

Basing his argument on a wealth of historical and contemporary support, Jacobs makes a strong case for his argument that deference by federal courts to the political branches of government through their political question and standing doctrines is unconstitutional and denies individuals access to the courts to address violations of their most fundamental human and constitutional rights. Using the Juliana case as his primary example, Jacobs convincingly argues that we have reached a point to where only monied interests have effective access to the courts. His solution points to a difficult process of uniting the diverse voices of the American populace. An important and inspiring book for anyone interested in reclaiming fundamental human rights for the American people.

*Lance N. Long
Professor of Law
Stetson University College of Law*

Many writers have explored the negative impact of monied, special interests on American government, but Jacobs provides a unique perspective by focusing on the judicial branch and how it has become overly deferential to its political counterparts in recent decades. As evidenced by Jacobs' ample historical support, that deference means the courts no longer function how the founders intended – as a check on the branches more susceptible to special interests. Highlighting contemporary cases such as Juliana, Jacobs explores specifically how deference through the standing and political question doctrines denies ordinary citizens access to the courts, and how failure to review harmful political actions by acquiescing to those doctrines could likely be in itself unconstitutional. Refusing to accept the status quo, Jacobs proposes a return to proper judicial review as means to protect individual rights and ensure America is no longer a Democracy of Dollars moving forward.

*Ryan Hughey
Stetson University College of Law
Candidate for Juris Doctor 2022
Stetson Law Review | Associate Member
Stetson Democrats | Secretary*

Let me congratulate you on a most complete, concise reporting of an incredible range of subjects and problems which have evolved in our system of governing since our forefathers set this great idea in motion. From your insightful look at partisan gerrymandering to the chaotic results of shadow lobbyists and administrative agencies run amuck, you have managed to enlighten, encourage and certainly interest not only the legal field, I'm sure, but additionally clarified such events and circumstances even to a lay person like me. Many thanks for your incredible efforts.

Joyce Beltz, retired

The Democracy of Dollars describes and decries the transformation of the US government into one in which the separation of powers provided by the Constitution has become amalgamated and corrupted: Influence peddling has strengthened special interests to the disadvantage of citizens, the Congress has abdicated its legislative duties, the Supreme Court no longer calls the balls and strikes with regard to clear Constitutional issues before it, the imperial presidency is unbound, and the unelected administrative state is accountable to no one. A fascinating read which ends with a plea to the reader to get involved, become informed, demand change. For only through the concerted will of the people will our democracy be restored.

Martha Lockhart, retired

Mandatory reading if you care about America!

John Cole, Attorney

Copyright © 2020 by Richard O. Jacobs
Published May 2021
By Indies United Publishing House, LLC
Cover: Design, Danielle Johnston; Photo, Shutterstock

First Edition

We thank Black's Law Dictionary, Bryan Garner, Editor, for the definitions used in this book that are identified [BLD] in its Definitions Appendix.

All rights reserved worldwide. No part of this publication may be replicated, redistributed, or given away in any form without the prior written consent of the author or publisher.

ISBN 978-1-64456-178-2

Library of Congress Control Number: 202094326



INDIES UNITED PUBLISHING HOUSE, LLC

P.O. BOX 3071

QUINCY, IL 62305-3071

<http://www.indiesunited.net/>

Dedicated to Our Children's Trust, and those gutsy kids and their pro bono attorneys, who have sued governments, state and federal, to protect children's inherent Natural and Constitutional Rights, which are being trampled by America's Democracy of Dollars.

DEMOCRACY OF DOLLARS

WHERE NATURAL AND CONSTITUTIONAL RIGHTS
GO TO THE HIGHEST BIDDER

RICHARD JACOBS



INDIES UNITED PUBLISHING HOUSE, LLC

The Constitution of the United States is a carefully balanced document. It is designed to provide for a national government sufficiently strong and flexible to meet the needs of the republic, yet sufficiently limited and just to protect the guaranteed rights of citizens; it permits a balance between society's need for order and the individual's right to freedom.

About the Supreme Court
www.SupremeCourt.gov

I agree to this Constitution with all its faults.... I believe, further, that this is likely to be well administered for a course of years, and can only end in despotism, as other forms have done before it, when the people shall be so corrupted as to need a despotic government, being incapable of any other.

Benjamin Franklin
Constitutional Convention 1787

You are where you are today because you stand on somebody's shoulders. And wherever you are heading, you cannot get there by yourself. If you stand on the shoulders of others, you have a reciprocal responsibility to live your life so that others may stand on your shoulders. It's the quid pro quo of life. We exist temporarily through what we take, but we live forever through what we give.

