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The Stagnation, Retrogression, and Potential Pro-Voter Transformation of U.S. Election Law

ABSTRACT. This Feature describes the stagnation and retrogression of election-law doctrine, politics, and theory, explains why these trends have emerged, and explores how to transform election law in a pro-voter direction.

It begins by detailing election law's stagnation. After a short period of strengthening voting rights, 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. Courts have deprived other actors, including Congress, election administrators, and state courts, of the ability to protect voters' rights more fully. Politically, pro-voter election reform has stalled 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 also has stagnated, failing to generate meaningful theoretical advances about the field's key purposes.

The Feature then considers the more recent 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. In the aftermath of the 2020 election, liberal and conservative judges rejected illegitimate attempts to overturn Joe Biden's presidential-election victory. Yet courts' ability to thwart attempted election subversion remains a question mark in light of the Supreme Court's recent decisions in *Trump v. Anderson* and *Trump v. United States*. Congress came together at the end of 2022 to pass the Electoral Count Reform Act to deter future attempts to manipulate Electoral College rules in order to subvert election results, but future bipartisan action to prevent retrogression seems less likely. Further, because of the collapse of local journalism and the rise of cheap speech, voters are less able to obtain reliable information to make voting decisions consistent with their interests and preferences. Meanwhile, parties have become potential paths for subversion. Party-centered election-law theory, and the First Amendment marketplace-of-ideas thesis, have yet to incorporate these emerging challenges.

Finally, the Feature considers the potential to transform election-law doctrine, politics, and theory to favor voters. Election law alone is not up to the task of saving American democracy. But it can help counter stagnation and thwart retrogression, beginning by assuring continued free and fair elections and peaceful transitions of power. More broadly, a pro-voter approach to election law grounded in political equality engages legal doctrine, political action, and election-law scholarship to further five principles: all eligible voters should have the ability to register and vote easily in fair, periodic elections; each voter's vote should carry equal weight; free speech, a free press, and free expression should assure voters reliable access to accurate information to enhance their capacity for reasoned voting; the winners of fair elections should be recognized and able to take office

peacefully; and political power should be fairly distributed across groups in society, with particular protection for those groups who have faced historical discrimination in voting and representation.

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INTRODUCTION

American election law is in something of a funk.

As a matter of judicial interpretation of federal election statutes and the U.S. Constitution, election law is retreating from the protection of voters. The U.S. 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 (VRA).[4] When the Court recently issued a 5-4 opinion in *Allen v. Milligan* merely applying the existing interpretation of Section 2 of the VRA to redistricting,[5] voting-rights advocates correctly described it as a major victory,[6] even though a concurring Justice invited new constitutional litigation against the Act.[7]

Partisan fights about voting rules, federalism, the decentralization of election administration, and the Supreme Court's shadow-docket practice[8] can combine to harm voters. Consider the Kafkaesque litigation in Arizona just weeks before the start of early voting in the 2024 presidential election.[9] Eligible Arizonans who attempted to register to vote using a federal form without providing

1. *See infra* Section I.A.1; Richard L. Hasen, A Real Right to Vote: How a Constitutional Amendment Can Safeguard American Democracy 21, 24-25 (2024).
2. Shelby County v. Holder, 570 U.S. 529, 557 (2013) (striking down the coverage formula of the Voting Rights Act (VRA) (in Section 4(b)), rendering preclearance (in Section 5) mostly inoperable).
3. *See* Brnovich v. Democratic Nat'l Comm., 594 U.S. 647, 673-74 (2021) (rejecting a model focused on disparate impact for Section 2 vote-denial cases); *infra* notes 58-62 and accompanying text.
4. Voting Rights Act of 1965, Pub. L. No. 18-110, 79 Stat. 437 (codified as amended in scattered sections of 42 and 52 U.S.C.).
5. 599 U.S. 1, 17-23 (2023) (applying the *Gingles* test to uphold a lower court's finding of a Section 2 violation); *see infra* notes 63-68 and accompanying text.
6. Ian Millhiser, *Surprise! The Supreme Court Just Handed Down a Significant Victory for Voting Rights*, Vox (June 8, 2023, 2:10 PM EDT), https://www.vox.com/scotus/2023/6/8/23753932/supreme-court-john-roberts-milligan-allen-voting-rights-act-alabama-racial-gerrymandering [https://perma.cc/HG2G-J6TU].
7. *See Milligan*, 599 U.S. at 45 (Kavanaugh, J., concurring) (noting that Alabama did not raise, and so the Court could not consider, the argument that "the authority to conduct race-based redistricting cannot extend indefinitely into the future").
8. *See generally* Stephen Vladeck, The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic (2023) (observing a precipitous rise in the Supreme Court's use of its "shadow," or non-merits, docket).
9. The background of this case is long and complex. It is briefly described in Hansi Lo Wang, *Supreme Court Grants GOP Bid to Require Citizenship Proof for Some Arizona Voters*, NPR (Aug. 23, 2024, 9:57 AM ET), https://www.npr.org/2024/08/22/nx-s1-5084146/voter-registration-arizona-supreme-court-citizenship [https://perma.cc/5PDK-ML2V].

documentary proof of citizenship were allowed to vote only for federal, but not state, offices.[10] Thanks to an emergency order of the Supreme Court,[11] those who used a state-prescribed form would not be registered to vote at all, despite an earlier court order that had allowed those voters to be registered in federal races.[12] Only those who had provided Arizona with proof of citizenship while registering would be eligible to vote for all offices. This restriction effectively disenfranchised thousands of voters while deterring only a minimal amount of potential fraud.[13] The Supreme Court sent a clear message: if you file the wrong form or lack some paperwork, then a state can take away some or all of your right to vote.

The Court's emergency order appeared to contradict its own so-called *Purcell* Principle, which opposes federal court orders that change voting rules just before an election—suggesting the "Principle" applies only in ways that hurt voters.[14] Three conservative Justices would have gone even further and allowed Arizona retroactively to deregister over forty thousand people who had used the state form without providing proof of citizenship.[15]

Rulings like this are not outliers. The Supreme Court's election jurisprudence has stagnated, with a bias favoring states over voters. Its *Anderson-Burdick* framework[16]—for evaluating election laws that regulate ballot access, voter

10. *Id.*

11. Republican Nat'l Comm. v. Mi Familia Vota, 145 S. Ct. 108, 108 (2024) (mem.) (granting in part and denying in part an application for a stay).

12. Wang, *supra* note 9.

13. *Id.* On the very small amount of noncitizen voting fraud, see RICHARD L. HASEN, THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN 43-73 (2012).

14. *See infra* notes 119-126 and accompanying text.

15. *Mi Familia Vota*, 145 S. Ct. at 109 (noting that Justices Alito, Gorsuch, and Thomas would have granted the Republican National Committee's stay application in full); Wang, *supra* note 9 (noting that "42,301 voters in the state were registered for only federal elections, as of July 1," and that it was unclear "[w]hether those registered voters are allowed to vote in future presidential elections after this fall's race without showing proof of citizenship"); *see* Steve Vladeck, *96. Bad Supreme Court Math*, ONE FIRST (Aug. 26, 2024), https://www.stevevladeck.com/p/96-bad-supreme-court-math [https://perma.cc/S3E9-T3XG] ("[I]t's rather remarkable that Thomas, Alito, and Gorsuch would've put all three laws back into effect—a move that, had it applied to recent registrations, might have prevented a large number of Arizonans (especially, as I understand it, college students) who are legally entitled to vote (and duly registered) from casting mail-in and/or presidential ballots in the upcoming election." (emphasis omitted)).

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

registration, and election administration—has emerged as an asymmetric, state-protective rule.[17] The Court has prevented federal courts from policing partisan gerrymanders.[18] It has also claimed the power to second-guess state-court decisions to rein in congressional gerrymandering under state constitutions and other state voting rules applicable in federal elections.[19] Its campaign-finance jurisprudence has made federal limits on money in politics both toothless and a trap for unwary voters.[20]

The Supreme Court usually divides ideologically in its election cases, but the split is now frequently also along party lines. Republican-appointed Justices have been far less protective of voting rights than Democratic-appointed ones.[21] There is reason to worry that today's conservative and originalist majority, skeptical of earlier readings of the Equal Protection Clause of the Fourteenth Amendment, could weaken or overturn key voter-protective precedents of the liberal Warren Court.[22]

Political action protecting voters also has stagnated. In the 1960s and 1970s, Congress broadly expanded voting rights through a series of constitutional amendments and statutes, most importantly the 1965 VRA. Today's hyperpolarized Congress usually divides along party lines on election matters and rarely passes consequential legislation.[23] While voting is generally seamless for many Americans, the ease of access to the ballot varies for citizens across different states. 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 equal representation in the key national legislative body, leading to overrepresentation of sparsely populated states.[24]

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in original) (citations omitted) (first quoting Burdick v. Takushi, 504 U.S. 428, 434 (1992); and then quoting Anderson v. Celebrezze, 460 U.S. 780, 789 (1983))).

17. *See infra* notes 91-104 and accompanying text.

18. *See* Rucho v. Common Cause, 588 U.S. 684, 718 (2019).

19. *See* Moore v. Harper, 600 U.S. 1, 34-36 (2023) (articulating an anti-"arrogat[ion]" principle); *see also infra* notes 111-118 and accompanying text (further discussing *Moore*'s anti-arrogation principle).

20. *American Confidence in Elections: Protecting Political Speech: Hearing Before the H. Comm. on H. Admin.*, 118th Cong. 65 (2023) (statement of Bradley A. Smith, Chairman and Founder, Institute for Free Speech) (discussing the burdens of campaign-finance laws on ordinary Americans); *see infra* notes 131-146 and accompanying text.

21. S*ee infra* notes 147-158 and accompanying text.

22. HASEN, *supra* note 1, at 32-33; *see also infra* notes 88-89 and accompanying text (discussing the possibility of the Court overturning rulings by the Warren Court that protect voting rights in the wake of *Evenwel v. Abbott*).

23. *See infra* notes 169-197 and accompanying text.

24. HASEN, *supra* note 1, at 85-90.

The theoretical debates in election law have stagnated as well. The field started with a focus on representation reinforcement and professed fidelity to the famous footnote four of *Carolene Products*.[25] This approach tasked courts with policing the political process because legislative self-interest would leave the system stuck.[26] From this insight emerged the rights/structure debate of the early 2000s, which considered whether the role of courts in election cases is to assure adequate political competition or to protect individual and group rights.[27] That debate appears to have been resolved, more or less, by the work of Professor Guy-Uriel Charles, who showed there was less a divide than a question of emphasis.[28] The Supreme Court has essentially rejected the call to interpret election laws with a focus on political competition.[29] Today, there is scant academic debate over the broad purposes of election law.

Recently, bipartisan action on U.S. democracy, both in Congress and in the courts, has aimed to assure the minimum conditions for a functioning democracy, showing how far the bar has been lowered. Since 2020, the work to limit this newly emerging retrogression has focused on thwarting election subversion.[30] In the aftermath of the 2020 election, courts on a bipartisan basis rejected attempts to overturn Joe Biden's victory over Donald J. Trump on spurious grounds of fraud or election "irregularities."[31] The Supreme Court also rejected the most extreme version of the "independent state legislature" theory, which

25. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

26. John Hart Ely fleshed out the "representation reinforcement" theory of judicial review. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 87-104, 181-83 (1980).

27. *See, e.g.*, Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 648 (1998). For a good overview of the debate, see Heather K. Gerken, *Election Law and Constitutional Law*, *in* THE OXFORD HANDBOOK OF AMERICAN ELECTION LAW 25, 26-29, 34-35 (Eugene D. Mazo ed., 2024).

28. Guy-Uriel Charles, *Judging the Law of Politics*, 103 MICH. L. REV. 1099, 1102, 1131 (2005) (reviewing RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE* (2003)).

29. *See infra* notes 225-228 and accompanying text (discussing N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 205-07 (2008), and Rucho v. Common Cause, 588 U.S. 684, 718 (2019)).

30. I use the term "retrogression" here as a general term to refer to the rolling back of past advances. *See infra* Section II.A. I do not mean it in the technical way that it was used in relation to preclearance under Section 5 of the VRA. *See* Beer v. United States, 425 U.S. 130, 141 (1976) (setting forth the nonretrogression test in the VRA context).

31. *See* Texas v. Pennsylvania, 141 S. Ct. 1230, 1230 (2020) (mem.); William Cummings, Joey Garrison & Jim Sergent, *By the Numbers: President Donald Trump's Failed Efforts to Overturn the Election*, USA TODAY (Jan. 6, 2021, 10:50 AM EST), https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001 [https://perma.cc/P8HW-98UW].

might have allowed state legislatures to ignore the voters when casting each state's Electoral College votes.[32]

Yet the courts' ability to quash attempted election subversion remains an open question. In *Trump v. Anderson*, the Supreme Court barred states from disqualifying Trump or other federal candidates under Section 3 of the Fourteenth Amendment for participation in or support of an insurrection.[33] In *Trump v. United States*,[34] the immunity case, the Court made it much harder for the government to prosecute President Trump for his role in seeking to overturn the results of the 2020 election. The Court seemed far less concerned about the current risks to U.S. democracy than the hypothetical risk that a future President could be deterred from acting boldly out of fear of a bogus political prosecution after leaving office.

In 2022, Congress passed the Electoral Count Reform Act (ECRA)[35] to deter future attempts to subvert election results by manipulating Electoral College rules.[36] The ECRA's passage was possible only because Democrats controlled the House of Representatives and enough moderate Republicans remained in the Senate.[37] With unified Republican control of Congress and Trump having returned to the White House in 2025, further bipartisan legislation to counter retrogression appears unlikely.

During this new period of retrogression, voters face fresh challenges. It has become more difficult to obtain reliable information to make voting decisions consistent with one's interests and preferences. The collapse of local journalism and the rise of cheap speech spread over social media and other channels have upset the market in political information, threatening voter competence.[38] Meanwhile, some voters are losing the power to govern themselves through

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32. Moore v. Harper, 600 U.S. 1, 22 (2023); *see also infra* notes 111-118 and accompanying text (discussing the case).

33. 601 U.S. 100, 110 (2024) (per curiam); *see also infra* notes 253-265 and accompanying text (discussing *Trump v. Anderson*).

34. 603 U.S. 593 (2024); *see also infra* notes 267-282 and accompanying text (discussing *Trump v. United States*).

35. Electoral Count Reform and Presidential Transition Improvement Act of 2022, Pub. L. No. 117-328, 136 Stat. 5233 (codified in scattered sections of 3 U.S.C.).

36. For an analysis of various election-subversion risks and possible solutions, 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).

37. Carl Hulse, *How a Bipartisan Senate Group Addressed a Flaw Exposed by January 6*, N.Y. Times (Dec. 22, 2022), https://www.nytimes.com/2022/12/22/us/politics/electoral-count-act-jan-6.html [https://perma.cc/L3K8-4VPA]; *see also infra* notes 326-330 and accompanying text (recounting the passage of the Electoral Count Reform Act).

38. Richard L. Hasen, Cheap Speech: How Disinformation Poisons Our Politics—And How to Cure It 20-22 (2022).

initiatives, as some Republican legislatures tighten rules for qualifying or passing voter initiatives and take steps to counteract the effects of some that have passed.[39]

Election-law scholarship is still catching up to the changing American political and informational 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.[40] But President Trump's effective takeover of the Republican Party illustrates the difficulty of using party-centric reforms, such as proposals to channel public campaign financing through the parties, to combat extremism and threats to democracy.[41] These days, parties can become the pathways for democratic backsliding rather than bulwarks against it. This period of retrogression also coincides with significant technological change that has upset the dominant marketplace-of-ideas theory of the First Amendment, which rests on the premise that truth will eventually prevail over falsehood through public debate.[42] The collapse of this paradigm has yet to penetrate fully First Amendment election-law scholarship.

Election law alone is not up to the task of saving American democracy. But it can help counter stagnation and thwart retrogression. A transformational theory of election law must begin by recognizing threats to peaceful transitions of power 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 frustrates voters' ability to distinguish true and false statements, sounds, and images.

Transformed election law, however, must go beyond the focus on retrogression to be more ambitiously and unambiguously *pro-voter*. This pro-voter approach is grounded in political equality as reflected in democratic theory and international human-rights norms. It engages legal doctrine, political action, and election-law scholarship to further five principles: (1) all eligible voters should have the ability to register and vote easily in fair, periodic elections; (2) each voter's vote should carry equal weight; (3) free speech, a free press, and free expression should assure voters reliable access to accurate information to enhance their capacity for reasoned voting; (4) the winners of fair elections should

39. *See infra* notes 347-349 and accompanying text.

40. *See infra* notes 352-362 and accompanying text.

41. *See infra* notes 363-366 and accompanying text.

42. *See* HASEN, *supra* note 38, at 22-23; *see also infra* notes 367-384 and accompanying text (analyzing the shortcomings of the marketplace-of-ideas theory in our contemporary political and technological landscape).

be recognized and able to take office peacefully; and (5) political power should be fairly distributed across groups in society, with particular protection for those groups who have faced historical discrimination in voting and representation.[43] These principles might seem self-evident and this focus unnecessary, given the ease of voting for many Americans. But that view ignores the uneven nature of voting rights across states, the risk that courts will pull back further on protecting voting rights for all Americans, and new threats of retrogression.

Pro-voter election-law theory must build upon scholarship not only to reverse democratic backsliding, but also to chart a path toward a fairer, multiracial democracy. It is as much about political change as legal change. It must harness the power of federalism to help voters while recognizing the key role of federal courts in assuring fair vote counts. It must design the best ways to promote equal voting rights and deal with antimajoritarian features of the American political system at a time of prolonged hyperpolarization and dramatic technological change. It must consider whether parties or other new forms of political organization can effectively facilitate collective action, promote democratic self-government,[44] and guard against extremism in this new era.

Part I describes election law's stagnation. Part II considers retrogression. Part III explores the potential transformation of election-law doctrine, politics, and theory to the pro-voter approach.

I. STAGNATION

This Part sketches stagnation in election-law doctrine, politics, and theory over past decades. By *stagnation*, I mean the end of major forward progress on protecting eligible voters' opportunity to register, to vote, and to have votes counted equally in a system that assures fair representation. Across the breadth of election law, earlier progress to favor voters has stalled or even begun to reverse.

43. *See infra* notes 385-418 and accompanying text.

44. "[D]emocratic self-government" includes "the process by which Americans elect officials to federal, state, and local government offices." Bluman v. FEC, 800 F. Supp. 2d 281, 288 (D.D.C. 2011) (three-judge court) (upholding under strict scrutiny against a First Amendment challenge a federal law barring campaign contributions and expenditures by most foreign nationals, governments, and entities); *see also* Bernal v. Fainter, 467 U.S. 216, 220 (1984) (describing the "political function" exception for analyzing laws that discriminate based on alienage).

A. Doctrine

1. Voting Rights

Outside the short tenure of the Warren Court in the 1960s, the Supreme Court has been a laggard, not a leader, on voting rights.[45] Despite the passage of the Fifteenth Amendment to the U.S. Constitution—in the aftermath of the Civil War—to bar discrimination in voting based on race,[46] African American voters, especially in the South, faced extensive barriers to registration and often-outright disenfranchisement.[47] In the early twentieth century, the Court notoriously provided these voters with no protection.[48] The Supreme Court also read the Constitution to permit the disenfranchisement of women.[49] It was only with the passage of the Nineteenth Amendment in 1920, barring gender discrimination in voting,[50] and Congress's passage of the 1965 VRA, that broad voter registration and voting became possible throughout the United States.[51]

The Court began with strong support for Congress's power to protect voting rights under the VRA. A year after the VRA's passage, the Court rejected South Carolina's attack on a provision in Section 5 of the Act that required jurisdictions

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45. HASEN, *supra* note 1, at 19-40.

46. U.S. CONST. amend. XV.

47. On the history of the passage of the VRA, see generally GARY MAY, BENDING TOWARD JUSTICE: THE VOTING RIGHTS ACT AND THE TRANSFORMATION OF AMERICAN DEMOCRACY (2013). On the brief history of enfranchisement of African Americans in the period right after the Civil War before the rise of Jim Crow, see generally J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910 (1974).

48. *See* Giles v. Harris, 189 U.S. 475, 488 (1903). For a critique of *Giles*, see Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295, 305-07, 317-19 (2000). There were some cases between *Giles* and the 1960s in which the Court occasionally did better at protecting African American voting rights, as in the cases concerning all-white primaries. *See, e.g.*, Smith v. Allwright, 321 U.S. 649, 661-66 (1944); Terry v. Adams, 345 U.S. 461, 469-70 (1953).

49. Minor v. Happersett, 88 U.S. (21 Wall.) 162, 170-71, 177 (1875); *see also* Richard L. Hasen & Leah M. Litman, *Thin and Thick Conceptions of the Nineteenth Amendment Right to Vote and Congress's Power to Enforce It*, 108 GEO. L.J. (19TH AMEND. EDITION) 27, 32 (2020) (noting that even after the passage of the Nineteenth Amendment, the Supreme Court "allowed for de jure gender discrimination in voting rules").

50. U.S. CONST. amend. XIX.

51. *See* Chandler Davidson, *The Voting Rights Act: A Brief History*, *in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 7, 20-21 (Bernard Grofman & Chandler Davidson eds., 1992). I focus here on discrimination against African Americans. I have discussed discrimination in voting rights against women, Latinos, Native Americans, students, and others in previous work. *See* HASEN, *supra* note 1, at 1-4, 45-50, 64, 92-101.

with a history of racial discrimination in voting to get federal approval, or "preclearance," before making changes to voting rules that could hinder minority voters.[52] It also upheld the VRA's ban on literacy tests[53] and read the preclearance provisions broadly to require federal review of many voting practices.[54] In 1982, Congress amended Section 2 of the VRA to provide additional opportunities for minority voters to participate in the political process and to elect representatives of their choice.[55] The Court then created a workable, if complex, framework in *Thornburg v. Gingles* to determine when minority voters are entitled to districts that give them a fair chance to elect their preferred representatives.[56] This ruling greatly increased minority representation in legislative bodies throughout the United States.[57]

In the decades since *Gingles*, however, the Court's interpretations of the VRA have led to numerous setbacks in voter protection.[58] In the 2021 *Brnovich* case, for example, the Court—for the first time—interpreted Section 2 in the context

52. South Carolina v. Katzenbach, 383 U.S. 301, 315-16, 334-37 (1966).

53. Oregon v. Mitchell, 400 U.S. 112, 118 (1970).

54. *See* Allen v. State Bd. of Elections, 393 U.S. 544, 565-66 (1969).

55. *See* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 5, 96 Stat. 131, 134-35 (codified as amended at 42 U.S.C. § 1973aa-6).

56. 478 U.S. 30, 47-51 (1986). For an exploration of *Gingles* and its aftermath, see Daniel H. Lowenstein, Richard L. Hasen, Daniel P. Tokaji & Nicholas O. Stephanopoulos, Election Law: Cases and Materials 291-349, 383-89 (7th ed. 2022).

57. *See* Nicholas O. Stephanopoulos, *Race, Place, and Power*, 68 Stan. L. Rev. 1323, 1330-31 (2016) (finding that *Gingles* led to a significant increase in representation for Black, but not Hispanic, populations). *See generally id.* (measuring Section 2's success in assuring minority representation).

