Abstract: In earlier work – particularly The Law of Democracy casebook and an article on The Hydraulics of Campaign Finance Reform – I have argued that the relationship between law and democracy is a hydraulic one. On the one hand, the function of elections (that is, of democracy) is to tally our preferences and to determine the future policies of our government (that is, to produce law). But existing arrangements powerfully influence our preferences and dramatically limit the choices available to us. The kind of democracy we have, and can imagine, is thus a function of the existing structure. Law, in this sense, produces elections every bit as much as elections produce law.

The idea of a hydraulic relationship has a second element: the series of ostensibly discrete doctrines governing issues such as voter registration, political party autonomy, campaign finance, and the like are all part of a broader ecosystem. Understanding how these parts are connected requires thinking about the system as a whole and recognizing that developments in one area may have consequences that reverberate across the system. The underlying quest for political power means that actors are constantly adjusting to changes in the system, often in ways that are hard to predict in advance.

In my presentation at the University of Wisconsin conference, I will address three aspects of the 2016 election that illustrate this hydraulicism. These aspects are linked by their relationship to the increased political polarization that has emerged since the turn of the century.

The first phenomenon is the new vote denial, to use Professor Dan Tokaji’s phrase. After a generation of expansions in the right to vote, polarized state legislatures have produced a spate of legislation cutting back on voting rights. These cases raise an important question about what the baseline should be against which changes to voting practices and procedures should be measured and illustrate once again the tangled relationship between race and politics that has long resulted in doctrinal exploitation. The Supreme Court’s evisceration of the Voting Rights Act’s preclearance regime, combined with the substitution of an “undue burden” standard for a regime of heightened scrutiny, raises the question whether there are other doctrinal avenues for addressing vote denial.

The second phenomenon is the emergence of Donald Trump as a serious contender for the Republican Party’s presidential nomination. The conventional prediction that the Roberts Court’s libertarian campaign finance doctrine would elevate the influence of political money has been turned on its head by a shift in the balance of power among the three components that comprise a political party: the party-in-government, the party leadership, and the party-in-
the-electorate. Little noticed features of the existing legal regime have empowered a faction of the party-in-the-electorate to undercut the other players. The conventional wisdom’s confidence in the primary of money may have blinded longtime participants to changes in the media that have made paid advertising less critical in political persuasion.

Finally, a third – and essentially fortuitous – feature of the 2016 election cycle that will potentially shape law and democracy for a generation stems from the death of Justice Antonin Scalia. Like the two hands emerging from the sheet of paper to draw one another in M. C. Escher’s famous 1948 lithograph *Drawing Hands*, the Supreme Court emerges from the political process—in the sense that the Court’s membership, and thus the justices’ viewpoints, are a product of broad political and intellectual movements—even as its decisions fundamentally shape the possibilities and boundaries of that political process going forward. If the Court permits restrictive voter registration practices—as it has—or strikes down restrictions on political spending—as it also has—this will influence the shape of the elections that produce the public officials who nominate and confirm future members of the Court. The public recognition that the Court is increasingly political in the sense that partisan control over the nomination and confirmation process produces increasingly predictable views in cases governing politics has produced an extraordinary response on the part of Senate Republicans and may have consequences far beyond filling this particular seat on the Court.