Vernon E. Jordan, Jr.
Attorney, Civil Rights Activist
Circa 1990

TABLE OF CONTENTS

| | |
|---|----|
| Foreword..... | 1 |
| Preface..... | 4 |
| Prologue..... | 12 |
| The Problem..... | 19 |
| Lincoln’s Apple of Gold..... | 19 |
| The Problem..... | 24 |
| What We Need..... | 27 |
| Part I..... | 29 |
| Chapter 1 - Democracy of Dollar versus Democracy of People..... | 30 |
| What the Diagram Tells Us..... | 30 |
| Democracy of People Triangle..... | 30 |
| Judiciary and the Democracy of People..... | 31 |
| Democracy of Dollars Triangle..... | 31 |
| Judiciary and the Democracy of Dollars..... | 33 |
| Can Shareholders Influence Special Interests?..... | 34 |
| Who Speaks for the People in a Democracy of Dollars?..... | 35 |
| Chapter 2 - Our Constitution..... | 36 |
| Seven Key Passages..... | 36 |
| Interpreting the Constitution..... | 38 |
| Separation of Powers..... | 39 |
| Fiduciary Responsibilities of the Branches of Government..... | 40 |
| Presidential Elections: Electoral Collage..... | 41 |
| Bias..... | 41 |
| Electoral College: Voter Dilution..... | 42 |
| To the Winner Belong the Spoils..... | 43 |
| Congressional Elections..... | 45 |
| From Factions to Parties..... | 46 |
| Political Party Democracy Distortions..... | 47 |
| Voter Gerrymandering..... | 47 |
| Layering of Voting Requirements..... | 47 |
| Purging Voter Records..... | 48 |
| Vote Blocks..... | 48 |
| Tampering with Judicial Independence..... | 49 |
| Amend the Constitution?..... | 50 |
| Chapter 3 - The Constitution's First Three Articles..... | 52 |
| Constitution-Article I - Legislature..... | 52 |
| Constitution-Article II – Executive..... | 54 |
| Constitution-Article III – Judiciary..... | 55 |
| The Long-term Influence of Judicial Dissent..... | 56 |
| Ultimate Limitations on Supreme Court’s Authority..... | 57 |
| An Active People and a Supporting Court..... | 58 |
| Playing by the Rules..... | 59 |
| Part II..... | 61 |
| Chapter 4 – Judicial Deference: Congress’s Over-Delegation..... | 62 |
| War Powers..... | 62 |
| Administrative Agencies..... | 63 |
| Chevron and Companion Deference Doctrines..... | 65 |
| A Supreme Court Rollback in the Making?..... | 68 |
| Chapter 5 – Judicial Deference: The Standing Doctrine..... | 75 |
| Marbury v. Madison and the Marshall Court..... | 75 |

| | |
|--|-----|
| Stare Decisis..... | 80 |
| Judge-Made Rules..... | 81 |
| Precedent for Change..... | 82 |
| Our Children’s Trust..... | 83 |
| Juliana v. United States Chronology of Legal Actions..... | 85 |
| Juliana v. United States: The Government’s Interlocutory Appeal..... | 86 |
| Deference Should Not Mean Denial..... | 93 |
| When Judicial Concerns Rise From “Theoretical” to “Experiential”..... | 94 |
| Chapter 6 – Judicial Deference: The Political Question Doctrine..... | 96 |
| A Political Question: <i>Rucho v. Common Cause</i> | 97 |
| No Political Question: <i>Baker v. Carr</i> | 101 |
| Stare Decisis..... | 102 |
| Mirror of Representation..... | 102 |
| What is the Role of Political Parties?..... | 103 |
| What is the Gerrymandering Role for the Supreme Court?..... | 106 |
| The Voice of the People..... | 110 |
| The Unsolved Problem..... | 112 |
| Judge-Made Deference Rules: Unconstitutional?..... | 113 |
| Chapter 7 - The Era of Presidential Administration..... | 117 |
| Introduction..... | 117 |
| George Washington’s Cabinet Beginnings..... | 120 |
| Today’s Presidential Cabinet and Administrative Agencies..... | 121 |
| Constitutional Background: Legislative Delegation..... | 122 |
| The Era of Presidential Administration..... | 125 |
| Executive Orders – A Prime Tool in the Era of Presidential Administration..... | 130 |
| Lincoln’s Order About Habeas Corpus..... | 130 |
| Youngstown Sheet and Tube Co.: A Landmark Case..... | 131 |
| Presidential Uses of Executive Orders..... | 133 |
| The Executive Branch’s Reality Show..... | 136 |
| Ethics Statutes..... | 136 |
| Executive Branch Ethics Commitment..... | 137 |
| The Swamp..... | 138 |
| Two Views of Lobbying by Former or Future Governmental Employees..... | 140 |
| The Lobbying Reality..... | 140 |
| Cuts in IRS Budget, Minimizing Tax Collections from the Wealthy..... | 142 |
| Agency Rollbacks..... | 143 |
| Administration Rollback Legal Challenges..... | 146 |
| Pandemics Aren’t the Only Excuse to Trample on Rights..... | 148 |
| Rights to the Highest Bidder..... | 149 |
| Chapter 8 – Natural Rights and the Ninth Amendment..... | 150 |
| Two Questions About Democracy and Why Governments are Formed..... | 151 |
| Scalia’s Democracy..... | 152 |
| Jefferson’s Democracy..... | 152 |
| First Amendment Right to Petition Our Government for Grievances..... | 153 |
| Natural Rights: Our Unenumerated, Inalienable Rights..... | 154 |
| Judge-Made Balancing Rules..... | 157 |
| Balancing Rules in Emergencies..... | 158 |
| Suspending Rights..... | 158 |
| Balancing Rules, the Presumption of Constitutionality and Footnote Four..... | 160 |
| <i>Griswold v. Connecticut</i> – Marital Right to Privacy..... | 162 |
| Ninth Amendment: Does it Mean What it Says?..... | 164 |
| The Justinian Code..... | 168 |

