
ELECTION LAW’S LOCHNERIAN TURN

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INTRODUCTION

This panel has been asked to consider whether “the Constitution [is] responsible for electoral dysfunction.”¹ My answer is no. The electoral process undeniably falls well short of our aspirations, but it strikes me that we should look to the Supreme Court for an accounting before blaming the Constitution for the deeply unsatisfactory condition in which we find ourselves.

More specifically, a good deal of what might be labeled electoral dysfunction stems from quite recent decisions from the Roberts Court. I focus on three representative cases, *Citizens United v. Federal Election Commission*² and *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*,³ which invalidated campaign finance regulations, and *Shelby County v. Holder*,⁴ which vastly limited the Voting Rights Act.⁵ Needless to say, these decisions are not responsible for every flaw in the electoral process. They are, nevertheless, the source of significant and unnecessary electoral problems. As important, they capture the singular perspective with which the Roberts Court views the electoral process and the Court’s role in policing it. I suggest that it is this perspective that goes a good distance in explaining why contemporary

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¹ See *America’s Political Dysfunction: Constitutional Connections, Causes, and Cures*, BOS. UNIV. SCH. OF LAW, <http://www.bu.edu/law/events/upcoming/documents/America%19sPoliticalDysfunctionConferenceSchedule.pdf> (last visited Feb. 10, 2014), *archived at* <http://perma.cc/D7VG-5MLD>.

² *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

³ *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011).

⁴ *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

⁵ Other candidates for this list arguably include *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008) (upholding voter identification law as facially constitutional), which, in important ways, both propelled *Shelby County* and heightened its consequences; *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007), which fueled *Citizens United*; and *Davis v. FEC*, 554 U.S. 724 (2008), which provided the foundation for *Arizona Free Enterprise*.

electoral processes take the form they do, and, accordingly, why the Court and not the Constitution is most responsible for that form.

My argument is that the Roberts Court has become – and perhaps has always been⁶ – deeply skeptical of electoral regulations that attempt to displace certain traditional forms of political participation. It sees a good deal of contemporary electoral regulation as impermissibly redistributive and needlessly disruptive of the type of political participation that would exist in its absence. The Court, moreover, tends to view the type of participation that is displaced as a neutral baseline against which to gauge challenged regulations rather than itself the product of affirmative regulation. Put differently, the present Court confronts contemporary efforts to regulate the electoral process much like the *Lochner* Court⁷ approached progressive wage and hour legislation a century ago.⁸ In fact, much of what the Roberts Court has been up to in the electoral arena may be explained by an influential understanding of the *Lochner* era.⁹

To be sure, labeling recent decisions *Lochnerian* in sensibility is a predictable move.¹⁰ Critics reliably invoke *Lochner* whenever the Court deems legislation they favor to be unconstitutional, and the charge has been lodged in the election law context with particular vigor.¹¹ And yet, recent work of the Roberts Court differs both in degree and in kind from the election law cases that have prompted the charge previously. I will explain why after first discussing the ways in which *Citizens United*, *Arizona Free Enterprise Club*,

⁶ Five years ago, I understood the stance of the Roberts Court differently. See Ellen D. Katz, *Withdrawal: The Roberts Court and the Retreat from Election Law*, 93 MINN. L. REV. 1615, 1616 (2009) (suggesting that the Roberts Court was seeking “to avoid active federal engagement with the state-created rules regulating democratic participation”). Whether or not that understanding was wrong at the time, and, in hindsight, it might have been, it does not capture the approach of the Court today.

⁷ See, e.g., *Adkins v. Children’s Hosp.*, 261 U.S. 525 (1923); *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Lochner v. New York*, 198 U.S. 45 (1905).

