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THE STAGNATION, RETROGRESSION, AND POTENTIAL PRO-VOTER TRANSFORMATION OF U.S. ELECTION LAW

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FEATURE

THE STAGNATION, RETROGRESSION, AND POTENTIAL PRO-VOTER TRANSFORMATION OF U.S. ELECTION LAW

Richard L. Hasen*

INTRODUCTION

American election law is in something of a funk.

As a matter of judicial interpretation of federal election statutes and the United States Constitution, election law is retreating from the protection of voters. The United States Supreme Court in the 1960s strongly supported voting rights.[1] In more recent years, however, the Court has struck down[2] or weakened[3] key parts of the 1965 Voting Rights Act. When the Court recently issued a 5-4 opinion merely maintaining the status quo in applying Section 2 of the Act to redistricting,[4] voting rights advocates correctly described it as a major victory,[5] even when a concurring Justice invited new constitutional litigation against the Act.[6]

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[1] *See infra* Part I.A; RICHARD L. HASEN, A REAL RIGHT TO VOTE 19-26 (2024).

[2] Shelby County v. Holder, 570 U.S. 529, 557 (2013) (striking down the coverage formula (section 4) of the Voting Rights Act, rendering preclearance (in section 5) mostly inoperable).

[3] Brnovich v. Dem. Nat'l Comm., 594 U.S. 647, 673-74 (2021) (rejecting disparate impact model for Section 2 vote denial cases); *Restoring the Voting Rights Act After Brnovich and Shelby County: Hearing Before the Subcomm. on the Const. of the S. Comm. on the Judiciary*, 117th Cong. 1, 5 (2021) (statement of Richard Hasen, Professor of Law and Political Science, University of California Irvine School of Law), https://www.judiciary.senate.gov/imo/media/doc/Hasen%20-%20Testimony1.pdf (criticizing the ruling and its methodology).

[4] Allen v. Milligan, 599 U.S. 1, 19 (2023) (applying *Gingles* test to uphold finding of Section 2 violation).

[5] Ian Millhiser, *Surprise! The Supreme Court Just Handed Down a Significant Victory for Voting Rights*, VOX (Jun. 8, 2023), https://www.vox.com/scotus/2023/6/8/23753932/supreme-court-john-roberts-milligan-allen-voting-rights-act-alabama-racial-gerrymandering.

[6] *Milligan*, 599 U.S. at 45 (Kavanaugh, J., concurring in all but Part III-B-1).

The Supreme Court's common *Anderson-Burdick* framework[7] for evaluating election laws regulating ballot access and rules governing voter registration and election administration has emerged as an asymmetric, state-protective rule. It usually lets states simply posit, without proving, a state interest such as avoiding voter confusion to justify imposing burdens on voters, while requiring voters to come forward with significant evidence of such burdens to defeat the law.[8] Even that standard is not state-protective enough for some lower court judges.[9]

The Supreme Court has removed federal courts from the business of policing partisan gerrymanders[10] and it has reserved for itself the power to second-guess state court decisions to rein in congressional gerrymandering under state constitutions and perhaps other voting rules applicable in federal elections.[11] The Court also has embraced an aggressive timing rule called the *Purcell* Principle limiting federal court injunctive relief in the period before an election. The rule often gives states the ability to violate voters' rights for one election period before federal judicial intervention becomes permissible.[12]

Thanks to a series of rulings by the Supreme Court[13] and actions of other government actors,[14] campaign finance law is barely effective: any sophisticated party can collect and spend unlimited sums supporting or opposing candidates for

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[7] "In *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), the Supreme Court articulated a 'flexible standard,' for a court to evaluate '[c]onstitutional challenges to specific provisions of a State's election laws,' *Anderson*, 460 U.S. at 789. The *Anderson-Burdick* test may apply to First Amendment claims as well as to Equal Protection claims." Daunt v. Benson, 956 F.3d 396, 406 (6th Cir. 2020).

[8] For a short explanation and critique, see HASEN, *supra* note 1, at 62-64 (2024); *see also infra* notes 106-23 and accompanying text.

[9] *Daunt*, 956 F.3d at 422-26 (Readler, J., concurring in the judgment).

[10] Rucho v. Common Cause, 588 U.S. 684 (2019).

[11] Moore v. Harper, 600 U.S. 1, 34-36 (2023) (stating the anti-"arrogation" principle).

[12] Purcell v. Gonzalez, 549 U.S. 1 (2006); STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC 197-227 (2023); Wilfred U. Codrington III, Purcell *in Pandemic*, 96 N.Y.U. L. Rev. 941 (2021); Richard L. Hasen, *Reining in the* Purcell *Principle*, 43 FLA. ST. U. L. REV. 427 (2016) (coining the term "*Purcell* Principle" and criticizing its application).

[13] The most notable being *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

[14] Daniela Altimari, *Democrats Rap FEC Gridlock That Republicans Say is a Feature*, ROLL CALL (Sept. 20, 2023), https://rollcall.com/2023/09/20/democrats-rap-fec-gridlock-that-republicans-say-is-a-feature/.

office, often avoiding effective disclosure.[15] But the laws can ensnare the unsophisticated person looking to participate in politics.[16]

In its most important election cases, the Supreme Court usually divides ideologically, and it now also divides along the party lines of the president who nominated each Justice, with Republican-appointed Justices far less protective of voting rights than Democratic-appointed ones.[17] There is reason to worry that some of the key voter-protective precedents of the liberal Warren Court could be in danger in the hands of a conservative and originalist Supreme Court skeptical of earlier readings of the Equal Protection Clause of the Fourteenth Amendment.[18]

Lower federal courts too have pulled back on voter protection, such as the Eighth Circuit, which recently issued an en banc decision holding that private actors have no right to bring suits under Section 2 of the Voting Rights Act,[19] a ruling, that if extended could mean the inability of most such cases being heard.[20] So worried were voting rights plaintiffs about that potential that they did not risk seeking Supreme Court review in the Eighth Circuit case.[21]

Political action protecting voters also has stagnated. The last voting-related amendment to the Constitution, the Twenty-Sixth Amendment barring discrimination against 18-to-20-year-olds in voting,[22] was ratified in 1971, before a majority of living American citizens were even born.[23] The Constitution even today contains no affirmative right to vote, and the Supreme Court as recently as 2000 confirmed that voters do not have a constitutional right to vote for President,[24] a ballot voters may cast only thanks to the grace of state legislatures. Congress could not come together to pass a revised Voting Rights Act preclearance

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[15] *See* Richard L. Hasen, *Nonprofit Law as a Tool to Kill What Remains of Campaign Finance Law: Reluctant Lessons from Professor Aprill*, 56 LOY. L.A. L. REV. 1233, 1241-43 (2023) (describing deregulatory path of campaign finance law following *Citizens United*); *id.* at 1250-57 (describing new constitutional attacks on campaign disclosure laws).

[16] *Hearing, On American Confidence in Elections: Protecting Political Speech before the Committee on House Administration*, United States House of Representatives at 3 (May 11, 2023), https://www.congress.gov/118/meeting/house/115880/witnesses/HHRG-118-HA00-Wstate-SmithB-20230511.pdf [https://perma.cc/H9L8-B7ZQ] (Testimony of Bradley A. Smith).

[17] *See infra* notes 177-94 and accompanying text.

[18] HASEN, *supra* note 1, at 32-33; *see also infra* note 105 and accompanying text.

[19] Arkansas St. Conf. of NAACP v. Arkansas Bd. of Apportionment, 86 F.4th 1204 (2023), en banc reh'g denied, 91 F.4th 967 (2024).

[20] *See infra* note 86 and accompanying text.

[21] Hansi Lo Wang, *After Controversial Court Rulings, a Voting Rights Lawsuit Takes an Unusual Turn*, NPR (July 4, 2024). Plaintiff may also be waiting to see if the Eighth Circuit embraces the view that these lawsuits may be brought under 42 U.S.C. § 1983. *See id.*

[22] U.S. CONST., AMEND. XVI.

[23] *See* HASEN, *supra* note 1, at 14.

[24] Bush v. Gore, 531 U.S. 98, 104 (2000).

provision,[25] despite the Supreme Court at least formally leaving the door open to such legislation in the 2013 *Shelby County v. Holder* case[26] striking down the earlier formula used to determine which jurisdictions were subject to preclearance. The hyperpolarized Congress usually divides along party lines on election legislation.[27] The last major proposed voting rights law from Democrats, the For the People Act, passed the House solely with Democratic votes, but it failed to overcome a Senate filibuster following another party line vote.[28]

Meanwhile, effective national majority rule is stifled not just by the supermajority filibuster rule but by the composition of the U.S. Senate, which awards each state, rather than each voter, equal representation in the key national legislative body, leading to overrepresentation for those living in sparsely populated states.[29]

The theoretical debates in election law also have stagnated. The field started out with a focus on representation-reinforcement and an adherence to the famous footnote 4 of the *Carolene Products* case:[30] courts must police the political process because legislative self-interest left the system stuck.[31] From this insight emerged the rights-structure debate of the early 2000s, over whether it is more appropriate to conceive of courts' role in election cases as assuring adequate political competition or as protecting individual and group rights.[32] That debate appears to have been resolved, more or less, by the work of Professor Guy Charles,[33] who showed there was less of a divide than a question of emphasis, and by the Supreme Court, which essentially rejected the call to interpret election laws with a focus on political competition.[34] Courts have mostly ignored or rejected the political markets approach. Today, there is scant academic debate.

Bipartisan political and judicial action on U.S. democracy recently has emerged because the bar has been lowered to that of assuring the bare minimum conditions for a functioning democracy in the United States. Since 2020, much of

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[25] Clare Foran, *Senate Republicans Block John Lewis Voting Rights Bill in Key Vote*, CNN (Nov. 3, 2021).
[26] *Shelby County*, 570 U.S. at 557.
[27] *See infra* notes 226-39 and accompanying text
[28] Carl Hulse, *After a Day of Debate, the Voting Rights Bill is Blocked in the Senate*, N.Y. TIMES (updated Jan. 27, 2022).
[29] HASEN, *supra* note 1, at 85-90.
[30] United States v. Carolene Products Co., 304 U.S. 144, 154 n.4 (1938).
[31] Most importantly JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1981).
[32] *See, e.g.,* Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockup of the Democratic Process*, 50 STAN. L. REV. 643 (1998). For a good overview of the debate, see Heather K. Gerken, *Election Law and Constitutional Law*, in OXFORD HANDBOOK OF AMERICAN ELECTION LAW (Eugene Mazo, ed., forthcoming 2024).
[33] Guy-Uriel Charles, *Judging the Law of Politics*, 103 MICH. L. REV. 1099 (2005) (reviewing RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE* (2003)).
[34] *See infra* notes 257-60 and accompanying text (discussing N.Y. St. Bd of Elections v López Torres, 552 U.S. 196, 207-09 (2008)).

this work to limit the retrogression of the conditions of basic democratic governance has focused on thwarting election subversion.[35] Courts on a bipartisan basis in the aftermath of the 2020 election rejected attempts to overturn Joe Biden's presidential election victory over Donald J. Trump on spurious grounds of fraud or election "irregularities."[36] The Supreme Court also rejected the most extreme version of the "independent state legislature" theory that might have allowed state legislatures to ignore voters' votes in casting each state's Electoral College votes for President.[37]

Yet the courts' ability to thwart attempted election subversion remains a question mark. In *Trump v. Anderson*,[38] the Court barred states from disqualifying Trump or other federal candidates from the ballot under Section 3 of the Fourteenth Amendment for participation in an insurrection.[39] In *Trump v. United States*,[40] the immunity case, the Supreme Court made it much harder for the government to prosecute former president Trump for his role in seeking to overturn the results of the 2020 election. The Court seemed far less concerned about the current risk to U.S. democracy than about a hypothetical risk that a future president could be deterred from acting boldly out of fear of a bogus political prosecution after leaving office.

Congress came together at the end of 2022 to pass the Electoral Count Reform Act[41] to deter future attempts to manipulate electoral college rules in order to subvert election results.[42] The passage of the ECRA was possible only because

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[35] *See infra* Part II. I use the term retrogression here as a general term to refer to the rolling back of past advances. I do not mean it in the technical way that it was used in relation to preclearance under Section 5 of the Voting Rights Act. *Cf.* Beer v. United States, 425 U.S. 130 (1976) (setting forth the nonretrogression test in Voting Rights Act context). These categories are just a heuristic and bleed into one another. For example, it would be fair to characterize recent rulings of the Supreme Court that I discuss in Part I.A on "stagnation" as a form of "retrogression" and not merely the absence of further forward progress on voting rights.

[36] Texas v. Pennsylvania, 141 S. Ct. 1230, 1230 (2020) (mem.); *See* William Cummings, Joey Garrison & Jim Sergent, *By the Numbers: President Donald Trump's Failed Efforts to Overturn the Election*, USA TODAY (Jan. 6, 2021).

[37] Moore v. Harper, 600 U.S. 1, 34 (2023) ("we conclude that the Elections Clause does not exempt state legislatures from the ordinary constraints imposed by state law"); *see also infra* notes 136-39 and accompanying text.

[38] 600 U.S. 100 (2024).

[39] *Id.* at 110 ("States have no power under the Constitution to enforce Section 3 with respect to federal offices, especially the Presidency").

[40] 144 S. Ct. 2412 (2024).

[41] H.R. 2617, 117th Cong., Second Sess., Division P—Electoral Count Reform and Presidential Transition Act (2022)' *see also infra* notes 338-41.

[42] See generally Richard L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, 135 HARV. L. REV. F. 265 (2022).

Democrats controlled the House of Representatives and enough moderate Republicans remained in the Senate.[43] Further bipartisan action seems unlikely.

Shoring up election administration also has become necessary to stop retrogression. With harassment and even threats of violence made against election officials based upon false claims of a stolen 2020 election, attrition rates are high. Administrators face low pay, difficult work, and now a fight against a sea of election-related disinformation leading to a flood of freedom of information act requests, doxing, swatting, and social media attacks.[44]

During this period of retrogression, voters face new challenges, beginning with a decreased ability to obtain reliable information to make voting decisions consistent with their interests and preferences. The collapse of local journalism and the rise of cheap speech spread over social media and other channels has upset the market in political information, threatening voter competence.[45] Meanwhile, voters increasingly are losing the power to govern themselves through voter initiatives, as some Republican legislatures tighten the rules for qualifying or passing voter initiatives and take steps to counteract some of the more controversial laws passed by these initiatives.[46]

Election law scholarship is still catching up to the changing American political and information environment. For example, it remains orthodoxy within the election law scholarly community that election law should be structured to enhance the role of the major political parties to fight factionalism and counter polarization.[47] Donald Trump's effective takeover of the Republican Party, however, illustrates the difficulty of party-centric reforms, such as proposals to channel public campaign financing through the parties, to combat extremism and threats to democracy.[48] These days, parties can become the pathways for democratic backsliding rather than bulwarks against it. This period of retrogression also coincided with avulsive technological change that has upset the dominant "marketplace of ideas" theory of the First Amendment, where truth is expected inevitably to rise to the top.[49] The collapse of this paradigm has yet to fully penetrate First Amendment election law scholarship.

Whereas the election law debates of yesterday focused on questions such as whether there are judicially manageable standards to rein in the drawing of

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[43] Carl Hulse, *How a Bipartisan Senate Group Addressed a Flaw Exposed by January 6*, N.Y. TIMES (Dec. 22, 2022); see also infra notes 338-41 and accompanying text.

[44] Allison Mollenkamp, *America's Election Officials Fight Disinformation and Death Threats Ahead of 2024*, Just Security (Dec. 4, 2023), https://www.justsecurity.org/90417/americas-election-officials-fight-disinformation-and-death-threats-ahead-of-2024/. See also the sources cited in Hasen, *Identifying*, *supra* note 42, at 271 nn. 26-30.

[45] RICHARD L. HASEN, CHEAP SPEECH: HOW DISINFORMATION POISONS OUR POLITICS—AND HOW TO CURE IT (2022).

[46] *See infra* notes 352-54 and accompanying text.

[47] *See infra* notes 364-69 and accompanying text.

[48] *See id.*

[49] *See* HASEN, *supra* note 45, at 22-23; *see also infra* notes 371-77.

legislative district lines for political gain[50] or the changing standards for Voting Rights Act preclearance,[51] those debates now seem almost quaint. Today's key election law debates consider conditions to avoid retrogression of democratic governance: What does it mean for a president to have engaged in "insurrection" so as to be disqualified for future office under section 3 of the Fourteenth Amendment?[52] Should social media companies be treated like common carriers and be required by the government to carry election disinformation despite the protections of the First Amendment?[53] Is new congressional legislation sufficient to stop the risk of a subverted presidential election when it comes to the counting of Electoral College votes?[54] What can be done to protect voters from generative artificial intelligence that may trick them and interfere with their understanding of the world and of their electoral choices?[55]

Election law alone is not up to the task of saving American democracy. But it can help counter stagnation and thwart retrogression. Any transformed theory of election law must begin with the basics, recognizing threats to democracy and the fair administration of elections from conditions of high polarization across political branches, the judiciary, and election administration; the rise of antidemocratic populism and fragmented government; and the rapidly changing information environment that makes it harder for voters and others to differentiate between true and false statements, sounds, and images. The first order of business must be to assure continued free and fair elections and peaceful transitions of power.

But the new election law must be more ambitiously and unambiguously *pro-voter*. The pro-voter approach to election law is one grounded in political equality and based on four principles: all eligible voters should have the ability to easily register and vote in a fair election with the capacity for reasoned decisionmaking;

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[50] See, e.g., Bernard Grofman, *Crafting a Judicially Manageable Standard for Partisan Gerrymandering: Five Necessary Elements*, 17 ELECTION L.J. 117 (2018).

[51] See, e.g., Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 216-51 (2007).

[52] Mark A. Graber, *Section 3 of the Fourteenth Amendment: Insurrection*, WM. & MARY BILL RTS. J. (forthcoming 2024), *draft available*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4733059; Kurt T. Lash, *The Meaning and Ambiguity of Section Three of the Fourteenth Amendment*, 47 HARV. J. L. & PUB. POL'Y 309 (2024); William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. PA. L. REV. 605 (2024).

[53] Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. FREE SPEECH L. 377 (2021-2022); Christopher S. Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, 1 J. FREE SPEECH L. 463(2021-2022).

[54] Derek T. Muller, *The President of the Senate, the Original Public Meaning of the Twelfth Amendment, and the Electoral Count Reform Act*, 73 CASE W. RES. L. REV. 1023 (2023).

[55] Spencer Overton, *Overcoming Racial Harms to Democracy from Artificial Intelligence*, IOWA L. REV. (forthcoming 2025), *draft available*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4754903; Spencer Overton, *State Power to Regulate Social Media Companies to Prevent Voter Suppression*, 53 U.C. Davis L. Rev. 1793 (2020); HASEN, *supra* note 45.

each voter's vote is entitled to equal weight; the winners of fair elections are recognized and able to take office peacefully; and political power is fairly distributed across groups in society, with particular protection for those groups who have faced historical discrimination in voting and representation.[56]

Pro-voter election law is neutral on political parties and candidates, but it is unapologetically biased in favor of fair elections, eligible voter enfranchisement, and equal representation. While the current Democratic Party has been more protective of voting rights than the current Republican Party, this partisan lineup has shifted over time and there is reason to believe things could shift again.[57] A pro-voter agenda is not the agenda of the Democratic Party and it needs to be applied consistently regardless of partisan effects.

Election law scholars must not only chronicle stagnation and explore how to stanch democratic retrogression. They must create a reinvigorated theory of election law that is voter-focused and not dependent upon federal courts as the primary drivers of democratic reform or political parties as democracy's ultimate saviors.

As explained in Part III, pro-voter election law is premised on the idea that the federal judiciary in the short- to medium-term at most can ensure continued fair vote counts and administration of elections, and not be a democratic leader. Preventing election subversion is a significant role, but it is one that until 2020 was hardly thought necessary. The question is how to ensure that the judiciary holds the line on fair vote counts despite increased polarization and division over resolution of other serious, although less existential, voting cases. The broader pro-voter election law political program must look elsewhere for voter protection: to Congress (with legislation perhaps adopted through antihardball tactics[58]), to state protections, and to the initiative process where permitted by state law.

Pro-voter election law theory must build upon voting rights scholarship of the past to not only explore how to reverse democratic backsliding but also point towards a fairer, multiracial democracy in the United States. It must harness the power of federalism to help voters while recognizing the key role of the federal courts in assuring fair vote counts and peaceful transitions of power. And it must design the best ways to promote equal voting rights and deal with anti-majoritarian features of the American political system at a time of prolonged hyperpolarization and dramatic technological change.

Given space constraints, this Feature cannot be not comprehensive. It aims to describe the general contours of stagnation and retrogression in doctrine, politics, and theory and to offer a brief roadmap for the transition to pro-voter election law, leaving further development to future work. Part I of this Feature describes election law's stagnation. Courts (and especially the Supreme Court), acting along ideological—and now partisan—lines, have pulled back on voter protections in most areas of election law and deprived other actors including Congress, election

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[56] For further discussion of this standard, see *infra* Part III.
[57] *See infra* notes 399-408 and accompanying text.
[58] *See infra* note 422 and accompanying text.

administrators, and state courts of the ability to more fully protect voters rights. Politically, pro-voter election reform has stalled out in a polarized and gridlocked Congress, and the voting wars in the states mean that ease of access to the ballot depends in part on where in the United States one lives. Election law scholarship too has stagnated, failing to generate meaningful theoretical advances about the key purposes of election law. Part II considers the retrogression of election law doctrine, politics, and theory to a focus on the very basics of democracy: the requirement of fair vote counts, peaceful transitions of power, and voter access to reliable information. It explains how party-centered election law theory and orthodox First Amendment theory have not yet incorporated these emerging challenges. Part III considers the potential to transform election law doctrine, politics, and theory in a pro-voter direction despite high current levels of polarization, the perceived partisan consequences of pro-voter election reforms, and new, serious technological and political challenges to democratic governance.