| | |
|--|-----|
| Part III..... | 173 |
| Chapter 9 – The Engaged Court..... | 174 |
| The 21st Century Court: Standing on the Shoulders of the Marshall Court..... | 175 |
| The Engaged Court, Madison’s “Auxiliary Precautions”..... | 178 |
| Is the Court both Independent and Political?..... | 180 |
| The Court’s Political Significance as an Institution..... | 181 |
| The Importance of 5-to-4 Court Decisions..... | 183 |
| Shifting Court Balance..... | 184 |
| Beliefs, Policy Decisions and Judge-Made Rules..... | 186 |
| Judicial Diversity: for Liberals, Conservatives, Independents..... | 188 |
| The Real World..... | 189 |
| Judicial Review: Shaping Political Branch Homework..... | 193 |
| Will the Court Rise to the Occasion?..... | 195 |
| Chapter 10 – The Voice of the People..... | 197 |
| When We Crow Like a Rooster..... | 197 |
| The Court Wants to Hear Our Voice..... | 200 |
| The Silent People..... | 201 |
| Building the Movement..... | 203 |
| America’s 2020 Mindset, Ready for Change..... | 203 |
| Our Movement’s Objective: Reestablish Our Democracy of People..... | 204 |
| The Arc of Change..... | 204 |
| The Will and Voice of the People: A Myth or a Jazz Band?..... | 206 |
| Who Speaks for the People?..... | 207 |
| Where Our Unfinished Work Begins..... | 209 |
| Epilogue..... | 211 |
| Five Takeaways..... | 231 |
| “Democracy Doesn’t Happen by Accident”..... | 255 |
| Epilogue Endnotes..... | 256 |
| Index..... | 265 |
| Definitions Appendix..... | 266 |
| References and Resources..... | 270 |
| Cases..... | 270 |
| Laws..... | 271 |
| Texts..... | 271 |
| Polls..... | 274 |
| U.S. Government Sources..... | 276 |
| Other References and Resources..... | 277 |
| Appendix..... | 289 |
| Appendix A: Chapter 5 – Juliana v. United States Chronology of Actions..... | 289 |
| Appendix B: Chapter 7 – President’s Cabinet Members..... | 291 |
| Appendix C: Chapter 7 – Executive Branch Agencies’ Employees..... | 291 |
| Appendix D: Chapter 7 – Presidents’ Executive Orders..... | 292 |
| Appendix E: Chapter 7 – Executive Order 13770..... | 293 |
| Appendix F: Chapter 5 - Our Children’s Trust: Congressional Resolution Introduced | 299 |
| About the Author..... | 301 |

Foreword

It is the year 2021 and we live at the intersection of so many critical tipping points. The climate crisis. Racial injustice. A global health pandemic. Social media and the [mis]information age. Politicizing the Supreme Court. These tipping points tell us that our entire democracy is at risk. Will we be a true constitutional democracy for the sake of our children, or to a democracy sold to the highest bidder and the most influential interest groups?

These tipping points are interrelated and interdependent. As Dick Jacobs so insightfully explains in the pages to follow, the red tide of money's power in our constitutional democracy has become the lifeblood oxygenating these crises. While the arc of justice may be long and the pendulum will naturally swing along that arc, the scales of justice that live within any form of government can and do come crashing down when the systems no longer serve the people and those in power don't reform the systems.

What I love about *Democracy of Dollars*, and the incredible citizen behind it, is its historical, practical, and gracious optimism about what can yet be done to tip our nation back toward a healthy, sustainable constitutional democracy. Dick Jacobs never just lays down a problem and throws up his hands. He implores you to learn, question, explore, and then act, as he himself continues to faithfully do now in his ninth decade on our planet.

Dick Jacobs found me through his journeys around the world. A lawyer turned photographer and writer turned constitutional scholar and climate guardian. Dick first uncovered the climate crisis through his camera. He amplified Our Children's Trust and our most well-known case, *Juliana v. United States*, through his passion to see the planet protected from the utter failings of our majoritarian politics and the ensuing climate destruction his journeys showed him. Dick Jacobs is an ethical caretaker and ally to future generations, the best kind of living ancestor, the kind I want my children to be one day.

The need for the stories contained in this book to make their way into the minds of Americans could not be more pressing or timely, and they will be relevant whether a Republican or a Democrat sits in the White

House for these crises did not originate only under one party's power.

If we are living at the intersection of tipping points, then our courts are at its fulcrum. Central to Dick's plea to us to save our nation is for us to revive our third branch of our federal government to its vital role of calling balls and strikes in a way to provide each of us with the benefits of our democracy. As *Democracy of Dollars* shows us, if we really want to avoid revolution, we need to re-learn the lesson from James Madison: "A dependence on the people is, no doubt, the primary control on the government; *but experience has taught mankind the necessity of auxiliary precautions.*" Too often today, our courts fail to be that auxiliary precaution and shut their doors on the politically powerless minority, the interests that don't come monetized and who can't afford the price of admission to be heard.

Even the process of nominating and confirming our federal judges to their lifetime appointments has lost its precautionary nature. In the 2017 Seventh Circuit Court of Appeals confirmation hearing for Amy Coney Barrett (later confirmed to the Supreme Court by the Senate October 31, 2020, to replace Justice Ginsburg), Senator Sheldon Whitehouse said the judicial confirmation process had become preposterous. Whitehouse too has long warned of the monetization of democracy: "I look out at a very significant machinery of influence that is designed, that has as its purpose, to bring the will of ideological and commercial interests into our courts in ways that will follow the wishes of those ideological and commercial interests. And then I see nominees who have the support of that President with his litmus tests and with his disregard for the rule of law who've been cleared by those very ideological and commercial interests for policymaking on our courts."