⁸ For discussions analogizing *Citizens United* to *Lochner*, see, for example, Robert L. Kerr, *Naturalizing the Artificial Citizen: Repeating Lochner’s Error in Citizens United v. Federal Election Commission*, 15 COMM. L. & POL’Y 311 (2010); Lawrence Lessig, *Democracy After Citizens United*, BOS. REV. (Sept. 4, 2010), <http://bostonreview.net/lessig-democracy-after-citizens-united>, archived at <http://perma.cc/UNH3-HKKV>.

⁹ See Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 875 (1987); see also David E. Bernstein, *Lochner’s Legacy’s Legacy*, 82 TEX. L. REV. 1 (2003) (offering a different analysis of the *Lochner* era).

¹⁰ See, e.g., Robert C. Post, *Defending the Lifeworld: Substantive Due Process in the Taft Court Era*, 78 B.U. L. REV. 1489, 1494 (1998) (“The ghost of *Lochner* has haunted efforts at aggressive judicial protection of constitutional rights since the New Deal, even when such protection has been informed by a liberal agenda, such as in the days of the Warren Court.”).

¹¹ See *infra* Part II.

and *Shelby County* are similar in structure and motivation, and why these similarities support the *Lochner* label.

I. THE COURT, NOT THE CONSTITUTION

Citizens United, *Arizona Free Enterprise Club*, and *Shelby County* resemble one another in several respects. All three decisions refused to defer to legislative findings and judgments, mistrusted the motives underlying the challenged legislation, and confidently vindicated a constitutionally grounded right that had not previously been understood to be as robust and absolute as these holdings suggest. These similarities in structure, moreover, were fueled by the Court's deep skepticism about electoral rules that displace particular, traditional forms of political participation and alter the balance of power those forms would have produced.

Consider, first, *Citizens United*, which scrapped key provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA)¹² and precedent that supported them.¹³ The provisions at issue prevented corporations and unions from using general treasury funds for "electioneering communication," a practice the BCRA broadly defined to include broadcast and related types of communication that mentioned candidates for federal office during specified periods.¹⁴ Congress meant for these provisions to rein in so-called issue advocacy, namely, advertisements that were intended to endorse or condemn candidates, but did so without using words like "elect" or "vote" and hence fell outside the preexisting regulatory framework.¹⁵

Congress's effort was for naught. The *Citizens United* Court understood the BCRA's limits on corporate-funded issue advocacy to be a ban on speech, rather than a regulation of it, and a ban made worse by the regime's selective reach.¹⁶ The Court, moreover, suggested that the problem Congress intended the BCRA provisions to target – namely, preferential access and the opportunity to influence – might not even be a problem at all.¹⁷ In his opinion for the Court, Justice Kennedy wrote that the goals of combatting corruption and the appearance of it, which had long served as justifications for regulation in the campaign finance arena, were "limited to *quid pro quo* corruption."¹⁸ Even if corporate independent expenditures could lead to ingratiation and preferential access – something Justice Kennedy doubted – "[i]ngratiation and access . . . are not corruption."¹⁹ This rendered most of the record supporting

¹² Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2, 8, 18, 28, 36, and 47 U.S.C.).

¹³ See *Citizens United v. FEC*, 558 U.S. 310, 365 (2010).

¹⁴ See *id.* at 321.

¹⁵ See *id.* at 439-40 (Stevens, J., dissenting).

¹⁶ See *id.* at 339 (plurality opinion).

¹⁷ See *id.* at 359.

¹⁸ *Id.*

¹⁹ *Id.* at 360.

the BCRA irrelevant, and left Congress without authority to address issues of influence, access, and the appearance it fostered, at least in the manner it had done.

