

# *Some Politics are Local: Homogeneity, Identity, and Legal Revolution in American Democracy*

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Modern mass democracy, in Carl Schmitt's telling, is a "confused combination" of democracy and liberalism.<sup>1</sup> Democracy is based on substantive equality, which is incompatible with the universal equality of liberalism. Even with such contrary principled foundations, "democracy and liberalism could be allied to each other for a time." Yet "as soon as it achieves power, liberal democracy must decide between its elements."<sup>2</sup> For there can be "heterogeneity of purposes,"<sup>3</sup> but "no heterogeneity of principles."<sup>3</sup>

I argue that the American system of divided and shared powers has postponed that decision indefinitely. Both levels of government, federal and state, have tried their hand at excluding or marginalizing something "unequal that threatens [their] homogeneity."<sup>4</sup> State governments, however, have more actively sought to maintain homogeneity in this sense, even after the implementation of universal suffrage,<sup>5</sup> which marks the coming to power of liberal democracy, according to Schmitt. How states

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1. Carl Schmitt, *The Crisis of Parliamentary Democracy*, trans. and introd. Ellen Kennedy (Cambridge, MA: MIT Press, 1988), p. 13.

2. *Ibid.*, p. 15.

3. *Ibid.*, p. 3.

4. *Ibid.*, p. 9.

5. This does not apply to all state governments. See, for example, Sara Chatfield, *In Her Own Name: The Politics of Women's Rights before Suffrage* (New York: Columbia Univ. Press, 2023).

make use of liberal institutions to preserve homogeneity has changed over time, just as federal-level liberal institutions have opposed and facilitated state-level efforts at exclusion. Nonetheless, elimination of heterogeneity is a persistent characteristic of American democratic practice (I).

Wisconsin politics from 2010 to 2024 offers an example of what Schmitt terms a “legal revolution.”<sup>6</sup> A particular identity, “rural consciousness,” helped Republican Scott Walker win the governorship and Republicans gain control of the state legislature by very slim margins in 2010. Once in power, Republicans gerrymandered legislative district lines so decidedly in their favor that they were able to effectively disempower Democrats and even limit the authority of the incoming Democratic governor in 2018, all in a state with an electorate that remains equally divided in partisan terms (II).

By teasing out the role of representation in Schmitt’s consideration of constitution-making in *Constitutional Theory*, I account for how Scott Walker rendered rural consciousness political in Schmitt’s sense by inducing a significant segment of the electorate to think in us-versus-them terms rather than in their economic self-interest (III).

I conclude by arguing that while the American system of divided and shared power does encourage and facilitate efforts to disempower political opponents through gerrymandering and other means, the very same wide distribution of power also makes it difficult to do so permanently, as Schmitt feared. The Wisconsin case shows that even one remaining independent institution can induce the dominant party to consider institutional changes that might loosen its hold on power and make it more difficult for future parties to capture the government in similar fashion (IV).

## I

“Equal rights,” Schmitt argues, “make good sense where homogeneity exists.” Three-quarters of the inhabitants of the British Empire, he points out, are not citizens. If they were, “with their terrible majority, the coloreds would dominate the whites,” and yet “the British Empire is [considered] a democracy.” “Even a democratic state” like the United States “is far from allowing foreigners to share in its power or its wealth.”<sup>7</sup> For “democracy,”

6. Carl Schmitt, *Legality and Legitimacy*, trans. and ed. Jeffrey Seitzer, introd. John McCormick (Durham, NC: Duke Univ. Press, 2004), p. 95. The potential for such a legal revolution was anticipated in *Crisis of Parliamentary Democracy*, pp. 28–29.

7. Schmitt, *Crisis of Parliamentary Democracy*, pp. 10–11.

Schmitt argues, “requires . . . first homogeneity and second—if the need arises—elimination or eradication of heterogeneity.”<sup>8</sup>

One cannot help but be unsettled by these claims, particularly given Schmitt’s deplorable collaboration with the Nazi regime from 1933 to 1936. Schmitt’s argument, one commentator asserts, “provided a wide-reaching argumentative platform for the future Nazi regime’s anti-Semitic policies.”<sup>9</sup> Perhaps, but one might make a similar claim about the U.S. Immigration Restriction Act of 1924,<sup>10</sup> which effectively cut off immigration from Asia and favored immigration from northern and western Europe. A primary purpose of the Act was to preserve the homogeneity of the nation. In the words of one of the bill’s sponsors: “The racial composition of America at the present time is now made permanent.”<sup>11</sup>

Schmitt’s claim about homogeneity and democracy is nonetheless a useful analytical tool for understanding distinctive aspects of American liberal democracy. The new American republic created a system of dual sovereignty, in which the federal and state governments were supreme in their respective spheres. In practical terms, the state governments dwarfed the newly created federal government. Not only were states the primary locus of allegiance for most people. The state governments also regulated most aspects of people’s everyday lives, including the eligibility to vote. By limiting the right to vote at first to mostly white male property owners, states in the early republic ensured that ruling elites at both the federal and state levels would be relatively homogeneous.

Schmitt concedes that it would be a “great injustice . . . not to respect the human worth of every individual.”<sup>12</sup> Many Americans in the early republic agreed, though they mostly understood “worth” to not justify giving excluded groups full political and civil rights.<sup>13</sup> In a functional sense,

8. *Ibid.*, p. 9.

9. Samuel Salzborn, “The Will of the People? Carl Schmitt and Jean-Jacques Rousseau on a Key Question in Democratic Theory,” *Democratic Theory* 4, no. 1 (2017): 11.

10. Stefan Kuhl, *The Nazi Connection: Eugenics, American Racism, and German National Socialism* (Oxford: Oxford Univ. Press, 2002).

11. Anna Diamond, “The 1924 Law That Slammed the Door on Immigrants and the Politicians Who Pushed It Back Open,” *Smithsonian Magazine*, May 19, 2020.