And yet, despite these many daunting tipping points, weighted heavily with dollars, I believe, like Dick, that we can reclaim our children's inalienable rights, their equal protection of the law, and be good ancestors for Our Posterity. We can reclaim our courts and rescue our democracy through good lawyering, good judging, and good citizenship. Justice Ginsburg wrote in *U.S. v. VMI*: "A prime part of the history of our Constitution ... is the story of the extension of constitutional rights and protections to people once ignored or excluded ... as our comprehension of 'We the People' expanded." It starts with waking up and ends with never giving up.

The book that follows is a culmination of a lifetime of learning and of love, for our laws, our land, and our legacy. It is an honor and a gift to know Dick Jacobs. We are all better off for his many contributions to our

DEMOCRACY OF DOLLARS

country and our planet. I hope this book inspires others, as it did me, to keep striving for justice and fighting for the survival of our constitutional democracy from the pinnacle of that proverbial – and, for our planet, literal - melting iceberg on which it rests. Read on and join us as a difference maker.

Julia A. Olson
Chief legal counsel, Our Children's Trust
Lead counsel, *Juliana v. United States*

Preface

In 1919, Supreme Court Justice Oliver Wendell Holmes, in a famous dissent, wrote that our Constitution is an “experiment, as all of life is an experiment.” The experiential history of our Constitution is a continuum of course corrections, as we so often stumble in our attempts to retain a founding purpose. We fail from time to time to keep our world on track, often bringing American institutions and people to the precipice of crisis and failure.

Democracy of Dollars creates a narrative that exposes and examines the systemic threat to 21st Century America. This threat has grown exponentially in recent times, suppressing the Democracy of People the Framers of our Constitution provided for themselves and for us as their posterity.

Although I am an attorney, *Democracy of Dollars* is not speaking primarily to an audience of lawyers. Nor is *Democracy of Dollars* a political book. Political authors implicitly choose sides and sooner rather than later begin filtering the issues through a partisan or factional lens. That filtering is a kind of censorship that has become the *weltanschauung* of today’s discourse, which limits enlightenment, rather than facilitates it. However, in the interests of currency, the elemental examples provided in this book are set in today’s reality – the reality provided us during the Presidency of Donald J. Trump. Although the Democracy of Dollars, and the issues we present, did not originate during Trump’s Presidency, Trump’s ramp up provides us with current examples useful in our analyses.

But the underlying issues will not disappear simply because a successor administration leads our nation. Until we have the courage to rid ourselves of the Democracy of Dollars infliction, the potential harm of the underlying issues will continue to fester and harm us whether Republicans or Democrats are in charge. The harm will occur until we reestablish our Democracy of People.

Democracy of Dollars is about context, not theory. It is an examination of today’s context in which the interplay of our three branches of government – the legislative, executive, and judiciary – reveal themselves as far different institutions than those in 1789, when our Constitution was

DEMOCRACY OF DOLLARS

adopted. Although our Constitution's Framers had remarkable insight, they never contemplated America as it exists today.

General Colin Powell once said that understanding context in military preparation is everything. Similarly, in our course-correcting as we live the American experiment, context is the guiding light in our making good decisions. A decision that was made, or a theory that was promulgated, decades or centuries ago under different circumstances may not work in our times.

What is the context of our times, here in America?

As a society we have morphed from a Democracy of People into a Democracy of Dollars, described in detail in the chapters that follow. Consequently, the two political branches of our federal government, the legislative and the executive branches, designed to protect and serve all Americans, have become willing resources to special interests who, in today's pricy politics, can buy their way to the head of the line.

Besides our two political branches of government, fortunately, our national government has a co-equal third institution, the judicial branch, the federal judiciary headed by the Supreme Court. The federal judiciary, with its lifetime appointment of judges, is intended by our Constitution's Framers to function as nonpolitical and independent. And, most importantly, the judiciary is intended to provide a constitutional check over the other two branches. Supreme Court Chief Justice Roberts said in his 2005 confirmation hearing, "Judges are like umpires.... They make sure everybody plays by the rules."

The "everybody" includes our two political branches of government, and the Court itself.

Unfortunately, the Court has grown overly dependent on its judge-made rules of deference to those political branches. By so doing, it has too frequently discarded its important judicial review function of their actions and inactions. Thus, the Court has become their unwitting handmaiden, allowing the political branches to operate outside the four corners of our Constitution. Unchaperoned by constitutional checks and balances, the political branches too frequently fail to operate by the rules.

To use a metaphor neither we nor the Court should overlook, the 21st Century sandlot in which our government plays its game today is not the same as the 18th Century sandlot when the Constitution was adopted. The game of government is not played the same way. The equipment is different. The ground rules are different. The price of admission is different. The Court's challenge in fulfilling its umpire role is dramatically different.

It may seem counterintuitive that I, an attorney, would argue that the Supreme Court should be more sensitive to context and less bogged down by its judge-made rules. However, in today's Democracy of Dollars, the rights of individuals are too often subordinated by a political branch of government aligning itself with special interests and their lobbies. When that happens, the judicial branch's deference to the political branch fails the American people. A consequence, as I see it, is that our Supreme Court must reassert its umpire role in an independent, nonpolitical way, providing the checks and balances over our two political branches of government with the objective of protecting the unalienable rights of the people.

Rights-protection is what Thomas Jefferson wrote about in 1776 in our Declaration of Independence. It is what people seek when they form their government. The checks and balances must operate successfully in the context of each successive generation. To reach our constitutional destiny, and accomplish its mission in protecting our rights, the 21st Century Supreme Court must follow the lead of the Supreme Court at the early beginnings of our country.