Most critical for present purposes, *Citizens United* scrapped the core premise undergirding restrictions of corporate political activity. For decades, the “special advantages” state laws grant to corporations – namely “limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets”²⁰ – had been understood to justify restrictions on corporate activity connected with elections. As then-Justice Rehnquist observed back in 1978, one “might reasonably” conclude that “the blessings” a state gives a corporation to “enhance its efficiency as an economic entity” might “pose special dangers in the political sphere.”²¹ Justice White added that “[t]he State need not permit its own creation to consume it.”²²

To be sure, both Justices were dissenting at the time, but it is worth recalling that the majority in *First National Bank of Boston v. Bellotti* did not question the fundamental premise Justices Rehnquist and White described, namely, that corporations were artificial, state-created institutions vested by the state with special privileges that justified additional regulation in the political sphere.²³ The majority never doubted that the political activity of corporations could be regulated more extensively than the political activities of individuals.²⁴ Instead, the *Bellotti* majority crafted what it described as a limited exception to that principle. It made clear that it was not holding that corporations themselves enjoyed First Amendment rights, but instead that the First Amendment interests of others would be served by allowing limited corporate expenditures in connection with referenda.²⁵

As has been widely observed, *Citizens United* disregarded these carefully crafted limits.²⁶ The Court read *Bellotti* to support precisely what it disavowed, namely, that a corporation is entitled to make unrestricted expenditures in connection with any election, not just a referendum, and that a corporation possesses a First Amendment right to do so.²⁷ In so doing, *Citizens United*

²⁰ *Id.* at 351 (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 658-59 (1990)); see also *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 809 (1978) (White, J., dissenting).

²¹ *Bellotti*, 435 U.S. at 825-26 (Rehnquist, J., dissenting).

²² *Id.* at 809 (White, J., dissenting).

²³ See *id.*

²⁴ *Id.* at 789 (majority opinion) (“[C]orporations are wealthy and powerful and their views may drown out other points of view.”).

²⁵ *Id.* at 776 (“The Constitution often protects interests broader than those of the party seeking their vindication.”).

²⁶ See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 442 (2010) (Stevens, J., dissenting) (“The only thing about *Bellotti* that could not be clearer is that it declined to adopt the majority’s position.”); Kerr, *supra* note 8, at 348 (observing that *Citizens United* “mischaracterizes” *Bellotti*).

²⁷ See *Citizens United*, 558 U.S. at 346-47.

transformed the state-granted “blessings” corporations enjoy into inherent, even pre-legal attributes of these institutions. No longer would these “special advantages” provide cause to regulate corporate political activity, or, indeed, treat corporations differently from individuals engaged in such activity. The Court said so explicitly, noting these advantages “do[] not suffice to allow” the disputed regulations. *Citizens United* thereby recognized that corporations enjoy robust First Amendment rights similar to, and perhaps even coextensive with, those enjoyed by individuals.²⁸

*Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*²⁹ followed *Citizens United* in form and inspiration. The decision struck down Arizona’s Citizens Clean Elections Act, a public funding regime that provided candidates who opted to participate an initial outlay of public funds to conduct their campaigns, and additional matching funds if a privately funded candidate or political committee spent more than the publicly financed candidate’s initial allotment.³⁰

Chief Justice Roberts’ opinion for the Court held that this regime penalized both privately funded candidates and PACs. Because privately funded candidates who chose to speak through spending triggered a subsidy for their opponents,³¹ and because that subsidy in turn might lead both these candidates and PACs to limit their spending or modify their message, the regime imposed “a special and potentially significant burden” on privately funded candidates and PACs.³²

The Chief Justice, moreover, was not convinced that the regime served Arizona’s interest in combatting corruption.³³ He observed that Arizona had already placed strict limits on campaign contributions, the practice most closely associated with *quid pro quo* corruption, while a good deal of private funding involved independent expenditures or contributions by candidates to their own campaigns, practices that were not seen to raise corruption concerns at all.³⁴ To the extent that the matching funds provision might encourage candidates to accept public funding and thereby avoid the opportunities for corruption fundraising invites, Chief Justice Roberts held that serving anticorruption interests “indirectly” did not justify the burden the regime placed on privately funded candidates and PACs.³⁵

²⁸ *See id.* at 314.

²⁹ *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011).

³⁰ *See id.* at 2828.

³¹ *Id.* at 2821.

³² *Id.* at 2818.

