established under the Constitution, operate primarily to maintain the integrity of the policy space granted by our constitutions to legislatures—not to limit them. The First Amendment does not function like the Reconstruction Amendments to remove certain topics from legislative consideration. Certainly, it bars certain types of legislative actions (e.g., the criminalization of seditious speech or advance censorship of the press). But the First Amendment does not per se prohibit the regulation of speech or association.

First Amendment rights apply only in the "domain of politics"—to burdens on the openness of the processes and practices for influencing policymaking, demanding responsiveness, and ensuring democratic accountability. Those practices and processes are capacious, but they are not limitless. The Amendment precludes the regulation of what can be said in the newspaper or on public radio, but not the regulation of what employers can be made to tell their employees about their statutory rights. This is

207. See Möller, *supra* note 19, and accompanying text for a definition of the positive liberty of self-governance.

because the former is speech in the domain of politics (speech that influences public discourse) while the latter is a regulation of speech in the employment context (a governance decision that has been left to the democratic process).

Or that, at least, is how a First Amendment that reinforces the constitutional commitment to self-governance ought to be construed. This final pivot is a radical break from most theories of the First Amendment. Most judges and scholars (regardless of their political persuasions) view the First Amendment as a specific and explicit bar to state action implicating the freedom of expression (as they would say).[208] While Justice Alito's ruling in *Janus v. American Federation of State, County, & Municipal Employees, Council 31* was controversial, his view that "the very purpose of [the First Amendment] *was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials*" is conventional.[209]

This is a mistake. The First Amendment is distinct from other "specific prohibition[s] . . . of the first ten amendments."[210] While most other constitutional rights take particular subjects off the political agenda (insulating them from the normal processes of democratic deliberation), this is not how the First Amendment works. The First Amendment does not seek to entrench a particular substantive political commitment. Instead, its primary guarantee is that *all* policy options will be available for public consideration before policy choices are made democratically.

The First Amendment protects the freedom of speech, the press, peaceable assembly, petitioning, and voting to enable democratic deliberation and ensure its authenticity. It does not per se "withdraw" speech "from the vicissitudes of political con-

208. The dominant view, in other words, places the First Amendment in *Carolene Products* Footnote 4's first category: "a specific prohibition . . . of the first ten amendments." United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). This Article argues that the First Amendment instantiates the insight that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," is inherently suspect. *Id.*

209. 138 S. Ct. 2448, 2486 (2018) (Alito, J.) (quoting W. Va. Bd. of Ed. v. Barnette, 319 U.S. 624, 638 (1943) (emphasis added)); *see also Barnette*, 319 U.S. at 638 ("One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.").

210. *Carolene Prods. Co.*, 304 at 152 n.4.

troversy" or "place [it] beyond the reach of majorities and officials."[211] Only speech that is part of public discourse and debate is withdrawn.

B. POLITICS AND GOVERNANCE

A proper construction of the First Amendment depends, therefore, on drawing a distinction between a *domain of politics* and a *domain of governance*—however difficult. The construction of other constitutional rights does not depend on this distinction between inputs and outputs because they simply remove certain policy options from legislative consideration. The Fourteenth Amendment circumscribes the domain of governance by barring racial discrimination. The Second Amendment restricts "the right of the people to keep and bear Arms."[212] The scope of what has been removed is always contested,[213] but the basic principle is clear.

The First Amendment is different. It articulates a set of individual rights (negative liberties). But its principal end is not to take certain choices *off* the legislative agenda. As such, it does not implicate *every* iteration of the regulation of speech in the way that the Second Amendment implicates any regulation of arms. Rather, its negative liberties preclude only those regulatory choices that function as restraints on the openness of public discourse and the political process.

The boundary between the domains of politics and governance will not always be bright. But all theoretical accounts of the First Amendment raise boundary issues. Even the boundary between speech and conduct can blur.[214] The ultimate goal is a theory in which disputes about the coverage and scope of First Amendment rights are fought on terms that will lead to a construction that supports, rather than undermines, self-governance—thereby vindicating the Amendment's underwriter function.

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211. *Janus*, 138 S. Ct. at 2486.

212. U.S. CONST. amend. II.

213. *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2122 (2022).

214. *See* Spence v. Washington, 418 U.S. 405, 409–10 (1974) (per curiam); *see also* Caroline Mala Corbin, *Speech or Conduct? The Free Speech Claims of Wedding Vendors*, 65 EMORY L.J. 241, 241 (2015) ("Is baking a cake for a same-sex wedding or photographing the bride-and-bride or groom-and-groom 'speech' triggering free speech scrutiny? Or is providing wedding services better viewed as conduct that does not implicate the Free Speech Clause?").

1. The Domain of Politics

It is important to stress that the domain of politics, as conceived here, is capacious in ways previous iterations of it have not been. It is a refinement of Robert Post's core insight: The domain protected by the First Amendment extends to all forms of communication *and conduct* that enable the "democratic state [to] remain[] responsive" and accountable "to the views of its citizens."[215] It thus includes all forms of public discourse and debate,[216] but also civic associations, public meetings and political protests, the free press, elections, and, yes, individual autonomy. This last point is worth stressing.

Speech that implicates individual autonomy is part of the domain of politics. The existence of a republican form of government is "utterly dependent on persons who are capable of thinking for themselves, and on an environment that encourages such thinking."[217] The "freedom to be intellectually and spiritually diverse" is core to the functioning of a liberal democracy because it is critical to preserving the possibility for fundamental social and cultural change.[218] The First Amendment thus recognizes "an autonomy of self that includes freedom of thought, belief, [and] expression" and protects a "realm of personal liberty which the government may not enter."[219] It guarantees a "right of self-de-

215. Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 4 (2000). Robert Post defines the field of democratic governance as an "arena in which members of the general public meet to accommodate competing values and expectations, and hence in which all goals or objectives *are open to discussion* and modification." CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT, *supra* note 24, at 200 (emphasis added). It is also worth emphasizing that the domain of politics here is defined as a set of processes, rather than as speech of political import (as with older theories).

216. Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 790 (2011) ("The Free Speech Clause exists principally to protect discourse on public matters, but we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try."). Protection from the criminalization of obscenity, including violent video games and crush videos, follows from the recognition of culture as within the realm of public debate. *Id.* (correctly observing that, "[l]ike the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages").

217. Blasi, *supra* note 99, at 22.

218. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943).

219. Lawrence v. Texas, 539 U.S. 558, 562, 578 (2003) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847 (1992)); *see also* Möller, *supra* note 19, at 761 (explaining how the commitment to allowing "each person . . .

termination in matters that touch individual opinion and personal attitude,"[220] and forbids a state to compel its citizens to affirm their allegiance to it.[221] This does not mean all burdens upon one's autonomy constitute the type of infringement that falls within the "realm of personal liberty which the government may not enter."[222] A government logo on its license plate, however offensive, does not implicate an individual's conscience and autonomy interests to the same degree as, for example, compelling an individual to recite the same words as their own, before others, would.[223] Still, this recognition covers a great deal more than previous theorizations of the self-governance interest.

The primacy of self-governance as the organizing principle for First Amendment protection need not result in a cramped conception of First Amendment rights. Properly understood, it dictates a strong presumption against legislative intrusion in a broadly construed domain of politics: Burdens on public discourse, the press, or peaceable assemblies like the regulation of civic associations, political parties, and access to the vote would all be viewed skeptically. It justifies a First Amendment interest in preventing government officials from impeding political practices that foster accountability, responsiveness, and change, and demands a doctrine that guards against efforts by government officials to tamper with the authenticity of political inputs or to entrench their own political power. The self-governance interest is even able to explain why the First Amendment must secure a realm of individual autonomy and conscience. Each of these limits ensures democratic outputs are responsive to popular will, that elected officials can be ousted when their constituents are unhappy, and that political, social, and cultural change is possible. In the absence of this security, our democratic bodies cannot do their constitutional jobs responsibly.

