Four things I've learned from the 5-4 Podcast about how SCOTUS has ruined American democracy

5-4's tagline is "a podcast about how much the Supreme Court sucks". The hosts cover a wide variety of cases, but in this essay I've focused on election law, because a lot of people have been worrying about the future of democracy in Trump's America and how far the extremists on the court will let him go. This worry is well-founded, as in its most progressive eras SCOTUS has still never upheld in its hallowed halls that Americans even have the right to vote.

But I'm getting ahead of myself. I should start by saying that before *Bush v. Gore* my understanding was that the Supreme Court had a rigid philosophy—the sanctity of the law—determining their actions. Afterwards, I still believed that there was a good reason for there to be an apolitical body of civil servants to provide a check on government and executive power. But now, after listening to 160 hours of the 5-4 podcast, I know that any justification for its existence on the grounds of objectivity is clearly nonsense the moment you view the cases side-by-side. Constitutional law is so open to interpretation that it's mainly just a logic game played by political appointees redefining words to make the rules match their worldviews.

This essay is essentially a book review of the 5-4 podcast, what you might call *fan nonfiction*. Any clever points or good jokes are likely theirs, any mistakes mine. With it, I hope to radicalise my parents against the Supreme Court—two septuagenarians who might never listen to a podcast—and provide others with a summary of the excellent episodes on election law: 1, 2, 4, 8, 22, 36, 39, 65, 66, 105, 116 and 145. It's also a sort of social experiment to show an answer to the question: what if your only education was through podcasts?

Thing 1: The court ignores the text of the constitution to strip you of your right to vote

The 13th, 14th and 15th Amendments were passed immediately after the end of the Civil war. They were an attempt to fix a broken country, prevent another civil war and enshrine sorely missing basic rights *for all* into the constitution.

The 13th is famous for (sort of) ending slavery. The 14th covered a lot of ground, much of which is still being attacked by conservatives today. It created birthright citizenship, something Trump has vowed to end on day one of his 2nd term. It also prevents insurrectionists from leading the country (ha), guarantees equal protection under the law, says that States can't restrict the privileges of citizenship, and says the government can't take away your life, liberty or property without following the 'due process' of law. To prevent there being any wriggle room, the 15th Amendment adds that your "right to vote" can't be revoked because of your race.

Importantly, all three amendments end with the same clause: that Congress can pass laws to enforce their provisions. This was what America had fought over. If states failed to be inclusive and equitable in their election laws, Congress could step in. These amendments were the legal foundations on which the country's new-fashioned egalitarianism was built. From this moment onwards, everyone—regardless of race—had the right to be free, to be treated as equals, and to take part in the political system.

Psyche! The Supreme Court immediately shredded those rights by simply ignoring the Constitution's new text. In 1875, they ruled in *Minor v. Happersett* that women don't have the "right to vote", on the basis that there is no "right to vote" in the constitution. Eagle-eyed observers will know that the 15th Amendment *begins* with the words, "The right of citizens of the United States to vote", something even skim-readers should have spotted. The majority opinion also argued that voting isn't a privilege of citizenship, and I challenge readers to come up with a more obvious privilege of citizenship.

There were a bunch of other contemporary cases that whittled away at these new rights—invalidating the 1875 Civil Rights act (Civil Rights Cases, 1883), overturning the convictions of a white mob that murdered dozens of African Americans (United States v. Cruikshank, 1876), and numerous cases allowing all sorts of laws discriminating against black voters—but this is not just an abhorrent kink in SCOTUS's past. More recently, the court allowed for there to be *some* racism in political gerrymandering (*Rucho v. Common Cause*, 2019), voter restrictions (*Brnovich v. DNC*, 2021) and felony disenfranchisement (*Richardson v. Ramirez*, 1974).

This latter case revolved around just 8 words in Section 2 of the 14th Amendment, which says states must respect your right to vote, "except for participation in rebellion, or other crime." A legal doctrine called **ejusdem generis** would interpret a general term like "other crime" as meaning crimes similar to the specific term that came before it: "rebellion". This would make sense, as you probably shouldn't trust someone who has taken part in rebellion or similar (sedition, insurrection, treason and so on) with the vote. And yet, the court's 1974 decision

maximised how many people can be disenfranchised by interpreting “other crime” as including *any and all* crimes.

The result is that 5 million people in the USA are now disenfranchised, including 8% of the eligible voters in Alabama, Tennessee and Mississippi. These are vestiges of the Jim Crow era, with black people in Virginia, Tennessee, Iowa, Kentucky, Florida, Alabama and Arizona being disenfranchised at 3.5x the rate of white people. In Florida, 900,000 convicts remain disenfranchised, despite people voting in a referendum to have this practice abolished. There are American citizens who cannot vote simply because they can’t afford to pay off a parking ticket. And in multiple states, the insane-when-you-think-about-it practice of “prison gerrymandering” (where the largely urban populations of prisons count towards the census totals of the rural districts they’re built in) is a tool Republicans use to inflate the political power of rural whites at the expense of more racially diverse urban communities.