³³ *Id.* at 2826.

³⁴ *Id.* at 2826-27.

³⁵ *Id.* at 2827 (“But the fact that burdening constitutionally protected speech might indirectly serve the State’s anticorruption interest, by encouraging candidates to take public financing, does not establish the constitutionality of the matching funds provision.”).

Animating much of *Arizona Free Enterprise Club* was the Court's belief that Arizona was less interested in battling corruption than in "leveling the playing field."³⁶ Equalization, of course, has long been anathema in the realm of campaign finance regulation,³⁷ but *Arizona Free Enterprise Club* took that aversion to a new height. Whereas efforts to cap spending have previously prompted charges of leveling, the Arizona regime allowed privately funded candidates and PACs to raise and spend unlimited funds.³⁸ The "leveling" charge, accordingly, rested not on a spending limit, but, instead, on the chain of events private spending triggered under the regime. And what it triggered was an award of matching funds that gave publicly funded candidates a benefit they would not otherwise have received, and a benefit that might alter or distort private spending and the speech private spending would have produced.³⁹

Reporting and disclosure requirements arguably shape private spending and resulting speech in a similar manner. *Arizona Free Enterprise Club*, however, made clear that the Court thought the Arizona regime differed in legally significant ways from such requirements. As a result, the case did not vindicate the right to speak without consequence, or even without state-authorized consequence. Instead, it recognized the right of privately funded speakers to spend and speak without triggering a "windfall" to their opponents or distorting their own speech to prevent that windfall.⁴⁰ Put differently, the Court found that the regime unlawfully distorted speech that would have occurred in its absence by providing unearned benefits to some speakers but not others. That conclusion assumed the existence of an unregulated (or, perhaps, differently regulated) electoral arena in which speech would not be distorted and windfalls not bestowed.

*Shelby County v. Holder*⁴¹ addressed a different aspect of the political process and undeniably distinct concerns. Nevertheless, the decision was similarly animated by the Court's sense that the challenged regime impermissibly burdened some participants in the electoral arena and provided others unearned benefits.

Shelby County specifically invalidated the coverage formula set forth in section 4(b) of the Voting Rights Act (VRA), thereby rendering inoperative the VRA's section 5 preclearance regime.⁴² Much of the debate preceding the

³⁶ *Id.* at 2825.

³⁷ *See Buckley v. Valeo*, 424 U.S. 1, 56-57 (1975).

³⁸ *See Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. at 2815.

³⁹ *See id.*

⁴⁰ *See id.* at 2822.

⁴¹ *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

⁴² Section 4(b) of the VRA "covered" jurisdictions if they utilized a "test or device" as a prerequisite to voting and had low levels of voter participation on specified dates between 1964 and 1972. *See Voting Rights Act of 1965*, Pub. L. No. 89-110, § 4(b), 79 Stat. 437, 438 (codified as amended at 43 U.S.C. § 1973(b) (2012)). Once covered jurisdictions could

Court's decision in *Shelby County* focused on the conditions for political participation in places subject to that coverage formula. No one disputed that these conditions had improved markedly since Congress first crafted the statute and that the VRA itself was largely responsible for these improvements.⁴³ What was disputed was the extent to which these improvements were dependent on the VRA's continued operation and the degree of backsliding that would occur if the regime were scrapped. Justice Ginsburg's dissent argued vociferously that the VRA provided necessary protection and that significant backsliding would occur in its absence.⁴⁴

One of the curious facets of *Shelby County* is that Chief Justice Roberts' majority opinion did not challenge this argument. Instead, the Chief Justice concluded that the discrimination documented in the congressional record and described by Justice Ginsburg was legally insufficient to justify the statute's continued regional application.⁴⁵ As explanation, he observed that this discrimination was not as severe as it was when Congress first crafted the regime in 1965; that it had not led Congress to alter the statute's pre-existing coverage formula; and that it encompassed subjects different from the ones that Congress listed in the coverage formula when it first subjected places to the regime's requirements.⁴⁶

I explain elsewhere why these observations, all of which are true, should have been insufficient to render preclearance obsolete – and indeed should have been irrelevant – under applicable doctrine that the *Shelby County* majority did not purport to displace.⁴⁷ For present purposes, however, the doctrinal inadequacy of these observations matters less than what they expose about the Court's stance with regard to the VRA's role in the electoral process and about Congress' power to address ongoing discrimination in voting in the matter that it did.

