

The Roberts Court's Assault on Democracy

Lynn Adelman*

This article argues that economic and political developments in the last fifty years have in many respects undermined America's democratic institutions and that, instead of working to strengthen democracy, the Supreme Court over which Chief Justice Roberts presides, is substantially contributing to its erosion. The Court has done this in two ways, first by carrying on a sustained assault on the right of poor people and minorities to vote. The Court has virtually eviscerated the landmark Voting Rights Act, it has upheld strict voter identification laws that serve no purpose other than to make voting more difficult, and it has authorized states to purge thousands of people from the voting rolls. In addition, the Court has abdicated its responsibility to end the anti-democratic process of partisan gerrymandering. The second way in which the Court is weakening democracy is by reinforcing the enormous imbalance in wealth and political power that has developed in recent decades and that has contributed to undermining democracy. The Court has done this by consistently strengthening the economic and political power of corporations and wealthy individuals, as, for example, through its campaign finance decisions, and by reducing that of ordinary Americans as, for example, through its decisions involving labor unions, forced arbitration and the expansion of Medicaid.

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INTRODUCTION

By now, it is a truism that Chief Justice John Roberts' statement to the Senate Judiciary Committee that a Supreme Court justice's role is the passive one of a neutral baseball "umpire who [merely] calls the balls and strikes"¹ was a masterpiece of disingenuousness. Roberts' misleading testimony inevitably comes to mind when one considers the course of decision-making by the Court over which he presides. This is so because the Roberts Court has been anything but passive. Rather, the Court's hard right majority is actively participating in undermining American democracy. Indeed, the Roberts Court has contributed to insuring that the political system in the United States pays little attention to ordinary Americans and responds only to the wishes of a relatively small number of powerful corporations and individuals.

* Lynn Adelman is a United States District Court judge in the Eastern District of Wisconsin. Judge Adelman thanks Barbara Fritschel for her research and suggestions. He bears full responsibility for any errors.

¹ David G. Savage, *Roberts Sees Role as Judicial 'Umpire'*, L.A. TIMES (Sept. 13, 2005), <https://www.latimes.com/archives/la-xpm-2005-sep-13-na-roberts13-story.html> [<https://perma.cc/U59C-UC4Y>].

As Columbia Law School professor Tim Wu explains:

About 75 percent of Americans favor higher taxes for the ultrawealthy. The idea that federal law would guarantee paid maternity leave attracts 67 percent support. Eighty-three percent favor strong net neutrality rules for broadband, and more than 60 percent want stronger privacy laws. Seventy-one percent think we should be able to buy drugs imported from Canada, and 92 percent think that Medicare should negotiate for lower drug prices. The list goes on.²

Of course, one cannot blame the Roberts Court for the fact that, in numerous instances, the will of the majority is ignored. The fault for that state of affairs is primarily with Congress. But, it is also true that the decisions of the Roberts Court are contributing substantially to the fact that ordinary Americans have so little political power. In at least two critical respects, the Court's decisions are undermining the democratic republic that the American people, often led by subordinated groups, have fought for. And this is happening at a time when democratic institutions need strengthening.

First, the Court has decided a number of cases which, taken together, constitute a direct assault on the right of poor people and minorities to vote. For example, the Court has weakened the Voting Rights Act ("VRA"), a landmark civil rights law.³ In addition, it has upheld strict voter identification laws⁴ as well as statutes authorizing purges of thousands of voters from the voting rolls.⁵ Further, it has failed to rein in the anti-democratic practice of partisan gerrymandering.⁶ The second way in which the Court's decisions have undermined democracy is that they have unfailingly increased the economic and political power of corporations and wealthy individuals and reduced that of ordinary Americans and entities which represent them, like labor unions.⁷

In this Article, I explore the decisions of the Roberts Court in these areas in more detail and discuss why they are so harmful to democracy. In Section I, I provide some background information in order to situate the Roberts Court in an historical context. I talk about how in the last third of the twentieth century in response to a number of economic and political

² Tim Wu, Opinion, *The Oppression of the Supermajority*, N.Y. TIMES (Mar. 5. 2019), <https://www.nytimes.com/2019/03/05/opinion/oppression-majority.html> [<https://perma.cc/HJ7R-4YVC>].

³ See 52 U.S.C. § 10101 (1965); see *infra* notes 60–90 and accompanying text.

⁴ See *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008).

⁵ See *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833 (2018).

⁶ See *Benisek v. Lamone*, 138 S. Ct. 1942 (2018); see also *Gill v. Whitford*, 138 S. Ct. 1916 (2018).

⁷ See Michele Gilman, *A Court for the One Percent: How the Supreme Court Contributes to Economic Inequality*, 2 UTAH L. REV. 389 (2014); David L. Franklin, *What Kind of Business-Friendly Court? Explaining the Chamber of Commerce's Success at the Roberts Court*, 49 SANTA CLARA L. REV. 1019 (2009).

developments, including the egalitarian movements of the 1960s, corporations and wealthy conservative donors began to invest large sums of money in promoting conservative ideas. At the same time, a conservative legal movement emerged, and it provided the context in which all of the members of the Roberts Court's conservative majority came of age. I note that in conjunction with several other developments, the conservatives' aggressiveness has contributed to causing economic and political power to become increasingly concentrated at the top. As a result of this concentration, government policies have become less and less responsive to the needs of ordinary Americans. I point out that under these circumstances, it would be highly desirable to have a Supreme Court that could at least play some role in righting the ship as the Warren Court did in the 1950s and 1960s when it addressed such long standing deficiencies of American democracy as segregation⁸, malapportioned legislative districts⁹, and a brutally unfair criminal justice system.¹⁰ Rather than counteracting the anti-democratic trends in the country, however, the Roberts Court reinforces them. I also briefly discuss some of the decisions of the predecessors to the Roberts Court, the Courts presided over by Warren Burger (1969-86) and William Rehnquist (1986-2005) that foreshadowed the Roberts Court's approach.

In Section II, I discuss the Roberts Court's decisions undermining voting rights and in Section III its decisions enhancing the power of corporations and wealthy individuals and reducing that of ordinary Americans. In Section IV, I discuss in more detail how the disenfranchisement and economic inequality that the Court's decisions have intensified undermine democracy.

I. BACKGROUND

A government loses its character as a democracy when its leaders stop devoting their efforts to benefitting the public, including the large number of people who have little economic power, and instead serve the interests of a minority, the relatively few individuals and corporations who, through their financial and/or organizational support, play a key role in keeping the leaders in power. This is the direction in which the United States has moved in the last fifty years. As political scientists Paul Pierson and Jacob Hacker have shown, the United States has morphed from a society seeking a shared pros-

⁸ See *Brown v. Board of Education*, 347 U.S. 483 (1954) (ending segregation in public education); see also *Gayle v. Browder*, 352 U.S. 903 (1956) (ending segregation in public transportation); see also *Loving v. Virginia*, 388 U.S. 1, (1967) (allowing interracial marriages).

⁹ See *Baker v. Carr*, 369 U.S. 186 (1962); see also *Reynolds v. Sims*, 377 U.S. 533 (1964); see also *Maryland Comm. for Fair Representation v. Tawes*, 377 U.S. 656 (1964).

¹⁰ See *Miranda v. Arizona*, 384 U.S. 436 (1966) (requiring procedural safeguards to protect against self-incrimination); see also *Gideon v. Wainwright*, 372 U.S. 335 (1963) (asserting the right to appointed counsel in criminal cases); see also *Mapp v. Ohio*, 367 U.S. 643 (1961) (holding that Fourth Amendment protections apply to states).

perity that defined the decades following World War II into a country of hyper-concentrated rewards at the top.¹¹

The problem is twofold; runaway incomes at the top of the earnings scale and widespread income stagnation. Between 1973 and 2007, the top twenty percent of families increased their share of total income from 41.1% to 47.3%, while the bottom eighty percent lost an equivalent share.¹² And the problem is getting worse. In 2010, 93% of the additional income created went to the top one percent, and thirty-seven percent of these additional earnings went to just the top 0.01 percent, a teaspoon-size collection of about 15,000 households with average incomes of \$23.8 million.¹³

And the pattern has continued without interruption. Seventy-eight percent of Americans working full time live paycheck to paycheck,¹⁴ and the bottom half of families in the United States in terms of wealth own no wealth because debts cancel out whatever small assets they possess.¹⁵ Moreover, increased inequality has been accompanied by declining social mobility. Americans born to humble origins no longer rise to a higher level more easily than people living elsewhere.¹⁶ Further, political power has followed money to the top, and government has responded more and more to the small segment of the population that holds the economic power and less and less to the majority of the people in the country. The U.S. government once enacted policies such as Social Security that broadened prosperity but, with the notable exception of the Affordable Care Act, rarely does so any more. In fact, present government policies, particularly tax policies, exacerbate inequality.¹⁷ The majority of Americans watch as the game has been more and more tilted against them, their economic standing less secure and their chances of climbing the economic ladder diminished.

¹¹ JACOB S. HACKER & PAUL PIERSON, *WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS*, 15–19, (2010).

¹² Jeff Madrick, *American Incomes: Soaring or Static*, NATION, July 19, 2010, at 21.

¹³ Steve Rattner, Opinion, *The Rich Get Even Richer*, N.Y. TIMES (Mar. 25, 2012), <https://www.nytimes.com/2012/03/26/opinion/the-rich-get-even-richer.html> [<https://perma.cc/6JXX-N7FK>].

¹⁴ Zach Friedman, *78% Of Workers Live Paycheck To Paycheck*, FORBES (Jan. 11, 2019), <https://www.forbes.com/sites/zackfriedman/2019/01/11/live-paycheck-to-paycheck-government-shutdown/#5c9cfd4e4f10> [<https://perma.cc/27TT-CYG3>].

¹⁵ See HACKER & PIERSON, *supra* note 11, at 32–33.

¹⁶ See Jason DeParle, *Harder for Americans to Rise from Lower Rungs*, N.Y. TIMES (Jan. 4, 2012), <https://www.nytimes.com/2012/01/05/us/harder-for-americans-to-rise-from-lower-rungs.html> [<https://perma.cc/2A2S-2FAR>].