58. Among other things, the Court refused to read Section 2 as extending to fair representation of minority interests within legislative bodies. Holder v. Hall, 512 U.S. 874, 881 (1994). 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. Abbott v. Perez, 585 U.S. 579, 603-04 (2018). The Court recently extended this presumption to racial-gerrymandering claims. Alexander v. S.C. State Conf. of the NAACP, 602 U.S. 1, 9-10 (2024); *see also* Richard L. Hasen, *The Supreme Court's Pro-Partisanship Turn*, 109 Geo. L.J. Online 50, 59-65 (2020) (describing the expansion of the Court's presumption of good faith to favor the state). The Court also 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 of their choice. Bartlett v. Strickland, 556 U.S. 1, 14-15 (2009). The Court's racial-gerrymandering doctrine also made it harder for states to create minority-opportunity districts. *See* Richard L. Hasen, *Racial Gerrymandering's Questionable Revival*, 67 Ala. L. Rev. 365, 365 (2015) [hereinafter Hasen, *Racial Gerrymandering*].

of laws that make it harder for people to register and vote[59] (sometimes referred to as "new vote denial" cases[60]). It adopted an atextual, ahistorical, state-friendly, and voter-hostile reading of Section 2 that eviscerated the VRA's ability to mitigate new vote denial.[61] There apparently has not been a single successful Section 2 vote-denial case in the lower courts since *Brnovich*.[62]

The Supreme Court recently reaffirmed the *Gingles* framework in *Allen v. Milligan*, holding that 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.[63] Voting-rights activists breathed a sigh of relief because the Court did not replace *Gingles* with a more state-protective test as the Court did in *Brnovich* for new-vote-denial claims.[64] Still, four of the Court's conservative Justices would have watered down the Act.[65] Some indicated they would have held that the VRA was unconstitutional as applied[66] or that Section 2 does

59. Brnovich v. Democratic Nat'l Comm., 594 U.S. 647, 653-54 (2021) ("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.").

60. Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. Rev. 689, 691-92 (2006).

61. *See 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, 4-6 (2021) (statement of Richard Hasen, Chancellor's Professor of Law and Political Science, University of California Irvine School of Law) (criticizing the ruling and its methodology).

62. One Section 2 vote-denial claim against three Washington state counties alleging higher levels of signature-match denials for Latino voters' mail-in ballots settled before trial. Order on Voluntary Dismissal with Prejudice of Benton and Chelan County Defendants at 1-2, Reyes v. Chilton, No. 21-cv-05075 (E.D. Wash. Oct. 13, 2023), ECF No. 195; Order on Agreed Stipulation of Dismissal of Yamika County Defendants at 1-2, *Reyes*, No. 21-cv-05075 (E.D. Wash. Oct. 13, 2023), ECF No. 200; *see also* Diana Dombrowski, Alex Ebert & Kimberly Robinson, *Voting Rights Claims Plunge in Wake of Supreme Court Decision*, Bloomberg L. (Feb. 12, 2025), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/business-and-practice/BNA%2000000194-8fa2-d938-a1fe-affae6e70001 [https://perma.cc/3ZFM-E594] (analyzing 579 federal voting-rights complaints and finding that Section 2 was sixty percent less likely to be cited after *Brnovich*). 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, 264-65 (5th Cir. 2016) (en banc).

63. 599 U.S. 1, 19 (2023).

64. *See, e.g.*, Millhiser, *supra* note 6.

65. *See Allen*, 599 U.S. at 50-78 (Thomas, J., dissenting). This part of Justice Thomas's dissenting opinion was joined by Justices Barrett and Gorsuch, and in part by Justice Alito.

66. *Id.* at 79-91. On this part, Justice Thomas was joined by Justices Barrett and Gorsuch. In his own dissent, Justice Alito also argued that "[t]he VRA's demand that States not unintentionally 'dilute' the votes of particular groups must be reconciled with the Constitution's demand

not cover redistricting.[67] One Justice who joined the majority invited new litigation over whether Section 2 is still constitutional.[68]

These challenges to Section 2 followed *Shelby County v. Holder*, in which the Supreme Court reversed course on the constitutionality of the VRA's preclearance provisions.[69] The Court noted that Congress relied on old data to identify jurisdictions for preclearance.[70] The use of old data rendered preclearance unconstitutional as exceeding Congress's power over the states: the Court held that Congress could not subject any state to preclearance on the basis of older evidence of intentional racial discrimination in voting.[71]

Shelby County followed earlier cases narrowing the Department of Justice's power to withhold preclearance[72] and the emergence of a new constitutional racial-gerrymandering claim reversing some gains for minority voters. That new claim barred making race the predominant factor in drawing legislative districts absent compelling justification.[73] The result of recent rulings has been a rise in

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that States generally avoid intentional augmentation of the political power of any one racial group (and thus the diminution of the power of other groups)." *Id.* at 109 (Alito, J., dissenting).

67. Justice Thomas, joined only by Justice Gorsuch in this part of his dissent, made this point. *Id.* at 46-49 (Thomas, J., dissenting).

68. *Id.* at 45 (Kavanaugh, J., concurring in part and in the judgment) ("Justice Thomas notes . . . that even if Congress in 1982 could constitutionally authorize race-based redistricting under § 2 for some period of time, the authority to conduct race-based redistricting cannot extend 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*." (emphasis added) (citation omitted)). Two Justices have suggested that voters may not even have the right to bring suit under Section 2. Brnovich v. Democratic Nat'l Comm., 594 U.S. 647, 690 (2021) (Gorsuch, J., joined by Thomas, J., concurring); *see also Allen*, 599 U.S. at 90 n.22 (Thomas, J., dissenting) (noting that the majority did not "address whether § 2 contains a private right of action"). The Eighth Circuit has recently held that no private right of action exists. Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, 86 F.4th 1204, 1216 (8th Cir. 2023), *reh'g en banc denied*, 91 F.4th 967 (8th Cir. 2024). Applying the Eighth Circuit's reasoning nationally might eliminate over ninety-six percent of Section 2 redistricting cases, leaving only the smattering of cases brought by the U.S. Department of Justice. Will Craft & Sam Levine, *Obscure Legal Theory Could Weaken Voters' Protections from Racist Laws*, GUARDIAN (Mar. 15, 2024, 7:00 AM EDT), https://www.theguardian.com/us-news/2024/mar/15/arkansas-voting-rights-act-racial-bias [https://perma.cc/4WSP-AU9K] ("Since 1982, there have been 466 Section 2 cases. Only 18 were brought by the Department of Justice.").

69. 570 U.S. 529, 550-51, 556-57 (2013).

70. *Id.*

71. *Id.* at 557.

72. *See* Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 199-200 (2007) (discussing the effects of the Supreme Court's decision in Reno v. Bossier Parish Sch. Bd., 528 U.S. 320 (2000)).

73. *See, e.g.*, Shaw v. Reno, 509 U.S. 630, 658 (1993).

restrictive voting laws, especially in Republican states in the South,[74] and perhaps an increase in the turnout gap between white and minority voters in jurisdictions previously subject to preclearance.[75]

Supreme Court precedent from the 1960s advanced the idea that the Constitution generously protected voting rights.[76] The Warren Court began applying what we would today term "strict scrutiny" to laws restricting the franchise, at least among adult, citizen, resident nonfelons. It held that states could not restrict voting rights of members of the military,[77] people living on federal enclaves,[78] people who could not afford to pay a poll tax,[79] or, in school-board elections, people who are neither a parent of school-age children nor an owner or renter in the district.[80] The Court also required that congressional elections,[81] state elections,[82] and most local elections[83] be conducted under a one-person, one-vote principle of equipopulous districts. Most of these rulings relied upon a capacious, nonoriginalist reading of the Equal Protection Clause of the Fourteenth Amendment.[84]

Since these rulings, constitutional voting-rights claims have stagnated. The Court has rejected challenges to felon disenfranchisement,[85] except when there

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74. Jasleen Singh & Sara Carter, *States Have Added Nearly 100 Restrictive Voting Laws Since SCOTUS Gutted the Voting Rights Act 10 Years Ago*, BRENNAN CTR. FOR JUST. (June 23, 2023), https://www.brennancenter.org/our-work/analysis-opinion/states-have-added-nearly-100-restrictive-laws-scotus-gutted-voting-rights [https://perma.cc/ZH7T-EWBC].

75. Kevin Morris & Coryn Grange, *Growing Racial Disparities in Voter Turnout, 2008-2022*, BRENNAN CTR. FOR JUST. 3 (Mar. 2024), https://www.brennancenter.org/media/12347/download [https://perma.cc/6NSZ-AUG3]; Stephen B. Billings, Noah Braun, Daniel B. Jones & Ying Shi, *Disparate Racial Impacts of* Shelby County v. Holder *on Voter Turnout*, 230 J. PUB. ECON. art. no. 105047, at 1 (2024).

76. *See* HASEN, *supra* note 1, at 19-26.

77. Carrington v. Rash, 380 U.S. 89, 96 (1965).

78. Evans v. Cornman, 398 U.S. 419, 426 (1970).

79. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 666 (1966).

80. Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 632-33 (1969).

81. Wesberry v. Sanders, 376 U.S. 1, 17-18 (1964) (relying on Article I of the Constitution to require use of the one-person, one-vote rule in congressional elections).

82. Reynolds v. Sims, 377 U.S. 533, 568 (1964).

83. Avery v. Midland County, 390 U.S. 474, 476 (1968).

84. *See, e.g.*, Carrington v. Rash, 380 U.S. 89, 96 (1965); *id.* at 97 (Harlan, J., dissenting) ("In making this holding the Court totally ignores, as it did in last Term's reapportionment cases, all the history of the Fourteenth Amendment and the course of judicial decision which together plainly show that the Equal Protection Clause was not intended to touch state electoral matters." (citing *Reynolds*, 377 U.S. 533)).

85. Richardson v. Ramirez, 418 U.S. 24, 54 (1974).

is evidence of a racially discriminatory purpose.[86] It created an exception to the one-person, one-vote rule for local, special-purpose-district elections.[87] In *Evenwel v. Abbott*, two Justices expressed skepticism about the one-person, one-vote rule as a whole.[88] The originalist Justices who have joined the Supreme Court since *Evenwel* could join these skeptics if the Court chooses to reexamine the Warren Court rulings that broadly protected voting rights and did not rely on originalist theories. The likelihood of their reversal may depend on how the conservative majority balances the desire for change with its willingness to respect what it may view as errant, if well-established, precedent.[89]

2. Anderson-Burdick *Balancing for Minor Parties and Election Rules*

The Supreme Court has developed a biased doctrine that favors states over those who challenge election-administration rules as discriminatory under the Equal Protection Clause. The doctrine also applies when minor parties and independent candidates argue that ballot-access rules violate speech and association rights under the First Amendment.

The Court did not always look at such challenges in a state-protective way. In 1968, the Court assured Alabama Governor George Wallace's access to the Ohio ballot as an independent presidential candidate, holding that state laws could not give the Democratic and Republican parties "in effect" a "complete monopoly."[90] The Court then took seriously the burdens that election rules can have on groups of voters.

But then the Court shifted gears and created a new doctrine to govern these claims. The *Anderson-Burdick* balancing test requires courts first to assess the extent of the burden on plaintiffs raising a constitutional claim, only applying strict

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86. Hunter v. Underwood, 471 U.S. 222, 233 (1985).

87. Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 730 (1973).

88. 578 U.S. 54, 75 (2016) (Thomas, J., concurring in the judgment); *id.* at 103 (Alito, J., concurring in the judgment) ("I would hold only that Texas permissibly used total population in drawing the challenged legislative districts."); *see also* Alexander v. S.C. State Conf. of the NAACP, 602 U.S. 1, 62-63 (2024) (Thomas, J., concurring in part) (arguing that *Reynolds v. Sims* inadequately explained why the judiciary has the power to remedy voting-rights violations). For a discussion of *Evenwel*'s implications for Latino voters, see generally Rachel F. Moran, *The Perennial Eclipse: Race, Immigration, and How Latinx Count in American Politics*, 61 HOUS. L. REV. 719 (2024).

89. On the dispute among originalists over the correctness of the one-person, one-vote rule, see *infra* note 214 and accompanying text; and Thomas Berry, *How Would Neil Gorsuch Rule on One Person, One Vote?*, LEARN LIBERTY (Apr. 5, 2017), https://www.learnliberty.org/blog/how-would-neil-gorsuch-rule-on-one-person-one-vote [https://perma.cc/H7XC-VCWE].

90. Williams v. Rhodes, 393 U.S. 23, 32 (1968).

scrutiny when plaintiffs can prove that they face a severe burden.[91] Eschewing "litmus tests" in favor of flexibility, *Anderson-Burdick* developed into a rational-basis-like rule that allows states to justify a law in most cases by positing—without having to prove—a state interest such as preventing voter confusion or deterring fraud.[92] The Court's decisions on ballot-access rules reached a nadir in the 1997 *Timmons* case, in which the Court accepted a state's claimed interest in a "healthy two-party system" to justify barring a minor party from cross-endorsing a Democratic Party candidate, a practice known as "fusion."[93] The Court has not meaningfully examined ballot-access-related rules governing minor parties since *Timmons*. The Court's dismissal of the claims of minor parties is a longstanding trend.[94]

Voter protection deteriorated as the Court extended the *Anderson-Burdick* framework to election-administration rules. After the disputed 2000 election,

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91. On the *Anderson-Burdick* balancing test, see LOWENSTEIN ET AL., *supra* note 56, at 677-80; Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313, 316-18 (2007); and Edward B. Foley, *Voting Rules and Constitutional Law*, 81 GEO. WASH. L. REV. 1836, 1847-49 (2013).

92. Richard L. Hasen, *Bad Legislative Intent*, 2006 WIS. L. REV. 843, 852-53; *see also* HASEN, *supra* note 1, at 62-64 (proposing an alternative legal test that imposes a burden of proof on states to justify restrictive voting provisions); 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"). In a 1986 case, the Court derided the idea that a state would have to produce evidence to show its laws served important purposes. Munro v. Socialist Workers Party, 479 U.S. 189, 195 (1986). The Court put the word "evidence" in quotation marks, suggesting that it did not take seriously the requirement that states justify their restrictive laws. *Id.* ("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 critiques, see Emily Rong Zhang, *Voting Rights Lawyering in Crisis*, 24 CUNY L. REV. 123, 141-43 (2021); and Richard L. Hasen, Abuse of Discretion: The U.S. Supreme Court's Indefensible Use of Evidence in Election Law Cases, Keynote Address at the Southern California Law and Social Science Forum Conference (Mar. 28, 2014), https://ssrn.com/abstract=4622883 [https://perma.cc/QW57-4RYK]. Some judges want to make the *Anderson-Burdick* test even more state-protective and antivoter. *See* Daunt v. Benson, 956 F.3d 396, 422-26 (6th Cir. 2020) (Readler, J., concurring in the judgment).

93. Timmons v. Twin Cities Area New Party, 520 U.S. 351, 367 (1997). For an argument that major political parties neither needed nor deserved this judicial protection under the Constitution, 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.

94. *See* Jenness v. Fortson, 403 U.S. 431, 439-42 (1971) (upholding a requirement that a minor party's candidate receive twenty percent of the vote to be a "political party" in the state). *See generally* Richard Winger, *The Supreme Court and the Burial of Ballot Access: A Critical Review of* Jenness v. Forson, 1 ELECTION L.J. 235 (2002) (critiquing the reasoning in *Jenness* and examining its influence on subsequent doctrine).

which famously culminated in the Supreme Court's decision in *Bush v. Gore*,[95] states passed a variety of election laws along party lines, such as those requiring that voters present one of a limited number of forms of photo identification, often with the intention of shaping the electorate.[96] The new legislation led to an explosion of litigation.[97]

The matter came to a head in *Crawford v. Marion County Election Board*, a case concerning a strict voter-identification law in Indiana.[98] Voters argued that the law violated the Equal Protection Clause, but the Supreme Court upheld it against a facial challenge.[99] The Court wrote that the law did not impose significant burdens on most voters, leaving open the possibility of future as-applied challenges.[100] If plaintiffs cannot prove a severe burden, the state may win by simply positing a state interest in preventing voter fraud or promoting voter confidence.[101] Indiana was lucky it did not have to prove its interests; the state had seen no cases of impersonation fraud that its law would prevent.[102] In fact, impersonation fraud was not a problem in the conduct of elections anywhere in the United States.[103]

Since *Crawford*, equal-protection challenges to election-administration rules have proceeded asymmetrically. Courts require voters to produce real evidence of severe burdens, while states need not produce evidence to justify that state's interests. These cases are very difficult for voters to win.[104]

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95. 531 U.S. 98, 111 (2000).

96. *See generally* HASEN, *supra* note 13 (chronicling state efforts to change election laws and accompanying legal battles since 2000).

97. 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, 150 (2022).

98. 553 U.S. 181, 185 (2008). Under the law, if a voter could not afford the underlying documents to get a free state identification, they had to travel at their own expense to the county seat, in each election, to sign a declaration of indigency. *Id.* at 216-17 (Souter, J., dissenting). The same rule applied to voters with religious objections to being photographed. *Id.* at 216, 236.

99. *Id.* at 204 (plurality opinion).

100. *Id.* at 199-200 (recognizing the possibility that the law may place "a somewhat heavier burden" on some voters).

101. *Id.* at 191-97.

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

103. *See* HASEN, *supra* note 13, at 62-67 (reviewing the paucity of evidence of widespread voter-impersonation fraud in the United States).

104. Joshua A. Douglas, *The Significance of the Shift Toward As-Applied Challenges in Election Law*, 37 HOFSTRA L. REV. 635, 673 (2009); *see also* Katie Eyer, *As-Applied Equal Protection*, 59 HARV. C.R.-C.L. L. REV. 49, 53 (2024) (emphasizing the difficulty of facial challenges brought under the Equal Protection Clause).

3. *Partisan-Gerrymandering Challenges Under State and Federal Constitutions and Limitations on State Courts*

The Supreme Court in a 1986 case, *Davis v. Bandemer*, held that partisan-gerrymandering cases were justiciable and that drawing district lines to favor one party over another possibly violated the Equal Protection Clause.[105] But it failed to develop a doctrine that meaningfully limited partisan gerrymandering.[106] In 2004, a highly fractured Court in *Vieth v. Jubelirer* rejected a variety of intent- and effect-related tests to separate permissible consideration of party information in drawing district lines from improper partisan gerrymandering.[107] In 2019, the Court in *Rucho v. Common Cause* held—despite *Bandemer*—that partisan-gerrymandering claims were nonjusticiable in federal court.[108] The Court in *Rucho* assured that states had other paths to policing gerrymandering, including "state statutes and state constitutions" with "standards and guidance for state courts to apply."[109] Indeed, the Court in 2015 had left open the opportunity for states to limit partisan gerrymandering through the initiative process, holding that such initiatives did not violate the Constitution's provision that state legislatures set the rules for conducting congressional elections.[110]

But in 2023, the Court in *Moore v. Harper* cast doubt on the ability of state courts to police partisan gerrymandering in federal elections under state

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105. 478 U.S. 109, 123-25, 133 (1986).

106. LOWENSTEIN ET AL., *supra* note 56, at 167 ("Challenges based on *Bandemer* met with little success.").

107. 541 U.S. 267, 305-06 (2004). Justice Kennedy's controlling opinion left the courthouse open to the future development of such claims under either the Equal Protection Clause or the First Amendment. *Id.* at 306-17 (Kennedy, J., concurring in the judgment). For a decade and a half after *Vieth*, voting-rights advocates pushed for a redistricting standard to satisfy Kennedy. Richard L. Hasen, *Justice Kennedy's Beauty Pageant*, ATLANTIC (June 19, 2017), https://www.theatlantic.com/politics/archive/2017/06/justice-kennedys-beauty-pageant/530790 [https://perma.cc/RZ5H-W6W7]. They never satisfied him. *Id.* In *Gill v. Whitford*, Kennedy joined in Chief Justice Roberts's majority opinion, punting on the partisan-gerrymandering question on standing grounds and not commenting on Justice Kagan's embrace of his First Amendment theory. 585 U.S. 48, 51, 80-84 (2018). Kennedy retired from the Court the week 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 [https://perma.cc/B6XJ-PTEX].

108. 588 U.S. 684, 718 (2019) ("We conclude that partisan gerrymandering claims present political questions beyond the reach of the 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.").

109. *Id.* at 719.

110. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 813-24 (2015).

constitutions.[111] Under a new reading of what some have referred to as the "independent state legislature" theory,[112] 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.[113]

The precise scope and limitations of the *Moore* ruling are unclear,[114] but the case may have implications beyond redistricting. State courts can protect voting rights using voter-protective provisions 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.[115] It is uncertain whether the U.S. Supreme Court would have found that reaching beyond statutory deadlines violated *Moore*'s anti-arrogation rule.[116] Before *Moore*, three Justices had signaled that such actions by a state court violated the independent-state-legislature theory.[117] This approach would allow federal courts to second-guess a whole category of voter-protective judicial interpretations of state statutes and constitutional provisions applied in federal elections as well as the actions of election administrators, who could also potentially "arrogate" state legislative power.[118]

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111. 600 U.S. 1, 36 (2023).

112. *See* Carolyn Shapiro, *The Independent State Legislature Theory, Federal Courts, and State Law*, 90 U. Chi. L. Rev. 137, 140 & n.14 (2022) (defining the theory and identifying the alternative "independent state legislature doctrine" terminology).

113. *Moore*, 600 U.S. 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.").

114. For explorations, see Manoj Mate, *New Hurdles to Redistricting Reform: State Evasion,* Moore*, and Partisan Gerrymandering*, 56 Conn. L. Rev. 839, 857-62, 893-99 (2024); and Scott L. Kafker & Simon D. Jacobs, *The Supreme Court Summons the Ghosts of* Bush v. Gore*: How* Moore v. Harper *Haunts State and Federal Constitutional Interpretation of Election Laws*, 59 Wake Forest L. Rev. 61, 108-29 (2024).

115. Pa. Democratic Party v. Boockvar, 238 A.3d 345, 370-72 (Pa. 2020).

116. *See* Shapiro, *supra* note 112, at 141-42; *see also* Carolyn Shapiro, *State Law and Federal Elections After* Moore v. Harper, 99 N.Y.U. L. Rev. 2049, 2072-73 (2024) (noting that "situations in which a [state] court concludes that the [state] constitution or principles of equity require some modification of the statutory scheme" are "the most fraught areas for the *Moore* exception").

117. *See* Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732, 732 (2021) (Thomas, J., dissenting); *id.* at 738 (Alito, J., joined by Gorsuch, J., dissenting); *see also* Lowenstein et al., *supra* note 56, at 412-15 (describing related litigation during the 2020 election).

118. *See* Leah M. Litman & Katherine Shaw, *The "Bounds" of* Moore*: Pluralism and State Judicial Review*, 133 Yale L.J.F. 881, 893-95, 904 (2024); Michael Weingartner, *Second-Guessing State*

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 Arizona voter-identification-law case, *Purcell v. Gonzalez*,[119] the *Purcell* "Principle" has emerged as a timing doctrine that discourages federal courts from issuing injunctions protecting voting rights too close to an election.[120] Departing from the usual test for preliminary-relief cases brought to the Supreme Court on an emergency basis, the *Purcell* Principle emphasizes the risk of voter confusion and administrative difficulties as key reasons to deny relief—even when plaintiffs have a strong likelihood of success on the merits.[121]

In 2020, the Court appeared to apply the doctrine aggressively in election-administration cases coinciding with the COVID-19 pandemic.[122] Recent cases have extended the reach of the *Purcell* Principle to redistricting cases and have expanded the time period in which it may be applicable to months rather than just weeks before an election. For example, in a 2022 Alabama congressional-redistricting case, the Supreme Court applied the doctrine when the primary was two months away and the general election was nine months away.[123] As a result, the 2022 midterm election used a districting plan that, as the Court held a year

Courts in Election Cases: Arrogation and Evasion Under Moore v. Harper, 56 ARIZ. ST. L.J. 1971, 1978-84 (2025). For a much narrower view of the anti-arrogation principle, see David H. Gans, Brianne J. Gorod & Anna K. Jessurun, Moore v. Harper*, Evasion, and the Ordinary Bounds of Judicial Review*, 66 B.C. L. REV. (forthcoming 2025) (manuscript at 35-50), https://ssrn.com/abstract=4947688 [https://perma.cc/VU2H-3MY6]. *Moore* may have already deterred state courts from applying their state-constitutional voting-rights provisions to protect voters. *See* Richard L. Hasen, *Thousands of Pennsylvania Ballots Will Be Tossed on a Technicality. Thanks SCOTUS*, SLATE (Nov. 4, 2024), https://slate.com/news-and-politics/2024/11/2024-election-pennsylvania-votes-supreme-court.html [https://perma.cc/ZLP2-V6SR].

119. 549 U.S. 1, 4-6 (2006) (per curiam) (allowing an Arizona voter-identification law to remain in effect for an imminent election before a trial on its legality).