Shelby County held that the regional operation of the preclearance regime contravened the equal sovereignty doctrine by imposing unjustified burdens on

no longer use their test or device and could not implement any electoral changes without first showing that the proposed change would be nondiscriminatory. *Id.* § 5. This preclearance obligation applied only to jurisdictions covered by section 4(b). *See id.* As a result, eliminating section 4(b) dissolved all existing obligations to seek preclearance. It did not strike down section 5, and it is a possible that a new trigger might restore the regime in more limited ways. *See* H.R. 3899, 113th Cong. (2014) (VRA Amendments).

⁴³ *See, e.g., Shelby Cnty.*, 133 S. Ct. at 2625-26 (“Nearly 50 years later, things have changed dramatically . . . [t]hose conclusions are not out alone. Congress said the same when it reauthorized the Act in 2006.”); Brief for Petitioner at 9-12, *Shelby Cnty.*, 133 S. Ct. 2612 (No. 12-96).

⁴⁴ *See Shelby Cnty.*, 133 S. Ct. at 2632 (Ginsburg, J., dissenting).

⁴⁵ *See id.* at 2625 (majority opinion).

⁴⁶ *Id.* at 2629-31.

⁴⁷ *See* Ellen D. Katz, *What Was Wrong with the Record?*, 12 ELECTION L.J. 329, 330 (2013).

public actors in some states but not others.⁴⁸ As others have explained, this holding rested on an unprecedented reading of the equal sovereignty doctrine and one that may well have repercussions in other contexts.⁴⁹ Whatever its merits and lasting effects, however, that reading provided what the Court was looking for, namely, a convenient means to terminate the regional application of the preclearance regime.

And the Court wanted preclearance to end. While it had long viewed the regime's regionally applicable burden-shifting requirements as an "exceptional" and "extraordinary"⁵⁰ remedy, it has more recently become convinced that the regime operated as a source of unjust enrichment to its beneficiaries. By the time it decided *Shelby County*, a majority of the Court no longer viewed preclearance as a vehicle to make victims of undeniable discrimination whole, but saw it instead as a device that placed a host of interested parties, victims included, in a decidedly better position than they would have been had the discrimination never occurred.⁵¹

Justice Scalia captured this sensibility when he characterized the VRA as "a racial entitlement" at oral argument in *Shelby County*.⁵² Chief Justice Roberts did so as well in the part of his *Shelby County* opinion that described the 2006 VRA amendment that overruled *Reno v. Bossier Parish School Board*.⁵³ The Chief Justice saw the amendment as proof of congressional overreach in that it was designed to "prohibit laws that *could have favored* [minority voters] but did not do so because of a discriminatory purpose."⁵⁴ Consider the words "could have favored." Far from inartful drafting, they imply that invidious discrimination is not always damaging to minority voters. Notably, the Bossier Parish School Board had adopted a districting plan that it avowedly designed to prevent the election of a black representative.⁵⁵ *Shelby County* suggested

⁴⁸ See *Shelby Cnty.*, 133 S. Ct. at 2627 ("Racial disparity in those numbers was compelling evidence justifying the preclearance remedy and the coverage formula.").

⁴⁹ See *id.* at 2649 (Ginsburg, J., dissenting); *Whose Term Was It? A Look Back at the Supreme Court*, NAT'L PUB. RADIO (July 5, 2013), <http://www.npr.org/2013/07/05/198708325/whose-term-was-it-a-look-back-at-the-supreme-court>, archived at <http://perma.cc/8HTB-Q5D8> ("There's no requirement in the Constitution to treat all states the same . . . [i]t might be an attractive principle, but it doesn't seem to be in the Constitution." (quoting Professor Michael McConnell)).