The prime role model was provided by Chief Justice John Marshall, appointed by our second President, John Adams. During the 34 years of John Marshall's leadership, the Marshall Court did more than call balls and strikes. Through its role as umpire, it shaped the responsibilities of the Supreme Court for all time. The Marshall Court defined the role of the federal judiciary and architected judicial solutions needed to deal with constitutional ambiguities or omissions. The Marshall Court was a solution-oriented judiciary. It created legal precedents – *stare decisis* — courts follow as authority to this day.

The 21st Century Supreme Court must be of a similar mindset when it comes to its use of its judge-made rules of deference created in another time, when special interests and lobbies were less influential. Today's Court must revamp its judge-made rules of deference, rules we discuss in this book. Rather than negate its judicial authority through deference to the political branches, the Court must reassert its constitutional responsibility. In particular, the Court must provide judicial reviews of cases and controversies when natural and constitutional rights of persons are at stake. Because the Supreme Court decisions bind lower federal and state courts, the judicial system falls into sync with an engaged Supreme Court.

Now, what does all this have to do with us in 21st Century America?

This question brings me to a central thesis of my narrative. In today's

DEMOCRACY OF DOLLARS

complexity it is impossible to totally change the over-all way our government operates, primarily through administrative agencies within the executive branch – a method of operation that by its very nature enhances the influence of special interests. Constitutional amendments might create a structure for change. But that kind of change is difficult, expensive, time consuming, and unlikely to provide the solutions we need. Amendments must originate through Congress and the state legislatures, which in too many instances today are the source of the problems the amendments must address.

What we and the Court need to hear is a strong voice that originates from the people. A strong, persistent voice will catch the attention of the Court. Ultimately, the Court will recognize that its Deference Doctrines yielding to the two political branches is in fact abandonment of its constitutional status as a coequal branch of government. The Court's Deference Doctrines, which negate judicial review, invite influence and power from special interests and their lobbies into our government. This book calls for this void in the Court's performance to be corrected.

Over time, public influence can have a dynamic and positive effect on the Court. David Cole, national legal director of the ACLU, wrote in the 2016 *Engines of Liberty*: "The reality is that the formal mechanisms of constitutional law – the separation of powers, a Bill of Rights, federalism, and judicial review – are not enough to sustain liberty. Citizen engagement on the side of liberty is essential to the defense, and the evolution, of the nation's fundamental values." Effective citizen engagement takes sustained action. It takes dedication over the "long haul." Without meaningful citizen engagement, as Judge Learned Hand said in 1944 in a talk with political immigrants, liberty can die and "no court can save it." To reignite our Democracy of Dollars, we cannot remain silent on the sidelines. As important as voting is, it is not enough.

But with citizen engagement, public influence can guide the Court in perceiving and understanding the systemic threats to our survival as a nation that can otherwise overwhelm and destroy us. Public influence can guide the Court to understand that its deference to the political branches defeats the Court's responsibility to protect the people and has the unintended effect of empowering special interests to our detriment.

The Court has fulfilled this responsibility in the past. In response to public outcries, our Supreme Court has reacted to fill unmet human needs. It has recognized new forms of cruel and unusual punishment. It has guaranteed that people charged with serious crimes must have appointed counsel. And perhaps, in its most shining hour, it has recognized that

“separate but equal” education violates the 14th Amendment’s equal protection guarantee to all children regardless of race.

The Court also had no timidity in America’s Gilded Age, the late 1800s, the period of great economic expansion as America moved from coast to coast. In 1886, the Court decided that corporations were “persons” within the meaning of the 14th Amendment. Thus, corporations are entitled access to federal courts and a bevy of constitutional rights intended by the Founders exclusively for individuals. Furthermore, the Court did not hesitate to opine in a series of cases, collectively known since 2010 as *Citizens United*, that unlimited amounts of money contributed in political campaigns is a form of constitutionally protected “free speech.” However, those sorts of decisions by the Court represent the musings of an activist court, stretching the Constitution beyond its four corners and underlying intent to reach a political goal. The Court’s political activism represented by those decisions has contributed to the diminution of our Democracy of People and its replacement by a Democracy of Dollars. Thom Hartmann concludes in his 2019 *The Hidden History of The Supreme Court and the Betrayal of America* that by those decisions the Court “essentially handed our elections over to the highest bidders.”

Clearly, a course correction by the Court is needed if we are to return to our Democracy of People.

Fulfilling the Court’s responsibility, as this book advocates, does not make the Court an activist court, moving us outside the frame of the Constitution. Rather, when fulfilling its responsibility, the Court is an engaged Court. An engaged Court is fully attuned to the challenges of the 21st Century, bringing the political branches back within the intent and meaning of the Constitution. In doing so, the Court shines as the bastion of American democracy and the protector of our rights. That is its role as envisioned by our nation’s Founders in the Declaration of Independence and Constitution. Reaching this goal will require the encouragement by the strong voice of the people.

Perhaps most illustrative of the role of a strong public voice is the way the Supreme Court listened to the public during the Great Depression in the 1930s. The Court’s record evolved from opining that Franklin Roosevelt’s New Deal legislation was unconstitutional to the Court’s supporting it.

In her 1958 American Heritage article, “F.D.R. Vs. The Supreme Court,” Merlo Pusey wrote, “The great struggle between the President and the Supreme Court in 1937 stirred the national emotions to unusual depths

because it brought Franklin D. Roosevelt's crusade against depression into collision with one of our most hallowed traditions.... [I]t remains high on the list of the most dramatic contests in our constitutional history."