¹⁷ See, e.g., Timothy Noah, *Brooks Brothers Bolshevism*, NEW REPUBLIC, Oct. 6, 2011, at 2; Jason Bordoff & Jason Furman, *Progressive Tax Reform in the Era of Globalization: Building Consensus for More Broadly Shared Prosperity*, 2 HARV. L. & POL'Y REV. 327, 328 (2008). Compare Anne Mooney, *The Great Society and Health: Policies for Narrowing the Gaps in Health Status between the Poor and the Nonpoor*, 15 MED. CARE 611 (1977) with Max Ehrenfreund, *Republicans Threaten to Deny Poor People Medical Care if They Aren't Working*, WASH. POST (Mar. 18, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/03/18/republicans-threaten-to-deny-poor-people-medical-care-if-they-arent-working/?utm_term=.dacf04e68c1b [<https://perma.cc/ANN9-D9PQ>].

While it may be arbitrary to assign a date to the beginning of the shift toward the concentration of wealth, and political power, one could do worse than point to the year 1971. In that year, just two months before he was appointed to serve as a Supreme Court justice, Lewis Powell, then counsel to the U.S. Chamber of Commerce, wrote a now infamous memorandum to a leader of the Chamber arguing that the American economic system was under attack and that the Chamber and American corporations needed to respond by becoming much more politically aggressive.¹⁸ Reacting to the egalitarian legislation enacted in the 1960s, to decisions of the Warren Court, and to the social upheavals of the same decade, Powell argued that business had to organize and engage in coordinated political activity.¹⁹ He also asserted that the courts “may be the most important instrument for social, economic and political change” and that they “offered a vast area of opportunity for the Chamber.”²⁰

At about the same time, conservative activists began to create and fund right wing political and legal organizations and to advance an economic vision of the Constitution that sought to overturn the New Deal consensus.²¹ Conservatives raised large sums of money and fought legislation favorable to labor unions, working people, and the poor. They also developed an aggressive litigation strategy regarding a variety of constitutional and economic issues and sought to undermine previous Supreme Court decisions authorizing broad Congressional regulation of commerce and promoting equal citizenship.²²

Over the years, the success of the business groups, trade associations, and right wing advocacy groups in raising money was such that a large imbalance in wealth and organizational resources developed between conservatives who sought to influence government policy and their liberal counterparts.²³ The conservatives also had considerable success from a policy standpoint, and government became increasingly responsive to a relatively small number of individuals and corporations and increasingly unresponsive to the majority of Americans.²⁴

¹⁸ Memorandum from Lewis Powell to U.S. Chamber of Commerce (Aug. 23, 1971) <http://law2.wlu.edu/deptimages/PowellArchives/PowellMemorandumTypescript.pdf> [<https://perma.cc/C85T-HFFF>].

¹⁹ *Id.* at 11-12, 25-26.

²⁰ *Id.* at 26-27.

²¹ See HACKER & PIERSON, *supra* note 11, at 118-20.

²² See *id.* at 219-20.

²³ See Peter Francia et al., *Limousine Liberals and Corporate Conservatives: The Financial Constituencies of the Democratic and Republican Parties*, 86 SOC. SCI. Q. 761, 764-65 (2005); IAN VANDEWALKER, BRENNAN CTR. FOR JUSTICE, ELECTION SPENDING 2016: JUST THREE INTERESTS DOMINATE, SHADOW PARTIES CONTINUE TO RISE (Oct. 25, 2016), <https://www.brennancenter.org/publication/election-2016-spending-analysis-just-three-interests-dominate-shadow-parties> [<https://perma.cc/NB5W-DJNV>].

²⁴ See Francia et al., *supra* note 23, at 761; Davis Frum, *Crashing the Party: Why the GOP Must Modernize to Win*, 93 FOREIGN AFF. 37 (2014).

The Republican Party has been particularly afflicted by the concentration of wealth at the top.²⁵ The party's policy agenda is now determined by a small and unrepresentative number of individuals and corporations.²⁶ President Trump's behavior after being elected illustrates this. Although he ran as a populist and promised to promote policies that benefited ordinary people, upon taking office Trump almost entirely reversed course. He appointed mostly wealthy far-right Republicans and their supporters to his cabinet and to key positions in his administration and supported health care legislation drafted by conservative Republican legislators that, had it passed, would have been extremely harmful to millions of low and moderate income Americans.²⁷ Trump also supported a tax bill that provided big benefits to the country's largest corporations and wealthiest individuals and virtually nothing to the majority of American taxpayers.²⁸ Trump also promised to offer a major infrastructure program to provide well-paying jobs to American workers and modernize the country's transportation system. However, he has not followed through on this promise largely because it would require a considerable increase in domestic spending which influential Republicans oppose.²⁹

Because Congressional Republicans depend on a relatively small number of wealthy donors to stay in power, their major public policy goal is to do whatever makes such donors happy.³⁰ And Republican donors are mostly interested in tax cuts, fewer regulations and less spending on anything benefiting ordinary Americans.³¹ And Trump, who has few commitments to substantive policies of any sort, found it much easier to ally himself with Congressional Republicans than to make an effort to enact policies beneficial to the general public.³² To follow through on his populist campaign promises would have required him to engage in the difficult and unpleasant work of bucking his own party. Thus, while Trump's temperament is that of an auto-

²⁵ See HACKER & PIERSON, *supra* note 11, at 163–64.

²⁶ See VANDEWALKER, *supra* note 23, at 1–2 (noting that the Koch network provided more money in ten key 2016 Senate races than the Republican Party); see also Francia et al., *supra* note 23; see also Frum, *supra* note 24; see JANE MAYER, *DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT*, 273–78 (2016).

²⁷ Jack M. Balkin, *Why Trump Campaigned like a Populist and Governs Like a Sellout*, BALKINIZATION (May 27, 2017), <https://balkin.blogspot.com/search?q=trump> [<https://perma.cc/76EW-FN7D>].

²⁸ Jonathan Allen, *Passing the GOP Tax Bill is Hard. Selling it to Voters may be Harder*, NBC NEWS (Dec. 19, 2017), <https://www.nbcnews.com/politics/elections/passing-gop-tax-bill-hard-selling-it-voters-may-be-n830836> [<https://perma.cc/56FF-8WEY>].

²⁹ Kathryn A. Wolfe & Lauren Gardner, *Conservatives vs. Trump's Infrastructure Plan*, POLITICO (Nov. 11, 2016), <https://www.politico.com/story/2016/11/conservatives-vs-trumps-infrastructure-plan-231221> [<https://perma.cc/JG9S-P2HU>].

³⁰ See Theda Skocpol, *Voice and Inequality: The Transformation of American Civic Democracy*, 2 PERSP. ON POL. 3, 11–12 (2004); MAYER, *supra* note 26, at 273–78 (noting the Koch brothers influence over environmental policies in the 112th Congress); Cf. VANDEWALKER, *supra* note 23.

³¹ See HACKER & PIERSON, *supra* note 11, at 200–22.

³² See Balkin, *supra* note 27.

crat, he is disinclined to buck the wealthy individuals and corporations who control his party.

For some of the same reasons that it has become more focused on serving the wealthy, the Republican Party has also become more partisan, more ideological and more uncompromising.³³ This is particularly true regarding matters relating to the judiciary. A good example of this was the response to President Obama's nomination of Merrick Garland to the Supreme Court. Notwithstanding that Garland was a moderate nominated well in advance of the next presidential election, Republicans used their majority in the Senate to prevent consideration of his nomination.³⁴ The zealous partisanship the Republicans displayed in connection with the Garland nomination, as well as judicial appointments generally reminds one of nothing so much as the "fireaters," those fervent defenders of slavery who pushed the South into the Civil War.³⁵

Under these circumstances, it would be beneficial if the Supreme Court were interested in doing what it could to counteract the anti-democratic currents which presently afflict the country. As mentioned, in the 1950's and 60's, when gross inequalities and injustices became so stark that they could no longer be ignored, the Supreme Court rendered decisions that attempted to address some of them.³⁶ These included such decisions as *Brown v. Board of Education*,³⁷ which attempted to desegregate public education, *Baker v. Carr*,³⁸ which attempted to equalize the political power of citizens residing in different communities and *Gideon v. Wainwright*,³⁹ which attempted to reduce the importance of a criminal defendant's financial resources by requiring that counsel be provided to defendants facing serious criminal charges.

Unfortunately, the Roberts Court does not play a comparable role. As the Republican Party has become more conservative, so too have the Supreme Court justices appointed by Republican presidents.⁴⁰ For the last fifty years, the Court has been controlled by Republican appointees and as it has moved through the Burger, Rehnquist, and Roberts chief justiceships it has become increasingly right wing.⁴¹ Rather than attempting to counteract the

³³ Matt Grossmann & David A. Hopkins, *Ideological Republicans and Group Interest Democrats: The Asymmetry of American Party Politics*, 13 PERSP. ON POL. 119, 120 (2015).

³⁴ See Cristian Farias, *Merrick Garland's Supreme Court Nomination Just Died with the Old Congress*, HUFFINGTON POST (Jan. 3, 2017), https://www.huffingtonpost.com/entry/merrick-garland-supreme-court-nomination-dead_us_586be633e4b0de3a08f9a8f2 [https://perma.cc/M3EF-ET7V].

³⁵ See David S. Heidler & Jeanne T. Heidler, *The Fire-Eaters*, ESSENTIAL CIVIL WAR CURRICULUM, <http://www.essentialcivilwarcurriculum.com/the-fire-eaters.html> [https://perma.cc/9P9V-N2QV].

³⁶ See *supra* notes 8–10 and accompanying text.

³⁷ 347 U.S. 483 (1954).

³⁸ 369 U.S. 186 (1962).

³⁹ 372 U.S. 335 (1963).

⁴⁰ See Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into A Partisan Court*, 2016 SUP. CT. REV. 301, 305–06 (2014).