12. Schmitt, *Crisis of Parliamentary Democracy*, p. 11.

13. Many Americans objected to the brutal suppression of African Americans, and yet were not yet ready to grant them full civil and political rights. Abraham Lincoln, for example, saw the phrase “all men are created equal” of the Declaration of Independence as an organizing principle for the American experiment in republican government. Full

one might characterize this as a division of labor, where state governments did the dirty work of “eliminating heterogeneity” so that both levels of government could operate with a considerable degree of homogeneity.

Of course, Americans fought a bloody civil war over the issue of slavery, which led to major changes to the constitutional order. The Civil War Amendments to the U.S. Constitution prohibited slavery (XIII); granted citizenship to anyone born in the United States and extended privileges and immunities, due process rights, and equal protection of the laws to all persons, not just citizens (XIV); and granted the right to vote to African Americans (XV). During the brief Reconstruction period, former slaves, their descendants, and free blacks in the South and North were educated and participated actively in politics and society, all with the protection of the federal government and the U.S. Army.<sup>14</sup> This decade of progress ended abruptly in 1877 with the settlement agreement over a disputed presidential election. The federal government withdrew its support for racial equality in the South, leaving state governments mostly free to establish a new, very elaborate system of racial oppression, which rivaled the antebellum slave codes in terms of severity and brutality.<sup>15</sup>

In formal constitutional terms, African Americans in the late nineteenth and early twentieth centuries enjoyed formal political equality under the federal Constitution, that is, as it was interpreted by the Supreme Court, whose narrow readings of the Civil War Amendments and civil rights legislation effectively drained them of their substance. States could legally limit racial equality if they paid lip service to it. Separate but equal, for example, preserved equality in name, though it effectively established a system of apartheid. Voting rights of African Americans were formally preserved, though grandfather clauses and literacy tests effectively

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equality for all would be realized gradually as conditions permitted. Abraham Lincoln, “Speech at Chicago, Illinois,” in *Speeches and Writings: 1832–1858* (New York: Library of America, 1984), pp. 439–58. More generally, see Nikole Hannah-Jones, “America Wasn’t a Democracy until Black Americans Made It One,” *New York Times Magazine*, August 14, 2019, <https://www.nytimes.com/interactive/2019/08/14/magazine/black-history-american-democracy.html>.

14. President Grant sent his attorney general to the former Confederacy to challenge the Klan. In a clear illustration of the potential efficacy of political will, he eliminated it with the support of the army and the federal courts. Fergus M. Bordewich, *Klan War: Ulysses S. Grant and the Battle to Save Reconstruction* (New York: Knopf, 2023).

15. Hannah-Jones, “America Wasn’t a Democracy.”

deprived them of the right to vote or significantly diminished their votes' electoral impact.<sup>16</sup>

In a perverse way, these exclusions had a positive impact on political deliberation. On the state level, one could exchange opinions over proposed policies and risk being persuaded by the better argument, because the exclusions ensured agreement over the principled basis of the system, for example, maintaining the principle of white male supremacy. It also facilitated discussion and compromise at the federal level by excluding potentially fractious issues like equality for African Americans.<sup>17</sup>

The Democratic Party was a beneficiary of these discriminatory laws and practices until the passage of the Civil Rights Acts in the 1960s. Before then, with the issue of racial equality off the table, the Democratic Party could successfully compete at both the state and federal levels, which, in turn, positioned it well to win the White House in the Electoral College. Moreover, passage of major legislative initiatives, such as the New Deal, would not have been possible without the southern Democrats, who would not have supported the proposals of the national Democratic Party if the federal government continued to intervene in racial politics at the state level.

The 1960s civil rights legislation fundamentally altered the American political landscape. Aggressive enforcement produced the first generation of African Americans who enjoyed the full rights of citizenship, in the words of Nikole Hannah-Jones, one of the founders of the 1619 Project.<sup>18</sup> But it also brought to an abrupt end the intersectional political cooperation on racial discrimination.<sup>19</sup>

More recently, the Supreme Court has significantly reduced the Voting Rights Act's scope of application, with more limitations perhaps on the horizon.<sup>20</sup> This reopens the door to state-level discrimination against

16. Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Civil Rights* (Oxford: Oxford Univ. Press, 2004).

17. Stephen Holmes, "Gag Rules or the Politics of Omission," in *Constitutionalism and Democracy*, ed. John Elster and Rune Slagstad (Cambridge: Cambridge Univ. Press, 1988).

18. Hannah-Jones, "America Wasn't a Democracy."

19. Charles S. Bullock et al., *The South and the Transformation of U.S. Politics* (Oxford: Oxford Univ. Press, 2019).

20. Michael Wines and J. David Goodman, "Appeals Court Further Narrows Voting Rights Act's Scope," *New York Times*, August 2, 2024, <https://www.nytimes.com/2024/08/02/us/texas-voting-rights-minorities.html>.

African Americans in terms of voting rights. The Supreme Court also rejected placing limits on political gerrymandering, a long-standing practice that benefits both parties. Though treated as separate legal issues, these discriminatory practices are often hard to distinguish from one another in practice.<sup>21</sup>

The state power to regulate the conduct of elections is increasingly the go-to method for limiting the participation of certain target groups.<sup>22</sup> Voter ID laws, shorter early voting periods, elimination of Sunday and evening voting, restrictions on or prohibitions of drop boxes for mail-in ballots, and even bans on eating and drinking while in line to vote are typically justified with unsubstantiated claims of widespread electoral fraud. In lieu of factual evidence, the proponents of such laws conjure images of shadowy figures emptying bags of falsified ballots into drop boxes, of valid ballots found in dumpsters or in landfills, of illegal immigrants or criminals impersonating registered voters, of party hacks plying voters waiting in long lines with food and drink to persuade them to change their votes.<sup>23</sup>

Politicians conjure such images for partisan purposes. Elimination of Sunday voting, for example, is aimed at African American voters, who travel by bus after church to cast their ballots, typically in large percentages for Democratic candidates.<sup>24</sup>

The people swayed by such images, however, are thinking in terms of identity. They prefer candidates they perceive to be like themselves, however that is understood, and wish to exclude or marginalize those they perceive as different from themselves. Facts, evidence, and specific policy proposals are not their primary concerns, nor are such voters strictly partisan in outlook. Rather, they are moved by images that prompt voters to

21. In *Rucho v. Common Cause* (2019), the Supreme Court ruled that partisan gerrymandering is nonjusticiable because there are no workable standards of review. However, in a politically polarized environment, it is often hard to distinguish between them, so racial gerrymandering might be passed off as partisan gerrymandering to escape judicial challenge. Sara Tofighbakhsh, “Racial Gerrymandering after *Rucho v. Common Cause*: Untangling Race and Party,” *Columbia Law Review* 120, no. 7 (2020): 1885–1928.