The other 127 words in Section 2—that’s 94% of the total—lay out the exact punishment that would befall states for denying or abridging “the right to vote” (again, those exact words). Should states be caught making it tough to vote, or disenfranchising people altogether, they’re supposed to be punished by having their representation in Congress reduced. And yet, despite a century of cases adjudicated by SCOTUS that prove states have been involved in all manner of schemes to suppress votes, the court has never enforced this part of the constitution. As such, the vast majority of the words in Section 2 of the 14th Amendment are functionally invisible. That’s the part *protecting* your right to vote. However, the part *limiting* voting rights—felony disenfranchisement—is maximised to the greatest extent possible, to the point where the United States is the *least* representative Western democracy.

And things are getting worse. The conservatives on the current court, emboldened by their supermajority, are freely making stuff up to support their political goals. There is no other way of viewing Samuel Alito’s self-aggrandising decree in *Brnovich v. DNC*, 2021, than as a textbook example of **legislating from the bench**. His decision invented, out of thin air, entirely new factors by which to determine whether election laws are too racist. Perhaps sensing he was verging into territory far beyond his authority, Samuel avoided calling them “rules” or “legal tests”, instead settling on “guideposts”, without explaining how legal guideposts differ from established legal standards, or how they should be treated by lower courts. This is as close to “because I said so” reasoning as you can get, entirely unmoored from precedent or constitutional grounding.

His first guidepost was that new voter laws must be judged by the size of the burden they’d place on minorities. However, in making that calculation, courts must ignore whether those burdens disproportionately impacted one race more than another. In this case, for example, Samuel was saying that the Republican state legislature could ban voting practices that were twice as popular among black people, because overall those practices weren’t that common.

His second guidepost was to take into account whether the laws themselves were racist. However, he wrote that if a racial disparity is a consequence of differing levels of wealth, employment or education between races—in other words, if systemic racism is the cause—that’s absolutely fine. The only thing that matters is whether election laws were drafted

with racist intent. This reading of the constitution is bizarre, as nowhere in the 13th, 14th or 15th Amendments does it mention *intent* (something that's both beside the point and almost impossible to prove, as it requires knowledge of the inner thoughts of map drawers), they only talk about *outcomes*. And yet, Samuel's second guidepost, as the 5-4 Podcast notes, has created a world in which "states can DO racism, they just can't MEAN to do racism".

This case was a fight between the plaintiffs, who provided evidence that a law discriminated against black voters, and the Republican Party, who are trying to stop black people from voting. There was no question which side the conservatives on the court would take, but it's offensive how far Samuel went to rationalise this decision. Offensive, but not surprising. Samuel was nominated to the bench by George W. Bush. He has since been caught hiding gifts worth millions from Republican donors whose cases he later ruled on. After the January 6th attempt to overthrow the government, he flew flags associated with Trump's election fraud lie. As for his character, he also earned the nickname "Strip-Search Sammy" after arguing, in *Doe v. Groody*, 2004, that police officers were within their rights to strip-search a mother and her 10-year-old daughter. In *Brnovich v. DNC*, Strip-Search Sammy was allowing the team he supports to enforce unconstitutionally racist policies, fumbling around for an excuse for his perversion of the law like a cop violating the dignity of a ten year old girl.

Thing 2: The court is completely aware that it is destroying democracy

> The Government has a clear and compelling interest in safeguarding the integrity of elections and avoiding the undue influence of wealth. Both the reality and appearance of electoral corruption justify Congressional intervention…in order to avoid the corrosion of public confidence that is indispensable to democratic survival.

That's a quote from the majority decision in *Buckley v. Valeo*, 1976, asserting that *the survival of America's democracy* depends on preventing wealth from having an "undue influence". And yet, this same decision created the ludicrous premise that made billionaires far more likely to win campaigns. You or I—or, indeed, economists and the IRS—think of money as 'property', something politicians can use to *amplify* their message by trading it for ad space and balloons. And yet, the Supreme Court decided that for the purposes of analysing the constitutionality of election laws courts must take the view that *money is speech*, a uniquely American folly.

This designation is hugely powerful, because speech is protected by the 1st Amendment (a part of the constitution the conservative justices have actually read), and so laws limiting speech are given "**strict scrutiny**" by the court, the highest level of judicial review. This is essentially a balancing test, one that measures the size of the government interest in having a law against the size of the law's burden on speech. Almost no laws pass that test. In *Buckley*, strict scrutiny meant the survival of democracy was not as important as the removal of caps on candidate spending (or, in the Supreme Court's warped logic, caps on the total amount of speech the candidate is allowed to spend on balloons), thus allowing billionaires to spend as much as they liked to win campaigns.

By contrast, the court has never acted like Americans have a "right to vote". So, laws restricting voting are given **intermediate scrutiny**, which is more deferential to government interests. In SCOTUS's view, therefore, money spent in politics is far more important than votes voted.

Three contradictory cases underline this warped perspective. In *Doe v. Reed*, 2010, Chief Justice and unmasked villain John Roberts wrote that the government's interest in preventing fraud was sufficient to require the disclosure of signatures on ballot referendums. The plaintiffs were voters who worried their names might be made public, which might lead to repercussions, which would have a **chilling effect** on their likelihood to vote for controversial ballot measures.