120. *See* VLADECK, *supra* note 8, at 197-227; Wilfred U. Codrington III, Purcell *in Pandemic*, 96 N.Y.U. L. REV. 941, 984 (2021); *see also* Richard L. Hasen, *Reining in the* Purcell *Principle*, 43 FLA. ST. U. L. REV. 427, 428-29 (2016) (coining the term "*Purcell* Principle" and criticizing its application). I will not continue to put "Principle" in quotation marks, but I do not mean to suggest by the absence of quotation marks that the Supreme Court is applying a consistent and well-considered rule.

121. *See* Hasen, *supra* note 120, at 441-43.

122. *See* Codrington, *supra* note 120, at 981-84. I say "appeared to apply" because the Court in these cases often issues orders without giving reasons.

123. Merrill v. Milligan, 142 S. Ct. 879, 879 (2022) (mem.) (preventing the creation of a second Black majority district in Alabama under Section 2 of the VRA); *id.* at 888-89 (Kagan, J., dissenting). Justice Kavanaugh's concurrence offered an extended defense of the *Purcell* Principle. *Id.* at 880-82 (Kavanaugh, J., concurring in grant of applications for stays).

later, violated Section 2 of the VRA.[124] The emerging rule effectively allows states to violate voters' rights for at least one election cycle as litigation makes its way through the courts.

Even worse, *Purcell* is inconsistently applied, often depending on whether the result helps or hurts voters. Just days before the 2020 election, the Eleventh Circuit reversed a preliminary injunction against a Florida law that sought to nullify a voter initiative to re-enfranchise Florida felons who had completed their sentences.[125] Over the objection of liberal Justices, the Court seemingly refused to apply *Purcell*.[126]

Understood in context, the *Purcell* Principle is just one of the Supreme Court's doctrines favoring the state over voters in election cases. This bias toward states includes (1) *Purcell*'s delay in remedies for voting violations, (2) the presumption of good faith when a state is challenged for voting-rights violations[127] or for engaging in racial gerrymandering,[128] (3) *Moore*'s anti-arrogation principle,[129] and (4) the *Anderson-Burdick* asymmetric balancing test.[130] This bias puts a big thumb on the scale, favoring states' rights over voters' rights across a range of doctrinal areas.

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124. Allen v. Milligan, 599 U.S. 1, 9 (2023). The Court applied *Purcell* a second time to redistricting in a 2024 racial-gerrymandering case from Louisiana. Robinson v. Callais, 144 S. Ct. 1171, 1171 (2024) (mem.). The Court's three liberal Justices expressed their disagreement with the ruling. *See id.* (noting that Justice Sotomayor and Justice Kagan would have denied the stay of a new electoral map); *id.* at 1172 (Jackson, J., dissenting from grant of applications for stay).

125. Raysor v. DeSantis, 140 S. Ct. 2600, 2602 (2020) (Sotomayor, J., dissenting from denial of application to vacate stay) ("On July 1, 2020—over a month after the District Court's judgment and 19 days before the voter-registration deadline—the Eleventh Circuit stayed the permanent injunction pending appeal. The Court of Appeals provided no reasons for its order.").

126. *Id.* at 2600 (mem.); *id.* (Sotomayor, J., dissenting from denial of application to vacate stay). As noted in the Introduction, the Court in 2024 allowed Arizona to enforce a major antivoter change to its registration rules just weeks before early voting. *See supra* notes 8-15 and accompanying text. To take another example, the Court's decision to allow Virginia to undertake a voter purge (removing voters from the list of eligible voters because they are no longer eligible) just before the 2024 elections in apparent violation of federal law may have been based upon *Purcell* as well, but we do not know because the Court's order did not provide any reasoning. Abbie VanSickle, *Supreme Court Allows Virginia to Purge Possibly Ineligible Voters for Now*, N.Y. Times (Oct. 30, 2024), https://www.nytimes.com/2024/10/30/us/politics/supreme-court-virginia-purge-voter-registration.html [https://perma.cc/3G7E-KQZH].

127. *See supra* note 58.

128. Alexander v. S.C. State Conf. of the NAACP, 602 U.S. 1, 9-16 (2024).

129. *See supra* notes 111-118 and accompanying text.

130. *See supra* notes 90-104 and accompanying text.

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.[131] The swing in positions followed changes in Supreme Court personnel, most notably when Justice Alito replaced Justice O'Connor, flipping a 5-4 split on the issue at the Court.[132] The Court's deference to campaign-finance regulation in the early 2000s gave way to skepticism, resulting in the watershed moment of *Citizens United v. Federal Election Commission*.[133]

In *Citizens United*, the Court struck down corporate spending limits applied to elections,[134] and it has since upheld spending limits only related to foreign individuals and entities.[135] It has also increased its scrutiny of federal and state campaign-contribution limits, rendering more of these laws open to constitutional challenge.[136] 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 in the 2003 case *McConnell v. Federal Election Commission*,[137] has been undermined by the reasoning of later cases, such as *Citizens United*.[138] The Supreme Court has nonetheless repeatedly refused to

131. For a brief history of the Court's vacillation, see RICHARD L. HASEN, PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS 25-36 (2016).

132. *Id.* at 25, 29; Richard L. Hasen, Citizens United *and the Illusion of Coherence*, 109 MICH. L. REV. 581, 586-90 (2011).

133. 558 U.S. 310 (2010); *see also* HASEN, *supra* note 131, at 29 (explaining the relationship between *Citizens United* and the shift in Supreme Court personnel).

134. *Citizens United*, 558 U.S. at 339.

135. Bluman v. FEC, 565 U.S. 1104, 1104 (2012) (mem.), *aff'g* 800 F. Supp. 2d 281 (D.D.C. 2011) (three-judge court); *cf.* Am. Tradition P'ship v. Bullock, 567 U.S. 516, 516 (2012) (per curiam) (confirming that *Citizen United*'s holding that corporate spending limits are unconstitutional applies to state limits as well as federal limits).

136. *See, e.g.*, McCutcheon v. FEC, 572 U.S. 185, 192-93 (2014); Thompson v. Hebdon, 589 U.S. 1, 5-6 (2019) (per curiam).

137. 540 U.S. 93, 171 (2003) (upholding "soft money" limits on political parties).

138. *See, e.g.*, *McCutcheon*, 572 U.S. at 243-44 (Breyer, J., dissenting) (questioning whether the Court in *McCutcheon* was silently overruling *McConnell*'s soft-money holding); *id.* at 209 n.6 (majority opinion) (rejecting the argument that it was silently overruling the soft-money holding of *McConnell*).

reconsider its ruling on party "soft money"[139] or other rulings that are now questionable, such as its 2003 decision upholding the ban on corporate contributions directly to candidates.[140]

The result is that some 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 through contributions to outside groups such as "super PACs" that can effectively serve as shadow campaign committees for candidates.[141] For an example of how hollow campaign-contribution limits have become, consider Elon Musk's contribution of over a quarter of a billion dollars in 2024 to super PACs — and other nominally independent entities — to work closely with and support the campaigns of Donald Trump and other Republican candidates.[142]

Decades of Supreme Court precedent endorsed disclosure as a permissible tool for ferreting out corruption and providing voters with valuable and accessible information about candidates.[143] The Court has now turned more hostile. It recently redefined the "exacting scrutiny" standard to require narrow tailoring of interests,[144] and this new standard is already threatening campaign-finance laws.[145]

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139. Republican Nat'l Comm. v. FEC, 561 U.S. 1040, 1040 (2010) (mem.), *aff'g* 698 F. Supp. 2d 150 (D.D.C. 2010) (three-judge court); Cao v. FEC, 562 U.S. 1286, 1286 (2011) (mem.), *denying cert. to* 619 F.3d 410 (5th Cir. 2010) (en banc); Republican Party of La. v. FEC, 581 U.S. 989, 989 (2017) (mem.), *aff'g* 219 F. Supp. 3d 86 (D.D.C. 2016) (three-judge court); *see also* LOWENSTEIN ET AL., *supra* note 56, at 1068-69 (describing the line of cases from *Republican National Committee* to *Republican Party of Louisiana* and discussing the broader soft-money implications of *McCutcheon*). The Supreme Court soon may take up the question whether political parties may make unlimited coordinated expenditures with candidates. *See* Petition for a Writ of Certiorari at 14-29, Nat'l Republican Senatorial Comm. v. FEC, No. 24-621 (U.S. Dec. 4, 2024).

140. FEC v. Beaumont, 539 U.S. 146, 155-56, 163 (2003).

141. On the rise of super PACs, see LOWENSTEIN ET AL., *supra* note 56, at 1032-40.

142. Theodore Schleifer & Maggie Haberman, *Elon Musk Backed Trump with over $250 Million, Fueling the Unusual 'RGB Pac,'* N.Y. TIMES (Dec. 5, 2024), https://www.nytimes.com/2024/12/05/us/politics/elon-musk-trump-rbg-election.html [https://perma.cc/V9W3-B5D4].

143. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 366-71 (2010) (upholding broad campaign-finance disclosure and disclaimer rules within the Bipartisan Campaign Reform Act of 2002); Buckley v. Valeo, 424 U.S. 1, 64-84 (1976) (per curiam) (upholding the broad disclosure provisions of the 1974 amendments to the Federal Election Campaign Act).

144. Ams. for Prosperity Found. v. Bonta, 594 U.S. 595, 608 (2021).

145. *See, e.g.*, Wyo. Gun Owners v. Gray, 83 F.4th 1224, 1247-50 (10th Cir. 2022) (striking down a state disclosure law and distinguishing other cases upholding similar laws as predating *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.").

Whether one thinks more regulation or less regulation is more voter-protective,[146] everyone should see the current system as a trap for the unwary voter. While sophisticated, large-scale players can essentially contribute and spend whatever they want to influence campaigns, everyone else can get caught violating those rules that remain on the books. Ordinary people may rightly see this system as working against their interests.

6. The Partisan Split Among Supreme Court Justices

The Supreme Court's protection of voters has stagnated because of the increasingly ideological (and now partisan) divide in election-law cases. Republican-appointed Justices have been much less protective of voters and more protective of state prerogatives than Democratic-appointed ones.

The Supreme Court has long divided along ideological lines in some of the Court's biggest election-law cases. For example, *Bush v. Gore*,[147] *Shelby County*,[148] and *Citizens United*[149] were each 5-4 cases in which the Court's conservative Justices prevailed by a single vote over the Court's liberals. Justice Stevens was appointed by a Republican president but was considered the leader of the Court's liberal wing by the end of his tenure.[150] Since his retirement in 2010, the Court's ideological split has also become partisan; all the conservative Justices have been appointed by Republican presidents and all the liberal Justices by Democratic presidents.[151] In recent years, Republican-appointed Justices, over the

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146. My view is that the Supreme Court's campaign-finance jurisprudence is fundamentally at odds with principles of political equality. *See generally* HASEN, *supra* note 131 (explicating this argument).

147. 531 U.S. 98, 111 (2000) (ending the disputed Florida recount in the 2000 U.S. presidential election). The Justices divided 5-4 along ideological lines 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).

148. Shelby County v. Holder, 570 U.S. 529, 557 (2013) (striking down the coverage formula used for VRA preclearance).

149. Citizens United v. FEC, 558 U.S. 310, 318-19 (2010) (invalidating limits on independent corporate spending in elections).

150. Linda Greenhouse, *Supreme Court Justice John Paul Stevens, Who Led Liberal Wing, Dies at 99*, N.Y. TIMES (July 16, 2019), https://www.nytimes.com/2019/07/16/us/john-paul-stevens-dead.html [https://perma.cc/NH86-GW9B] (noting Justice Stevens's retirement in 2010, his appointment by Republican President Ford, and his liberal leanings in his later years on the Court).

151. Richard L. Hasen, *Polarization and the Judiciary*, 22 ANN. REV. POL. SCI. 261, 267 (2019).

opposition of their Democratic-appointed colleagues, have reshaped many areas of election-law doctrine.[152]

Moore v. Harper,[153] which advanced the "anti-arrogation principle,"[154] is the most significant of the recent high-profile election-law cases in which the Justices did not divide along party lines.[155] It is possible that the liberal Justices joined Chief Justice Roberts in *Moore* to solidify a majority behind a version of the independent-state-legislature theory that was more moderate than the more extreme version of the theory embraced by Justices Thomas and Gorsuch in their dissent.[156]

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 rather on a living-constitutionalist approach to questions of equality and voting rights.[157] Although respect for precedent may lead some of the more conservative Justices to decline to reconsider rulings such as the one-person, one-vote rule of the Warren Court, today's Court 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.[158]

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152. *See infra* notes 267-282 and accompanying text (discussing Trump v. United States, 603 U.S. 593 (2024)); Brnovich v. Democratic Nat'l Comm., 594 U.S. 647, 653-55 (2021); Ams. for Prosperity Found. v. Bonta, 594 U.S. 595, 611 (2021); Rucho v. Common Cause, 588 U.S. 684, 718 (2019); *supra* notes 119-130 and accompanying text (discussing the *Purcell* cases); McCutcheon v. FEC, 572 U.S. 185, 227 (2014).

The one major election-law area where the Court has not divided along usual partisan lines has been racial gerrymandering. In this context, the partisan valence of the doctrine has shifted over time, perhaps explaining the lack of partisan division. *See* Hasen, *Racial Gerrymandering*, *supra* note 58, at 367-73 (tracing the development of racial-gerrymandering cases). In the early racial-gerrymandering cases such as *Shaw v. Reno*, 509 U.S. 630 (1993), the conservative Justices were in the majority and the more liberal Justices were in dissent. Daniel Hays Lowenstein, *You Don't Have to Be Liberal to Hate the Racial Gerrymandering Cases*, 50 STAN. L. REV. 779, 781 (1998). In more recent cases, liberals have embraced racial-gerrymandering claims as well. *E.g.*, Cooper v. Harris, 581 U.S. 285, 290 (2017) (noting that the majority opinion of Justice Kagan was joined by the liberal Justices—Breyer, Ginsburg, and Sotomayor—and the conservative Justice Thomas).

153. 600 U.S. 1, 36 (2023).

154. *See supra* notes 111-118 and accompanying text.

155. I put aside until Section II.A the Court's decision in *Trump v. Anderson*, 601 U.S. 100 (2024), in which the Court was unanimous in its holding but divided sharply in dicta.

156. *See supra* note 117 and accompanying text.

157. *See* HASEN, *supra* note 1, at 31-33.

158. Justice Thomas's recent concurring opinion in the *Alexander* racial-gerrymandering case takes a new position of nonjusticiability on vote-dilution claims, even apparently in the face of

B. Politics

1. Federal

As the U.S. Supreme Court expanded voting rights, primarily through the Equal Protection Clause of the Fourteenth Amendment,[159] Congress and the states expanded voting rights through legislation.[160] 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;[161] the Twenty-Fourth Amendment, barring poll taxes in federal elections;[162] the Twenty-Sixth Amendment, barring discrimination in voting on the basis of age of those eighteen or older;[163] the Civil Rights Act of 1964,[164] which contained some protections for voting;[165] and the 1965 VRA.[166]

The Twenty-Sixth Amendment was the last voting-related amendment passed by Congress. It was ratified in 1971, before a majority of living American citizens were born.[167] The Constitution contains no affirmative right to vote, and the Supreme Court as recently as 2000 confirmed that voters do not have a

intentional racial discrimination in voting. *See* Alexander v. S.C. State Conf. of the NAACP, 602 U.S. 1, 40 (2024) (Thomas, J., concurring in part) (arguing that "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).

159. *See supra* notes 76-84 and accompanying text.

160. 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. 2009); and Richard L. Hasen, *The Past, Present, and Future of Election Reform*, *in* THE OXFORD HANDBOOK OF AMERICAN ELECTION LAW, *supra* note 27, at 1103, 1113-16.

161. U.S. CONST. amend. XXIII.

162. *Id.* amend. XXIV.

163. *Id.* amend. XXVI.

164. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 5, 42, and 52 U.S.C.).

165. *See, e.g.*, *id.* § 101(a), 78 Stat. at 241 (codified as amended at 52 U.S.C. § 10101(a)(2)(B)) (containing the materiality provision). *But see* Pa. State Conf. of NAACP Branches v. Sec'y Commonwealth of Pa., 97 F.4th 120, 125 (3d Cir. 2024) (rejecting an argument that Pennsylvania rules disallowing timely but undated mail-in ballots for counting violate the materiality provision of the Civil Rights Act), *cert. denied*, 2025 WL 247452 (U.S. Jan. 21, 2025).

166. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 and 52 U.S.C.).

167. *See* HASEN, *supra* note 1, at 14.

constitutional right to vote for President, a ballot voters may cast only by the grace of state legislatures.[168]

In the 1970s, Congress passed the Federal Election Campaign Act[169] and modest extensions of the VRA.[170] In the 1980s, Congress significantly expanded Section 2 of the VRA.[171] The 1990s brought the National Voter Registration Act, which increased some voter-registration opportunities.[172] Right after the disputed 2000 election, Congress passed the Help America Vote Act, which aimed to improve election administration.[173] Many of these laws passed with large, mostly bipartisan majorities.[174]

Rising polarization in the 2000s soon infected election issues. In that decade, Congress enacted the Bipartisan Campaign Reform Act (BCRA) of 2002[175] and renewed key provisions of the VRA.[176] BCRA, 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 the bill's sponsor, John McCain).[177] The lopsided vote in favor of the 2006 amendments to the VRA masked new Republican skepticism.[178] Although all Senate Republicans voted

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168. Bush v. Gore, 531 U.S. 98, 104 (2000).

169. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended in scattered sections of 2, 5, 18, 26, 47, and 52 U.S.C.).

170. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (codified as amended in scattered sections of 42 and 52 U.S.C.); Act of Aug. 6, 1975, Pub. L. No. 94-73, 89 Stat. 400 (codified as amended in scattered sections of 42 U.S.C.).

171. Voting Rights Act Amendments of 1982, Pub. L. 97-205, 96 Stat. 131 (codified as amended at 42 U.S.C. §§ 1971 note, 1973 note, 1973b). Further, the Voting Accessibility for the Elderly and Handicapped Act and the Uniformed and Overseas Citizens Absentee Voting Act each passed by voice vote. *See* 130 CONG. REC. 18492-93, 23781, 25159-60 (1984); 132 CONG. REC. 20976-79, 21894 (1986).

172. National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 (codified as amended at 42 U.S.C. § 1973gg).

173. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified as amended in scattered sections of 42 U.S.C.).

174. For details, see the Appendix at the end of this Feature.

175. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 2, 18, 28, 36, 47, and 52 U.S.C.).

176. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, §§ 3-9, 120 Stat. 577, 578-81 (codified as amended at 42 U.S.C. §§ 1971 note, 1973 note).

177. *See infra* notes 534-535.

178. For a detailed history of the 2006 amendments, see Persily, *supra* note 72, at 183-92. For commentary, see generally Richard H. Pildes, *Political Avoidance, Constitutional Theory, and the VRA*, 117 YALE L.J. POCKET PART 148 (2007), https://yalelawjournal.org/forum/political-avoidance-constitutional-theory-and-the-vra [https://perma.cc/9YZN-2YEU].

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,[179] presaging arguments that eventually led the Supreme Court to strike down the coverage formula in *Shelby County*.[180]

In the last decade and a half, support for major voting-rights legislation has become almost-completely polarized.[181] Democrats tried for years to pass the John Lewis Voting Rights Advancement Act to restore preclearance and make other voter-protective changes to the VRA.[182] There were no Republican cosponsors in the 2023 version of the House bill,[183] and the last Senate vote on the bill faced a successful Republican filibuster.[184] Democrats also spent two years following the 2020 election trying to pass a large-scale election-reform bill, called the For the People Act.[185] This bill also faced united Republican opposition, passing the Democratic-led House on a near party-line vote[186] and failing to overcome a Republican filibuster in the Senate.[187]

After Republicans regained control of the House following the 2022 midterm elections, 132 Republican cosponsors put forward the American Confidence in Elections Act,[188] an omnibus election-related bill that seemed to be the Republican response to the Democrats' For the People Act and that included giving states more power to make voter registration harder on purportedly antifraud

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179. Persily, *supra* note 72, at 189-90.

180. Shelby County v. Holder, 570 U.S. 529, 557 (2013).

181. The only partial exception to this more recent partisan divide is the Electoral Count Reform Act. *See infra* Section II.B.

182. *See, e.g.*, John Lewis Voting Rights Advancement Act, S. 4263, 116th Cong. (2020); John R. Lewis Voting Rights Advancement Act of 2021, H.R. 4, 117th Cong.; John R. Lewis Voting Rights Advancement Act of 2024, S. 4, 118th Cong.

183. GovTrack listed 218 cosponsors, all Democrats, in the 118th Congress. *H.R. 14: John R. Lewis Voting Rights Advancement Act of 2023*, GovTrack.us, https://www.govtrack.us/congress/bills/118/hr14 [https://perma.cc/9EYG-U2P9].

184. Carl Hulse, *After a Day of Debate, the Voting Rights Bill Is Blocked in the Senate*, N.Y. Times (Jan. 27, 2022), https://www.nytimes.com/2022/01/19/us/politics/senate-voting-rights-filibuster.html [https://perma.cc/733G-7XNN].

185. For the People Act of 2021, S. 1, 117th Cong.

186. The bill passed by a vote of 220-210, with all but one Democrat voting in favor and all Republicans voting against. *See H.R. 1 – For the People Act of 2021*, Congress.gov, https://www.congress.gov/bill/117th-congress/house-bill/1/all-actions [https://perma.cc/8EHE-GNHQ]; *Roll Call 62 | Bill Number: H. R. 1*, Clerk: U.S. House Representatives, https://clerk.house.gov/Votes/202162 [https://perma.cc/RRU6-3RGY].

187. *See* Hulse, *supra* note 184.

188. H.R. 4563, 118th Cong. (2023). The 132 cosponsors were all Republican. *See Cosponsors: H.R. 4563—118th Congress (2023-2024)*, Congress.gov, https://www.congress.gov/bill/118th-congress/house-bill/4563/cosponsors [https://perma.cc/69KG-MGJK].

grounds.[189] The bill passed the House Committee on Administration on a party-line vote, but it was not put up for a vote on the House floor during the 118th Congress.[190]

In the run-up to the 2024 election, in which Donald Trump continued to raise unsubstantiated claims of voter fraud,[191] 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.[192] All voting Republicans supported the bill, and all but five voting Democrats opposed it.[193] The Democratic-led Senate did not hold any hearings on the bill before Democrats lost control of the Senate in January 2025.[194] In the new Congress, House Republicans have prioritized passage of the SAVE Act.[195]

After the constitutional and legislative expansion of voting rights on the federal level beginning in the 1960s, progress slowed down and has now stalled. Congress has not taken adequate steps to fortify and expand access to the ballot. There has been no serious effort to deal with other inequalities, most importantly the unequal composition of the U.S. Senate, which gives residents of sparsely populated states much more influence and power than the majority of Americans who live in states that are more densely populated.[196]

On campaign finance, support for the DISCLOSE Act, which provides for improved disclosure of campaign-finance contributions and spending, split

189. Title I, Subtitle C of the bill listed a number of measures purportedly aimed at assuring the integrity of elections, including rules related to voter registration and identification, as well as prohibitions on noncitizen voting. H.R. 4563, 118th Cong. §§ 121-139 (2023).

190. *See All Actions: H.R. 4563—118th Congress (2023-2024)*, CONGRESS.GOV, https://www.congress.gov/bill/118th-congress/house-bill/4563/all-actions [https://perma.cc/6K43-KPVN].

191. Laura Doan, *Trump Falsely Claims Noncitizen Voting Is Widespread. Here Are 5 Facts*, CBS NEWS (Oct. 30, 2024), https://www.cbsnews.com/news/trump-noncitizen-voter-fraud-fact-check [https://perma.cc/4Z2Z-DCFT].

192. H.R. 8281, 118th Cong. (2024).

193. *See Roll Call | 345 Bill Number: H. R. 8281*, CLERK: U.S. HOUSE REPRESENTATIVES (July 10, 2024, 5:22 PM), https://clerk.house.gov/Votes/2024345 [https://perma.cc/DV92-XHKU].