⁵⁰ See, e.g., *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 501 (1997); *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1965).

⁵¹ Ellen D. Katz, *Justice Ginsburg's Umbrella*, in *A NATION OF WIDENING OPPORTUNITIES? THE CIVIL RIGHTS ACT AT FIFTY* (Samuel Bagenstos & Ellen D. Katz eds., forthcoming 2014).

⁵² Transcript of Oral Argument at 47, *Shelby Cnty.*, 133 S. Ct. 2612 (No. 12-96) (statement of Scalia, J.) (suggesting that the VRA is a "racial entitlement" and "[t]here are certain districts in the House that are black districts by law just about now").

⁵³ *Bossier Parish Sch. Bd.*, 528 U.S. 320.

⁵⁴ *Shelby Cnty.*, 133 S. Ct. at 2626-27 (emphasis added).

⁵⁵ See Jurisdictional Statement at 8, *Bossier Parish Sch. Bd.*, 528 U.S. 320 (No. 98-405)

that such unconstitutional conduct was of little consequence, as all it did was block implementation of electoral rules “that could have favored” minority voters. The broader suggestion is that unconstitutional discrimination does not always deny minority voters an equal opportunity to participate in the political process, and that in some circumstances simply denies them preferential treatment. That suggestion propelled the Court’s conviction that the VRA’s preclearance regime had become a source of unwarranted preferential treatment and hence something to discard.

In this sense, *Shelby County* followed directly from *Arizona Free Enterprise Club* and *Citizens United*. All three decisions deemed efforts to regulate the electoral process impermissibly disruptive of the balance of power that would have prevailed in their absence. *Citizens United* scrapped the idea that the “special advantages” corporations enjoy provide cause to limit corporate campaign expenditures or otherwise treat corporations differently from individuals in this arena. *Arizona Free Enterprise Club* thought Arizona’s experiment with public funding provided “windfall[s]” that distorted political debate because of the way it responded to spending by privately funded candidates and PACs. And *Shelby County* understood the VRA’s regionally applicable burden-shifting requirements less as a remedy for past discrimination than as a source of unjust enrichment for its beneficiaries. In short, all three decisions envisioned the existence of an electoral process that, absent the challenged regulations, would not be distorted by windfalls or special advantages or electoral rules that favored particular constituencies.

This vision ignores the fact that, as the authors of a leading casebook have argued, any democratic political order must operate through preexisting laws, rules, and institutions, and that democracy does not exist, in any meaningful sense, “prior to and independent of the specific institutional forms in which it happens to be embodied at any particular time and place.”⁵⁶ This means that there is no neutral or natural baseline of political participation against which to gauge contemporary electoral regulations.

The Court’s suggestion that there is resembles and arguably replicates the error long identified as the defining marker of the *Lochner* era. An influential view of that period posits that the *Lochner* Court erroneously viewed market practices at common law as a neutral, prepolitical baseline against which to measure the constitutionality of new regulation.⁵⁷ The problem, of course, was that this baseline was far from neutral, and, instead, was itself a legal construct that reflected the “existing distributions of wealth and entitlements.”⁵⁸

(“There was evidence that several Board members preferred the [redistricting plan with all white-majority districts] because they did not want black representation on the Board. Board member Barry Musgrove said that ‘the Board was “hostile” toward the idea of a black majority district.’”).

⁵⁶ ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY* 1 (4th ed. 2012).

⁵⁷ Sunstein, *supra* note 9, at 882.