But, in *Americans for Prosperity v. Bonta*, 2021, John wrote that California law *couldn't* require the disclosure of the names of the biggest political donors. Such a law could have a chilling effect on something far more important: political spending. The 5-4 Podcast notes that the plaintiffs in this case were Americans for Prosperity, an out-of-state political advocacy group founded by the Koch Brothers (the notorious oil tycoons that bankrolled the Tea Party), one of 15 groups accounting for a huge proportion of the anonymous money flowing into politics. They were joined by the Thomas Law Center, an out-of-state Catholic law firm "promoting Judeo-Christian values" by opposing gay rights, abortion and social welfare, even suing the

federal government during the Obama administration for allegedly engaging in Islamic religious activities based on Sharia Law. Together they successfully argued that California's case differed from *Doe v. Reed*, because there was money on the line, not votes, which warrants a higher level of scrutiny. As a result of this case, states nationwide are powerless to prevent political organisations from funnelling unlimited, untraceable 'dark money' into elections, so we have no way of knowing who was behind putting the current bunch of perverts and psychopaths in power.

John said the California law had failed the strict scrutiny balancing test because the state had failed to provide enough evidence that disclosure requirements for donors would prevent fraud. And yet, SCOTUS released this decision on the same day as the aforementioned *Brnovich v. DNC* decision, in which Strip-Search Sammy gave his blessing to Arizona's racist voter restrictions, despite the fact that they hadn't provided *a single piece of evidence* that those laws were needed. A 9th Circuit judge had even ruled that the Republican lawmakers had used "false, race-based claims of ballot collection fraud" to justify their laws. Again, this case differed from *Americans for Prosperity v. Bonta* because black people in Arizona were prevented from *voting*, not *spending money*, so the Republicans had a much lower bar to hurdle over (intermediate scrutiny), and thus didn't have to provide evidence. Can you believe that this is the logic by which the venerated Supreme Court of the United States makes its decisions to protect or restrict your democratic rights?

Talking of which, after being nominated to the bench by President Bush, John said in his 2005 confirmation hearing his famous line that it would be his job, "to call balls and strikes, and not to pitch or bat", a baseball metaphor meant to indicate that he wouldn't be invested in the outcome of any particular case, he'd merely be a legal umpire making decisions that followed the rules of the game. This metaphor was perfect, but not in the way he intended. Baseball umpires are notoriously idiosyncratic, making calls one way or the other based on how they view the rules. Also, as Justice Elena Kagan later pointed out, if an umpire makes every call to benefit one team, "that's a bad umpire".

One such call was John's opinion in *Shelby County v. Holder*, 2013, striking down protections afforded by the 1965 Voting Rights Act. The VRA demanded that if states with a history of voter suppression tactics wanted to pass new election laws, they'd first have to run them by Congress for approval. This was called 'preclearance', and its impact was phenomenal. In the 1960s, black voter turnout in some Southern states was below 10%. By the 1980s, thanks to the VRA, black voter turnout was approaching 50-60%. A 2019 study showed that just the preclearance part of the VRA increased minority turnout by up to 19 percentage points in covered jurisdictions.

The VRA was reauthorized by a staggeringly nonpartisan 98-0 vote in the senate in 2006. 15,000 pages of congressional records over 6 months showed (surprise!) that places covered by preclearance were still attempting to pass racist laws. But by 2013, just 7 years later, the Republican Party had made minority disenfranchisement a key pillar of their election strategy, so when Shelby County argued at the Supreme Court that the preclearance provision was unconstitutionally treating some states differently to others, their arguments fell on sympathetic

ears. [For example, although the absolute most someone could get out of the VRA was the ability to vote, Reagan appointee Antonin Scalia called preclearance a “racial entitlement” during oral arguments.]

Now, I don’t have any legal training, only what’s known as “podcast knowledge”, a form of education you’d be well within your rights to dismiss. I have no idea what the difference is between a legal precedent, doctrines, standards, principles or rules. But, I do know that these frameworks (like ejusdem generis, mentioned before) are tools meant to guide how judges decide cases, alongside the text of the Constitution itself, and John entirely ignored a fundamental rule in deciding in this case.

Shelby County had made a ‘**facial challenge**’ to preclearance, an argument that *on its face*—as in, regardless of when or how it was implemented—the law was inherently unconstitutional. This challenge failed by John’s own reasoning. He wrote that preclearance had been constitutional when the VRA was written. And that’s the ball game. Anyone who’d passed the 2nd year of law school would read that, understand the facial challenge had failed, and throw the case out. Instead, the nation’s top legal mind wrote that preclearance had “outlived its usefulness”, a judgement call about *policy*, not *constitutionality*, and thus out of SCOTUS’s domain.

The part in his decision that got the most coverage was his laughably backwards logic. The Department of Justice had presented evidence that they’d rejected or modified 1,500 attempted voter law changes over the last 25 years—that’s five interventions a month—showing that preclearance was successfully addressing an ongoing problem. But, John argued that *as minority voter turnout had increased* over the last fifty years, the law was no longer needed. This was an umpire refusing to count a home run, eliminating the very law responsible for this improvement. Or, as Ruth Bader Ginsberg put it in the quote that made her Gen Z famous (as The Notorious RBG), “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.”

24 hours after this abominable decision dropped, Texas announced a new voter ID law. Mississippi, Alabama and North Carolina followed. Five years after the ruling, nearly 1,000 U.S. polling places had closed, many of them in predominantly African-American counties. There were also cuts to early voting, purges of voter rolls, and the imposition of strict voter ID laws. The Brennan Center for Justice issued a report in 2018 that found that this court decision alone was responsible for the removal of 2 million voters from the polls by 2016, just 3 years later. The Republicans got what they’d been asking for: a lawless frontier of discriminatory voter laws reshaping the electoral landscape.