⁴¹ Alvin Chang, *Brett Kavanaugh and the Supreme Court's Drastic Shift to the Right, Cartoonsplained*, VOX (Sept. 14, 2018), <https://www.vox.com/policy-and-politics/2018/7/9/>

present anti-democratic trends, the Roberts Court exacerbates them.⁴² Before discussing specific Roberts Court decisions, however, I want to mention briefly several Burger and Rehnquist Court decisions that presaged them.

I previously noted that two types of decisions have played a significant role in making the American political system less democratic. The first type involves cases that constitute relatively direct assaults on democracy such as cases that affect voting rights. Probably the most prominent example of a case of this type is *Bush v. Gore*,⁴³ a 2000 decision of the Rehnquist Court in which the Court's 5-4 conservative majority intervened in the 2000 presidential election, ordered a halt to the counting of votes in Florida and awarded the presidency to the Republican candidate, George W. Bush. Legal scholars are virtually unanimously in agreement that there was no legal basis for the Court's action. The decision appeared to most observers to be entirely political.⁴⁴ The Court itself reinforced this impression when it said that the holding in the case should not be treated as a precedent.⁴⁵ The Court's termination of the recount of votes in Florida and its award of the Presidency to its preferred candidate demonstrated an enormous disrespect for voters and for the democratic process. As we will see, many of the Roberts Court's decisions involving voting rights demonstrate a similar disrespect.⁴⁶ It is worth noting that then attorney John Roberts, now Chief Justice, played a significant, if little known, role in assisting the Bush forces.⁴⁷

The second type of decision that has contributed to weakening American democracy involves cases that are not directly political like voting rights cases, but which contribute to economic inequality and make it harder for poor and working people to improve their economic circumstances. These cases have a strong impact on democracy because, as I will discuss, the viabil-

17537808/supreme-court-brett-kavanaugh-right-cartoon [https://perma.cc/G88L-BNA2]; see also Paul Butler, *The Rightwing Takeover of the US Court System will Transform America*, GUARDIAN (Dec. 12, 2017), <https://www.theguardian.com/us-news/commentsfree/2017/dec/12/donald-trump-right-wing-takeover-court-system> [https://perma.cc/P8TE-HFMU].

⁴² Mohamed A. Faizer, *Reinforced Polarization: How the Roberts Court's Recent Decision to Invalidate the Voting Rights Act's Coverage Formula Will Exacerbate the Divisions That Bedevil U.S. Society*, 45 CUMB. L. REV. 303 (2014).

⁴³ 531 U.S. 98 (2000).

⁴⁴ See Richard L. Hasen, *A Critical Guide to Bush v. Gore Scholarship*, 7 ANN. REV. POL. SCI. 297 (2004) (noting several articles and their criticisms); Peter Berkowitz & Benjamin Wittes, *The Professors and Bush v. Gore*, 25 WILSON Q., 76 (2001) (noting that, on January 13, 2001, 554 law professors took out an ad in the New York Times stating the justices acted as "political proponents for candidate Bush, not as judges").

⁴⁵ See *Bush*, 531 U.S. at 109 ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.").

⁴⁶ See *infra* notes 60-90 and accompanying text.

⁴⁷ See Ari Berman, *How the 2000 Election in Florida Led to a New Wave of Voter Disenfranchisement*, NATION (Aug. 24, 2015), <https://www.thenation.com/article/how-the-2000-election-in-florida-led-to-a-new-wave-of-voter-disenfranchisement/> [https://perma.cc/SQB4-BBZZ].

ity of American democracy is highly dependent on a popular sense of shared burdens and shared prosperity.⁴⁸ One of the most important decisions of this type was the Burger Court's 1973 decision in *San Antonio Independent School District v. Rodriguez* in which the Court's 5-4 conservative majority upheld a school financing system in Texas in which for every \$1,000 that the state sent wealthy districts, it sent only \$370 to poor districts.⁴⁹ The Court held squarely that students in public schools had no constitutional right to an equal public education.⁵⁰ The extraordinarily pinched and narrow understanding of the concept of equality displayed by the Court in *Rodriguez* later became a hallmark of the jurisprudence of the Roberts Court.⁵¹

In an eloquent dissent, Justice Thurgood Marshall argued that the government had to treat all citizens equally and questioned how the judiciary in a democracy that was supposedly committed to equality could uphold the Texas system.⁵² Marshall noted that the discriminatory expenditures at issue seriously impaired the ability of the poor to participate effectively in society and emphasized the close connection between education and political participation which is at the heart of citizenship.⁵³

It is also important to mention the 1978 Burger Court decision in *First National Bank of Boston v. Bellotti*,⁵⁴ which dealt with a Massachusetts statute prohibiting corporations from spending money to influence the outcome of state referenda that did not directly affect their businesses. A number of companies and conservative legal organizations challenged the law and the question presented to the Supreme Court was whether corporations should have the same First Amendment rights as individuals.⁵⁵ In a 5-4 decision, the Supreme Court struck down the law determining that the identity of the speaker did not matter.⁵⁶ The dissent pointed out that a corporation was an entirely artificial creation and that First Amendment rights were not necessary for corporations to serve the purposes for which states created them.⁵⁷ But, the Court's decision set a precedent that the Roberts Court would later use when, in *Citizens United v. FEC*, it held that corporations could make expenditures on behalf of political candidates.⁵⁸

⁴⁸ *Infra*, pp. 35-39.

⁴⁹ 411 U.S. 1 (1973).

⁵⁰ *Id.* at 33-35.

⁵¹ Stephen E. Gottlieb, *The Roberts Court's Hostility to the Equality of Minorities*, 41 HUM. RTS. 16 (July 2014).

⁵² See *San Antonio*, 411 U.S. at 89 (Marshall, J., dissenting).

⁵³ *Id.* at 111-13 (Marshall, J., dissenting).

⁵⁴ 435 U.S. 765 (1976).

⁵⁵ *Id.* at 775-76.

⁵⁶ *Id.* at 777-78.

⁵⁷ *Id.* at 809-10 (White, J., dissenting).

⁵⁸ 558 U.S. 310, 342-43 (2010).

II. THE COURT'S ATTACK ON THE VOTING RIGHTS OF POOR PEOPLE AND MINORITIES

I turn now to the Roberts Court's handling of cases involving voting rights. I first note that a successful and self-confident democracy will do everything it can to encourage people to vote. When a legislative body enacts policies designed to make it harder for people to vote or to discourage them from voting, it does so because it does not want them to vote.⁵⁹ It prefers that government be controlled by a small segment of the population. It mistrusts and fears democracy. This is what Republican legislatures have done for at least the last decade. They have ratcheted up identification requirements, conducted scare campaigns against immigrant voters, rolled back early voting and absentee voting, and manipulated the opening hours and number of polling places in Democratic cities.⁶⁰ And instead of attempting to thwart these types of anti-democratic initiatives, the Roberts Court has aided and abetted them. Like the Court in *Bush v. Gore*, the Roberts Court has shown a disrespect for voters and for the democratic process. The cumulative effect of the Court's voting rights jurisprudence has been to make it much more difficult for poor people and minorities to exercise their right to vote.

Possibly the Court's most disturbing attack on voting rights can be found in two decisions which, taken together, come close to totally eviscerating the Voting Rights Act (VRA) and dismantling all federal protection of minority voting rights.⁶¹ The VRA is a landmark statute designed to eliminate obstacles to minority voting.⁶² It was enacted in 1965 as part of a passel of important civil rights laws, and it has long been regarded as the most important, or one of the most important, civil rights laws ever enacted.⁶³ The law represented an important step toward fulfilling the promise made approximately 100 years earlier in the Fifteenth Amendment that no citizen

⁵⁹ See Jay Michaelson, *Republicans Have a Secret Weapon in the Midterms: Voter Suppression*, DAILY BEAST (Oct. 12, 2018, 4:43 AM), <https://www.thedailybeast.com/republicans-have-a-secret-weapon-in-the-midterms-voter-suppression> [<https://perma.cc/42TC-KBDC>]; Vann R. Newkirk II, *Voter Suppression is Warping Democracy*, ATLANTIC (July 17, 2018), <https://www.theatlantic.com/politics/archive/2018/07/poll-prri-voter-suppression/565355/> [<https://perma.cc/3DJ7-TBNS>].

⁶⁰ Michaelson, *supra* note 59.

⁶¹ Richard L. Hasen, *Suppression of Minority Voting Rights is About to Get Way Worse*, SLATE, (June 25, 2018, 2:20 PM) <https://slate.com/news-and-politics/2018/06/the-abbott-v-perez-case-echoes-shelby-county-v-holder-as-a-further-death-blow-for-the-voting-rights-act.html> [<https://perma.cc/T9YV-ZXGJ>]; Faizer, *supra* note 42 (discussing impact of *Shelby County*).

⁶² *The Voting Rights Act of 1965 – Overview*, FINDLAW, <https://civilrights.findlaw.com/other-constitutional-rights/the-voting-rights-act-of-1965-overview.html> [<https://perma.cc/66WY-9ZQA>].

⁶³ Faizer, *supra* note 42, at 304; *The Voting Rights Act*, ANTI-DEFAMATION LEAGUE (July 27, 2015), <https://www.adl.org/news/article/the-voting-rights-act> [<https://perma.cc/GF7U-TC9V>].

would be denied the right to vote “on account of race, color, or previous condition of servitude.”⁶⁴

The decisions in question were both decided by 5-4 margins with the five conservatives in the majority. The first of the two cases was *Shelby County v. Holder*,⁶⁵ decided in 2013, and the second was *Abbott v. Perez*,⁶⁶ decided in 2018. In *Shelby County*, in an opinion written by Chief Justice Roberts, the Court struck down the formula provided in the VRA for determining whether states and municipalities had to get approval (preclearance) for any change in their voting rules to ensure that the change was not racially discriminatory on states' rights grounds.⁶⁷ The preclearance provision required nine states, and municipalities in six others, to prove to the U.S. Attorney General or a three-judge court that any change in their voting rules had neither the purpose nor effect of discriminating on the basis of race or language.⁶⁸ *Shelby County* turned on the question of whether African-American voters in the South continued to face substantial discrimination. The conservative majority ignored the extensive legislative record compiled by Congress establishing the persistence of voting discrimination in the covered jurisdictions.⁶⁹ It stated that Congress's findings were out of date and that to continue to require preclearance would violate the equal dignity of states.⁷⁰ Justice Ginsburg wrote a powerful dissent, arguing that “throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”⁷¹

As it turned out, Justice Ginsburg's concerns were entirely justified. Since the demise of the VRA's formula, states and municipalities formerly covered by the law have implemented numerous discriminatory voting procedures.⁷² Within hours of the Supreme Court's decision, Texas announced that its previously blocked discriminatory voter-identification law would immediately go into effect.⁷³ Local governments in Texas also made many discriminatory changes. One city eliminated two city council seats in

⁶⁴ U.S. CONST. amend. XV, § 1.

