Vanderbilt Law Review

Volume 48
Issue 6 *Issue 6 - November 1995*

Article 2

11-1995

Is Democracy Like Sex?

Glenn H. Reynolds

ESSAY

Is Democracy Like Sex?

*Glenn Harlan Reynolds**

I. INTRODUCTION

Despite the end of the Cold War, democracy seems to be in bad shape these days. In fact, there has been a modest boom in books and commentary proclaiming either the inadequacy of democracy or its

* Associate Professor of Law, University of Tennessee. J.D. Yale Law School, 1985; B.A. University of Tennessee, 1982. Much of the thinking that underlies this piece was developed in conversations that took place while I was a visiting professor at the University of Virginia School of Law in the Spring of 1993. I would like to thank George Cohen, John Jeffries, Jody Kraus, Bob Scott, Peter Swire, Steven Walt, and G.E. White for their ideas and suggestions. Early versions of this Essay were presented at the University of Cincinnati Law School and as part of the University of Tennessee's Centripetal Lectures series. I would like to thank Tom Eisele, Michael Solimine, and Joseph Tomain of the University of Cincinnati, as well as evolutionary biologist John Gittleman and political scientist Otis Stephens of the University of Tennessee for helpful comments at those presentations. Rob Merges, Steven Walt, Heidi Henning, Bob Lloyd, Peter Morgan, and Tom Plank read the manuscript and provided many useful insights. Brooks Smith, Brannon Denning, and Micaela Burnham provided excellent research assistance. And Helen Smith provided excellent comments and support throughout. In spite of all of this high quality intellectual input, this Essay undoubtedly contains errors and omissions. Those are my fault, and not those of the individuals listed above.

imminent demise. According to at least one commentator, we face the possibility that American democracy will turn out to be a failure.[1] Much has also been made of the gloomy assessments of American democracy contained in recent books by Christopher Lasch and Jean Bethke Elshtain.[2] Such gloom seems a natural follow-on to the generally negative evaluations of democracy as a decision-making device provided by the works of decision theorists such as Kenneth Arrow,[3] and, more recently, by public choice theorists.[4] It has even been suggested that democracy may be a victim of its own success: too much democracy, we are warned, may be the death of America as a vibrant and productive society.[5]

I would be the last to argue that this concern is entirely misplaced. As I have suggested elsewhere, there are real problems with the way our society addresses and resolves important issues. Those problems undoubtedly incorporate the shortcomings of democracy (at least as it is currently practiced) in some ways.[6] But I also believe that things may not be quite as bad as pictured, for some surprising reasons. In short, I believe that some of the characteristics of democracy that are often portrayed as shortcomings may actually be strengths. If properly appreciated, these characteristics may even be seen as protections against the very kinds of problems that today's commentators describe. Furthermore, a proper understanding of the role of democracy in our constitutional system suggests that many of the structural reforms being urged by some who complain about special interest dominance are likely to make things worse, rather than better.

---

1. See John Omcinski, *Americans Must Face Possibility Democracy Might Fail Here,* Gannett News Service (January 1, 1995) ("American democracy, we suddenly are realizing, is quite capable of failing"). See also Robert J. Samuelson, *The Public Trust: Handle With Care,* Washington Post A15 (January 4, 1995).

2. Christopher Lasch, *The Revolt of the Elites and the Betrayal of Democracy* (W.W. Norton, 1995); Jean Bethke Elshtain, *Democracy on Trial* (Basic Books, 1995). Popular reviews of these books capture the gloom in their titles. See, for example, John Gray, *Does Democracy Have a Future?* New York Times Book Review 1 (January 22, 1995); Carlin Romano, *Democracy Endangered By a Self-Centered Population,* Philadelphia Inquirer N3 (January 15, 1995).

3. See note 34 and accompanying text.

4. Id.

5. See, for example, Jonathan Rauch, *Demosclerosis: The Silent Killer of American Government* (Times Books, 1994); Robert Wright, *Hyper Democracy,* Time 14 (January 23, 1995).

6. See generally Glenn H. Reynolds, *Penumbral Reasoning on the Right,* 140 U. Pa. L. Rov. 1333, 1346-48 (1992) (criticizing the debasing of constitutional discourse by politics); Glenn H. Reynolds, *Up in Arms About a Revolting Movement,* Chicago Tribune 11 (January 30, 1995) (describing the consequences of the growing distrust of America's political establishment).

To explore this idea, I have chosen as an analogy or metaphor another widely criticized and misunderstood institution—sex. In short, some discoveries resulting from the application of complexity theory[7] to the question of evolutionary fitness among biological systems have important implications for our discussion of the fitness of the body politic. Both kinds of systems face a similar problem—maintaining a balance between adaptability and stability on the one hand, while resisting parasitism on the other. In essence, democracy can be viewed as serving the same function in political systems that sex serves for biological systems—enhancing resistance to parasites. As it turns out, this approach raises important questions regarding the merits of many proposals for fixing current democracy through, for example, "electronic town meetings," in which citizens vote directly on issues, or term limits for elected officials.

This Essay will first summarize some contemporary thinking about the role of sex in evolutionary biology. Next, it will briefly outline some reasons why the conclusions reached by evolutionary

---

7. This Essay, like my earlier piece *Chaos and the Court*, 91 Colum. L. Rev. 110 (1991), draws on my ongoing interest in applying what is variously called "complexity theory," "chaos theory," or "dynamic systems theory" to the complex, dynamic, and sometimes chaotic behavior of legal and political institutions. For more on these topics in a legal context, see generally J.B. Ruhl, *Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: Wake-Up Call for Legal Reductionism and the Administrative State*, 45 Duke L. J. (forthcoming 1996); Lawrence A. Cunningham, *From Random Walks to Chaotic Crashes: The Linear Genealogy of the Efficient Capital Market Hypothesis*, 62 Geo. Wash. L. Rev. 546 (1994); Thomas Earl Geu, *The Tao of Jurisprudence: Brain Science, Synchronicity, and the Law*, 61 Tenn. L. Rev. 933 (1994); Rebert E. Scott, *Chaos Theory and the Justice Paradox*, 35 Wm. & Mary L. Rev. 329 (1993); Andrew W. Hayes, *An Introduction to Chaos and Law*, 60 U.M.K.C. L. Rev. 751 (1992); Roger Lewin, *Complexity: Life at the Edge of Chaos* (Macmillan, 1992); M. Mitchell Waldrop, *Complexity: The Emerging Science at the Edge of Order and Chaos* (Simon & Schuster, 1992).

As these sources indicate, a staple of complexity theory is that its approaches apply to all kinds of complex dynamic systems, meaning that it is worth considering in the context of social or legal institutions. Indeed, as I finished writing this Essay, I discovered that others are calling for this kind of analysis—or, at any rate, for the kind of analysis teward which this Essay represents a very tentative first step. See Kenneth Arrow and Neil Smelser, *Letters*, 267 Science 1618 (1995) (calling for the application of evolutionary theory to economics and social behavior and calling the resulting science "bio-psycho-social"). According to Smelser, the new field "will synthesize ingredients from molecular biology, genetics, and neurosciences on the one hand and from the behavioral and social sciences on the other." Id. I particularly agree with Arrow that "[e]volutionary theory is a point of view rather than a complete theory such as has been the desideratum of economists" (and, I might add, some constitutional theorists). Id. Nonetheless, I believe that it is a valuable point of view. As Richard Feynman wrote in a very different context: "There is a pleasure in recognizing old things from a new point of view. Also, there are problems for which the new point of view offers a distinct advantage." Richard Feynman, *Space-Time Approach to Non-Relativistic Quantum Mechanics*, 20 Rev. Modern Phys. 367 (1948) (quoted in James Gleick, *Genius: The Life and Science of Richard Feynman* 249 (Vintage Books, 1993)).

biologists regarding the advantages of sexual reproduction are likely to be applicable to complex dynamic systems that are not biological, including political systems. It will then apply this construct to analyze the outcomes of two recent Supreme Court cases. It will conclude with some observations about what the similar roles of sex and democracy can tell us regarding our American constitutional system, including various proposals for its reform.