22. Luis Ricardo Fraga et al., “American Democracy and Voter Suppression,” *Annals of the American Academy of Political and Social Science* 708, no. 1 (2023): 227–42. For an overview of state laws regulating the conduct of elections, see “Voting Laws Roundup: October 2023,” Brennan Center for Justice, October 19, 2023, <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2023>.

23. Jason Abel, “Voting in an Era of Crisis,” *Human Rights* 45, no. 3 (2020): 2–4.

24. Gabrielle Gurley, “Voter Suppression Works Too Well,” *American Prospect* 28, no. 1 (2017): 15–17.

think in us-versus-them terms. Wisconsin politics from 2010 to 2024 indicates what is at stake in such identity politics.

## II

Wisconsin is a so-called 50/50 state divided equally between Republicans and Democrats. Until recently, Wisconsin did not experience the political polarization characteristic of state and national politics in the United States today. Known as a “laboratory of democracy” in the twentieth century, Wisconsin officials of both parties cooperated to improve governmental and administrative institutions and the economic and social conditions in the state. Citizens voted in high numbers, and electoral competition focused on issues, not personalities.<sup>25</sup>

This more collaborative political culture ended abruptly in 2010, when Wisconsin effectively became a one-party state for over a decade. In that year, Republican Scott Walker won the governorship with 52 percent of the vote, and Republicans won both houses of the legislature by much smaller margins. Walker was not your Wisconsin grandmother’s Republican, so to speak, willing to work with those across the aisle on issues of joint concern. He was a member of the Tea Party wing of the Republican Party, which rejects bipartisan cooperation and aggressively pursues a small government agenda. The Walker administration moved quickly to dismantle key components of Wisconsin’s progressive heritage. The cornerstone of these efforts was Act 10, which severely limited the bargaining rights of unionized public employees and required them to pay a larger share of their health insurance coverage. Huge public protests followed, along with a recall effort, which Walker survived by winning 53 percent of the vote, a large margin by Wisconsin standards.<sup>26</sup>

The following year, the Republican-controlled legislature redrew state legislative and congressional districts in partisan terms, producing lopsided Republican majorities in the state assembly and in the state senate. Wisconsin remains equally divided in terms of party affiliation, and yet the Republicans obtained an unshakable hold on control of the state

25. James K. Conant, *Wisconsin Politics and Government* (Lincoln: Univ. of Nebraska Press, 2006).

26. Aaron Blake and Rachel Weiner, “The Recall of Wisconsin Gov. Scott Walker Explained,” *Washington Post*, June 4, 2012, [https://www.washingtonpost.com/blogs/the-fix/post/the-recall-of-wisconsin-gov-scott-walker-explained/2012/06/04/gJQAHxLoDV\\_blog.html](https://www.washingtonpost.com/blogs/the-fix/post/the-recall-of-wisconsin-gov-scott-walker-explained/2012/06/04/gJQAHxLoDV_blog.html).



legislature and sent to Washington a lopsided congressional delegation, 6–2 in favor of Republicans.<sup>27</sup>

It is important to point out several distinctive features of the American system that are at play here. The primary system favors candidates that appeal to their party's base, leaning toward the left for Democrats or toward the right for Republicans. In so-called "safe districts," with a clear majority favoring one party, there is no incentive to choose candidates who appeal to more moderate voters, even to moderate members within their own party. Hence, Walker could institute major changes with very slim majorities because his party in the legislature was so unified. Gerrymandering increases the number of safe districts, which accentuates the tendency toward the extreme of either the right or the left, depending, of course, on which party is gerrymandering district lines. Political deliberation, even discussion of competing interests, falls by the wayside, as ruling parties need not compromise on their policy proposals at all or even engage the opposition. Because states also draw district lines for federal elections, this tendency to warp political deliberations and limit the capacity for compromise, even within parties, is present at both the state and federal levels.<sup>28</sup>

After Walker lost reelection in 2018,<sup>29</sup> the legislature in the closing days of his term passed numerous restrictions on his Democratic successor.<sup>30</sup> Three years later, with a veto-proof majority, the Republican legisla-

27. Erik Engstrom, *Partisan Gerrymandering and the Construction of American Democracy* (Ann Arbor: Univ. of Michigan Press, 2013).

28. Gerrymandering has been a mainstay of American politics since the Founding. The gerrymandering after the 2010 census, however, has proven "resilient" in that its partisan effects are not just more pronounced but also less transitory. Charles R. Beitz, "How Is Partisan Gerrymandering Unfair?," *Philosophy & Public Affairs* 46, no. 3 (2018): 323–58. See also Dennis W. Johnson, *Campaigns, Elections, and the Threat to Democracy: What Everyone Needs to Know*, 2nd ed. (Oxford: Oxford Univ. Press, 2022); and Jordan Kujala, "Donors, Primary Elections, and Polarization in the United States," *American Journal of Political Science* 64, no. 3 (2020): 587–602.

29. Higher turnout among young voters in Madison and Milwaukee was the difference maker. Annie Gowen, "How the Democrats Finally Defeated Wisconsin Gov. Scott Walker," *Washington Post*, November 7, 2018, [https://www.washingtonpost.com/politics/how-the-democrats-finally-defeated-wisconsin-gov-scott-walker/2018/11/07/3377ed17-9cbe-4537-8b2a-acd0c37a8d35\\_story.html](https://www.washingtonpost.com/politics/how-the-democrats-finally-defeated-wisconsin-gov-scott-walker/2018/11/07/3377ed17-9cbe-4537-8b2a-acd0c37a8d35_story.html).