Decades of evidence (strike), the DOJ (strike), a unanimous vote in the Senate (strike) and the 15th Amendment (strike) pointed to preclearance being both constitutional (strike) and necessary (strike), all called balls by an umpire in a black robe who entirely understands the harm his decisions are having on democratic participation, but will always back the team that hired him to referee their matches.

Thing 3: They'll deploy or ignore whatever logic they need to achieve their political goals.

On June 17th 2015, a white supremacist murdered nine black worshippers at a church in Charleston, South Carolina. When photos surfaced of him draped in the confederate battle flag, that symbol of white nationalism became the subject of a national debate. This continued into 2016, as confederate flags were a common sight at Trump rallies. That year, a white lady who'd started the Facebook group "New Orleans Blacks for Trump"—a small group made up of entirely white members at the time that I checked—told me that Trump's confederate flag-bearing supporters were merely paying homage to our shared cultural history. She shared a link to an interview with a Trump supporter arguing that the Civil War itself had nothing to do with slavery, and was instead fought over "**states' rights**"—the principle that states have the authority to govern themselves without federal interference.

This ahistorical view of the cause of America's bloodiest war was a popular one. A 2011 Pew Research Center poll found that 48 percent of Americans—the largest segment of respondents—believed that the Civil War had been fought over states' rights, despite the fact that slavery was explicitly mentioned in multiple states' secession documents as the impetus for their decision to leave the Union, and that the Vice President of the Confederacy said that their new government was "founded upon" the preservation of slavery.

In 1901, Alabama adopted a new state constitution containing the most aggressive voter suppression measures in the nation's history, including criminal disenfranchisement, poll taxes, vague 'good character' requirements and 'grandfather clauses' that exempted white people from these new rules. The president of the all-white Alabama Constitutional Convention was clear about their intent, proclaiming, "What is it that we want to do? Why it is within the limits imposed by the federal constitution to establish white supremacy in this state."

But when this came before the Supreme Court in Giles v. Harris, 1903, the justices decided that Alabama could do as it pleased because of states' rights. SCOTUS used that same reasoning when deciding *Williams v. Mississippi*, 1898, and *Breedlove v. Suttles*, 1937, which upheld literacy tests and poll taxes aimed at excluding black people from voting. These decisions and more greenlit Jim Crow laws across the south, and laid the groundwork for modern voter suppression tactics. The result was that the number of southern Black legislators elected in 1872 would not be matched again until the 1990s.

This history would not be unknown by the conservatives on the Roberts Court when they deployed the states' rights argument to excuse Strip-Search Sammy's ruling in *Brnovich v. DNC*, 2021, explicitly allowing states to have election laws with racist impacts, and in *Rucho v. Common Cause*, 2019, where John utilised states' rights to allow Republicans in North Carolina to use gerrymandered political maps. The year after he wrote this decision, black people voted for Biden at 7.25 times the rate they voted for Trump. No map then or now could benefit Republicans without diluting the votes of ethnic minorities, violating the 15th Amendment, but John wrote that SCOTUS was powerless to intervene.

And yet, the Republican nominees on the court are quick to dismiss states' rights when given the chance to benefit Republican politicians. Take *Bush v. Gore*, 2000. In that case, Republican Secretary of State Katherine Harris had tried blocking a recount that looked like it might give Al Gore the presidency (Bush was ahead at the time). The Florida Supreme Court stepped in to remind her that Florida election law mandated recounts in close races, and instructed officials to go ahead. Republicans appealed to the Supreme Court, whose Republican majority ordered the recount to stop, trampling over Florida's right to govern its own elections and handing the victory to Bush.

The Roberts Court also ignored states' rights again when deciding *Republican National Committee v. Democratic National Committee*, 2020 (with a case name like that, take a second to guess which way the court voted). After the Wisconsin Governor, a Democrat, had passed an executive order that people should stay home to stop the spread of Covid-19, a District Court judge ruled that existing deadlines would "unconstitutionally burden voters"—the burden was that it would kill them—and, with five days to go until the election, extended the deadline for absentee ballots by a week.

Republicans in Wisconsin appealed to their friends on the Supreme Court, who duly stepped in to block that lower court decision, claiming it violated the **Purcell Principle** (from *Purcell v. Gonzalez*, 2006). This is the common sense idea that to avoid creating chaos, officials shouldn't *ordinarily* alter election rules too close to elections. That may have made sense, but SCOTUS's decision was released on the evening of the eve of the election, just 12 hours before polls were set to open, a far greater violation of the principle they were pretending to uphold.

Also, the Purcell Principle only applies under *ordinary* conditions and these were *exceptional circumstances*. By invoking it, the court was arguing that an election where a deadly pandemic had produced an order to 'stay at home', and where 180 polling stations had been reduced to 5, was just another run-of-the-mill election. Had the court cared more about saving the lives of voters than helping their own side win, they might have recognised that desperate times call for desperate measures. Or, in this case, a deadly pandemic calls for a short delay.

We are taught to believe in "the letter of the law". The above cases are perfect examples of why that belief is misplaced. States' rights has always been a clarion call of racists nationwide, and it's the security blanket that white men in fancy robes have used to let racists oppress their own citizens for more than a century. And yet, this constitutional principle, one so important it enabled human rights abuses, is easily dismissed by the same men whenever it's inconvenient.