II. SEX AND EVOLUTION

As should be obvious by now, the "sex" that I am talking about is not the intimate, individual experience of sexual intercourse, but is rather the overall biological phenomenon of sexual reproduction. In other words, I mean the process of reproducing by intermingling the genes of two individuals to produce a third unique individual possessing some attributes from each parent in a combination that is new.[8] A more accurate (though less catchy) title for this piece would thus have been "Is Democracy Like Sexual Reproduction?," for that is what I am really talking about.

As a means of reproduction, sex seems to have many drawbacks compared to asexual methods such as fission or budding. An organism that reproduces asexually does not have to waste time or energy in a (possibly futile) search for a mate. It is not at risk for sexually-transmitted disease, it need not take part in combat with other members of its species for the privilege of mating, and it need not accept a paltry fifty percent (average) pass-on rate for its genes. With asexual reproduction, you "just do it." With little muss or fuss, you can produce a perfect copy of yourself—not just a chip off the old block, but its exact duplicate, a clone. Furthermore, an asexual organism that survives to reproduce is, by definition, a successful collection of genes, one that presumably will be successful again when copied. Sexual reproduction, on the other hand, takes two perfectly good sets of genes and mixes them up to create an entirely new combination that may or may not be as good as its parents.[9]

---

8. See, for example, Neil A. Campbell, *Biology* 245 (Benjamin/Cummings, 3d ed. 1993) ("Compared to asexual reproduction, sexual reproduction usually results in greater variation; two parents give rise to offspring that have unique combinations of genes inherited from both parents. In contrast to a clone, offspring of sexual reproduction vary genetically from their siblings and both parents").

9. Id.

With all of these advantages, it would seem that asexual reproduction should be the only game in town. Why would any species go to the trouble to evolve sexually, when it is such a clumsy and inefficient means of passing on genes? As two scientists put it, "Isn't all the effort involved in finding a mate, chemically attracting it, and compromising with it long enough for sexual interchange more complex than simple one-parent reproduction?"[10] This has been a leading question for some time, one that evolutionary biologists (most of them, anyway) now believe that they have answered.

For sex is in fact pervasive, and there must be some good reason. That is, there must be compensating advantages to sex that offset its rather obvious disadvantages. The answer that evolutionary biologists have developed is that sex offers the primary advantage of increasing resistance to parasites.

The role of sex in increasing resistance to parasites was suggested as long ago as 1932 by the eminent biologist J.B.S. Haldane, but for many years no one followed up on his idea. According to Haldane, evolutionists were too caught up in notions of predators and prey. Just because it is easy to see wolves chasing and eating sheep does not mean that avoidance of wolves is the most important part of sheep fitness. (Indeed, even a passing acquaintance with sheep should suggest that if wolf-resistance were the key to sheep survival, sheep would be extinct by now.) Instead, Haldane suggested the likelihood that "[o]ne of the principal characters possessing survival value is immunity to disease."[11]

For a long time, no one paid much attention to this idea, even though Haldane repeated it in 1949. "The struggle against disease, and particularly infectious disease, has been a very influential agent," he argued, and "some of its results have been rather unlike those of the struggle against natural forces, hunger, and predators, or with members of the same species."[12] His point was that predators, which typically breed far more slowly than prey, were poorly suited to controlling numbers of prey. On the other hand, as species became more crowded, parasitism became more important: "I believe that the den-

10. Lynn Margulis and Dorion Sagan, *Mystery Dance: On the Evolution of Human Sexuality* 194 (Summit Books, 1991).

11. Quoted in Sahotra Sarkar, *Thinking of Biology: Sex, Disease and Evolution—Variations on a Theme from J.B.S. Haldane,* 42 BioScience 448, 448 (1992).

12. J.B.S. Haldane, *Disease and Evolution,* 19 La Ricerca Scientifica 1, 2-3 (1949) (translated and quoted in Sarkar, 42 BioScience at 448 (cited in note 11)).

sity-dependent limiting factor is more often a parasite whose incidence is disproportionately raised by overcrowding."[13]

The problem was made worse by the fact that parasites typically can mutate faster than their hosts, becoming better adapted to overcoming host defenses over time. In this "arms race" host species are at a disadvantage. Haldane suggested that the best response to these problems of parasitism was for organisms to become moving targets. In short, the best move for individuals was to become as biochemically unique as possible—and a population that allowed its members to become biochemically diverse in this fashion was more resistant to parasites as a result. In a remark that one writer describes as "remarkably prescient,"[14] Haldane suggested that:

> [E]very species of mammal and bird so far investigated has shown a quite surprising diversity revealed by serological tests. The antigens concerned seem to be proteins to which polysaccharide groups are attached. We do not know their functions in the organisms, though some of them seem to be part of the structure of cell membranes. I wish to suggest that they may play a part in disease resistance, a particular race of bacteria or virus being adapted to individuals of a certain range of biochemical constitution, while those of other constitutions are relatively resistant.[15]

Seen in this light, the chief flaw of sexual reproduction—that it is constantly mixing up perfectly good gene patterns to produce new ones—becomes a virtue. With sex keeping the population of individuals in a species diverse and constantly shifting, parasites (a term that encompasses everything from viruses and bacteria all the way up to more complex organisms like tapeworms) find it more difficult to adapt. In a species composed of clones, a parasite that is well adapted to any individual member is well adapted to all, allowing infection to sweep through the population like wildfire. On the other hand, a parasite that is well adapted to one individual in a diverse, sexually reproducing population may or may not be adapted to others. As parasites try to adapt to their hosts, the hosts constantly shift characteristics, so that the biochemical and physical points of entry relied on by the parasites are in constant flux. Each new generation brings about entirely new combinations. Thus, even though parasites are good at adapting to their hosts, this "moving target" approach makes it hard for parasites to adapt especially well to a species that reproduces sexually.

---

13. Id. at 4.
14. Sarkar, 42 BioScience at 449 (cited in note 11).
15. Haldane, 19 La Ricerca Scientifica at 6 (cited in note 12).

For that matter, another apparent flaw—that sexual reproduction is a lot more trouble—may also be a virtue. Since mating and courtship are complex and time-consuming, individuals who are susceptible to parasites (and thus weaker, slower, or otherwise less healthy) are less likely to be successful at mating. This means that genes for parasite-resistance, once randomly created, are more likely to be passed on.