30. Monica Davey, "Wisconsin Turns Page as Walker Concedes," *New York Times*, November 8, 2018, <https://www.nytimes.com/2018/11/07/us/elections-wisconsin-governor-overs-walker.html>.



ture redrew the legislative districts even more in their favor,<sup>31</sup> essentially disempowering the Democratic governor for the foreseeable future. These changes are the equivalent to “constitutional amendments through ordinary law,” to borrow terminology from Benjamin Schupmann, because the extremely gerrymandered state legislature makes it very difficult, if not impossible, to change them through the ordinary political process.<sup>32</sup>

What made such fundamental change possible? Or, in the words of social scientist Katherine Cramer, a native Wisconsinite, what happened to Wisconsin “nice”?<sup>33</sup>

To answer her own question, Cramer participated in conversations with thirty-nine groups throughout the state between 2007 and 2012. She met with most of these groups on three separate occasions over this period. The groups were not selected to achieve a representative sample akin to an opinion survey. They were selected, rather, to ensure she met with a wide range of people from a variety of racial and ethnic backgrounds. By encouraging them to speak openly about the state of their lives, she noticed patterns in their perceptions of politics that might not be evident in an opinion survey. For example, while their views on politics aligned with those of the Republican Party in terms of smaller government, their reasons for supporting its political agenda were not the same as many party regulars. This support for smaller government reflected what Cramer calls “rural consciousness,” which does not necessarily oppose governmental programs or spending, even though it aligns with this position at times.

Rural consciousness, Cramer argues, has three main components, all rooted in feelings of resentment toward an opposing group prompted by perceptions of systemic injustice. To wit, rural dwellers believe that urban residents receive a disproportionately large share of assistance from the state, though the needs of those in rural areas are greater.<sup>34</sup> Rural residents also believe that urban dwellers receive more governmental attention and concern and that city dwellers and governmental officials do not understand or appreciate the distinctiveness of rural life. Finally, rural residents consider themselves more deserving of governmental concern and

31. “Redistricting in Wisconsin after the 2020 Census,” Ballotpedia, [https://ballotpedia.org/Redistricting\\_in\\_Wisconsin\\_after\\_the\\_2020\\_census](https://ballotpedia.org/Redistricting_in_Wisconsin_after_the_2020_census).

32. Benjamin A. Schupmann, *Carl Schmitt's State and Constitutional Theory* (Oxford: Oxford Univ. Press, 2017), ch. 1, sect. f.

33. Katherine J. Cramer, *The Politics of Resentment: Rural Consciousness in Wisconsin and the Rise of Scott Walker* (Chicago: Univ. of Chicago Press, 2016).

34. *Ibid.*, pp. 104–5.

support, since they work harder and live under more difficult conditions than urbanites do.

Cramer argues that rural consciousness is not an ideology, nor is it an intellectual argument about the nature, conduct, or limits of culture, politics, religion, or society. It is an identity, a feeling of distinctiveness, an understanding of oneself, of where one sits in the world and how one moves through the world. Rural consciousness serves as a prism through which one views politics and these other forms of collective experience. This prism is rooted in a feeling of being the victim of systemic injustice and expresses itself as resentment toward urbanites and the politicians, who systematically favor urban residents over rural ones.<sup>35</sup>

Rural consciousness translates into a general distrust of government, which can produce support for small government initiatives. However, such distrust does not mean that rural residents are ideologically opposed to governmental assistance per se, as a Tea Party Republican like Walker is. On the contrary, many of them support public assistance. Voters with rural consciousness oppose governmental assistance when they believe it primarily benefits city dwellers.<sup>36</sup>

Cramer concedes that race is in the mix here, as it is in American politics generally.<sup>37</sup> Because most of the African Americans and Hispanics live in Madison and Milwaukee, which are akin to Sodom and Gomorrah for the rural residents she met, one must ask whether resentment against urbanites is simply a cover for more conventional racial sentiments.

Cramer responds that she observed little overt racism in the rural areas of her study, but ample amounts in the urban and suburban areas. When rural residents spoke of undeserving welfare recipients, they were referring to white welfare recipients in their area, not African Americans in cities. Also, when the rural residents criticized lazy, undeserving urbanites, they were referring to government employees and wealthy people, whom they thought did not have to work as hard as they routinely did. Young people were also targets of criticism as lazy and undeserving, not African Americans.

Still, it is remarkable that Obama, an African American supporter of active government, won Wisconsin handily in 2008, and yet two years later Scott Walker, a member of the Tea Party wing of the Republican

35. *Ibid.*, pp. 1–9, on the more recent us-vs.-them quality of Wisconsin politics.

36. *Ibid.*, pp. 90–94.

37. *Ibid.*, p. 165.

Party, won the governorship. Though they are polar opposites of one another, Obama and Walker each won statewide elections in a span of two years. What accounts for the change?

First, Walker's victory in 2010 was an off-year election with lower turnout, which tends to favor Republican candidates. More importantly, though, the Great Recession of 2009 heightened the resentment characteristic of rural consciousness.<sup>38</sup> Viewing the recession through the lens of rural consciousness, the perception was that public employees retained their jobs with good benefits, while the economic position of those in the rural areas deteriorated. Walker's platform of balancing the budget without higher taxes while limiting the bargaining rights and benefits of public employees resonated especially strongly with rural residents, who already felt adversely *and* disproportionately affected by the economy. Finally, the perception was that public employees would finally have to pay their fair share, or at least more than before, and rural residents would not be expected to pay higher taxes to provide financial assistance to less deserving city dwellers, assistance rural residents would not receive, at least not to the same extent as urbanites.<sup>39</sup>

This rather policy-wonkish gloss misses the importance of the personal and existential dimension of Walker's victory. Note, for example, the perceptions of Obama among the rural residents in Cramer's study. Apart from his race, Obama was a big-city guy, a community organizer, and a professor at an elite university, all things one would expect to rankle those identifying as rural in Cramer's study. Interestingly, though, he was perceived as down-to-earth. This perception of Obama stands in stark contrast to that of Hillary Clinton, who was seen not just as elitist but also as someone who felt entitled to the office. The perception of Obama changed considerably after he was reported as saying in (big-city) San Francisco that blue-collar voters in America's rust belt "'get bitter . . . and cling to guns or religion or antipathy to people who aren't like them or anti-immigrant sentiment or anti-trade sentiment as a way to explain their frustrations.'"<sup>40</sup> Obama outed himself as a myopic urbanite in rural consciousness terms.