If there is a letter of the law, it's like poetry: open to interpretation. This is why it is so important who nominates judges to the bench, as what president would be so stupid as to hire anyone who is not a partisan hack willing to interpret the rules of the game (or the text of the constitution) in their favour?

Today, there is a well-funded political enterprise, called the Federalist Society, which poaches right-wing law students straight out of college and gives them high-profile clerkships under right-wing judges, then provides lists of their members to presidents, who use them to fill benches from district courts all the way up. It is a political coup on a scale far greater than

January 6th could ever have been. Trump's tenure will only last as long as his cheese-whizz addled brain keeps him alive. But, the decisions these justices make—political appointees all—create 'precedent', meaning they are supposed to be adhered to by the entire country for the rest of time. Law isn't law, it's politics, and we need to lose any idealised notions to the contrary.

Thing 4: They have transformed politics into a game where only money matters.

The court's (good) decision in *Austin v. Michigan State Chamber of Commerce*, 1990, held that Michigan was within its right "to prevent corporations from using immense aggregations of wealth...from unfairly influencing elections". They argued that the influence that money bought, "could both distort the political process and foster the appearance of corruption", which would "erode public confidence in the electoral system". In other words, huge campaign donations, even if they are given and received in a legal manner, would make the rest of us distrust the political process.

But in *Citizens United v. Federal Election Commission*, 2010, the court had changed its mind. Now they were claiming that *Austin* had failed to show that the "distorting effects" of corporate wealth were a compelling enough reason to limit its influence. "The appearance of influence or access," they wrote, "will *not* cause the electorate to lose faith in our democracy."

Why? We don't know, because they didn't bother explaining this part. But they *did* say that going forwards the court was going to act as if *corporations are speakers*. Speakers have the constitutionally protected right to speak and so, in the Court's newly rendered dystopia, corporations have the right to spend as much as they like on political campaigns.

What's insane about the decision is that the question before the court was whether or not *Hillary: The Movie* was a legitimate documentary. Citizens United, the movie's producer, argued that it was, and therefore shouldn't be subject to campaign financing rules. The FEC was calling bullshit, giving as evidence the content of the obviously-politically-motivated movie, and the fact that Citizens United used to be called "Americans for Bush".

SCOTUS agreed that Citizens United were disingenuous political operatives, but instead of throwing out the case, or ordering that the law must allow disingenuous political operatives to run attack ads, the court used this simple, almost trivial case to eliminate all caps on corporate spending. It's the kind of giant leap of logic that only a partisan judge could make, and resulted in the end of representative politics in America. Corporate spending on presidential elections increased from $144 million in 2008 to $1 billion in 2012, a 594% increase in just one election cycle. By 2020, "outside spending" had reached $4.5 billion, of which $1 billion was untraceable 'dark money'.

Here's where John really came into his own. The year after *Citizens United*, he authored the majority opinion In *Arizona Free Enterprise v. Bennett*, 2011, in which he wrote that states weren't allowed to help the poor to have a voice in politics. The decision struck down Arizona's "match funding" program for candidates who rejected corporate funds. This was a program voted for by Arizonans in a referendum (the clearest example of a citizenry's free speech at work) and funded by their money (in the manner that made the most sense: taxes), but John said no.

In his opinion, the first amendment doesn't just give corporations the right to speak, or for them to fund candidates with huge donations, but also *the relative power* of those donations. It is

written into the American Constitution that the wealthiest people must have the loudest voices. He also wrote that governments are not allowed to 'level the playing field'. The only legitimate target of campaign finance laws was to prevent cases of **quid pro quo** corruption—meaning cases where politicians promise favours in return for cash. This batshit ruling ignored that Arizona's match-funding scheme was attempting to target exactly that: decades of real, actual corruption scandals in the state.

John wasn't finished. In *McCutcheon, et al. v. Federal Election Commission*, 2014, he decided to get rid of the 'aggregate cap' on individual political spending. *You* can't give more than $3,000 to your preferred local candidate, but after this decision billionaires could conceivably give over a million dollars to candidates in their favourite party. The most egregious part of his decision essentially rebanded cash for favours—the basic definition of quid pro quo corruption—as something akin to friends helping friends. "Government regulation," he wrote, "may not target the *general gratitude* a candidate may feel towards those who support him." On the contrary, "the political access such support may afford…embody a central feature of democracy."

Apologies if you, like me, can taste bile after reading that. I've tried hard to work out where the ethical line is between "corporations using immense aggregations of wealth to buy access to grateful politicians" and "corporations using immense aggregations of wealth to unfairly influence elections", and I don't think it exists. This decision codified pay-to-play politics as democracy *working as intended*. Now, when billionaire Michael Bloomberg accidentally bragged on stage at the Democratic National Convention that he "bought" 21 congressmen, he didn't say anything illegal.

The last and worst decision I'd like to look at concerns another bile-inducing man, the subject of the 2022 case, *Federal Election Commission v. Ted Cruz for Senate*, in a ruling that touched on almost all of the themes mentioned above. The 2002 Bipartisan Campaign Reform Act put limits on the nature of campaign loan repayments. Stick with me, as it will soon become clear why these rules are important. The law stated that if you were a candidate that had loaned money to your own campaign, your campaign was free to pay you back out of donations received from 3rd parties. However, if those donations were received *after you had already won your campaign*, the amount you could be repaid was capped at $250,000. This makes sense: the only reason to pay a campaign's debt to a candidate who has already won is to gain influence with a sitting politician by funnelling money directly into their pockets.