194. H.R. 8281 was placed on the Senate Legislative Calendar under General Orders on July 23, 2024, and received no further Senate action. *See All Actions: H.R. 8281—118th Congress (2023-2024)*, CONGRESS.GOV, https://www.congress.gov/bill/118th-congress/house-bill/8281/all-actions [https://perma.cc/T2GN-C32G].

195. Courtney Cohn, *House Republicans to Prioritize Controversial SAVE Act in New Session*, DEMOCRACY DOCKET (Jan. 6, 2025), https://www.democracydocket.com/news-alerts/house-republicans-to-prioritize-controversial-save-act-in-new-session [https://perma.cc/894H-LNJH].

196. *See* HASEN, *supra* note 1, at 89-90.

Congress along party lines.[197] 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—allows people and entities to contribute millions of dollars without publicly disclosing their identities.[198] This makes it harder for voters to evaluate who is trying to influence their voting choices. More generally, a stalemated Federal Election Commission has all but abdicated responsibility for policing the boundaries of acceptable conduct through a set of challenged "coordination" rules.[199] It is now moving toward further deregulation.[200]

2. State

On the state level, things are more mixed. In many states, it has become easier to register and to vote, often through the expansion of early voting.[201] Some states have also passed their own voting-rights acts to protect voters as the Supreme Court and other federal courts have weakened the protections of the VRA.[202]

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197. DISCLOSE Act of 2023, S. 512, 118th Cong. GovTrack listed only Democrats and Independents who caucus with Democrats among the fifty-one cosponsors of the Senate version of the DISCLOSE Act. *See Cosponsors of S. 512*, GovTrack.us, https://www.govtrack.us/congress/bills/118/s512/cosponsors [https://perma.cc/CD6G-NW5N].

198. *See* Richard L. Hasen, *Nonprofit Law as the Tool to Kill What Remains of Campaign Finance Law: Reluctant Lessons from Ellen Aprill*, 56 Loy. L.A. L. Rev. 1233, 1258-59 (2023).

199. *The Illusion of Independence: How Unregulated Coordination Is Undermining Our Democracy, and What Can Be Done to Stop It*, Campaign Legal Ctr. 6-7 (Nov. 30, 2023), https://campaignlegal.org/sites/default/files/2023-11/Coordination%20Report%20%28Final%20POST%20Proofing%29.pdf [https://perma.cc/JP22-FHWL].

200. 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), https://www.nytimes.com/2024/06/10/us/politics/fec-deadlock-deregulation.html [https://perma.cc/U4R4-C74Y].

201. *See* Scot Schraufnagel, Michael J. Pomante II & Quan Li, *Cost of Voting in the American States: 2020*, 19 Election L.J. 503, 508 (2020). *See generally* Michael Ritter & Caroline J. Tolbert, Accessible Elections: How the States Can Help Americans Vote (2020) (surveying state reforms that have made voting more accessible).

202. For an examination of state voting-rights acts, see generally Ruth M. Greenwood & Nicholas O. Stephanopoulos, *Voting Rights Federalism*, 73 Emory L.J. 299 (2023). A state trial court struck down New York's voting-rights act as a violation of the U.S. Constitution's Equal Protection Clause. Clarke v. Town of Newburgh, No. EF002460-2024, 2024 WL 4982210, at *1-2 (N.Y. Sup. Ct. Nov. 7, 2024). However, this decision was reversed. *See* Clarke v. Town of Newburgh, No. 2024-11753, 2025 WL 337915, at *12-13 (N.Y. App. Div. Jan. 30, 2025). On the risk that the U.S. Supreme Court could eventually strike down state voting-rights acts as unconstitutional, see Hansi Lo Wang, *A Voting Rights Battle in a New York City Suburb May Lead*

But progress is uneven, and in the states that need voter protections the most, primarily in the American South, we see backwards movement.[203] These states have no state voting-rights acts.[204] Instead, we see new restrictions on registration and voting, seemingly attempts to turn the voting process into an obstacle course and to shape who will vote. At bottom, despite federal rules that provide some protection for voters, the difficulty of registration and voting depends a great deal on the state in which one lives and who controls the government.

C. Theory

Election law emerged as a discrete scholarly area of study in the 1980s and 1990s.[205] Central to the nascent field was the idea that judicial intervention in political cases was appropriate when the political process was stuck and seemed unlikely to self-correct. Members of a legislative body benefiting from malapportioned districts have no incentive to redistrict to equalize political power, and political pressure cannot work because of the malapportionment.

The idea of more aggressive judicial intervention traces back to the 1938 Supreme Court opinion in *United States v. Carolene Products Company*. In footnote four 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."[206] This call for judicial

to a National Fight, NPR (Feb. 8, 2024), https://www.npr.org/2024/02/07/1227586316/nassau-county-state-voting-rights-act-new-york [https://perma.cc/E4KE-YCY7].

203. *See* Michael Barber & John B. Holbein, *400 Million Voting Records Show Profound Racial and Geographic Disparities in Voter Turnout in the United States*, 17 PLOS ONE art no. e0268134, at 8-11 (2022); Singh & Carter, *supra* note 74.

204. *See State Voting Rights Acts*, Nat'l Conf. State Legislatures (Nov. 25, 2024), https://www.ncsl.org/elections-and-campaigns/state-voting-rights-acts [https://perma.cc/B4LR-NTTW] (listing eight states with voting-rights acts, none in the deep South: "California, Connecticut, Illinois, Minnesota, New York, Oregon, Virginia and Washington").

205. On the history of the field, see Gerken, *supra* note 27, at 25-32; Eugene D. Mazo, *Introduction: The Maturing of Election Law*, *in* Election Law Stories 7, 7-11 (Joshua A. Douglas & Eugene D. Mazo eds., 2016); Chad Flanders, *Election Law: Too Big to Fail?*, 56 St. Louis U. L.J. 775, 775-76 (2012); Heather K. Gerken, *Keynote Address: What Election Law Has to Say to Constitutional Law*, 44 Ind. L. Rev. 7, 7-10 (2010); and Richard L. Hasen, *Introduction—Election Law at Puberty: Optimism and Words of Caution*, 32 Loy. L.A. L. Rev. 1095, 1095-97 (1999). *See generally* Symposium, *Election Law as Its Own Field of Study*, 32 Loy. L.A. L. Rev. 1095 (1999) (presenting a symposium dedicated to detailing the field's history).

206. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

intervention went unheeded when the Court in 1946 refused to enter the "political thicket" in *Colegrove v. Green*.[207]

John Hart Ely, in his influential book *Democracy and Distrust*, further fleshed out what has come to be known as "process theory," or the "representation reinforcement" theory of judicial review.[208] Ely defended the Warren Court's decision to reverse course from *Colegrove*.[209] When the Court decided *Baker v. Carr* in 1962, holding malapportionment cases justiciable under the Equal Protection Clause of the Fourteenth Amendment,[210] and *Reynolds v. Sims* in 1964, imposing a one-person, one-vote standard in state elections,[211] Ely saw the *Carolene Products* approach finding new life in these decisions.[212]

The one-person, one-vote cases were controversial at the time they were decided, but the controversy eventually subsided.[213] 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 the rest of the Warren Court's voting cases.[214] The real debate in the field was 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*, leading election-law scholars Samuel Issacharoff and Richard H. 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.[215] Such a structural or "political markets" approach

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207. 328 U.S. 549, 556 (1946) (holding that malapportionment claims were nonjusticiable under the Guarantee Clause of Article IV, Section 4).

208. *See generally* ELY, *supra* note 26 (developing and laying out this theory). For an explanation of John Hart Ely's thesis, see David A. Strauss, *Modernization and Representation Reinforcement: An Essay in Memory of John Hart Ely*, 57 STAN. L. REV. 761, 761-62 (2004).

209. ELY, *supra* note 26, at 119-21, 120 n.46 (rejecting Justice Frankfurter's approach in *Colegrove*).

210. 369 U.S. 186, 228-29 (1962).

211. 377 U.S. 533, 565-66 (1964).

212. ELY, *supra* note 26, at 102, 121-22.

213. *See* LOWENSTEIN ET AL., *supra* note 56, at 107 n.15; Eugene D. Mazo, *The Right to Vote in Local Elections: The Story of* Kramer v. Union School Dist. No. 15, *in* ELECTION LAW STORIES, *supra* note 205, at 87, 114-16 (recounting efforts of Senator Dirksen to convene a constitutional convention to overturn the one-person, one-vote cases of the Warren Court).

214. For some rarely expressed scholarly skepticism, see Derek T. Muller, *Perpetuating "One Person, One Vote" Errors*, 39 HARV. J.L. & PUB. POL'Y 371, 395 (2016); and Robert J. Pushaw, Jr., Bush v. Gore*: Looking at* Baker v. Carr *in a Conservative Mirror*, 18 CONST. COMMENT. 359, 372-78 (2001).

215. Issacharoff & Pildes, *supra* note 27, at 646; *see also* Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 501 (1997) (evaluating entrenchment problems in constitutional law to determine whether "the anti-entrenchment game is worth the candle"). For a good overview of the ensuing debate, see generally Gerken, *supra* note 27.

encourages the courts to break up partisan (and even bipartisan) gerrymanders, to improve ballot access, and to take other steps toward a properly functioning political process.

The rights-based theorists, including Daniel H. Lowenstein,[216] Nathaniel Persily,[217] Bruce E. Cain,[218] and me,[219] have 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 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 obvious 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 is only one value among many in redistricting.[220] For example, drawing competitive districts might inhibit, rather than promote, fair representation.[221] Competitive districts could lead to wild swings in representation as political winds shifted and could well reduce the number of voters represented by legislators who actually embraced their values.[222]

The rights/structure debate seemed to reach a compromise — or impasse, depending upon your point of view — when Guy-Uriel Charles reviewed *The Supreme Court and Election Law*, my 2003 book defending the rights-based approach, in the *Michigan Law Review*.[223] Charles pointed out that the rights-based

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216. *See* 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).

217. *See* Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 679-81 (2002). Nathaniel Persily was responding to an article from Samuel Issacharoff. *See* Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 608-09 (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, 540-45 (2002) (arguing against a rights-based conception of redistricting); Franita Tolson, *Partisan Gerrymandering as a Safeguard of Federalism*, 2010 UTAH L. REV. 859, 890 (arguing that thinking of partisan gerrymandering solely in terms of rights ignores the ways it enhances democracy and federalism).

218. *See* Bruce E. Cain, *Garrett's Temptation*, 85 VA. L. REV. 1589, 1600-03 (1999). For a response, see generally Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605 (1999).

219. RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE* 138-56 (2003); Richard L. Hasen, *The "Political Market" Metaphor and Election Law: A Comment on Issacharoff and Pildes*, 50 STAN. L. REV. 719, 725-28 (1998).

220. Persily, *supra* note 217, at 678-80.

221. *Id.* at 671.

222. *Id.* at 678-79.

223. Charles, *supra* note 28, at 1099.

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 their own sake but to protect political rights. Charles wrote:

> [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.[224]

From there, this academic dialogue over the grand purpose of election law seems to have stagnated, with nothing new added in almost two decades. The structural approach made little headway in the courts, and the Supreme Court seemed to reject it.[225] The majority in *New York State Board of Elections v. Lopez Torres* criticized the idea that anyone has a constitutional right to a "fair shot" in elections.[226] In *Rucho v. Common Cause*, the Court, echoing *Colegrove*, declared that federal-court policing of partisan gerrymandering would be impossible because there are no judicially manageable standards for separating permissible from impermissible considerations of party identification in drawing district lines.[227] No structuralist has elucidated, to the Supreme Court's satisfaction, a workable dividing line between appropriate and inappropriate judicial intervention. Indeed, as Nicholas O. Stephanopoulos argues, the current Supreme Court can be aptly considered the "anti-*Carolene* Court."[228]

Following the rights/structure debate, election-law theory turned to the role of nonjudicial institutions, such as citizen redistricting commissions, in

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224. *Id.* at 1102.

225. *See* N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 205-07 (2008).

226. *Id.* The case arose from a judicial candidate's complaint about a political-party machine's extensive control over the party's nomination processes. *Id.* at 201-02. The closest the Court has come to recognizing the value of competition as a constitutional value is the plurality opinion in *Randall v. Sorrell*, in which Justice Breyer put forth a multifactor test that included the competitiveness of elections in determining when a campaign-contribution limit is unconstitutionally low. 548 U.S. 230, 253-56 (2006). The Supreme Court later endorsed the multifactor test in a unanimous per curiam opinion in *Thompson v. Hebdon*. 589 U.S. 1, 5 (2019) (per curiam); *see also* Clingman v. Beaver, 544 U.S. 581, 603 (2005) (O'Connor, J., concurring in part and concurring in the judgment) (expressing some support for considering competitiveness in assessing election cases).

227. 588 U.S. 684, 718 (2019).

228. *See* Nicholas O. Stephanopoulos, *The Anti-*Carolene *Court*, 2019 SUP. CT. REV. 111, 169-70.

regulating elections. This focus on institutions was an important corrective to the early juricentrism of the rights/structure debate,[229] but it has not sparked major theoretical advances. Theoretical insights about the design of electoral institutions have not led to any fundamental changes in the highly decentralized and partisan structure of election administration, aside from the increased use of redistricting commissions in states that have adopted them via the initiative process.[230]

Occasionally, leading members of the academy have advanced new theoretical approaches. Most recently and significantly, Stephanopoulos has focused on "alignment."[231] His alignment theory requires a congruence between "popular preferences and governmental outputs."[232] This theory echoes political-equality concerns that I,[233] and others,[234] have long voiced. At heart, Stephanopoulos's focus on the preferences of the median voter is roughly congruous with a version of the political-equality argument that public policy should reflect the views of a majority of citizens. It is not clear that the alignment framing will lead to different results than one focused more directly on principles of political equality,[235] either as a matter of theory or in the courts. Moreover, many of the recent

229. *See, 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 86, 90 (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, 1373-80 (2005).

230. As noted in Part III, however, a revived focus on comparative institutions and electoral structures, including what Kevin M. Stack calls the "internal law of democracy," is beginning to show promise. Kevin M. Stack, *The Internal Law of Democracy*, 77 VAND. L. REV. 1627, 1629 (2024). On new interest in alternative voting systems, see *infra* notes 459-465 and accompanying text.

231. *See generally* NICHOLAS O. STEPHANOPOULOS, ALIGNING ELECTION LAW (2024) (arguing that alignment should be a fundamental principle of election law).

232. *Id.* at xviii-xix.

233. *See generally* Charles, *supra* note 28 (reviewing my account of the Supreme Court's election-law jurisprudence); HASEN, *supra* note 131 (discussing how campaign financing distorts political equality).

234. *See* Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1740 (1993) (discussing the limited progress in the political equality of Black voters after the passage of the VRA).

235. Nicholas O. Stephanopoulos distinguishes between an equality-of-influence theory and a focus on alignment with the views of the median voter most directly. *See* Nicholas O. 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 they are variations on a similar theme of public policy reflecting the overall preferences of voters.

advances in election law are less grand theory—focused on the purposes of election law—than discrete projects.[236]

Election-law scholarship also has not fully accounted for the rise of political polarization in politics and the judiciary. As explained in Section II.C, 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. The scholarship has not adequately 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 courts could successfully implement the political-markets approach. It is probably an exaggeration to say that theoretical scholarship on the purposes of election law has reached a dead end, but nothing groundbreaking has emerged in the last few decades.

II. RETROGRESSION

The retrogression of the American political system in recent years has overshadowed the stagnation of election-law doctrine, politics, and theory described in Part I. Stagnation in voting rights is still occurring, but the retrogressive trends that began in the last decade or so present new dangers. By *retrogression*, I mean that changes in politics, culture, and technology in the United States have endangered peaceful transitions of power and continuing free and fair elections and undermined the capacity of voters to judge the veracity of information and make competent voting decisions. This Part explores how courts, political actors, and election-law scholars have responded to retrogression.

A. Doctrine

For the most part, the courts effectively countered retrogression in the 2020 election, applying doctrine and signaling fortitude against antidemocratic moves. The Supreme Court started out strong against subversion, but its more recent decisions signal trouble ahead.

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,[237] the sitting President running for reelection had relentlessly questioned the

236. These discrete projects when viewed together, however, form the building blocks for the new pro-voter approach. *See infra* Section III.D.

237. *See* Hasen, *supra* note 36, at 266-82.

integrity of the election system and vote count, with no credible evidence.[238] After unofficial results showed then-President Trump losing to Joe Biden, Trump pursued a political and legal strategy to overturn the election.[239] The failed political strategy depended on bogus claims of fraud and irregularities to cajole legislatures—in states that Biden had won and that also had a Republican legislative majority—to submit alternative slates of electors.[240] These fake electors could then be counted as valid by Trump's Republican allies in Congress.[241] The strategy also used social media to mobilize public support among Trump supporters for overturning the election by spreading false claims of voter fraud and election irregularities.[242]

Trump's legal strategy sought to overturn election results judicially in contested states using similar phony claims.[243] By one count, Trump and his allies lost sixty-one of sixty-two cases, and Trump's sole win was a minor one.[244] Although there were some divisions along party lines among the judges, the judiciary, mostly on a bipartisan basis, resisted efforts to subvert the election.[245] It was a stark contrast with the usual partisan divide in election cases.

As Judge Bibas 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."[246] In that case, Trump's lawyers tried to throw out millions of mail-in ballots in Pennsylvania or to delay certification of the 2020 presidential-election results without alleging fraud or offering any explanation of how certain ballots that were cast or counted violated the Constitution.[247]

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238. *Id.* at 269-70.

239. *Id.* at 270-77.

240. *Id.* at 274.

241. *Id.*

242. *Id.* at 270-71. For a discussion of the political responses to this strategy, see *infra* Section II.B.

243. Hasen, *supra* note 36, at 272.

244. Cummings et al., *supra* note 31. The one successful case was *Donald J. Trump for President, Inc. v. Boockvar*, No. 602 M.D. 2020, slip op. at 3 (Pa. Commw. Ct. Nov. 12, 2020) (granting a special injunction).

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

246. Donald J. Trump for President, Inc. v. Sec'y of Pa., 830 F. App'x 377, 381 (3d Cir. 2020).

247. *See id.* at 384-91.

Judge Bibas's message was even more impressive because he is a noted conservative judge whom Trump himself had nominated to the Third Circuit.[248] Cases like this one sent important signals that the judiciary would not ignore evidence and simply declare that election losers had won. These cases were a triumph for the rule of law, and they were not costless for those involved. Judge Bibas received "very angry" messages after the ruling and had to take steps to assure his and his family's security.[249]

The Supreme Court did its part as well to counter retrogression. Without opinion, the Court summarily rejected Texas's legally and factually unsound lawsuit, filed directly in the Supreme Court.[250] Texas tried to use false and unsubstantiated charges of fraud and hoped to overthrow election results in states that Biden had won and that also had Republican-run legislatures.[251] The Court did not hear any postelection disputes on the merits because they raised no substantial legal issues or serious questions about the integrity of the election. The Court would later reject the most extreme version of the independent-state-legislature theory that Trump and his allies had relied upon to appoint alternative electors.[252] The Court admirably held the line and did not seem to consider

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248. Masood Farivar, *Trump-Appointed Judges Balk at President's Efforts to Overturn Election*, VOA (Dec. 2, 2020, 3:17 PM), https://www.voanews.com/a/2020-usa-votes_trump-appointed-judges-balk-presidents-efforts-overturn-election/6199079.html [https://perma.cc/N3UQ-BDRN].

249. Suzanne Monyak, *US Judge Recounts Security Concerns After Trump Election Ruling*, BLOOMBERG L. (July 24, 2024, 11:32 PM), https://news.bloomberglaw.com/us-law-week/us-judge-recounts-security-concerns-after-trump-election-ruling [https://perma.cc/Q35U-JMHM].

250. Texas v. Pennsylvania, 141 S. Ct. 1230, 1230 (2020) (mem.).

251. *See* Emma Platoff, *U.S. Supreme Court Throws Out Texas Lawsuit Contesting 2020 Election Results in Four Battleground States*, TEX. TRIB. (Dec. 12, 2020), https://www.texastribune.org/2020/12/11/texas-lawsuit-supreme-court-election-results [https://perma.cc/5VKY-ARGT] ("Texas' lawsuit leaned heavily on discredited claims of election fraud in swing states. Election officials and U.S. Attorney General Bill Barr have said there is no evidence of election fraud on a scale that could have swayed the results."). 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.

Texas v. Pennsylvania, 141 S. Ct. at 1230 (statement of Alito, J.) (citation omitted).

252. Moore v. Harper, 600 U.S. 1, 36-37 (2023); *see* Hasen, *supra* note 36, 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, 1052-55 (2021) ("[A] substantial amount of attention has . . . focused on the ability of state legislatures to appoint electors in the period between Election Day and the electors' vote.").

overturning the results of the election and did not signal 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*, the case deciding 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.[253] 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 to uphold the Constitution, and later participated in or supported an insurrection are ineligible to serve in office again, unless Congress, by a two-thirds vote, removes this disability.[254]

Because insurrections in the United States are mercifully uncommon, few modern cases have interpreted the meaning and scope of this disqualification provision. Its application to Donald Trump raised many legal and factual issues that the Supreme Court sidestepped in its decision. The Court decided unanimously that states lack the power to remove federal candidates from the ballot for a Section 3 violation.[255] The Court may have feared a race to the bottom in which some states would use flimsy excuses to remove candidates from the ballot for political reasons. The Court agreed on the need for uniformity in rules for disqualifying federal candidates under Section 3.[256]

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 hold federal office. The majority opinion was opaque, but it suggested that Congress may need to pass a statute to disqualify a federal candidate under Section 3.[257] 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 January 6 following a presidential election.[258]

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253. 601 U.S. 100, 104-06 (2024) (per curiam).

254. U.S CONST. amend. XIV, § 3.

255. *Anderson*, 601 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).

256. *Id.* at 110 (per curiam); *id.* at 119 (Sotomayor, Kagan & Jackson, JJ., concurring).

257. *Id.* at 109-10 (per curiam).

258. *See* William Baude & Michael Stokes Paulsen, *Sweeping Section Three Under the Rug: A Comment on* Trump v. Anderson, 138 HARV. L. REV. 676, 715 (2025) (concluding that *Anderson* does not limit the power of Congress to decline to count votes for disqualified candidates, but adding that, "[i]f called upon to extend the fallacious reasoning of *Trump v. Anderson*, the Court might well extend it, by hook or by crook").

Justices Sotomayor, Kagan, and Jackson issued an opinion in *Trump v. Anderson* that was styled as a concurrence but sounded like a partial dissent.[259] They excoriated the majority for attempting to limit Congress's power in a case that only raised the question of states' powers.[260] 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."[261]

Trump v. Anderson had the benefit of clarifying the scope of state power, and perhaps the Court was right as a pragmatic matter to take state-by-state disqualification of presidential candidates off the table as a potential political strategy. It is much harder to square its holding with the text of Section 3,[262] with history,[263] with originalism,[264] or with the usual nonuniform, state-by-state system for determining ballot access.[265] The Court was on firmer ground in seeing Section 3's disqualification grounds as more open to political manipulation than the usual application of a state's ballot-access rules. Ultimately, the standard for what

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259. Mark Joseph Stern, *Supreme Court Inadvertently Reveals Confounding Late Change in Trump Ballot Ruling*, SLATE (Mar. 4, 2024, 4:58 PM), https://slate.com/news-and-politics/2024/03/supreme-court-metadata-sotomayor-trump-dissent.html [https://perma.cc/V8WU-RCEU] ("[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.").

260. *Anderson*, 601 U.S. at 120-23 (Sotomayor, Kagan & Jackson, JJ., concurring).

261. *Id.* at 118 (Barrett, J., concurring in part and concurring in the judgment) ("In my judgment, this 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.").

262. *See* Baude & Paulsen, *supra* note 258, at 700 ("There is, however, a huge problem with this reasoning: It is directly contrary to what the Constitution actually says, and does, with respect to presidential elections.").

263. *See, e.g.*, Mark A. Graber, *Section 3 of the Fourteenth Amendment: Is Trump's Innocence Irrelevant?*, 84 MD. L. REV. 1, 9-43 (2024) (analyzing how those who framed Section 3 understood it); Gerard N. Magliocca, *Background as Foreground: Section 3 of the Fourteenth Amendment and January 6th*, 25 U. PA. J. CONST. L. 1059, 1070-72 (2023) (arguing that the Supreme Court should adopt a broad construction of Section 3).