I. STAGNATION

This Part briefly sketches the stagnation in election law doctrine, politics, and theory over past decades.

A. Doctrine

1. Voting rights. Starting as a leader on voting rights in the 1960s, the Supreme Court has become at best a laggard and sometimes a hindrance to democratic governance.

Despite the passage of the Fifteenth Amendment to the United States Constitution[59] in the aftermath of the Civil War to bar discrimination in voting based on race, African American voters especially in the South faced extensive barriers to registration and often outright disenfranchisement.[60] The Supreme Court in the early twentieth century notoriously provided these voters with no protection.[61] It was only with Congress's passage of the Voting Rights Act of 1965

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[59] U.S. CONST., AMEND XV.

[60] On the history of the passage of the Voting Rights Act, see GARY MAY, BENDING TOWARD JUSTICE: THE VOTING RIGHTS ACT AND THE TRANSFORMATION OF AMERICAN DEMOCRACY (2014). On the brief history of enfranchisement of African Americans in the period right after the Civil War before the rise of Jim Crow, see J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1910 (1974).

[61] Giles v. Harris, 189 U.S. 475 (1903). For a critique, see Richard H. Pildes*, Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295 (2000). There were cases between *Giles* and the 1960s where the Court occasionally did better in protecting African-American voting rights, as in the White Primary cases. *E.g.*, Terry v. Adams, 345 U.S. 461 (1953).

that broad voter registration and voting became possible throughout the United States.[62]

The Supreme Court gave critical early support to the Act, quickly rejecting South Carolina's attack on the preclearance provisions that required jurisdictions with a history of racial discrimination in voting to get federal approval before making changes to their voting rules that could make minority voters worse off.[63] The Court also upheld other parts of the Act including its ban on literacy tests,[64] and it read the preclearance provisions broadly to apply to require federal review of a host of voting practices.[65] Further, after Congress in 1982 amended Section 2 of the Voting Rights Act to provide additional opportunities for minority voters to participate in the political process and to elect representatives of their choice,[66] the Court created a workable if complex framework in the 1986 *Thornburg v. Gingles*[67] case to determine when minority voters are entitled to have congressional and legislative districts drawn to give them a fair chance to elect their preferred representatives.[68] This ruling greatly increased minority representation in legislative bodies throughout the United States.[69]

In the decades since *Gingles*, however, there have been numerous setbacks in the Court's interpretation of the Voting Rights Act. The Court refused to read Section 2 as extending to fair representation of minority interests *within* legislative bodies.[70] It tightened up the *Gingles* requirements, requiring courts to apply a presumption of good faith when considering whether states are violating Section 2 even if states have a recent history of discrimination.[71] It created a strict rule that barred Section 2 claims for districts in which minority voters, in coalition with a small number of white majority voters, could have the ability to elect candidates

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[62] Chandler Davidson, *The Voting Rights Act: A Brief History*, in CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 7, 21 (Bernard Grofman and Chandler Davidson, eds., 1992); *see also* DANIEL H. LOWENSTEIN ET AL., ELECTION LAW—CASES AND MATERIALS 48-49, 225-26 (7th ed. 2022) (summarizing sources). I focus here on discrimination against African-Americans. In HASEN, *supra* note 1, I discuss discrimination in voting rights against women, Latinos, Native Americans, and others. In the interest of space, I do not go into those details here.
[63] South Carolina v. Katzenbach, 383 U.S. 301 (1966).
[64] Oregon v. Mitchell 400 U.S. 112, 118 (1970).
[65] Allen v. State Bd. of Elections, 393 U.S. 544 (1969).
[66] Pub. L. 97-205, 96 Stat. 134 (1982).
[67] 478 U.S. 30 (1986).
[68] For an exploration of *Gingles* and its aftermath, see LOWENSTEIN ET AL., *supra* note 62, at 291-349, 382-89.
[69] *See generally* Nicholas O. Stephanopoulos, *Race, Place, and Power*, 68 STAN. L. REV. 1323 (2016) (measuring Section 2's success in assuring minority representation).
[70] Holder v. Hall, 512 U.S. 874 (1994).
[71] Abbott v. Perez, 585 U.S. 579, 603-04 (2018). The Supreme Court recently extended this presumption to racial gerrymandering claims. Alexander v. South Carolina State. Conf. of the NAACP, 144 S. Ct. 1221, 1235-36 (2024). On the expansion of the Court's presumption of good faith to favor the state, see Richard L. Hasen, *The Supreme Court's Pro-Partisanship Turn*, 109 GEO. L.J. ONLINE 50, 59-65 (2020).

of their choice.[72] Its racial gerrymandering doctrine made it harder for states to create minority opportunity districts.[73] In the 2021 *Brnovich* case,[74] the Supreme Court for the first time interpreted Section 2 in the context of laws that make it harder for people to register and vote[75] (sometimes referred to as "new vote denial" cases[76]). It adopted an atextual, ahistorical, state-friendly, and voter-hostile reading of Section 2 that eviscerated its strength in the new vote denial context.[77] I am unaware of a single successful Section 2 vote denial case in the lower courts since *Brnovich*.[78]

When the Supreme Court recently reaffirmed the *Gingles* framework in the 2023 *Allen v. Milligan*[79] case concerning whether Section 2 required Alabama to draw a second congressional district in which Black voters would have the opportunity to elect a representative of their choice, voting rights activists breathed a sigh of relief that the Court did not displace *Gingles* for redistricting with a much more state-protective test as the Court did in *Brnovich* for new vote denial claims.[80] Still, four of the Court's conservative Justices would have watered down the Act,[81] held it unconstitutional at least as applied,[82] or held that Section 2 does not cover redistricting.[83] Even a Justice who joined the *Milligan* majority invited new constitutional litigation over whether Section 2, once held constitutional, is no longer so.[84] Two Justices suggested that voters do not even have the right to bring

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[72] Bartlett v. Strickland, 556 U.S. 1 (2009).
[73] For an explanation, see Richard L. Hasen, *Racial Gerrymandering's Questionable Revival*, 67 ALABAMA L. REV. 365, 365 (2015).
[74] Brnovich v. Dem. Nat'l Comm., 594 U.S. 567 (2021).
[75] *Id.* at 653 ("In these cases, we are called upon for the first time to apply § 2 of the Voting Rights Act of 1965 to regulations that govern how ballots are collected and counted.").
[76] Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689 (2006).
[77] I make that case in Hasen, *supra* note 3 (hearing testimony).
[78] One Section 2 vote denial against three Washington state counties alleging higher levels of signature match denials for Latino voters' mail-in ballots settled on the eve of trial. Reyes v. Chilton, 4:20-cv-04075 (E.D. Washington, 2021). In contrast, before *Brnovich*, there were some successful Section 2 vote denial cases, including most importantly a Section 2 claim against Texas for its voter identification law that was upheld *en banc* by the very conservative United States Court of Appeals for the Fifth Circuit. Veasey v. Abbott, 830 F.3d 216, 265-65 (5th Cir. 2016) (en banc).
[79] Allen v. Milligan, 599 U.S. 1, 19 (2023).
[80] Millhiser, *supra* note 5.
[81] *Allen*, 599 U.S. at 50-78 (Thomas, J., dissenting). On this part of his dissenting opinion, Justice Thomas was joined by Justices Barrett and Gorsuch, and in part by Justice Alito.
[82] *Id.* at 79-91. On this part as well, Justice Thomas was joined by Justices Barrett and Gorsuch, and in part by Justice Alito.
[83] Justice Thomas, joined only by Justice Gorsuch in this part of his dissent, made this point. *Id.* at 46-49 (Thomas, J., dissenting)
[84] *Id.* at 45 (Kavanaugh, J., concurring in all but Part III-B-1) ("Justice Thomas notes . . . that even if Congress in 1982 could constitutionality authorize race-based districting under

suit under Section 2,[85] and recently the Eighth Circuit has embraced this position.[86] If applied nationally, such a ruling could eliminate over 96 percent of Section 2 redistricting cases,[87] leaving only the smattering of cases brought by the United States Department of Justice.

These new challenges to Section 2 came on the heels of the 2013 opinion in *Shelby County v. Holder*[88] in which the Supreme Court reversed course on the constitutionality of the preclearance provisions of the Voting Rights Act. The Court held that the passage of time rendered these laws unconstitutional as exceeding Congress's power over the states, in the absence of more recent evidence of intentional and official race discrimination.[89] This ruling followed a series of cases in which the Court had narrowed the Department of Justice's power to withhold preclearance[90] and the emergence of a new constitutional racial gerrymandering claim that reversed some voting rights gains for minority voters.[91] The result of *Shelby County* has been a rise in restrictive voting rules, especially in Republican states in the South,[92] and potentially an increase in the turnout gap between white and minority voters in what used to be jurisdictions covered by preclearance.[93]

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§ 2 for some period of time, the authority to conduct race-based redistricting cannot extended indefinitely into the future. But Alabama did not raise that temporal argument in this court, and I therefore would not consider it *at this time*") (citation omitted and emphasis added).

[85] *Brnovich*, 494 US. At 690 (Gorsuch, J., joined by Thomas, J., concurring); see also *Allen*, 599 U.S. at 91 n.22.

[86] Arkansas St. Conf. of NAACP v. Arkansas Bd. of Apportionment, 86 F.4th 1204 (2023), en banc reh'g denied, 91 F.4th 967 (2024).

[87] Will Craft & Sam Levine, *Obscure Legal Theory Could Weaken Voters' Protections from Racist Laws*, GUARDIAN (Mar, 15, 2024), https://www.theguardian.com/us-news/2024/mar/15/arkansas-voting-rights-act-racial-bias [https://perma.cc/V3UJ-F8S8] ("Since 1982, there have been 466 Section 2 cases. Only 18 were brought by the Department of Justice").

[88] 570 U.S. 529 (2013).

[89] *Id.* at 557.

[90] *See* Persily, *supra* note 51, at 199-200 (discussing the effects of Supreme Court's decision in *Reno v. Bossier Parish School Bd.*, 528 U.S. 320 (2000)).

[91] *See, e.g.,* Shaw v. Reno, 509 U.S. 630 (1993).

[92] Jasleen Singh & Sara Carter, *States Have Added Nearly 100 Restrictive Voting Laws Since SCOTUS Gutted the Voting Rights Act 10 Years Ago*, Brennan Center for Justice (June 23, 2023) [https://perma.cc/ZH7T-EWBC] ("At least 29 laws were passed in 11 states that had been subject to preclearance, either in whole or in part, at the time Shelby County was decided. In other words, if not for the Supreme Court's decision, approximately one-third of the restrictive laws passed in the last 10 years would have been subject to pre-approval by the Justice Department or a panel of federal judges, and many of them may have been barred from implementation.")

[93] Kevin Morris & Coryn Page, Growing Disparities in Voter Turnout 2008-2022 (Brennan Center for Justice rpt. (Mar. 2024),

On the constitutional level, Supreme Court protection of voting rights grew dramatically in the 1960s and has since stagnated.[94] The Warren Court began applying what we would today term "strict scrutiny" to laws restricting the franchise, at least among adult, citizen, resident non-felons. It held that states could not restrict voting rights of members of the military,[95] people living on federal enclaves,[96] people who could not afford to pay a poll tax,[97] or in school board elections on grounds that the person was neither the parent of school aged children, nor an owner or renter of taxable property in the district.[98] The Court also required that congressional elections,[99] state elections,[100] and most local elections[101] be conducted under a one person, one vote principle of equipopulous districts. Most of these rulings relied upon a capacious, non-originalist reading of the Equal Protection Clause of the Fourteenth Amendment.

Since these rulings, constitutional voting rights claims have stagnated at the Court. The Court has rejected challenges to felon disenfranchisement,[102] except when there is evidence of such laws being enacted for a racially discriminatory purpose.[103] It created an exception to the one person, one vote rule for "special purpose" local district elections.[104] At least two Justices have expressed skepticism about the continued vitality of the one person, one vote rule as a whole,[105] and more originalist Justices who were not on the Court could join them if the issue returned to the Court. More generally, many of the Warren Court era rulings broadly protecting voting rights without reliance on originalist theories could be on the chopping block if the current Supreme Court chooses to reexamine them—an issue that likely depends on how the conservative majority balances the desire for

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https://www.brennancenter.org/media/12347/download; Stephen B. Billings et al., *Disparate Racial Impacts of* Shelby County v. Holder *on Voter Turnout*, 230 J. PUB. ECON. (2024), https://doi.org/10.1016/j.jpubeco.2023.105047.

[94] *See* HASEN, *supra* note 1, ch. 1.

[95] Carrington v. Rash, 380 U.S. 89 (1965).

[96] Evans v. Cornman, 398 U.S. 419 (1970).

[97] Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966).

[98] Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969).

[99] Wesberry v. Sanders, 376 U.S. 1 (1964).

[100] Reynolds v. Sims, 377 U.S. 533 1964).

[101] Avery v. Midland County, 390 U.S. 474 (1968).

[102] Richardson v. Ramirez, 418 U.S. 24 (1974).

[103] Hunter v. Underwood, 471 U.S. 222 (1985).

[104] Salyer Land. Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973).

[105] Evenwel v. Abbott, 578 U.S. 54, 75 (2016) (Thomas, J., concurring); *id*. at 103 (Alito, J., concurring ("I would hold only that Texas permissibly used total population in drawing the challenged legislative districts"); *see also* Alexander v. South Carolina State Conf. of the NAACP, 144 S Ct. at 1261, 1265-66 (Thomas, J., concurring in part) (arguing that *Reynolds v. Sims* incorrectly held that the judiciary has the power to remedy voting-rights violations). For *Evenwel*'s implications for Latino voters, see Rachel F. Moran, *The Perennial Eclipse: Race, Immigration, and How Latinx Count in American Politics*, 61 HOUSTON L. REV. 719 (2024).

change with its willingness to respect what it may view as errant, if well established, precedent.

2. Anderson-Burdick *balancing for minor parties and for election rules*. The Supreme Court has developed a biased state-protective doctrine to apply when people challenge registration or election administration rules under the Equal Protection Clause and when minor parties and independent candidates argue that ballot access and related rules violate speech and association rights under First Amendment.

The Court did not always look at such challenges in a state-protective way. In assuring presidential candidate George Wallace's access to the Ohio ballot as an independent candidate in 1968, the Court held that state laws could not give the Democratic and Republican parties "in effect" a "complete monopoly."[106] The Court at that time took seriously the burdens of election rules on groups of voters.

But then the Court shifted gears by creating a doctrine, commonly referred to as the *Anderson-Burdick* balancing test, that requires courts to first assess the extent of the burden on plaintiffs raising a constitutional claim, and only applying strict scrutiny when plaintiffs could prove they faced a severe burden.[107] Eschewing "litmus tests" in favor of flexibility, *Anderson-Burdick* developed into a rational-basis like rule that gives states in most cases the ability to simply *posit*, without having to *prove*, a state interest such as preventing voter confusion or deterring fraud in order to justify a law.[108] In a 1986 case, for example, the Court derided the idea that states would have to produce evidence to show its laws served important purposes; the court put the word "evidence" in quotation marks, suggesting that it did not take seriously the demands that states justify their restrictive laws.[109]

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[106] Williams v. Rhodes, 393 U.S. 23, 32 (1968) ("The fact is . . that the Ohio system does not merely favor a 'two-party system'; it favors two particular parties—the Republicans and the Democrats—and in effect tends to give them a complete monopoly").

[107] On the *Anderson-Burdick* balancing test generally, see LOWENSTEIN ET AL., *supra* note 62, at 678-80; Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313 (2007); Edward B. Foley, *Voting Rules and Constitutional Law*, 81 GEO. WASH. L. REV. 1836 (2013).

[108] Richard L. Hasen, *Bad Legislative Intent*, 2006 WISC. L. REV. 843, 852-53; *see also* Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 COLUM. L. REV. 1855, 1917 (2023) (calling *Anderson-Burdick* "a sort of rational basis review").

[109] Munro v. Socialist Workers Party, 479 U.S. 189, 191 (1986) "(To require States to prove actual voter confusion, ballot overcrowding, or the presence of frivolous candidacies as a predicate to the imposition of reasonable ballot access restrictions would invariably lead to endless court battles over the sufficiency of the 'evidence' marshaled by a State to prove the predicate."). For further critiques, see Emily Rong Zhang, *Voting Rights Lawyering in Crisis*, 24 CUNY L. REV. 123, 141-43 (2021); Richard L. Hasen, Abuse of Discretion: The U.S. Supreme Court's Indefensible Use of Evidence in Election Law Case (2014 lecture posted 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4622883.

When it came to ballot access rules, the Court's decisions reached a nadir in the 1997 case of *Timmons v. Twin Cities Area New Party*,[110] in which the Court accepted the state's posited (but not proven) interest in promoting a "healthy two-party system" to justify barring a minor party from cross-endorsing a Democratic Party candidate, a practice known as "fusion."[111] The Court has not meaningfully examined ballot access rules and related rules governing minor parties since *Timmons*.[112]

The Court made things even worse as it extended the *Anderson-Burdick* framework to challenges to new, potentially onerous election administration rules. In the aftermath of the disputed 2000 election culminating in the Supreme Court's decision in *Bush v. Gore*,[113] states started passing a variety of election laws along party lines, often with the intention of trying to influence the outcome of elections by shaping the electorate.[114] The new legislation in turn led to an explosion of election-related litigation.[115]

The matter came to a head in the 2008 case, *Crawford v. Marion County Election Board.*[116] The State of Indiana had passed a new restrictive law requiring that voters present one of a limited number of photographic forms of identification in order to be able to vote. If a voter was too indigent to afford the underlying documents (such as a birth certificate) to get a free state identification, the voter had to travel at the voter's own expense to the county seat, *in each election*, to sign a declaration of indigency.[117] The same rule applied to those voters with religious objections to being photographed.[118] Voters sued, arguing the law violated the Equal Protection Clause. The Supreme Court in *Crawford* upheld the law against a facial challenge.[119] The Court did not see the law as posing significant burdens

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[110] 520 U.S. 351 (1997).
[111] For an argument that major political parties neither needed nor deserved under the Constitution this judicial protection see Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331, 367-71.
[112] See Jenness v. Fortson, 403 U.S. 431 (1971); Richard Winger, *The Supreme Court and the Burial of Ballot Access: A Critical Review of* Jenness v. Forson, 1 ELECTION L.J. 235 (2002).
[113] 531 U.S. 98 (2000).
[114] RICHARD L. HASEN, THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN (2012).
[115] Richard L. Hasen, *Research Note: Record Election Litigation Rates in the 2020 Election: An Aberration or a Sign of Things to Come?*, 21 ELECTION L.J. 150 (2022).
[116] 533 U.S. 181 (2008).
[117] *Id*. at 217 (Souter, J., dissenting).
[118] *Id*. at 236 (Souter, J., dissenting) ("The State hardly even tries to explain its decision to force indigents or religious objectors to travel all the way to their county seats every time they wish to vote, and if there is any waning of confidence in the administration of elections it probably owes more to the State's violation of federal election law than to any imposter at the polling places").
[119] *Id*. at 288 (plurality opn.).

for most voters, leaving open the possibility of future as-applied challenges.[120] If plaintiffs cannot prove a severe burden, the state may win by simply positing an interest in preventing voter fraud or promoting voter confidence to justify the law. Indiana was lucky it did not have to prove its interests justifying its law; the state had seen no cases of impersonation fraud that its law would prevent,[121] and impersonation fraud was not a problem in the conduct of elections anywhere in the United States.[122]

Since *Crawford*, equal protection challenges to election administration rules have proceeded asymmetrically, with voters having to produce real evidence of severe burdens but states having to produce no evidence at all in most cases. These cases are very difficult for voters to win.[123]

3. Partisan gerrymandering challenges under state and federal constitutions, and limitations on state courts. After the Supreme Court held in the 1986 *Bandemer* case[124] that partisan gerrymandering cases were justiciable and that drawing district lines to favor one party over another could possibly violate the Equal Protection Clause, it failed to develop a doctrine that meaningfully limited partisan gerrymandering.[125] In 2004, a highly fractured Supreme Court in the *Vieth* case[126] rejected a variety of intent- and effect-related tests to separate permissible consideration of party information in drawing district lines from improper partisan gerrymandering, but Justice Kennedy's controlling opinion left the courthouse open to the future development of such claims, either under the Equal Protection Clause or the First Amendment.[127] For a decade and a half after *Vieth*, voting rights advocates pushed for a redistricting standard to satisfy Justice Kennedy.[128] They

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[120] *Id.* at 199-200 (recognizing the possibility that the law may be overly burdensome to some voters).

[121] "The record contains no evidence of any [impersonation] fraud actually occurring in Indiana at any time in its history." *Id.* at 194.

[122] *See* RICHARD L. HASEN, ELECTION MELTDOWN ch. 1 (2020) (reviewing paucity of evidence of widespread voter fraud in the United States).

[123] Joshua A. Douglas, *The Significance of the Shift Toward As-Applied Challenges in Election Law*, 37 HOFSTRA L. REV. 635 (2009); *see also* Katie Eyer, *As-Applied Equal Protection*, 59 HARV. CIVIL RTS.-CIVIL LIBERTIES L. REV. 49 (2024).