⁵⁸ *Id.*

Similarly, striking down contemporary electoral regulations does not restore a neutral political arena in which there are no windfalls, debate is not distorted, and favored (and disfavored) treatment does not occur. Entitlements, to be sure, are dislodged, but other ones are revived as a consequence. Electoral regulations, in particular, cannot help but favor some over others because, apart from a few defining elements, there is no neutral baseline that defines what a democratic political process must look like. Accordingly, scrapping the core provisions of campaign finance law and the VRA because they bestow preferential treatment does not restore neutrality, but instead simply substitutes one set of entitlements for another.

That recognition hardly means that electoral regulations should be immune from review, but it does (or at least should) require a different sort of analysis as to whether a challenged regulation fails to pass muster. Preferential treatment is only preferential when compared to something else, and that something else needs to be examined critically to ensure the entitlements being vindicated warrant vindication.

II. THE ROBERTS COURT AND ITS PREDECESSORS

Critics predictably invoke *Lochner* whenever the Court strikes down legislation they favor, and the charge has been lodged in the election law context with some frequency. Nevertheless, recent work from the Roberts Court differs both in degree and in kind from the types of cases that have provoked the charge previously.

Buckley v. Valeo,⁵⁹ for instance, has been described as the “direct heir to *Lochner*.”⁶⁰ This description stems from the reason the Court offered when it struck down new caps on campaign expenditures that were intended to prevent big spenders from dominating political discourse and thereby inhibiting diverse and balanced debate. In striking down the caps, the *Buckley* Court famously stated that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”⁶¹ The ruling is seen as *Lochnerian* because it posits that “the state must take disparities in wealth, and the existence of some with more ‘voice’ than others, as part of nature for which the government bears no responsibility.”⁶²

Buckley has few defenders today, both because of its rejection of equalization as a justification for regulation and because of the untenable line it drew between contribution and expenditure limits.⁶³ Still, one need not

⁵⁹ *Buckley v. Valeo*, 424 U.S. 1 (1976).

⁶⁰ Sunstein, *supra* note 9, at 884.

⁶¹ *Buckley*, 424 U.S. at 48-49.

⁶² Sunstein, *supra* note 9, at 884.

⁶³ See, e.g., *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 438, 443 n.8 (2001); *id.* at 465 (Thomas, J., dissenting); Richard L. Hasen, *Money Grubbers*, SLATE (Jan. 21, 2010), http://www.slate.com/articles/news_and_politics/jurisprudence/2010/01/money_

celebrate *Buckley* to recognize the ways in which the ruling was more limited than a good deal of contemporary precedent. *Buckley*, for example, did not call into question longstanding restrictions on corporate and union political activity. The decision, moreover, upheld significant contribution limits, reporting and disclosure requirements, a public-funding system, and, most notably, non-negligible congressional power to craft and shape these measures. All the while, *Buckley* never suggested that these measures, individually or collectively, might provide windfalls or otherwise favor some participants in the electoral process over others, or that they might significantly distort or diminish speech.

Decisions like *Citizens United*, *Arizona Free Enterprise Club*, and *Shelby County* expressed far more skepticism about the regulatory projects they confronted. These decisions voiced the Justices' concerns about windfalls, preferential treatment, and unjust enrichment; they mistrusted the motives underlying the challenged legislation; and they suggested that the regulatory projects as a whole were fundamentally flawed.⁶⁴ Put differently, these decisions retained the elements of *Buckley* that were most Lochnerian while setting up the foundation to discard the elements that were not.

These recent decisions, however, are not simply more Lochnerian than their predecessors. They also differ in kind from a set of election law decisions that have previously prompted charges of *Lochner*'s resurrection. Specifically, and not surprisingly, they differ notably from the election law jurisprudence of the Warren Court.

This earlier precedent is associated with *Lochner* because it aggressively displaced state election laws and did so based on understandings of the Constitution that were not easily grounded in text or history.⁶⁵ From the reapportionment revolution⁶⁶ to the invalidation of the poll tax⁶⁷ to the recognition of voting as a fundamental right subject to strict scrutiny,⁶⁸ the Warren Court repeatedly scrapped state laws that would have easily survived more deferential review. The Court's reliance on the Equal Protection Clause rather than the Due Process Clause did little to insulate these holdings from the *Lochner* charge.⁶⁹

grubbers.html, archived at <http://perma.cc/WM76-B6EM>.