Haldane's theory has become quite popular in the past few years, finding support in both empirical research and computer modeling. It was addressed by John Maynard Smith in *The Evolution of Sex*,[16] and the theory has now attained the status of front-runner in the evolutionary biology community's race to explain the reasons for sex.[17] As William Hamilton writes:

> The decade that is witnessing the emergence of a new, lethal, sexually transmitted disease may seem a bad one in which to be supporting a theory that sex is life's main adaptation to combat disease. But such a theory exists, and it seems to me the best contender in a great puzzle.[18]

For our purposes, it does not really matter whether the theory that resistance to parasitism is "the" reason why sex developed and persists is correct. The important part is that pretty much everyone agrees that sex produces resistance to parasites by creating diversity in the host population. The "moving target" approach to parasite resistance is thus widely accepted on its own grounds.

All of this is interesting in itself, but what is particularly interesting is the idea that the same kinds of dynamics may be applicable in another area altogether. One key political problem today is the growth of "special interest" power in our society, and the role of de-

---

16. John Maynard Smith, *The Evolution of Sex* (Cambridge, 1978). For more on this view of sex and parasite resistance, see generally John Maynard Smith, *Evolutionary Genetics* (Oxford, 1989); John Maynard Smith, *Why Sex?*, in John Maynard Smith, ed., *Games, Sex, and Evolution* (Harvester/Wheatsheaf, 1988).

17. For an excellent popular account of the theory and its status, see *Having Sex to Avoid Disease*, The Economist 79 (April 13, 1991).

18. William Donald Hamilton, *Sex and Disease*, in Robert Bellig and George Stevens, eds., *The Evolution of Sex* 65 (Harper & Row, 1988). For more on this view of sex and parasite resistance, see generally William Donald Hamilton, Robert Axelrod, and Reiko Tanese, *Sexual Reproduction as an Adaptation to Resist Parasites: A Review*, 87 Proceedings, National Academy of Sciences 3566 (1990); George Bell, *The Masterpiece of Nature: The Evolution and Genetics of Sexuality* (U. Cal., 1982); William Donald Hamilton, *Sex Versus Non-sex Versus Parasite*, 35 Oikos 282 (1980). For a discussion of host-parasite interactions in general, see Eric R. Pianka, *Evolutionary Ecology* 235-48 (Harper & Row, 3d ed. 1983).

mocracy as either cause or cure for that problem. The "moving target" approach has much to offer our understanding in this field.

III. DEMOCRACY AND ITS PARASITES

At the beginning of this Essay, I mentioned popular criticisms of democracy today. One major criticism of democracy is that it is open to domination by special interests. In his influential book *The Rise and Decline of Nations: Economic Growth, Stagflation, and Social Rigidities,*[19] economist Mancur Olson argues that a peculiar hazard of democracies is the formation of special-interest lobbies that use the democratic process to redistribute wealth from society as a whole to themselves. According to Olson, such groups inevitably gain power, creating a web of special interests that tends to convert government from a responsive and generally wealth-enhancing institution into an institution paralyzed by the ability of minorities to frustrate change and bled dry by the demands of special interest groups.[20]

More recently, Jonathan Rauch has given a name to this phenomenon, which he calls "Demosclerosis."[21] According to Rauch, the growth of interest group domination of politics is the major threat to American society today. As Rauch notes, although democracies have done well in competition with dictatorships, their real problem lies

> in the democratic public's tendency to form ever more groups clamoring for ever more goodies and perks and then defending them to the death. Free and stable societies, it seems, tend to drift toward economic cannibalism and governmental calcification, unless they make a positive effort to fight the current. Demosclerosis may now represent the most serious single challenge to the long-term vitality of democratic government.[22]

These special interest groups may be characterized as the parasites of the body politic. In fact, Rauch uses this very term, describing the growth of special interest legislation and the entities that

---

19. Mancur Olson, *The Rise and Decline of Nations: Economic Growth, Stagflation and Social Rigidities* (Yale U., 1982). For a clear and insightful review of Olson's work see Peter H. Schuck, *The Politics of Economic Growth,* 2 Yale L. & Policy Rev. 359 (1984).

20. Olson, *Rise and Decline* at 41-47 (cited in note 19).

21. Rauch, *Demosclerosis* at 17 (cited in note 5) ("By definition, government's power to solve problems comes from its ability to reassign resources, whether by taxing, spending, regulating, or simply passing laws. But that very ability energized countless investors and entrepreneurs and ordinary Americans to go digging for gold by lobbying government. . . . As it grows, the steady accumulation of subsidies and benefits, each defended in perpetuity by a professional interest group calcifies government").

22. Id. at 19-20.

it supports as the "Parasite Economy."[23] The growth of special interest groups not only does harm in itself, it also forces others to respond in kind. As Rauch puts it:

> In the economy, as in nature, a parasite is set apart from a mere freeloader by its ability to force its target to fend it off. This is the sense in which transfer-seekers are, not so loosely speaking, parasitic: they are not only unproductive themselves, *they also force other people to be unproductive*. . . . A bad stockbroker or a pesky real-estate agent can take your money if you do hire him, but only a transfer-seeker can take your money if you *don't* hire him.[24]

Thus, political parasites are a double danger: they not only pursue their own self-interested agenda, but also force others into a political "arms race" to protect their own interests. "What is peculiar about the parasite economy, then, is its ability to suck in resources that people would rather invest elsewhere. Activism on one side draws counteractivism on another."[25] Of course, efforts at the political redistribution of wealth make society poorer, not richer.[26] To the extent that people are investing in lobbyists, lawyers, and public relations firms instead of research and development, for example, they are foregoing investments that might benefit society as a whole. Furthermore, to the extent that special interest groups succeed in getting self-serving laws and regulations enacted, they are taking money out of other citizens' pockets. Special interest groups provide nothing of value in return and quite possibly block new innovations that might benefit society as a whole but that would threaten their own interests.[27]

It thus seems fair to say that, just as the fitness of an organism has a lot to do with its ability to resist biological parasites, the "fitness" of a political system stems in no small part from its ability to resist these political parasites. The easier it is for special interest groups to get a foothold, and the more points of entry there are for those seeking transfer payments and laws against competition, the more vulnerable a given system is to special interest domination. Inversely, the harder it is for special interest groups to achieve and

---

23. Id. at 64-97 (chapter entitled "The Parasite Economy").
24. Id. at 72-73.
25. Id. at 75.
26. Olson, *Rise and Decline* at 58-69 (cited in note 19).
27. One example given by Rauch is an effort by bicycle messengers to set legal limits on the use of fax machines, which is a more efficient method of delivering messages. Rauch, *Demosclerosis* at 28-31 (cited in note 5).

maintain control over the machinery of government, and the fewer points of entry there are for those seeking self-serving laws and regulation, the less likely a system of government is to he parasitized.[28]

In many ways, there is nothing new about these arguments. The Framers of our Constitution were certainly aware of the dangers of special interests (what they called "faction"[29]). They crafted our system of government with an eye toward resisting such pressures.[30] There is even some suggestion that they regarded electoral turnover as providing protection against corruption.[31] The use of governmental power to transfer wealth at the behest of special interests was viewed with considerable suspicion, not only by the Framers, but by later constitutional theorists such as Justice Joseph Story.[32]

Nonetheless, this Essay's perspective is a somewhat unusual one today. At least since World War II, the notion that government should be resistant to special interest pressures has been in eclipse. Instead, political thinkers lıave generally viewed responsiveness to special interest pressures as being emblematic of democracy.[33] Sucli a view, however, runs counter to a proper understanding of the role democracy plays in our system of government. This point will be addressed in tlie next Part of tliis Essay.