⁶⁵ 570 U.S. 529 (2013).

⁶⁶ 138 S. Ct. 2305 (2018).

⁶⁷ 570 U.S. at 544.

⁶⁸ Voting Rights Act of 1965, 42 U.S.C.A. § 1973b(b), *invalidated* by *Shelby County v. Holder*, 570 U.S. 529 (2013).

⁶⁹ 570 U.S. at 553–54.

⁷⁰ *Id.* at 551.

⁷¹ *Id.* at 590 (Ginsburg, J., dissenting).

⁷² See TOMAS LOPEZ, BRENNAN CTR. FOR JUSTICE, *SHELBY COUNTY: One Year Later* (2014), <http://www.brennancenter.org/analysis/shelby-county-one-year-later> [https://perma.cc/58BH-ELQE].

⁷³ Alexa Ura, *Voting Rights Battle in Pasadena Could Have Texas-Wide Legal Ramifications*, THE TEXAS TRIBUNE (July 11, 2017), <https://www.texastribune.org/2017/07/11/voting-rights-battle-pasadena-could-come-wide-legal-ramifications/> [https://perma.cc/M388-ADHD]; see also Ed Pilkington, *Texas Rushes Ahead with Voter ID Law After Supreme Court Decision*, GUARDIAN (June 25, 2013, 3:32 PM), <https://www.theguardian.com/world/2013/jun/25/texas-voter-id-supreme-court-decision> [https://perma.cc/C2YA-ARUJ].

predominantly Hispanic districts and replaced them with at-large seats in majority-white districts.⁷⁴ North Carolina also quickly got in on the act, passing an omnibus law including a strict photo-ID requirement, elimination of same-day voter registration, a seven-day decrease in the early voting period, and invalidation of provisional ballots cast at the wrong polling station.⁷⁵ North Carolina municipalities quickly followed suit, as did other Southern states, including Florida, Georgia, Mississippi, South Carolina, Virginia, Arizona, Arkansas, and Alabama as well as numerous local governments in these states.⁷⁶ *Shelby County* opened the floodgates, enabling states and local governments with the most egregious histories of discriminating against the voting rights of minorities to start discriminating all over again.

It was utterly predictable that, freed from the requirement of preclearance, Southern states and municipalities would once again enact anti-democratic laws designed to suppress or devalue minority votes. The Court had only to pay attention to the evidence compiled by Congress as well as the long-standing connection between federalism and race, especially in the South. It would have been obvious to any reasonably well-informed observer that striking down the preclearance rule would do great harm to the voting rights of African Americans in the South and to democracy itself.⁷⁷ Nevertheless, the Court forged ahead, not only exalting the notion of state sovereignty but also reviving the equal dignity of states argument that arose out of the long-disgraced *Dred Scott* decision that it had explicitly rejected in South Carolina's 1966 challenge to the VRA.⁷⁸ Americans have been fighting since the Civil War and Reconstruction about the structural implications of the events of 1861–1870 for the sovereignty, dignity, and equality of the states—especially the Southern states.⁷⁹ The implications of adopting the “equal dignity” of the states of the former confederacy as a constraint on Congress's Reconstruction Power are profoundly troubling.

Roberts' assurances that other sections of the VRA would help minorities turned out to be false. This became clear when the Court decided *Abbott*, in which the question was whether the Texas legislature had racially gerrymandered the state's congressional and legislative districts so as to dilute the voting power of African-American and Hispanic voters.⁸⁰ The lower court engaged in extensive fact-finding and determined that the state had inten-

⁷⁴ Voter Information Verification Act, Act of July 26, 2013, ch. 381, 2013 N.C. Sess. Laws 1505. See also Michael C. Herron & Daniel A. Smith, *Race, Shelby County and the Voter Information Act in North Carolina*, 43 FLA. ST. U. L. REV. 465 (2015).

⁷⁵ See *id.*

⁷⁶ See *id.*

⁷⁷ See *id.*; MYRNA PEREZ & VISHAL AGRAHARKAR BRENNAN CTR. FOR JUSTICE, IF SECTION 5 FALLS: NEW VOTING IMPLICATIONS (2013), <http://www.brennancenter.org/publication/if-section-5-falls-new-voting-implications> [<https://perma.cc/3FVN-F3DK>].

⁷⁸ *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

⁷⁹ Joseph Fishkin, *The Dignity of the South*, 123 YALE L. J. 175, 179 (2013).

⁸⁰ *Abbott v. Perez*, 138 S. Ct. 2305, 2313 (2018).

tionally discriminated based on race, a conclusion that set the stage for returning Texas to federal supervision under another section of the VRA.⁸¹

The Roberts Court's reversal of the district court was a classic example of judicial overreaching. First, deviating from its usual procedure, the Court chose to review the lower court's decision even though the lower court had not actually entered an order providing injunctive relief.⁸² Secondly, the Supreme Court ordinarily reviews factual findings of district courts under a deferential "clear error" standard.⁸³ In *Abbott*, however, the Court declined to apply this standard ostensibly on the ground that the district court had mistakenly placed the burden of proof on Texas to show a lack of discrimination, a conclusion with little support in the record.⁸⁴ Even assuming that this was true, the normal procedure would have been for the Court to remand the case to the lower court so that it could apply the correct burden of proof.⁸⁵ The Court, however, chose to proceed to the merits itself.

In addressing the merits, the Court also deviated from normal judicial procedures. It ignored the voluminous evidence compiled by the lower court that Texas had engaged in intentional racial discrimination.⁸⁶ Further, it directed lower courts determining whether a state had engaged in racial discrimination to presume that the state legislature acted in good faith.⁸⁷ Thus, even when the evidence makes clear that in drawing legislative districts white legislators empower white voters at the expense of racial minorities, they are entitled to a presumption of innocence.⁸⁸ The upshot of *Abbott* is that plaintiffs will face an almost impossible task in proving that states engaged in intentional racial discrimination with respect to voting rights.⁸⁹ Justice Sotomayor wrote a strong dissent noting that both the Constitution's Equal Protection Clause and the VRA promise all citizens, regardless of race, equal opportunity to participate in the political process.⁹⁰ "The Court today does great damage to that right of equal opportunity," she wrote. "Not because it denies the existence of that right, but because it refuses its enforcement."⁹¹

Unfortunately, we have only begun to address the Roberts Court's decisions assaulting the voting rights of poor people and minorities. Consider the Court's 2018 5-4 decision in *Husted v. A. Philip Randolph Institute*,

⁸¹ *Perez v. Abbott*, 267 F. Supp. 3d 750, 758-69 (W.D. Tex. 2017).

⁸² *Abbott*, 138 S. Ct. at 2319.

⁸³ *Id.* at 2326 (citing *Easley v. Cromartie*, 532 U.S. 234, 242 (2001)).

⁸⁴ *Id.*

⁸⁵ *Id.* at 2349 n.14 (Sotomayor, J., dissenting).

⁸⁶ *Id.* at 2337-2339 (Sotomayor, J., dissenting); see also *Perez v. Abbott*, 274 F. Supp. 3d 624 (W.D. Tex. 2017); *Perez v. Abbott*, 267 F. Supp. 3d 750 (W.D. Tex. 2017).

⁸⁷ *Abbott*, 138 S. Ct. at 2324.

⁸⁸ *Id.*

⁸⁹ Lisa Marshall ManHein & Elixabeth G. Porter, *The Elephant in the Room: Intentional Voter Suppression*, 2018 SUP. CT. REV. 213, 248-49; note 174 (noting the challenges of proof in intent-based cases is growing, especially after cases like *Abbott* which applies a presumption of innocence on legislative actions, even if here has been evidence of previous discrimination).

⁹⁰ *Id.* at 2360 (Sotomayor, J., dissenting).

⁹¹ *Id.*

which involved a massive Ohio voter purge, purportedly carried out for the purpose of protecting the integrity of the voting process.⁹² Ohio uses a voter's failure to vote regularly as evidence that the voter has moved and thus should be eliminated from the voter list.⁹³ The Court declined to find that Ohio's purge of thousands of voters from the voting rolls violated the National Voter Registration Act ("NVRA"),⁹⁴ which bars states from removing a registrant "by reason of the person's failure to vote."⁹⁵ According to the Court, Ohio's purge passed muster because the purge was not triggered by the failure to vote, which was merely used as evidence that the person had moved.⁹⁶

Ohio, the most aggressive state in the union with respect to purging voters⁹⁷, initially sends notices to registrants who do not vote for two years.⁹⁸ If the registrant does not respond to the notice and does not vote for four more years, she is presumed to have moved and is purged from the voting rolls.⁹⁹ The problem with this procedure is that many people do not vote, do not respond to the notice, but also have not moved.¹⁰⁰ And if they do not vote regularly, Ohio disenfranchises them. Further, they are not informed that they have been disenfranchised until they show up to vote and are told they are not registered. Voters of all stripes in Ohio are affected, but the policy appears to be helping Republicans in the state's largest metropolitan areas, according to a Reuters survey of voter lists. In the state's three largest counties that include Cleveland, Cincinnati, and Columbus, voters have been struck from the rolls in Democratic-leaning neighborhoods at roughly twice the rate as in Republican neighborhoods.¹⁰¹ A 2016 analysis found that Ohio removed at least 144,000 people from the rolls in African-American neighborhoods in Cleveland, Cincinnati, and Columbus.¹⁰² Ohio is by no

⁹² 138 S. Ct. 1833 (2018).