In this case, Ted Cruz intentionally loaned his campaign $10,000 more than the limit, precisely so that he could argue in court that this clause of the BCRA violated the 1st Amendment. John agreed, giving four separate and equally stupid reasons for his decision.

First, he held that tax deductible campaign donations that donors make to a candidate's campaign are not campaign donations if the candidate was already owed the loan repayment. The asinine analogy he gave was that if the candidate didn't have enough money to buy a car before they made a loan to their own campaign, they still wouldn't have enough to buy a car once they were paid back. It doesn't take an economist (or even an education) to understand how dumb this is. Campaigns spend the money they raise. So, there's no guarantee that a campaign could repay a loan afterwards. Therefore, the donation *does* make a financial

difference to the candidate because—again, these words shouldn't have to exist in a rebuttal of a legal decision written by any Chief Justice of the Supreme Court—*being owed money is not the same thing as having money*.

This self-evident and uncontroversial fact is the reason why candidates charge interest on loans they give to their campaigns. The interest offsets their risk of not getting paid back, the same reason why banks charge interest on the loans they make to you. Except, unlike banks, there are no usury laws limiting the interest rate that candidates can charge to their own campaigns, making these loans wildly open for abuse. In terms of John's analogy above, this means that the candidate might very well be able to afford a car (or even a house) after being repaid their loan in full. If that sounds like an exaggeration, Elena Kagan's dissent included the story of a Congress person who loaned her campaign $150,000 at 18% interest, getting back $222,000 in interest payments alone while still being owed more than half of the principal.

The second reason John gave is that *Buckley v. Valeo* threw out caps on candidate expenditures, and this law might suppress how much Candidates are willing to loan their own campaigns. But, that wasn't at issue here. This law was about the timing of money coming from 3rd party donors, so the candidate's free speech concerns weren't at stake. And even if they were, a campaign contribution handed over *after the campaign is finished* is not given to promote the candidate's speech. The ads have stopped airing. The campaign events are over. The campaign has functionally stopped speaking. As Kagan pointed out as well, this donation is therefore not a form of 'expressive funding', so it could be banned entirely without going against the 1st Amendment.

Third, John wrote that there's no evidence that capping these repayments would prevent corruption, because there's no evidence that campaign loan repayments have ever resulted in a case of quid pro quo. No analysis needs to be done here, as this was just a barefaced lie. The government's brief included several examples: In Kentucky, two governors loaned their own campaigns millions of dollars, only to be repaid after the election by contributors seeking no bid contracts; In Ohio, an Attorney General routed 225 state contracts worth $9.6 million in legal fees to law firms and lawyers who had given him $194,830 after the election to repay personal loans; and in Oregon, contributors who had supported losing candidates before an election contributed to the winning opponents after the election, a move that Oregon insiders referred to as "apology money", or "makeup cash". Also, they showed that winning campaigns were far more likely to have their debts paid back by post-election donations, and candidates who'd had their debts paid back were more likely to switch their votes to benefit their donors. As Kagan wrote, post-election donations are just "cash for favours" with an extra step, "a natural quid pro quo", because there's literally no other reason to give a post-election campaign donation than to curry influence.

Which brings us to the fourth and worst argument: that buying influence isn't a form of corruption. John repeated his statement in *McCutcheon*, that the government, "may not seek to limit the appearance of mere influence or access," which, according to him, "embody a central feature of democracy." But as always, John went a step further, asserting that, "constituents support candidates who share their beliefs and interests, and candidates who are elected can

be expected to be responsive to those concerns". In other words, "cash for favours" is democracy baby 🤑.

Which leaves us to ask: what does John think corruption is, and what does he think democracy is? How does what he described differ from quid pro quo? To his credit, John did grapple with this question, writing, "The line between quid pro quo corruption and general influence may seem vague at times, but the distinction must be respected in order to safeguard basic 1st Amendment rights." He's saying that we don't know where the line is between good and bad corruption, so laws attempting to prevent corruption by limiting spending will always fail the strict scrutiny balancing test.

The most difficult part to read in this decision was a list of self-citations, which, as the 5-4 hosts point out, sound like a confession, until you realise John was just bragging: "We have denied attempts to reduce the amount of money in politics, see *McCutcheon*, to level electoral opportunities by equalizing candidate resources, see *Bennett*, and to limit the general influence a contributor may have over an elected official, see *Citizens United*".

To view these as positives, John has to believe an incredible amount of bullshit. First, he has to think that money is literally speech. Then, that Ted loaning speech to his own campaign is also speech. Then, that Ted should be able to charge interest speech on that speech. Then, that a billionaire giving speech to Ted's campaign, after the campaign has stopped speaking, in order to repay Ted's speech and interest speech, *specifically so that Ted, now a sitting politician who has made a speech profit, gives that billionaire favours*, is the kind of democracy the founders envisaged when they wrote "We the people."