---

28. One might stretch the metaphor even further. Just as the courtship behavior required by sex favors robust, parasite-resistant individuals over those who have been weakened by parasite infestation, so the limitations imposed by special interest groups on political party flexibility may limit the ability to woo voters. A party that is too thoroughly controlled by special interest groups may find it difficult to change its positions even when it is clear that the voters want something different. Over time, voters may favor parties that are less dominated by such groups. Therefore, democracy may have anti-parasitic effects at the party level as well.

29. See Federalist 10 (Madison), in Clinton Rossiter, ed., *The Federalist Papers* 77-84 (Mentor, 1961) (describing the problem of "faction").

30. See id. (discussing the Constitution's structural means for dealing with the problem of "factions" through federalism).

31. See, for example, Federalist 63 (Madison), in Rossiter, *The Federalist Papers* 388 (cited in note 29) (describing the difficulty in corrupting the Senate by noting tbat "tbe periodical change of members would otherwise regenerate the whole body").

32. Joseph Story, *Commentaries on the Constitution of the United States*, in Ronald Rotunda and John Nowak, eds., *Commentaries on the Constitution of the United States* § 712, 510-11 (Carolina Academic Press, 1987) (arguing that the "nature of republican and free governments" may limit legislative power to, among other things, "take the property of A. and transfer it to B. by a mere legislative act").

33. See, for example, Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 257-58 (Macmillan, 1990). Indeed, Bork goes further than most theorists of this stripe by declaring that courts have no business denying a majority, or even "an intense and politically influential minority," the opportunity to effect its selfish political will. Id. at 227.

IV. PARASITE RESISTANCE

Another major criticism of democracy is that it does not produce rational decisions. Beginning with the work of Kenneth Arrow, and continuing with the work of some public choice writers, decision theorists have argued that democratic decisionmaking is inherently irrational, even chaotic.[34] Because of a combination of the electorate's "rational ignorance"[35] and the inherent instability of coalitions needed to produce a majority, the results of democratic decisionmaking are as likely to be determined by virtually random factors, such as the order in which decisions are made, as by any underlying sense of rationality.[36] Furthermore, on those rare occasions when voters in fact think through issues, they are likely to be wrong. Their decisions are as likely to be swayed by passion and ideology as by any rational understanding of the merits.[37]

Instead of arguing with these criticisms, which are rather well established, I intend to take them as true. In short, my argnment is that these "flaws" of democracy as a decision-making device may turn out to be virtues when democracy is properly employed, virtues that have the effect—because of their "randomness" or at least unpredictability—of increasing the political system's resistance to special interest domination over the long term.

To understand this point, think back to the criticisms of sexual reproduction. If sex is seen merely as a means of passing on genes, it is pretty obviously a loser. Sexually reproducing organisms pass on only half of their genes, unlike asexual organisms which pass on all of them. Furthermore, in sexual reproduction, genes are more or less

---

34. See, for example, Kenneth J. Arrow, *Social Choice and Individual Values* 46-60 (John Wiley & Sons, 2d ed. 1963); James M. Buchanan and Gordon Tullock, *The Calculus of Consent* 285-95 (U. Mich., 1965). For more modern treatments of the subject, see Daniel A. Farber and Philip P. Frickey, *Law and Public Choice: A Critical Introduction* 32-62 (U. Chicago, 1991); Peter C. Ordeshook, *Game Theory and Political Theory* (Cambridge U., 1986); William H. Riker, *Liberalism Against Populism* 21-40 (W. H. Freeman, 1982).

35. "Rational ignorance" exists when voters conclude that their stake in the outcome of a question, multiplied by the probability that their vote will make a difference, is too small to justify expending the effort to become informed. Olson, *Rise and Decline* at 26-27 (cited in note 19).

36. Id.

37. See, for example, Alan Rosenthal, *Sloppy Democracy*, 20 State Gov. News 19, 19 (January 1995) (noting that "the contemporary legislature . . . may be too responsive"); Charles L. Black, Jr., *The Humane Imagination* 116-17 (Ox Bow, 1986) ("I think it is an insult to the intelligence of the American people to flatter them with the suggestion that politics, lawmaking, and national policy formation do not call for expertness, professionalism, and the commitment of full time. These jobs are as complicated as law or medicine").

randomly combined, meaning that the new combination may or may not be as good as either parent. Finally, there is a lot of mess and fuss involved with sexual reproduction: finding a mate and so on. But these flaws of sexual reproduction—flaws, that is, when the system is viewed solely as a means of passing on genes—turn out to be virtues when the view is widened to include the problem of dealing with parasites.

Similarly, most criticisms of democracy have to do with its efficacy as a means of making decisions. Because intelligence is not additive (as anyone who has ever served on a committee can attest), groups of people do not necessarily make better decisions than do individuals. Furthermore, the decisions that groups make often turn out to be worse, or at least less consistent and rational, than decisions made by individuals. Democracy is messy, which is why diplomats notoriously prefer to deal with autocracies than with democracies. It is easy to predict what a dictator will do most of the time. Elected politicians, on the other hand, must answer to the ever-changing whims of the voters or be replaced by new figures with whom the diplomat must learn to deal.

But this is precisely the advantage of being a democracy, at least in a world where one must deal with special interest "parasites." Because democratic politicians have to answer to the changing mood of the voters, their actions are not always predictable. Furthermore, because politicians are frequently replaced by the voters, even the coziest relationships are liable to disruption. Just as the randomizing factor of sex creates a "moving target" for parasites, preventing them from becoming too well adapted to their hosts, so the randomizing factor of democratic politics creates a "moving target" for special interests, keeping their relationships with lawmakers from being too comfortable or mutually beneficial.

There is some evidence that things really do work this way in practice. On the broad scale, parasitism is so widespread that one scientist has suggested the following as a universal law: "All successful systems attract parasites."[38] This maxim is not limited to purely biological systems. In computer simulations, known as "artificial life," parasites spontaneously evolve, taking advantage of the fact that it is easier to take from others than to do the work oneself.[39] The widespread use of the term "parasite" to refer to special

38. Thomas Ray, quoted in Kevin Kelly, *Out of Control: The Rise of Neo-Biological Civilization* 289 (Addison-Wesley, 1994).

39. Probably the best-known such simulation is Thomas Ray's program, "Tierra," which spontaneously evolved parasitic entities in short order. Ray's work is described at length in *Out*

interest groups certainly suggests the validity of such an analogy between the biological and the political world.

Furthermore, within the political world, reshuffling things does seem to set the parasites back. The last two elections, which replaced a Republican-dominated presidency with a Democratic President, and which replaced a Democratic-dominated Congress with a Republican majority, seem to have thoroughly upset the established special-interest applecart. Although the ultimate impact of these changes is uncertain, there seems to be no question that special interest groups are feeling much less comfortable in their relationship with government agencies and officials than they did before these changes.[40] It also seems to be the case that state governments—which were substantially insulated from democratic turnover prior to the Supreme Court's reapportionment decisions of the 1960s[41]—have

---

of Control, id. at 283-90. For other descriptions of Ray's work, see generally Diana Mahoney, *Artificial Life: Organisms and Systems Created in the Computer Exhibit Behaviors Characteristic of Natural Evolution*, Computer Graphics World 37 (February 1993); M. Mitchell Waldrop, *Artificial Life's Rich Harvest: Computer Simulations of Dynamics of Living Things*, 257 Science 1040 (1992) (describing both Thomas Ray's "Tierra" model and its spontaneous evolution of parasites).