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the right to develop and act upon his or her own conception of the good life" is a central tenet of classic liberal theory).

220. *Barnette*, 319 U.S. at 631.

221. *Id.* at 628–29 (striking down West Virginia's requirement that school children recite: "I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all.").

222. *Lawrence*, 539 U.S. at 578.

223. *Cf.* Wooley v. Maynard, 430 U.S. 705, 706–07 (1977) (prohibiting New Hampshire from "enforc[ing] criminal sanctions against persons who cover the motto 'Live Free or Die' on passenger vehicle license plates because that motto is repugnant to their moral and religious beliefs").

The domain of politics, however, must have an outer boundary. First Amendment doctrine must leave ample space for democratic governance. Liberal democracies are founded on the recognition that, in the absence of a clear measure of truth and justice, it is for democratically accountable institutions to make judgements about the public good. Our Constitution, therefore, commits contested matters of public policy to democratically accountable legislatures—as do state constitutions. The compromise is that these judgments are always provisional and subject to democratic revision.

2. The Domain of Governance

First Amendment jurisprudence must, therefore, recognize a domain of governance. In the domain of governance, the legislative prerogative to make law must prevail. Legislatures must be allowed to make decisions about how best to provide education, regulate markets, and maintain public safety. They must also be given latitude to regulate for the public good and to explore affirmative efforts to realize the constitutional commitment to equality. As Justice Kagan eloquently explains, "[U]ncertain, contested, and value-laden" choices for which there is "[n]o mathematical formula" are "precisely" the sort of issues that must be left for "the political branches to debate—and then debate again as times change."[224]

The domain of economic regulation illustrates this core insight. "Should workers be able to sell their labor for less than a living wage? Must drug manufacturers disclose to consumers known side effects? Should it be legal to pay for sex? Or, for a surrogate mother to sell her baby?" These are all hotly contested questions—questions reserved for democratic deliberation and decision. They are also often choices that may burden speech or association—compelling disclosures or mandating association with all, as customers and employees.

The presumption of constitutionality in the domain of governance must extend to all *regulatory choices, even those that impact speech, assembly, or association*. The outputs of politics must be given a presumption of constitutionality. Compelled disclosure is speech within the domain of governance (economic regulation), and it should be presumed constitutional. The same is true of the forced association required by public accommodation

224. Seila Law, LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2237 (2020) (Kagan, J., dissenting).

laws. This is because our constitutional design leaves to our democratically accountable bodies the prerogative to determine, not just the ends of regulation, but also the means for achieving those goals.[225] The choice of means is how legislatures set the price at which they are willing to solve problems.[226]

Some will object that this effectively nullifies the First Amendment. To the degree that moral regulation, health, and safety regulation, education, and poor and elderly relief—no less than economic regulation—are quintessentially core police powers, what would be left in the First Amendment's domain?

The objection and its implied conclusion miss the mark. The default rule in a republican form of government is that policy choices are reserved for the legislature. The first priority of our various constitutions is to enable democratically accountable actors to govern.

The proper question, therefore, is not what is *within* the legislative domain, but rather how to decide what has been *excluded* from the domain of governance. With respect to the First Amendment, as we saw above, what is prohibited from legislative consideration are burdens on public discourse and the political process (political inputs), especially those that seek to entrench officials, parties, policies, or viewpoints.

But not all speech exists in the domain of politics. Sometimes the regulation of speech—e.g., compelled disclosures at a health facility—is not a burden on public discourse, but merely a health and safety regulation. A California law requiring crisis pregnancy centers to disclose truthful and material information—that they are not licensed medical providers and that the state provides free abortion services—is the controversial output of a political process, and it should be insulated from First Amendment challenges for that reason. It is immaterial that abortion is per se controversial. The decisive fact is that this burden on speech (even conceding it is politicized speech) occurs

225. *See* MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 234 (1994); *see also* John F. Manning, *The Means of Constitutional Power*, 128 HARV. L. REV. 1, 5 (2014).

226. *Cf.* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 546–47 (1983) ("The selection of [Rule] *Y* is a measure of what Goal *X* was worth to the legislature, of how best to achieve *X*, and of where to stop in pursuit of *X*."); John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 114 ("Because lawmaking entails compromise, and because no legislative majority pursues its purposes at all costs, interpreters must look carefully at the means prescribed by the enacted text.").

squarely within the domain of governance (a run-of-the-mill health regulation). The critical First Amendment fact is that the disclosure requirement does *not* burden the ability of crisis pregnancy centers to continue to advocate their anti-abortion message or for the repeal of this disclosure requirement.[227] By contrast, a ban on leafletting about recent medical successes with preemies is an entirely different matter, like a ban on prohibition pro-life petitions to the legislature. The latter would squarely impact speech within the domain of politics—impeding efforts to change minds about abortions in the public domain.

In sum, a more thorough consideration of the self-governance interest and its implications presses for a First Amendment jurisprudence in which the pertinent distinction for vindicating and differentiating First Amendment rights is the line between the domain of governance and the domain of politics. The domain of governance refers to most of government life—the sphere where democratically accountable bodies may govern pursuant to their constitutional police powers. In this domain, the normal presumption of constitutionality would apply *regardless* of whether the regulatory choices impact speech, assembly, or association. By contrast, where legislatures seek to regulate political processes—including public discourse—the presumption must run the other way, even when they are not expressive processes.

This account unsettles some aspects of existing jurisprudence. Yet in other respects, it is consistent with existing doctrine. First Amendment protection is generally less robust in schools, prisons, and government employment—domains of governance.[228] The theory also explains the lack of free speech rights

227. Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2378 (2018) (striking down California's notice as a form of compelled speech).

228. For example, while students do not lose all of their First Amendment rights when they enter school, the Court has recognized that schools are unique institutions and, thus, may constitutionally regulate student speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others," including indecent, lewd, or vulgar speech, speech promoting illegal drug use, and speech in a school-sponsored newspaper. *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2423–24 (2022) (summarizing both the precedent governing the speech rights of government employees and that governing student speech); Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2044–45 (2021) (same); Cynthia Estlund, *Freedom of Expression in the Workplace*, *in* THE OXFORD HANDBOOK OF FREEDOM OF SPEECH 411, 413–19 (Adrienne Stone & Frederick Schauer eds., 2021).

in courtrooms—institutions that vindicate legislative efforts to maintain public safety.[229]

One final objection should be addressed: Isn't this theory of the First Amendment subject to the same devastating criticisms that have debunked process-based theories of judicial review?[230] A key critique of process-based theories of judicial review has been that they are inherently substantive insofar as they depend on a normative account of democracy.[231] My own view is that these criticisms are largely overstated, and this one is particularly overstated.

The fact that it is difficult to determine whether the political process is working smoothly or fairly does not necessarily mean that we cannot agree when the political process is locked up or unfair. It is just not clear that one needs to have a definitive measure of fairness in order to recognize that something is unfair.

The analogy that comes to mind is *Chevron*. A statute is ambiguous when a range of reasonable interpretations of its language and import exist. Yet, the fact that a statute is ambiguous does not preclude a Court from deciding that one particular interpretation is unreasonable—outside the bounds of that ambiguity.[232] Similarly, we can differ about how inclusive or majoritarian a democracy must be, yet still know that a system in which the laws effectively preclude one party from losing its legislative majority for an entire decade is undemocratic. Additionally, we might differ in our views about how readily popular opinion should translate into policy outputs, yet still balk at a system where certain viewpoints are banned in public discourse.

To put this slightly differently, earlier I argued that the First Amendment functions differently than other rights because it does not seek to take certain topics off the legislative

229. Consider the subpoena in this regard. It literally compels speech, but subpoenas are presumptively constitutional, and no one seriously contends that the First Amendment protects someone from refusing to comply with a subpoena.

230. For a succinct review of this literature, see Stephanopoulos, *supra* note 47, at 135–40.

231. *Id.* at 137–38.