264. *See* Aziz Z. Huq, *Structural Logics of Presidential Disqualification*, 138 HARV. L. REV. 172, 179-80 (2024).

265. Consider for example how states treated the candidacy of Robert F. Kennedy, Jr., who ran as an independent in 2024 until he dropped out and endorsed Donald Trump. His ability to get on and withdraw from the ballot as a candidate differed from state to state. *See* Alyce McFadden, Taylor Robinson, Leanne Abraham & Rebecca Davis O'Brien, *Where Independent and Third-Party Presidential Candidates Are on the Ballot*, N.Y. TIMES (Oct. 16, 2024), https://www.nytimes.com/interactive/2024/us/politics/presidential-candidates-third-party-independent.html [https://perma.cc/Q4FG-S7WJ].

counts as an "insurrection" that would justify 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 bring this matter back to the courts someday.

The Court's opinion in *Trump v. Anderson* was also surprisingly devoid of any mention of Trump's attempt to subvert the outcome of the 2020 election. After all, his conduct formed the basis of the claim that he was disqualified from the Presidency. A Court that used its dicta to limit the scope of Congress's power could have also used its dicta to praise the rule of law and stress the importance of peaceful transitions of power. The Court passed up an opportunity to recognize that Trump's actions during the 2020 election threatened the foundation of democratic governance in the United States.

Anderson demonstrates that sometimes it is just as important to examine what the Court chooses not to say as it is to examine what the Court says. Indeed, Karen M. Tani describes the Court's theme of "silence" in its 2023 Term, focusing in part on the Trump-related cases, and noting that a narrative of the events of January 6, 2021, was "conspicuously absent," with the Court "referencing these events only either obliquely or bloodlessly."[266]

The Court had a harder time ignoring the scope of Trump's 2020 activities in the immunity case, *Trump v. United States*.[267] A federal grand jury indicted Trump on four counts for conduct related to his attempts to subvert the outcome of the 2020 election.[268] Trump filed an interlocutory appeal arguing that he had presidential immunity for official acts he took as President and that many of the acts that were the subject of the indictment were official acts.[269] Dividing 6-3 along party lines, the Court held that 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.[270]

The majority tentatively divided potential immunity claims into three types. First, for "core" presidential functions, including speaking with officials at the U.S. Department of Justice, absolute immunity is appropriate.[271] Second, for cases involving the use of executive authority up to the "outer perimeter" of

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266. Karen M. Tani, *The Supreme Court, 2023 Term—Foreword: Curation, Narration, Erasure: Power and Possibility and the U.S. Supreme Court*, 138 HARV. L. REV. 1, 78-79 (2024) (footnote omitted).

267. 603 U.S. 593 (2024).

268. *Id.* at 602-03.

269. *Id.* at 603-04.

270. *Id.* at 621, 641-42.

271. *Id.* at 607-09, 619-21.

presidential power, there is a presumption of immunity.[272] 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.'"[273] Finally, unofficial acts receive no immunity.[274] The Court also held that evidence of official acts could not be used to prosecute a former President for unofficial acts.[275]

The Court did not clearly decide whether using illegal means to commit an act 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."[276] 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.[277] The majority left many such issues open for future development. But the message was clear enough about the attempted prosecution of Trump: it was going to be difficult. Prosecution now would require a fact- and context-based examination of the evidence to decide when immunity applied, with a bias against the prosecution and with an evidentiary rule that would make proving election subversion even harder. With Trump's victory in the 2024 election and the subsequent dismissal of the charges without prejudice under the Department of Justice's policies against prosecution of a sitting President,[278] these questions were never tested.

The Republican-appointed Justices on the Supreme Court ignored the real risk to peaceful transitions of power occurring in the current moment. They

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272. *Id.* at 614.

273. *Id.* at 615 (quoting Nixon v. Fitzgerald, 457 U.S. 731, 754 (1982)).

274. *Id.*

275. *Id.* at 630-32. *But see* Ned Foley, *Don't Overread the Court's Immunity Opinion*, LAWFARE (July 15, 2024, 1:25 PM), https://www.lawfaremedia.org/article/don-t-overread-the-court-s-immunity-opinion [https://perma.cc/72LY-2VB5] (arguing for a less sweeping reading of the Court's opinion).

276. Trump v. United States, 603 U.S. at 694 n.5 (Jackson, J., dissenting).

277. *Id.* at 632 n.3 (majority opinion) ("[Th]e 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.*

278. Paula Reid, Tierney Sneed & Devan Cole, *Special Counsel Jack Smith Drops Election Subversion and Classified Documents Cases Against Donald Trump*, CNN (Nov. 25, 2024, 4:49 PM EST), https://www.cnn.com/2024/11/25/politics/trump-special-counsel-jack-smith/index.html [https://perma.cc/8GCW-AUFC].

appeared more concerned about the hypothetical risk of an overzealous prosecution after the end of a presidential term chilling "an energetic and vigorous President."[279] Chief Justice Roberts's majority opinion offered not a word of condemnation about attempted election subversion, or the importance of fair elections and democratic transfers of power.[280] 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 President into a king.[281] The dissenting Justices lamented the potential for the ruling to allow a President to kill a political rival or underling with impunity.[282]

2. *The Cheap-Speech Cases*

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 omnipresence of social media. As I explain in more detail elsewhere, this rise of cheap speech interferes with voters' ability to make decisions consistent with their interests and ideologies in this period of technological change.[283]

The legal terrain is uncertain. For example, it is unclear whether 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 these media as they make voting decisions.[284] Two months before the

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279. Trump v. United States, 603 U.S. at 639.

280. Richard L. Hasen, *Trump Immunity Ruling Will Be John Roberts' Legacy to American Democracy*, SLATE (July 1, 2024, 3:20 PM), https://slate.com/news-and-politics/2024/07/supreme-court-trump-immunity-john-roberts-legacy.html [https://perma.cc/92XN-MM85].

281. Trump v. United States, 603 U.S. at 685 (Sotomayor, J., dissenting); *id.* at 686, 706 (Jackson, J., dissenting).

282. *Id.* at 685 (Sotomayor, J., dissenting) (suggesting a President could be immune from criminal liability for ordering "the Navy's Seal Team 6 to assassinate a political rival"); *id.* at 694 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: A Comparative Perspective on the United States*, 46 LAW & POL'Y 349, 350-53 (2024); Thomas M. Keck, *The U.S. Supreme Court and Democratic Backsliding*, 46 LAW & POL'Y 197, 198-201 (2024); and Michael Dichio & Igor Logvinenko, *"Culture and Practice Eat Documents for Lunch:" Norms and Procedures in the 2020 Election Cases*, 46 LAW & POL'Y 298, 300-06 (2024).

283. *See generally* HASEN, *supra* note 38 (describing the rise of election disinformation and detailing strategies to combat it).

284. *Id.* at 97-102.

2024 elections, California passed a law barring the dissemination of certain maliciously created deepfakes.[285] The law would prohibit

> an advertisement or other election communication containing materially deceptive content of . . . [a] candidate for any federal, state, or local elected office in California portrayed as doing or saying something that the candidate did not do or say if the content is reasonably likely to harm the reputation or electoral prospects of a candidate.[286]

The law contained exceptions for such communications coming from a candidate and for "satire or parody," both of which could be shared legally so long as the communications included a label (or, in the case of audio, an audio statement) to indicate that the image or sound was "manipulated."[287] The law further provided that, "[f]or visual media, the text of the disclosure shall appear in a size that is easily readable by the average viewer and no smaller than the largest font size of other text appearing in the visual media."[288]

In *Kohls v. Bonta*, a federal district court preliminarily enjoined the law, holding that it likely violated the First Amendment.[289] The court "acknowledge[d] that the risks posed by artificial intelligence and deepfakes are significant, especially as civic engagement migrates online and disinformation proliferates on social media."[290] But it held that the law "acts as a hammer instead of a scalpel, serving as a blunt tool that hinders humorous expression and unconstitutionally stifles the free and unfettered exchange of ideas which is so vital to American democratic debate."[291] The court concluded that the ban on these communications stifled too much political speech, and counterspeech was a more narrowly tailored alternative.[292] Moreover, the font size of the labeling requirement for satire or parody was too burdensome.[293] However, the court recognized that "labelling requirements, . . . if narrowly tailored enough, could pass constitutional muster."[294]

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285. CAL. ELEC. CODE § 20012 (West 2024).

286. *Id.* § 20012(b)(1)(A).

287. *Id.* § 20012(b)(2)-(3).

288. *Id.* § 20012(b)(2)(B)(1), (b)(2)(B)(3).

289. No. 24-cv-02527, 2024 WL 4374134, at *1, *5 (E.D. Cal. Oct. 2, 2024).

290. *Id.* at *8.

291. *Id.*

292. *Id.* at *1.

293. *Id.* at *5-6.

294. *Id.* at *5.

On the other end of the political spectrum, Florida and Texas passed laws[295] 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.[296] The states passed those laws after social-media companies deplatformed Donald Trump for failing to condemn the violence of January 6, 2021.[297]

In *Moody v. NetChoice, LLC*, the Supreme Court rejected social-media platforms' facial challenge to the Florida and Texas laws, remanding for further proceedings more pinpointed to actual applications of the laws.[298] But the Court in dicta embraced the view that social-media platforms, which are private entities, have the same rights as newspapers to engage in moderation and to select content as they see fit.[299] It rejected the argument that, at least when it comes to content moderation, social-media companies are like "common carriers" who must carry content with which they may disagree.[300] Barring platforms' private content-moderation decisions in the current political moment would have fueled election denialism. As Justice Kagan wrote in her majority opinion, Texas's law would prevent platforms from removing posts that "advance false claims of election fraud."[301] The Court concluded that "a State may not interfere with private actors' speech to advance its own vision of ideological balance."[302]

Defamation law is another tool that has somewhat succeeded in countering false information about the integrity of elections. Two voting-machine companies, Smartmatic and Dominion, sued a number of cable-television stations for spreading false claims about their machines altering the outcome of the 2020

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295. *See* Act of May 24, 2021, ch. 32, 2021 Fla. Laws 503 (codified as amended at FLA. STAT. § 501.2041); Act of Sept. 9, 2021, ch. 3, 2021 Tex. Gen. Laws 3904 (codified as amended at TEX. BUS. & COM. CODE ANN. §§ 120.001-.151).

296. HASEN, *supra* note 38, at 127.

297. *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 at 5-6, Moody v. NetChoice, LLC, 603 U.S. 707 (2024) (Nos. 22-277, 22-555).

298. 603 U.S. 707, 723-26 (2024). Although the laws differ in their particulars, they both limited the moderation of certain political content by social-media platforms. *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, *supra* note 297, at 6-7.

299. *Moody*, 603 U.S. at 726-42.

300. Richard L. Hasen, *The First Amendment Just Dodged an Enormous Bullet at the Supreme Court*, SLATE (July 1, 2024, 1:35 PM), https://slate.com/news-and-politics/2024/07/supreme-court-opinions-first-amendment-netchoice-texas-kagan.html [https://perma.cc/75XX-CQJA].

301. *Moody*, 603 U.S. at 737.

302. *Id.* at 741.

election.[303] Dominion's suit against Fox News led to a record $787.5 million settlement.[304] The suits seem to have deterred Fox from repeating lies about stolen elections.[305] Former Trump lawyer Rudy Giuliani faced bankruptcy proceedings after being found liable for $148 million in damages for his defamatory claim that Georgia election workers Ruby Freeman and Shaye Moss plotted to steal the 2020 presidential election in Georgia.[306] He eventually consented to a permanent injunction barring him from repeating the lies.[307]

Defamation law on its own cannot fully counter election lies or ensure that voters have accurate and timely information to make electoral decisions.[308] First, truth-telling through a defamation lawsuit happens retrospectively because defamation trials take place well after the false statement. This means defamation law cannot produce contemporary rebuttals or "counterspeech" against false claims. Second, many false claims about election integrity, such as statements that an election will be rigged, do not defame a specific person or entity and lack any disprovable fact that could provide the basis for suit.[309] Still, the general

303. Katie Robertson, *Smartmatic and OAN Settle Defamation Suit*, N.Y. TIMES (Apr. 16, 2024), https://www.nytimes.com/2024/04/16/business/media/smartmatic-oan-settle-defamation-suit.html [https://perma.cc/J3PK-7W69].

304. *Id.*

305. *See, e.g.*, Holly Patrick, *Moment Fox News Takes Trump Off Air to Fact-Check South Carolina Speech*, INDEPENDENT (Feb. 23, 2024, 23:00 GMT), https://www.independent.co.uk/tv/news/donald-trump-south-carolina-fox-news-b2501711.html [https://perma.cc/25AC-AVBL] (sharing commentary by Fox anchor Neil Cavuto that "judges picked by Donald Trump himself found no evidence of a [rigged election] in seven battleground states").

306. Praveena Somasundaram, Niha Masih & Maham Javaid, *Giuliani Says He Will Stop Accusing Georgia Workers of Election Tampering*, WASH. POST (May 22, 2024, 10:05 AM EDT), https://www.washingtonpost.com/politics/2024/05/21/giuliani-georgia-defamation-agreement [https://perma.cc/J7XB-32DT].

307. *Id.*; *see also* Plaintiffs' Motion for Civil Contempt at 3-4, Freeman v. Giuliani, No. 23-cv-3754 (D.D.C. Nov. 20, 2024) (recognizing Giuliani's earlier stipulation to an injunction against him). The case then settled. Erica Orden, *Rudy Giuliani Settles with Georgia Women Who Won $148 Million Judgment Against Him*, POLITICO (Jan. 16, 2024, 3:14 PM EST), https://www.politico.com/news/2025/01/16/rudy-giuliani-georgia-defamation-settlement-00198755 [https://perma.cc/4XHT-SBKX] (quoting a Giuliani statement on social media reading in part that "I and the Plaintiffs have agreed not to ever talk about each other in any defamatory manner, and I urge others to do the same").

308. *See* HASEN, *supra* note 38, at 115-17. Other tort and criminal laws also could provide a basis to counter certain dangerous election lies. *See* Amicus Curiae Brief of Professor Richard L. Hasen in Support of Appellee and Affirmance at 9-21, United States v. Mackey, No. 23-7577 (2d Cir. Feb. 12, 2024).

309. Defamation law typically specifies that a false statement must be "of or concerning" the plaintiff. *E.g.*, WJLA-TV v. Levin, 564 S.E.2d 383, 390 (Va. 2002).

deterrent effect of defamation verdicts may make the tort a worthy interstitial tool to fight the spreading of election lies.[310]

B. Politics

Like the legal system, the political system has reacted in mixed ways to the threat of democratic retrogression. 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 reverse Trump's loss in the state.[311]

On January 6, 2021, when Congress proceeded to count the Electoral College votes cast for each candidate, then-Vice President Mike Pence refused to advance the false slates of electors as Trump had urged.[312] A mob of Trump's supporters invaded the Capitol 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 five protesters dead and 140 law-enforcement officers injured.[313]

Within hours of the attack, 138 Republican members of Congress voted to object on bogus grounds to the counting of Electoral College votes from Pennsylvania for Biden.[314] Even in the face of an unprecedented attack on American democracy, the Trumpian wing of the Republican party remained committed to supporting Trump.

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310. Defamation law may go too far in deterring protected speech. On the controversy surrounding a $16 million settlement between Donald Trump and ABC News just before Trump took office for a second time, see Richard J. Tofel, *Questions ABC News Should Answer Following the $16 Million Trump Settlement*, COLUM. JOURNALISM REV. (Dec. 16, 2024), https://www.cjr.org/business_of_news/questions-abc-news-should-answer-16-million-trump-settlement.php [https://perma.cc/58CX-EMHA].

311. Amy Gardner, *"I Just Want to Find 11,780 Votes": In Extraordinary Hour-Long Call, Trump Presses Georgia Secretary of State to Recalculate the Vote in His Favor*, WASH. POST (Jan. 3, 2021, 9:59 PM EST), https://www.washingtonpost.com/politics/trump-raffensperger-call-georgia-vote/2021/01/03/d45acb92-4dc4-11eb-bda4-615aaefd0555_story.html [https://perma.cc/G64K-A999]; *see* Hasen, *supra* note 36, at 272-75.

312. Hasen, *supra* note 36, at 274.

313. HASEN, *supra* note 1, at 120-21.

314. Harry Stevens, Daniela Santamariña, Kate Rabinowitz, Kevin Uhrmacher & John Muyskens, *How Members of Congress Voted on Counting the Electoral College Vote*, WASH. POST (Jan. 7, 2021, 12:48 PM), https://www.washingtonpost.com/graphics/2021/politics/congress-electoral-college-count-tracker [https://perma.cc/95AB-SAGA].

The House of Representatives impeached Trump for inciting insurrection.[315] The vote divided mostly along party lines, with ten Republicans and all Democrats voting for impeachment.[316] In the Senate, fifty-seven senators, including seven Republicans, voted for conviction.[317] But Senate Majority Leader Mitch McConnell, who had harshly condemned Trump for his postelection attempts to overturn the election results, voted against conviction, leading some Senate Republicans in claiming that criminal law would take care of Trump and that a former President already out of office could not be impeached.[318] The vote fell short of the sixty-seven senators needed for conviction.[319] Without a conviction, the Senate did not consider disqualifying Trump from holding future office, allowing him to run again for President and to prevail in 2024.

Amidst partisan maneuvering in the House, Speaker of the House Nancy Pelosi convened a special committee to investigate January 6.[320] After negotiations between parties over the composition of the committee and scope of its work broke down, Pelosi appointed all the members, including two Republican members, Liz Cheney and Adam Kinzinger (both of whom had voted to impeach

315. Nicholas Fandos, *Trump Impeached for Inciting Insurrection*, N.Y. TIMES (Apr. 22, 2021), https://www.nytimes.com/2021/01/13/us/politics/trump-impeached.html [https://perma.cc/LP69-9HDH].

316. Jonathan Weisman & Luke Broadwater, *A Long Hard Year for Republicans Who Voted to Impeach After Jan. 6*, N.Y. TIMES (Jan. 5, 2022), https://www.nytimes.com/2022/01/05/us/politics/republican-impeachment-votes-trump-jan-6.html [https://perma.cc/ML2G-A7Y8]; *see Roll Call 17 | Bill Number: H. Res. 24*, CLERK: U.S. HOUSE REPRESENTATIVES, (Jan. 13, 2021, 4:33 PM), https://clerk.house.gov/Votes/202117 [https://perma.cc/6PEE-98QX].

317. Carl Hulse & Nicholas Fandos, *McConnell, Denouncing Trump After Voting to Acquit, Says His Hands Were Tied*, N.Y. TIMES (Feb. 17, 2021), https://www.nytimes.com/2021/02/13/us/mcconnell-trump-impeachment-acquittal.html [https://perma.cc/PCN2-8FBS]. The roll call vote appears at Weiyi Cai, Annie Daniel, Jon Huang, Jasmine C. Lee & Alicia Parlapiano, *Trump's Second Impeachment: How the Senate Voted*, N.Y. TIMES (Feb. 13, 2021), https://www.nytimes.com/interactive/2021/02/13/us/politics/senate-impeachment-live-vote.html [https://perma.cc/V86Z-TN2N].

318. Hulse & Fandos, *supra* note 317.

319. *Id.*; *see* U.S. CONST. art. I, § 3, cl. 6.

320. Claudia Grisales, *House Speaker Nancy Pelosi Launches Select Committee to Probe Jan. 6 Insurrection*, NPR (June 24, 2021 11:16 AM ET), https://www.npr.org/2021/06/24/1009818514/house-speaker-nancy-pelosi-launches-select-committee-to-probe-jan-6-insurrection [https://perma.cc/6SU6-J2H7].

Trump).[321] The committee held high-profile hearings and issued a report that commanded great public attention.[322]

Eventually, many Republicans came to downplay both January 6 and Trump's role in inspiring the Capitol invasion.[323] Anti-Trumpian elements in the Republican Party were mostly purged. Of the ten House members who voted to impeach Trump, only two 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.[324] Shortly before leaving office, President Biden issued pardons of January 6 committee members and staff, expressing fear that returning President Trump would target for prosecution those who investigated and reported on the 2020 election-subversion attempt.[325]

Congress passed the ECRA in 2022, just before Republicans regained control of the House.[326] It was a measure aimed at fixing the Electoral Count Act—the law that had governed much of the procedure for counting Electoral College votes since 1876—whose holes and ambiguities were central parts of Trump's

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321. Michael S. Schmidt, Luke Broadwater & Maggie Haberman, *How the House Jan. 6 Panel Has Redefined the Congressional Hearing*, N.Y. Times (June 25, 2022), https://www.nytimes.com/2022/06/25/us/politics/jan-6-congressional-hearing.html [https://perma.cc/3G58-EQPP]. On Cheney and Kinzinger's impeachment votes, see *Roll Call 17 | Bill Number: H. Res.* 24, *supra* note 316.

322. *See generally* H.R. Rep. No. 117-663 (2022) (reporting the findings of the Select Committee to Investigate the January 6th Attack on the United States Capitol).

323. *See, e.g.*, Jonathan Weisman & Reid J. Epstein, *G.O.P. Declares Jan. 6 Attack "Legitimate Political Discourse,"* N.Y. Times (Feb. 4, 2022), https://www.nytimes.com/2022/02/04/us/politics/republicans-jan-6-cheney-censure.html [https://perma.cc/U3TK-9NLZ] (noting that, in a voice vote, the Republican National Committee officially declared the attack on the Capitol was "legitimate political discourse").

324. Mariana Alfaro, *Trump Takes Aim at a Remaining House Republican Who Voted to Impeach Him*, Wash. Post (Apr. 17, 2024, 3:25 PM EDT), https://www.washingtonpost.com/politics/2024/04/17/trump-dan-newhouse-republican-challenger [https://perma.cc/2EBB-RF5B]. In 2024, the remaining two—David Valadao and Dan Newhouse—were reelected to the House. Melissa Gomez, *Republican David Valadao Wins Reelection, Notching GOP Closer to Control of U.S. House*, L.A. Times (Nov. 13, 2024), https://www.latimes.com/california/story/2024-11-12/ca-22-election-results-david-valadao [https://perma.cc/LF7U-UBR3]; Melissa Santos, *Dan Newhouse, Republican Who Voted to Impeach Trump, Wins Reelection*, Axios Seattle (Nov. 14, 2024), https://www.axios.com/local/seattle/2024/11/14/newhouse-wins-election-impeachment-trump [https://perma.cc/4UQD-MUTL].

325. Irie Senter, Kyle Cheney, Nicholas Wu & Josh Gerstein, *Biden Issues Preemptive Pardons for Fauci, Milley, Jan. 6 Committee, and Others*, Politico (Jan. 20, 2025, 11:30 AM EST), https://www.politico.com/news/2025/01/20/biden-pardons-fauci-milley-jan-6-committee-00199244 [https://perma.cc/KD3H-EVTF].

326. For background, see 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, 1041 (2023).

strategy to overturn the election results.[327] The measure was negotiated carefully on a bipartisan basis, and it received more Republican support in the Senate than in the House.[328] The ECRA passed as a small section of a must-pass defense authorization bill by a mostly party-line vote of 225-201 in the House[329] and a more bipartisan 68-29 in the Senate.[330]

Some of those who participated in the attempt to overturn the 2020 elections faced prosecution. Numerous states prosecuted others for attempting to subvert the 2020 election. Fifty-two people who participated in the fake-electors plots and related means of subverting the 2020 election either pled guilty or have been indicted in cases brought in Arizona, Georgia, Michigan, Nevada, and Wisconsin.[331] Trump was indicted in the Georgia state case.[332] Numerous bar proceedings have also weighed the disbarment or suspension of several Trump lawyers alleged to have helped him with the scheme, including Jeffrey Clark, John Eastman, Rudy Giuliani, and Jenna Ellis.[333] These cases and proceedings offer some public reckoning for the actions in 2020 and 2021.

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327. Hasen, *supra* note 36, at 274.

328. *See* Hulse, *supra* note 37.