Nowhere in the constitution does it state that money is speech, nor that corporations are speakers, nor that the 1st Amendment protects the relative power of your speech, nor that freedom is more important than fairness, and nor that paying for influence is how democracy works. Yet here we are, thanks to half a century of radically conservative, pro-business, pro-billionaire members of the Supreme Court legislating from the bench. The result is that election spending topped $20 billion in the 2023/24 election cycle. Undisclosed "dark money" is up 16,000% since 2004. Outside spending is up 8,500% since 2000. Billionaires donated 39 times more money in 2020 than they did in 2010. Thanks to the Supreme Court, America has never been a truly representative democracy, but a white man called John has absolutely destroyed all hope that elections are a viable route to fix America's problems.

What if SCOTUS believed voting is speech?

Multiple Supreme Court decisions have recognised that the right to vote is the basis for all other freedoms (“Other rights, even the most basic, are illusory if the right to vote is undermined”, *Wesberry v. Sanders*, 1964) and a fundamental part of democracy (“The right to vote is inherent in the concept of democratic government”, *Oregon v. Mitchell*, 1970). The words “right to vote” appear in these and many other cases since the 13th, 14th and 15th Amendments were passed, like *Yick Wo v. Hopkins* (1886), *Harper v. Virginia Board of Elections* (1966) and *Dunn v. Blumstein* (1972).

And yet, despite their flowery language defending the *principle* of the right to vote, the Court has always *acted* as if it doesn’t functionally exist. In *Bush v. Gore* (2000), a ‘per curiam’ decision so awful that its authors weren’t brave enough to sign their names, they began their legal analysis by asserting that it would be constitutional for a state *to disenfranchise its entire citizenry*. “The individual citizen has no federal constitutional right to vote,” it says, noting that even if a state *does* confer that right, they can “take back” that power at any time.

In *Disappearing democracy: how Bush v. Gore undermined the federal right to vote for presidential electors*, Peter M. Shane points out that this was the necessary starting point for the court’s decision, because they needed to justify the fact that its ruling was going to likely lead to the disenfranchisement of thousands of people. “The Court’s implicit stance,” Shane writes, “is that voters whose votes are counted but improperly weighted lose something that the Constitution protects, but that disenfranchised voters do not. There is no other sensible reason for starting where the Court starts.”

There are two absurdities here. First, that SCOTUS recognises that free speech is illusory without the right to vote, but will only protect the former, not the latter. This is like protecting your right to open an umbrella in a rainstorm, but not your right to have an umbrella. The second is just as farcical: the court enforces the lie it created that spending is more similar in function to speech than is voting. Only people who’d suffered the degenerative effects of law school could possibly make the argument that money gives you a voice more than voting does.

So, let’s make the case that voting is equally (*if not more!*) deserving of that designation, and thus should be given the same protections by the court. After all, campaign donations and votes share so many traits: both are a means to an end, not a direct act of communication; they both reflect choices, not personal expression; they can both be anonymous, so you don’t know who the spender/voter is; they are both highly regulated by the government; they both depend on citizenship and age; and neither necessarily express beliefs (sometimes a vote is a ‘lesser of two evils’ obligation, and sometimes a campaign donation is just a bribe).

Also, if the court is willing to treat corporations as speakers, they should treat ballots the same way. Both are nothing but pieces of paper, and both are intended to separate individuals from scrutiny and accountability (a corporation limits the liability of its owners, and a ballot enables people to vote anonymously). In fact, ballots would seem the more natural choice for ‘speaker’, as corporations may claim to represent the collective voice of their shareholders, but most people have no idea which companies their pension funds are invested in, so how can the

Disney corporation claim to represent the political voice of their 4,000 individual and corporate shareholders? Ballots, on the other hand, directly embody the values, beliefs and choices of voters.

It's maddening that we even have to go down this road. In arguing that voting is a form of speech, I'm playing an entirely fabricated game of logic that makes no sense as the constitution is written. The right to vote is mentioned twice in the constitution, so there's no reason why it shouldn't be afforded the same protections as freedom of speech, which is only mentioned once. Also, we already know that the court doesn't *actually* care about free speech, because they have repeatedly shown that they hold political, not principled, positions.

Take the free speech absolutist, John Roberts. In Citizens United v. FEC, 2010, he wrote, "There's no such thing as too much free speech". But in Morse v. Frederick, 2007, he wrote it was fine to punish someone for displaying a sign with the words "Bong Hits 4 Jesus" on it. Or compare the writings of Strip-Search Sammy. He wrote in his concurrence in *Nevada Commission on Ethics v. Carrigan*, 2011, that as far as he's concerned voting is speech. And yet, that didn't seem to matter to him at all when inventing those "guideposts" in *Brnovich v. DNC*, 2021, that explicitly allowed racist laws that limit how many people vote.

Finally, the conservative justices don't even interpret "free speech" correctly, when making their abhorrent rulings. For example, the court has previously written that a free press is critical for ensuring that the electorate are well informed (*New York Times Co. v. Sullivan*, 1964), that a "free discussion of governmental affairs" is essential for voters to make informed choices (*Mills v. Alabama*, 1966, and *Citizens United v. FEC*, 2010), that debate of public issues is integral to the operation of the system of government established by the constitution (*Buckley v. Valeo*, 1976), and that the 1st Amendment protects the right to be exposed to ideas (*Martin v. Struthers*, 1943), to receive ideas (*Lamont v. Postmaster General*, 1965, and *Stanley v. Georgia*, 1969) and to access diverse viewpoints (*Red Lion Broadcasting Co. v. Federal Communications Commission*, 1969).