232. *Cf.* NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 129–30 (1944) (holding that, even without settling on a complete and "definitive" definition of the term employee, the National Labor Relations Act could not reasonably be construed as incorporating the common law definition preferred by Hearst Publications).

agenda but instead to ensure an openness to the political process. This is both true and not true. There is one object of contestation that the First Amendment does take off the table: the form of government established by the U.S. Constitution. The First Amendment allows us to debate whether the system of nested republics established by the Constitution is the best system of government. It permits disputes about the qualities of republics, about the Electoral College, the filibuster, ballot initiatives, and same-day registration. But it does not permit legislatures to effect a different system of government. Instead, like the Guarantee Clause, the First Amendment promises that the actual practice of politics will be (let's say, minimally) responsive.

V. CONSTRUING THE FIRST AMENDMENT TO PROTECT DEMOCRACY

Properly construed, the First Amendment can do better. It can secure a democratic process capable of political responsiveness and change without encroaching on the constitutional prerogative of democratic institutions to govern. The doctrine will, however, need to adapt to achieve these ends. An exhaustive doctrinal treatment of each area is beyond the scope of this Article. The focus below is on first principles.

A. AUGMENTING THE RIGHT OF PEACEABLE ASSEMBLY

The First Amendment should be construed to institute parity between the Speech and Assembly Clauses. Constitutional protection for disruptive public assemblies should be made equivalent to protection for disruptive speech. Courts should make clear that the First Amendment bars the government from dispersing assemblies or arresting participants in the absence of a credible and imminent risk of violence to persons or property—and that the requisite level of violence is high.

The text of the Amendment invites this extension. It singles out assembly (a form of conduct) for protection. Moreover, by providing for "the right of the people *peaceably* to assemble," it implicitly draws a constitutional line between peaceable (protected) and violent (unprotected) assemblies.[233]

233. U.S. CONST. amend. I (emphasis added); *see also supra* note 146 and accompanying text.

The original meaning of the term "*peaceable*," moreover, was not intended "to be confused with 'legal' or 'permissible.'"[234] Historically, the constitutional shield disappeared only when an assembly descended into a "riot" or "unlawful assembly"—common law crimes that were narrowly construed by American courts to apply only to participants in violent crowds.[235] Before the incorporation of the First Amendment against the states,[236] American courts consistently vindicated this expansive conception of the people's right to assemble, maintaining that unruly assemblies, including those engaged in illegal activity, were peaceable.[237] Moreover, the requisite level of violence was high.[238]

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234. LEON WHIPPLE, OUR ANCIENT LIBERTIES: THE STORY OF THE ORIGIN AND MEANING OF CIVIL AND RELIGIOUS LIBERTY IN THE UNITED STATES 104 (1927).

235. *See Riots, Routs, and Unlawful Assemblies*, 3 AM. L. MAG. 350, 351, 357 (1844) (arguing that American law preserved the common law of riot and unlawful assembly because gatherings "which look to violence and not to reason and the influence of a strong expression of public opinion, do not fall within the protection of the constitutional guarantees").

236. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

237. *See* Commonwealth v. Kahn, 176 A. 242, 243 (Pa. Super. Ct. 1935) (construing the crime of riot as "a tumultuous disturbance of the peace by three or more persons assembled and acting with a common intent; either in executing a lawful private enterprise *in a violent and turbulent manner*, to the terror of the people, or in executing an unlawful enterprise *in a violent and turbulent manner*") (emphasis added); *see also* FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 740 (7th ed. 1874) (clarifying that "[a] riot is a tumultuous disturbance of the public peace by three persons or more assembling together . . . *with an intent mutually to assist one another against any who shall oppose them* . . . and afterwards executing the same in a violent and turbulent manner, to the terror of the people, whether *the act intended is lawful or unlawful*") (emphasis added).

238. *See* WHARTON, *supra* note 237, at 740–41 (noting that assemblies could only be disrupted by the state if it was shown "that the assembling was accompanied with . . . either . . . actual force or violence, or at least of an apparent tendency thereto, as were calculated to inspire people with terror, such as being armed, using threatening speeches, turbulent gestures, or the like. *If an assembly of persons be not accompanied with such circumstances as these, it can never be deemed a riot, however unlawful their intent, or however unlawful the acts which they actually commit*") (emphasis added); *see also* Owens v. Commonwealth, 179 S.E.2d 477, 480–81 (Va. 1971) (striking down Virginia's unlawful assembly statute as "unconstitutionally overbroad" in part because it rendered any unpermitted assembly an "unlawful assembly," while contrasting it to "the common law definition [that] expressly requires clear and present danger of violent conduct").

As summarized in an 1899 treatise, although "the right of the people peaceably to assemble . . . does not prevent interference with the riotous assemblages of the people; *where there is no riotous conduct the government cannot interfere*."[239] This tradition is consistent with the *Brandenburg* standard.[240] The right of peaceable assembly was included in the First Amendment to preserve the promise of fundamental political or social change. As revolutionaries, the Framers understood that "First Amendment freedoms need breathing space to survive"[241] and that public assemblies need license to be disorderly.

First Amendment doctrine should develop to vindicate these basic principles. Going forward, the Court should eschew interpretations of precedent that imply that the imminence of mere law-breaking removes individuals or groups from constitutional cover. As Judge Willett recently argued, "raucous public protest—even 'impassioned' and 'emotionally' charged appeals for the use of force—is protected unless clearly intended to, and likely to, spark immediate violence."[242]

The Court should specifically clarify that an otherwise peaceful crowd may not be dispersed for merely illegal activity.[243] Crowds that burn police cars and injure police officers are

239. JOHN RANDOLPH TUCKER, THE CONSTITUTION OF THE UNITED STATES § 326 (Henry St. George Tucker ed., 1899) (emphasis added). John Randolph Tucker was the grandson of Henry St. George Tucker, a Democratic-Republican leaning professor of law at the College of William and Mary, who previously authored an influential 1803 edition of Blackstone's *Commentaries*.

240. Despite the use of the term "lawlessness" in *Brandenburg*, it is clear that the Court meant violent lawlessness. *Cf.* Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969) ("[T]he mere abstract teaching of the moral propriety . . . [of] a resort to force and violence [] is not the same as preparing a group for violent action and steeling it to such action."). This is consistent with early articulations of the line between advocacy and incitement. *See* Whitney v. California, 274 U.S. 357, 376 (1927) (clarifying the line between incitement and advocacy by explaining that "[i]n order to support a finding of clear and present danger it must be shown . . . that immediate serious violence was to be expected or was advocated").

241. FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 468–69 (2007) (Roberts, C.J.) (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

242. Doe v. McKesson, 945 F.3d 818, 840 (5th Cir. 2019) (Judge Willett, dissenting in relevant part) ("And under *Claiborne Hardware* (and a wealth of precedent since), raucous public protest—even 'impassioned' and 'emotionally charged' appeals for the use of force—is protected unless clearly intended to, and likely to, spark immediate violence.") (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927–28 (1982), *vacated by* 141 S. Ct. 48 (2020)).

243. *Cf.* Cantwell v. Connecticut, 310 U.S. 296, 308 (1940) ("When clear and present danger of riot, disorder, interference with traffic upon the public streets,

not protected,[244] but cities should be barred from dispersing crowds—with or without tear gas—that officers themselves characterize as peaceful.[245] Similarly, police should not be allowed to disperse nonviolent protesters for occupying city thoroughfares in the middle of the night, however inconvenient.[246]

Courts should also strike down broad definitions of the crimes of riot and its predicate, unlawful assembly.[247] Criminalization of participants at public assemblies should be limited by a threshold requirement that the individuals pose a clear and present danger of *significant and imminent* violence to persons or property. Concerted "law-breaking," once again, should not be enough.