⁹³ Ohio Rev. Code Ann. § 3503.21(A)(7) (West).

⁹⁴ *Husted*, 138 S. Ct. at 1848.

⁹⁵ 52 U.S.C. § 20507(b)(2) (2012).

⁹⁶ *Husted*, 138 S. Ct. at 1843.

⁹⁷ Adam Liptak, *Supreme Court Upholds Ohio's Purge of Voting Polls*, N.Y. TIMES, June 11, 2018, <https://www.nytimes.com/2018/06/11/us/politics/supreme-court-upholds-ohios-purge-of-voting-rolls.html> [<https://perma.cc/ZVT3-F3LY>] (noting that Ohio's aggressive procedures allow for the fastest removal from voter polls by failing to vote in one federal election cycle).

⁹⁸ See *A. Phillip Randolph Inst. v. Husted*, 838 F.3d 699, 702–703 (6th Cir. 2016), *rev'd*, 138 S. Ct. 1833 (2017) (describing Ohio's "Supplemental Process" for voter removal).

⁹⁹ Ohio Rev. Code Ann. § 3503.21(A)(7) (West).

¹⁰⁰ *Husted*, 138 S. Ct. at 1856–57 (Breyer, J., dissenting) (noting that of the 1.5 million registered voters sent confirmation notices, more than one million were not returned; and that of the returned cards, 60,000 cards indicated the voter had moved and 235,000 cards indicated they had not moved).

¹⁰¹ Andy Sullivan & Grant Smith, *Use it or Lose it: Occasional Ohio Voters may be Shut Out in November*, REUTERS (June 2, 2016, 7:05 AM), <https://www.reuters.com/article/us-usa-vot-ingrights-ohio-insight-idUSKCN0YO19D> [<https://perma.cc/BFX8-3YB5>].

¹⁰² *Id.*

means alone. Purges are on the rise across the country and are a growing threat to the right to vote.¹⁰³

Justice Breyer's dissent clearly explains that the Court's refusal to recognize that the purge process is not triggered by the possibility that the registrant has moved but by her failure to vote which, of course, is precisely what the federal statute prohibits.¹⁰⁴ Once again, it fell to Justice Sotomayor to say out loud what should have been obvious to everyone: that the Court's conservative majority was driven by a barely concealed ideological agenda and that its reading of the law "entirely ignores the history of voter suppression against which the NVRA was enacted and upholds a program that appears to further the very disenfranchisement of minority and low-income voters that Congress set out to eradicate."¹⁰⁵ She also explains how such voters are purged because of the reality of their lives, including "language-access problems, mail delivery issues, inflexible work schedules, and transportation issues."¹⁰⁶

Another of the Roberts Court's decisions assaulting the voting rights of the poor and minorities is *Crawford v. Marion County Election Board*, a 2008 case in which the Court upheld an Indiana statute requiring voters to present official photo identification cards in order to vote.¹⁰⁷ Republican-run states have increasingly enacted such laws arguing that they are necessary to prevent vote fraud.¹⁰⁸ This justification, however, is a sham. The only type of fraud that voter ID laws prevent is voter impersonation fraud, where a person shows up at the polls pretending to be someone else—a type of fraud that almost never occurs.¹⁰⁹ And for good reason. No sane person would stand in line at a polling place and risk five years in prison and a \$10,000 fine in order to cast one vote, which would almost certainly have no effect on an election.¹¹⁰

What is not a sham, however, is that, for many poor people and minorities, obtaining an official voter ID card is not easy.¹¹¹ Many eligible voters live far from ID issuing offices and do not have access to a car or other

¹⁰³ JONATHAN BRATER ET AL., BRENNAN CTR. FOR JUSTICE, PURGES: A GROWING THREAT TO THE RIGHT TO VOTE 1 (2018), https://www.brennancenter.org/sites/default/files/publications/Purges_GrowA>ing_Threat_2018.pdf [<https://perma.cc/H7KL-QJ6R>].

¹⁰⁴ *Husted*, 138 S. Ct. at 1858 (2018) (Breyer, J., dissenting).

¹⁰⁵ *Id.* at 1865 (Sotomayor, J., dissenting).

¹⁰⁶ *Id.* at 1864 (Sotomayor, J., dissenting).

¹⁰⁷ 553 U.S. 181 (2008).

¹⁰⁸ Reid Wilson, *GOP Platform Calls for Tough Voter ID Laws*, HILL (July 19, 2016, 10:20 AM), <https://thehill.com/blogs/ballot-box/288302-gop-platform-calls-for-tough-voter-id-laws> [<https://perma.cc/V59S-AWDS>].

¹⁰⁹ Justin Levitt, *A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents Out of One Billion Ballots Cast*, WASH. POST (Aug. 6, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/?noredirect=on&utm_term=.8d270636f9b2 [<https://perma.cc/H9Y9-8NJ6>].

¹¹⁰ 52 U.S.C. §10307(c) (2012).

¹¹¹ *Frank v. Walker*, 17 F. Supp. 3d 837, 875–76 (E.D. Wis. 2014).

transportation options.¹¹² Moreover, such offices are often open only on a part-time basis.¹¹³ Beyond the challenge of merely getting to an office, millions of these voters have trouble paying the fees that come with acquiring IDs, because they are poor.¹¹⁴ Voter ID laws are like poll taxes of the type used in the Jim Crow era in that they force people who do not have drivers licenses to obtain IDs for the sole purpose of voting.¹¹⁵ Thus, they discourage poor people and minorities from participating in the political process. Justice Souter's dissent in *Crawford* explained clearly why the Roberts Court's decision to uphold the Indiana statute was a mistake.¹¹⁶ He pointed out that the statute threatened to impose non-trivial burdens on the voting rights of tens of thousands of people and that a significant percentage of them would be deterred from voting. He then went on to explain that the state may not constitutionally burden the right to vote without making a particular factual justification and that the state had failed to make such a showing.¹¹⁷

Finally, we turn to the Court's very recent decision in *Rucho v. Common Cause*¹¹⁸ which raised the question of whether a state legislature could constitutionally draw legislative districts to dilute the value of the minority party's votes. This practice, known as partisan gerrymandering, is a cancer on American democracy.¹¹⁹ It enables legislators to entrench the governing party, in Justice Kagan's words, "against voters' preferences."¹²⁰ The cases before the Court in *Rucho*, as well as other cases, made it clear to the Court that legislatures of both parties will go to extreme lengths to preserve and expand the power of their party and to subordinate voters of the opposing party.¹²¹ Computer technology and sophisticated data enable legislators to pick the voters who they want to represent rather than, as democracy re-

¹¹² KEESHA GASKINS & SUNDEEP IYER, BRENNAN CTR. FOR JUSTICE, THE CHALLENGE OF OBTAINING VOTER IDENTIFICATION (2018) at 3–4 (estimate of voters living more than 10 miles from ID issuing office and estimate of those who do not have cars), https://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Challenge_of_Obtaining_Voter_ID.pdf [<https://perma.cc/QJR5-G443>].

¹¹³ *Id.* at 6 (noting that in Wisconsin, Alabama and Mississippi, less than half of the ID issuing offices are open for five days a week). *Id.* at 870–77.

¹¹⁴ See Sari Horwitz, *Getting a Photo ID so You Can Vote is Easy. Unless You're Poor, Black, Latino or Elderly*, WASH. POST (May 23, 2016), https://www.washingtonpost.com/politics/courts_law/getting-a-photo-id-so-you-can-vote-is-easy-unless-youre-poor-black-latino-or-elderly/2016/05/23/8d5474ec-20f0-11e6-8690-f14ca9de2972_story.html?utm_term=.8cba8926506c [<https://perma.cc/Z5NM-JKNF>]; see also GASKINS & IYER, *supra* note 112, at 14–15 (noting costs of supporting documents needed to get "free" IDs).

¹¹⁵ *Id.*

¹¹⁶ See *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 209 (2008) (Souter, J., dissenting).

¹¹⁷ *Id.* at 222–24 (Souter, J., dissenting).

¹¹⁸ *Rucho v. Common Cause*, No. 18-422, (U.S. June 27, 2019).

¹¹⁹ *Benisek v. Lamone*, 348 F. Supp. 3d 493, 525 (D. Md. 2018) (Bredar, C.J., concurring).

¹²⁰ *Rucho v. Common Cause*, No. 18-422, at 1 (U.S. June 27, 2019) (Kagan, J., dissenting).

¹²¹ *Id.* at 7–11 (majority opinion).

quires, allowing voters to choose the representatives who they think will best represent them.

Nevertheless, in yet another 5-4 decision written by the Chief Justice, the conservative majority on the Roberts Court held that partisan gerrymandering presented political questions that were beyond the reach of the federal courts.¹²² The majority's rationale for reaching this result was that the Court could not find a "discernible and manageable standard" for deciding when a gerrymander was so partisan as to be unconstitutional.¹²³ Justice Kagan's dissenting opinion, however, made clear how weak and unsatisfactory the majority's justification was:

But in throwing up its hands, the majority misses something under its nose: what it says can't be done, has been done. Over the past several years, federal courts across the country – including, but not exclusively, in the decisions below – have largely converged on a standard for adjudicating partisan gerrymandering claims. . .¹²⁴

The dissent then proceeded to explain the standard that the lower courts had established. Once again, we see the Roberts Court's conservative majority relying on a flimsy and untenable justification for a decision that appears to be based on little more than its Darwinian survival of the fittest ideology.

Most significantly, the decision is profoundly anti-democracy. As Kagan's dissent put it:

So the only way to understand the majority's opinion is as follows: In the face of grievous harm to democratic governance and flagrant infringements on individuals' rights – in the face of escalating partisan manipulation whose compatibility with this Nation's values and law no one defends – the majority declines to provide any remedy. For the first time in this nation's history, the majority declares that it can do nothing about an acknowledged constitutional violation. . .¹²⁵

Thus, the Roberts Court's voting decisions have made it much easier for state legislatures to prevent or discourage poor people and minorities from voting. Further, they have made it harder for plaintiffs alleging racial gerrymandering to prove their case. Finally, the Court has refused to adjudicate claims of partisan gerrymandering. In these ways, the Court has considerably undermined American democracy.