[124] Davis v. Bandemer, 478 U.S. 109 (1986).

[125] LOWENSTEIN ET AL., *supra* note 62, at 167 ("Challenges based on *Bandemer* met with little success").

[126] Vieth v. Jublelirer, 541 U.S. 267 (2004).

[127] *Id.* at 306-17 (Kennedy, J., concurring in the judgment).

[128] Richard L. Hasen, *Justice Kennedy's Beauty Pageant,* THE ATLANTIC (June 19, 2017), https://www.theatlantic.com/politics/archive/2017/06/justice-kennedys-beauty-pageant/530790/.

never satisfied him,[129] he retired from the Court in 2018,[130] and the Supreme Court in the 2019 case *Rucho v. Common Cause*[131] held—despite *Bandemer*—that partisan gerrymandering claims were in fact nonjusticiable in federal court, however framed.[132]

The Court in 2015 had left open ability of states to enact limitations on partisan gerrymandering through the initiative process, holding that such initiatives as applied to congressional elections did not violate Article I, section 4 of the Constitution giving state legislatures the power to set the rules for conducting congressional elections (subject to congressional override).[133] But in 2023, the Court in *Moore v. Harper*[134] cast doubt on the ability of some state courts to police partisan gerrymandering in federal elections under state constitutions. Under a new reading of what some have referred to as the "independent state legislature" theory, the Court held that when state courts issue opinions limiting partisan gerrymandering in congressional elections, they may not "arrogate" the power of state legislatures to set the rules for conducting congressional elections.[135]

The precise scope and limitations of the *Moore* ruling are unclear,[136] but the case may have implications far beyond redistricting—as when states protect voting rights under voter protective provisions contained in state constitutions. For example, the Pennsylvania Supreme Court, facing mail delays attributable to the COVID-19 pandemic, relied on voter protections in the Pennsylvania constitution to extend by three days the statutory deadline for the receipt of absentee ballots in the 2020 general election.[137] It is uncertain if a majority of the Supreme Court would have found such a ruling a violation of *Moore*'s nascent anti-arrogation rule

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[129] In *Gill v. Whitford*, 585 U.S. 48 (2018), Justice Kennedy joined in Chief Justice Roberts' majority opinion punting on the partisan gerrymandering question on standing grounds and not commenting on Justice Kagan's embrace of his First Amendment theory.

[130] Justice Kennedy retired from the Court the day after he punted in the *Gill* case. Richard L. Hasen, *Did Justice Kennedy Just Signal His Retirement? (Update: Yes.)*, SLATE (June 26, 2018), https://slate.com/news-and-politics/2018/06/did-justice-anthony-kennedy-just-signal-his-retirement.html.

[131] 588 U.S. 684 (2019).

[132] *Id*. at 718 ("We conclude that partisan gerrymandering claims present political questions beyond the reach of federal courts. Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions.").

[133] Arizona St. Leg. v. Ariz. Independent Redistricting Comm'n, 576 U.S. 787 (2015).

[134] 600 U.S. 1 (2023).

[135] *Id*. at 36 ("We hold only that state courts may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections.").

[136] For explorations, see Manoj Mate, *New Hurdles to Redistricting Reform: State Evasion,* Moore*, and Partisan Gerrymandering*, 56 CONN. L. REV. 839 (2024); Scott Kafker & Simon Jacobs, *The Supreme Court Summons the Ghost of* Bush v. Gore: *How Moore v. Harper Haunts State and Federal Constitutional Interpretation of Election Laws*, 59 WAKE FOREST L. REV. 61 (2024).

[137] Pa. Democratic Party v. Boockvar, 238 A.3d 345, 370–71 (Pa. 2020).

by having the state court reach beyond statutory deadlines to protect the state's voters under the state constitution;[138] before *Moore*, three Justices signaled that the state court's actions violated the independent state legislature theory.[139] If such actions potentially violate *Moore*, federal courts have put themselves in the position to second guess a whole category of voter protective laws under state constitutions as well as the actions of election administrators, who also could be accused of "arrogating" state legislative power.[140]

4. The Purcell *Principle and a general presumption of the state's good faith in passing election laws.* From somewhat obscure origins in a 2006 case, *Purcell v. Gonzalez*,[141] over whether to put an Arizona voter identification law on hold pending a trial on its legality, the *Purcell* Principle has emerged as a timing doctrine that greatly discourages federal courts from issuing injunctions protecting voting rights if such orders come too close to an election.[142] Rather than apply the usual four-factor test for determining when preliminary relief is justified in a case brought to the Supreme Court on an emergency basis, the *Purcell* Principle emphasizes the risk of voter confusion and election administrator difficulty as key considerations in denying relief even when election plaintiffs have a strong likelihood of success on the merits.[143]

The Court appeared to have applied the doctrine aggressively during the 2020 election coinciding with the Covid pandemic,[144] and it recently expanded the doctrine's reach from election administration cases to redistricting, and for an extended period: in a 2022 Alabama congressional redistricting case, the Supreme Court applied the doctrine—in the case later know as *Allen v. Milligan*—to prevent the creation of a second Black majority district in Alabama under section 2 of the Voting Rights Act when it the primary was four months away and the general election nine months away.[145] The result was that the 2022 election was conducted under lines found a year later in *Allen* to be drawn in violation of Section 2 of the Voting Rights Act.[146] The Court applied the principle a second time to redistricting

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[138] Carolyn Shapiro, *The Independent State Legislature Theory, Federal Courts, and State Law*, 90 U. CHI. L. REV. 137, 138 (2022).
[139] Republican Party of Pa. v. DeGraffenreid, 141 S. Ct. 732 (2021) (separate dissents of Justice Thomas, and Justice Alito, joined by Justice Gorsuch); *see also* LOWENSTEIN ET AL., *supra* note 62, at 412-15 (describing independent state legislature litigation during the 2020 election season).
[140] Leah M. Litman & Katherine Shaw, *The "Bounds" of* Moore*: Pluralism and State Judicial Review*, 133 YALE L.J.F. 881, 904 (2024).
[141] 549 U.S. 1 (2006).
[142] VLADECK, *supra* note 12, at 197-227.
[143] Hasen, *supra* note 12.
[144] For a review, see Codrington, *supra* note 12. I say appeared to have applied the doctrine because, as with most of the Court's rulings on the emergency (shadow) docket, the Court issued no majority opinion explaining the basis for its decision.
[145] Justice Kavanaugh offered an extended defense of the principle in *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (Kavanaugh, J., concurring)
[146] 599 U.S. 1 (2023).

in a 2024 racial gerrymandering case from Louisiana.[147] The emerging rules gives de facto permission for states to violate voters' rights for at least one election cycle as election cases make their way through the courts.

Even worse, *Purcell* is not consistently applied. Over the objection of liberal Justices, the Supreme Court refused to apply *Purcell* when the Eleventh Circuit just days before an election reversed a preliminary injunction issued by a district court against a Florida law that sought to nullify a voter initiative reenfranchising Florida felons who had completed their sentences.[148]

The *Purcell* Principle should be viewed in the broader context of a set of Supreme Court commitments favoring the state over voters in election cases. This bias towards states ranges from *Purcell*'s ability for a state to delay remedies for voting violations,[149] to the presumption of good faith that the Supreme Court has said should apply when the state is challenged for voting rights violations[150]—and now when it is alleged to have engaged in a racial gerrymandering[151]—to *Moore*'s anti-arrogation principle,[152] to the *Anderson-Burdick* asymmetric balancing test.[153] Together, these cases put a big thumb on the scale favoring states' rights over voters' rights across a range of doctrinal areas.

5. Campaign finance: deregulation with the illusion of regulation. For decades, Supreme Court doctrine vacillated between periods of great skepticism about the constitutionality of campaign finance laws challenged under the First Amendment and periods of deference to legislative judgments about the need to limit money in politics.[154] The swing in positions followed changes in Supreme Court personnel.[155] Most recently, the Court went from its greatest period of deference in the early 2000s to its greatest period of skepticism, most notably associated with the Supreme Court's 2010 opinion in *Citizens United v. Federal Election Commission*,[156] when Justice Samuel Alito replaced Justice Sandra Day O'Connor, flipping a 5-4 split on the Court.

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[147] Robinson v. Callais, 144 S. Ct. 1171 (2024). The Court's three liberal justices expressed their disagreement with the ruling: Justices Sotomayor and Kagan indicated they would deny the applications for a stay, and Justice Jackson dissented. *Id.* at 1172 (Jackson, J., dissenting from grant for applications of stay).
[148] Raysor v. DeSantis, 140 S. Ct. 2600 (2020) (mem.); *id.* (Sotomayor, J., dissenting).
[149] *See supra* notes 141-48 and accompanying text.
[150] *See supra* note 71 and accompanying text.
[151] Alexander v. South Carolina State. Conf. of the NAACP, 144 S. Ct. 1221, 1235-36 (2024).
[152] *See supra* notes 133-40 and accompanying text.
[153] *See supra* notes 106-23 and accompanying text.
[154] For a brief history, see RICHARD L. HASEN, PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS 15-36 (2016).
[155] *Id.* at 29; Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011).
[156] 588 U.S. 310 (2010).

Since *Citizens United* the Court has struck down all spending limits it has examined as applied to elections[157] except those related to foreign individuals and entities,[158] and it has increased the burden on states to justify campaign contribution limits.[159] But the Court has proceeded on this deregulatory path in a disturbing way. The rationale of its earlier, deferential decisions upholding contribution limits, most notably its opinion the in the 2003 *McConnell v. Federal Election Commission*[160] case upholding "soft money" limits on political parties, has been undermined by the reasoning of later cases such as *Citizens United*.[161] The Supreme Court has nonetheless repeatedly refused to reconsider its ruling on party "soft money,"[162] or other rulings that are now constitutionally questionable,[163] such as its 2003 decision[164] upholding the ban on corporate contributions directly to candidates.

The result is that some very strict limits on how much individuals may contribute to federal candidates and to parties remain on the books. And yet those limits are quite easy to circumvent though contributions to outside groups such as "super PACs" that can effectively serve as shadow campaign committees for candidates.[165] A stalemated Federal Election Commission has all but abdicated policing the boundary of acceptable conduct through a set of challenged "coordination" rules,[166] and now has moved on a firmer path toward deregulation.[167] Regardless of whether one thinks more regulation or less

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[157] *Id*.
[158] Bluman v. Fed. Election Comm'n, 565 U.S. 1104 (2012), *aff'g without opn.*, 800 F. Supp. 2d 281 (D.D.C. 2011) (three-judge-court).
[159] McCutcheon v. Fed. Election Comm'n, 572 U.S. 184 (2014); Thompson v. Hebdon, 589 U.S. 1 (2019).
[160] 540 U.S. 93 (2003).
[161] *See, e.g., McCutcheon*, 572 U.S. at 243-44 (Breyer, J., dissenting) (questioning whether Court in *McCutcheon* was silently overruling *McConnell*'s soft money holding); *id*. at 209 n.6 (majority rejecting argument it was silently overruling soft money holding of *McConnell*).
[162] *See* LOWENSTEIN ET AL., *supra* note 62, at 1068-69 (noting three rulings in which the Supreme Court passed over the opportunity to reconsider its soft money ruling in *McConnell*).
[163] *Id*. at 1069-70 (noting three rulings in which the Supreme Court passed over the opportunity to reconsider its ruling upholding the ban on direct corporate contributions to candidates).
[164] Fed. Election Comm'n v. Beaumont, 539 U.S. 146 (2003).
[165] On the rise of Super PACs, see LOWENSTEIN ET AL., *supra* note 62, at 1032-40.
[166] Campaign Legal Center, The Illusion of Independence: How Unregulated Coordination is Undermining Our Democracy, and What Can Be Done to Stop It (Nov. 30 2023) [https://perma.cc/JP22-FHWL].
[167] Shane Goldmacher, *A Democrat, Siding with the G.O.P., is Removing Limits on Political Cash at 'Breathtaking Speed,'* N.Y. TIMES (June 10, 2024).

regulation should be constitutionally permissible and is more voter protective,[168] everyone should see the current system as a trap for the unwary: sophisticated large-scale players can essentially contribute and spend whatever they want to influence campaigns, but those lacking sophistication can easily get caught violating those rules that remain on the books. Ordinary people may see the system as loophole-driven and corrupt. Such a system could not be considered pro-voter under the standards set forth in Part III.

As to disclosure, after decades of the Supreme Court's endorsement of disclosure as a tool not only for ferreting out corruption but also for providing busy voters with valuable information about candidates,[169] the Court has now turned more hostile. In the 2021 *Americans for Prosperity Foundation v. Bonta*[170] case, the Court redefined the "exacting scrutiny" standard to require narrow tailoring of interests—a standard which is already making it harder to sustain the constitutionality of campaign finance laws.[171] In the meantime, Congress's inability to update campaign disclosure laws to cover communications sent over the Internet and the failures of the Federal Election Commission and Internal Revenue Service to enforce existing campaign finance and tax laws governing campaign-related spending has led to a porous disclosure system that easily allows people and entities contributing millions of dollars to do so without public disclosure of their identities.[172]

On public financing, the Court in a 2011 case from Arizona overturned a voter initiative that tried to create a viable voluntary public financing system in the face of other Supreme Court rules allowing large spending in elections by nonparticipating candidates.[173] In ruling the law unconstitutional under strict scrutiny[174] even though the law stopped no one's speech or spending,[175] the Court

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[168] My own view, put forward as the general thesis of HASEN, *supra* note 154, is that the Supreme Court's campaign finance jurisprudence is fundamentally at odds with principles of political equality.
[169] *E.g., Citizens United*, 588 U.S. at 366-71 (upholding broad campaign finance disclosure and disclaimer rules of Bipartisan Campaign Reform Act of 2022); Buckley v. Valeo, 424 U.S. 1, 64-67 (1976) (upholding broad disclosure provisions of 1974 amendments to Federal Election Campaign Act).
[170] 594 U.S. 595 (2021).
[171] *E.g.,* Wyoming Gun Owners v. Gray, 83 F.4th 1244, 1247-1250 (10th Cir. 2022) (striking down state disclosure law and distinguishing other cases upholding similar laws as being pre-*Bonta*'s gloss on "exacting scrutiny"). But see No on E v. Chiu, 85 F.4th 493, 503 n.7 (9th Cir. 2023) ("We hold that *Americans for Prosperity Foundation* does not alter the existing exacting scrutiny standard.").
[172] Hasen, *supra* note 15, at 1250-47.
[173] Ariz. Free Enterprise Club's Freedom Club PAC v. Bennett, 564 U.S. 721 (2011).
[174] *Id*. at 734 (applying strict scrutiny).
[175] *Id*. at 763-67 (Kagan, J., dissenting) (rejecting argument that the Arizona law limits political speech or spending).

made it harder for state and local government to enact public financing that are both effective in the face of outside spending and constitutional.[176]

6. Election law stagnation is driven by an ideological and now partisan split among Supreme Court justices. The expansion and protection of voting rights by the United States Supreme Court, begun in the 1960s, has at best stagnated and at worst started to recede. The cause for the change is no mystery: it is the increasingly ideological (and now partisan) divide in election law cases, with conservative-leaning Justices much less protective of voters and more protective of state prerogatives than liberal-leaning Justices.

The Supreme Court has long divided along ideological lines in some of the Court's biggest election law cases. Cases such as *Bush v. Gore*,[177] ending the disputed Florida recount in the 2000 U.S. presidential election, *Shelby County*[178] on the constitutionality Voting Rights Act preclearance, and the *Citizens United*[179] case on the constitutionality of limits on corporate spending in elections were each 5-4 cases pitting the Court's more conservative Justices against the Court's more liberal ones.

Since the 2010 retirement of Justice Stevens, who was appointed by a Republican president but was considered by the end of his tenure the leader of the Court's liberal wing,[180] the Court's ideological split also has become a partisan one: all of the conservative Justices have been appointed by Republican presidents and all of the liberal Justices by Democratic presidents.[181] Republican-appointed Justices, over the opposition of the Democratic-appointed Justices, in recent years have: signaled a broad grant of absolute immunity to a former president credibly accused of seeking to overturn the results of a legitimate election;[182] limited the scope of Section 2 of the Voting Rights Act;[183] held partisan gerrymandering non-justiciable in federal court;[184] held that federal courts can second-guess state court decisions applying state constitutional voting rights protections in federal elections under the anti-arrogation principle;[185] regularly applied the *Purcell* Principle to

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[176] LOWENSTEIN ET AL., *supra* note 62, at 1132 n.5 (questioning how to "design a campaign finance system that would satisfy the Supreme Court and induce participation from those candidates who fear large independent expenditures against them").

[177] 531 U.S. 98 (2000). The justices divided along ideological lines 5-4 on the remedy, although two of the more liberal justices, Breyer and Souter expressed some agreement with the more conservative justices on a possible equal protection or due process violation. *Id*. at 134 (Souter, J., dissenting); *id*. at 145 (Breyer, J., dissenting).

[178] Shelby County v. Holder, 570 U.S. 529 (2013).

[179] 588 U.S. 310 (2010).

[180] Linda Greenhouse, *Supreme Court Justice John Stevens, Who Led Liberal Wing, Dies at 99*, N.Y. TIMES (July 16, 2019) (noting Stevens' retirement in 1999, his appointment by Republican President Ford and his liberal leanings in his later years on the Court).

[181] Richard L. Hasen, *Polarization and the Judiciary*, 2019 ANN. REV. POL. SCI. 261, 267.

[182] *See infra* notes 291-303 and accompanying text (discussing *Trump v. United States*).

[183] Brnovich v. Dem. Nat'l Comm., 594 U.S. 647 (2021).

[184] Rucho v. Common Cause, 588 U.S. 684 (2019).

[185] Moore v. Harper, 600 U.S. 1, 34-36 (2023).

give states at least one election cycle to keep an illegal election law in place;[186] struck down numerous campaign finance limits;[187] and called into question campaign finance disclosure laws.[188]

Only three high-profile election law decisions after full briefing and oral argument since Justice Stevens' retirement did not break neatly along party lines.[189] Two were 5-4: *Williams-Yulee*[190] on personal solicitation of campaign funds by judicial candidates saw a defection by Chief Justice Roberts, and the *Arizona Independent Redistricting Commission* case[191] allowing voters to establish independent redistricting commissions applied to congressional elections saw a defection by Justice Kennedy. Perhaps the Roberts' vote was about protecting the judiciary in *Williams-Yulee* and Kennedy's vote was about protecting the initiative process in the Arizona case. In *Allen v. Milligan*,[192] the only significant election law case with two Republican defections (Chief Justice Roberts and Justice Kavanaugh), Justice Kavanaugh wrote separately to leave open for a future case reconsideration of the constitutionality of Section 2 of the Voting Rights Act.[193]

The partisan split among the Justices over voting issues may only get more severe. Many of the Warren Court cases from the 1960s expanding voting rights were based not on the original public meaning of the Equal Protection Clause but decided under more of a living constitutionalist approach to questions of equality and voting rights. Although respect for precedent may lead some of the more conservative Justices to decline to reconsider rulings such as the one person, one vote rules of the Warren Court, nothing should be considered off the table before a Court that has shown its willingness to use originalist theory to abandon *stare decisis* in the face of what the Justices describe as egregiously wrong earlier precedent.[194] Depending on the new conservative supermajority's aggressiveness, U.S. constitutional election law could get far less voter-protective in future years, although predicting exactly what will happen is especially difficult without knowing how long each of the current Justices will end up serving on the Court

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[186] *See supra* notes 141-48 and accompanying text.
[187] McCutcheon v. Fed. Election Comm'n, 572 U.S. 184 (2014); Thompson v. Hebdon, 589 U.S. 1 (2019).
[188] Americans for Prosperity Foundation v. Bonta, 594 U.S. 595 (2021).
[189] I put aside until Part II.A the Court's decision in *Trump v. Anderson*, 600 U.S. 100 (2024), in which the Court was unanimous in its holding but divided sharply on dicta.
[190] Williams-Yulee v. Florida Bar, 575 U.S. 433 (2015).
[191] Arizona St. Leg. v. Ariz. Independent Redistricting Comm'n, 576 U.S. 787 (2015).
[192] Allen v. Milligan, 599 U.S. 1 (2023).
[193] *See supra* note 84 and accompanying text.
[194] Justice Thomas's recent concurring opinion in the *Alexander* racial gerrymandering case takes a new position of non-justiciability on vote dilution claims, even apparently in the face of intentional racial discrimination in voting. Alexander v. South Carolina State. Conf. of the NAACP, 144 S. Ct. 1221, 1252-1253 (2024) (Thomas, J., concurring in part) ("In my view, the Court has no power to decide either a 'racial gerrymandering' claim, in which districts were drawn with race as the predominant factor, or a 'vote dilution' claim, in which a state intentionally draws districts to reduce the voting strength of a racial group).

and who eventually will replace them. In the meantime, as described in Part II, the almost universal party-line splits on the Court in election cases has negative implications for the Court's ability to deal with threats to democratic government.

B. Politics

At the same time that the U.S. Supreme Court expanded voting rights judicially, primarily through the Equal Protection Clause of the Fourteenth Amendment,[195] Congress and the states expanded voting rights legislatively.[196] The 1960s and early 1970s saw the passage of the Twenty-Third Amendment, granting residents of Washington D.C. the right to vote for President;[197] the Twenty-Fourth-Amendment barring poll taxes in federal elections;[198] the Twenty-Sixth Amendment barring discrimination in voting on the basis of age of at least eighteen;[199] the Civil Rights Act of 1964,[200] which contained some protections for voting;[201] and the Voting Rights Act of 1965.[202] As noted,[203] the passage of the Voting Rights Act gave the federal government the tools to fully enforce the Fifteenth Amendment's ban on discrimination in voting on the basis of race.