On the flipside, courts should eschew efforts to strike down the constitutionality of the federal Anti-Riot Act based on how the statute arguably inhibits protected *speech*.[248] Courts should instead scrutinize constitutional challenges to the federal Anti-

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or other immediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious."). Obviously, this Article takes issue with *Cantwell*'s suggestion that an immediate "danger of . . . interference with traffic upon the public streets" is equivalent to the "danger of riot, disorder . . . or other immediate threat to public safety, peace, or order").

244. *Cf.* Don't Shoot Portland v. City of Portland, 465 F. Supp. 3d 1150, 1153–54 (D. Or. 2020) (describing range of crowds dispersed in Portland, including some engaged in violence to persons and property).

245. *Cf.* Christoph Koettl, Nilo Tabrizy & Muyi Xiao, *How the Philadelphia Police Tear-Gassed a Group of Trapped Protesters*, N.Y. TIMES (June 25, 2020), https://www.nytimes.com/interactive/2020/admin/100000007209446.embedded.html [https://perma.cc/V4NN-SJ9T] (showing video footage of police deploying tear gas on a group of peaceful protesters).

246. *Cf.* M.L. Elrick & Meredith Spelbring, *Detroit Police Arrest 44 During Downtown Protest After Weeks of Calm*, DETROIT FREE PRESS (Aug. 24, 2020), https://www.freep.com/story/news/local/michigan/detroit/2020/08/23/detroit-protest-downtown-police-arrests/3423820001 [https://perma.cc/64KB-7NAC] (describing police firing tear gas and making mass arrests after midnight).

247. *Compare, e.g.*, MINN. STAT. § 609.71 (2021) (providing that offense of riot requires "an intentional act or threat of unlawful force or violence to person or property"), *with* 18 PA. STAT. AND CONS. STAT. ANN. § 5501 (West 2022) (defining a riot as "a course of disorderly conduct" undertaken "with two or more others" under one of several conditions, including "with intent to commit or facilitate the commission of a felony or misdemeanor [i.e., unlawful acts]").

248. *Cf.* United States v. Miselis, 972 F.3d 518, 528, 535 (4th Cir. 2020) (striking down federal provisions that criminalized "promot[ing], [and] encourag[ing]" a riot on grounds that both involve speech and thus could cover mere advocacy, while (incorrectly) asserting that "the First Amendment protects speech (the sine qua non of expression) as opposed to mere conduct"); *see also* United States v. Rundo, 990 F.3d 709 (9th Cir. 2021) (per curiam); Bible Believers v. Wayne Cnty., 805 F.3d 228 (6th Cir. 2015).

Riot Act through the lens of the right of peaceable assembly: Where a crowd is engaged in disruptive nonviolent behavior, the words of its participants, like their assembly, are protected by the First Amendment.[249] Where an assembly has been organized for the purpose of violence and carries out the intended violence, it is not protected by the First Amendment, nor are the words its leaders used to organize it.

Indeed, the former scenario is the scenario in *Brandenburg*. Brandenburg invited a television reporter to come to a performance of a Ku Klux Klan "rally" in the hopes that he would film it. The case against Brandenburg rested on evidence from those portions of the film that were later broadcast on a local station and on national television. While the film "showed 12 hooded figures, some of whom carried firearms . . . gathered around a large wooden cross, which they burned,"[250] the rally was nothing like a quintessential Klan event.[251] It did not target a Black community, church, family, or individual, nor was there an imminent threat of violence to persons or property. Indeed, it was staged at a remote farm location, and "[n]o one was present other than the participants and the newsmen who made the film."[252]

Compare that to the storming of the U.S. Capitol building on January 6, 2021.[253] The crowd engaged in violence to enter

249. This is particularly critical given that violent groups often use jokes or slang to engender plausible deniability and shield themselves from liability. *See* Ellie Silverman, *In Charlottesville Trial, Jurors Learn to Decode the Secret Slang of White Supremacists*, WASH. POST (Nov. 18, 2021), https://www.washingtonpost.com/dc-md-va/2021/11/18/charlottesville-jury-slang-white-supremacists [https://perma.cc/FC38-TNFA].

250. Brandenburg v. Ohio, 395 U.S. 444, 445 (1969). *But see* Virginia v. Black, 538 U.S. 343, 388–91 (2003) (Thomas, J., dissenting) (arguing that "[i]n our culture, cross burning has almost invariably meant lawlessness and understandably instills in its victims well-grounded fear of physical violence," regardless of context).

251. *Black*, 538 U.S. at 357; *see also id.* at 353–55 (reviewing history of the Klan); *id.* at 388–89 (Thomas, J., dissenting).

252. *Brandenburg*, 395 U.S. at 445–46. The majority in *Virginia v. Black* recognizes this same distinction, although given the Court's speech-centered approach to the Amendment, it framed the question in terms of the existence of a "true threat" (rather than an unlawful assembly). *Black*, 538 U.S. at 359–60.

253. The violence that occurred during the August 2017 Unite the Right demonstration in Charlottesville and the rally the previous night followed one of the most common scripts by which protests descend into unlawful assemblies and riots: police mismanagement and ineffective efforts to separate demonstrators from counterdemonstrators. *See* TIMOTHY J. HEAPHY, HUNTON & WILLIAMS, LLP, FINAL REPORT: INDEPENDENT REVIEW OF THE 2017 PROTEST

the Capitol to find Mike Pence (the target of its ire); moreover, there is substantial evidence that these actions were organized and coordinated by the leaders of the Proud Boys.[254] Once at the Capitol, the crowd's violence reached a terrifying level, the classic hallmark of the crime of riot and unlawful assembly.[255] The First Amendment's Speech Clause should not be used to shield organizers from responsibility for the riot they orchestrated.

Finally, courts should clarify that individuals exercising their right to peaceably assemble may only be charged with low-level criminal offenses when their individual acts pose an imminent threat of violence to persons or property. This final change will be the most difficult to implement, but it is very important. By far the most consistent threat to protesters' rights in the last decade has been the overuse of individual arrests for catch-all public order offenses. To leave things as they are is to condone the routine suppression of constitutionally protected activity.

While these implications amount to a significant shift in First Amendment doctrine, each is consistent with both the text and the historical practice of American courts through the late nineteenth century. Each also vindicates the purpose of the First Amendment as the underwriter of the constitutional promise of a republican form of government. As Judge Rakoff once admonished, "prudence, and respect for the constitutional rights to free speech and free association . . . dictate that the legal system cut all non-violent protesters a fair amount of slack."[256] This is especially important today when, as Justice Gorsuch recently noted, "governments . . . regulate our lives finely, acutely, thoroughly, and exhaustively . . . [and] criminal laws have grown . . . to cover

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EVENTS IN CHARLOTTESVILLE, VIRGINIA 4–6 (Nov. 24, 2017) (summarizing key findings and emphasizing role of poor planning on the part of law enforcement).

254. Natalie Reneau, Stella Cooper, Alan Feurer & Aaron Byrd, *Proud Boys Led Major Breaches of Capitol on Jan. 6, Video Investigation Finds*, N.Y. TIMES (June 17, 2022), https://www.nytimes.com/2022/07/12/us/politics/proud-boys-jan-6.html [https://perma.cc/3SQW-NEKY] (compiling visual evidence of coordination).

255. Ashley Parker, Isaac Stanley-Becker & Carol D. Leonnig, *Frantic Secret Service Radio Traffic Shows How Close Pence Was to Danger*, WASH. POST (July 22, 2022), https://www.washingtonpost.com/national-security/2022/07/22/mike-pence-secret-service-january-6 [https://perma.cc/9LG3-3EFE] (reporting new evidence that at some point Vice President Pence was "just 100 feet away . . . [from] the rioters—some of whom had earlier been chanting 'Hang Mike Pence!'").