329. *See* 168 CONG. REC. H10528 (daily ed. Dec. 23, 2022); *Roll Call 549 | Bill Number: H. R. 2617*, CLERK: U.S. HOUSE REPRESENTATIVES (Dec. 23, 2022, 2:00 PM), https://clerk.house.gov/Votes/2022549 [https://perma.cc/V26L-R4F5] (showing that Republicans voted 9-200 against the bill and Democrats voted 216-1 in favor of the bill).

330. *See* 168 CONG. REC. S10077 (daily ed. Dec. 22, 2022). Republicans voted 18-29 against the bill. *H.R. 2617 (117th): Consolidated Appropriations Act, 2023*, GOVTRACK.US (Dec. 22, 2022, 2:00 PM ET), https://www.govtrack.us/congress/votes/117-2022/s421 [https://perma.cc/BC4Q-6F5K]. Democrats voted 47-0 in favor of the bill. *Id.* Two Independent senators, Bernie Sanders and Angus King, voted in favor of the bill. *Roll Call Vote 117th Congress – 2nd Session*, U.S. SENATE, https://www.senate.gov/legislative/LIS/roll_call_votes/vote1172/vote_117_2_00421.htm [https://perma.cc/8NC9-ED9C]. 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. *Roll Call 449 | Bill Number: H. R. 8873*, CLERK: U.S. HOUSE REPRESENTATIVES (Sept. 21, 2022, 4:56 PM), https://clerk.house.gov/Votes/2022449 [https://perma.cc/6BRZ-TXM6].

331. Neil Vigdor & Danny Hakim, *Wisconsin Charges 3 Trump Allies in Fake Electors Scheme*, N.Y. TIMES (June 4, 2024), https://www.nytimes.com/2024/06/04/us/politics/wisconsin-charges-3-trump-allies-in-fake-electors-scheme.html [https://perma.cc/S2UX-XJ7M]; Hunter Evans, Adam George, Quinta Jurecic & Emma Plankey, *How States Are Investigating and Prosecuting the Trump Fake Electors*, LAWFARE (Apr. 23, 2024, 8:00 AM), https://www.lawfaremedia.org/article/how-states-are-investigating-and-prosecuting-the-trump-fake-electors [https://perma.cc/6BLV-DK73].

332. Vigdor & Hakim, *supra* note 331.

333. Benjamin Weiser, *Giuliani Disbarred from the Practice of Law in New York*, N.Y. TIMES (July 2, 2024), https://www.nytimes.com/2024/07/02/nyregion/giuliani-disbarred-new-york-trump.html [https://perma.cc/X4PP-52DV]; Alison Durkee, *Giuliani Disbarred in D.C.: Here*

The U.S. Department of Justice charged or convicted nearly 1,600 people of federal offenses related to the January 6, 2021, invasion of the U.S. Capitol.[334] This too appeared to offer a public reckoning. But in 2025,

> President Donald J. Trump, in one of his first official acts, issued a sweeping grant of clemency . . . to all of the nearly 1,600 people charged in connection with the attack on the Capitol on Jan. 6, 2021, issuing pardons to most of the defendants and commuting the sentences of 14 members of the Proud Boys and Oath Keepers militia, most of whom were convicted of seditious conspiracy.[335]

The clemency was the opposite of a public reckoning, a dangerous signal that unsuccessful attempts to overthrow the government would be forgiven down the line if election losers once again regained power.

Overall, states' responses to retrogression have been mixed.[336] 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.[337] Some states amended their election code to clarify that those who certify votes have no discretion to reject the

Are All the Other Ex-Trump Lawyers Now Facing Legal Consequences, FORBES (Sept. 27, 2024, 9:23 AM EDT), https://www.forbes.com/sites/alisondurkee/2024/09/26/kenneth-chesebro-charged-in-wisconsin-here-are-all-the-former-trump-lawyers-now-facing-legal-consequences [https://perma.cc/54SZ-JHL7]. On the use of lawyers to police democratic backsliding, see Scott L. Cummings, *Lawyers in Backsliding Democracy*, 112 CALIF. L. REV. 513, 598-621 (2024).

334. Alan Feuer, *Trump Grants Sweeping Clemency to All Jan. 6 Rioters*, N.Y. TIMES (Jan. 21, 2025), https://www.nytimes.com/2025/01/20/us/politics/trump-pardons-jan-6.html [https://perma.cc/R337-9N22].

335. *Id.*

336. For a broad overview, see generally 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 253 (Karen J. Greenberg & Julian E. Zelizer eds., 2024).

337. *State Laws Providing Protection for Election Officials and Staff*, NAT'L CONF. STATE LEGISLATURES (Apr. 12, 2024), https://www.ncsl.org/elections-and-campaigns/state-laws-providing-protection-for-election-officials-and-staff [https://perma.cc/DQ78-W9V8]. On the attrition of election officials, see Joshua Ferrer, Daniel M. Thompson & Rachel Orey, *Election Official Turnover Rates from 2000-2024*, BIPARTISAN POL'Y CTR. 12-26 (Apr. 2024), https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2024/04/WEB_BPC_Elections_Admin_Turnover_R01.pdf [https://perma.cc/QY9U-JSPU].

statewide election results.[338] Some state supreme courts have reined in county boards that refused to do their ministerial duties in certifying elections.[339]

Other states flirted with making 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.[340] An Arizona lawmaker proposed a bill that would allow the state legislature to overturn the voters' choice for the state's presidential electors.[341] 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 a contested election.

Some state legislatures have engaged in performative acts that pandered to the Republican base and could further erode confidence in election integrity. For example, the Arizona State Legislature ordered a high-profile "audit" of the 2020 election returns to be done by a private firm, "Cyber Ninjas."[342] This group did not produce any reliable evidence of a stolen election.[343] In Wisconsin, an 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.[344]

Republican states continue to enact new laws and policies to make voter registration and voting more difficult.[345] Continuing a longstanding practice,

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338. Lauren Miller & Will Wilder, *Certification and Non-Discretion: A Guide to Protecting the 2024 Election*, 35 STAN. L. & POL'Y REV. 1, 37 (2024).

339. *See* Derek T. Muller, *Election Subversion and the Writ of Mandamus*, 65 WM. & MARY L. REV. 327, 347-48, 350-51 (2024).

340. Hasen, *supra* note 36, at 300.

341. *Id.* at 300-01, 301 n.175.

342. Kevin Brueninger, *Cyber Ninjas' GOP-Backed Audit of Arizona Votes Still Shows Biden Won, Maricopa County Says*, CNBC (Sept. 24, 2021, 10:47 AM EDT), https://www.cnbc.com/2021/09/24/trump-friendly-cyber-ninjas-audit-of-arizona-votes-still-shows-biden-won.html [https://perma.cc/YQJ3-TQ8H].

343. Nathaniel Persily, *Election Administration and the Right to Vote*, *in* OUR NATION AT RISK: ELECTION INTEGRITY AS A NATIONAL SECURITY ISSUE, *supra* note 336, at 191, 204.

344. Scott Bauer, *Judge: Wisconsin Probe Found 'Absolutely No' Election Fraud*, AP NEWS (July 28, 2022, 12:12 PM EST), https://apnews.com/article/2022-midterm-elections-wisconsin-lawsuits-presidential-16d90c311d35d28b9b5a4024e6fb880c [https://perma.cc/89SX-NPSC].

345. JACOB M. GRUMBACH, LABORATORIES AGAINST DEMOCRACY: HOW NATIONAL PARTIES TRANSFORMED STATE POLITICS 170-76 (2022); Aaron Mendelson, *A Headlong Rush by States to Attack Voting Access — Or Expand It*, CTR. FOR PUB. INTEGRITY (Oct. 6, 2022), https://publicintegrity.org/politics/elections/who-counts/a-headlong-rush-by-states-to-attack-voting-access--or-expand-it [https://perma.cc/5HQP-MNQP].

legislators tried to justify the passage of such laws by pointing to the potential for fraud.[346] Some Republican states with direct-democracy options have launched new attacks on the initiative process.[347] The attacks appear driven in part by the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, which allowed states to ban abortion,[348] and subsequent attempts by voters in red states to protect abortion rights via initiative.[349]

As noted, state regulation of social media has also been a mixed bag.[350] Social-media regulation raises delicate questions about how to balance the need to give voters reliable information, thereby curtailing retrogression, with concerns about squelching core political speech protected by the First Amendment.

C. Theory

Election-law theory has not caught up to the retrogression of American democracy. In some ways, the field maintains a business-as-usual attitude that does not meet the moment. The continued embrace of the responsible-party-government theory and the continued dominance of a marketplace-of-ideas theory of the First Amendment illustrate the gap between theory and reality.

One tenet of election-law orthodoxy, borrowed from American political science,[351] is that strong political parties are necessary for a well-functioning

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346. *See, e.g.*, Mendelson, *supra* note 345.

347. *See, e.g.*, Sara Carter & Alice Clapman, *Politicians Take Aim at Ballot Initiatives*, BRENNAN CTR. FOR JUST. (Jan. 16, 2024), https://www.brennancenter.org/our-work/research-reports/politicians-take-aim-ballot-initiatives [https://perma.cc/3TCY-JJ9U]; Camille Squires, *Red State AGs Keep Trying to Kill Ballot Measures by a Thousand Cuts*, BOLTS (Feb. 29, 2024), https://boltsmag.org/attorneys-general-stall-ballot-measures [https://perma.cc/RRC3-64A5]. For a recent example, see *Brown v. Yost*, 103 F.4th 420, 425, 444 (6th Cir. 2024), which granted a preliminary injunction after finding that plaintiffs were likely to show that the Ohio Attorney General had impermissibly interfered with their ballot initiative, *vacated*, 104 F.4th 621, 622 (6th Cir. 2024) (en banc). For a longer history finding that Republican control of the state legislature is positively correlated with backsliding in initiative power, see John Matsusaka, Direct Democracy Backsliding, 1955-2022, at 24 (Apr. 14, 2024) (unpublished manuscript), https://papers.ssrn.com/abstract=4522377 [https://perma.cc/U5PD-3MJS].

348. 597 U.S. 215, 292 (2022).

349. *See* 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), https://www.nytimes.com/2023/04/23/us/republicans-abortion-voting.html [https://perma.cc/D3EG-SDCW].

350. *See supra* notes 289-302 and accompanying text (discussing the *Kohls v. Bonta* and *Moody v. NetChoice, LLC* cases).

351. *E.g.*, Am. Pol. Sci. Ass'n, *Toward a More Responsible Two-Party System: A Report of the Committee on Political Parties*, 44 AM. POL. SCI. REV. 1, 15-25 (Supp. 1950).

democracy.[352] Indeed, E.E. Schattschneider, a leading political scientist of the mid-twentieth century, famously wrote that modern democracy was "unthinkable," except in terms of the parties.[353] In the United States's 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,[354] such as evangelicals and business leaders in the Republican Party and (traditionally) labor and minority interests in the Democratic Party.

The idea that parties channel factionalism in responsible ways informed the Supreme Court's decision to reject the First Amendment right of a minor party to "fusion," the practice of nominating someone who also is a major-party candidate.[355] In holding that the state could discriminate against minor or new parties in favor a "healthy two-party system,"[356] the Court was echoing the views of mainstream political scientists and law professors about the importance of major parties to democratic stability.[357]

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.[358] Professor Richard H. Pildes argues against state and local laws that provide multiple public matching funds for small-dollar donations.[359]

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352. For an excellent overview and critique of the theory 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, 1229-33 (2018).

353. E.E. SCHATTSCHNEIDER, PARTY GOVERNMENT 1 (1942).

354. LEE DRUTMAN, BREAKING THE TWO-PARTY DOOM LOOP 45-47, 126 (2020) (analyzing and critiquing this perspective); *see also* SAM ROSENFELD, THE POLARIZERS 12-17 (2020) (explaining the origins of the concept of "party responsibility," which entailed "[m]aking the parties more cohesive and programmatic" and thus less likely to be seen as interchangeable).

355. *See supra* notes 93-94 and accompanying text.

356. Timmons v. Twin Cities Area New Party, 520 U.S. 351, 367 (1997).

357. *See* Hasen, *supra* note 93, at 332 (critiquing the Court's "uncritical reliance" on the political-science theory of the time).

358. *See, e.g.*, Raymond J. La Raja, *Campaign Finance*, *in* ELECTORAL REFORM IN THE UNITED STATES: PROPOSALS FOR COMBATTING POLARIZATION AND EXTREMISM 251, 272-75 (Larry Diamond, Edward B. Foley & Richard H. Pildes eds., 2025).

359. Richard H. Pildes, *Small-Donor-Based Campaign-Finance Reform and Political Polarization*, 129 YALE L.J.F. 149, 161-65 (2019); *see also* Thomas B. Edsall, *For $200, A Person Can Fuel the Decline of Our Major Parties*, N.Y. TIMES (Aug. 30, 2023), https://www.nytimes.com/2023/08/30/opinion/campaign-finance-small-donors.html [https://perma.cc/W2A7-3TX2] (arguing that highly ideological small-dollar donors constitute a threat to American democracy through polarization and extremism). *But see generally* Nathaniel Persily, *Campaign Finance and Contemporary Political Dysfunction*, *in* MONEY, FREE SPEECH AND THE FUTURE OF OUR DEMOCRACY: THE SUPREME COURT AND A HALF CENTURY OF CAMPAIGN FINANCE REGULATION (Lee C. Bollinger & Geoffrey R. Stone eds., forthcoming 2025) (on file with author)

His concern is that donors are generally more polarized than nondonors, and multiple matches amplify support for more extreme candidates, leading to greater polarization.[360] Evidence shows that small donors have been much more likely to support election deniers in Congress, for example.[361] Along similar lines, Professors Raymond J. La Raja and Brian F. Schaffner want to channel any public financing through parties.[362]

Whether or not the responsible-party-government theory in the past justified channeling money through political parties, however, today the parties can become vectors of polarization and threaten democratic backsliding.[363] Trump's takeover of the Republican Party apparatus means that funneling money to the parties could stoke extremism over compromise. Further, it is doubtful that parties can serve their "big tent" functions in an era of intense polarization.[364]

(arguing that the campaign-finance system has played a "small, but supporting, role in the drama of political dysfunction and polarization over the last few decades").

360. Pildes, *supra* note 359 at 156-61. Large and small donors alike appear much more ideological than nondonors. *See* La Raja, *supra* note 358, at 256 fig.7.1.

361. Samuel Issacharoff & Richard H. Pildes, *Participation Versus Effective Government*, 26 Theoretical Inquiries L. (forthcoming 2025) (manuscript at 25-26), https://ssrn.com/abstract=5163201 [https://perma.cc/TM97-54E7].

362. Raymond J. La Raja & Brian F. Schaffner, Campaign Finance and Political Polarization: When Purists Prevail 147-49 (2015).

363. The literature here is voluminous. *See* Steven Levitsky & Daniel Ziblatt, Tyranny of the Minority: How to Reverse an Authoritarian Turn and Forge Democracy for All 92-133 (2023) (recounting how the Republican Party became captured by its base and then violated several key principles of democratic behavior); Daniel Schlozman & Sam Rosenfeld, The Hollow Parties: The Many Pasts and Disordered Present of American Party Politics 4-11 (2024) (connecting the trend of "party hollowness"—parties' increasing inability to run a democracy—with increasing polarization); Paul Pierson & Eric Schickler, Partisan Nation: The Dangerous New Logic of American Politics in a Nationalized Era 12-21, 71-125 (2024) (describing the process of party polarization); Persily, *supra* note 359 (manuscript at 8) ("[P]arty 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 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.").

364. *See* Drutman, *supra* note 354, at 45 ("Other contemporary scholars also fretted (it turns out correctly) that more coherent parties would reduce political competition. If Democratic and Republican candidates were stuck to national party brands, they would lose the flexibility to target their appeals to local constituencies.").

Partisan primaries create incentives for candidates to embrace the extreme right or left, leading to greater partisan divides in legislatures and in society.[365]

Large corporate donors may not mitigate polarization either. In the Republican Party, these donors may support Trumpian politicians that favor corporate interests. Although some corporations pledged to boycott PAC contributions to Republicans who objected to Pennsylvania's Electoral College votes after January 6, they quickly returned to funding election deniers as public attention waned.[366]

The new cheap-speech era also has destabilized First Amendment theory.[367] Election law implicates the First Amendment in areas such as campaign-finance law,[368] minor-party ballot-access rules,[369] rules for conducting petition drives,[370] regulations of speech in judicial campaigns,[371] and, more recently, laws regulating online campaign content.[372]

Conventional First Amendment theory has long embraced a marketplace-of-ideas approach to free speech under the First Amendment, where the usual cure for false speech is "counterspeech" and the assumption is that truth will prevail in public debate.[373] In *Moody*, the Supreme Court expressed skepticism about the constitutionality of Florida and Texas laws purporting to limit private platforms' content-moderation decisions, stating that "the government cannot get its way

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365. *See* Edward B. Foley, *Requiring Majority Winners for Congressional Elections: Harnessing Federalism to Combat Extremism*, 26 LEWIS & CLARK L. REV. 365, 368-76 (2022); *infra* notes 459-465 and accompanying text.

366. Jessica Piper & Zach Montellaro, *Corporations Gave $10 Million to Election Objectors After Pledging to Cut Them Off*, POLITICO (Jan. 6, 2023 4:30 AM EST), https://www.politico.com/news/2023/01/06/corporations-election-objectors-donations-00076668 [https://perma.cc/U6FC-WGCE].

367. *See generally* HASEN, *supra* note 38 (advocating for legal and social measures to help mitigate against the spread of disinformation in U.S. democracy).

368. *E.g.*, Buckley v. Valeo, 424 U.S. 1, 58-59 (1976) (per curiam) (invalidating certain campaign-spending limitations as violating the First Amendment).

369. *E.g.*, Munro v. Socialist Workers Party, 479 U.S. 189, 196-99 (1986) (holding that a state statute requiring minor-party candidates to receive a certain proportion of primary votes did not run afoul of the First Amendment).

370. *E.g.*, Buckley v. Am. Const. L. Found., Inc., 525 U.S. 182, 186-87, 192 (1999).

371. *E.g.*, Republican Party of Minn. v. White, 536 U.S. 765, 768 (2002).

372. *See supra* notes 289-294 and accompanying text (discussing *Kohls v. Bonta*).

373. At the Supreme Court, perhaps the most prominent celebration of counterspeech as a solution to bad speech is Justice Kennedy's opinion in *United States v. Alvarez*, 567 U.S. 709, 726-27 (2012). For scholarly explorations of the "marketplace of ideas," see generally 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); and 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).

just by asserting an interest in improving, or better balancing, the marketplace of ideas."[374]

The Court made the right call in *Moody*, given the immediate risks of election denialism following Trump's 2020 conduct.[375] In that particular case, leaving the content moderation to the private market was the less risky choice for democracy. But in the long term, we need to explore more deeply the connections between the First Amendment, technology, and the conditions for democratic governance.[376]

Whether or not the marketplace of ideas was ever an accurate depiction of political speech, it is misguided to believe that the truth will prevail quickly enough that it can affect voter choices in the new cheap-speech era. For example, the staying power of the false claim that the 2020 election was stolen led to the January 6 invasion of the Capitol and the "Stop the Steal" movement.[377] The ability of President Trump and his allies to share their false messages directly on social media and across fragmented partisan media—in ways that were not technologically possible in an earlier era—increased the influence of the false claim of a stolen election. The truth that the 2020 election was not stolen was out there, but many people did not believe it.

The episode demonstrates the need to consider more carefully how to tweak election laws to provide voters with accurate information about elections while avoiding government censorship. The solution is not to outlaw false election-related speech, aside from a narrow set of statements that threaten or coerce voters, bribe them, or trick them about when, where, or how to vote.[378] Speech restrictions that stifle important political discourse, essential to fair decision-making, might be a cure worse than the disease. But much more can be done to aid voters in accessing and assessing reliable information, including providing better disclosure of certain election-related information.

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374. Moody v. NetChoice, LLC, 603 U.S. 707, 732 (2024).

375. *See supra* notes 298-302 and accompanying text.

376. For an introduction to the complexities, see Jack M. Balkin, *Moody v. NetChoice*: The Supreme Court Meets the First Amendment Triangle 6-9 (Jan. 19, 2025) (unpublished manuscript), https://ssrn.com/abstract=5104013 [https://perma.cc/DFJ4-R2D2].

377. 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.").

378. Some of this speech is already outlawed. *See, e.g.*, 52 U.S.C. § 10307(b) (2018) ("No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote . . . .").

The issues require nuanced thinking. Consider, for example, the disclosure of campaign-finance information. Voters could benefit from mandatory disclosure of the large-scale funders of online political activity and mandatory labels on audio and video content that has been digitally manipulated with the help of artificial intelligence.[379] But in this complex era, where information travels cheaply and widely, increased disclosure sometimes can hurt the public interest. Public disclosure of certain personal identifying information, such as the home addresses of small campaign donors, can lead to privacy invasions and even harassment, without giving voters any meaningful information to evaluate candidates' positions or deterring corruption.[380] One possible fix is to raise the monetary threshold for public disclosure of campaign contributions.

However the correct democracy-enhancing First Amendment paradigm takes shape, the debate must move beyond an overly simplistic marketplace-of-ideas approach. To take one prominent debate, consider the reversal of both scholars and judges on the issue of "antidistortion" as a basis for equalizing political power in campaign-finance and social-media cases.[381] "Antidistortion" is the idea that law can limit the ability of those with large economic resources to convert those resources into political power for a political agenda disproportionate to the public's support for that agenda.[382] In the past, it was mostly liberals that embraced antidistortion to call for corporate campaign-finance spending limits.[383] Now many conservatives call for regulation of the content-moderation decisions of social-media companies because of the large power—and perceived

379. *See* HASEN, *supra* note 38, at 85-102; *see also supra* notes 289-294 and accompanying text (discussing the *Kohls v. Bonta* litigation).

380. *See* Dara Lindenbaum, *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 2 (May 16, 2024), https://www.fec.gov/resources/cms-content/documents/Statement-Urging-Amend-FECA-to-Eliminate-Disclosure-of-Contributors-Street-Nam.pdf [https://perma.cc/7U94-23N7].

381. *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, *supra* note 297, at 35-36. Some liberals have joined with conservatives in arguing for further scrutiny of the content-moderation decisions of online platforms. *See, e.g.*, Tim Wu, *The First Amendment Is Out of Control*, N.Y. TIMES (July 2, 2024), https://www.nytimes.com/2024/07/02/opinion/supreme-court-netchoice-free-speech.html [https://perma.cc/P6Y7-FCFW].

382. *See* HASEN, *supra* note 131, at 27, 73; Austin v. Mich. Chamber of Com., 494 U.S. 652, 659-60 (1990) (upholding on antidistortion grounds a Michigan campaign-finance law aiming to limit "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas").

383. *See* HASEN, *supra* note 131, at 72-83.

liberal bias—of these companies.[384] How much can the government be trusted to regulate speech to assure voter competence and fair elections without risking censorship? Here, it is enough to say that the First Amendment marketplace-of-ideas theory, like the responsible-party-government theory, does not match the new reality.

III. TRANSFORMATION

A. The Pro-Voter Approach

1. The Five Basic Principles of the Pro-Voter Approach

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. Most urgently, no longer can Americans take peaceful transitions of power for granted, especially with millions of people believing false claims about rigged elections, increasing the chances of deteriorating "loser's consent"—the willingness of the losing side to accept election results as legitimate.[385]

The problems are potentially existential, and there is only so much that election law can do. Recognizing these realistic limits, this Part outlines the case to use election law as a project of *pro-voter transformation* that would put voters and democracy in the center of legal, political, and theoretical change. These principles might seem self-evident, but nothing should be taken for granted. The courts may not afford voters adequate protection, and these principles are already facing governmental resistance. For this reason, it is important to articulate these principles and to use multiple levers to reinforce them as a commitment to democracy and political equality.

The pro-voter approach to election law engages legal doctrine, political action, and scholarship[386] to further five principles: (1) all eligible voters should

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384. *See* HASEN, *supra* note 38, at 123-27 (contrasting Justice Thomas's deregulatory approach and rejection of the antidistortion rationale in the campaign-finance cases with his embrace of antidistortion in the context of regulating social-media companies that he may think have a liberal bias); *id.* at 126 n.85 (discussing Professor Eugene Volokh's contrasting views in the campaign-finance and social-media contexts).