In the 1970s, Congress passed the Federal Election Campaign Act[204] and modest extensions of the Voting Rights Act.[205] In the 1980s Congress significantly expanded Section 2 of the Voting Rights Act.[206] The 1990s saw passage of the National Voter Registration Act,[207] which increased some voter registration

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[195] *See supra* notes 94-101 and accompanying text.
[196] On the history of voting rights expansions during this period, see JOHN F. KOWAL & WILFRED U. CODRINGTON III, THE PEOPLE'S CONSTITUTION: 200 YEARS, 27 AMENDMENTS, AND THE PROMISE OF A MORE PERFECT UNION 181-215 (2021); ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 205-57 (rev. ed. 2000); Richard L. Hasen, *The Past, Present and Future of Election Reform* in OXFORD HANDBOOK OF ELECTION LAW (Eugene Mazo ed. Forthcoming 2024).
[197] U.S. CONST., AMEND XXIII.
[198] U.S. CONST., AMEND XXIV.
[199] U.S. CONST., AMEND XXVI.
[200] Pub. L. No. 88-352, 78 Stat. 241 (1964).
[201] *E.g.* 52 U.S.C. § 10101(a)(2)(B) (materiality provision); *see* Pa. State Conf. of NAACP v. Secretary, 97 F.4th 120 (3rd Cir. 2024) (rejecting argument that Pennsylvania law rejecting for counting timely but undated mail-in ballots violates materiality provision of Civil Rights Act).
[202] Pub. L. No. 89-110, 79 Stat. 437 (1965).
[203] *See supra* notes 59-69 and accompanying text.
[204] Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974).
[205] Pub. L. No. 91-285, 84 Stat. 314 (1970); Pub. L. No. 94-73, 89 Stat. 400 (1973).
[206] Pub. L. 97-205, 96 Stat. 134 (1982). Further, the Voting Accessibility for the Elderly and Handicapped Act, 130 CONG. REC. 18499, 23781, 25159-25160 (1984), and the Uniform and Overseas Citizens Absentee Voting Act, 132 CONG. REC. 20976-20979, 21894 (1986), each passed by voice vote.
[207] National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 (1993).

opportunities, and in the 2000s Congress passed the Help America Vote Act,[208] which aimed to improve election administration following the contentious Florida recount after the 2000 U.S. presidential election, the Bipartisan Campaign Reform Act of 2002,[209] and the 2006 renewal of key provisions of the Voting Rights Act.[210]

These laws passed with lopsided, mostly bipartisan, majorities. The 1974 amendments to the Federal Election Campaign Act passed by a vote of 365-24 in the House[211] and 60-16 in the Senate.[212] The 1970, 1975, and 1982 amendments to the Voting Rights Act passed by votes in the House of 272-132[213], 346-56[214], and unanimous consent,[215] and in the Senate of 64-12[216], 77-12[217], and 85-8[218] respectively. The National Voter Registration Act of 1993 passed by a mostly

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[208] Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1706 (2002).
[209] Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002).
[210] Pub. L. No. 109-246, 120 Stat. 577 (2006).
[211] 120 CONG. REC. 35148-49 (1974). Republicans voted 145-18 in favor of the bill. Democrats voted 220-6 in favor of the bill. *To Agree to the Conference Report on S.3044, Providing for Public Financing of Federal Primary and General Election Campaigns*, GOVTRACK.US (Oct. 10, 1974), https://www.govtrack.us/congress/votes/93-1974/h978.
[212] 120 CONG. REC. 34392 (1974). Republicans voted 15-11 in favor of the bill. Democrats voted 45-4 in favor of the bill. One Independent voted against the bill. *To Agree to the Conference Report on S.3044, Providing for Public Financing of Federal Primary and General Election Campaigns*, GOVTRACK.US (Oct. 8, 1974), https://www.govtrack.us/congress/votes/93-1974/s1038.
[213] 116 CONG. REC. 20198-200 (1970). Republicans voted 100-76 in favor of the bill. Democrats voted 172-56 in favor of the bill. *To Agree to H. Res. 914, Providing for Agreeing to the Amendments of the Senate to H.R. 4249*, GOVTRACK.US (June 17, 1970), https://www.govtrack.us/congress/votes/91-1970/h274.
[214] 121 CONG. REC. 25219-20 (1975). Republicans voted 96-36 in favor of the bill. Democrats voted 250 or 249 to 20 in favor of the bill. (The Congressional Record reports that Representative Dan Daniels voted in favor of the bill, while GovTrack.us reports that he did not vote.) *To Agree to H. Res. 640, Providing to Agree to Senate Amendments to H.R. 6219, a Bill Amending and Extending the Voting Rights Act of 1965*, GOVTRACK.US (July 28, 1975), https://www.govtrack.us/congress/votes/94-1975/h328.
[215] 128 CONG. REC. 14933, 14940 (1982).
[216] 116 CONG. REC. 7336 (1970). Republicans voted 33-1 in favor of the bill. Democrats voted 31-11 in favor of the bill. *To Pass H.R. 4249*, GOVTRACK.US (Mar. 13, 1970), https://www.govtrack.us/congress/votes/91-1970/s342.
[217] 121 CONG. REC. 24780 (1975). Republicans voted 27-6 in favor of the bill. Democrats voted 49-5 in favor of the bill. One Conservative voted in favor of the bill and one Independent voted against the bill. *To Pass H.R. 6219*, GOVTRACK.US (July 24, 1975), https://www.govtrack.us/congress/votes/94-1975/s329.
[218] 128 CONG. REC. 14337 (1982). Republicans voted 43-7 in favor of the bill. Democrats voted 42-0 in favor of the bill. One Independent voted against the bill. *To Pass H.R. 3112. (Motion Passed)*, GOVTRACK.US (June 18, 1982), https://www.govtrack.us/congress/votes/97-1982/s687.

party-line vote of 259–164 in the House[219] and 62-36 in the Senate.[220] The Help America Vote Act of 2002 passed by a vote of 357-48[221] in the House and 92-2 in the Senate.[222] The Bipartisan Campaign Reform Act passed by a mostly party-line vote of 240-189 in the House[223] and 60-40 in the Senate.[224] The 2006 amendments to the Voting Rights Act passed by a vote of 390-33[225] in the House and 98-0 in the Senate.[226]

As these numbers show, increasing polarization in Congress and in the United States more generally by the 2000s spilled over into splits on election issues. The Bipartisan Campaign Reform Act, updating and expanding campaign finance rules, was not all that "bipartisan;" it was supported by most Democrats in Congress and opposed by most Republicans (despite support from some prominent Republicans in the Senate including prime Senate sponsor John McCain). The lopsided vote in favor of passage of the 2006 amendments to the Voting Rights

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[219] 139 CONG. REC. 9232 (1993). Republicans voted 20-150 against the bill. Democrats voted 238-14 in favor of the bill. *Roll Call 154 | Bill Number: H. R. 2*, CLERK OF THE UNITED STATES HOUSE OF REPRESENTATIVES, https://clerk.house.gov/Votes/1993154 (May 5, 1993, 5:11 PM).

[220] 139 CONG. REC. 9640 (1993). Republicans voted 6-36 against the bill. Democrats voted 56-0 in favor of the bill. *H.R. 2 (103rd): National Voter Registration Act of 1993*, GOVTRACK.US (May 11, 1993, 4:30 p.m.) https://www.govtrack.us/congress/votes/103-1993/s118.

[221] 148 CONG. REC. 20333 (2002). Republicans voted 172-37 in favor of the bill. Democrats voted 184-11 in favor of the bill. One Independent voted in favor of the bill. *Roll Call 462 | Bill Number: H. R. 3295*, CLERK OF THE UNITED STATES HOUSE OF REPRESENTATIVES, https://clerk.house.gov/Votes/2002462 (Oct. 10, 2002, 10:27 PM).

[222] 148 CONG. REC. 20860 (2002). Republicans voted 44-0 in favor of the bill. Democrats voted 47-2 in favor of the bill. One Independent voted in favor of the bill. *H.R. 3295 (107th): Help America Vote Act of 2002*, GOVTRACK.US (Oct. 16, 2002), https://www.govtrack.us/congress/votes/107-2002/s238.

[223] 148 CONG. REC. 1418-19 (2002). Republicans voted 41-176 against the bill. Democrats voted 198-12 in favor of the bill. One Independent voted for the bill and one Independent voted against the bill. *Roll Call 34 | Bill Number: H. R. 2356*, CLERK OF THE UNITED STATES HOUSE OF REPRESENTATIVES, https://clerk.house.gov/Votes/200234 (Feb. 14, 2002, 2:42 AM).

[224] 148 CONG. REC. 3623 (2002). Republicans voted 11-38 against the bill. Democrats voted 48-2 in favor of the bill. One Independent voted in favor of the bill. *H.R. 2356 (107th): Bipartisan Campaign Reform Act of 2002*, GOVTRACK.US (Mar. 20, 2002, 6:23 a.m.), https://www.govtrack.us/congress/votes/107-2002/s54.

[225] 152 CONG. REC. 14303-04 (2006). Republicans voted 192-33 in favor of the bill. Democrats voted 197-0 in favor of the bill. One Independent voted in favor of the bill. *Roll Call 374 | Bill Number: H. R. 9*, CLERK OF THE UNITED STATES HOUSE OF REPRESENTATIVES, https://clerk.house.gov/Votes/2006374 (July 13, 2006, 05:38 PM).

[226] 152 CONG. REC. 15325 (2006). Republicans voted 53-0 in favor of the bill. Democrats voted 44-0 in favor of the bill. One Independent voted in favor of the bill. *H.R. 9 (109th): Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act*, GOVTRACK.US (July 20, 2006, 4:28 pm) https://www.govtrack.us/congress/votes/109-2006/s212.

Act masked new Republican skepticism:[227]Although all Senate Republicans voted in favor of the amendments, the Republican-led Senate Judiciary Committee issued a committee report arguing that the coverage formula used for preclearance renewal was unconstitutional, presaging arguments that eventually led the Supreme Court to strike down the coverage formula in the *Shelby County* case.[228]

In more recent years, support for major voting rights legislation has become almost completely polarized.[229] Democrats tried for years to pass the John Lewis Voting Rights Advancement Act to restore preclearance and make other voter-protective changes to the Voting Rights Act.[230] There are no Republican co-sponsors in the House of the most recent version of the bill[231] and the last Senate vote on the bill faced a successful Republican filibuster.[232] Democrats also spent two years following the 2020 election trying to pass a large-scale election reform bill, the For the People Act. This bill too faced united Republican opposition, passing the Democratic-led House on a party line vote and failing to overcome a Republican filibuster in the Senate.[233] Support for stand-alone election bills such as the DISCLOSE Act providing for improved disclosure of campaign finance contributions and spending also split the Congress along party lines.[234]

After Republicans regained control of the House following the 2022 midterm elections, 132 Republican co-sponsors put forward the American Confidence in Elections Act,[235] an omnibus election-related bill that seems to be the Republican response to the Democrats' For the People Act, including giving states more power to make voter registration harder on purportedly antifraud grounds.[236] The bill

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[227] For a detailed history, see Persily, *supra* note 51, at 183-92. For commentary, see Richard H. Pildes, *Political Avoidance, Constitutional Theory, and the VRA*, 117 YALE L.J. POCKET PART 148 (2007).
[228] Persily, *supra* note 51, at 185-90.
[229] The only partial exception to this more recent partisan divide is the Electoral Count Reform Act, considered *infra* in Part II.B.
[230] John Lewis Voting Rights Advancement Act, S. 4263, 116th Cong. (2020).
[231] Govtrack.us currently lists 216 co-sponsors, all Democrats. https://www.govtrack.us/congress/bills/118/hr14.
[232] *See supra* note 28 and accompanying text.
[233] *See id.*
[234] Govtrack.us currently lists only Democrats and independents who caucus with Democrats among the 51 co-sponsors of the current version of the DISCLOSE Act. https://www.govtrack.us/congress/bills/118/s512.
[235] H.R. 4563, 118th Cong. (2024), https://www.congress.gov/bill/118th-congress/house-bill/4563/text. The 132 co-sponsors are all Republican. https://www.congress.gov/bill/118th-congress/house-bill/4563/cosponsors.
[236] Title I, subtitle C of the bill lists a number of measures purportedly aimed at assuring the integrity of elections, including rules related to voter registration, voter identification, and prohibitions on noncitizen voting. *Id*., https://www.congress.gov/bill/118th-congress/house-bill/4563/text.

passed the House Committee on Administration on a party line vote, but it has not yet been put up for a vote on the House floor.[237]

In the runup to the 2024 elections, in which Donald Trump continued to raise unsubstantiated claims of voter fraud, the Republican-led House passed the Safeguard American Voter Eligibility (SAVE Act) to require documentary proof of citizenship before a person may register to vote in federal elections.[238] All Republicans voting for the measure supported the bill, and all but 5 Democrats opposed it.[239] There appeared no prospect the Democratic-led Senate would take up the bill, which appeared more about messaging a problem of phantom voter fraud than anything else.

Overall, the period of voting rights expansion during the heyday of the civil rights movement ended more than a half-century ago with 1971's ratification of the Twenty-Sixth Amendment. Legislative developments protecting voters since then have been much more moderate in scale, and today we see much more partisan division over voting rules. But we should not ignore progress. In many places for many people, registering to vote and voting is easier than it has been at any time in American history.

But assuring ease of participation does not guarantee *equal* participation. In some states unnecessary barriers to registration and voting have been put in place in the name of protecting election "integrity." And crucially but unsurprisingly, there has been no path to deal with other inequalities, most importantly the unequal composition of the United States Senate, which gives residents of sparsely-populated states much more influence and power than the majority of Americans who live in larger states.

C. Theory

Election law emerged as a discrete scholarly area of study in the 1980s and 1990s.[240] Central to the nascent field was the idea that judicial intervention in political cases was appropriate when the political process was stuck and could not be expected to self-correct. For example, members of a legislative body benefitting from malapportioned districts have no incentive to redistrict to equalize political power and political pressure cannot work to get them to do so because of the malapportionment.

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[237] The current status of the bill is noted at: https://www.congress.gov/bill/118th-congress/house-bill/4563/all-actions.

[238] H.R. 8281, 118th Cong. 2d Sess., https://www.congress.gov/bill/118th-congress/house-bill/8281/all-actions.

[239] As noted at: https://clerk.house.gov/Votes/2024345.

[240] On the history of the field see Gerken, supra note 32; Eugene D. Mazo, *Introduction: The Maturing of Election Law* in ELECTION LAW STORIES 7 (Joshua A. Douglas & Eugene D. Mazo eds., 2016); Chad Flanders, *Election Law: Too Big to Fail?*, 56 ST. LOUIS U. L.J. 775 (2012); Heather K. Gerken, *Keynote Address: What Election Law Has to Say to Constitutional Law*, 44 IND. L. REV. 7 (2010); Symposium, *Election Law as Its Own Field of Study*, 32 LOY. L.A. L. REV. 1095 (1999); Richard L. Hasen, *Election Law at Puberty: Optimism and Words of Caution*, 32 LOY. L.A. L. REV. 1095 (1999).

The idea of more aggressive judicial intervention traced back to the 1938 Supreme Court opinion in *United States v. Carolene Products Company*. In footnote 4 of *Carolene Products*, the Court noted a few situations in which heightened judicial scrutiny of equal protection claims was appropriate, including for legislation that "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation."[241] This stand on aggressive judicial intervention is in stark contrast with the Supreme Court's 1946 refusal to enter the "political thicket" in *Colegrove v. Green*,[242] when the Court held such malapportionment claims nonjusticiable under the Guarantee Clause of the Fourteenth Amendment.

John Hart Ely, in his influential 1980 book, *Democracy and Distrust*, further fleshed out what has come to be known as "process theory," or the "representation reinforcement" theory of judicial review.[243] Ely defended the Warren Court's decision to reverse course from *Colegrove*.[244] He embraced the *Carolene Products* approach in praising *Baker v. Carr*[245] in 1962, holding malapportionment cases justiciable under the Equal Protection Clause of the Fourteenth Amendment, and *Reynolds v. Sims*[246] in 1964, imposing a one person, one vote standard in state elections.[247]

The one person, one vote cases were controversial at the time they were decided,[248] but controversy eventually subsided, and as the field of election law emerged, scholars influenced by Ely seemed to converge on the correctness of the one person, one vote rulings and more broadly a defense of the Warren Court voting cases.[249] The real debate in the field turned upon how much further courts should go in policing political competition, and how much beyond "representation-reinforcement" the field should stretch. In an influential 1999 *Stanford Law Review* article entitled *Politics as Markets*,[250] leading election law scholars Samuel Issacharoff and Richard Pildes argued that the primary role of courts in election law cases is to promote "appropriate" political competition rather than to focus on the rights of individuals or groups. Such a structural or "political markets" approach would have the courts intervene to break up partisan (and even

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[241] United States v. Carolene Products Co., 304 U.S. 144, 154 n.4 (1938).
[242] 328 U.S. 549 (1946).
[243] ELY, *supra* note 30, at 73-124.
[244] *Id.* at 120-21 n.46 (rejecting Justice Frankfurter's approach in *Colegrove*).
[245] 369 U.S. 186 (1962).
[246] 377 U.S. 533 (1964).
[247] ELY, *supra* note 31, at 100-124.
[248] LOWENSTEIN ET AL., *supra* note 62, at 107 n.15; Eugene D. Mazo, *The Right to Vote in Local Elections: The Story of* Kramer v. Union School Dist. No. 15, 87, 114-16, *in* ELECTION LAW STORIES, *supra* note 239 (recounting efforts of Senator Dirksen to convene a constitutional convention to overturn one person, one vote cases of the Warren Court).
[249] I cannot identify any leading election law scholar writing in the 1990s or 2000s who has argued for reversal of the one person, one vote cases.
[250] Issacharoff & Pildes, *supra* note 32; see also Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491 (1997).

bipartisan) gerrymanders, improve ballot access, and take other steps to assure a properly functioning political process.

The rights-based theorists, including Daniel Lowenstein,[251] Nathaniel Persily,[252] Bruce Cain,[253] and me,[254] pushed back against the structuralists. These scholars focused on the difficulty of defining the adequate scope of political competition: aside from breaking up gerrymanders and assuring great ballot access for minor parties, would the theory of political markets, for example, require eliminating first-past-the-post single-member district elections in favor of proportional representation? There was no natural ending point. The rights-based theorists compared having self-interested legislatures police political competition with having life-tenured federal judges lacking political expertise do so. Persily stressed that competition was only one value among many in redistricting: drawing competitive districts could mean not only wild swings in representation as political winds shifted but also limit the ability of some voters to be represented by legislators who strongly embraced their values.

The rights-structure debate seemed to reach a compromise—or impasse, depending upon your point of view—when Guy Charles reviewed *The Supreme Court and Election Law*, my 2003 book defending the rights-based approach, in the *Michigan Law Review*.[255] Charles pointed out that the rights based theorists, in focusing on the power of groups, implicitly accepted some of the structural points about the political process. And the structuralists cared about competition and process not for its own sake but to protect political rights. "[E]lection law cases cannot be divided into neat categories along the individual rights and structuralism divide. Election law cases raise both issues of individual and structural rights. Therefore, the label attached to election law claims is immaterial. The fundamental questions are what are the values that judicial review ought to vindicate and how best to vindicate those values. These are questions that transcend the rights-structure divide."[256]

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[251] Daniel H. Lowenstein, *The Supreme Court Has No Theory of Politics—And Be Thankful for Small Favors*, in THE U.S. SUPREME COURT AND THE ELECTORAL PROCESS 245, 263 (David K. Ryden ed., 2000).

[252] Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649 (2002). Persily was responding to Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002). See also Luis Fuentes-Rohwer, *Doing Our Politics in Court: Gerrymandering, "Fair Representation" and an Exegesis into the Judicial Role*, 78 NOTRE DAME L. REV. 527 (2002); Franita Tolson, *Partisan Gerrymandering as a Safeguard of Federalism*, 2010 UTAH L. REV. 859 (2010).

[253] Bruce Cain, *Garrett's Temptation*, 85 VA. L. REV. 15589 (1999). For a response, see Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605 (1999).

[254] HASEN, supra note 33, at 138-56; Richard L. Hasen*, The "Political Market" Metaphor and Election Law: A Comment on Issacharoff and Pildes*, 50 STAN. L. REV. 719, 725-28 (1998).

[255] Charles*, supra* note 33.

[256] *Id.* at 1102.

From there, this academic dialogue seems to have stagnated, with nothing new added in almost two decades. Perhaps more importantly, the structural approach made little headway in the courts. At the level of doctrine, the Supreme Court in the *López Torres* case[257] seemed to rejected the structural approach to election law generally, criticizing the idea that anyone has a constitutional right to a "fair shot" in elections.[258] In *Rucho*, the Court, echoing *Colegrove*, declared that policing partisan gerrymandering would be impossible because there are no judicially manageable standards for separating permissible from impermissible consideration of party identification in drawing district lines.[259] No structuralist has elucidated to the Supreme Court's satisfaction the appropriate dividing line between appropriate and inappropriate judicial intervention. Indeed as Nick Stephanopoulos argues, it is appropriate to think of the current Supreme Court as the "anti-*Carolene* Court."[260]

Following the petering out of the right-structure debate, election law theory turned to the role of non-judicial institutions, such as citizen redistricting commissions, in regulating elections. This later focus on institutions was an important corrective to early juricentrism of the rights-structure debate,[261] but not much of major theoretical interest has emerged since that recognition. Theoretical insights about the design of electoral institutions have not led to any fundamental changes in the highly decentralized, partisan structure of United States election administration, aside from the increased use of redistricting commissions in states that have adopted them via the initiative process.