Walker was adept at playing the rural consciousness card. Though he was a Milwaukee County executive, he claimed to have taken on the

38. *Ibid.*, pp. 168–79.

39. *Ibid.*, pp. 110–44, esp. pp. 143–44.

40. *Ibid.*, p. 183.

Milwaukee machine when running against the mayor of Milwaukee in 2008. His opposition to federal money for infrastructure improvements like a high-speed rail line between Milwaukee and Madison was that it mostly only served residents in these cities and would take money away from more necessary projects in small cities and towns in other parts of the state. And he emphasized that budget-cutting would force government employees to have brown-bag lunches, as he did himself, to make ends meet.

Did Walker really eat brown-bag lunches and buy his sweaters at thrift stores, as he claimed? Perhaps. But the factual basis of the claim is not at issue. Walker is purveying an image designed to resonate with a significant segment of the electorate. It says to them that he, Walker, though a well-funded urbanite, is “like” them, rural residents, and that he, the urbanite qua rural resident, will vanquish city dwellers on their behalf and put their needs first.

Walker is operating here on a symbolic, not a factual, level. A symbolic belief tolerates inconsistency and cannot be disproved in the way that a factual belief can.<sup>41</sup> Hence, one cannot persuade rural residents that their economic interests lie with additional governmental spending *if* such spending also benefits urbanites, for urban residents, according to rural consciousness, will benefit unfairly from the program. It is better to not have the assistance in that case. Thus, their identity prompts them to vote against what one might otherwise think is their self-interest understood in narrow economic terms. As a result, rural residents, who needed significant government assistance, came to support Walker’s small-government agenda.

### III

In *The Crisis of Parliamentary Democracy*, Schmitt argues that there are many possible bases of homogeneity. Virtue, some physical similarity, and a common heritage are just a few possibilities. He continues: “There may be isolated examples . . . where each of [the community’s] inhabitants . . . is so similar to every other one physically, psychically, morally, and

41. On the difficulty of responding to misinformation in politics, see Manvir Singh, “How Gullible Are You?,” *New Yorker*, April 22 and 29, 2024, esp. pp. 62–63, discussing the work of Dan Sperber on the paradox of belief. See more generally Hugo Mercier and Dan Sperber, *The Enigma of Reason* (Cambridge, MA: Harvard Univ. Press, 2017), esp. pp. 204–73.

economically that a homogeneity without heterogeneity exists.”<sup>42</sup> Otherwise, such heterogeneous elements must be excluded. With the resulting unanimity, “laws come into existence *sans discussion*.”<sup>43</sup>

However, mechanisms of direct democracy, Schmitt argues, are incapable of bringing about “an absolute, direct identity that is actually present at every moment.”<sup>44</sup> When the entire citizen body gathers to vote, even for a yes/no vote in a plebiscite, they do so with their own understanding of the identity of the community, on what basis they are similar, and how this essential similarity may be preserved. What matters is not the factual identity so much as the idea of an identity. This idea must be presented to the people so that they can recognize it, accept it, and act upon it. And this requires some form of representation, some person or body of persons that poses the question, that re-presents the idea of identity in a form that resonates with the community.<sup>45</sup> And this representation has an existential component, first in making present something absent, but also in the sense of individuals recognizing something in the representative, an idea of a bond on a deeper personal level. This is the politics of identity that played a large role in the Walker period in Wisconsin. Schmitt’s discussion of the constitution-making power in *Constitutional Theory* helps us understand how an identity like rural consciousness becomes political in Schmitt’s sense by getting those with rural consciousness to think in us-versus-them terms rather than in their rational, individual self-interests.

Schmitt argues that the American Declaration of Independence and the 1789 French Revolution marked a new epoch. The Declaration of Independence did not go as far as the French Revolution in terms of establishing a fundamentally different form of constitution-making because it was accompanied by the establishment of individual states from the preexisting colonies. The main concern was practical: how the new association of states would relate to one another. A new type and form of political existence did not result, nor was a new constitutional theory proposed.

The French Revolution, by contrast, took this additional step. It did not establish a new state. The absolute monarchy, by pulverizing intermediary powers over an extended period, had already accomplished that. The big change was Emmanuel Joseph Sieyès’s innovation in terms of

42. Schmitt, *Crisis of Parliamentary Democracy*, p. 9.

43. *Ibid.*, p. 14.

44. *Ibid.*, p. 27.

45. *Ibid.*

understanding the people as subject of the constitution-making power. The people, conscious of itself as a nation, gave itself a new constitution and the preexisting state a new form of political existence. This understanding of the people as a nation, conscious of itself and capable of acting on its own to adopt a new form of political existence, is fundamentally new and of crucial importance, according to Schmitt.<sup>46</sup>

One might point out that Schmitt's discussion of constitution-making overstates the degree of awareness and unity typically prevailing in political movements and doesn't address how these movements take shape over time. Individuals or subgroups, either through words or actions, forge a connection with disparate groups, expressing their previously unarticulated desires for change or giving concrete form to their inchoate desires. Unity, awareness of distinctiveness, the will or capability for action are not the precursors, preconditions, or vehicles for action; they are produced through political action, and the unity and purpose apparent to a limited degree in the end product come to define the entire range of thought and action at the decisive moment.<sup>47</sup>

This was certainly the case with the American instance of constitution-making, as Gordon Wood's history of the American founding moment makes clear.<sup>48</sup> Schmitt is right, however, to emphasize that the sovereign American states distinguished the American case from the French one. The concept of union resonated strongly with those formulating the new constitution, and yet what defined the effort was the need to compromise with established powers with distinctly different cultures and economies—most notably, “free” versus slave labor—based on separate systems of law.