385. *See* Geoffrey Layman, Frances Lee & Christina Wolbrecht, *Political Parties and Loser's Consent in American Politics*, 708 ANNALS AM. ACAD. POL. & SOC. SCI. 164, 164-65 (2023).

386. Institutions have varied capacities to further each of the five aspects of the pro-voter approach. Courts, for example, are much better suited to thwart election subversion by deciding cases consistent with the rule of law and democratic principles than to promote civic engagement. Scholars can develop legal frameworks for combatting election subversion helpful to courts

have the ability to easily register and vote in fair, periodic elections; (2) each voter's vote should carry equal weight; (3) free speech, a free press, and free expression should assure voters reliable access to accurate information to enhance their capacity for reasoned voting; (4) the winners of fair elections should be recognized and able to take office peacefully; and (5) political power should be fairly distributed across groups in society, with particular protection for those groups who have faced historical discrimination in voting and representation.

Although there is some complexity to the pro-voter approach, the principles are rooted in political equality and basic, modern democratic theory. Here, the work of Robert A. Dahl is especially important.[387] In his short but powerful book, *On Democracy*, Dahl laid out requirements for a working large-scale democracy from which I draw inspiration for the pro-voter principles: "[e]ffective participation,"[388] "[v]oting equality,"[389] "[e]nlightened understanding,"[390] "[c]ontrol of the agenda,"[391] and "[i]nclusion of adults."[392] Dahl did not focus on the question of peaceful transitions of power following fair elections, and he was writing before the risk of retrogression materialized in the United States,

and explore the best forms of representative government to further pro-voter values and the best technology to assure fair vote counts. Legislative bodies, informed by scholarly debate, pass the laws that protect voter equality. The discussion below points out which institutions are best suited to further each component of the approach.

387. For a deeper exploration of Robert A. Dahl's contributions to democratic theory, see generally ROBERT A. DAHL, ON DEMOCRACY (1998) [hereinafter DAHL, ON DEMOCRACY], which discusses the core tenets of large-scale democratic processes; and Robert A. Dahl, *What Political Institutions Does Large-Scale Democracy Require?*, 120 POL. SCI. Q. 187 (2005), which provides similar analysis on this topic. Other leading scholars take a similar approach. *See, e.g.*, Larry Diamond & Leonardo Morlino, *Introduction* to ASSESSING THE QUALITY OF DEMOCRACY, at ix, x-xi (Larry Diamond & Leonardo Morlino eds., 2005) ("At a minimum, democracy requires 1) universal adult suffrage; 2) recurring, free, competitive, and fair elections; 3) more than one serious political party; and 4) alternative sources of information.").

388. "Before a policy is adopted by the association, all the members must have equal and effective opportunities for making their views known to the other members as to what the policy should be." DAHL, ON DEMOCRACY, *supra* note 387, at 37.

389. *Id.* ("When the moment arrives at which decision about policy will finally be made, every member must have an equal and effective opportunity to vote, and all voters must be counted as equal.").

390. *Id.* ("Within reasonable limits as to time, each member must have equal and effective opportunities for learning about the relevant alternative policies and their likely consequences.").

391. *Id.* at 38 ("The members must have the exclusive opportunity to decide how and, if they choose, what matters are to be placed on the agenda. Thus the democratic process required by the three preceding criteria is never closed. The policies of the association are always open to change by the members, if they so choose.").

392. *Id.* ("All, or at any rate, most adult permanent residents should have the full rights of citizens that are implied by the first four criteria.").

but he recognized this obvious democratic requirement in his other work.[393] He also explained:

> [I]f we accept the desirability of political equality, then every citizen must have an *equal and effective opportunity to vote, and all votes must count as equal*. If equality in voting is to be implemented, then clearly elections must be free and fair. To be free means that citizens can go to the polls without fear of reprisal; and if they are to be fair, then all votes must be counted as equal.[394]

He further embraced the requirement of free expression (and a free press)[395] to achieving enlightened understanding: "To acquire civic competence, citizens need opportunities to express their own views; learn from one another; engage in discussion and deliberation; read, hear and question experts, political candidates, and persons whose judgments they trust; and learn in other ways that depend on freedom of expression."[396]

Dahl also acknowledged that democracy requires fair representation and inclusion, disagreeing vehemently with Joseph Schumpeter that it was possible to consider the United States a democracy during the Jim Crow era when states in the South disenfranchised Black voters.[397] He considered Schumpeter's position "absurd[],"[398] "carrying historicism and moral relativism to their limits, . . . obliterat[ing] the possibility of any useful distinction between democracy, aristocracy, oligarchy, and one-party dictatorship."[399] At the same time that Dahl advocated for the inclusion principle of fair representation, he noted that democratic theory could not fully resolve disputes over which forms of voting

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393. *See* ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 233 (1989) (listing among the seven criteria for an advanced democracy (or "polyarchy") that "[e]lected officials are chosen and peacefully removed in relatively frequent, fair, and free elections in which coercion is quite limited").

394. DAHL, ON DEMOCRACY, *supra* note 387, at 95. He added that these criteria are not enough unless the people also "retain *final control over the agenda*," necessitating frequent elections. *Id.*; *see also* ROBERT A. DAHL, ON POLITICAL EQUALITY, at ix (2006) ("[T]he existence of political equality is a fundamental premise of democracy."); DAHL, *supra*, at 8-10 (restating the minimum features of an "ideal democracy").

395. DAHL, *supra* note 393, at 175 ("Nor is the right to the democratic process 'merely an abstract claim.' It is instead a claim to all the general and specific rights—moral, legal, constitutional—that are necessary to it, from freedom of speech, press, and assembly to the right to form opposition parties.").

396. DAHL, ON DEMOCRACY, *supra* note 387, at 97.

397. DAHL, *supra* note 393, at 121.

398. *Id.* at 121-22.

399. *Id.* at 122.

arrangements (such as proportional-representation systems) best achieve fair representation, leaving a menu of permissible arrangements.[400]

The pro-voter principles articulated in this Feature are consistent not just with Dahl's democratic theory but also with international human-rights law. Article 25 of the International Covenant on Civil and Political Rights (ICCPR), which the United States ratified in 1992, guarantees everyone "the right and the opportunity, without any [discrimination,] . . . [t]o vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors."[401] The Code of Good Practice issued by the Venice Commission of the

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400. DAHL, ON DEMOCRACY, *supra* note 387, at 96 ("How to best implement free and fair elections is not obvious."); *see also id.* (holding that democratic theory could not determine the choice between proportional-representation systems and first-past-the-post systems as used in the United States); *id.* at 140 ("All constitutional arrangements have some disadvantages; none satisfy all reasonable criteria. From a democratic point of view, there is no perfect constitution.").

401. International Covenant on Civil and Political Rights art. 25, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171, 179 (entered into force Mar. 23, 1976). The Human Rights Committee General Comment No. 25 provides:

> 10. The right to vote at elections and referenda must be established by law and may be subject only to reasonable restrictions, such as setting a minimum age limit for the right to vote. It is unreasonable to restrict the right to vote on the ground of physical disability or to impose literacy, educational or property requirements. Party membership should not be a condition of eligibility to vote, nor a ground of disqualification.
>
> 11. States must take effective measures to ensure that all persons entitled to vote are able to exercise that right. Where registration of voters is required, it should be facilitated and obstacles to such registration should not be imposed. If residence requirements apply to registration, they must be reasonable, and should not be imposed in such a way as to exclude the homeless from the right to vote. Any abusive interference with registration or voting as well as intimidation or coercion of voters should be prohibited by penal laws and those laws should be strictly enforced. Voter education and registration campaigns are necessary to ensure the effective exercise of article 25 rights by an informed community.

U.N. Human Rights Committee, General Comment No. 25, ¶¶ 10-11, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (July 12, 1996). For an argument that the United States should apply the principles of Article 25 to its own constitutional obligations to its citizens, see Sara Dillon, *Bringing the ICCPR's Right to Vote Under the American Constitutional Umbrella*, 46 SUFFOLK TRANSNAT'L L. REV. 1, 27-29 (2023). On how U.S. ratification of the treaty with reservations makes such implementation contrary to U.S. law, see David Sloss, *Using International Law to Enhance Democracy*, 47 VA. J. INT'L L. 1, 2-4 (2006).

Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination requires that

> States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour,

Council of Europe offers similar, consistent guidelines.[402] The United Nations and the Council of Europe regularly adjudicate and offer guidance on whether member states are following these democratic requirements.[403] The articulation and application to concrete cases of pro-voter principles show great national and international convergence on ideals for democratic self-government.

Under pro-voter principles, members of the political community are entitled to equal voting rights in a fair election. The political community includes all adult citizens residing in a jurisdiction, excluding those lacking mental

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> or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights . . . (c) Political rights, in particular the right to participate in elections—to vote and to stand for election—on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service.

International Convention on the Elimination of All Forms of Racial Discrimination art. 5, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195, 220; *see also* Alexander Kirshner, The International Status of the Right to Vote 7-10 (2003) (unpublished manuscript), https://electionlawblog.org/wp-content/uploads/kirshner.pdf [https://perma.cc/Z4XM-37AA] (surveying the right to vote in democratic constitutions throughout the world); Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 63-77 (1992) (describing the spread of democracy among United Nations (U.N.) member states).

402. *See generally Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report*, EUROPEAN COMM'N FOR DEMOCRACY THROUGH L. (Oct. 30, 2002), https://rm.coe.int/0900001680092af01 [https://perma.cc/L69V-ZEAS] (laying out these guidelines). The five basic principles articulated in the report, further explained with subsidiary principles, are "universal suffrage," "equal suffrage," "free suffrage," "secret suffrage," "direct suffrage," and "frequency of elections." *Id.* at 14-24. These principles require three conditions for implementation: "respect for fundamental rights," "regulatory levels and stability of electoral law," and "procedural guarantees." *Id.* at 25-32.

403. For example, the Human Rights Committee at the United Nations determined that Brazil violated the Article 25(b) rights of presidential candidate Luiz Inácio Lula da Silva by charging him with crimes without due process and preventing him from running for election during the 2016 Brazilian national elections. U.N. Human Rights Committee, Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2841/2016, § 8.17, U.N. Doc. CCPR/C/134/D/2841/2016 (Final proceedings) (May 24, 2022). More generally, a search of a U.N. database in December 2024 shows nineteen decisions in which the Human Rights Committee at the United Nations considered whether member states had violated Article 25(b). *See OHCHR Juris Database*, UNITED NATIONS HUM. RTS. OFF. HIGH COMM'R, https://juris.ohchr.org [https://perma.cc/5E6U-RUFK] (searching the database for Article 25(b) of the International Covenant on Civil and Political Rights). The Venice Commission has produced voluminous materials. *See Opinions and Studies in the Electoral World*, COUNCIL EUR., https://www.venice.coe.int/WebForms/pages/?p=02_Opinions_and_studies [https://perma.cc/9QV4-PKNL]. This includes a comparative report on best practices for election dispute resolution. *Report on Election Dispute Resolution*, EUROPEAN COMM'N FOR DEMOCRACY THROUGH L. (Oct. 8, 2020), https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)025-e [https://perma.cc/VE29-JLXQ].

capacity[404] and, in some places and for some period of time, those with felony convictions.[405] For an election to be fairly conducted, basic procedures must assure that eligible members of the community have easy access to register and to vote, that ineligible voters are unable to vote, that votes are weighted equally, that election officials run the election and ballot-counting process fairly and transparently, that results accurately reflect the choices of voters, and that the winners of the election are able to take office peaceably. Individuals and groups must have the right to free expression and to engage in robust political debate. The press must be free to offer reporting and commentary without government interference or censorship.[406] These rules guarantee access to accurate information so that voters can make choices consistent with their values and interests.

None of these ideas should be contestable to anyone committed to a serious democracy in which power is to be divided among political equals.[407] It would violate these democratic principles to hold an election among ten people in which nine people are each given one vote but one person is given fifteen votes because the person with fifteen votes could determine the results alone. It also violates

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404. On residency, citizenship, and age requirements, see HASEN, *supra* note 1, at 171 n.2. On mental capacity, see *id.* at 69; and LOUIS MASSICOTTE, ANDRÉ BLAIS & ANTOINE YOSHINAKA, ESTABLISHING THE RULES OF THE GAME: ELECTION LAWS IN DEMOCRACIES 27 (2004), which notes that fifty-eight democratic countries limit voting on the basis of mental incompetence while only four do not.

405. On the question whether there should be continued disenfranchisement for felony convictions, see HASEN, *supra* note 1, at 70-79.

406. *See* Special Rapporteur on the Promotion & Prot. of the Right to Freedom of Op. and Expression, *Freedom of Expression and Elections in the Digital Age*, OFF. HIGH COMM'R HUM. RTS. 4-6 (June 2019), https://www.ohchr.org/sites/default/files/Documents/Issues/Opinion/ElectionsReportDigitalAge.pdf [https://perma.cc/K6LV-N3PQ]; *see also generally Joint Declaration on Freedom of Expression and Elections in the Digital Age*, ORG. OF AM. STATES AND UNITED NATIONS HUM. RTS. SPECIAL PROCS. AND ORG. FOR SEC. & CO-OPERATION IN EUR. (Apr. 30, 2020), https://www.osce.org/files/f/documents/9/8/451150_0.pdf [https://perma.cc/VAZ7-B4XF] (expressing concern about threats to the freedom of the press and recommending steps to promote such freedom). On the balance between freedom of expression and the right to vote, see U.N. Human Rights Committee, General Comment No. 34, ¶ 28, U.N. Doc. CCPR/C/GC/34 (July 21, 2011), which explains that

> it may be legitimate to restrict freedom of expression in order to protect the right to vote under article 25 . . . . Such restrictions must be constructed with care: while it may be permissible to protect voters from forms of expression that constitute intimidation or coercion, such restrictions must not impede political debate, including, for example, calls for the boycotting of a non-compulsory vote.

407. Although these points are not fairly contestable, there are many other complex questions about the scope of political equality. For a survey, see generally CHARLES R. BEITZ, POLITICAL EQUALITY: AN ESSAY IN DEMOCRATIC THEORY (1989), which describes the difficulty in defining and identifying political equality. The examples that follow in this paragraph echo some of Dahl's examples. *See, e.g.*, DAHL, ON DEMOCRACY, *supra* note 387, at 39.

such principles to conduct an election in which half the voters have an easy time registering and voting but the other half must run a gauntlet to do so. Those persons with an easier system of registering and voting would be more likely to influence the election's outcome.

An election in which ten eligible and fifteen ineligible persons may vote also violates democratic principles because the ineligible voters could negate the will of the majority of eligible voters. Similarly, an election is not democratic if officials ignore the tally of eligible voters' ballots and create a false record of the election results consistent with their own preferences. Before the 2020 election, it might have seemed unnecessary to make this point, but the retrogression we have witnessed in recent years now demands it.

Access to reliable information is a prerequisite to democratic voting and governance. It would be hard to call an election system fair and democratic if voters did not have access to reliable information about who the candidates were, what they stood for, and what they were likely to do once in office. As Dahl observed, extreme inequality in the ability to convince fellow voters how to vote undermines ideals of effective participation.[408]

More contestable is the principle about the "fair" distribution of power across society, with particular attention to those groups that have faced historical discrimination. This principle recognizes that people participate in politics not just as atomistic individuals but as members of groups with different interests: farmers, city dwellers, members of racial or ethnic or religious groups, union members, and others. As Pamela S. Karlan has explained, a key purpose of voting is the "aggregation" of preferences across groups.[409] Classic pluralist theory views politics as a competition for power and influence among groups,[410] but groups historically facing discrimination have had a harder time organizing for political action to elect representatives of their choice. Legislation such as Section 2 of the VRA helps ensure that these groups can elect their preferred representatives and see their preferences enacted into policy.[411] The successful application of Section 2 over many decades makes this principle a worthy component of the pro-voter approach.[412]

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408. *See* DAHL, ON DEMOCRACY, *supra* note 387, at 39 ("[I]f some members are given greater opportunities than others for expressing their views, their policies are more likely to prevail. In the extreme case, by curtailing opportunities for discussing the proposals on the agenda, a tiny minority of members might, in effect, determine the policies of the association. The criterion of effective participation is meant to insure against this result.").

409. *See* Karlan, *supra* note 234, at 1707-08.

410. *See, e.g.*, DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION 501-35 (2d ed. 1971).

411. *See supra* notes 55-71 and accompanying text.

412. I expand on these points elsewhere. *See* HASEN, *supra* note 1, at 64-65.

One problem with a principle based on "fair" representation is that there is no universally accepted definition of what makes representation "fair." Taking steps to eradicate past discrimination on the basis of race in voting is well within the principle of fair representation and is consistent with Dahl's "inclusion" criterion,[413] but the concept of fair representation could be pushed in additional, controversial directions.

For example, perhaps egregious partisan gerrymandering could be seen to violate a fair-representation principle. One might also argue that proportional-representation schemes work better than territorial-based election systems in fairly aggregating voter preferences.[414] Consistent with Dahl,[415] the pro-voter approach is agnostic on such potential extensions, given tradeoffs between forms of participation, governability, and fair interest representation.[416] Democratic theorists differ on these questions,[417] and international human-rights law does not require one form of representation over another.[418]

The pro-voter approach will not answer all questions in election law about the best forms of government and political arrangements; political science has much to offer. But the approach covers the basics, including fair elections, equally weighted votes, ease of registration and voting for eligible voters, and free speech and expression.

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413. *See supra* note 392 and accompanying text. For more on Dahl's views of inclusion, see Robert A. Dahl, *Procedural Democracy*, *in* PHILOSOPHY, POLITICS AND SOCIETY 97, 108-20 (Peter Laslett & James Fishkin eds., 5th Series 1979).

414. For an argument along such lines, see generally DOUGLAS J. AMY, REAL CHOICES/NEW VOICES: HOW PROPORTIONAL REPRESENTATION ELECTIONS COULD REVITALIZE AMERICAN DEMOCRACY (2d ed. 2002).

415. *See supra* note 400 and accompanying text.

416. On the tradeoffs, see Richard H. Pildes, *Skepticism About Proportional Representation for Congress*, 2024 U. ILL. L. REV. 1529, 1532, 1545; and BRUCE E. CAIN, DEMOCRACY MORE OR LESS 15 (2014).

417. *See, e.g.*, Pildes, *supra* note 416, at 1532 (arguing against the use of proportional representation for choosing congressional representatives). On the contested definitions of democracy and disagreement over forms of democracy, see *Democracy*, STAN. ENCYC. PHIL. (Jan. 18, 2024), https://plato.stanford.edu/entries/democracy [https://perma.cc/J75Y-NPBC].

418. *See* PAUL M. TAYLOR, A COMMENTARY ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 693 (2020) ("While Article 25 requires certain voting and representative rights to be guaranteed, it does not specify any particular constitutional model of government or political system."); *see also supra* notes 401-406 and accompanying text (setting forth basic democratic principles under international human-rights law, which say nothing about the propriety of district-based elections).

2. *The Contrast with Process Theory*

Election-law scholarship generally endorses the concepts of democracy and voting rights, but it rarely delves more deeply into the contours of the right to vote and the requirements for democratic self-government as defined by theorists such as Dahl or by international law and norms.[419] Instead, election-law scholarship tends to lean heavily on process theory.[420] The two approaches differ in some important respects.

Certainly, both process theory and the pro-voter approach support the equal weighting of votes under the one-person, one-vote rule. But the two approaches use different justifications. Process theory justifies the one-person, one-vote rule on the grounds that it is primarily the role of the courts to unstick the political process because they are best positioned to do so.[421] Voter-equality ideals are mostly implicit in the idea that the political process is "stuck." The pro-voter approach more straightforwardly justifies the one-person, one-vote rule on substantive-democracy grounds: in a society made up of political equals, it is fundamentally unfair to give some people substantially greater voting power than others.

The theories also differ in terms of their prescriptive visions. While process theory relies primarily on federal courts to reinforce representation, the pro-voter approach—which pushes legal doctrine, political action, and election-law scholarship to reinforce democracy and voting rights[422]—is skeptical that originalist judges will continue to uphold the nonoriginalist Warren Court precedents and seeks political change to enshrine voting rights in statutes and constitutional amendments. It sees political action as paramount for expanding and protecting voting rights.

The theories would lead to different results in certain court cases. Process theory urges courts to intervene to block bipartisan (or "sweetheart")

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419. For some notable exceptions, see STEPHANOPOULOS, *supra* note 231, *passim*, which puts forward the alignment theory to make election law congruent with the views of the median voter; Karlan, *supra* note 234, at 1708, which describes participation, aggregation, and governance as three components of the right to vote; James A. Gardner, *The Illiberalization of American Election Law: A Study in Democratic Deconsolidation*, 90 FORDHAM L. REV. 423, 427 (2021), which argues that Supreme Court jurisprudence has fostered conditions for an illiberal democracy inconsistent with democratic principles; and David Schultz, *The Case for a Democratic Theory of American Election Law*, 164 U. PA. L. REV. ONLINE 259, 263 (2016), which briefly advocates for reliance on Dahl's democratic theory to build American election law. On the meaning of democratic self-government, see *Bluman v. FEC*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011) (three-judge court).

420. *See, e.g.*, Issacharoff & Pildes, *supra* note 27, *passim*.

421. *See supra* notes 206-212 and accompanying text.

422. *See supra* Section III.A.1.

gerrymandering, in which Democrats and Republicans come together and pass a redistricting plan with many safe seats.[423] Process theorists more generally have urged courts to intervene to promote an "appropriately competitive political order."[424] On the other hand, the pro-voter approach does not value competition for its own sake and would not have courts intervene to disturb such redistricting plans because such plans would likely not violate the approach's requirement of "fair" representation.

Further, process theory, at least in the version endorsed by John Hart Ely, appears uncertain or ambiguous about the scope of protection for the "discrete and insular" minorities flagged in the famous footnote four of *Carolene Products*.[425] In contrast, the pro-voter approach assures that historically disadvantaged groups have a fair chance to participate in the political process and to elect representatives of their choice. The pro-voter approach, unlike process theory, supports broad readings of constitutional and statutory provisions against minority vote dilution.

B. The Limited Role of Doctrine in Polarized Courts

Before turning to the pro-voter approach's political agenda, I first consider the role of courts. The Warren Court precedents protect the fundamental right of adult, resident, nonfelon citizens to vote in elections in which votes are equally weighted. These decisions serve a number of the core principles of the pro-voter approach. However, no one can take this legal status quo for granted. Polarization has infected questions about democracy itself and spread to the judiciary. If the Supreme Court breaks along ideological and partisan lines on hot-button issues of the day—from abortion,[426] to the permissibility of a workplace mandate for vaccines in the middle of a pandemic,[427] to the power of the administrative state[428]—of course it also is going to divide on election-law issues.

Those embracing the pro-voter approach should not expect more (or less) of a very conservative Court skeptical of voting rights than for it to protect against retrogression and democratic backsliding. Although federal courts and

423. *See Redistricting Glossary and Key Terms*, ASIAN AM. ADVOC. FUND, https://asianamericanadvocacyfund.org/redistricting-glossary [https://perma.cc/9F2J-75DD].

424. *See* Issacharoff & Pildes, *supra* note 27, at 716; Hasen, *supra* note 219, at 724-28 (discussing Richard H. Pildes and Samuel Issacharoff's failure to define "appropriately competitive political order").

425. ELY, *supra* note 26, at 75, 151-55.

426. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 222-23 (2022).

427. Nat'l Fed'n of Indep. Bus. v. Occupational Safety & Health Admin., 595 U.S. 109, 116 (2022).

428. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 378 (2024); SEC v. Jarkesy, 603 U.S. 109, 115 (2024).

especially the Supreme Court have divided on a number of very basic democracy issues, the courts must hold the line on fair vote counts and prevention of election subversion.

Upholding the rule of law will play the most important role in furthering the pro-voter principle of protecting peaceful transitions of power. While many issues of election law are contested, 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.