¹²² *Id.* at 30.

¹²³ *Id.* at 20.

¹²⁴ *Id.* at 15 (Kagan, J. dissenting).

¹²⁵ *Id.* at 13–14.

III. THE ROBERTS COURT'S SYSTEMATIC ENHANCEMENT OF THE POWER OF CORPORATIONS AND REDUCTION OF THAT OF ORDINARY AMERICANS

Governmental bodies can undermine democracy in many ways other than by restricting voting rights. If they prefer that government be run by the rich and powerful instead of by ordinary citizens, they can establish policies that bring that about. The Roberts Court's decisions constitute such a policy in that they consistently augment the power of corporations and the wealthy and reduce that of ordinary Americans. Like the Court's voting rights decisions, they undermine efforts by legislators, judges and activists to strengthen American democracy.

Probably the best place to begin discussing this aspect of the Court's jurisprudence is its campaign finance decisions. This is because the campaign finance rules that a government adopts will go a long way in determining who gets elected and what policies are adopted. The Roberts Court's campaign finance jurisprudence has substantially contributed to the creation of a system in which candidates become heavily dependent on the support of the wealthy. Even worse, it has turned the First Amendment into a weapon that prevents legislators from altering that system.

In 2014, in *McCutcheon v. FEC*, the Court rejected for the seventh consecutive time a limit on electoral spending on the ground that it violated the First Amendment.¹²⁶ In *McCutcheon*, the Court struck down the aggregate contribution limit, which capped the amount that a single donor could give to federal candidates and parties at \$123,200 in a single election cycle.¹²⁷ *McCutcheon* confirmed the Court's commitment to using the First Amendment to block limits set by democratically elected officials on electoral spending, even as the destructive consequences of an electoral system financed disproportionately by wealthy donors had become increasingly apparent.¹²⁸ The cases preceding *McCutcheon* include the following: *Randall v. Sorrell*, which held unconstitutional expenditure and contribution limits set by the Vermont legislature;¹²⁹ *FEC v. Wisconsin Right to Life, Inc.*, which struck down a federal statute regulating sham issue ads (attack ads artfully worded to avoid being treated as express advocacy and subjected to regulation);¹³⁰ *Davis v. FEC*, which invalidated the so-called "Millionaire's Amendment," a provision permitting candidates facing wealthy self-funded opponents to raise larger contributions until they achieve parity with their

¹²⁶ 572 U.S. 185, 227 (2014); Johanna Kalb, *J. Skelly Wright's Democratic First Amendment*, 61 Loy. L. Rev. 107, 109 (2015).

¹²⁷ *McCutcheon*, 572 U.S. at 194, 227.

¹²⁸ Michael S. Kang, *Party-Based Corruption and McCutcheon v. FEC*, 108 Nw. U.L. Rev. 240, 240–41 (2014); Adam Lamparello, *Citizens Disunited: McCutcheon v. Federal Election Commission*, 90 IND. L.J. SUPP. 43, 43 (2015).

¹²⁹ 548 U.S. 230, 230 (2006).

¹³⁰ 551 U.S. 449, 450 (2007).

opponents;¹³¹ *Citizens United v. FEC*, which, building on *First National Bank of Boston v. Bellotti*,¹³² permitted corporations and unions to make unlimited independent election expenditures;¹³³ *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, which invalidated the triggered matching fund provisions of Arizona's public finance system;¹³⁴ and *American Tradition Partnership Inc v. Bullock*, which struck down a Montana ban on corporate political spending.¹³⁵ After *McCutcheon*, the few campaign finance regulations that remain, the "soft money" ban, "pay to play" regulations, base contributions limits, and even public finance systems are arguably at risk.¹³⁶

Some of the pre-Roberts Court campaign finance cases recognized that the government's compelling interest in combating corruption, which the Court has treated as the sole basis for regulating campaign spending, could be construed as a compelling interest in combating the influence of money in politics. Thus, for a time *Buckley v. Valeo*, the seminal campaign finance case, was not regarded as an insurmountable constraint on the power of government to limit the campaign spending of the wealthy.¹³⁷ But, the Roberts Court has made it clear that this is no longer the case. The Court sees contribution and expenditure limits not as reasonable efforts to equalize the political influence of different classes of Americans, but as attempts to censor the voices of the wealthy.¹³⁸ Further, according to the Court, the government's interest in safeguarding elections from the distorting effects of corporate wealth is not only not compelling, it is not even legitimate.¹³⁹

It is, of course, no surprise that the Court's campaign finance jurisprudence has led to an enormous increase in spending on elections most of it coming from the extremely wealthy. The Court's judgments have also made American citizens far less equal in terms of their ability to influence the decisions of elected officials. As Justice Breyer pointed out in his dissent in *McCutcheon*, the First Amendment does not have to be construed in the extraordinarily individualistic way that the Roberts Court has chosen, protecting the right of every person, natural or corporate, to spend as much as they want without regard to its effect on American democracy.¹⁴⁰ Another approach would be to consider the impact of a regulation on the body politic. For example, the reason that we are concerned about corruption is not

¹³¹ 554 U.S. 724, 724 (2008).

¹³² 435 U.S. 765 (1977).

¹³³ 558 U.S. 310, 356 (2010).

¹³⁴ 564 U.S. 721, 727 (2011).

¹³⁵ 567 U.S. 516, 516–17 (2012).

¹³⁶ Johanna Kalb & Burt Neuborne, *Building a First Amendment-Friendly Democracy or a Democracy-Friendly First Amendment*, 89 N.Y.U. L. REV. ONLINE 10 (2014).

¹³⁷ Brice M. Clagett & John R. Bolton, *Buckley v. Valeo, Its Aftermath, and Its Prospects: The Constitutionality of Government Restraints on Political Campaign Financing*, 29 VAND. L. REV. 1327, 1381–82 (1976).

¹³⁸ Robert Sprague & Mary Ellen Wells, *The Supreme Court as Prometheus: Breathing Life into the Corporate Supercitizen*, 49 AM. BUS. L.J. 507, 540–41 (2012).

¹³⁹ *McCutcheon v. FEC*, 572 U.S. 185, 193, 206 (2014).

¹⁴⁰ See *id.* at 237 (Breyer, J., dissenting).

because it is a terrible crime per se, but because it undermines our belief in representative government.¹⁴¹ And when elected officials are selected by and dependent on a small number of rich people, the same loss of faith occurs. Statutes that impose reasonable limitations on the influence of wealthy people, therefore, build confidence in the integrity of our electoral institutions. Not only do such statutes not violate the First Amendment, they ensure that citizens are an active and important part of the self-governance project which American democracy represents.

The Roberts Court has also placed the interests of corporations over those of ordinary Americans in cases that do not involve campaign finance. Take, for example, its decision in *Sorrell v. IMS Health, Inc.*, which involved a Vermont statute prohibiting pharmacies from selling data regarding prescriptions without affirmative consent from the prescribing physicians.¹⁴² The purposes of the legislation were to protect the privacy of physicians and patients, to protect doctors from being harassed by salespersons from pharmaceutical companies urging them to purchase more or different medicine, and to reduce the cost of healthcare by curbing the disproportionate sale of expensive drugs.¹⁴³ The law exempted academic researchers and nonprofits because they did not pose the same problems as representatives from the pharmaceutical industry.¹⁴⁴

The Court's conservative majority saw this different treatment not as a rational response to a marketplace structured by forces that give profit-seeking actors particular incentives but as legislative interference with the marketplace.¹⁴⁵ In the view of the Roberts Court, the marketplace is by definition a neutral and even benign space that Vermont was contaminating by discriminating against particular speakers: pharmaceutical marketers.¹⁴⁶ As in the campaign finance cases, the Court treated government not as a representative of the public but as a coercive force burdening the rights of corporations.

Sorrell is disturbing on a number of levels. For one thing, the speaker was a large corporation and, for another, the sale of data hardly seems recognizable as speech. For most of American history, the law treated corporations as artificial entities created solely as economic instrumentalities but always subordinate to public regulatory power and without authority to convert their state-enabled private wealth into political power and influence through speech.¹⁴⁷ But, as discussed, the Roberts Court has helped change that. In *Sorrell*, the Court treated a corporation's wish to sell and maintain

¹⁴¹ See *id.* at 236–37 (Breyer, J., dissenting).

¹⁴² 564 U.S. 552, 557 (2011).

¹⁴³ *Id.* at 560–61.

¹⁴⁴ *Id.* at 563.

¹⁴⁵ See Amy Kapczynski, *The Lochnerized First Amendment and the FDA: Toward a More Democratic Political Economy*, 118 COL. L. REV. ONLINE 179, 181–82, 201 (2018).

¹⁴⁶ See *Sorrell*, 564 U.S. at 567, 579.

¹⁴⁷ See Ganesh Sitaraman, *THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION* 264 (2017) (“For virtually all of American history, the First Amendment was largely irrelevant

data as superior to an individual's interest in privacy and in receiving less expensive health care.¹⁴⁸ The Court chose to shield corporations from democratic power, markets over majorities, if you will. Further, in commercial speech cases in the pre-Roberts Court era, the Court connected the protection of commercial speech to the formation of intelligent opinion and to the value of democracy.¹⁴⁹ The Roberts Court has dispensed with this connection.

As stated, the decisions of the Roberts Court have not only augmented the power of corporations but also reduced that of ordinary Americans. And this too undermines democracy because it exacerbates inequality. Take, for example, the Courts' labor jurisprudence. One of the reasons that the United States was able to achieve a relatively broad security and prosperity during the middle decades of the twentieth century was the strength of organized labor.¹⁵⁰ The economic and political power of unions enabled many working people to become more prosperous.¹⁵¹ Moreover, the more recent decline in the fortunes of unions has operated to undermine the broad prosperity and sense of security that makes for less group competition and antagonism and thus facilitates democratic negotiation.¹⁵² In a recent paper entitled "Unions and Inequality Over the Twentieth Century – New Evidence from Survey Data," four economists document these facts.¹⁵³ The paper makes clear that unions played a major role in reducing income inequality in the middle decades of the twentieth century and that their decline since the 1960s contributed significantly to the widening gap between rich and poor.¹⁵⁴

Thus, a Supreme Court interested in strengthening American democracy might consider the wisdom of further weakening the labor movement. Sadly, this is not the Roberts Court's approach. Consider its 2018 decision in *Janus v. American Federation of State, County and Municipal Employees*, in

when it came to corporate rights. Corporations were highly regulated, only able to undertake activities the public allowed in their charters, and subject to common-law regulations as well.”)