William Leuchtenburg wrote in his 2005 article for the Smithsonian, "When Franklin Roosevelt Clashed with the Supreme Court and Lost," that the early Supreme Court decisions holding the offerings of Roosevelt's New Deal legislation unconstitutional "drew biting criticism, from inside and outside the court.... On the night following [the Court's] opinion, a passerby in Ames, Iowa, discovered life-size effigies of the six majority justices hanged by the side of the road." Disgusted with the Court's holding New York's minimum wage law unconstitutional, Secretary of the Interior Harold Ickes said, "If this decision does not outrage the moral sense of the country then nothing will."

The monumental public fight between Roosevelt and the Court was described by Leuchtenburg as the fight for the Court's need for independence versus the fact that "a few judges appointed for life would be able to ignore the popular will, destroy programs vital to the welfare of the people...." A frustrated Roosevelt proposed legislation to solve the problem: he would pack the Court with new judges. His court-packing proposal failed to gain support from Congress or the people – on that point he lost. But after a few initial setbacks, the Supreme Court never again held any other of Roosevelt's New Deal legislation unconstitutional. Among the results: we have Social Security and a minimum wage.

Pusey concludes her American Heritage article with: "The net effect of the 1935-37 ferment over constitutional issues was to confirm their insistence that the judges must take into account changed social and economic conditions as well as past legal precedents.... The principle for which they struggled was continued independent judgment on the part of the court [stood firm]."

This question needs to be asked. Has our Court – have we – forgotten the lessons from that struggle?

This book illustrates how our democracy and many of our unalienable rights have suffered as a result of the forgotten lessons. The public voices so important in championing our rights in the past have grown too silent.

After introducing *The Problem*, Part I and its three chapters provide us with a background about our Constitution.

In Chapter 4, we focus on the Supreme Court's indifference to Congress's delegation of its exclusive legislative power to the executive branch's administrative agencies. The outcome is to increase the political power and influence of special interests on our government.

In Chapter 5, we focus on the Supreme Court’s deference through judge-made rules of “standing” and “redressability” that deny judicial review to aggrieved persons whose rights have been injured by a political branch of government. These Deference Doctrines leave the injured without effective remedies.

Chapter 6 focuses on the plight of individuals whose voting effectiveness is diluted by partisan gerrymandering, through a judge-made “political question” rule. This Deference Doctrine destroys the Constitution’s mandate that the vote of each person is equally effective.

Chapter 7 looks closely at the chaotic effect of our legislative branch’s sweeping delegation of legislative and judicial powers to the executive branch. The result has been the unfettered growth of our “fourth branch” of government. That administrative state has created the 21st Century’s “Era of Presidential Administration” as our government’s *modus operandi*, driven by lobbies and special interests and not the will of the people.

Chapter 8 focuses on our natural rights, rights not written into the Constitution’s Bill of Rights, but protected by Article 9 of the Bill of Rights. Natural rights have their roots deep within the history of humankind, predating the Constitution. These rights include life, liberty and the pursuit of happiness championed in the Declaration of Independence. Too many of these unenumerated rights — particularly those rights that provide for a healthy environment, clean air, and clean water — are being badly damaged by our political branches of governments’ devotion to special interests. However, the little-used Article 9 of the Bill of Rights, which provides, “The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people,” confirms for us that, although these fundamental human rights are not constitutional rights, our Constitution protects them from manipulation or interference by the political branches of government.

These examples are not exclusive, they are illustrative. And they lead us to an important conclusion, expressed in an old saw attributed to Michael Moore:

“Democracy is not a spectator sport, it’s a participatory event. If we don’t participate in it, it ceases to be a democracy.”

An engaged Court and the importance of the voice of the people are the subjects of the final section of this book. America needs us to become involved. The Epilogue provides us with five takeaways from the 2020 presidential election, and the insurrection and failed coup d’état that followed. These takeaways confirm that we must be an informed and

DEMOCRACY OF DOLLARS

active citizenry if we are to reestablish our Democracy of People.

In our discussion, certain key legal terms are used. Legal terms are defined in the Definitions appendix and in appropriate chapters.

Please read on.

*Dick Jacobs
Tierra Verde, Florida
March 2021*

We are all Republicans; we are all Federalists.

President Thomas Jefferson
First Inaugural Address, March 4, 1801

Prologue

I am writing this *Prologue* in late 2020, at a time when the most contentious presidential political campaign and election of my lifetime refuses to draw to a harmonious close. The contention has deep roots within our political culture and has been growing for years.

The inability of competing political parties to talk to and work with each other, along with the growing inability for people to determine the truthfulness of the news and what our government tells us, has been too much. The American people have lost faith in our institutions and our political leadership.

In July 2020, the Associated Press-NORC Center for Public Affairs Research reported that three-quarters of Americans believe our country is headed in the wrong direction.

Trust in our government's political institutions could hardly be lower.

A January 2020 Pew Research Center thirty-three country international poll concluded that only 29% of the people in those countries trusted our President. In February 2020, Pew found that "just 15% of U.S. adults say they like the way he conducts himself as President." In June 2020, Gallup determined that just 25% of Americans trusted Congress.

Pew's poll in July 2019 reported two-thirds of Americans said they find it hard to tell when elected officials are telling the truth. Political parties are factious and rarely agree. They hardly speak to each other. The growing political divide between political parties and the eroding public trust in our political institutions and elected officials represents a serious handicap in our nation's abilities to solve its pressing problems.