Occasionally leading members of the academy have advanced new theoretical approaches, including most recently Professor Nicholas Stephanopoulos's focus on "alignment."[262] Stephanopoulos's alignment theory requires a congruence

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[257] New York State Bd. of Elections v. López Torres, 552 U.S. 196 2008).

[258] *Id.* The context in the case was a judicial candidate complaining about a political party machine's extensive control over the party's nomination processes. The closest the Court has come to recognizing the value of competition as a constitutional value is the Court's opinion in *Randall v. Sorrell*, 548 U.S. 230 (2006), in which Justice Breyer's plurality opinion put forth a multifactor test that included the competitiveness of elections in determining when a campaign contribution limit is unconstitutionally low. The Supreme Court later endorsed this approach in a unanimous *per curiam* opinion in Thompson v. Hebdon, 589 U.S. 1 (2019). See also Justice O'Connor's partially concurring opinion in *Clingman v. Beaver*, 544 U.S. 581 (2005) (O'Connor J., concurring in part and concurring in the judgment), expressing some support for considering competitiveness in assessing election cases.

[259] Rucho v. Common Cause, 588 U.S. 684, 718 (2019).

[260] Nicholas Stephanopoulos, *The-Anti-*Carolene *Court*, 2019 SUP. CT. REV. 111.

[261] *E.g.*., Heather K. Gerken & Michael S. Kang, *The Institutional Turn in Election Law Scholarship*, IN RACE, REFORM, AND THE REGULATION OF THE ELECTORAL PROCESS: RECURRING PUZZLES IN AMERICAN DEMOCRACY (Guy-Uriel E. Charles, Heather K. Gerken & Michael S. Kang eds. 2011); Christopher S. Elmendorf, *Representation Reinforcement Through Advisory Commissions: The Case of Election Law*, 80 N.Y.U. L. REV. 1366 (2005).

[262] NICHOLAS STEPHANOPOULOS, ALIGNING ELECTION LAW (forthcoming 2025).

between "popular preferences and governmental outputs."[263] This theory echoes political equality concerns that I[264] and others[265] have long voiced, and it is not clear that the alignment framing will lead to different results than one focused more directly on principles of political equality.[266] Moreover, as shown in the next two Parts, most of the recent advances in election law are less about grand theory than about confronting the new risk of election subversion,[267] understanding the contours and consequences of shrinking judicial protection of voting rights,[268] providing deep historical analysis,[269] or using social science to measure bias, discrimination, or the influence on money in campaigns.[270]

Election law scholarship also has not fully accounted for the rise of political polarization, in politics and in the judiciary. As explained in Part II.C below, election law scholars have typically embraced the orthodoxy that strengthening political parties can stabilize democracy and limit factionalism. That theory is under tremendous stress today. Nor has the scholarship grappled with the implications of the partisan divide among judges in election law cases. The polarization of the judiciary means it is far less likely that polarized courts could successfully implement the political markets approach. It is probably an

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[263] *Id.* at __ (introduction at manuscript p. 12) (on file with the author).

[264] *See* HASEN*, supra* note 33; HASEN, *supra* note 154.

[265] Pamela S. Karlan, *The Right to Vote: Some Pessimism about Formalism*," 71 TEXAS L. REV. 1705 (1993).

[266] Stephanopoulos distinguishes between an equality of influence theory and a focus on alignment with the views of the median voter most directly in Nicholas Stephanopoulos, *Aligning Campaign Finance Law*, 101 VA. L. REV. 1425, 1464-66 (2015). There no doubt is some daylight between converging on the positions of the median voter and seeking to equalize voter input to the election of candidates and public policy. But at heart Stephanopoulos's focus on that median voter is roughly congruous with trying to come closest to the preferences of a majority of citizens, another means of achieving a version of political equality.

[267] *E.g.,* Derek T. Muller, *Election Subversion and the Writ of Mandamus*, 65 WM. & MARY L. REV. (forthcoming 2024); LAWRENCE LESSIG & MATTHEW SELIGMAN, HOW TO STEAL A PRESIDENTIAL ELECTION (2024); Lisa Marshall Manheim, *Election Law and Election Subversion*, 132 YALE L.J. F. 312 (2022).

[268] E.g. Joshua S. Sellers, *Race, Reckoning, Reform, and the Limits of the Law of Democracy*, 169 U. PA. L. REV. ONLINE 1995 (2021).

[269] E.g. FRANITA TOLSON, IN CONGRESS WE TRUST?: ENFORCING VOTING RIGHTS FROM THE FOUNDING TO THE JIM CROW ERA (forthcoming 2025); Travis Crum, *The Unabridged Fifteenth Amendment*, 133 YALE L.J. 1039 (2024).

[270] *E.g.*, Moon Duchin & Douglas M. Spencer, *Blind Justice: Algorithms and Neutrality in the Case of Redistricting*, CSLAW'22: Proceedings of the Symposium on Computer Science and Law,101-108 (2022); Christopher Elmendorf & Douglas M. Spencer*, The Geography of Racial Stereotyping: Evidence and Implications for VRA Preclearance After* Shelby County,102 CAL. L. REV.1123 (2014); Abby K. Wood & Christian R. Grose, *Campaign Finance Transparency Affects Legislators' Election Outcomes and Behavior*, 66 AM. J. POL. SCI. 516 (2022).

exaggeration to say that theoretical scholarship in election law has reached a dead end, but nothing groundbreaking has emerged in the last few decades.

II. RETROGRESSION

A. Doctrine

The fundamental concern about whether the United States can continue to hold free and fair elections recently has overshadowed the stagnation of election law doctrine, politics, and theory described in Part I. This retrogression of American democracy to questions of American capacity for basic governance and about voter competence has put the judiciary to the test, where the early results are mixed.

1. The Trump-related election cases. The most direct confrontation of election law doctrine with threats to democracy emerged in the aftermath of the 2020 election. As detailed elsewhere,[271] the pandemic-laden 2020 presidential election featured a sitting president running for reelection, Donald Trump, who relentlessly called the integrity of the election system and vote count into question with no basis in evidence. After unofficial results showed Trump losing to Joe Biden, Trump pursued a political and legal strategy in an attempt to overturn the election. The failed political strategy depended upon bogus claims of fraud and irregularities to cajole state legislatures that Biden had won with a Republican majority to submit alternative slates of electors. These fake electors could then be counted as valid by Trump's Republican allies in Congress. The strategy also used social media to mobilize public support among Trump supporters and others for overturing the election by spreading false claims of voter fraud and election irregularities.[272]

The legal strategy sought to overturn election results judicially in those same states using similar bogus claims. By one count, Trump and his allies lost 61 of 62 cases raising challenges to the results in the 2020 election, and Trump's one win was a minor one.[273] Although there were some divisions along party lines among the judges, the judiciary mostly on a bipartisan basis resisted attempts to be coopted into election subversion.[274] It was a stark contrast with the usual partisan

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[271] Hasen, *supra* note 42, at 266-82.
[272] I discuss the political responses to the strategy in Part II.B below.
[273] William Cummings et al., *By the Numbers: President Donald Trump's Failed Efforts to Overturn the Election*, USA TODAY (Jan. 6, 2021, 10:50 AM), https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001 [https://perma.cc/79U5-44T4]. The one successful case was Donald J. Trump for President, Inc. v. Kathy Boockvar, et al., 602 M.D. 2020 (Pa. Commw. Ct.), https://www.pacourts.us/Storage/media/pdfs/20210604/020642-file-10440.pdf.
[274] Russell Wheeler, *Trump's Judicial Campaign to Upend the 2020 Election: A Failure, But Not a Wipe-Out*, BROOKINGS INST.. (Nov. 30, 2021), https://www.brookings.edu/blog/fixgov/2021/11/30/trumps-judicial-campaign-to-upend-the-2020-election-a-failure-but-not-a-wipe-out [https://perma.cc/E2RP-W288] ("Trump . .

divide in the election cases described in Part I.A. As Judge Stephanos Bibas of the Third Circuit, a noted conservative and Trump appointee to the United States Court of Appeals for the Third Circuit, wrote in one of Trump's unsuccessful cases from Pennsylvania, "Free, fair elections are the lifeblood of our democracy. Charges of unfairness are serious. But calling an election unfair does not make it so. Charges require specific allegations and then proof. We have neither here."[275]

The Supreme Court without opinion summarily rejected the State of Texas's legally and factually unsound lawsuit filed directly in the Supreme Court that tried to use false and unsubstantiated charges of fraud seeking to overthrow election results in those same states that Biden had won but with Republican legislatures.[276] The Court ultimately did not hear any 2020 post-election disputes on the merits. Further, as explained above,[277] the Supreme Court in the 2023 *Moore v. Harper* case[278] rejected the most extreme version of the independent state legislature theory that Trump and his allies had relied upon in arguing for legislatures' rights to appoint alternative electors after voters had already voted for President.[279]

The Supreme Court in these cases admirably held the line and did not allow itself to consider overturning the results of the election or to provide a new pathway for subversion. The Court's more recent performance in deterring retrogression of democratic governance, however, has been far more concerning.

Consider first *Trump v. Anderson*,[280] the case determining whether the state of Colorado could remove Trump from the ballot as a presidential candidate in 2024 for purportedly violating Section 3 of the Fourteenth Amendment. This part of the Constitution, written in the wake of the Civil War in the 1860s, provides that those who served in government office, swore an oath in assuming that office to uphold the Constitution, and who later participated in insurrection, are ineligible to serve in office again unless Congress by a two-thirds vote removes this disability.[281]

Naturally, because insurrections in the United States are mercifully uncommon, few modern cases interpret the meaning and scope of this disqualification provision. Its application to Donald Trump raised a host of legal

. lost all but one case — and the great majority of judicial votes in all cases disfavored his claims.").

[275] Donald J. Trump for President, Inc. v. Sec'y of Pa., 830 Fed. App'x 377, 381 (2020).

[276] Texas v. Pennsylvania, 141 S. Ct. 1230, 1230 (2020) (mem.). Justice Alito, joined by Justice Thomas, issued the following statement: "In my view, we do not have discretion to deny the filing of a bill of complaint in a case that falls within our original jurisdiction. I would therefore grant the motion to file the bill of complaint but would not grant other relief, and I express no view on any other issue." (citation omitted).

[277] *See supra* notes 133-39 and accompanying test

[278] 600 U.S. 1 (2023).

[279] *See* Hasen, *supra* note 42, at 273-74 (describing the fake electors scheme); see also Justin Levitt, *Failed Elections and the Legislative Selection of Presidential Electors*, 96 N.Y.U. L. REV. 1052 (2021).

[280] 601 U.S. 100 (2024).

[281] U.S CONST., AMEND. XIV, § 3. For detailed history and analyses of this part of the Fourteenth Amendment, see the sources cited in note 52.

and factual issues which the Supreme Court sidestepped in its decision. In the part of the decision on which it was unanimous, the Court held that for federal offices, states do not have the power to remove federal candidates from the ballot for a Section 3 violation.[282] The Court expressed fear of a race to the bottom in which some states would use flimsy excuses to remove candidates from the ballot for political reasons. It required greater uniformity in rules for disqualifying federal candidates under Section 3.[283]

The Court was far more divided, however, over dicta in the majority opinion on the scope of *Congress*'s power to determine that a candidate is disqualified to serve in federal office. The majority opinion was opaque, but it suggested that Congress may be required to pass a statute in order to disqualify a federal candidate under Section 3.[284] It is unclear if Congress has other paths to disqualify federal candidates for participating in insurrection, such as when it considers the qualifications of newly-elected members of Congress or when it counts the electoral college votes on the January 6 following a presidential election.

The three liberal Justices on the Court, Justices Kagan, Jackson, and Sotomayor, issued an opinion in *Trump v. Anderson*, styled a concurrence but sounding like a partial dissent,[285] that excoriated the majority for reaching out to attempt to limit Congress's power in a decision raising the question only of states' powers.[286] Justice Barrett, writing separately and agreeing that the majority wrongly reached out to opine on Congress's Section 3 powers, criticized the Court's liberals for raising the political temperature.[287]

Trump v. Anderson had the benefit of clarifying the scope of state power, and perhaps the Court was right as a practical matter to take state disqualification of

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[282] *Anderson*, 600 U.S. at 110; *id.* at 117-18 (Barrett, J., concurring in part and concurring in the judgment); *id*. at 118-19 (Sotomayor, Kagan, & Jackson, JJ., concurring in the judgment).
[283] *Id*. at 110; *id.* at 119 (Sotomayor, Kagan, & Jackson, JJ., concurring in the judgment).
[284] *Id*. at 109-110.
[285] *Id*. at 118 (Sotomayor, Kagan, & Jackson, JJ., concurring in the judgment); Mark Joseph Stern, *Supreme Court Inadvertently Reveals Confounding Late Change in Trump Ballot Ruling*, SLATE (Mar. 4, 2024), https://slate.com/news-and-politics/2024/03/supreme-court-metadata-sotomayor-trump-dissent.html ("The Supreme Court's decision on Monday to keep Donald Trump on Colorado's ballot was styled as a unanimous one without any dissents. But the metadata tells a different story. On the page, a separate opinion by the liberal justices is styled as a concurrence in the judgment, authored jointly by the trio. In the metadata of the link to the opinion posted by the court, however, this opinion is styled as an opinion concurring in part and dissenting in part, authored not by all three justices but by Sonia Sotomayor alone.").
[286] *Anderson*, 600 U.S.at 120-23 (Sotomayor, Kagan, & Jackson, JJ., concurring in the judgment);
[287] *Id.* at 118 (Barrett, J., concurring in part and concurring in the judgment) ("In my judgment, now is not the time to amplify disagreement with stridency. The Court has settled a politically charged issue in the volatile season of a Presidential election. Particularly in this circumstance, writings on the Court should turn the national temperature down, not up.").

presidential candidates from state ballots off the table as a potential political strategy. It is much harder to square its holding with the text of Section 3,[288] with history,[289] or with usual nonuniform, state-by-state system for determining ballot access under the Fourteenth Amendment. Consider, for example Robert F. Kennedy, Jr., who is running as an independent presidential candidate against Biden and Trump in 2024. RFK's ability to get on the ballot as a candidate differs from state to state.[290] The Court was perhaps on firmer ground in seeing Section 3's disqualification grounds as more open to political manipulation than state application of the usual ballot access rules such as requiring proof of age or citizenship, because the standard for what counts as an "insurrection" justifying disqualification is opaque. The attempts to hamstring Congress's power through dicta were less developed, and uncertainty about Congress's power to use disqualification may well bring such matters back to the courts.

The Court's opinion in *Trump v. Anderson* was also surprisingly devoid of any mention of the basis for the claim that Trump was disqualified from the presidency: his attempt to subvert the outcome of the 2020 election. A Court that used its dicta in an attempt to limit the scope of Congress's power also could have used its dicta to praise the rule of law and stress the importance of peaceful transitions of power, recognizing that the actions of Trump during the 2020 election threatened the foundation of democratic governance in the United States. Sometimes, it is just as important to examine what the Court chooses not to say as what it says.

The Court had a harder time ignoring the scope of Trump's 2020 activities in the immunity case, *Trump v. United States*.[291] The United States government had indicted Trump on three sets of charges related to his attempts to subvert the outcome of the 2020 election.[292] Trump filed an interlocutory appeal arguing he had presidential immunity for any official acts he took as President and that many of the acts that were the subject of the indictment were official acts. Dividing 6-3 along party lines, the Court held Trump was likely entitled to absolute immunity for at least some of the acts charged in the indictment, and it remanded the case for further proceedings.[293]

The majority tentatively divided potential immunity claims into three types. For "core" presidential functions, including speaking with officials at the United States Department of Justice, absolute immunity is appropriate.[294] For cases involving the use of presidential power up to the "outer perimeter" of presidential

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[288] Baude & Paulsen, *supra* note 52.
[289] Graber, supra note 52; Gerard N. Magliocca, *Background as Foreground: Section 3 of the Fourteenth Amendment and January 6*, 25 U. PA. J. CONST. L. 1059 (2023).
[290] According to a count by the *New York Times*, as of July 10, 2024, RFK Jr. had secured ballot access in nine states and was in the process of seeking access in 16 more. Alyce McFadden et al,, *Where R.F.K. Jr. and Independent Presidential Candidates Are On the Ballot*, N.Y. TIMES (last updated July 10, 2024).
[291] 144 S. Ct. 1312 (2024).
[292] *Id*. at 2324-25.
[293] *Id*. at 2347.
[294] *Id*. at 2327-34.

power, there is a presumption of absolute immunity. Under this presumption, "the President must . . . be immune from prosecution for an official act unless the Government can show that applying a criminal prohibition to that act would pose no dangers of intrusion on the authority and functions of the Executive Branch."[295] Unofficial acts received no immunity.[296] The Court held that evidence of official acts could not be used to prosecute a former president for unofficial acts.[297]

The Court was not clear on whether using illegal means to commit an act that is clearly within the power of the President could count as unofficial and be prosecuted. As Justice Jackson wrote in her dissent: "While the President may have the authority to decide to remove the Attorney General, for example, the question here is whether the President has the option to remove the Attorney General by, say, poisoning him to death."[298] In a footnote, the Court seemed to assume that the President could be prosecuted in a bribe-for-pardon scheme, "though testimony or private records of the President or his advisers probing the official act itself" would be inadmissible.[299]

The majority left many of these issues open for future development. But the message was clear enough about the attempted prosecution of Trump: it was going to be difficult to do, and it was going to take a considerable amount of time for a fact- and context-based examination of the evidence to decide when immunity applied, with a very large thumb on the scale against the prosecution and with an evidentiary rule that would make proving election subversion even harder.

The Republican-appointed Justices on the Supreme Court seemed far less concerned about the real risk to peaceful transitions of power occurring in the current moment and more about the hypothetical risk of an overzealous prosecution after the end of a presidential term chilling "an energetic and vigorous President[.]"[300] Chief Justice Roberts' majority opinion offered not a word of condemnation about attempted election subversion, or the importance of fair elections and democratic transfers of power.[301] It was a worrisome sign for the future, as evidenced by the dire warnings from the Supreme Court's Democratic-appointed justices who wrote in dissent that the ruling threatened to turn the

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[295] *Id*. at 2331-32 (internal quotation marks omitted).
[296] *Id*.
[297] *Id*. at 2340-41; but see Ned Foley, *Don't Overread the Supreme Court's Immunity Opinion*, LAWFARE, July 15, 2024, https://www.lawfaremedia.org/article/don-t-overread-the-court-s-immunity-opinion (arguing for a less draconian reading of the Court's opinion).
[298] *Trump*, 144 S. Ct. at 2337 n.5 (Jackson, J. dissenting).
[299] *Id*. at 2341 n.3 ("the prosecutor may admit evidence of what the President allegedly demanded, received, accepted, or agreed to receive or accept in return for being influenced in the performance of the act."). The public record of the pardon would be admissible. *Id*.
[300] *Id*. at 2345.
[301] Richard L. Hasen, *Trump Immunity Ruling Will Be John Roberts' Legacy to American Democracy*, SLATE (July 1, 2024), https://slate.com/news-and-politics/2024/07/supreme-court-trump-immunity-john-roberts-legacy.html.

president into a king,[302] and who pondered if the President could kill a political rival or underling with impunity and immunity.[303]

Aside from action at the Supreme Court, numerous states also took aim at would-be election subverters. In all, 52 people who participated in the fake electors plots and related means of subverting the 2020 election have either pled guilty or have been indicted in cases brought in Arizona, Georgia, Michigan, Nevada and Wisconsin.[304] So far Trump has been indicted only in the Georgia state case.[305] (On the federal level, at least 1,380 people have been charged or convicted in the January 6, 2021 invasion of the United States Capitol.[306]) These cases have the potential to offer some public reckoning for the actions in 2020. Numerous bar proceedings have also considered the disbarment or suspension of a number of Trump lawyers alleged to have helped him with the scheme including Jeffrey Clark, John Eastman, Rudy Guiliani, and Jenna Ellis.[307]

2. The cheap speech cases. The cases described above relate directly to the questions of retrogression of the condition of free and fair elections. But another line of cases implicates the retrogression of American democracy indirectly. These cases concern threats to voter competence caused by the decline of local journalism and the rise of social media. As I explain in more detail elsewhere,[308] this rise of

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[302] *Trump v. U.S.*, 144 S. Ct. at 2371 (Sotomayor, J., dissenting); *id.* at 2372 (Jackson, J., dissenting).

[303] *Id.* at 2371 (Sotomayor, J., dissenting) (suggesting a president would be immune from criminal liability for ordering "the Navy's Seal Team 6 to assassinate a political rival"); *id.* at 2377 n.5 (Jackson, J., dissenting) ("While the President may have the authority to decide to remove the Attorney General, for example, the question here is whether the President has the option to remove the Attorney General by, say, poisoning him to death")., For explorations of U.S. courts' potential power to prevent democratic backsliding, see Stephen Gardbaum, *Courts and Democratic Backsliding*, LAW & SOC'Y (2024), https://doi.org/10.1111/lapo.12248; Thomas M. Keck, *The U.S. Supreme Court and Democratic Backsliding*, LAW & SOC'Y (2024), https://doi.org/10.1111/lapo.12237; Michael Dichio & Igor Logvinenko, *Culture and Practice Eat Documents for Lunch:" Norms and Procedures in the 2020 Election Cases*, LAW & SOC'Y (2024), https://doi.org/10.1111/lapo.12241.