256. Garcia v. Bloomberg, 865 F. Supp. 2d 478, 482 (S.D.N.Y 2012), *rev'd on other grounds*, Garcia v. Does, 779 F.3d 84 (2d Cir. 2015).

so much previously innocent conduct that almost anyone can be arrested for something."[257] Indeed, "[i]f the state could use these laws not for their intended purposes but to silence those who voice unpopular ideas, little would be left of our First Amendment liberties."[258]

B. ELEVATING SCRUTINY OF ELECTION REGULATION

The First Amendment must be construed to foreclose political entrenchment, just as it precludes challenges to orthodoxies in the marketplace of ideas. The Court should return to reviewing election laws through a democracy-reinforcing lens grounded now in the First Amendment.[259] The entire Amendment is designed to ensure democratic responsiveness and an openness to social and political change. The Guarantee Clause ensures Congress will not admit officials from states that lack a republican form of government,[260] but it is the First Amendment that secures the individual political rights that are necessary to realize self-governance in the first instance. Interference with the electoral process, like restrictions on the marketplace of ideas and freedom of the press, warrant judicial scrutiny.

First Amendment doctrine should provide protection to the right to vote as willingly as it provides protection to the right to spend money in campaigns or to the rights of political parties to control their messages and membership. The fact that voting is not a forum for individual expression is immaterial. As the *Reynolds* Court recognized: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."[261]

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257. Nieves v. Bartlett, 139 S. Ct. 1715, 1730 (2019) (Gorsuch, J., concurring in part and dissenting in part).

258. *Id.*

259. My argument here is distinct from Nicholas Stephanopoulos's. His argument is that *Rucho* and all other election law cases should be governed by the democracy-reinforcing theory of judicial review laid out in *Carolene Products* regardless of doctrinal category, whereas my argument is that these cases, properly understood, implicate the First Amendment and should be adjudicated according to a democracy-reinforcing theory of that Amendment. *See* Stephanopoulos, *supra* note 47.

260. U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . .").

261. Reynolds v. Sims, 377 U.S. 533, 560 (1964) (citing Wesberry v. Sanders, 376 U.S. 1, 17–18 (1963)).

The rote application of strict scrutiny to all election laws is, of course, impractical.[262] But the solution is not to throw one's hands up (as the Court has done).[263] Rather, the solution is to settle on a principle for when rigorous judicial intervention is required. Recognition of the First Amendment's role as the underwriter of the constitutional promise of self-governance supplies that principle.

1. Rules Governing Election Administration

The focus in cases involving burdens on the right to vote ought to be on the degree to which the regulation constitutes an effort to skew the "distribution . . . of political influence."[264] States may have "broad powers to determine the conditions under which the right of suffrage may be exercised,"[265] but the First Amendment bars them from using that authority to entrench current officeholders in power.[266]

The First Amendment, therefore, bars politicians and parties from maintaining their lock on power through rules governing the time, place, and manner of elections. Practically speaking, this means that in cases involving election administration, courts should not take proffered government interests at face

262. Anderson v. Celebrezze, 460 U.S. 780, 788 (1983) (quoting Storer v. Brown, 415 U.S. 724, 730 (1974)) (rejecting the applicability of strict scrutiny because "as a practical matter, there must be substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes").

263. Issacharoff, *supra* note 183, at 308 (explaining that burdens resulting from "administrative" rules that make voting more inconvenient are left "virtually immune from review" under the *Anderson-Burdick* test).

264. *Cf.* Jedediah Purdy, *Beyond the Bosses' Constitution: The First Amendment and Class Entrenchment*, 118 COLUM. L. REV. 2161, 2163 (2018) (critiquing this First Amendment mantra); *see* Daniel P. Tokaji, *Voting is Association*, 43 FLA. ST. U. L. REV. 763, 765 (2016) (recognizing that there are "constitutional problems inherent when political insiders manipulate election rules to stymie those collectively seeking to challenge their power").

265. Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 639–41 (1969) (Stewart, J., dissenting) (noting that "the Constitution of the United States does not confer the right of suffrage upon any one").

266. This is consistent with Michael Kang's demonstration that under existing doctrine, partisan motivations for legislation are generally unconstitutional. *See* Kang, *supra* note 172, at 376–80, 390–93; *accord* Tokaji, *supra* note 264, at 765 (noting that election laws that burden voters are generally "better understood as inter-party disputes, in which political insiders seek to block political outsiders from aggregating their votes so as to challenge the dominant group").

value. Instead, courts should consider evidence of partisan motivation. Legislation that passes without substantial bi-partisan support ought to be particularly suspect.

The likely result of such scrutiny would be that voter registration requirements, insofar as they are supported by both parties, would generally pass constitutional muster, despite the burdens they place on voters. But efforts to repeal permissive voting rules (e.g., Sunday voting or no-excuse absentee ballots), where there is evidence that the change was motivated by turnout of the opposing party's voters, would not.[267]

2. Challenges to the Design of Electoral Districts

A construction of the First Amendment that privileges its role as the underwriter of the promise of a republican form of government would also provide a clear anchor for addressing partisan gerrymanders. The primary constitutional harm in partisan gerrymandering cases is political entrenchment. As in the original one-person, one-vote cases, legislatures engaged in gerrymandering seek to stymy groups of citizens in their political aims by undermining their "political weight at the polls."[268]

The core affront to the First Amendment arises because "the foundation of effective democratic governance dissolves" when "legislators can entrench themselves in office despite the people's will."[269] The argument from there is simple. The First Amendment seeks to ensure the conditions necessary for a republican form of government; partisan gerrymanders render legislatures impervious to change. Therefore, they are an affront to the First Amendment which guards against efforts to entrench both political orthodoxies and partisan power. It is immaterial

267. *Cf.* Bob Bauer, Opinion, *How to Counter the Republican Assault on Voting Rights*, N.Y. TIMES (Mar. 18, 2021), https://www.nytimes.com/2021/03/18/opinion/republicans-voting-rights.html [https://perma.cc/89JM-HUYA] (arguing for statutory reforms to prevent states from revising election laws "to restrict voting access in federal elections in specified areas—including the withdrawal of existing vote-by-mail opportunities and reductions in early voting—*unless* it is done on a bipartisan basis"). Only North Dakota does not have a voter registration requirement.

268. Baker v. Carr, 369 U.S. 186, 258–59 (1962) (Clark, J., concurring) (emphasizing that "the people of Tennessee have no 'practical opportunities for exerting their political weight'" and thus "are stymied"); *accord* Reynolds v. Sims, 377 U.S. 533, 569–70 (1964) (noting "the unavailability of any political or judicial remedy" to the costs of legislative inaction).

269. Gill v. Whitford, 138 S. Ct. 1916, 1940–41 (2018) (Kagan, J., concurring).

whether the effort at entrenchment was successful. In no other area of First Amendment law does the constitutionality of efforts to shore up orthodoxies in the marketplace of ideas turn on their success.

Doctrinally, partisan gerrymanders are best conceived as a prior constraint on the freedom of political association: They constrain party associations from achieving their political goals by placing a cap on their opportunities for electoral success.[270] The creation of uncompetitive districts directly burdens political parties, as associations, by undermining their capacity to organize and recruit candidates. As Justice Kagan recognized in her *Gill v. Whitford* concurrence, "deprived of their natural political strength by a partisan gerrymander, [political parties] may face difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office."[271] The fact, therefore, that partisan

270. *See* Whitford v. Gill, 218 F. Supp. 3d 837, 849 (W.D. Wis. 2016) (finding that the challenged redistricting plan was intended to "aggressive[ly]" burden the ability of Democratic voters to translate their votes into legislative seats through the decennial period and that it had succeeded), *vacated*, 138 S. Ct. 1916 (2018), *remanded to* 402 F. Supp. 3d 529 (W.D. Wisc. 2019). Others have argued that partisan gerrymanders violate the First Amendment because they discriminate against voters based on their partisan affiliations. But, as Chief Justice Roberts rightly objects, this framing leads to the untenable proposition that *any* accounting for political affiliation in the redistricting process is unconstitutional. *Compare* Vieth v. Jubelirer, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring) (suggesting that "[t]he First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering" insofar as the State has allegedly "burden[ed] or penalize[ed] citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views"), *with* Rucho v. Common Cause, 139 S. Ct. 2484, 2505 (2019) ("[T]he First Amendment analysis . . . offers no 'clear' and 'manageable' way of distinguishing permissible from impermissible partisan motivation."); *see also* Gaffney v. Cummings, 412 U.S. 735, 752 (1973) (discussing how evidence of political consideration in drafting a reapportionment plan is in itself, not sufficient to invalidate that plan). The argument fairs no better when the charge is that partisan gerrymanders unconstitutionally segregate "voters by political affiliation." Benisek v. Lamone, 266 F. Supp. 3d 799, 816 (D. Md. 2017), *aff'd*, 138 S. Ct. 1942 (2018). Some degree of partisan sorting is inevitable and likely beneficial during legislative redistricting.