In 1952, when I was a student at the University of Wisconsin, I cast my first presidential vote, for Eisenhower as President. During his two terms, Pew reported in a 2015 study, that trust in the federal government to do the right thing most of the time exceeded 70%. Trust reached an all-time high, 77% in 1964, the year Lyndon Johnson defeated Barry Goldwater.

DEMOCRACY OF DOLLARS

Pew also reported in the same study that in the decade after Johnson's election, "a period that included the Vietnam War, civil rights legislation, civil unrest and Nixon's Watergate Scandal," public trust fell to 36%. "By the end of the 1970s, only about a quarter of Americans felt they could trust the government at least most of the time." There were ups and downs in the 1980s and 1990s, with trust never exceeding 50% until the 9/11 attacks in 2001 when trust rose to 60%. But Trust fell in the "summer of 2002 to the 20-25% range, essentially where it has remained."

Pew's 2015 study also concluded that the lack of trust in government "has been mirrored by the steep decline in the belief that the government is run for the benefit of all Americans."

As contentious as our times may be, they pale in comparison to the election of 1800 and the political conflicts which led up to it. Alfred J. Mapp, Jr., wrote in his 1987 *Thomas Jefferson, a Strange Case of Mistaken Identity*, those were times when our young nation suffered through its "Struggle of Titans." Mapp refers to the battle of our Founders, the Framers of our Constitution, who couldn't agree on the kind of government the Constitution they wrote and just adopted was meant to give us.

George Washington, our first President, was unanimously elected to two terms by the electoral college. His first term began April 30, 1789. During his presidency, as Washington and his cabinet wrestled with problems, both domestic and international, differing views about the role our federal government should play developed.

There were sharply contrasting opinions about the Constitution's implied but unstated meanings, as new and unforeseen problems and opportunities faced our young nation. For example, Washington established the first "cabinet" under the Constitution's implied meaning. The Constitution does not provide for an executive branch cabinet. Washington also issued the first eight presidential executive orders, also not specifically authorized by the Constitution.

Some of Washington's cabinet members saw America as a nation of commerce with a need for international alliances and taxes to build our infrastructure. They were led by Alexander Hamilton, Washington's Secretary of Treasury, and favored a strong central government. Hamilton had an ally in John Adams, Washington's Vice President. This faction ultimately formed the Federalist Party (later replaced by the Republican Party).

Other cabinet members saw America as primarily a nation of small farmers with low taxes. Those favored a decentralized government and

were led by Thomas Jefferson, Washington's Secretary of State, who picked up an ally in James Madison. That faction became the Republican Party (initially referred to as the Democratic-Republican Party, and ultimately given the name of the Democratic Party).

When Washington declined to serve a third term, he retired. His Vice President, John Adams, became our second President in the election of 1796, winning the electoral college by three votes. Adams' opponent, Thomas Jefferson, came in second in voting. Under the checks and balances in our original Constitution (amended by the 12th Amendment in 1804), Jefferson became Adams' Vice President. During that period, it became apparent that political parties were necessary to channel conflicting views among the American people on the role of government.

Washington opposed political parties and when he died during Adams' term, our nation lost his leadership, and its cohesiveness.

For the first time, with the election of 1800, political parties nominated candidates. Each party nominated two, with the idea that the candidate with the most votes would be President and the runner up would be Vice President. Each member of the electoral college could cast two votes.

The 1800 election pitted the Federalist candidates, Adams, seeking his second term, and Charles Pinckney, against the Republicans' Jefferson and Aaron Burr. The campaigns, however, were very contentious and failed to produce the expected result. Jefferson and Burr, not Jefferson and Adams, tied for the lead.

Among the issues, New Englanders favored the Federalists and sought a return to a closer relationship between religion and government. They did not trust Jefferson and labeled him an atheist. Some New Englanders feared they would have to hide their Bibles from Jefferson if he were elected. The political differences between New Englanders and the rest of the 13 states were so strong that New England thought about leaving the union.

It took 36 ballots in the House of Representatives – and Hamilton's efforts to influence Federalists to vote for Jefferson – before the deadlock between Jefferson and Burr was broken. Jefferson only then became our third President, Burr his Vice President.

After being sworn into office by Supreme Court Chief Justice John Marshall, Jefferson delivered his first inaugural address. It was a masterful speech, set on healing the factions that had built in our nation. Jefferson began with recognition that America was a "rising nation, spread over a wide and fruitful land, traversing all the seas with rich productions of their industry, engaged with commerce with nations who feel power and forget

right...” followed by: “During the contest of opinion through which we have passed, the animation of discussions and of exertions has sometimes worn an aspect which might impose on strangers unused to think freely, and to speak and write as they think; but this being now decided by the voice of the nation.... [The differences] will of course arrange themselves under the rule of law and unite in common efforts for the common good.... Let us then, fellow citizens unite with one heart and one mind, let us restore to social intercourse that harmony and affection without which liberty, and even life itself, are but dreary things.... We are all republicans: we are all federalists.”

As our young nation settled into its new form of government as a democratic republic, factions and differing views about the independence of each of the three branches of government surfaced. Which branch had the ultimate authority regarding the Constitution’s mandate of checks and balances was far from resolved. It was in Jefferson’s first term of office that Chief Justice John Marshall, a Federalist appointed by President Adams, took charge, and resolved the question.

The Marshall Court defined the role of the Supreme Court as the final arbiter to determine whether Congress’s laws were constitutional. Marshall rejected the Jeffersonian idea that the Constitution was merely a platform on which Congress could stand to build on with later laws.