[304] Neil Vigdor & Danny Hakim, *Wisconsin Charges 3 Trump Allies in Fake Electors Scheme*, N.Y. TIMES (June 4, 2024); Hunter Evans et al., *How States are Investigating and Prosecuting the Trump Fake Electors*, LAWFARE (Apr. 23, 2024) [https://perma.cc/6BLV-DK73].

[305] Vigdor & Hakim, *supra* note 304.

[306] Alan Feuer, *Capitol Attack Prosecutions Have Ensnared Over 1,380 People*, N.Y. Times (Apr. 16, 2024).

[307] Benjamin Weiser, *Giuliani Disbarred from Practice of Law in New York*, N.Y. TIMES (July 24, 2024); Alison Durkee, Kenneth Chesebro *Charged in Wisconsin—Here Are All the Trump Lawyers Now Facing Legal Consequences*, FORBES (June 4, 2024) [https://perma.cc/7QFH-7F5R]. On the use of lawyers to police democratic backsliding, see Scott Cummings, *Lawyers in Backsliding Democracy*, 112 CALIF. L. REV. 513 (2024).

[308] HASEN, *supra* note 45.

cheap speech interferes with voters' ability to make decisions consistent with their interests and ideologies in this period of technological change.

The legal terrain is uncertain. For example, despite their strong social benefits, it is unclear if the government could pass laws consistent with the First Amendment requiring that deepfakes and other altered video and audio clips be labeled as altered to help voters evaluate evidence of the state of the world as they make voting decisions.[309]

Florida and Texas have threatened to make things harder for voters by passing social media laws that would make it difficult or impossible for social media platforms to remove false election content or content that undermines confidence in elections and promotes political violence.[310] Those states passed their laws in the wake of the deplatforming of Donald Trump following his failure to condemn the violence of January 6, 2021 that interfered with Congress's counting of the 2020 U.S. presidential electoral college votes.[311]

In *Moody v. NetChoice*,[312] the Supreme Court rejected a facial challenge brought by the social media platforms to the Florida and Texas laws.[313] But the Court in dicta strongly embraced the view that social media platforms, which are private entities, have the same rights as newspapers to engage in content moderation, including or excluding content as they see fit.[314] It rejected, at least for now, the argument that, at least when it comes to content moderation, social media companies should be treated like "common carriers" who could be forced to carry content with which they disagree.[315] Such treatment in the current political moment would have fueled election denialism. As Justice Kagan wrote in her majority opinion, Texas's law, if upheld, would prevent platforms from removing posts that "advance false claims of election fraud."[316] The Court concluded that "a State may not interfere with private actors' speech to advance its own vision of ideological balance."[317]

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[309] *Id*. at 97-102; *see, e.g.*, MINN. STAT. ANN. § 211B.075 (2024).
[310] HASEN, *supra* note 45, at 127.
[311] See Brief of Professors Richard L. Hasen, Brendan Nyhan, and Amy Wilentz as Amici Curiae Supporting Respondents in No. 22-277 and Petitioners in No. 22-555, Moody v. NetChoice LLC and NetChoice LLC v. Paxton, at 35-36, https://www.supremecourt.gov/DocketPDF/22/22-555/292335/20231205150756930_NetChoice%2022-555%20-%20Amicus%20Brief-Hasen%20Nyhan%20Wilentz%20-%20Final.pdf.
[312] 144 S. Ct. 2383 (2024).
[313] *Id*. 2397-99 Although the laws differ in their particulars, they both limited the moderation of certain political content by social media platforms.
[314] *Id*. at 2399-2408.
[315] Richard L. Hasen, *The First Amendment Just Dodged an Enormous Bullet at the Supreme Court*, SLATE (July 1, 2024), https://slate.com/news-and-politics/2024/07/supreme-court-opinions-first-amendment-netchoice-texas-kagan.html.
[316] *NetChoice*, 144 S. Ct., at 2405.
[317] *Id*. at 2407.

Defamation law is another tool that appears to have been somewhat successful in regulating speech by countering false information about the integrity of elections in the United States. For example, two voting machine companies, Smartmatic and Dominion, sued a number of cable television stations for spreading false claims about their machines being used to alter the outcome of the 2020 election.[318] Dominion's suit against Fox News led to a record $787.5 million settlement.[319] At least anecdotally, the suits seem to have deterred Fox from repeating lies about stolen elections on the air.[320] Former Trump lawyer Rudy Giuliani faced bankruptcy proceedings after being found liable for $148 million in damages for lying that Georgia election workers Ruby Freeman and Shaye Moss were involved in a plot to steal the 2020 presidential election in Georgia for Joe Biden.[321] He eventually consented to a permanent injunction barring him from repeating the lies.[322]

Defamation law, however, is of only limited utility in countering election lies and assuring that voters have accurate and timely information to make decisions in elections.[323] First, truth telling through a defamation lawsuit happens retrospectively and not in real time, so it does not function as contemporary rebuttal to or "counterspeech" of false claims. Second, many false claims about election integrity, such as statements that the election "will be rigged," involve neither a person nor entity specifically being defamed or any disprovable fact that could provide the basis for suit. Still, the general deterrent effect of defamation verdicts may make the tort a worthy interstitial tool to fight the spreading of election lies.

B. Politics

Like the legal system, the political system reacted in mixed ways to the threat of democratic retrogression. The earliest signs were promising. As I describe in

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[318] Katie Robertson, *Smartmatic and OAN Settle Defamation Lawsuit*, N.Y. TIMES (Apr. 16, 2024).
[319] *Id.*
[320] As an example, *Moment Fox News Takes Trump Off-Air to Fact Check South Carolina Speech*, THE INDEPENDENT (Feb. 23, 2024), https://www.independent.co.uk/tv/news/donald-trump-south-carolina-fox-news-b2501711.html (FOX anchor Neil Cavuto, as part of fact check, says that "judges picked by Donald Trump himself found no evidence of a [rigged election] in seven battleground states").
[321] Pravena Somasundaram et al., *Giuliani Says He Will Stop Accusing Georgia Workers of Election Tampering*, WASH. POST (May 21, 2024, updated May 22, 2024).
[322] *Id.*
[323] *See* HASEN, *supra* note 45, at 115-17. Other tort and criminal law also could provide a basis to counter certain dangerous election lies. *See* Amicus Brief of Professor Richard L. Hasen in Support of Appellee and Affirmance, United States v. Mackey, No. 23-7577, United States Court of Appeals for the Second Circuit, https://protectdemocracy.org/wp-content/uploads/2024/02/2024.02.12-Mackey-Amicus-Brief-of-Professor-Richard-L.-Hasen.pdf.

more detail elsewhere,[324] in the aftermath of the 2020 election, Republican leaders around the country refused to cooperate with efforts to subvert election outcomes. For example, Georgia Secretary of State Brad Raffensperger rejected entreaties from Trump and his allies to "find 11,780 votes" to turn Trump's election loss in the state into a victory.[325]

When it came time for Congress to count the Electoral College votes cast for each candidate on January 6, 2021, Vice President Mike Pence refused to bring forward the false slates of electors that had been submitted to favor Trump as Trump had urged.[326] In the midst of Congress's proceedings, a mob of Trump supporters invaded the Capitol in an attempt to interfere with Congress's confirmation of Joe Biden's election. The effort was unsuccessful in stopping the vote and the eventual peaceful transition of power, but it imposed serious costs, leaving 5 protesters dead and 140 law enforcement officers injured.[327]

Within hours of the time that the Capitol (and American democracy itself) was under attack, 138 Republican members of Congress voted to object on bogus grounds to the counting of electoral college votes for Biden from Pennsylvania.[328] It was a sign that even in the face of an unprecedented internal violent attack on American democracy, the pull of political party allegiance, and particularly allegiance to the Trumpist wing of the Republican party, was strong.

The Democratic-majority House of Representatives impeached Trump for inciting insurrection.[329] The vote divided mostly along party lines, with 10 Republicans joining with all Democrats in voting for impeachment.[330] In the Senate, 57 Senators, including 7 Republicans, voted for conviction.[331] But Senate Majority Leader Mitch McConnell, who harshly condemned Trump for his post-election actions in attempting to overturn the election results, voted against conviction, claiming it was inappropriate to impeach a former president already out of office, advocating instead for criminal prosecution,[332] and signaling to other wavering Republican senators to oppose conviction. The vote fell short of the two-

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[324] Hasen, *supra* note 42, at 272-75.
[325] Amy Gardner, *"I Just Want to Find 11,780 Votes": In Extraordinary Hour-Long Call, Trump Pressures Georgia Secretary of State to Recalculate the Vote in His Favor*, WASH. POST (Jan. 3, 2021).
[326] Hasen, *supra* note 42, at 274.
[327] HASEN, *supra* note 1, at 121.
[328] Harry Stevens et al., *How Members of Congress Voted on Counting the Electoral College Vote*, WASH. POST (Jan. 7, 2021).
[329] Nicholas Fandos, *Trump Impeached for Inciting Insurrection*, N.Y. TIMES (Jan. 13, 2021, updated Apr. 22, 2021).
[330] Jonathan Weisman & Luke Broadwater, *A Long Hard Year for Republicans Who Voted to Impeach After January 6*, N.Y. TIMES (Jan. 5, 2022).
[331] Carl Hulse & Nicholas Fandos, *McConnell, Denouncing Trump after Voting to Acquit, Says His Hands Were Tied*, N.Y. TIMES (Feb. 13, 2021, revised Feb. 17, 2021).
[332] *Id.*

thirds of (or 67) senators needed for conviction.[333] Without conviction, the Senate did not consider disqualifying Trump from holding future office.

Amidst partisan maneuvering in the House, Speaker of the House Nancy Pelosi convened a special committee to investigate January 6. After negotiations between parties over the composition of the committee and scope of its work broke down, Pelosi appointed all the members, including 2 Republican members, Liz Cheney and Adam Kinzinger (both of whom had voted to impeach Trump).[334] The committee held high profile hearings and issued a report that commanded great public attention,[335] but public opinion and congressional opinion became more polarized over the events of January 6 as time passed. Eventually, many Republicans came to downplay both January 6 and Trump's role in inspiring the Capitol invasion.[336]

Anti-Trumpist elements in the Republican Party were mostly purged. Of the 10 House members who voted to impeach Trump for election subversion, only 2 were reelected to the House, with the remainder retiring or being defeated in primaries. Cheney lost her primary and Kinzinger chose not to run again.[337]

Congress passed the Electoral Count Reform Act in 2022 as its session ended, before Republicans regained control of the House.[338] The ECRA was a measure aimed at fixing holes and ambiguities in an 1876 law, the Electoral Count Act, that governed much of the procedure that Congress used for counting electoral college votes. Those holes and ambiguities figured heavily in Trump's strategy to overturn the election results.

The measure was negotiated carefully on a bipartisan basis,[339] and it received more Republican support in the Senate than in the House. It eventually got folded into a must-pass defense appropriate bill: The Electoral Count Reform and Presidential Transition Improvement Act of 2022 passed as Division P of the

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[333] *Id.*

[334] Michael S. Schmidt et al., *How the House Jan. 6 Panel Has Redefined the Congressional Hearing*, N.Y. TIMES (June 25, 2022).

[335] Select Committee to Investigate the January 6th Attack on the U.S. Capitol, Final Report, H.R. 117–663 (2022) [https://perma.cc/A7K7-S3SC].

[336] *E.g.,* Jonathan Weisman & Reid J. Epstein, *G.O.P. Declares Jan. 6 Attack 'Legitimate Political Discourse,'* N.Y. TIMES (Feb. 4, 2022).

[337] Mariana Alfaro, *Trump Takes Aim at a Remaining House Republican Who Voted to Impeach Him*, WASH. POST (Apr. 17, 2024).

[338] For background, see Muller, *supra* note 54.

[339] Hulse, *supra* note 43.

Consolidated Appropriations Act of 2023 by a mostly party-line vote of 225-201[340] in the House and a more bipartisan 68-29 in the Senate.[341]

States' responses to retrogression have been mixed as well.[342] First, to focus on the positive, some states acted to shore up election administration, passing laws protecting election administrators and poll workers from harassment and threats in the wake of false claims of election rigging in 2020 and 2022.[343] Some states changed their rules regarding certification of electoral college votes to remove any potential discretion that those who certify might have had to reject the statewide election results.[344] Some state supreme courts have reined in county boards that refused to do their ministerial duties in certifying elections.[345]

Other states flirted with actions that could make subversion easier. The Texas legislature considered a bill that would lower the standard of proof in election contests brought in state court from a clear and convincing evidence standard to a preponderance standard, giving state courts more leeway to overturn election results.[346] An Arizona lawmaker proposed a bill that would allow the state legislature explicitly to overturn the choice for the state's presidential electors as

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[340] 168 CONG. REC. H10528 (daily ed. Dec. 23, 2022). Republicans voted 9-200 against the bill. Democrats voted 216-1 in favor of the bill. *Roll Call 549 | Bill Number: H. R. 2617*, CLERK OF THE UNITED STATES HOUSE OF REPRESENTATIVES (Dec. 23, 2022, 02:00 PM), https://clerk.house.gov/Votes/2022549.

[341] 168 CONG. REC. S10077 (daily ed. Dec. 22, 2022). Republicans voted 18-29 against the bill. Democrats voted 47-0 in favor of the bill. Three Independents voted in favor of the bill. *H.R. 2617 (117th): Consolidated Appropriations Act, 2023*, GOVTRACK.US (Dec. 22, 2022, 2 p.m.), https://www.govtrack.us/congress/votes/117-2022/s421. Before Congress voted on this version of the ECRA, Representatives Zoe Lofgren and Liz Cheney introduced a competing Electoral Count Act reform bill, H.R.8873, 117th Cong. (2022). Representative Bennie Thompson, chair of the January 6 Select Committee, suggested that Rep. Lofgren and Rep. Cheney did not widely consult with other representatives when drafting the bill. Chris Cioffi, *Panels in Both Chambers to Take Up Presidential Elector Overhauls*, ROLL CALL (Sep. 16, 2022). Multiple Republican representatives described the bill as unconstitutional. Amy B. Wang & Liz Goodwin, *House Joins Senate in Passing Electoral Count Act Overhaul in Response to Jan. 6 Attack*, WASH. POST (Dec. 23, 2022)., The House passed H.R. 8873 by a vote of 229-203, with a 9-203 vote against it by Republicans and a 220-0 vote in favor of it by Democrats, https://clerk.house.gov/Votes/2022449.

[342] For a general overview, see Richard L. Hasen, *States as Bulwarks Against, or Potential Facilitators of, Election Subversion*, in OUR NATION AT RISK: ELECTION INTEGRITY AS A NATIONAL SECURITY ISSUE (Karen Greenberg & Julian Zelizer, eds. 2024).

[343] National Conference of State Legislatures, *State Laws Providing Protection for Election Officials and Staff* (last updated Apr. 12, 2024) [https://perma.cc/DQ78-W9V8]. On attrition, see Joshua Ferrer et al, Bipartisan Policy Center, Election Official Turnover Rates from 2000-2024 (Apr. 2024) [https://perma.cc/QY9U-JSPU].

[344] Lauren Miller & Will Wilder, *Certification and Non-Discretion: A Guide to Protecting the 2024 Election*, 35 STAN. L. & POL'Y REV. 1 (2024)

[345] Muller, *supra* note 267.

[346] Hasen, *supra* note 342, at 263.

chosen by Arizona voters.[347] These bills fortunately got no traction. The greatest realistic danger going forward appears to be a state legislature that gives itself rather than state courts the power to determine how a state should appoint electors in the event of an election contest.

Some state legislatures also have engaged in performative acts that juiced the Republican base and could serve to continue to erode confidence in election integrity. For example, the Arizona legislature ordered a high profile "audit" of the 2020 election returns to be done by a private firm, "cyber ninjas." This group did not produce any reliable evidence of a stolen election and in fact confirmed Biden's win in the state.[348] In Wisconsin, an aborted investigation of purported election fraud in 2020 ended with severe criticism of the questionable actions of a former state Supreme Court Justice who led the investigation.[349]

More commonly, some Republican states have continued to enact new laws and policies to make voter registration and voting more difficult.[350] Extending a long pattern, legislators tried to justify the passage of such laws by pointing to the potential for fraud.[351] Some Republican states also launched new attacks on the initiative process in those states with a direct democracy option.[352] The attacks appeared driven in part by the Supreme Court's decision in *Dobbs*[353] allowing states to ban abortion and the attempt by voters in red states to protect abortion rights via initiative.[354]

State regulation of social media also was a mixed bag. Some states began regulating social media in ways that may make it easier or harder to spread election related disinformation. A number of states passed or considered laws regulating "deep fakes,"[355] manipulated video or audio that could trick voters into believing

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[347] *Id*. at 260.

[348] Nathaniel Persily, *Election Administration and the Right to Vote*, 191, 204 in NATION AT RISK, *supra* note 342.

[349] Scott Bauer, *Judge: Wisconsin Probe Found 'Absolutely No' Election Fraud*, AP (July 28, 2022).

[350] JACOB M. GRUMBACH, LABORATORIES AGAINST DEMOCRACY 151-75 (2022); Aaron Mendelson, *A Headlong Rush by States to Attack Voting Access — Or Expand It*, Center for Public Integrity (Oct. 6, 2022) [https://perma.cc/5HQP-MNQP]

[351] *Id*.

[352] Sara Carter & Alice Clapman, *Politicians Take Aim at Ballot Initiatives*, BRENNAN CENTER (Jan. 16, 2024) [https://perma.cc/3TCY-JJ9U]; Camille Squires, *Red State AGs Keep Trying to Kill Ballot Measures by a Thousand Cuts*, BOLTS (Feb. 29, 2004) [https://perma.cc/RRC3-64A5]. For a recent example, see Brown v. Yost, 103 F.4th 420 (6th Cir. 2024), *vacated pet'n for en banc granted*, 104 F.4th 621 (6th Cir. 2024). For a longer history, finding Republican control of the state legislature positive correlated with initiative power backsliding, see John Matsusaka, *Direct Democracy Backsliding, 1955-2022*, *draft available*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4522377.

[353] Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

[354] Kate Zernike & Michael Wines, *Losing Ballot Issues on Abortion, G.O.P. Now Tries to Keep Them Off the Ballot*, N.Y. TIMES (Apr. 23, 2023).

[355] Adam Adelman, States *Turn Their Attention to Regulating AI and Deepfakes as 2024 Kicks Off*, NBC NEWS (Jan. 22, 2024) [https://perma.cc/4AB8-QP6R].

that candidates (or others) have said something or taken some action. These measures raise delicate questions about how to balance the need to provide voters with reliable information with concerns about squelching core political speech protected by the First Amendment. Other states have facilitated the spread of false information. As noted above in connection with the *NetChoice* case,[356] Texas and Florida passed laws that would make it harder for large platforms to remove the posts of politicians spreading election disinformation. At least for now, the Supreme Court has shut down these efforts.[357]

C. Theory

Election law theory has yet not caught up to the retrogression of and threats to American democracy, in some ways treating the current moment as one of business as usual. Two significant examples of the gap between theory and reality are the continued embrace of the responsible party government theory and the continued dominance of a "marketplace of ideas" theory of the First Amendment.

It is a matter of election law (as well as American political science[358]) orthodoxy that strong political parties are necessary for a well-functioning democracy.[359] Indeed, E.E. Schattschneider, a leading political scientist of the mid-twentieth century, famously wrote that modern democracy was "unthinkable" save in terms of the parties.[360] In the United States, with its dominant two-party system, parties were seen as especially significant to political stability. "Responsible" parties were to operate as "big tents" to accommodate various interests, such as evangelicals and business leaders in the Republican party and labor and minority interests in the Democratic Party.

The idea that parties channel factionalism in responsible ways is behind the Supreme Court's decision in the 1997 *Timmons* case rejecting the First Amendment right of a minor party to "fusion," the practice of nominating someone who also is a major party candidate.[361] In holding that the state could discriminate against minor or new parties in favor a "healthy two-party system,"[362] the Court

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[356] Moody v. NetChoice, 144 S. Ct. 2383 (2024).
[357] *See supra* notes 313-17 and accompanying text.
[358] *E.g.*, Am. Political Sci. Ass'n, Toward a More Responsible Two-Party System: A Report of the Committee on Political Parties of the American Political Science Association, 44 Am. Pol. Sci. Rev. 1 (1950).
[359] For an excellent overview and critique of "responsible party government", see Tabatha Abu El-Haj, *Networking the Party: First Amendment Rights and the Pursuit of Responsive Party Government*, 118 COLUM. L. REV. 1225 (2018); *see also* Edward B. Foley, *The Constitution and Condorect: Democracy Protection Through Electoral Reform*, 70 DRAKE L. REV. 543 (2022) (advocating for electoral reform that would create space for new centrist political party).
[360] E.E. SCHATTSCHNEIDER, PARTY GOVERNMENT 1 (1942).
[361] *See supra* notes 110-12 and accompanying text.
[362] *Timmons*, 520 U.S. at 367.

was echoing the views of mainstream political scientists and law professors about the importance of major parties to democratic stability.[363]

Today, some leading election law professors and political scientists still call for changes to election laws, and especially campaign finance laws, to strengthen political parties.[364] For example, Professor Pildes argues against state and local laws that provide multiple public matching funds for small dollar donations.[365] His concern is that donors are likely to be more polarized, and multiple matches amplify support for more extreme candidates, leading to greater polarization.[366] Evidence shows that small donors have been much more likely to support election deniers in Congress, for example.[367] Along similar lines, Professors LaRaja and Schaffer want to encourage corporate and other perceived centrist donations to political parties, as well as channel any public financing through political parties.[368]

Whether or not the responsible party government theory in the past was a sound basis upon which to recommend channeling more money through political parties, it is much harder to justify attempts to strengthen political parties at a time when the parties can become vectors of polarization and threaten democratic backsliding.[369] The Trumpist takeover of the Republican party apparatus means

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[363] *S*ee Hasen, *supra* note 111 for a critique.