Nonetheless, perhaps this was also true of the French case to a more limited degree. The concept of nation provided a rallying cry for the Third Estate, and for its allies among the nobility and clergy, and energized those seeking a clean break with the Old Regime. But would the outcome have been different if the doors had not been locked and the meeting took place as planned? And what if the subsequent royal concessions had been offered in 1788? Would the result have been a constitutional monarchy

46. Carl Schmitt, *Constitutional Theory*, trans. and ed. Jeffrey Seitzer, introd. Jeffrey Seitzer and Christopher Thornhill (Durham, NC: Duke Univ. Press, 2007), pp. 125–29.

47. I am indebted to David Pan's description of this as an aesthetic process. See David Pan, “Political Theology for Democracy: Carl Schmitt and John Dewey on Aesthetics and Politics,” *Telos* 161 (2012): 131–40.

48. Gordon S. Wood, *The Creation of the American Republic, 1776–1787* (Chapel Hill: Univ. of North Carolina Press, 1969).

that took the wind out of the sails of those seeking more radical change? More importantly, though, is the question of how the concept of nation was received by those taking the Tennis Court Oath. As Schmitt emphasizes, the essential idea did not have specific content. Considering oneself part of “the nation” was not a commitment to a particular outcome. The concept of the nation just recognized the politically conscious people as a previously unacknowledged subject of the constitution-making authority that was free to form a system of government it believed appropriate to itself. If the concept of nation came with a more fully formulated proposal for a concrete form of government, perhaps it would not have had the same unifying effect.

The Tennis Court Oath was a moment of singular unity without specific content apart from opposing the Old Regime. Adding content was left to subsequent acts of constitution-making. Schmitt’s concepts of identity and representation as principles of political form are applicable only to the results of the constitution-making process. Still, isn’t there a sense in which Sieyès was acting as a representative before the nation became aware of itself as the subject of the constitution-making power? Sieyès’s concept of nation did not merely describe the politically conscious unity prevailing among participants in the Tennis Court Oath. Without his concept of nation, perhaps the singular moment of unity would not have been possible. In other words, did the concept of nation, put forth at precisely the right moment and devoid of specific content, forge the feeling of unity that Schmitt’s takes as the essential precursor of French constitution-making?

It is a stretch to think of Sieyès as a candidate or representative in ordinary politics. At the same time, though, he was serving as one in a functional sense. His concept of the Third Estate created a mandate for a break with the Old Regime. A mandate, of course, is a slippery term.<sup>49</sup> Candidates and elected officials claim to act on a mandate, which they characterize in the broadest possible terms. People have quite different reasons for supporting them, just as breaking with the Old Regime was understood in varying ways. Still, Sieyès’s concept of nation was effective in making these differences secondary at that moment to forge unity on the general goal.

Seen in this way, the contrast Schmitt draws between the nation and the people proves helpful in understanding Wisconsin politics in this

49. Lawrence James Grossback et al., *Mandate Politics* (Cambridge: Cambridge Univ. Press, 2006).



period. If a people is not aware of its political distinctiveness and is not capable of action as a political unity aiming at establishing a political form of existence, according to Schmitt, then it is merely a multitude with an ethnic or cultural bond, not necessarily one that involves its political existence.<sup>50</sup> Those with a rural identity in Cramer's sense were aware of their distinctiveness. They recognized that others were positioned similarly to them and believed that these others were also systematically disadvantaged vis-à-vis urban dwellers. Those with rural consciousness, however, were not capable of giving political expression to that before Scott Walker cast his small-government agenda in terms that resonated with their feelings of resentment.

#### IV

The extreme partisan gerrymandering in Wisconsin, to speak with Schmitt, is a "ruthless exploitation" of the premiums on the possession of power, which serve "partisan power maintenance," whereby "the principle of equal chance loses its persuasiveness."<sup>51</sup>

Is the state power to draw legislative district lines the democratic equivalent of a wolf in sheep's clothing? Periodic changes in legislative district lines are necessary. How else is one to accommodate shifts in population? Granting to states the power to draw these lines seems reasonable since the districts are within their jurisdictions. It also gives states a power they can use to fend off federal government encroachments on their autonomy. That's not objectionable on its face. And since legislatures are traditionally thought to express the will of the people most directly, it seems only appropriate to give state legislatures the power to draw the district lines. But then a governor with a razor-thin legislative majority can "use legal means to close the door to legality, through which they themselves entered."<sup>52</sup> A seemingly ordinary power to draw district lines becomes a vehicle for the capture of the system and the disempowerment of the legitimate opposition. What does this say about the long-term viability of our democratic institutions? Is democracy prone to bringing about its own destruction?

Perhaps. Reexamining the events in Wisconsin with these questions in mind suggests that our system is more resilient than it at first appears. And

50. Schmitt, *Constitutional Theory*, p. 127.

51. Schmitt, *Legality and Legitimacy*, p. 36.

52. *Ibid.*, p. 30.

it shows how existing institutions at the point of attack, so to speak, can respond effectively and even institute changes that make such capture less likely in the future. This discussion provides an example of how the highly diffuse American system of power provides opportunities for self-correction just as it encourages considerable institutional mischief.

This willingness to dredge out workable solutions from any level of the system distinguishes my approach to the problem of legal revolution from Schmitt's, as his decidedly unitary outlook blinds him to the potential efficacy of decentralized responses to major challenges to democratic government. Take, for example, his discussion of the extraordinary lawgivers that "endanger the parliamentary legislative state's logically consistent system of legality," where he leaves "the further complications [that result from] the federal element of the constitution . . . entirely out of account."<sup>53</sup> Back to Wisconsin.