In other words, the 1st Amendment protects far more than just your freedom to say what you like. It also protects your right to *hear* ideas, which, as the court has repeatedly held, depends on all candidates being able to financially compete. A real free speech absolutist would never have enabled rich people to flood the marketplace of ideas with unlimited mountains of cash to drown out their opponents' voices. And yet, John Roberts et al. have created a world in which political outsiders might just as well be sharing their ideas from within an airtight lead box at the bottom of the ocean (a metaphor that might very well become real once our newly immune-from-prosecution president begins his second term).

The only plausible explanation for the court's selective defence of the rights enumerated in the constitution is that these are political choices. Over the last four years, America may have woken up to the fact that the current court is an oligarchic nightmare of Trump's creation, but there's been more than a century of this shit. The Supreme Court is not suddenly broken, it's flawed by design, an institution whose brief and muted progressive moments have always resulted in prolonged and extreme conservative backlashes. Huge structural change is needed for the court to become—for the first time in its history—a benefit to American democracy.

So where do we go from here?

In February 2022, the Democratic-led North Carolina State Supreme Court forced the state's heavily-gerrymandered maps to be redrawn under court supervision. The following midterms produced North Carolina's first fair House result in decades, with both parties receiving about half the votes and half the seats.

However, in that same election there were 2 State Supreme Court seats up for grabs, both of which went to Republicans, thanks to an ungodly amount of money. The Republican State Leadership Committee, a national organisation, had given $5.5 Million to the Good Government Coalition, another national organisation, which gave $5.1 million to Stop Liberal Judges in North Carolina, by far the largest spender on the state's Supreme Court elections, the most expensive judicial elections in North Carolina's history. This is how John Roberts' democracy functions. Get used to it

In 2023, the North Carolina Supreme Court, now with its nationally-paid-for Republican majority, broke with 205 years of tradition by overturning their decision just one year prior, claiming that SCOTUS's 2019 ruling in *Rucho v. Common Cause* (which they mentioned 50 times) prevented courts from tackling political gerrymandering. In the 2024 elections, those maps gained the GOP 3 extra seats in the House of Congress. As the Republicans only won the House by 220 to 215 that year, those 3 gerrymandered North Carolina seats are the reason why Republicans in Trump's 2nd term will control all three branches of government.

Why, then, has so little of the recent bickering over which minority was to blame for the 2024 result focused on the fact that the court has broken politics, divorcing it from the will of the people? Why were these perversions of democracy so bizarrely missing from almost all of the horse race coverage throughout this year?

I haven't even mentioned the most recent cases, like *Merrill v. Milligan*, 2023, in which they ruled that as long as a state disobeys the Supreme Court long enough, they're allowed to keep racist electoral maps; *Trump v. Anderson*, 2024, in which the court decided by unanimous decision that Colorado wasn't allowed to stop an insurrectionist running for president; *Alexander v. South Carolina NAACP*, 2024, which said a racist outcome from gerrymandering is not enough to bring a discrimination claim, you need to prove the map drawer's *intent* was racist (good luck with that); or *Snyder v. United States*, 2024, in which the court effectively ruled that a bribe is only a bribe if it's in the form of a check with "in exchange for illegal favours" on the memo line. With two more SCOTUS seats possibly up for grabs before the end of Trump's term, and a president this court has ruled is literally above the law, 2025 and beyond is looking bleak.

Rucho v. Common Cause was brought by the Republican Party. The 5 justices that took their side were picked by Republicans, one of whom is married to a Republican operative. Yes, that all sounds corrupt. But *all* of the decisions the Supreme Court makes—even those where they say they're not able to intervene in politics—have political outcomes. No matter how much they claim to be mere umpires objectively adjudicating the law, the political nature of their appointments means that SCOTUS judges are selected solely for their strong political ideologies. If Republican-nominated judges decide cases that help Republicans win,

Republicans can then nominate more judges to the bench, who then also benefit Republicans, and the cycle continues. If the justices' political leanings didn't matter, we wouldn't care that Trump will likely have nominated 5 supreme court justices by the time he dies (by now the only sure deadline for the end of his presidency). I'm 41 years old, and there's a good chance that in my lifetime I will never again see a Supreme Court where bribe taking, gift-hiding, racist, Christian nationalist, sex abusing, fascist-friendly Trump picks don't dictate the country's laws. That's the shortest timeline, by the way, and it depends on no more democrats dying under Republican presidents over the next 4 decades.

The point is simple and undeniable. Under our current system, all justices, regardless of party affiliation, should recuse themselves from political questions. And as all court decisions are political, the entire exercise is a cruel joke at the expense of anyone who wants their representatives to represent us. Progressives must make radical court reform a central pillar of their political platform, and get the country to believe that change is necessary. Otherwise, the country will continue to be governed by partisan hacks hell-bent on making "democracy" synonymous with "autocratic oligarchy". As Peter from the 5-4 Podcast notes,

> Just like the early 1900s, we call it the Lochner era for one of the more egregious cases of the court striking down worker friendly regulations. I think this is gonna be the Citizens United era. I think that's how we're gonna look back at this. As when arch conservative court went wild disassembling our democracy gutting the voting rights act [and] overturning a fucking election…and all the obscene things they've done with campaign finance. This, to me, is the defining issue of this era. It's like the real end of democracy shit.