271. *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring). Lower courts have recognized analogous associational claims by minor parties under the *Anderson-Burdick* test. *See, e.g.*, Green Party of N.Y. State v. N.Y. State Bd. of Elections, 389 F.3d 411, 416, 420–21 (2d Cir. 2004); Baer v. Meyer, 728 F.2d 471, 473–74 (10th Cir. 1984); Council of Alt. Pol. Parties v. State Div. of Elections, 781 A.2d 1041, 1047, 1051–52 (N.J. Super. Ct. App. Div. 2001).

gerrymanders do not prevent partisans from being heard, *as speakers*, and do not prevent political association per se is not determinative because they do limit their ability to effectively associate by robbing them of the opportunity to attain political power.[272]

Redistricting legislation that passes without substantial bipartisan support should be particularly suspect.[273] But the fact that legislative maps do not lead to proportional representation would not, alone, raise constitutional concern. The focus of the analysis would be on whether the maps were designed to render the partisan make-up of the legislature impervious to change.

C. LIMITING RIGHTS IN THE DOMAIN OF GOVERNANCE

First Amendment protection should be construed to leave ample space for democratic governance. Speech and associational rights in the domain of governance should be limited because legislatures must be allowed to make the public policy choices entrusted to them by our constitutions. They must be able to decide how best to provide education, regulate markets, distribute social goods, and maintain public safety, even if those choices impact speech, assembly, or association. This shift in First Amendment doctrine would be a radical departure from the Court's current course.

The Court's preoccupation with speech has culminated, during the Roberts Court, in a construction of the First Amendment that over-protects economic speech and association in ways that undermine the foundational constitutional commitment to leave contested policy choices to our democratic bodies. Indeed, the

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272. *Cf.* Williams v. Rhodes, 393 U.S. 23, 41 (1968) (Harlan, J., concurring) ("It is true that Ohio has not directly limited appellants' right to assemble or discuss public issues or solicit new members . . . the State[, however,] has eliminated the basic incentive that all political parties have for conducting such activities, thereby depriving appellants of much of the substance, if not the form, of their protected rights."); *see also* Daniel P. Tokaji, *Gerrymandering and Association*, 59 WM. & MARY L. REV. 2159, 2186 (2018) (observing that, in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), while "th[e] class of voters *was not completely barred* from associating with another," the filing deadline made it much harder to associate).

273. *Cf. Vieth*, 541 U.S. at 350 n.5 (Souter, J., dissenting) (noting that amici had argued for a presumption that "a political party strong enough to redistrict without the other's approval is analogous to a firm that exercises monopolistic control over a market, and that the ability to exercise such unilateral control should . . . trigger 'heightened constitutional scrutiny'").

Court increasingly allows corporations and other economic actors to use the First Amendment to constitutionalize particular economic settlements under the guise of the First Amendment. This is its final democratic failure. The nature of this mistake, however, is only apparent once we process that the primary function of the First Amendment is not to prevent speech regulation, but rather to ensure that democratically accountable bodies remain able to provisionally settle on the good through democratic contestation.

Expressions Hair Design v. Schneiderman illustrates the current doctrine's democratic failures in this regard.[274] The case involved a challenge to a New York statute that sought to encourage credit card use.[275] The statute was designed to institute lessons of behavioral psychology, which demonstrate that individuals react more strongly to surcharges than discounts.[276] Expressions Hair Design, however, argued the law violated the First Amendment because it prevented the company from choosing its own words: It had a constitutional right to say, "Haircuts $10 (we add a 3% surcharge if you pay by credit card)" rather than being forced to advertise the 3% as a discount if the customer pays cash, as the statute required.[277] The Supreme Court ultimately agreed that when applied to advertising (as opposed to pricing), the statute constituted a regulation of speech subject to the limits of the First Amendment.[278]

Expressions Hair Design will seem to many readers to be a boring, persnickety case. What's the big deal? So, Expressions Hair Design gets to choose its own words? The big deal is that before *Expressions Hair Design,* the New York legislature had a range of alternative means to get at its goal of encouraging credit card use. After the case, it does not. This is not how our system of government is meant to work. The question of whether *and how* legislatures encourage (or discourage) credit card use is properly reserved to the democratic process.[279] The fact that speech is involved should not change that basic constitutional settlement.

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274. 137 S. Ct. 1144 (2017).

275. *Id.* at 1147.

276. *Id.* at 1149.

277. *Id.*

278. *Id.* at 1151 (advising that "[i]n regulating the communication of prices rather than prices themselves . . . [the statute] regulates speech").

279. *See supra* Part IV.B.

Indeed, the consequences for self-governance of the Court's First Amendment literalism are dire. Disclosure requirements, labor laws, and anti-discrimination norms all arguably impact speech and association. Policymakers are, thus, increasingly hamstrung in their regulatory choices, from drug safety to the regulation of medical professionals.[280] In an era where information regulation is often a preferred regulatory choice, corporations and other economic actors—having previously lost the political battle in the legislature or before administrative agencies—are successfully using a tangle of free speech doctrines to constitutionalize their preferred economic policy.[281] Cigarette companies have invoked the freedom of speech to fend off disclosure requirements,[282] and the FDA is on the defensive in its efforts to regulate the promotion of off-label prescriptions—once known as selling snake oil.[283]

The consequences also impact efforts to address ongoing social and economic inequality. Recently, the City of Philadelphia sought to address the fact that "women in Pennsylvania earn 79 cents for every dollar a man earns, and African American women earn 68 cents for every dollar a man earns."[284] It enacted an ordinance making it illegal for employers "to rely on wage history 'at any stage in the employment process' to determine a salary

280. *See, e.g.*, Sorrell v. IMS Health Inc., 564 U.S. 552, 566–71 (2011) (holding that Vermont could not regulate prescription drug user's prescriber-identifiable data without consent). *See generally* Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613, 1624 (2015).

281. Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133. *But see* Jane R. Bambauer & Derek E. Bambauer, *Information Libertarianism*, 105 CALIF. L. REV. 335, 354–56 (2017) ("Even when the First Amendment applies, it leaves many regulatory regimes affecting speech unscathed.").

282. R.J. Reynolds Tobacco Co. v. FDA, 845 F.2d 266, 276 (D.C. Cir. 2012) (striking down FDA's graphic warning labels after applying intermediate scrutiny because the compelled disclosure was not purely factual and uncontroversial), *overruled by* Am. Meat Institute v. U.S. Dep't of Agric., 760 F.3d 18, 20 (D.C. Cir. 2014) (en banc) (clarifying the analysis under *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), without overruling the outcome).

283. *Cf.* United States v. Caronia, 703 F.3d 149, 168 (2d Cir. 2012) (holding that defendant's promotion of off-label drug use was protected by the First Amendment); *see also* Christopher Robertson, *The Tip of the Iceberg: A First Amendment Right to Promote Drugs Off-Label*, 78 OHIO ST. L.J. 1019, 1030 (2017) (discussing the debate over First Amendment coverage of speech promoting off-label prescribing).