At first blush, the prospects for breaking the Republican Party's hold on power in Wisconsin do not appear good. The U.S. Supreme Court will not review claims about political gerrymandering. The Court offered some hope when it rejected the so-called "independent legislature doctrine," which would grant state legislatures complete discretion over the drawing of legislative district lines. Yet it also left the door partially open for itself to intervene in a future case involving state law, if the state court "transgressed ordinary bounds of judicial review."<sup>54</sup> The Court seems more inclined to introduce an element of uncertainty into the mix than to respond in an effective way to instances of extreme political gerrymandering.

The Wisconsin courts can review claims about district lines violating state law. It is accepted wisdom that courts have trouble standing against a determined majority. In the Wisconsin case, this would be a supermajority, the supermajority in the Wisconsin Senate to be precise, which could impeach state Supreme Court justices to head off a potentially adverse judgment. Even though courts are at an institutional disadvantage in conflicts with the political branches, one should not underestimate their potential contribution to ensuring the correctability of legal and political decisions. A court decision or, as in the Wisconsin case, even the threat

53. *Ibid.*, p. 85.

54. Rebecca Brown, Lee Epstein, and Michael Nelson, "In Electoral Disputes, State Justices Are Less Reliable GOP Allies than the U.S. Supreme Court," *Annals of the American Academy of Political and Social Science* 708, no. 1 (2023): 208–26.

of a court decision can prompt a reconsideration of seemingly intractable positions.<sup>55</sup>

In 2023, the same year that the Republicans won a supermajority in the state senate, Janet Protasiewicz, a Democrat, won a seat on the state Supreme Court in a statewide vote, shifting the 4–3 majority in favor of the Democrats. Protasiewicz campaigned openly for abortion rights in wake of the U.S. Supreme Court’s *Dobbs* decision and was highly critical of Wisconsin’s gerrymandered state legislative districts.<sup>56</sup> The Republicans threatened impeachment if she did not recuse herself from consideration of the redistricting case. She did not, and the new Democratic majority on the court invalidated an 1849 anti-abortion law that came into effect after *Dobbs* and ordered the drawing of new legislative districts. The Court threatened to draw the maps itself if the legislature did not pass satisfactory ones.

It is important to pause to emphasize a distinctive feature of state governments. Wisconsin is one of thirty-nine states with elected judges, and one of thirty-five that hold statewide elections for judges. With limited terms for the state Supreme Court, this means that one can expect periodic changes in court composition. A major institutional change at one part of a system changes the calculus of actors in other institutions. This is one reason why state governments are more amenable to change than the federal government. With the current composition of the federal Supreme Court, when can one expect a Supreme Court reversal on its recent doctrine limiting the scope of the Voting Rights Acts?

55. Schmitt was a perceptive critic of problems in state structure that limited the potential for significant reform. His unitary outlook, however, caused him to underappreciate the potential of more decentralized approaches to the governability problems during Weimar. This led him to especially underestimate the potential contribution of courts enhancing the system’s capacity for correctability in works like *Guardian of the Constitution*. See Jeffrey Seitzer, *Comparative History and Legal Theory* (Westport, CT: Greenwood Press), pp. 73–102.

56. The shift toward more open and uncompromising partisanship in judicial elections began with a Wisconsin Supreme Court election in 2008, two years before Walker became governor. Traditionally, judicial elections were nonpartisan affairs, which did not line up with those for statewide races for governor or for the U.S. president. The campaigns revolved around endorsements from law enforcement officials, not legal doctrine or politics. The conservative candidate in 2008 ran a very negative campaign that was stridently and openly partisan. Nothing has changed since then, as the Court now is highly politicized. See Zach Montellaro, “Liberals Take Over Wisconsin Supreme Court—with Major Implications for Abortion,” *Politico*, April 4, 2023, <https://www.politico.com/wisconsin-supreme-court-election>.

The Evers administration redrew the maps in a way that was fairer to the Democrats, though Republicans still retained an advantage in terms of the partisan makeup of most districts.<sup>57</sup> Nonetheless, Republicans, fearing a court-drawn map that was much less favorable to them, proposed the establishment of a nonpartisan electoral commission. According to their proposal, nonpartisan administrative officials in the legislature would draw up maps, which would then be subject to legislative approval.

The Democrats rejected the Republican proposal, rightly so perhaps. For example, one might question the political independence of legislative staff members, even when they are not political appointees. And the Democrats were right to expect a better map from the state Supreme Court. Courts are legally required to remain politically neutral when drawing maps, and yet studies suggest that judges tend to err on the side of their own political party.<sup>58</sup>

There is a third option: Begin serious discussions with Republicans about an independent redistricting commission in place of the nonpartisan commission the Republicans proposed. Despite their stranglehold on state government, the Republicans appear open to discussing alternatives. What prompted such a change in attitude? Recommitment to the liberal ideal of government by discussion? Or changing institutional configurations?

Besides their understandable concern to avoid maps drawn by the current Wisconsin Supreme Court, Republicans at some level perhaps realize that they were partly in the right place at the right time before. The slim legislative majority they won in both houses of the state legislature would probably not have yielded so much fruit via gerrymandering if it had not occurred just after a reapportionment. Because they won in 2010, not 2014, they were offered an opportunity to gerrymander ruthlessly. In such a closely divided state, they themselves may be on the losing side of future gerrymandering.<sup>59</sup>

57. Shortly before the filing deadline for the 2022 midterm elections, the U.S. Supreme Court invalidated the maps drawn by the Evers administration for infringing on the Voting Rights Act by not providing sufficient evidence for the creation of an additional legislative district with a higher percentage of African Americans. Patrick Marley, "U.S. Supreme Court Throws Out Wisconsin's Redistricting Plan for Legislative Maps," *Milwaukee Journal Sentinel*, March 23, 2022.

58. Matthew Nelson, "Independent Redistricting Commissions Are Associated with More Competitive Elections," *PS: Political Science & Politics* 56, no. 2 (2023): 207–12.