40. See, for example, Michael Weisskopf, *Congressional Democrats Aren't the Only Bewildered Ones: Lobbyists Are Scrambling to Keep Up With—and Prevent—Changes*, Washington Post Nat'l. Weekly 21 (Nov. 28-Dec. 4, 1994):

> Morgan Stanley & Co. is as Republican-leaning as any Wall Streot firm. But when it comes to the new ruling party's plans for reorganizing the House, the financial giant prefers the old order. . . . The Republican takeover has necessitated improvisation by Morgan Stanley and other special interests facing major changes in the way they do business and the time-tested relationships they have cultivated with the lawmakers who govern their industries.

Id.

When Bill Clinton was elected President in 1992, lobby groups accustomed to dealing with Republican Presidents faced similar problems. See, for example, Karen Riley, *Clinton Victory Expected to Keep Lobbyists Busy*, Washington Times C1 (November 13, 1992) (reporting that "Republican [lobbying] companies are still moving to 'inoculate' themselves by adding Democrats to their firms"); Lew Sichelman, *Lobbyists Must Adjust to a New Congress*, Chicago Tribune Home Guide 3 (November 14, 1992).

An amusing testimonial to the problems created by political turnover can be found by paging through almost any industry trade publication just after an election. See, for example, Stephen Lodge, *How to Handle the New Congress*, Candy Indnstry 18 (January 1993) (advising members, among other things, to "send your product for festivities on Capitol Hill. . . . What better way to establish a good relationship with your legislater than to send along some goodies"). No further comment is needed.

41. See, for example, *Baker v. Carr*, 369 U.S. 186 (1962) (holding that Tennessee voters had a valid cause of action, under the Fourteenth Amendment's Equal Protection Clause, against the state for its failure to reapportion seats in the Tennessee General Assembly); *Reynolds v. Sims*, 377 U.S. 533 (1964) (holding that the Equal Protection Clause requires substantially equal legislative representation for all citizens in a state, and upholding a district court decision ordering temporary reapportionment of the Alabama legislature). See also Richard Neely, *How Courts Govern America* 14 (Yale U., 1981) (describing the way in which

become significantly less dominated by special interests, and far more innovative and effective since that time.[42]

Therefore, one virtue of democracy, wholly apart from its ability to make good decisions, is that it disrupts the sort of cozy back-scratching relationships between politicians and interest groups that favor special interest parasitism. The flaws of democracy as a means of making decisions—unpredictability, irrationality, and inconsistency—may actually further this effect. Note, however, that this conclusion does not mean that more democracy is inherently good, and less democracy inherently bad—it simply means that where democracy is properly employed, criticisms of its very real failings either miss the point entirely, or must be weighed against this very real advantage. These concerns will be addressed in the next Part.

V. REPRESENTATIVE GOVERNMENT AND THE PROPER PLACE OF DEMOCRACY

If democracy helps protect against the dominance of special interest parasites by constantly reshuffling their targets, and if special interest parasitism is, as many argue, one of the key problems facing our system of government today, then one obvious solution would seem to be more democracy. Referenda, "electronic town meetings" producing instant plebiscites on any issue, and increased access by constituents to their representatives would all seem to be unalloyed goods in this view. But such is not the case.

The anti-parasitic role of democracy that I am outlining is, after all, rather narrow. It does not have to do with making decisions (at which democracy is, by hypothesis, not superior), but rather with selecting *decisionmakers*. The way that democracy makes the political system more resistant to special interests is by mixing up the part that those interests target: the government. A change in party control, whether in Congress or the White House, or even just a substantial influx of new members of Congress, obliterates an entire constel-

---

entrenched elites in state government frustrated political change prior to Supreme-Court-ordered reapportionment).

42. See, for example, David Osborne, *Laboratories of Democracy* (Harvard Business School, 1990) (describing innovation by state governments after 1965); Advisory Commission on Intergovernmental Relations, *The Question of State Governmental Capability* 364 (1985) (stating that as a result of changes made in the mid-1960s through the 1970s, "states, in formal representational policymaking and implementation terms at least, are more representative, more responsive, more activist and more professional in their operations than they have ever been").

lation of relationships and entry points, leaving special interests scrambling to catch up.

Thus, "more democracy" only plays an anti-parasitic role when it is aimed at expanding the role of democracy in selecting decisionmakers. When it aims at expanding the ability of constituents to influence the decisions that those elected officials will make, a more democratic approach may actually make things worse. After all, it is primarily special interests—parasites—who will make use of those new points of contact.

Nor does direct popular decisionmaking serve the same anti-parasitic role. Although plebiscitary democracy *might* serve to reduce the influence of minority special interests (though this is far from certain), it no longer turns the vice of inconsistency into the virtue of a "moving target" of decisionmaker turnover. Instead, it replaces the decisionmakers entirely. In a representative government, decisions are made by democratically elected officials, but (because of legislative rules, party discipline, and individual conscience) not necessarily in a democratic fashion. Thus, the studied disadvantages of democratic decisionmaking do not apply, and the dangers of special interest parasitism are reduced.[43] A society in which all governmental decisions were made by an electronic mail ballot following a televised electronic town meeting, on the other hand, would face all the disadvantages of democratic decisionmaking without the offsetting advantages already discussed.[44]

Indeed, the kind of plebiscitary electronic democracy that some have trumpeted as a solution to special-interest dominance would probably constitute a move from the frying pan into the fire. Our constitutional system, after all, was designed to protect against the twin dangers of majority and minority tyranny. The Framers' conception of "faction" took account of both dangers. A move to direct democracy might reduce the danger of minority tyranny (though only under ideal conditions), but in so doing, it would instead expose us to

---

43. Nor does this structure disempower the voters in a meaningful sense. As Charles Black says:

> [T]he need for specialists does not contradict the need for participation by the people. The people under the present system have to judge records, positions and character, and they have to make their wants and beliefs known.

Black, *The Humane Imagination* at 117 (cited in note 37).

44. Furthermore, such a society would remain free of "special interest" domination only so long as all or nearly all of its citizens participated in decisionmaking, something unlikely to take place for long.

the dangers of majority tyranny. Plebiscitary democracy was the last thing that the Framers had in mind, and with good reason.