¹⁴⁸ See *Sorrell*, 564 U.S. at 579–80.

¹⁴⁹ See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 415 U.S. 748, 765 (1976).

¹⁵⁰ Henry S. Farber et al., *Unions and Inequality Over the Twentieth Century: New Evidence from Survey Data 1*, (Nat'l Bureau of Econ. Research, Working Paper No. 24587, 2018), <https://www.nber.org/papers/w24587> [<https://perma.cc/2EAE-48HL>].

¹⁵¹ NOAH BERGER & PETER FISHER, ECON. ANALYSIS & RESEARCH NETWORK, A WELL-EDUCATED WORKFORCE IS KEY TO STATE PROSPERITY 8 (2013), <http://www.policymattersohio.org/wp-content/uploads/2013/08/EducationProsperity.pdf> [<https://perma.cc/4452-DHCF>].

¹⁵² See LAWRENCE MISHEL, ECON. POLICY INSTIT., UNIONS, INEQUALITY, AND FALTERING MIDDLE-CLASS WAGES (Aug. 29, 2012), http://www.insightweb.it/web/files/unions_inequality_and_middle_class_wages.pdf [<https://perma.cc/4RJV-HNUF>]; Alana Semuels, *Fewer Unions, Lower Pay for Everybody*, ATLANTIC (Aug. 30, 2016), <https://www.theatlantic.com/business/archive/2016/08/union-inequality-wages/497954/> [<https://perma.cc/APR6-RF3W>]; Bruce Western & Jake Rosenfeld, *Unions, Norms and the Rise in U.S. Wage Inequality*, 76 AM. SOC. REV. 513, 514 (2011).

¹⁵³ Farber et al., *supra* note 150, at 24.

¹⁵⁴ *Id.* at 32–33.

which the five conservatives overturned a forty-year-old precedent by eliminating a public-sector union's ability to collect a "fair share" or "agency" fee from workers who choose not to become union members but who are still protected by collective bargaining agreements negotiated by the union.¹⁵⁵ As a result of *Janus*, public sector employees around the nation will no longer have to pay such fees even though the union obtains benefits for them.¹⁵⁶ A recent study estimates that the decision could reduce public employee union membership by 8 percent or over 700,000 members.¹⁵⁷ Losses in membership will cause unions to lose revenue, and with less money they will hire fewer representatives, take fewer cases to arbitration, and organize fewer members than they once did.¹⁵⁸ This will likely mean lower pay and benefits for public-sector employees.¹⁵⁹

Nor does the Roberts Court treat non-union workers any better than members of unions. Rather, the Court systematically rules against both entities that represent ordinary Americans and ordinary Americans themselves. A good example is the Court's 2018 decision in *Epic Systems v. Lewis*, a case again decided by the conservative majority.¹⁶⁰ At issue in *Epic Systems* were agreements that employees had to sign as a condition of being hired that required them to give up their right to join together with other employees to litigate disputes over pay and working conditions.¹⁶¹ Specifically, the agreements required the employees to relinquish their right to bring class actions for back pay or damages and instead to pursue their complaints individually before private arbitrators.¹⁶² It is much more difficult and much less efficient for an individual worker to pursue a complaint than it is for a group.¹⁶³ Employee class actions of the type that *Epic Systems* arbitration agreements prohibited are a means of dealing with the imbalance in bargaining power between employers and employees.¹⁶⁴

In *Epic Systems*, the employees sued the company seeking to recover overtime pay and to void the arbitration agreements that they had been forced to sign. The Roberts Court ruled that the 1925 Federal Arbitration

¹⁵⁵ 138 S. Ct. 2448, 2460 (2018).

¹⁵⁶ *Id.* at 2468, 2486.

¹⁵⁷ FRANK MANZO IV & ROBERT BRUNO, PROJECT FOR MIDDLE CLASS RENEWAL, AFTER JANUS: THE IMPENDING EFFECTS ON PUBLIC SECTOR WORKERS FROM A DECISION AGAINST FAIR SHARE 3–4 (2018), <https://illinoisepi.files.wordpress.com/2018/05/ilepi-pmcr-after-janus-final.pdf> [<https://perma.cc/D6HK-ENE4>].

¹⁵⁸ *How the Decline of Unions Will Change America*, ECONOMIST (Jul 19, 2018), <https://www.economist.com/united-states/2018/07/19/how-the-decline-of-unions-will-change-america> [<https://perma.cc/2PQM-NEQQ>].

¹⁵⁹ *Id.*

¹⁶⁰ 138 S. Ct. 1612, 1619 (2018).

¹⁶¹ *Id.*

¹⁶² *Id.* at 1619–20.

¹⁶³ David G. Savage, *Supreme Court Upholds Arbitration that Bans Workers from Joining Forces Over Lost Wages*, LOS ANGELES TIMES (May 21, 2018, 3:00 PM), <http://www.latimes.com/politics/la-na-pol-court-workers-20180521-story.html> [<https://perma.cc/H7BT-6ZTV>].

¹⁶⁴ *Id.*

Act¹⁶⁵ trumped workers' rights to join forces in "mutual aid or protection" as provided in the 1935 National Labor Relations Act¹⁶⁶ ("NRLA") even though the NRLA was enacted after the Arbitration Act and should therefore have been regarded as superseding it.¹⁶⁷ The Roberts Court had already ruled that companies could force consumers out of class actions and into arbitration,¹⁶⁸ and in *Epic Systems* it did the same thing to workers. The case will have long-lasting implications for employees who lose some \$3 billion in legally owed wages every year.¹⁶⁹ At the oral argument in *Epic Systems*, Justice Breyer went so far as to say that the case could undermine the "heart of the New Deal,"¹⁷⁰ by which he meant that the Roberts Court could, as it ultimately did, weaken one of the means by which ordinary Americans could maintain their incomes and sense of security.

Finally, as the Roberts Court has reduced the power of unions and made it more difficult for workers to remain economically stable, it has treated the lower strata of workers and the very poor just as badly. In today's economy the difficulties that the poor encounter in their daily lives are substantial, not to mention the obstacles in ascending the economic ladder. In its 2017 annual report on the poor, the Census Bureau indicated that the economic recovery had bypassed many of the 40 to 45 million Americans living below the poverty level.¹⁷¹ Moreover, since 1975, the percentage of families living on income no greater than half of the poverty threshold has nearly doubled.¹⁷² This is so because government policies designed to address poverty are highly inadequate. The decisions of the Roberts Court, however, are quite indifferent to the poor. Consider *National Federation of Independent Business v. Sebelius* ("*NFIB*"), in which the Court thwarted Congress' efforts to address one of the most serious problems that the poor face, the lack of health insurance, by determining that the Affordable Care Act's expansion of eligibility for Medicaid exceeded Congress's power under the Constitution's spending clause.¹⁷³

Congress expanded Medicaid, a federally-financed state administered program, to achieve the ACA's goal of expanding health insurance cover-

¹⁶⁵ See *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 344 (2011).

¹⁶⁶ 29 U.S.C.A. § 157 (2012).

¹⁶⁷ See SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 36A:10, 132 (7th ed. 2009) (Noting that, "[a]s a result, in any case of conflict between a provision in the enacted title and a prior statute, the enacted code provision being later in time would prevail[.]").

¹⁶⁸ *DirectTV, Inc. v. Imburgia*, 136 S. Ct. 463, 466 (2015).

¹⁶⁹ *Savage*, *supra* note 163.

¹⁷⁰ Transcript of Oral Argument at 8, *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (No. 16-285).

¹⁷¹ Glenn Thrush, *America's Poor Miss Out on Boom, Census Shows*, N.Y. TIMES (Sept. 13, 2018), <https://www.nytimes.com/2018/09/13/us/politics/poverty-rate-census-bureau.html> [<https://perma.cc/T2F3-257N>].

¹⁷² *Id.*

¹⁷³ 567 U.S. 519, 573 (2012).

age.¹⁷⁴ Expanding eligibility for Medicaid was the way that Congress chose to provide healthcare to the poor. The ACA provided that the federal government would pay 100 percent of the costs of the expanded Medicaid program for the first three years, gradually less over the three following years, and 90 percent from 2020 on.¹⁷⁵ To encourage states to participate in the expanded program, the law provided that if a state refused to participate, it would lose all or part of the funding it received for its existing Medicaid program.¹⁷⁶

The Supreme Court's decision holding the Medicaid expansion unconstitutional was a surprise.¹⁷⁷ Congress's spending power is very broad. This breadth is captured in the words, "to provide for the . . . general welfare of the United States."¹⁷⁸ Moreover, the Court had previously interpreted the spending clause broadly.¹⁷⁹ In fact, it had been close to a century since the Court had found that Congress exceeded its spending power.¹⁸⁰ The Court's reasoning was also surprising. Chief Justice Roberts opined that Congress exceeded its spending power because it had coerced states into participating in the expanded Medicaid program by authorizing the withholding of funds for existing Medicaid programs if states refused to participate.¹⁸¹ Before *NFIB*, no federal court had ever found any legislation to be an unconstitutionally coercive exercise of the spending power.¹⁸² The Roberts Court, however, was not deterred. Further, as a remedy, the Court rewrote the ACA to prohibit Congress from withholding funds for existing Medicaid programs, thereby removing the incentive that Congress had created to encourage states to provide healthcare to their poorest residents.¹⁸³

Roberts's explanation as to why the Medicaid expansion was coercive is unpersuasive. His major error was to say that by expanding Medicaid eligibility the ACA had changed the Medicaid program so dramatically as to transform it into an entirely new program.¹⁸⁴ This conclusion was critical to the coercion analysis because it enabled the Court to rule that because the expanded Medicaid was a "new" program, the possibility that Congress might withhold funding from existing or "old" Medicaid programs constituted a condition unrelated to the expanded program on which Congress

¹⁷⁴ Nicole Huberfeld *et al.*, *Plunging into Endless Difficulties: Medicaid and Coercion in National Federation of Independent Business v. Sebelius*, 93 B.U. L. REV. 1, 25 (2013).