[364] For an important statement along these lines from political scientists and law professors led by Ray LaRaja, see Chapter 7, on campaign finance, in the forthcoming book, ELECTORAL REFORM IN THE UNITED STATES: COMBATTING POLARIZATION AND EXTREMISM (Larry Diamond, Edward B. Foley & Richard H. Pildes, eds., forthcoming 2025) (on file with the author).

[365] Richard H Pildes, *Small-Donor-Based Campaign-Finance Reform and Political Polarization* 129 YALE L.J.F. 149 (2019); see also Thomas B. Edsall, *For $200, A Person Can Fuel the Decline of Our Major Parties*, N.Y. TIMES (Aug. 30, 2023); but see Nathaniel Persily, *Campaign Finance and Polarization: The Indirect Connection of Political Money to Contemporary Political Dysfunction*, in MONEY, FREE SPEECH AND THE FUTURE OF OUR DEMOCRACY (Lee Bollinger and Geoffrey Stone eds., forthcoming 2025).

[366] Large and small donors alike appear much more ideological than non-donors. See Figure 1 in Chapter 7 of ELECTION REFORM IN THE UNITED STATES, *supra* note 364.

[367] Samuel Issacharoff & Richard H. Pildes, *Participation and Democratic Competence ,* THEOR. INQUIRIES IN L. (forthcoming 2025) (draft at 16, relying on data from Ray LaRaja).

[368] RAYMOND J. LARAJA & BRIAN SCHAFFNER, CAMPAIGN FINANCE AND POLITICAL POLARIZATION: WHEN PURISTS PREVAIL (2015).

[369] The literature here is voluminous and includes STEVEN LEVITSKY & DANIEL ZIBLATT, TYRANNY OF THE MINORITY: HOW TO REVERSE AN AUTHORITARIAN TURN AND FORGE DEMOCRACY FOR ALL (2023); DANIEL SCHLOZMAN & SAM ROSENFELD, THE HOLLOW PARTIES: THE MANY PASTS AND DISORDERED PRESENT OF AMERICAN PARTY POLITICS (2024); PAUL PIERSON & ERIC SCHICKLER, PARTISAN NATION: THE DANGEROUS NEW LOGIC OF AMERICAN POLITICS IN A NATIONALIZED ERA (2024). *See also* Persily, *supra* note 365 ("party organizations can be captured by extremists, such that they become forces of polarization rather than counterbalances to it. The notion that party organizations are inherently most interested in gaining legislative majorities belies the evidence that parties

that funneling money to the parties could be a source for instability, not stability. Nor is it clear that parties can continue to serve their "big tent" functions in an era of intense polarization. Rather than seeing parties as loci for the accommodation of interests, we are more likely to see fighting within the parties, and scrambling of electoral coalitions that can be destabilizing rather than stabilizing.

Encouraging large corporate donors will not necessarily mitigate polarization either. In the Republican Party, for example, large corporate donors can align with Trumpist forces so long as those forces favor corporate policies such as lower taxes; witness the backsliding by corporations that had pledged to boycott PAC contributions to those who voted to object to counting Pennsylvania Electoral College votes for Joe Biden after the January 6, 2021 insurrection. They quickly returned to making their contributions to election deniers when light was no longer shining.[370]

First Amendment theory also has become destabilized by the new cheap speech era.[371] Conventional theory has long embraced a marketplace of ideas approach to free speech under the First Amendment, where the usual cure for false speech is more speech, or "counterspeech."[372] As recently as 2024 in the *NetChoice* case, the Supreme Court echoed the metaphor in stating that "the government cannot get its way just by asserting an interest in improving, or better balancing, the marketplace of ideas."[373] As I have argued, the Court made the right call in *NetChoice* given the immediate risks of election denialism, but longer term we need to explore more deeply the relationship among the First Amendment, technology, and the conditions for democratic governance.

Whether or not the marketplace of ideas was ever an accurate depiction of how political communications occurs in the United States, in the new cheap speech era, it is demonstrably wrong to believe that the truth inevitably rises to the top, or at least does so quickly enough so as not to affect voter choices in elections. Consider, for example, the staying power of the false claim that Biden and his allies somehow stole the 2020 election, and how this led to the January 6 invasion of the Capitol

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sometimes become handmaidens for the very centrifugal forces that the strong parties hypothesis suggests they should be counteracting. Either because of the extremism of donors to the parties or because of changes in leadership of the party organization, parties can use their financial clout to attack moderates, instead of extremists").

[370] Jessica Piper & Zach Montellaro, *Corporations Gave $10 Million to Election Objectors after Pledging to Cut Them Off*, POLITICO (Jan. 6, 2023).

[371] I make the arguments in this paragraph fully in HASEN, CHEAP SPEECH, *supra* note 45.

[372] Perhaps the most prominent modern Supreme Court example of this approach and the embrace of counterspeech as a solution to bad speech is Justice Kennedy's opinion in United States v. Alvarez, 567 U.S. 709 (2012). See also Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1; Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821 (2008); Eugene Volokh, *In Defense of the Marketplace of Ideas/Search for Truth as a Theory of Free Speech Protection*, 97 VA. L. REV. 595 (2011).

[373] *NetChoice*, 144 S. Ct., at 2402.

and the staying power of the "Stop the Steal" movement.[374] The claim is traceable to the ability of Donald Trump and his allies to relentlessly share that message on social media and across fragmented partisan media in ways that were not technologically possible in an earlier era. Recent events demonstrate that overreliance on counterspeech is misplaced, and we should consider more carefully how to tweak election laws to provide voters with accurate information about elections without running the risk of government censorship.

The issues require nuanced thinking. Consider, for example, the disclosure of campaign-related information. Some forms of additional mandatory disclosure can aid in voter competence. In particular, voters could be helped by mandatory disclosure of the large-scale funders of online political activity and by mandatory labels signaling to voters whether audio and video content shared on media and social media has been digitally manipulated with the help of artificial intelligence.[375] But in this new complex era where information travels cheaply and widely, increased disclosure sometimes can hurt the public interest. For example, public disclosure of certain personal identifying information, such as the home addresses of small campaign donors, can lead to privacy invasions and even potential harassment without giving voters any meaningful information to evaluate candidates' positions or deterring corruption.[376]

Whatever the correct democracy-enhancing First Amendment paradigm for the current political and technological era, the debate appears to have moved beyond an overly simplistic marketplace of ideas approach. To take one prominent debate, consider the flipping of the position of both scholars and judges on the issue of "antidistortion" as a basis for equalizing political power in the campaign finance and social media cases.[377] In the past, it was mostly liberals that embraced antidistortion to call for corporate campaign finance spending limits. Now many conservatives call for regulation of the content moderation decisions of social media companies. How much can the government be trusted to regulate speech to

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[374] RENEÉ DIRESTA, INVISIBLE RULERS: THE PEOPLE WHO TURN LIES INTO REALITY 173 (2024) ("Maybe just a small number of people had been sucked into the most divergent bespoke realities—but that small number of people had succeeded in making a spectacle certain to impact American politics for decades to come").

[375] HASEN, CHEAP SPEECH, *supra* note 45, at 85-103 .

[376] *See* Statement of Commissioner Dara Lindenbaum Urging Congress to Amend the Federal Election Campaign Act to Eliminate the Public Disclosure of Contributors' Street Names and Street Numbers, Fed. Election Comm'n (May 16, 2024) [https://perma.cc/7U94-23N7].

[377] See Brief of Professors Hasen, Nyhan, and Wilentz, *supra* note 311, at 35-36. Some liberals have joined with conservatives in arguing for further speech regulation of the content moderation decisions of online platforms. *E.g.*, Tim Wu, *The First Amendment is Out of Control*, N.Y. TIMES (July 2, 2024) ("The reasoning in the decision in the NetChoice cases marks a new threat to a core function of the state. By presuming that free speech protections apply to a tech company's curation of content, even when that curation involves no human judgment, the Supreme Court weakens the ability of the government to regulate so-called common carriers like railroads and airlines — a traditional state function since medieval times.").

assure voter competence and fair elections without risking censorship? Here it is enough to say that the First Amendment marketplace of ideas theory, like responsible party government theory, has not caught up with the new reality.

III. TRANSFORMATION

A. Introduction

The first two parts of this Feature paint a bleak picture not just of election law but of the state of democracy in the contemporary United States. These problems are large, potentially existential, and there is only so much that election law can do to solve them. That said, I put forward in this Part the best possible case to use election law as a transformative project that would put voters and democracy in the center of legal, political, and theoretical change.

How would this *pro-voter* approach to election law work and how does it differ from earlier process-based theories of the judiciary's proper role in election law cases?

The pro-voter approach to election law is one grounded in political equality and based on four principles: all eligible voters should have the ability to easily register and vote in a fair election with voters having the capacity for reasoned decisionmaking; each voter's vote is entitled to equal weight; the winners of fair elections are recognized and able to take office peacefully; and political power is fairly distributed across groups in society, with particular protection for those groups who have faced historical discrimination in voting and representation. I have justified support for each of these principles elsewhere, including in the context of arguing for a constitutional amendment affirmatively recognizing the right to vote.[378] Without the space to repeat those justifications, which echo earlier scholarship on protecting the right to vote,[379] the remainder of this Feature examines how this pro-voter approach would work across doctrine, politics, and theory.

To begin with, the pro-voter approach is a normative theory like process theory, and not just cheap sloganeering. Recall that process theory is a court-centric normative argument for courts to intervene in election rules to assure adequate political competition.[380] The pro-voter approach too asks for interventions—by courts (though less so than process theory), in politics, and in election law scholarship—to promote free and fair elections in which voters have equal rights and a fair allocation of political power, the capacity for reasoned

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[378] The full justification for this approach appears in chapter 2 of HASEN, *supra* note 1. These commitments obviously echo my concerns over equal voting rights that played a part in the earlier rights-structure debates of the early 2000s. But the pro-voter perspective is much more focused on political action rather than courts to advance voting rights.
[379] *E.g.,* Karlan, *supra* note 265; LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY (1994).
[380] *See supra* notes 243-50 and accompanying text.

decisionmaking, and an ability to organize for collective action to assure government responsiveness.

Some of the pro-voter approach is easy to apply to contested election-related questions: for example, courts and political actors should assure voters' votes are equally weighted, and election law scholarship should explore means to achieve this goal. Under the pro-voter approach, voters should be able participate in fair elections where their votes will be fairly counted. The approach is suspicious of rules that stymie voters' equal ability to organize for political action to achieve results, such as onerous ballot access rules and rules that consistently thwart the will of the majority, such as the rules for electing U.S. Senators giving each state rather than each voter equal representation in a key national decisionmaking body.

Other issues are contested and require further development. For example, consider the extent to which proportional representation schemes work better or worse than territorial-based election systems in furthering voters' interests. It may be that the pro-voter approach is agnostic on such questions, especially given tradeoffs[381] between forms of participation, governability, and fair interest representation. The pro-voter approach will not answer all questions in election law (and process theory never purported to do so); political science has much to offer on these questions. But the approach is decidedly not agnostic on the basics: fair elections, equally weighted votes, ease of voting for eligible voters, and restored capacity of voters to make reasoned decisions in the current information environment.

The emphasis on promoting fair elections is especially important now, much more so than had I been writing a decade ago. The U.S. crisis today is less one of poor overall participation, although it is partly about uneven participation and certainly about unequal political influence. With the explosion of social media, there are plenty of ways for people to express political views. Voting is easy for many, but certainly not all, people. But we face serious concerns about electoral subversion or political violence that could interfere with peaceful transitions of power. The warped information environment makes such interference more likely by potentially fomenting mass false beliefs among voters in rigged elections, undermining loser's consent.[382] Fair election concerns today are at the top of the pro-voter agenda, though they hardly exhaust it.

I turn now to more specific points in doctrine, politics, and theory.

B. Doctrine

In contrast to process theories that seek to justify rulings such as the one person, one vote rules on grounds that there was a structural need to get the political process unstuck,[383] the pro-voter approach is not juricentric. It begins with the recognition that courts cannot be expected to serve as the primary protectors of

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[381] On the tradeoffs, see BRUCE E. CAIN, DEMOCRACY, MORE OR LESS (2014).
[382] Geoffrey Layman, Frances Lee, & Christina Wolbrecht, *Political Parties and Loser's Consent in American Politics*, 708 ANNALS OF AM. ACAD. POL. & SOC. SCI. 164 (2023).
[383] As described *supra* notes 243-50 and accompanying text.

voting rights or chief election law regulators in the current United States. The approach too favors the one person, one vote rule, but to promote political equality and not for abstract structural reasons. Whereas process theory expects courts to set the main rules for political competition, pro-voter election law recognizes that the political branches will be primarily responsible for cementing and expanding voting rights protections, with the judiciary often either neutral to or hostile to such efforts. And whereas process theory is focused primarily on the question of political competition, the pro-voter approach is biased in favor of eligible voter enfranchisement, fair elections, and equal representation.

Unfortunately, polarization has infected questions about democracy itself and spread to the judiciary. If the judiciary is going to break along ideological and partisan lines in deciding the key hot-button issues of the day from abortion[384] to the permissibility of a workplace mandate for vaccines in the middle of a pandemic,[385] to the power of the administrative state,[386] of course it also is going to divide on election law issues. A conservative Supreme Court majority is not only going to refuse to police partisan gerrymandering or assure appropriate political competition, as process theory recommends; it instead is more likely to pull back on the Warren Court's earlier protection of voting rights, such as one person, one vote and universal suffrage for adult, resident, citizen non-felons.

For this reason, judicial doctrine protecting voting rights is likely to develop unevenly, primarily within particular states that are willing to read their state voting statutes[387] and constitutional right-to-vote provisions[388] in a pro-voter manner. But these courts must take into account the new anti-arrogation principle in *Moore v. Harper*[389] and other means by which the Supreme Court and other federal courts could second-guess state court decisions. For example, the anti-arrogation principle is likely to be interpreted to put a thumb on the scale against novel interpretations of state constitutional provisions by state supreme courts.[390] Therefore, when possible, state courts should first interpret their state statutes and constitutional voting rights provisions in cases affecting only *state* elections,

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[384] Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).
[385] Nat'l Fed. Ind. Bus. v. Dep't of Labor, 595 U.S. 109 (2022).
[386] Loper Bright Enter. v. Raimondo, 144 S. Ct. 2244 (2024); Securities & Exchange Commission v. Jarkesy, 144 S. Ct. 2117 (2024).
[387] Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69 (2009) (arguing for a pro-voter canon of statutory interpretation to apply in election cases).
[388] Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859 (2021); Joshua A. Douglas, *The Right to Vote under State Constitutions*, 67 VAND. L. REV. 89 (2014); *see also* Eyal Press, *Can State Supreme Courts Preserve—or Expand—Rights?*, NEW YORKER (June 3, 2024). Of course, not every state will read state voting right constitutional provisions capaciously. *E.g.* League of Women Voters v. Schwab, 549 P.3d 363 (Kan. 2024) (holding that voting is not a fundamental right under the Kansas state constitution).
[389] 600 U.S. 1 (2023); *see supra* note 135 and accompanying text.
[390] Litman & Shaw, *supra* note 140, at 910.

establishing precedents that later can be applied to *federal* elections without running afoul of *Moore*.

State supreme courts are a fertile area for the development of pro-voter judicial doctrine, especially because in some states, these provisions remain under-theorized and barely litigated.[391] Of course, polarization on voting issues sometimes shines through in these state court judicial determinations just as it does with the federal judiciary, and especially as U.S. politics, including judicial politics, gets nationalized.[392] Consider the issue of partisan gerrymandering. The North Carolina Supreme Court, when it had a Democratic majority, recognized partisan gerrymandering as violating the state constitution.[393] After state elections gave that court a Republican majority, that court overturned the gerrymandering ruling and held such claims nonjusticiable under the state constitution.[394] In contrast, a conservative-dominated state Supreme Court in Wisconsin rejected challenges to partisan gerrymandering under the state constitution.[395] After state elections gave that court a liberal majority, the Wisconsin high court overturned the ruling, suggesting that partisan gerrymandering violates the state constitution.[396]

The pro-voter approach to election law envisions a more modest role for the United States Supreme Court. These days, with a very conservative Court skeptical of voting rights, its primary role should be to protect against retrogression and democratic backsliding. Although federal courts and especially the Supreme Court have been dividing on a number of very basic democracy issues, the courts must hold the line on fair vote counts and prevention of election subversion.

It is here that norms to uphold the rule of law play the most important role. While many issues of election law are contestable and contested, such as whether and how to police partisan gerrymandering, it should be a point of consensus across the political spectrum that the winner of a legitimate election is entitled to take office peacefully. Courts deserve praise when they affirm such democratic norms, even if that seems like a low bar. Relatedly, criticizing the judiciary in apocalyptic and extreme terms when the courts decide controversial voting cases can backfire and undermine the norms protecting the basic principles of democratic governance.

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[391] Douglas, *supra* note 388.

[392] James A. Gardner, *New Challenges to Judicial Federalism*, 112 KY. L.J. 703 (2024).

[393] Harper v. Hall, 868 S.E.2d 499, 546 (N.C. 2022). Tierney Sneed et al., *GOP-Controlled North Carolina Supreme Court Reverses Rulings That Struck Down Partisan Gerrymanders By Republican Lawmakers*, CNN (Apr. 28, 2023).

[394] *Id.*; Harper v. Hall, 886 S.E.2d 393, 399 (N.C. 2023).

[395] Johnson v. Wisc. Elections Comm'n, 972 N.W.2d 559 (Wisc. 2022). Patrick Marley & Maegan Vasquez, *Wisconsin Supreme Court Overturns GOP-Favored Legislative Maps*, WASH. POST (Dec. 22, 2023).

[396] *Id.*; Clarke v. Wisc. Elections Comm'n, 998 N.W.2d 370, 399-400 (Wisc. 2023); Clarke v. Wisc. Elections Comm'n, 995 N.W.2d 779 (Wisc. 2023). More recently, the court split along ideological lines in reversing on the question of the propriety of ballot drop boxes under state law. Priorities U.S.A. v. Wis. Elections Comm'n, 2024 WL 3307807 (Wis. July 5, 2024).

If conservative judges and justices keep hearing from the left side of the political spectrum that they are not interpreting law and it is all politics, then they are more likely to internalize this belief and be less concerned about the widespread legitimacy of their opinions. But it is hard to avoid criticizing the judiciary for undermining democracy when courts turn their eyes away from serious risk of election subversion, as the Supreme Court did in *Trump v. United States*.

It is also crucial to prevent further erosion of federal court-recognized voting rights such as the one person, one vote rule. Although this perhaps is better considered as part of the political strategy rather than a matter of doctrine, Senators questioning federal judicial nominees should push them when possible into public acceptance of basic democratic principles and the Warren Court's pro-voter cases.[397] Judges and justices should be made aware of the political costs that would come from undermining core pro-voter decisions of the Warren Court. This defensive posture is necessary. Voting rights litigators already know that now is not the time to use the federal courts for an ambitious program of expanding voting rights. It is instead a moment to stanch the bleeding.

Eventually, doctrinal winds could shift on the Supreme Court, most likely following numerous changes in personnel. At that point, originalist and textualist conservative theories that sometimes judges have purportedly relied upon to reach anti-voter judicial outcomes[398] may fall by the wayside to be replaced with a more balanced approach to constitutional adjudication that considers text, history, tradition, and current social values of equality and democracy. If such a moment arrives, the Supreme Court again could lead on protecting voters. But pining for a second Warren Court is not a fruitful pro-voter strategy. Most of the pro-voter work will not be doctrinal but instead depend on politics.

C. Politics

I begin the discussion of transformative politics by addressing why the "pro-voter" approach to election law should not be mistaken for a pro-Democratic Party approach to election law. After all, in recent decades the Democratic Party has pushed for the expansion of voting rights, and elements of the Republican Party have pushed to make voting harder in the name of election integrity.[399] These efforts metastasized into the 2020 election subversion attempts by Trumpist forces, a key accelerant of retrogression and democratic backsliding.[400] But equating the pro-voter approach with the goals and views of one party is historically myopic,

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[397] Some lower court nominees of former President Trump refused to answer whether they thought *Brown v. Board of Education* was correctly decided. Laura Meckler & Robert Barnes, *Trump Judicial Nominees Decline to Endorse Brown v. Board under Senate Questioning*, WASH. POST (May 16, 2019).

[398] *Shelby County* is an example of poorly done originalism and *Brnovich* is poorly done textualism. On *Shelby County*, see Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207 (2016). On *Brnovich*, see my testimony cited in note 3.

[399] *See supra* notes 227-39 and accompanying text.

[400] *See supra* notes 324-36 and accompanying text.

ignores modern (though rarer) Democratic Party efforts to make voting harder,[401] and misses the emerging shift in electoral coalitions.