59. Nick Corasaniti, "Democrats in New Jersey Have a Firm Grip on Power. They Want Even More," *New York Times*, December 13, 2018, <https://www.nytimes.com/2018/12/13/nyregion/redistricting-new-jersey-democrats-republicans.html>.

Both Republicans and Democrats would benefit long-term from insulating redistricting decisions from the political process. The best option is to pass a bipartisan bill establishing an independent redistricting commission, which would place limits on partisanship. Such commissions are not all pressed from the same mold. However, they tend to share features. They stipulate that commissioners may be members of a party, and perhaps have partisan motivations to a degree. However, they typically cannot have been a candidate, a legislative staff member, a lobbyist, party staff, or a large donor over the previous ten years, nor may they run for office in a district created by the commission, usually for a specified period. Another common feature is to have partisan balance among the members: Republicans, Democrats, and independents. Finally, some states specify goals for the commission and offer guidelines about how to resolve conflicts among goals.

Admittedly, such commissions do not have a long track record. Still, the early returns are favorable. On balance, independent redistricting commissions have proven more effective at drawing district lines that are more competitive and less subject to court challenges than those drawn by legislatures, courts, or politician redistricting commissions.<sup>60</sup> A recent study concluded that district lines drawn by independent redistricting commissions are 2.5 times more competitive than those drawn by state legislatures and reduce incumbent party wins by 52 percent.<sup>61</sup> This gives each party a realistic chance of gaining a majority and changing existing

60. Sara Sadhwani, "Independent Redistricting: An Insider's View," *The Forum: A Journal of Applied Research in Contemporary Politics* 20, no. 3 (2023): 357–70; Nicholas Goedert, *Ground War: Courts, Commissions, and the Fight over Partisan Gerrymanders* (Oxford: Oxford Univ. Press, 2022); and David Imamura, "The Rise and Fall of Redistricting Commissions: Lessons from the 2020 Redistricting Cycle," *Human Rights* 48, no. 1 (2022): 14–16, see independent commissions as a better alternative to legislative redistricting. Robin E. Best et al., "Do Redistricting Commissions Avoid Partisan Gerrymanders?," *American Politics Research* 50, no. 3 (2022): 379–95, found that three of seven redistricting commissions operating in 2010 came up with partisan map favoring one party. Of the three, however, only Arizona was an independent commission. Overall, that is a 60 percent success rate. And the partisan advantages given in the three maps were relatively minor compared to recent gerrymanders by legislatures. John A. Henderson et al., "Gerrymandering Incumbency: Does Nonpartisan Redistricting Increase Electoral Competition?," *Journal of Politics* 80, no. 3 (2018): 1011–16, concludes that independent commissions provide virtually the same degree of electoral security to incumbents as plans devised by legislatures or by politician commissions.

61. Nelson, "Independent Redistricting Commissions."

policy in any future election. That is certainly better than the track record of partisan redistricting since 2010.

The ball is in the Democrats' court. They should play the long game. If the Wisconsin Supreme Court majority shifts again, as it might next year (2025) when a liberal justice retires, the newly constituted court may decide in favor of heavily gerrymandered districts that give Republicans an even greater advantage than current maps. Democrats should make a counteroffer. Establish an independent redistricting commission that takes the drawing of district lines mostly out of the hands of politicians, who cannot be trusted to draw the lines fairly.

This is an ordinary law version of a precommitment strategy.<sup>62</sup> In contrast to substantive constitutional provisions that remove certain issues from consideration via ordinary politics or perhaps even through constitutional amendments, as Schmitt suggested,<sup>63</sup> a future legislative majority could alter or eliminate a redistricting commission created through statute via the ordinary political process. This seems like little protection against a determined majority seeking to engage in partisan gerrymandering again. Since our goal is to enhance the correctability of past decisions through the ordinary political process, this is a chance we will have to take. Perhaps by then a less partisan and biased redistricting process will have gained sufficient public support to outlast shifts in the political winds. In the long term, politicians may come to prefer arguing over policy than over legislative district lines. One can only hope.

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62. On constitutional precommitment strategies, see Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (Chicago: Univ. of Chicago Press, 1995), pp. 134–77.

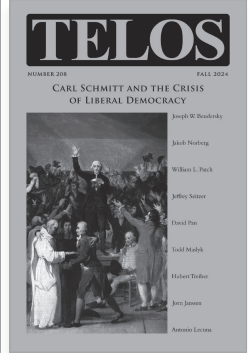
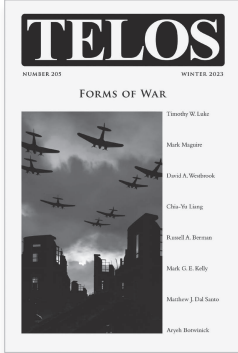
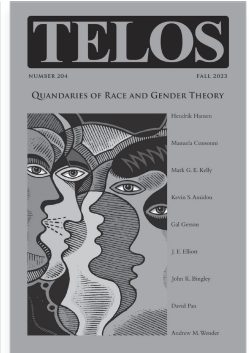
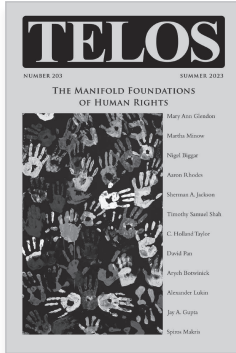
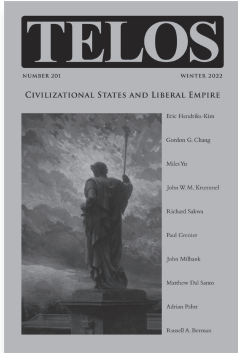
63. See Benjamin A. Schupmann, “Liberalism, Legal Revolution and Carl Schmitt,” *Philosophy & Social Criticism* 47, no. 2 (2021): 163–67, on Schmitt’s proposed substantive limitations on both ordinary and constitutional politics and the current debate about such provisions as a protection against legal revolution.

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