Term limits, a remedy proposed by some, are a bit more problematic. The imposition of mandatory turnover on elective offices certainly tends to change things around, but it is not at all certain that it would accomplish as much as the reshuffling brought about by democratic electoral politics. The value of "shuffling," after all, is that it is more or less random. The turnover created by term limits would not be random at all. In addition, the term-limit remedy acts whether it is needed or not. Turnover accomplished by electoral processes, on the other hand, may be in part "random,"[45] but it may also stem—as I think it has in the last couple of elections—from a widespread sense on the part of voters that special interest parasitism has gotten out of hand. Even if we do not feel that we can count on voters to engage in the kind of day-to-day effort required to make plebiscitary democracy work—something hard to expect in an age when we cannot get people to show up for jury duty—perhaps we *can* count on them to know when things have gotten too cozy, and to act appropriately. Certainly the end of the Cold War has produced just such a sense, and just such action, in quite a few democracies besides this one.[46]

Indeed, a look at the constitutional system that the Framers set up suggests that, as designed, it was rather well-equipped to take advantage of the sex-like aspects of democracy in preventing parasitism. It was, after all, a representative democracy. There were only two kinds of decisions that were to be made directly by the people: the election of representatives,[47] and the election of delegates to conventions for the ratification (or proposal, in some cases) of

45. Or at least unpredictable.

46. See, for example, *The Anti-Incumbent Tide Swamps Britain*, U.S. News & World Report 15, 15 (May 15, 1995) ("No specific issue explains the result. Instead, it reflects a general sense that the Tories have been in office too long and are out of touch"); Timothy Aeppel, *German Voters Turn to Right in State Poll*, Wall St. J. A9 (March 8, 1993) ("The main message of yesterday's election, however, was that voters are angry, particularly over the credibility of established parties"); *Change, Italian Style*, N.Y. Times A14 (March 30, 1994) (describing Italian voters' dissatisfaction with established parties and saying "[t]he rout of the main postwar parties is close to complete"); *Asterix le Gaulliste*, 326 Economist 14 (March 27, 1993) (describing French voters' unhappiness with existing politics). One caveat, however: Changes in party must actually make a difference in who governs. At a sufficiently high level of special interest control, elections no longer matter, because anyone who is elected will serve the same interest groups. I suspect that many alienated voters believe this to be the state of affairs teday, although I do not share that belief. One obvious implication of my approach, however, is that laws limiting the ability of voters to induce true change (such as laws that exclude third parties or independent candidates from the ballot) should be disfavored.

47. U.S. Const., Art. I, § 2.

constitutional amendments.[48] Senators, in those pre-Seventeenth Amendment days, were elected by state legislatures, while the President (then as now) was elected by the Electoral College. Not a single governmental decision was to be made by direct popular vote, yet all decision-making institutions were open to unpredictable, democratically induced change.

Since then, of course, the system has opened up somewhat. Senators are now elected by the people.[49] Although Presidents are still formally elected by the Electoral College, in practice the vote is democratic, rather than collegial.[50] These changes would seem to enhance the role of voter-induced turnover in promoting resistance to special interests.[51]

Nonetheless, most people seem to agree that the power of special interests has grown, particularly over the last fifty or sixty years. According to Jonathan Rauch, interest-group domination took off about the time of World War II.[52] Whereas the number of lobby groups was about 400 in the late 1920s, by 1950 that number was over 2,000, and today the number approaches 25,000.[53]

Can we reconcile this expansion of parasitism with the argument that the basic structure of our Constitution is anti-parasitic?[54] It is, of course, possible to argue that things would be much worse without the protections built into our system,[55] or that other factors are at work. There is, however, another explanation: we have stopped living under the constitutional system described above.

---

48. Id., Art. V.

49. Id., Amend. XVII.

50. For a description of the current system, see David W. Abbott and James P. Levine, *Wrong Winner: The Coming Debacle in the Electoral College* 16-19 (Praeger, 1991).

51. By noting this, I am not, of course, suggesting that the Framers had modern evolutionary biology in mind. They did, however, set out to control the problem of special interests, a kind of parasitism. The similarities between our Constitution's use of democracy and organisms' use of sexual reproduction might therefore be considered examples of parallel evolution.

52. Rauch, *Demosclerosis* at 38-44 (cited in note 5) (tracing the growth in membership of various interest groups).

53. Id.

54. To avoid confusion, I stress that an "anti-parasitic" role for democracy is not the full story any more than it is the full story with regard to sex. Democracy plays an important communal role as well—for example, by making citizens feel (and be) part of the polity. My discussion here focuses on the supposed vices of democracy and on how they may sometimes actually be virtues. The other virtues of democracy are already well known.

55. Indeed, I make an argument of this sort in Reynolds, *Chaos and the Court*, 91 Colum. L. Rev. at 114-15 (cited in note 7).

By this, I mean that the well-known changes in government introduced since the New Deal era have substantially undermined the protections against special interest dominance contained in the Constitution. Although there are a number of ways in which this is true, I will focus on two that are of key importance. First is the substantial expansion of federal authority brought about by the Supreme Court's broad reading of the Commerce Clause in *Wickard v. Filburn*.[56] From James Madison's notion of a federal government whose powers are "few and defined,"[57] the *Wickard* case brought us to the proposition that there are few, if any, limits to congressional power.[58] Second is the Supreme Court's abandonment (in all but name) of the anti-delegation doctrine, which prevented Congress from ducking important questions (and the responsibility for important decisions) by assigning them to administrative agencies, along with the consequent growth in power of unelected bureaucrats.[59] Both phenomena create the same problem: a growth in the power of unelected officials to make decisions and an increased opportunity for special interests to influence those decisions.

The growth of federal power under the Commerce Clause has increased the role of special interests because it has made lobbying the federal government vastly more attractive. A government that can regulate wages attracts the attention of lobbyists for trade unions and manufacturers; a government that can pass "crime" bills attracts the attention of police unions, local governments, gun-control activists and opponents, and so on. This should come as no surprise, but many commentators have so far failed to make the connection. According to

---

56. 317 U.S. 111 (1942) (holding that the enactment of the Agricultural Adjustment Act was within congressional power under the Commerce Clause).

57. As Madison wrote, "The powers delegated by the proposed Constitution to the federal government are few and defined." Federalist 45 (Madison) in Rossiter, *The Federalist Papers* at 292 (cited in note 29).

58. *Wickard*, as most readers will recall, was the case in which the Supreme Court held that congressional power "to regulate Commerce . . . among the several States," U.S. Const., Art. I, § 8, cl. 3, included the power to forbid a farmer to raise wheat for consumption on his own farm by his own family and livestock. 317 U.S. at 124-28. *Wickard* and the cases that followed it produced "a situation in which a standard law-student definition of the modern commerce power is, 'Congress can do whatever it wants.'" Glenn H. Reynolds, *Kids, Guns, and the Commerce Clause*, Policy Analysis No. 216 at 20 (October 10, 1994). The Supreme Court's recent decision in *United States v. Lopez*, 115 S. Ct. 1624 (1995) (holding that the enactment of the Gun-Free School Zones Act of 1990 exceeded congressional power under the Commerce Clause), has suggested that federal power may not be unlimited after all. See text accompanying notes 66-76.

59. For a thorough and lucid discussion of this phenomenon and the problems it has spawned, see David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (Yale U., 1993).

Rauch (and common sense), one reason why more special interests are lobbying the federal government is that there is more money involved:

> Like the bank robber Willie Sutton, Americans look for cash where the money is.... Never before has organizing groups to lobby for benefits been as potentially lucrative as it is today; never have the sums available been as large or the paths to them as plentiful.[60]

As Rauch notes, the federal budget was about three percent of the American economy in 1929, and only about ten percent at the peak of the New Deal. It is now nearly twenty-five percent.[61] With it raining federal soup, it is no surprise that interest groups have rushed out with buckets. Each new program, however, creates a new lobby:

> Indeed, a built-in side effect of new government programs is their tendency to summon into being new constituencies—which, in turn, often lobby for yet other new programs, keeping the whole cycle going. Fifty years ago the elderly were a demographic category. Today they are a lobby.[62]

The abandonment of commerce-clause limitations on federal power has led to greater special interest pressure, in no small part, because it has made the federal government more attractive to lobby. But the problem goes beyond that. A federal government with more powers and responsibilities is under increasing pressure to delegate decision-making responsibility to the bureaucracy. Such delegation moves decisionmaking from elected lawmakers, subject to the electoral-turnover effects outlined above, to unelected bureaucrats (or congressional staff) who are much more insulated from such effects. The anti-delegation principle formerly prevented such moves, but when the Supreme Court effectively stopped enforcing the doctrine during the New Deal, that check was lost.