Marshall’s 1803 *Marbury v. Madison* Opinion, which we discuss in Chapter 5, asserted that Congress did not have the power to modify the Constitution by passing laws. Rather, the Constitution, being a grant of power, provides the full expression of the authority for Congress’s legislative powers. The Supreme Court, Marshall opined, has “emphatically the duty to say what the law is” and, as to the President and other officers, “no high [executive] officer is above the law.”

The *Marbury* opinion solidified the Court’s role as including constitutional checks and balances over both the legislative and executive branches through its judicial review. That role is the most important responsibility the Supreme Court and the federal judiciary have.

But, as I argue in this book, it is an essential role from which the Supreme Court too frequently strays in our time. During these fractious times, when our Democracy of People has morphed into a Democracy of Dollars driven by special interests, the Court’s check and balance role must be reestablished.

We started this *Prologue* with context provided by Pew’s research on

the attitude of the American people about our government's direction and the lack of confidence we have in our political branches of government, the legislative and executive branches.

Of prime importance to our discussion is the Pew 2015 study concluding that our lack of trust in government "has been mirrored by the steep decline in the belief that the government is run for the benefit of all Americans." That uneasy feeling each of us has is a result of our Democracy of People morphing over time into today's Democracy of Dollars. Lack of trust is primarily the result of our two political branches of government, the legislative and executive branches, operating as an oligarchy, the government of the few for the benefit of a privileged few, driven by dollars and not the will of the people.

Of our three institutions, legislative, executive, and judicial, public confidence in the Supreme Court and its judicial branch remains highest. A September 2020 Pew Research Center Survey, reported by Hannah Hartig in "Before Ginsburg's death, a majority of Americans viewed the Supreme Court as 'middle of the road,'" concluded that 70% of Americans viewed the Supreme Court favorably.

We argue in the *Preface*, and throughout this book, that an independent, engaged Supreme Court providing constitutional checks and balances is, along with a strong voice of the people, necessary for us to return to a Democracy of People.

However, a May 2019 Quinnipiac University poll warned that there is a growing understanding among Americans that Supreme Court appointments have become too political. To the poll's question, "In general do you think that the Supreme Court is mainly motivated by politics or mainly motivated by the law?" 55% chose "politics."

For years, Senatorial confirmations of the federal judiciary were subject to its filibuster rule. It takes a vote of sixty percent of the Senators to waive a Senator's right to filibuster a vote. That rule was revoked, first by the Democrats in 2013 for judicial appointments other than the Supreme Court, and then by the Republicans in 2017 for Supreme Court appointments. Since compromise is no longer necessary, politicization of the appointment and confirmation process intensified.

With the October 2020 confirmation of Amy Coney Barrett as Ginsburg's successor, six of the current nine judges have been appointed by Republican presidents. Unlike past judicial appointments, which followed Senatorial discussion and compromise necessary to earn 60 votes, the most recent three appointments confirmed by the Republican Senate majority (Gorsuch, Kavanaugh and Barrett) were made without

DEMOCRACY OF DOLLARS

meaningful input or vote from Democrat Senators.

In contrast, in 1986, with the filibuster rule in place, when President Reagan nominated conservative justice Antonin Scalia, he was confirmed 98-0. When President Clinton nominated liberal justice Ruth Bader Ginsburg, she was confirmed 96-3. Republican Presidents have appointed 15 out of the last 19 Supreme Court judges. Appointments before Gorsuch's appointment in 2017 required confirmation votes from Democrats.

Without the guidance of the filibuster rule, the contentious factions our Framers were sure would be minimized by our Constitution have been extended to the lifetime appointments of the judiciary. In the future, Democratic appointments could likewise be confirmed without Republican input. The result would be the continuation of the politicization of the confirmation process. The extension thwarts the Framers' intent that the judiciary be independent and nonpolitical — capable of fulfilling their umpire role for the benefit of all Americans. A balanced, middle of the road Court sought by the American people has become further out of reach, to the detriment of us all. Thus, concerns of Americans that our government doesn't represent all of us are perpetuated.

Throughout this book, we focus on underlying issues that have grown over decades, regardless of the political party in power. Our failure to solve these issues has produced today's Democracy of Dollars. That failure should be a concern to each of us regardless of our political affiliation.

The November 3, 2020 election results reflect the broad divide we have in this country. Reporting on the election in the November 16, 2020 issue of *Time Magazine*, David French writes in "Polarization Prevailed, Again," that "[T]he nation's politics look like a version of trench warfare... [T]he reality of American politics and culture remain the same. Our nation is deeply divided, our partisans are very angry, and there is no immediate prospect for change."

That divide is exacerbated by America's Democracy of Dollars. We repeat:

"Our factiousness will not subside until we reinstate the Democracy of People our Constitution's Framers sought to provide for us as their 'Posterity.'"

A Democracy of Dollars speaks for a few, with no regard for the many. A Democracy of People speaks for the many, but with regard for the few.

Democracy of Dollars is driven by money, not principle. A Democracy

of People is driven by principle, not money.

A Democracy of People confirms that our government is run for the benefit of us all.

The confidence of the American people in our government and its institutions must be restored. Contributing to that objective is the mission of this book.

Throughout this book, we stress our need for a Supreme Court that provides us with constitutional checks and balances over the two political branches of government. We point out course corrections the Court must make.

We advocate for a strong *Voice of the People*, so necessary to influence the result we all seek: a return to our Democracy of People. A return to our cherishing the “We.” The *We* in *We the People*, the opening stanza of our Constitution.