¹⁷⁵ *Id.* at 27.

¹⁷⁶ 42 U.S.C. § 1396c (2010), *invalidated by NFIB v. Sebelius*, 567 U.S. 519 (2012).

¹⁷⁷ Huberfeld, *supra* note 174, at 36.

¹⁷⁸ U.S. CONST. art. I, § 8, cl. 1.

¹⁷⁹ Huberfeld, *supra* note 174, at 3.

¹⁸⁰ See *Virginia Dep't of Educ. v. Riley*, 86 F.3d 1337, 1355 (4th Cir. 1996) (Luttig, J., dissenting) ("I recognize that the Court has not invalidated an Act of Congress under the Spending Clause since *United States v. Butler*, over half a century ago" (citation omitted)).

¹⁸¹ See *NFIB*, 567 U.S. at 585.

¹⁸² Huberfeld, *supra* note 174, at 3.

¹⁸³ *NFIB*, 567 U.S. at 585.

¹⁸⁴ *Id.* at 583–84.

was spending money.¹⁸⁵ The Court's rigid distinction between the new and old Medicaid programs is extremely artificial. The basic function of Medicaid, both before and after the expansion, was the same: to provide health-care to poor people.¹⁸⁶ When Medicaid was created in 1965, it covered particular categories of the poor such as the elderly, the blind, and the disabled.¹⁸⁷ Since then, Congress has amended the statute many times for the purpose to expanding eligibility to other categories of poor people such as children and pregnant women.¹⁸⁸ In the ACA, Congress further expanded the program by making it available to non-elderly adults.¹⁸⁹ In other words, there has been a clear continuity in the changes that Congress made to Medicaid over the years, gradually adding additional categories of the poor. Moreover, when Congress limited eligibility to limited categories of poor people at the inception of Medicaid, it obviously did not intend that these categories be treated as a hardwired constitutional mechanism to protect states from the possibility that it might add other poor people in the future.

The ruling has been catastrophic for many of the most vulnerable Americans.¹⁹⁰ By making it easy for states to decline to participate in the expanded Medicaid program, the Court reinforced the discrimination against poor African Americans in the South, a legacy that the United States has been trying to overcome since the Civil War.¹⁹¹ As the Court's decision in *Shelby County* gave Southern states a green light to renew their long-standing pattern of discriminating against African-American voters, so, too, the *NFIB* decision encouraged Southern states to continue another long-standing tradition—that of severely restricting social-service benefits to their poorest citizens, most of whom are African American.¹⁹² After the Court decided *NFIB*, the consequences of the decision did not take long to emerge. Numerous states, now totaling nineteen (including every state of the former confederacy except Arkansas and, as of 2016, Louisiana), refused to participate in the expanded Medicaid program.¹⁹³ In 2016, Louisiana entered the

¹⁸⁵ *Id.*

¹⁸⁶ Huberfeld, *supra* note 174, at 16.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 16–17.

¹⁸⁹ 42 U.S.C. § 1396(a)(10)(A)(i)(VIII) (2012).

¹⁹⁰ Scott Lemieux, *How the Supreme Court Screwed Obamacare*, New Republic (June 26, 2017) <https://newrepublic.com/article/143524/supreme-court-screwed-obamacare> [<https://perma.cc/72B8-ATJ4>].

¹⁹¹ See Stephen Griffin, *The Tragedy of Medicaid Expansion (Part II)*, Balkinization (Mar. 4, 2017, 3:55 PM), <https://balkin.blogspot.com/2017/03/the-tragedy-of-medicaid-expansion-part.html> [<https://perma.cc/9HN7-W6CK>]; SAMANTHA ARTIGA ET AL., HENRY J. KAISER FAMILY FOUND., THE IMPACT OF THE COVERAGE GAP FOR ADULTS IN STATES NOT EXPANDING MEDICAID BY RACE AND ETHNICITY (Oct. 26, 2015), <https://www.kff.org/disparities-policy/issue-brief/the-impact-of-the-coverage-gap-in-states-not-expanding-medicaid-by-race-and-ethnicity/> [<https://perma.cc/J9MJ-R8QH>].

¹⁹² See Griffin, *supra* note 191.

¹⁹³ See ARTIGA ET AL., *supra* note 191.

program after electing a Democratic governor to succeed Bobby Jindal.¹⁹⁴ The decision has caused at least 2.6 million Americans who would have been eligible for health benefits under the ACA to not receive them. 91 percent of those Americans live in the South.¹⁹⁵ In fact, more than half of the adults falling into the “coverage gap” live in just three Southern states, Texas, Georgia, and Florida, and in this group, a vastly disproportionate share are people of color.¹⁹⁶ Naturally, this has had a significant negative impact on people’s health.¹⁹⁷ And once again, the Roberts Court struck a mighty blow against a government effort to provide greater equality.

CONCLUSION

I mentioned previously that I would provide additional comment regarding how the Roberts Court’s decisions in the areas that I have discussed harm democracy. It is not difficult to understand how the Court’s decisions concerning voting rights undermine democracy. Rulings that discourage people from voting or place obstacles in the path of voting cause people not to participate in the decision-making process that is the essence of democracy. Undoubtedly, large and influential sectors of the population have always opposed democratization and the extension of political rights. Yet one would hope that the Supreme Court would not be among them. The Court, however, has consistently ratified the efforts of Republican state legislatures to accomplish precisely these purposes. Further, as it has weaponized the First Amendment to combat efforts to democratize the law of campaign finance, the Court has weaponized the doctrine of states’ rights to prevent Congress from dismantling obstacles that minorities encounter in voting. Instead of doing what it can to ensure the maintenance of a robust democratic republic, the Court’s decisions ally it with the most anti-democratic currents in American politics, forces that would be pleased if unlimited money could be spent on elections and if minorities could be deterred from voting.

The anti-democratic nature of the Court’s decisions weakening the middle class by augmenting corporate power and reducing that of ordinary Americans is perhaps slightly less obvious. However, scholars have shown that a strong middle class is essential to a thriving democracy. In his book, *The Crisis of the Middle Class Constitution*, Ganesh Sitaraman talks about

¹⁹⁴ Griffin, *supra* note 191; Douglas McCollam, *John Bel Edwards defeats David Vitter in Louisiana governor’s race*, WASH. POST (Nov. 21, 2015), https://www.washingtonpost.com/politics/john-edwards-claiming-win-over-david-vitter-in-louisiana-governors-race/2015/11/21/a583fc06-9070-11e5-ae1f-af46b7df8483_story.html?noredirect=on&utm_term=.23e5db65b102 [<https://perma.cc/N9YH-WAGE>].

¹⁹⁵ Griffin, *supra* note 191.

¹⁹⁶ ARTIGA, *supra* note 191.

¹⁹⁷ Celeste Katz, *People Will Die if Trump Kills Obamacare, So Get It While You Can, These Big Names Say*, NEWSWEEK (Oct. 31, 2017), <https://www.newsweek.com/obamacare-affordable-care-act-open-enrollment-kathleen-sebelius-alyssa-milano-695436> [<https://perma.cc/K9LT-JBVE>].

how when the founders of the American political system developed a Constitution, American citizens were relatively equal economically:

Compared with England and other western European countries in the late eighteenth century, America didn't have either a super-rich tier of elites or a bottom rung of desperate poor. American estates were minor compared to their English counterparts. George Washington's estate, for example, earned £300 per year in the 1770s. This would have made him a "better sort of yeoman" in England. . . . The lack of a wealthy elite extended to the merchant class too; the wealthiest urban American merchants were worth £25,000 to £50,000; their counterparts in London were worth £200,000 to £800,000. . . .

The contrast was equally true at the lower end of the economic spectrum. Conditions approaching the slums of London were unknown in America. During an economic downturn, 10 percent of the American population might be poor, but this was a far cry from the 50 percent of people in England who occasionally or regularly relied on charity for survival. . . .

America [in] 1774 was surprisingly egalitarian. Considering all households, including slaves, the top 1 percent in America had 8.5 percent of total income. When only free households are taken into account, the number drops to 7.6 percent. [By] comparison, [in 2012,] the top 1 percent of Americans took 19.3 percent of total income.¹⁹⁸

Sitaraman further explains that the founders assumed that such equality would continue and based key provisions of the Constitution on that assumption.¹⁹⁹ He also argues that the country's ability to maintain such relative equality for over two centuries has played an important part in sustaining our democratic republic.²⁰⁰

As we have seen, however, all that has changed dramatically. The condition of relative equality no longer exists. The foundation on which the Constitution was built, the existence of a strong middle class and the absence of extreme wealth and poverty, has substantially eroded. Further, corporations, the wealthy, and those who represent them, adhering to the advice expressed in the Powell memorandum, which has been advanced more recently by a panoply of conservative advocacy groups, refuse to support policies that promote the common good such as Social Security, broad health insurance coverage, and campaign finance reform.²⁰¹ Rather, they use their resources to combat these types of policies and promote policies that benefit only themselves. And they have achieved considerable success in this selfish endeavor. We are thus in a new and arguably dangerous phase in American

¹⁹⁸ Sitaraman, *supra* note 147, at 60–62.

¹⁹⁹ *Id.* at 63.

²⁰⁰ *Id.* at 201–03.

²⁰¹ *Id.* at 239–40.

history. Democracy is inherently fragile, and it is even more so when government eschews policies that benefit all classes of Americans.²⁰² We desperately need public officials who will work to revitalize our democratic republic. Unfortunately, the conservative Justices on the Roberts Court are not among them. It will definitely take every bit of democratic resourcefulness that we can muster to undo the damage that the Court has already caused.

²⁰² *Id.* at 237–39.