⁶⁴ See *supra* Part I.

⁶⁵ See, e.g., Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 880-81 (2003) (questioning inter alia "how we can justify decisions like . . . *Reynolds v. Sims* . . . without also justifying decisions like *Lochner v. New York*").

⁶⁶ See, e.g., *Lucas v. Colo. Gen. Assembly*, 377 U.S. 713 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

⁶⁷ *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966).

⁶⁸ *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969).

⁶⁹ *Harper*, 383 U.S. at 686 (Harlan, J., dissenting). See generally Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473, 479 (2002).

Without doubt, these rulings were more political theory than constitutional interpretation. It was for this reason that Justice Harlan's dissent in *Harper v. Virginia Board of Elections* invoked *Lochner* and observed that the Constitution does not "rigidly impose upon America an ideology of unrestrained egalitarianism."⁷⁰ Curiously, Justice Douglas's majority opinion responded by invoking *Lochner* as well. Citing Justice Holmes's famous dissent, the opinion purported to disavow the notion that the Equal Protection Clause might be "shackled to the political theory of a particular era."⁷¹ And yet, the opinion's reading of the Equal Protection Clause to prohibit a state poll tax seemed to rest on the very error Justice Holmes thought the *Lochner* majority had committed.

Justice Douglas's opinion in *Harper*, however, makes more sense if *Lochner*'s error lay not in the decision's activism or in its untethered approach to constitutional interpretation, but instead in its assumption that the challenged regulations displaced "neutral" practices rather than "existing distributions of wealth and entitlements."⁷² *Harper* (and *Reynolds* and the related decisions) made no analogous assumption. The electoral rules the Warren Court confronted in these cases entrenched and effectively immunized the racial entitlements that defined the Jim Crow South. There was nothing neutral about that baseline.⁷³ True, there was also nothing neutral about the new rules – call them theories – the Warren Court decisions crafted to disrupt those racial entitlements.⁷⁴ But whatever criticism the Warren Court deserves for promulgating them, and it has received plenty, its project was analytically distinct from that of the *Lochner* Court.

Citizens United, *Arizona Free Enterprise Club*, and *Shelby County* stand more squarely within the *Lochner* tradition. Unlike the Warren Court holdings, these decisions not only disrupted existing entitlements, but disrupted them in order to restore displaced ones. All three scrapped regulatory efforts the Court viewed as impermissibly disruptive of the balance of power that would have otherwise prevailed. They did so envisioning an electoral process in which there would be no unjustified windfalls, unearned advantages, or rules that otherwise unfairly favored particular constituencies. All three decisions, moreover, assumed that electoral process would exist but for the challenged regulations.

⁷⁰ *Harper*, 383 U.S. at 686 (Harlan, J., dissenting).

⁷¹ *Id.* at 669.

⁷² Sunstein, *supra* note 9, at 882.

⁷³ See generally Cheryl I. Harris, *In the Shadow of Plessy*, 7 U. PA. J. CONST. L. 867 (2005).

⁷⁴ See Jack M. Balkin, *The Roots of the Living Constitution*, 92 B.U. L. REV. 1129, 1152 (2012) (observing that while "the reapportionment cases had little precedent in judicial reasoning, they meshed well with the new role of federal judges as defenders of democracy as opposed to defenders of property rights and federalism").

CONCLUSION

There is plenty wrong with the electoral process today. We face daunting problems that we are unlikely to overcome anytime soon. And yet, the Constitution is not to blame for our predicament. Instead, a good deal of contemporary electoral dysfunction stems from the distinct perspective with which the Roberts Court has approached efforts to regulate the electoral process. This perspective turns out to be a familiar one. We have seen it before.