284. Chamber of Com. for Greater Phila. v. City of Philadelphia, 319 F. Supp. 3d 773, 779 (E.D. Pa. 2018).

for an employee."[285] In doing so, it prohibited employers from "ask[ing] a job applicant in writing or otherwise" about their wage history.[286] A group of non-profit employers and the Chamber of Commerce sued, arguing the prohibition on asking about wage history violated their freedom of speech.[287] The Third Circuit vacated the preliminary injunction that the employers won in the lower court, and it should be applauded for its analysis.[288] But the pressure is on.

Convincing others that the presumption that robust First Amendment protection exists for anything that resembles speech is a mistake, will be a hard sell.[289] Many judges, scholars, and citizens, across the political spectrum, agree with Justice Alito that "the very purpose of [the First Amendment is] to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities."[290] *Expressions Hair Design* was unanimous, after all.[291]

The problem is that First Amendment literalism, especially when conjoined with First Amendment absolutism, crowds out space for self-governance. The inclination to afford virtually unlimited constitutional protection to anything that arguably could be considered speech in everyday English significantly limits democratic decisionmaking.[292] As Robert Post and Amanda Shanor have observed, in the absence of limits, "we cannot speak

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285. *Id.* at 780.

286. *Id.*

287. *Id.* at 812.

288. Greater Phila. Chamber of Com. v. City of Philadelphia, 949 F.3d 116, 157 (3d. Cir. 2020) (explaining that "[t]he City enacted the . . . [ordinance] in an attempt to address . . . persistent problem[s of discrimination] and the record is clearly sufficient to withstand this First Amendment challenge to it").

289. *See* Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 179 (2015) (arguing that construing the freedom of speech to encompass any "use of human language" threatens democracy); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RSCH. J. 521, 547 (noting the tendency of the autonomy interest to lead to absolutist views of First Amendment rights because the essence of autonomy is the freedom of choice itself).

290. Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2486 n.28 (2018).

291. Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144 (2017).

292. MAGARIAN, *supra* note 25 (reviewing the first decade of the Roberts Court's First Amendment decisions to demonstrate that the Roberts Court is selective in its provision of broad First Amendment protection).

of democratic self-determination, because virtually all government regulations will, in one way or another 'burden' speech, if by speech we mean the use of human language."[293]

The status quo is, therefore, untenable. Limiting speech and associational rights is necessary if our democratic institutions are to be able to govern, and the theoretical account of the First Amendment offered above provides a principled way of limiting such protection in the domain of governance by explaining why the First Amendment is not an injunction on *all* speech regulation. Indeed, the text does not prohibit the regulation of speech per se, but rather the making of laws that "abridg[e] the *freedom of speech*."[294]

A proper construction of the First Amendment would both vigorously protect the freedoms of press, speech, assembly, association, and the rights of voters in the domain of politics; *and* take care not to trample on the legislative prerogative to govern the economy, public health, social and economic relations, or even morality (the province of positive liberty). It would recognize that the First Amendment's negative liberties are not ends in themselves, but rather a means to self-governance; and respect our constitutional commitment to leave contested policy choices (with respect to both means and ends) to legislatures. It would rigorously distinguish between the *domain of politics* and the *domain of governance*. Within the domain of politics, a strong presumption against legislative intrusion is warranted. But within the domain of governance, the presumption should run the other way—regulatory burdens on speech, assembly, or association would be presumed constitutional. This presumption of constitutionality arises out of the constitutional fact, shall we call it, that "uncertain, contested, and value-laden" choices for which there is "[n]o mathematical formula" are for "the political branches to debate—and then debate again as times change."[295]

Several doctrines today implicitly track the line between the domains of politics and governance—including the law of defamation and libel and the doctrine governing the free speech rights of government employees. Newspapers and other speak-

293. Post & Shanor, *supra* note 289, at 179. Post and Shanor, however, argue for reducing protection for commercial speech, not (as I do) for a presumption of constitutionality.

294. U.S. CONST. amend. I (emphasis added).

295. Seila Law, LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2237 (2020) (Kagan, J., dissenting).

ers are virtually immune from liability for their coverage of public figures—on the assumption that such figures exist in the domain of politics and that speech about them is per se discourse of public concern.[296] Conversely, while government employees are fully protected when, as citizens, they write letters to the editor or otherwise engage in speech and association of public concern, their First Amendment rights are significantly limited where their actions, as employees, undermine the ability of the government to effectively implement policies—thereby undercutting the ability to govern.[297] Indeed, for a long time the Court refused to take the bait when corporations raised First Amendment challenges to economic legislation.[298] Justice Rehnquist was famously reticent to embrace such arguments.[299]

1. The Commercial Speech Doctrine Revisited

First Amendment doctrine would need to be reconstructed to reject the assumption that "speech proposing a commercial transaction" necessarily raises First Amendment concerns.[300] This lack of First Amendment coverage has nothing to do with the relative value of that speech. Compelled disclosures remain

296. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 283 (1964) (holding "that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct" absent proof of "actual malice"). *See generally* Harry Green, *Libel Actions by Public Officials*, 17 AM. JURIS. TRIALS 223 (2022); E.H. Schopler, Annotation, *Libel and Slander: What Constitutes Actual Malice, Within Federal Constitutional Rule Requiring Public Officials and Public Figures to Show Actual Malice*, 20 A.L.R.3d 988 (2022).

297. Estlund, *supra* note 228, at 418–19 (describing caselaw governing public employee speech rights).

298. *See* NLRB v. Fruehauf Trailer Co., 301 U.S. 49, 52, 57 (1937) (rejecting free speech challenges to the National Labor Relations Act). *See generally* SOPHIA Z. LEE, THE WORKPLACE CONSTITUTION: FROM THE NEW DEAL TO THE NEW RIGHT (2014); Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915 (2016).

299. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 589 (1980) (Rehnquist, J., dissenting) (recognizing that the Court's development of the commercial speech doctrine "unlocked a Pandora's Box" in "return[ing] to the bygone era of *Lochner v. New York*, 198 U.S. 45 (1905)").

300. Zauderer v. Office of Disciplinary Couns., 471 U.S. 626, 637, 650–51 (1985) (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978)); *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 561–63 (same); *see also* Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18, 28–30 (D.C. Cir. 2014) (en banc) (Rogers, J., concurring) (discussing *Zauderer* and *Central Hudson Gas*).

"speech," just as economic disassociation can have political valiance.[301] Instead, the doctrine would be driven by a recognition that the regulatory consequences for the marketplace of ideas and the potential for political change is limited.

Allowing legislatures to label foods to caution against sugar or to ban the advertisement of cigarettes does not preclude political, social, or cultural change.[302] A ban on advertising sex work is not the same as a ban on advertising a desire to legalize sex work. Indeed, legislatures do debate legalizing sex work—just as many have legalized marijuana after public debate and political organizing.[303]

What the First Amendment bars is efforts by the government to thwart a disgruntled regulated party from arguing for change. We can concede that FDA labeling of sugars indirectly influences views about nutrition by framing sugars as "bad food." Still, from the theoretical perspective advanced here, the critical point is that they in no way restrain regulated parties from campaigning to alter the regulatory regime or engaging in

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301. Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodation Law*, 66 STAN. L. REV. 1205, 1231–32 (2014) (discussing different protections awarded to "commercial" speech and "expressive" speech); Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CALIF. L. REV. 119, 139–40 (2000) (arguing that the distinction between expressive speech and economic speech is arbitrary and not defensible).

302. Some readers may concede that the risk of political entrenchment through information regulation in the economic sphere is extremely low, but wonder whether this theory will work for other legislative domains (education, morality, policing). My response is two-fold. First, it is probably fair to assume that the risks to individual autonomy and cultural and political dissent (elements of the political process) are likely to be greatest when legislatures regulate morality. That said, these concerns can be overstated. Social and cultural change has occurred, even in the face of criminal repression in the name of morality. Indeed, we have just recently seen the legalization of gay marriage and the trend towards the legalization of marijuana. Second, these concerns are peripheral to the immediate predicament. At the moment, this is not the frontier where the Court's construction of the First Amendment is interfering with our democratic institutions.