On history, it was Republicans, the Party of Lincoln, who were instrumental in emancipating black slaves and facilitating the passage of the Reconstruction Amendments.[402] It was forces within the Democratic Party who tried to filibuster passage of the Civil Rights Act and Voting Rights Act in the 1960s.[403] It is only recently that bipartisan consensus in Congress on the need to renew and strengthen the Voting Rights Act has broken down.[404] So while Democrats in this particular moment are more associated with the pro-voter approach than Republicans, this is just a snapshot in time.[405]

And times change. On changing electoral coalitions, the Republican Party under Donald Trump has made new inroads with (especially white) working class voters.[406] Polling today shows that non-voters and occasional voters are more likely to support Trump than Biden in the 2024 U.S. presidential election.[407] A proposal to make voter registration and voting easier could just as easily help Republicans as Democrats.[408] Indeed, forces allied with the Democratic Party who had engaged in the past in non-partisan efforts at increasing voter registration

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[401] *E.g.* Collazo v. Ill. State Bd. of Elections, Order, No. 24-CH-32 (Ill. Circuit Ct. of 7th Jud. Circuit, June 5, 2024) [https://perma.cc/D36F-ZWT5] (changing ballot access rules in the middle of the election season to benefit Democrats imposes a severe burden on the right to vote, failing strict scrutiny); Rick Pearson, *Judge Rules Unconstitutional Gov. J.B. Pritzker-Backed Election Law That Aided Democrats in November*, CHIC. TRIBUNE (June 5, 2024).

[402] ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 1-34 (2014 ed.).

[403] Clifford M. Lytle, *The History of the Civil Rights Bill of 1964*, 51 J. NEGRO HIST. 275, 276-77 (1966); KEYSSAR, *supra* note 196, at 211.

[404] *See supra* note 227 and accompanying text.

[405] And Nicholas Stephanopoulos suggests the moment may already be arriving where the parties' self-interest changes position on voting restrictions. Nicholas Stephanopoulos, *Election Law for the New Electorate* (draft of June 21, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4871529.

[406] Ronald Brownstein, *How Working-Class White Voters Became the GOP's Foundation*, THE ATLANTIC (Mar. 24, 2023); *see also* HASEN, *supra* note 1, at 141. The appeal to working class voters is generally true of right-leaning populist parties around the world. Richard H. Pildes, *Political Fragmentation in the Democracies of the West*, 37 BYU J. PUB. L. 209, 240-42 (2023). And in the U.S., working class black men and Latinos also may be gravitating more toward the Republican Party. Sareen Habeshian, *Trump Widely Unpopular Among Black and Latino Voters, Poll Analysis Shows*, AXIOS (July 11, 2024) ("there are a small but growing number of working class Black and Latino men who are attracted to Trump's populist economic message and trust Trump over Biden on immigration").

[407] Dan Hopkins, *The Less You Vote, the More You Back Trump*, ABC News (Apr. 10, 2024).

[408] Stephanopoulos, *supra* note 405, at 17.

debated pulling back from those efforts in 2024 for this reason.[409] Longer term, the partisan valence of a pro-voter approach to election law is far less certain than may appear today, and the approach should be applied consistently, regardless of which party ephemerally benefits from it.

In short the bias of a pro-voter approach is not toward any candidate or party. It is a bias toward full enfranchisement for eligible voters, continued free and fair elections, and equal representation for groups of voters, especially ensuring the protection of those who have faced historical discrimination.

With that key preliminary point out of the way, I turn to consider the key aspects of a pro-voter political program.

1. Reforms aimed at combatting extremism and stabilizing democracy. Given retrogression and the threat of democratic backsliding, the first item on the political agenda for a pro-voter approach to election law is combating extremism and stabilizing democracy. We have already seen some political movement in this regard to assure peaceful transitions of power, including ECRA reform, efforts to clarify certification rules so that rogue certifiers cannot interfere with the lawful allocation of presidential electors, and various efforts to protect election administrators, poll workers, and voters from harassment, threats of violence, and violence itself.[410] More of this work is necessary in part because it is hard to know what the next threats to peaceful transitions of power will look like. For example, it is appropriate to focus on assuring that members of the military accept the chain of command and follow the rule of law during periods of presidential transitions. It is also necessary to continue to insulate election administrators from political interference.[411]

Civics education for both children and adults must play a role. For many years, Americans took peaceful transitions of power for granted, and paid little attention to the proper functioning of American elections and the democratic process. Now, just a few years after an attempted overturning of the results of a presidential election, "January 6" increasingly is seen as yet another political issue.[412]

Further it is essential to build key coalitions among business, labor, political groups and others who may disagree on substantive policy question such as taxation, immigration, or abortion but who agree with the basic principle that votes should be fairly counted and that winners of fair elections have a lawful right to take office. The role of civil society also has been taken for granted, but it must be harnessed to protect democracy in the face of these new threats. Renewed corporate support for January 6 election deniers in Congress is a troublesome sign.

Beyond assuring peaceful transitions, those concerned with polarization and extremism have proposed a variety of election reforms, including political primary

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[409] Michael Scherer & Sabrina Rodriguez, *Democrats Spar Over Registration as Worries Over Young and Minority Voters Grow*, WASH. POST (Apr. 1, 2024).
[410] *See supra* notes 342-45 and accompanying text.
[411] SAMUEL ISSACHAROFF, DEMOCRACY UNMOORED: POPULISM AND THE CORRUPTION OF POPULAR SOVEREIGNTY 170-74 (2023).
[412] Anthony Salvanto, *CBS News Poll on Jan. 6 Attack 3 Years Later: Though Most Still Condemn, Republican Disapproval Continues to Wane*, CBS News (Jan. 6. 2024).

reform,[413] changes in campaign finance laws,[414] and allowing minor parties to engage in fusion.[415] One of the key problems here is that the political science evidence showing that these measures are effective to combat polarization is quite uncertain and the research is still in its nascent stages. For example, California's move to a "top two" primary has not appeared to have done much to produce more moderate candidates,[416] while Alaska's "top four" primary combined with ranked choice voting is widely credited as allowing Republican U.S. Senator Lisa Murkowski to make it onto the general election ballot and win election.[417] Perhaps because ranked choice voting as in Alaska may produce more moderate candidates, it has been opposed by more extreme forces on the right, who have made opposition to such voting a key part of their own political strategy.[418] But much more needs to be known before we can identify which electoral reform strategies, if any, can best stabilize democracy and combat extremism.[419]

2. Reforms aimed at expanding voting rights. The first set of reforms described above is the low hanging fruit, aimed at preventing further retrogression of fair elections and democracy in the United States. For the time being, this must be the first order of business. But in the longer term a second set of reforms aims to move beyond stagnation and retrogression towards political action supporting the other

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[413] *E.g.*, Nathan Atkinson, Edward B. Foley & Scott Ganz, *Beyond the Spoiler Effect: Can Ranked Choice Voting Solve the Problem of Political Polarization?,* ILL. L. REV. (forthcoming 2024); Richard H. Pildes, *Political Reform to Combat Extremism*, in THE NATION AT RISK, *supra* note 342, at 163.

[414] *See supra* notes 364-68 and accompanying text.

[415] Lee Drutman, *The Case for Fusion Voting and Multiparty Democracy in America*, New Am. Found. (Sept. 29, 2022) [https://perma.cc/339L-4BHJ]. It seems just as plausible that fusion could exacerbate extremism by causing major party candidates to move to the poles, where some minor political parties are, in order to attract votes from those party members.

[416] Eric McGhee & Boris Shor, *Has the Top-Two Primary Elected More Moderates?*, 15 PERSP. POL. 1053 (2017); *but see* Christian R. Grose, *Reducing Legislative Polarization: Top-Two and Open Primaries are Associated with More Moderate Legislators*, 20 J. POL. INST. & POL. ECON. 1 (2020) (finding more of a moderating effect).

[417] Becky Bohrer, *Murkowski Withstands Another Conservative GOP Challenger*, AP (Nov. 25, 2022); *see also* Richard H. Pildes, *Dunwoody Lecture: Combatting Extremism*, FLA. L. REV. (forthcoming 2025) (touting benefits of a top-four or top-five primary combined with instant runoff voting). See also Nathan Atkinson & Scott Ganz, *Robust Election Competition: Rethinking Electoral Systems to Encourage Representative Outcomes*, U. MD. L. REV. (forthcoming 2025), *draft available*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4728225 (finding problems with use of ranked choice voting as best means of electoral reform to promote robust political competition).

[418] Brendan Fischer, *Ranked-Choice Voting is MAGA's Latest Target*, DOCUMENTED (Feb. 29, 2004) [https://perma.cc/RRN9-P7JM].

[419] Anecdotally at least, the fear of being primaried seems to be driving some Republicans closer to extremist positions, as when many congressional Republicans voted to object to the electoral college votes of Pennsylvania in 2020 after the invasion of the Capitol. *See supra* note 328 and accompanying text.

key aspects of pro-voter election law: assuring that all eligible voters will easily be able to cast a ballot, that votes are equally weighted, and that political power is fairly distributed. There are three primary levers for this political action.

a. Congressional statutes and constitutional amendments. As we have seen, Congress has been a key protector and expander of voting rights throughout U.S. history from constitutional voting rights amendments to the Voting Rights Act.[420] Congress may have been able to pass voter protective legislation in 2021 if Senate leaders had been willing to make an exception to the filibuster for pro-voter legislation.[421] The opportunity may come along again, and if it does, Senators should take it. Professors Pozen and Fishkin make a strong case for using "antihardball tactics"—pushing procedural rules to their legal limits in order to put democracy-entrenching rules in place.[422]

More ambitiously, as I argue in detail elsewhere,[423] Congress should consider placing an affirmative right to vote amendment in the Constitution, drafted specifically with the idea that many courts are likely to be at least skeptical or even hostile to the expansion of voting rights. Compared to the passage of ordinary legislation, it is obviously much harder to get a constitutional amendment passed by a supermajority of Congress and a supermajority of state legislatures. But a constitutional amendment effort can bear fruit along the way by spurring state-based electoral reforms. The model here is that of the Nineteenth Amendment. Between the time in 1875 when the Supreme Court rejected the argument that the Fourteenth Amendment barred discrimination in voting on the basis of sex and the ratification of the Nineteenth Amendment in 1920, political organization in the states led over thirty states to bar gender discrimination in voting in their state constitutions.[424] The same momentum and state-based improvement can happen with a push for a constitutional amendment guaranteeing the right to vote.

And, if enacted, detailed constitutional rules are more protective of voters than federal statutes because of the civilizing force of hypocrisy:[425] under judicial norms, we expect judges to give reasons for their decisions and publicly criticize them for poor reasons. Detailed constitutional voting protections give judges less wiggle room than they have with the interpretation of voting rights statutes, making it more likely that judges interpret voting provisions in a pro-voter manner.

b. State voting rights and enforcement of state constitutional right to vote provisions. Some states have begun enforcing state voting rights acts, expanding

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[420] *See supra* notes 195-226 and accompanying text. On Congress's broad powers under the Constitution to expand voting rights see TOLSON, *supra* note 269; Nicholas Stephanopoulos, *The Sweep of Electoral Power*, 36 CONST. COMM. 1 (2021).
[421] Hulse, *supra* note 43.
[422] Joseph Fishkin and David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915 (2018); David E. Pozen, *Hardball and/as Anti-Hardball*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 949 (2019).
[423] HASEN, *supra* note 1.
[424] *Id*. at 15.
[425] Jon Elster, *Introduction* to DELIBERATIVE DEMOCRACY 12 (Jon Elster ed., 1998).

the protection of voters within those states.[426] The decentralized nature of elections and election administration is a challenge for universal protection of voting rights, but it also presents opportunities for iterative and smaller-scale change: Not every state will expand voting rights in a major way, but in every state there is room for at least incremental improvement.

Further, as noted above,[427] state constitutional right-to-vote provisions provide a strong pathway to protecting voting rights in some states. Polarization among the state judiciary means that voting rights proponents must expend energy on state supreme court races, and that voting issues will sometimes be major campaign issues. For example, a recent Wisconsin state supreme court race focused on the constitutionality of partisan gerrymandering under the state constitution (as well as abortion rights).[428] Ironically, the Supreme Court's recognition of First Amendment rights of judicial candidates to speak about contested legal and political issues[429]—supported by conservative Justices and opposed by liberal ones—has made it easier for state judicial candidates to signal to the public how they plan to vote in democracy-related cases.

c. Expanding voting rights through the initiative process. Not every state allows voters to protect and expand voting rights through initiative. But in those states where it is possible to do so, some initiatives have qualified and voters have taken advantage of the opportunity. One recent survey noted that over the last few years "citizen-initiated statu[t]es and constitutional amendments have led to the expansion of automatic voter registration, same day voter registration, independent redistricting commissions, the restoration of voting rights for those with felony convictions, and numerous other pro-voter reforms. Many of those reforms were implemented in politically competitive swing states, and ran well ahead of candidates for statewide office."[430] Among the most important such developments in recent years is Michigan voters adopting citizen commissions to redistrict in 2018[431] and Florida voters in the same year restoring voting rights for those with felony convictions who completed their sentences, an initiative that has been partially stymied by the Republican legislature and governor.[432] It is no wonder that some Republican officials have tried to curtail the initiative power.[433]

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[426] For an examination, see Ruth M. Greenwood & Nicholas O. Stephanopoulos, *Voting Rights Federalism*, 73 EMORY L. J. 299 (2023).
[427] *See supra* note 388 and accompanying text.
[428] Shawn Johnson, *Supreme Court Candidate Janet Protasiewicz Says She'd Recuse Herself in Cases Involving State Democratic Party*, WISCONSIN PUB. RADIO (Mar. 1, 2023).
[429] Republican Party of Minnesota v. White, 536 U.S. 765 (2002).
[430] Campbell Streator, *Ballot Initiatives and Pro-Voter Reform*, EVERY VOTE COUNTS (Nov. 7, 2023) [https://perma.cc/B7HX-GJR2].
[431] *Redistricting Proposal Passes in Michigan*, AP (Nov. 6, 2018).
[432] I chronicle the passage of the amendment, and the Republican legislature and governor's successful efforts to stymie its enforcement in HASEN, *supra* note 1, at 70-76.
[433] *See supra* notes 352-54 and accompanying text.

3. Reinvigorating civil society, increasing participation, and building a more inclusive multi-racial democracy. At its most ambitious, the transformation of U.S. election law will require reinvigorating civil society, increasing reasoned participation, and building a more inclusive multiracial democracy. But the road has not been and will not be easy. Professor Bertrall Ross, canvassing the long history of discrimination in voting, along with recent backsliding, notes with unease and caution that "African Americans and other impacted minorities will have to continue to advocate and lobby for themselves and wait for the right partisan alignment to prioritize their political rights for the United States to take the next steps toward a truly multiracial democracy."[434] Forces that undermine majority rule, most importantly equal representation for states rather than voters in the United States Senate, frequently frustrates majority rule.[435]

Increasing the concern is how technological change drives the atomization of politics and the insulation of voters from serendipitous exposure to news that should help them evaluate political choices.[436] Further, as Rick Pildes has argued, the fragmentation of political power driven in part by new technologies has made government less capable of delivering effective solutions, which exacerbates public dissatisfaction with democracy itself.[437] A vicious cycle of distrust ensues.

A key question is what comes next in terms of the building of durable associations capable of effective pro-voter concerted action. We have seen earlier transformations of political parties from mass-based parties that relied extensively on patronage to the "party in the electorate" in which voters encounter parties primarily as brand names for a basket of liberal or conservative policy agenda items.[438] The changing demographics of the United States coupled with shifting party alliances and disruptive technological change unfortunately have created opportunities for democratic backsliding. Those same shifts in social forces also create new opportunities for positive organizing and encouraging connections among like-minded voters, which, as I discuss below, should be an urgent concern for election law scholarship.

D. Theory

As with transformative politics, transformative scholarship must remain focused in part on the conditions for continued free and fair elections and peaceful

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[434] Bertrall Ross, *Race and Election Law: Interest-Convergence, Minority Voting Rights, and America's Progress Toward a Multiracial Democracy*, OXFORD HANDBOOK OF RACE AND LAW IN THE UNITED STATES (Devon Carbado et al., eds., 2023); *see also* Sellers, *supra* note 268; Joshua S. Sellers, *Election Law and White Identity Politics*, 87 FORDHAM L. REV. 1515 (2019).

[435] *See* HASEN, *supra* note 1, at 85-90.

[436] HASEN, *supra* note 45, at 114.

[437] E.g., Richard H. Pildes, *Democracy in the Age of Fragmentation*, 110 CAL. L. REV. 2051 (2022).

[438] Richard L. Hasen, *An Enriched Economic Model of Political Patronage and Campaign Contributions: Reformulating Supreme Court Jurisprudence,* 14 CARDOZO L. REV. 1311 (1993); CIARA TORRES-SPELLISCY, POLITICAL BRANDS (2019).

transitions of power. Some of this work is doctrinal or historical, considering for example, the interaction between provisions in the Constitution governing presidential selection and congressional statutes such as the ECRA.[439] Some of this work is empirical, such as the best forms of election reform that can bolster non-extreme candidates who are more likely to support the rule of law.[440] And some of this work is comparative, examining risks of democratic backsliding in other countries and how some have pulled back from the brink;[441] the risk of fragmented politics;[442] the rise of neo-authoritarian populism and polarization;[443] and unique features of the U.S. political system that present special vulnerabilities or defenses to such backsliding.

Pro-voter scholarship also can be more ambitious. On the doctrinal and historical side, such scholarship considers, for example, the vast reservoir of congressional power to protect voting rights under the Elections Clause and the power to enforce the Fourteenth and Fifteenth Amendments;[444] empirically it examines the scope of state voting rights acts and other tools of democratic experimentation,[445] along other enfranchisement tools for eligible such as online and automatic voter registration.[446] And comparatively, it examines things like the treatment of indigenous minority groups and methods of fair representation,[447] especially in systems of federalized government. A key question is how to harness the forces of federalism, such as through new reliance on state voting rights protections, in ways that assure that voters in as many states as possible can have maximum protections for the franchise and fair representation.

On a deeper level, pro-voter scholarship must consider how to rebuild social bonds and associations to enable voters to make competent decisions, to organize for fair and equal representation, and to vote, as Tabatha Abu El-Haj and Didi Kuo have argued.[448] It must take seriously the impediments to such organization, given profound demographic and technological change and given the fundamental mismatch between our system of government that frustrates effective majority rule and our polarized politics. The problem is not one of a simple lack of participation, but what it means to have uneven participation and influence in an atomized

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[439] *E.g.*, Muller, *supra* note 54.
[440] See, e.g.,, the sources cited *supra* notes 413-19.
[441] LEVITSKY & ZIBLATT, *supra* note 369; LARRY DIAMOND, ILL WINDS (2019); STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE (2018).
[442] Pildes, *supra* note 437.
[443] ISSACHAROFF, *supra* note 411.
[444] TOLSON, *supra* note 269; Crum, *supra* note 269.
[445] Greenwood & Stephanopoulos, *supra* note 426; Bulman-Pozen & Seifter, *supra* note 108.
[446] Holly Ann Garnett, *Registration Innovation: The Impact of Online and Automatic Voter Registration in the United States*, 21 ELECTION L.J. 34 (2022).
[447] *See, e.g.*, Fiona Barker & Hilde Coffé, *Representing Diversity in Mixed Electoral Systems: The Case of New Zealand*, 71 PARLIAMENTARY AFFAIRS 203 (2018).
[448] Tabatha Abu El-Haj & Didi Kuo, *Associational Party-Building: A Path to Rebuilding Democracy*, 122 COLUM. L. REV. F. 127 (2022).

society where new technologies warp voter realities, creating spaces for conspiracy theories to flourish and insufficient incentives or pathways for voters to recognize their self-interest and band together to further those interests and protect their rights.

I am less sanguine than Abu El-Haj and Kuo that political parties are capable of being transformed again to serve a major democratizing role. The weakness of parties as democratizing forces highlights the dilemma about the path moving forward, especially given calls for a political program dependent upon Congress and state legislatures, action that usually occurs thorough party organizing. If not through parties, how will this organizing work? It may no longer be true that democracy is unthinkable save in terms of the parties, but it still appears unthinkable for there to be vibrant democracy serving voters' interests without new forms of organized and rational collective action.

IV. CONCLUSION

The mess of American election law, and of the current precarious state of democracy in the United States, is not attributable to a single cause. Political polarization that followed the realignment of the parties after the civil rights movement proved to be a poor match to the separation of powers governance structure in the United States Constitution.[449] A closely divided electorate and a decentralized and partially partisan-run electoral system led to localized changes in the rules for elections that spurred the voting wars. The lack of an affirmative right to vote in the Constitution and the difficulty of amendment created space for disparate judicial approaches to voting rights, with the current conservative approach hostile to voters' rights. A revolution in political communication removed key intermediaries that helped voters obtain accurate information about the state of the world and how to vote consistent with their preferences. This communications shift has made democratic governance less effective and heightened polarization. The result first was stagnation of voting rights, and now retrogression to the point that we must worry about whether the United States can fairly count votes and assure that electoral winners can take office.

But all is not lost amid the funk. A pro-voter approach to election law doctrine, politics, and theory is possible. More than possible, the approach is necessary if the United States is going to have a fair, vibrant, and multiracial democracy going forward. The future of American democracy depends first and foremost on a commitment to free and fair elections and peaceful transitions of power. But we owe it to future generations to aim higher, much higher, and place voters at the center of the ongoing story.

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[449] Richard L. Hasen, *Political Dysfunction and Constitutional Change,* 61 DRAKE L. REV. 989 (2013).