Thus, the reason the special-interest problem has grown worse in our society in recent decades is that the safeguards that the Framers put in place have largely been removed. Without those safeguards, it is no surprise that the tendencies they guarded against have grown, any more than it is a surprise when someone whose immune system has been suppressed develops infections. In both cases, parasites quickly appear to take advantage of the new opportunities that open up. Also, in both cases the best hope for long-term survival

---

60. Rauch, *Demosclerosis* at 50, 54 (cited in note 5).
61. Id. at 54, 56.
62. Id. at 57.

is to reestablish the necessary immunity. In the political sphere, we can do that by restoring the very constitutional safeguards whose removal has led to the current problem.

VI. APPLYING THE THEORY: *LOPEZ* AND *THORNTON*

Two Supreme Court cases decided as this Essay was approaching publication are worth discussing, in light of the approach that has been outlined. Although predicting Supreme Court decisions is a chancy business,[63] a useful constitutional theory should provide a means of evaluating Supreme Court decisions within its terms. Though intended more as a source of understanding than of criticism, this Essay's approach, which emphasizes the anti-parasitic role of democracy in a system of representative government, turns out to provide some useful insights into these cases. *United States v. Lopez*,[64] the "Gun Free School Zones Act" case, dealt with congressional power under the Commerce Clause. *United States Term Limits v. Thornton*[65] involved the ability of states to apply term limits to federal officials elected within their bounds.

Because criticism of Supreme Court decisions, rather than praise of them, seems the surer path to academic success, I am disappointed to say that under the approach that I have outlined, the Supreme Court appears to have gotten it right both times. That is, the Court's endorsement of enumerated power limits on Congressional action, and its rejection of term limits, both seem consistent with my approach.

The *Lopez* case involved a law, passed during Congress's biennial ritual of chest-thumping over crime, that forbade the possession of a firearm within one thousand feet of a public or private school.[66] Passed (apparently) as an exercise of Congress's power to regulate commerce among the states, the statute had little to do with crime, and much to do with pleasing crime-related lobby groups and enhancing Congress's prospects for reelection. Jeffrey Rosen of *The New Republic* noted after the decision that "there is no uniquely federal interest involved—except for the purely symbolic interest of

63. For further discussion of this topic, see Reynolds, *Chaos and the Court*, 91 Colum. L. Rev. at 113-14 (cited in note 7).

64. 115 S. Ct. 1624 (1995).

65. 115 S. Ct. 1842 (1995) (finding unconstitutional state-imposed term limits on federal representatives).

66. 18 U.S.C. §922(q)(1)(A) (1994 ed.).

congressional Democrats and Republicans in appearing simultaneously tough on crime and tenderhearted on children."[67]

Even symbolic legislation, however, has consequences in the real world, and this legislation was no exception. Alfonso Lopez, a twelfth-grader at Edison High School in San Antonio, Texas, was caught with a revolver on school property. He was initially charged under a Texas law, which (like that of most states) already forbade the carrying of guns at school. Shortly thereafter, though, he was charged under the federal law, and the state charges were dropped.[68]

Lopez's conviction was overturned by the Fifth Circuit on the ground that the statute under which he was convicted was beyond the enumerated powers of Congress.[69] The original statute did not say what power Congress was relying upon in passing the statute; in the post-*Wickard* world such things appeared unnecessary. Once challenged, the government asserted that the statute represented an exercise of Congress's power to regulate commerce among the several states.[70] The government's argument, in brief, was that (1) the costs of crime are spread across the nation through the mechanism of insurance, so that crime affects interstate commerce, and that guns in schools promote crime; (2) crime makes people less willing to travel, and that guns in schools promote crime; and, most interestingly, (3) the "national productivity" argument that guns in school promote violence, violence promotes poor learning, poor learning produces an under-educated work force, an under-educated work force produces a less-productive economy, and a less-productive economy naturally produces less commerce among the states.[71] Hence, by regulating the possession of guns on school property, Congress was, in essence, regulating commerce among the states.

The Court rejected this argument. Writing for the majority, Chief Justice Rehnquist noted that under our constitutional system, the federal government is intended to be one of limited and enumerated powers. Under the government's formulation, however, he stated that "it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education."[72] Thus, the majority found that accepting the government's theory would

67. Jeffrey Rosen, *Fed Up,* The New Republic 9, 13 (May 22, 1995).
68. *Lopez,* 115 S. Ct. at 1626.
69. *United States v. Lopez,* 2 F.3d 1342, 1345 (5th Cir. 1995).
70. Id.
71. *Lopez,* 115 S. Ct. at 1632.
72. Id.

necessarily mean creating a federal government of general, rather than limited powers, with no limits on its jurisdiction beyond those imposed by the affirmative prohibitions of the Bill of Rights.[73]

Four dissenters, led by Justice Breyer, disagreed, or at least did not object to the creation of an essentially unlimited commerce power. In essence, the dissent agreed with the government's "national productivity" argument that possession of guns in school is bad for education, and that what is bad for education is bad for the national economy. In the dissent's formulation, Congress's power to regulate commerce among the states should be read as the power to manage the national economy. According to the dissent:

> Specifically, Congress could have found that gun-related violence near the classroom poses a serious economic threat (1) to consequently inadequately educated workers who must endure low paying jobs, and (2) to communities and businesses that might (in today's "information society") otherwise gain, from a well-educated work force, an important commercial advantage.[74]

Stressing "the immediacy of the connection between education and the national economic well-being,"[75] and implicitly interpreting Congress's power to regulate commerce as a power to promote the national economic well-being, the dissent would have upheld the statute as a valid exercise of Congress's power to regulate commerce among the states.[76]

There is obviously much more to the case than this brief description can capture, and the law reviews will no doubt be full of articles exploring all of its ramifications.[77] For our purposes, however, the question is whether the approach that I have set out provides a basis for choosing between the majority's view that Congress's power to regulate commerce is limited essentially to commerce and those things that have a substantial effect on commerce, and the dissent's view that Congress's power is essentially limitless, reaching anything that can plausibly be said to have a rational relationship to promoting the national economic well-being.[78]

---

73. Id. at 1634.
74. Id. at 1661 (Breyer, J., dissenting).
75. Id. at 1662.
76. Id. at 1665.
77. For more on the *Lopez* case and its constitutional implications, see Reynolds, *Kids, Guns, and the Commerce Clause*, Policy Analysis No. 216 at 20 (cited in note 58).
78. If this is so, one must wonder why the Framers bothered to include provisions like the Bankruptcy Clause, U.S. Const., Art. I, § 8, cl. 4, or the Patent and Copyright Clause, id. Art. I, § 8, cl. 8, both of which would rather obviously be subsumed under the sweeping power Justice Breyer proclaims to exist. That question, however, is a topic for another article.