303. *See, e.g.*, Ashley Hupfl, *Lawmakers and Advocates Debate Legalizing Sex Work in New York*, WAMC NE. PUB. RADIO (Oct. 11, 2021), https://www.wamc.org/news/2021-10-11/lawmakers-and-advocates-debate-legalizing-sex-work-in-new-york [https://perma.cc/X2QQ-FRGZ]; *see also State Medical Cannabis Laws*, NAT'L CONF. OF STATE LEGISLATURES (Sept. 12, 2022), https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx [https://perma.cc/6XQC-QYZB].

a publicity campaign in favor of sugar.[304] Similarly, a regulatory ban on the commercial promotion of off-label prescriptions leaves pharmaceutical companies free to fund research and publications on the benefits of off-label prescribing, and allied doctors free to speak in their private capacities to the issue. The only thing an off-label promotion ban precludes is dissembling, during sales pitches for specific drugs targeted at doctors, about the merits of specific off-label prescribing.

2. Adjudicating the Line Between the Domains of Politics and Governance

The line between the domain of governance and the domain of politics is not always bright. Still, the distinction brings clarity to many core cases that have stumped courts and scholars in recent years. A statute that prevents businesses from discriminating in the hiring, firing, and promotion of employees is clearly market legislation. So too is an FDA regulation that requires foods to include a label with information about the ingredients and calorie counts. Similarly, regulations that prohibit employers from lying or making misrepresentations to their workers about their statutory rights or other employment conditions are labor regulation. All these government regulations should be presumptively constitutional, regardless of whether they burden, or compel, speech or association.

Similarly, there is significant clarity about what falls within the domain of politics. Not only does the text provide guidance about the contours of the domain of politics, but we also have over two hundred years of democratic experience to help us navigate this boundary. Recent First Amendment challenges to automatic voter registration and independent redistricting commissions may be riddled with fallacies, but there is little question that they fall within the domain of politics. By contrast, when political associations, following *Americans for Prosperity Foundation v. Bonata*, seek to challenge the IRS's donor disclosure requirements as an abridgment of their freedom of association, courts should recognize that these disclosure laws lie within the domain of governance, and whatever burdens they place on

304. *Cf.* Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335, 2359 (2020) (Breyer, J., dissenting) ("From a democratic perspective, however, it is equally important that courts not use the First Amendment in a way that would threaten the workings of ordinary regulatory programs posing little threat to the free marketplace of ideas enacted as result of that public discourse.").

the freedom of association, should be presumptively constitutional.[305]

Still, there will be hard cases. The boundary between the domains of politics and governance will not always be bright. The Telephone Consumer Protection Act of 1991, recently challenged in *Barr v. American Association of Political Consultants*, is a prime example. The Act, at first glance, looks like ordinary market regulation—an effort to protect consumers from being badgered by telemarketers.[306] But it completely prohibits an array of organizations from making any "political robocalls to cell phones"—an unequivocal restraint on political and electioneering discourse.[307]

The doctrine must, therefore, include a mechanism for reversing the default presumption in these (rare) instances where regulation in the domains of governance targets speech in ways that substantially compromise political inputs.[308] The public forum's time, place, and manner doctrine provides one model.[309] In fact, one could argue that the time, place, and manner test already serves this boundary policing role. As currently used, it

305. 141 S. Ct. 2373 (2021).

306. *Cf. Barr*, 140 S. Ct. at 2359 (Breyer, J., dissenting) (recognizing the Act as "ordinary commercial regulation").

307. *Id.* at 2343.

308. Similarly, a state should not be allowed to retreat into the domain of governance by applying a law meant to govern commercial practices to the editorial pages of a newspaper. California did just that in 2002, when it used an editorial Nike wrote for the press as the basis for charging the company with violating California's prohibition of false and misleading advertising. *Cf.* Kasky v. Nike, Inc., 45 P.3d 243, 258 (Cal. 2002). Nike's editorial was attempting to respond to public allegations that the company's overseas factories routinely violated workers' rights. The presumption of constitutionality should have been reversed for this application of the statute. *See id.* at 263 (Chin, J., dissenting). The regulation of social media companies would likely be another example, although efforts to impose net neutrality on internet providers that no consumers interact with directly probably would not.

309. Equal Protection doctrine, which allows for heightened rational basis review in certain instances, provides another model. *Cf.* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (holding that notwithstanding the presumption of constitutionality for non-suspect classifications, the constitutional obligation to prove "'equal protection of the laws' . . . must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest").

operates to reverse the default presumption of *un*constitutionality for regulations of the domain of politics.[310] It functions to reverse the presumption of unconstitutionality in favor of the legislative prerogative to maintain order.[311] The government's right to regulate public forums in the interest of order maintenance is recognized so long as two critical conditions are met—the regulation is viewpoint neutral, and adequate alternative means for expression are available.[312] Each of these conditions serves to guarantee that the regulation is not an illicit effort to quash public discourse or assembly, but instead a genuine effort to maintain order.

The time, place, and manner doctrine could be adapted to reverse the presumption of constitutionality for economic regulation. In this context, the analysis would turn primarily on whether disgruntled regulated parties retain adequate alternative means with which to persuade the government to change course. One aspect of the test would have to change. Economic policy is inevitably not viewpoint neutral. Indeed, this is why we leave it to legislatures to make economic policy. Any adaptation of the time, place, and manner doctrine would have to abandon the traditional requirement of viewpoint neutrality. This requirement only makes sense where the government seeks special dispensation to undertake the inherently suspect project of regulating the domain of politics. Finally, and most importantly, as in Equal Protection's rational basis doctrine with bite, reversal would be the exception, not the rule.

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Line drawing is unavoidable. But it will be much easier if we are asking the right questions. Even the libertarian First Amendment's plain language speech test does not entirely avoid

310. *See supra* notes 122–23 and accompanying text.

311. Hague v. Comm. for Indus. Org., 307 U.S. 496, 515–16 (1939) (explaining that "[t]he privilege of a citizen . . . to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied").

312. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (noting that reasonable time, place, and manner restrictions are constitutional "in a public forum" so long as they were not "adopted . . . because of disagreement with the message it convey[ed]" and "they leave open ample alternative channels for communication") (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

the need to draw lines. Indeed, it fetishizes the line between conduct and speech.[313] This line not only operates to the detriment of democracy. But it also is entirely divorced from both the text and first principles of the First Amendment, which singles out at least one type of conduct (public assemblies) and one institution (the free press) for constitutional protection.

CONCLUSION

Americans deserve an account of the First Amendment that protects democracy in all its facets. Restoring the First Amendment to its roots in the constitutional guarantee of a republican form of government offers a theoretical path to that end. It bolsters protection for political conduct from protests to voting. And by offering a principled justification for limiting First Amendment incursions into the domain of governance, it offers a way to navigate a doctrinal path that respects constitutional commitments to both free speech and equality. By contrast, when the freedom of speech is allowed to eclipse the other provisions of the First Amendment—as in current doctrine—political conduct receives too little protection, efforts at political entrenchment are permitted to slide, and our constitutional commitment to leave decisions on contested values to our democratic institutions, including with respect to social and economic equality, is undermined.

313. *Compare* Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1152 (2017) (Breyer, J., concurring) ("When the government seeks to regulate those activities, it is often wiser not to try to distinguish between 'speech' and 'conduct.' Instead, we can, and normally do, simply ask whether, or how, a challenged statute, rule, or regulation affects an interest that the First Amendment protects."), *with id.* at 1150–51 (majority opinion) (noting that "[t]he Court of Appeals [had] concluded that [the challenged statute] posed no First Amendment problem because the law regulated conduct, not speech").