As should be obvious, I believe that the majority opinion is consistent with an approach informed by the role of special interest parasitism and the ways in which our system of representative democracy is structured to resist such parasitism. The dissenting opinion, quite obviously, is not consistent with this approach. Under the dissent's approach, there is no limit to the federal government's power other than the Bill of Rights. Special interest groups are free to seek the employment of governmental power in their own interest on any subject, even if their interest is against the common good. Everything is fair game; the only question is who has enough political clout. Worse yet, this extensive federal power will be—will *have* to be—exercised largely through an unelected bureaucracy that is insulated from the anti-parasitic effect of democracy, thereby deepening the influence of special interests.

There are plenty of other reasons to doubt that the dissenting opinion's approach is what the Constitution envisions,[79] but certainly such an approach to federal power is inconsistent with an anti-parasitic view of constitutional structure. On the other hand, as I have already suggested, a stricter adherence to enumerated limitations on federal power would significantly increase the federal government's resistance to special interests. The less lucrative the government is as a source of wealth transfers and special treatment, the less people will engage in parasitic efforts to gain such treatment.

The term limits case, *United States Term Limits v. Thornton,* is a bit more difficult. Certainly the Court seems to have found it difficult, notwithstanding the confident tone of both the majority opinion and the dissent. Leaving aside the many issues certain to be explored in countless law review articles, two points are worth looking at from the anti-parasitic viewpoint. The first is the merit of term limits as a guard against special interests. The second is the

79. Robert Bork, of course, has endorsed a similarly broad view of governmental power with regard to areas involving sexuality: in essence, that government can regulate anything not explicitly forbidden by the Bill of Rights. See Bork, *The Tempting of America* at 257-58 (cited in note 33) (arguing that, without an explicit constitutional prohibition to rely upon, a court has no principled means of distinguishing between valid and invalid legislation; it should, therefore, defer to the legislature). As I have argued elsewhere, such a plenary view of governmental power, even at the state level, is inconsistent with the Framers' views on the legitimate scope of governmental authority and, hence, inconsistent with Bork's own claim to be pursuing an "original understanding" approach. See Glenn H. Reynolds, *Sex, Lies, and Jurisprudence: Robert Bork,* Griswold, *and the Philosophy of Original Understanding,* 24 Ga. L. Rev. 1045 (1990). One might wonder if the term "conservative" means anything if it can be used to describe both the *Lopez* majority opinion and Bork's rather radically statist jurisprudence, but certainly it has been so used. That, however, is a topic for another article.

difference between the majority opinion and the dissent regarding who constitutes "the people" from a constitutional standpoint.

The first question has already been discussed. Viewed from the perspective of the anti-parasitic role of democracy, term limits are of doubtful utility in controlling special interest dominance, and they may even make things worse.[80] Ordinarily, this should be of no constitutional importance, since we do not generally require proof that constitutional rights or powers "work." After all, there is no proof that a free press or an armed populace protects against tyranny: the First and Second Amendments are as much statements of faith as of fact in that regard. Where the constitutional case is difficult, however, it is worth asking whether the program being advanced is consistent with the underlying character of the Constitution, and whether it is likely to produce the outcomes that are being touted as a justification for the change. The term limits approach fails this test. It is inconsistent with other aspects of the anti-parasitic structure of our system, and it is unlikely to produce the results claimed as the reason for term limits in the first place. On this basis the term limits remedy does not deserve to be cut any constitutional slack.

If the topic were term limits imposed at a national level, that would be the end of it. But the term limits in *Thornton* were imposed by a single state, Arkansas. This raises the more interesting question that Akhil Amar has called the "denominator problem."[81] In other words, who are "the people"? Are they the people of the United States as a whole (as the majority in *Thornton* argues), or are they the distinct peoples of the several states, summed together on a state-by-state basis (as the dissent maintains)?

This is, of course, a question that has divided our nation for some time, although I thought it had been pretty well answered by the Civil War. At any rate, from an anti-parasitic viewpoint we might ask which approach seems less likely to promote special interest dominance. This question is worthy of considerable attention, which fortunately it has received from none other than James Madison. Madison wrote famously about the dangers of special interests, or "faction," and the various approaches to controlling them, in The Federalist No. 10.[82] Madison argued that a representative government was less likely to be captured by factions than a pure democ-

---

80. See Part V.

81. Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. Colo. L. Rev. 749 (1994).

82. Federalist No. 10 (Madison) in Rossiter, *The Federalist Papers* (cited in note 29).

racy.[83] Madison clearly also believed that under representative government a larger society was more resistant to special interest domination than a smaller one. According to Madison:

> The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other.[84]

Madison's view is consistent with everyday observation: small schools are more cliquey, local governments more controlled by small organized groups, and state legislatures more easily influenced. If we conclude that one major point of our governmental system is resistance to special interests, the "denominator problem" seems best answerable in national, rather than state terms. Thus, though the opinion in *Thornton* properly rested on other grounds, it certainly seems fair to say that the Court was right from an anti-parasitic standpoint.

This may seem odd, since term limits are so often suggested as a cure for special interest dominance. But while there is certainly a problem with excessive special interest power, that does not mean that just any purported cure is a good idea. Term limits—particularly term limits imposed on federal officials by states—are both unlikely to work and inconsistent with the underlying principle. At best, they represent an effort to treat the symptoms of a much deeper problem—departure from the basic structure of the Constitution—that can

---

83. Madison stated:

> The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended.
>
> The effect of the first difference is, on the one hand, to refine and enlarge the public views.... Under such a regulation, it may well happen that the public voice pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves.

Id. at 82.

84. Id. at 83.

only be remedied by a much deeper solution, that of returning to the basic structure.

VII. CONCLUSION

In this Essay I have argued that democracy *is* like sex, insofar as electoral turnover, properly structured, can help limit the influence of special interests in much the same fashion that sex is believed to reduce the viability of parasites. I have further suggested that our constitutional system was originally structured in a manner that took advantage of these "anti-parasitic" characteristics of democracy, but that the expansion of federal authority under the Commerce Clause and the demise of the non-delegation doctrine have undermined that effect. I have argued that many current proposals to reduce the increased influence of special interests by making the system "more democratic" may actually make things worse. Instead, I have suggested that a revival of the doctrines of enumerated powers and non-delegation is likely to do more to reduce special interest dominance, with less risk of doing serious damage to the constitutional structure than these more popular proposals for "reform."

I have thus come a long way in this short paper to arrive at a rather straightforward suggestion: that we pay attention to the Constitution. That such a suggestion is radical—and I fear that it is—is a poor reflection on the state of constitutional discourse at the moment, but that is a topic for another paper. I do believe, at any rate, that I have provided a fairly clear reason (not simply an "It is written" argument) for doing so. Aside from providing a catchy title, the biological analogy I have chosen illustrates how our constitutional system can answer a problem that occupies much contemporary attention, without requiring major surgery.

If we are seriously concerned about the growth of special interest power, and the widespread demands for term limits and similar constitutional reforms would certainly suggest that we are, then we might consider the radical approach of actually doing what the Constitution commands. For the reasons already outlined, I think that we could do far more to restrain the influence of special interest parasites by taking seriously existing constitutional limitations such as enumerated powers and the anti-delegation doctrine than by adopting any of the slapdash proposals for constitutional reform that currently clutter the airwaves on the political talking-head circuit. And the risks of such an approach would probably be fewer. After all,

we lived under such limits for the first three quarters of our nation's existence without disaster. We can probably do so again.

Despite my catchy title, such a proposal lacks the "sex appeal" of flashy new solutions based on the Information Superhighway, or on major constitutional change. Against this deficiency, I can only suggest one virtue: it will probably work.