Criticizing the judiciary in apocalyptic and extreme terms when courts decide controversial voting cases can backfire by undermining the norms protecting the basic principles of democratic governance. If conservative judges keep hearing from critics that their interpretation of law is merely political, then they may be more likely to internalize this belief and care less about the perceived legitimacy of their opinions. Of course, it is hard to avoid criticizing the judiciary for undermining democracy when courts turn their eyes away from the serious risk of election subversion, as the Supreme Court did in *Trump v. United States*.[429] The issue is a delicate one.

As least in the near term, judicial doctrine advancing the pro-voter approach is likely to develop not in federal courts but unevenly across states. This is especially likely in states whose courts are willing to read their state election codes, state voting-rights acts, and constitutional right-to-vote provisions in a pro-voter manner.[430] For example, the democracy canon, a statutory-interpretation rule going back to the nineteenth century, directs state courts to read election-related statutes in ways that favor enfranchisement of voters and counting of ballots.[431]

State constitutions are a fertile area for the development of pro-voter judicial doctrine, especially because in some states, these provisions remain

429. 603 U.S. 593 (2024).

430. *See* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 861 (2021); Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 101 (2014); Lata Nott, *Protecting the Freedom to Vote Through State Voting Rights Acts*, CAMPAIGN LEGAL CTR. (Jan. 4, 2024), https://campaignlegal.org/update/protecting-freedom-vote-through-state-voting-rights-acts [https://perma.cc/R5ND-23VM]; Eyal Press, *Can State Supreme Courts Preserve—or Expand—Rights?*, NEW YORKER (June 3, 2024), https://www.newyorker.com/magazine/2024/06/10/can-state-supreme-courts-preserve-or-expand-rights [https://perma.cc/G8AX-5F22]. Of course, not every state will read state voting-right constitutional provisions capaciously. *See, e.g.*, League of Women Voters v. Schwab, 549 P.3d 363, 379 (Kan. 2024) (holding that voting is not a fundamental right under the Kansas state constitution).

431. Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69, 71-73 (2009) (arguing for a pro-voter canon of statutory interpretation to apply in election cases).

undertheorized and barely litigated.[432] Consider, for example, recent disputes in Pennsylvania courts over voting rights under that state's constitution's "free and equal" provision.[433] As noted above,[434] in the 2020 election, the state supreme court, amid a pandemic that severely slowed mail delivery, relied on that constitutional language to order a three-day extension for the receipt of mailed ballots.[435] In the 2024 election, a state court in Pennsylvania held that the same provision required election officials to accept mail-in ballots that were received on time but were misdated or undated.[436] The state supreme court later reversed that holding on technical grounds.[437] In both cases, a broad reading of the state constitution would have advanced the pro-voter approach.[438]

Of course, polarization on voting issues sometimes applies to state courts, just as it does with the federal judiciary, and especially as state politics and the decisions of state courts become nationalized.[439] Consider the issue of partisan gerrymandering. The North Carolina Supreme Court, when it had a Democratic majority, recognized that partisan gerrymandering violated the state

432. Douglas, *supra* note 430, at 91.

433. PA. CONST. art. I, § 5 ("Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.").

434. *See supra* note 115 and accompanying text.

435. Pa. Democratic Party v. Boockvar, 238 A.3d 345, 371 (Pa. 2020).

436. Black Pol. Empowerment Project v. Schmidt, 325 A.3d 1046 (unpublished table decision), 2024 WL 4002321, at *1 (Pa. Commw. Ct. Aug. 30, 2024), *vacated*, 322 A.3d 221 (Pa. 2024).

437. *Black Pol. Empowerment Project*, 322 A.3d at 222 (vacating the lower court's decision due to lack of subject-matter jurisdiction). The Pennsylvania Supreme Court rebuffed on timing grounds additional attempts to count such ballots cast during the 2024 elections, reaffirming that "[t]his Court will neither impose nor countenance substantial alterations to existing laws and procedures during the pendency of an ongoing election." Republican Nat'l Comm. v. All 67 Cnty. Bds. of Elections, 326 A.3d 402, 403 (Pa. 2024) (mem.) (per curiam) (quoting New PA Project Educ. Fund v. Schmidt, 327 A.3d 188, 189 (Pa. 2024) (per curiam) (unpublished table decision)). It did not address the merits of the issue. After the 2024 election passed, the Pennsylvania Supreme Court finally agreed to decide the question on the merits. Baxter v. Phila. Bd. of Elections, Nos. 395 EAL 2024, 396 EAL 2024, 2025 WL 224388 (Table), at *1 (Pa. Jan. 17, 2025).

438. In considering such a broad approach, state courts must consider the new anti-arrogation principle in *Moore v. Harper*, 600 U.S. 1, 22 (2023). *See supra* notes 111-118 and accompanying text. For example, the anti-arrogation principle may restrain novel interpretations of state constitutional provisions by state supreme courts in federal elections. Litman & Shaw, *supra* note 118, at 910. When possible, state courts should first interpret their state statutes and constitutional voting-rights provisions in cases affecting only state elections. This precedent can be applied later to federal elections with less chance of running afoul of *Moore*.

439. James A. Gardner, *New Challenges to Judicial Federalism*, 112 KY. L.J. 703, 706 (2024).

constitution.[440] After state elections gave that court a Republican majority, that court overturned the gerrymandering ruling and held such claims were nonjusticiable under the state constitution.[441] In contrast, the conservative-dominated Wisconsin Supreme Court initially rejected challenges to partisan gerrymandering under the state constitution.[442] After state elections gave that court a liberal majority, the Wisconsin high court held that the Republican-passed maps violated the state constitution.[443]

The bottom line is that the federal judiciary is unlikely to utilize a pro-voter approach, except in cases involving election subversion. However, in states where judiciaries are more sympathetic to protecting voters' rights, judicial doctrine may advance pro-voter principles.

C. The Greater Promise of Political Action

Before turning to the potential for political action to advance pro-voter ideals, I begin by addressing why the pro-voter approach should not be mistaken for a pro-Democratic Party approach. 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.[444] These efforts metastasized into the 2020 election-subversion attempts by Trumpian forces, a key accelerant of retrogression and democratic backsliding.[445] But equating the pro-voter approach with the goals and views of one party is historically myopic, ignores some recent—though rarer—Democratic Party

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440. Harper v. Hall, 868 S.E.2d 499, 546 (N.C. 2022); Tierney Sneed, Ariane de Vogue & Ethan Cohen, *GOP-Controlled North Carolina Supreme Court Reverses Rulings That Struck Down Partisan Gerrymanders by Republican Lawmakers*, CNN (Apr. 28, 2023, 4:44 PM EDT), https://www.cnn.com/2023/04/28/politics/north-carolina-gerrymandering-supreme-court/index.html [https://perma.cc/3UB2-9RNU].

441. Harper v. Hall, 886 S.E.2d 393, 399-401 (N.C. 2023); Sneed et al., *supra* note 440.

442. Johnson v. Wis. Elections Comm'n, 972 N.W.2d 559, 586 (Wis. 2022).

443. Clarke v. Wis. Elections Comm'n, 998 N.W.2d 370, 399-400 (Wis. 2023); Clarke v. Wis. Elections Comm'n, 995 N.W.2d 779, 780-82 (Wis. 2023) (ordering briefing on select questions from the plaintiffs' original suit); Patrick Marley & Maegan Vasquez, *Wisconsin Supreme Court Overturns GOP-Favored Legislative Maps*, WASH. POST (Dec. 22, 2023, 7:59 PM EST), https://www.washingtonpost.com/politics/2023/12/22/wisconsin-supreme-court-legislative-maps-redistricting [https://perma.cc/93CC-EWT4]. More recently, the court split along ideological lines to reverse on the question of the propriety of ballot drop boxes, holding that their use was allowed under state law. Priorities USA v. Wis. Elections Comm'n, 8 N.W.3d 429, 432 (Wis. 2024).

444. *See supra* notes 74-75 and accompanying text.

445. *See supra* notes 311-324 and accompanying text.

efforts to make voting harder,[446] and misses the emerging shift in electoral coalitions.

The Republican Party—the Party of Lincoln—was instrumental in emancipating Black slaves and facilitating the passage of the Reconstruction Amendments.[447] Forces within the Democratic Party tried to filibuster the Civil Rights Act and VRA in the 1960s.[448] The bipartisan consensus in Congress on the need to renew and strengthen the VRA has broken down only in recent years.[449] So while Democrats in this moment are more associated with the pro-voter approach than Republicans, this is just a snapshot in time.[450]

And times change. The Republican Party under Donald Trump made new inroads with working-class voters, especially in 2024.[451] Trump picked up significant minority support in the last election, especially among Latino men, where he handily beat Harris.[452] A proposal to make voter registration and

446. *E.g.*, Order at 11-12, Collazo v. Ill. State Bd. of Elections, No. 24-CH-32 (Ill. Cir. Ct. June 5, 2024), https://libertyjusticecenter.org/wp-content/uploads/Order-2.pdf [https://perma.cc/D36F-ZWT5] (granting declaratory and injunctive relief against ballot-access rules promulgated in the middle of the election season because they imposed a severe burden on the right to vote and failed strict scrutiny), *appeal dismissed*, 245 N.E.3d 983 (Ill. 2024); Rick Pearson, *Judge Rules Unconstitutional Gov. J.B. Pritzker-Backed Election Law That Aided Democrats in November*, CHI. TRIB. (June 5, 2024), https://www.chicagotribune.com/2024/06/05/judge-rules-unconstitutional-gov-j-b-pritzker-backed-election-law-that-aided-democrats-in-november [https://perma.cc/Q4JQ-EXLS].

447. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 1-34 (2d ed. 2014).

448. Clifford M. Lytle, *The History of the Civil Rights Bill of 1964*, 51 J. NEGRO HIST. 275, 276-77 (1966); KEYSSAR, *supra* note 160, at 211.

449. Hulse, *supra* note 184.

450. Nicholas O. Stephanopoulos suggests the moment may already be arriving where the parties' self-interest changes position on voting restrictions. Nicholas O. Stephanopoulos, *Election Law for the New Electorate*, 17 J. LEGAL ANALYSIS (forthcoming 2025) (manuscript at 1-6), https://ssrn.com/abstract=4871529 [https://perma.cc/S3SQ-G8QF].

451. In the 2024 election, "[s]ome 56% of voters without degrees picked Trump, up 6 points from the Republican's share in the 2020 exit poll. Harris won 55% of voters who have degrees, unchanged from Biden's share in 2020, when affluent suburbs helped power the Democrat's victory." Jason Lange, Bo Erickson & Brad Heath, *Trump's Return to Power Fueled by Hispanic, Working-Class Voter Support*, REUTERS (Nov. 7, 2024, 4:51 AM EST), https://www.reuters.com/world/us/trumps-return-power-fueled-by-hispanic-working-class-voter-support-2024-11-06 [https://perma.cc/7822-YQAQ].

452. Latino men shifted from a twenty-three-point margin in favor of Biden over Trump in 2020 to a twelve-point margin in favor of Trump over Harris in 2024, a swing of thirty-five points. Zachary B. Wolf, Curt Merrill, & Way Mullery, *Anatomy of Three Trump Elections: How Americans Shifted in 2024 vs. 2020 and 2016*, CNN (Nov. 6, 2024, 2:34 PM EST), https://www.cnn.com/interactive/2024/politics/2020-2016-exit-polls-2024-dg [https://perma.cc/X97P-YL93].

voting easier could help Republicans just as easily as Democrats.[453] For this reason, Democratic Party allies debated pulling back from nonpartisan efforts to increase voter registration in 2024.[454] In the medium-to-long term, the partisan valence of a pro-voter approach is unpredictable. The approach should be applied consistently over time, regardless of which party benefits from it in a particular moment.

A pro-voter approach does not inherently favor any candidate or party. It evinces 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 preliminary point, I turn to consider the key aspects of a pro-voter political program.

1. Reforms Aimed at Combating Extremism and Stabilizing Democracy

Given the immediate threat of retrogression and democratic backsliding, the first item on the political agenda for a pro-voter approach to election law is combating extremism and stabilizing democracy. Preserving the peaceful transition of power is one of the five key principles inherent in the approach.

We have already seen some political movement to this end, including the ECRA; efforts to clarify state-level certification rules so that rogue actors 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.[455] The 2024 elections proceeded peacefully, but that is no guarantee in future elections. Reform must anticipate the next threats to peaceful transitions of power. Lawmakers should assure that the military maintains the chain of command and follows the rule of law during periods of presidential transition. It is also necessary to insulate election administrators from political interference.[456]

Civics education for both children and adults must play a role. Until recently, most 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

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453. Stephanopoulos, *supra* note 450 (manuscript at 17).

454. Michael Scherer & Sabrina Rodriguez, *Democrats Spar over Registration as Worries over Young and Minority Voters Grow*, Wash. Post (Apr. 1, 2024, 5:00 AM EDT), https://www.washingtonpost.com/politics/2024/04/01/democrats-voter-registration-minorities [https://perma.cc/EZD5-9L6M].

455. *See supra* notes 326-330 and accompanying text.

456. Samuel Issacharoff, Democracy Unmoored: Populism and the Corruption of Popular Sovereignty 170-74 (2023).

presidential election, January 6 increasingly is seen as yet another political issue where opinions can differ.[457]

Furthermore, it is essential to build coalitions across groups in business, labor, politics, and other areas of civil society. These coalitions should set aside disagreements on substantive policy questions and unite around the need to count votes fairly and to allow winners of fair elections their lawful right to take office. Civil society must take on a new role to protect democracy in the face of new threats. Renewed corporate support for January 6 objectors and election deniers in Congress is a troublesome sign.[458]

Those concerned with polarization and extremism have proposed a variety of broader election reforms, including reforming political primaries,[459] changing campaign-finance laws,[460] and allowing minor parties to engage in fusion.[461] One key problem is that the political-science evidence does not clearly show that these measures are effective to combat polarization, although research is still in its nascent stages. For example, California's move to a "top two" primary has not appeared to produce more moderate candidates,[462] while Alaska's "top four" primary combined with ranked-choice voting is widely credited with allowing Republican U.S. Senator Lisa Murkowski to advance to the general election and

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457. 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, 10:04 PM EST), https://www.cbsnews.com/news/jan-6-opinion-poll-republican-disapproval-wanes-2024-01-06 [https://perma.cc/AVW3-XFQX].

458. *See supra* note 366 and accompanying text.

459. *See* Richard H. Pildes, *Political Reform to Combat Extremism*, *in* OUR NATION AT RISK: ELECTION INTEGRITY AS A NATIONAL SECURITY ISSUE, *supra* note 336, at 163, 174-77. *See generally* NICK TROIANO, THE PRIMARY SOLUTION: RESCUING OUR DEMOCRACY FROM THE FRINGES (2024) (advocating for the abolition of primaries); KATHERINE M. GEHL & MICHAEL E. PORTER, THE POLITICS INDUSTRY: HOW POLITICAL INNOVATION CAN BREAK GRIDLOCK AND SAVE OUR DEMOCRACY (2020) (making the case for "Final Five Voting," in which the top five candidates in a plurality election get ranked-choice voting in round two).

460. *See supra* notes 358-366 and accompanying text.

461. *See* Nate Ela, *A Path to Multiparty Democracy*, 85 OHIO ST. L.J. (forthcoming 2025) (manuscript at 53-54), https://ssrn.com/abstract=4986682 [https://perma.cc/KJH2-EDLP]; Lee Drutman, *The Case for Fusion Voting and a Multiparty Democracy in America*, NEW AM. FOUND. (Sept. 29, 2022), https://www.newamerica.org/political-reform/reports/the-case-for-fusion-voting-and-a-multiparty-democracy-in-america [https://perma.cc/339L-4BHJ]. It seems equally 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.

462. Eric McGhee & Boris Shor, *Has the Top-Two Primary Elected More Moderates?*, 15 PERSPS. ON POL. 1053, 1063-64 (2017). *But see* Christian R. Grose, *Reducing Legislative Polarization: Top-Two and Open Primaries Are Associated with More Moderate Legislators*, 20 J. POL. INSTS. & POL. ECON. 1, 17-18 (2020) (finding more of a moderating effect).

win reelection.[463] Perhaps because ranked-choice voting in Alaska may produce more moderate candidates, extreme forces on the right have made opposing it a key part of their own political strategy.[464] The jury is still out on which electoral reforms, if any, can best stabilize democracy and combat extremism.[465]

2. Reforms Aimed at Expanding Voting Rights

The set of reforms described above are a good start at preventing further retrogression of fair elections and democracy in the United States. In the longer term, another set of reforms could move elections beyond stagnation and

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463. Becky Bohrer, *Murkowski Withstands Another Conservative GOP Challenger*, AP NEWS (Nov. 25, 2022, 1:51 PM EST), https://apnews.com/article/2022-midterm-elections-donald-trump-alaska-b2ea0aa87460b0d5bee6565acf05288d [https://perma.cc/EB2P-5TYY]; *see also* Richard H. Pildes, *Combatting Extremism*, 76 FLA. L. REV. 1583, 1590-91 (2024) (touting the benefits of a top-four or top-five primary combined with instant-runoff voting); Nathan Atkinson & Scott C. Ganz, *Robust Electoral Competition: Rethinking Electoral Systems to Encourage Representative Outcomes*, 84 U. MD. L. REV. 102, 130-37 (2024) (finding problems with the use of ranked-choice voting as the best means of electoral reform to promote robust political competition); Benjamin Reilly, David Lublin & Glenn Wright, *Alaska's New Electoral System: Countering Polarization or "Crooked as Hell"?*, 15 CAL. J. POL. & POL'Y 1, 4 (2023).

464. Brendan Fischer, *Ranked-Choice Voting Is MAGA's Latest Target*, ROLLING STONE (Feb. 29, 2024), https://www.rollingstone.com/politics/politics-features/maga-war-democracy-ranked-choice-voting-1234978456 [https://perma.cc/RRN9-P7JM]. Most ballot measures proposing to adopt ranked-choice voting failed in 2024, but Alaska voted to keep its system in place by a narrow statewide margin of 737 votes. *See* Russell Berman, *Why Voters Rejected Election Reform*, ATLANTIC (Dec. 8, 2024), https://www.theatlantic.com/politics/archive/2024/12/election-reform-ranked-choice-partisan-primaries/680912 [https://perma.cc/J4NW-3NYU]; Madison Fernandez, *Another 2024 Election Loser: Ranked Choice Voting*, POLITICO (Nov. 6, 2024), https://www.politico.com/live-updates/2024/11/06/2024-election-results-live-coverage-updates-analysis/ranked-choice-voting-initiatives-00188091 [https://perma.cc/TRK4-RSHZ].

465. For examples of analyses on the effectiveness of these electoral reforms, see generally Nathan Atkinson, Edward B. Foley & Scott Ganz, *Beyond the Spoiler Effect: Can Ranked-Choice Voting Solve the Problem of Political Polarization?*, 2024 ILL. L. REV. 1655; G. Michael Parsons & Rachel Hutchinson, Reform for Realists: The False Promise of Condorcet Voting (Feb. 21, 2025) (unpublished manuscript), https://ssrn.com/abstract=5101402 [https://perma.cc/JV53-9LJ9]; Laurel Harbridge-Yong & Rachel Hutchinson, *The Plurality Problem: Plurality Primary Victors Hurt Parties in General Elections* (Northwestern IRP, Working Paper No. 24-07, 2024), https://www.ipr.northwestern.edu/documents/working-papers/2024/wp-24-07.pdf [https://perma.cc/6EG9-J6KX]; and Rachel Hutchinson & Benjamin Reilly, Does Ranked Choice Voting Promote Legislative Bipartisanship? Using Maine as a Policy Laboratory (Aug. 11, 2023) (unpublished manuscript), https://papers.ssrn.com/abstract=4538418 [https://perma.cc/SFV5-8MBY]. The fear of being primaried seems to be driving some Republicans closer to extremist positions. This may explain why many congressional Republicans voted to object to the Electoral College votes of Pennsylvania in 2020 after the invasion of the Capitol. *See supra* note 314 and accompanying text.

retrogression. Political action should support the other key aspects of the pro-voter approach: 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. Recall that the Warren Court's expansion of voting rights happened as the civil-rights movement grew in the United States. A new wave of political activism aimed at bolstering voting rights could once again lead the courts in a pro-voter direction.

a. Congressional Statutes and Constitutional Amendments

Throughout U.S. history, Congress has been a key protector and expander of voting rights, from constitutional voting-rights amendments to the VRA.[466] Congress may have continued to pass voter-protective legislation in 2021 if Senate leaders had made an exception to the filibuster.[467] The opportunity may come along again, and if it does, senators should take it. Professors Joseph Fishkin and David E. Pozen make a strong case for using "antihardball tactics," which push procedural rules to their legal limits in order to enact democracy-entrenching rules.[468]

More ambitiously, Congress should propose an amendment to the Constitution containing an affirmative right to vote, drafted specifically to temper courts' likely skepticism or even hostility to the expansion of voting rights by ordinary legislation.[469] It is obviously difficult to pass a constitutional amendment requiring a supermajority of Congress and state legislatures, but the amendment effort itself could bear fruit along the way by spurring state-based electoral reforms. The Nineteenth Amendment exemplifies this idea. Between 1875—when the Supreme Court rejected the argument that the Fourteenth Amendment barred discrimination in voting on the basis of sex[470]—and the ratification of the Nineteenth Amendment in 1920, political organizing led over thirty states to bar

466. *See supra* notes 159-174 and accompanying text. On Congress's broad powers under the Constitution to expand voting rights, see generally FRANITA TOLSON, IN CONGRESS WE TRUST?: ENFORCING VOTING RIGHTS FROM THE FOUNDING TO THE JIM CROW ERA (forthcoming 2025) (on file with author); and Nicholas O. Stephanopoulos, *The Sweep of Electoral Power*, 36 CONST. COMMENT. 1 (2021).

467. Hulse, *supra* note 37.

468. Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 981 (2018); David E. Pozen, *Hardball and/as Anti-Hardball*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 949, 950 (2019).

469. *See generally* HASEN, *supra* note 1 (making the case for and outlining the path to such a constitutional amendment).

470. Minor v. Happersett, 88 U.S. (21 Wall.) 162, 178 (1875).

gender discrimination in voting in their state constitutions.[471] A push for a constitutional amendment guaranteeing the right to vote could produce the same momentum and state-based improvement.

Detailed constitutional rules protect voters more than federal statutes because of the "civilizing force of hypocrisy."[472] We expect judges to make reasoned decisions, and we publicly criticize them for poor reasoning. Detailed voting protections in the Constitution give judges less wiggle room than they have with the interpretation of voting-rights statutes, making it more likely that judges will interpret voting provisions in a pro-voter manner.

b. State Voting Rights and Enforcement of State Constitutional Right-to-Vote Provisions

Some states have passed new voting-rights acts that expand the protection of voters. Although the decentralized nature of elections and election administration is a challenge for universal protection of voting rights, it also presents opportunities for iterative and smaller-scale change. Not every state will expand voting rights in a major way, but there is always room for at least incremental improvement.

Further, state constitutional right-to-vote provisions provide a strong pathway to protecting voting rights in some states.[473] Polarization among the state judiciary means that voting-rights proponents must expend energy on state-supreme-court races, where voting and election questions will sometimes be major campaign issues. For example, the constitutionality of partisan gerrymandering under the state constitution was central in a recent state-supreme-court race in Wisconsin.[474] The U.S. Supreme Court's recognition of the First Amendment rights of judicial candidates to speak about contested legal and political issues[475] allows state judicial candidates to signal to the public how they may vote in democracy-related cases.

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471. HASEN, *supra* note 1, at 15.

472. Jon Elster, *Introduction* to DELIBERATIVE DEMOCRACY 1, 12 (Jon Elster ed., 1998).

473. *See supra* note 430 and accompanying text.

474. Shawn Johnson, *Supreme Court Candidate Janet Protasiewicz Says She'd Recuse Herself in Cases Involving State Democratic Party*, WIS. PUB. RADIO (Mar. 1, 2023), https://www.wpr.org/justice/wisconsin-supreme-court-candidate-janet-protasiewicz-recuse-cases-democratic-party [https://perma.cc/V7D5-F67U].

475. Republican Party of Minn. v. White, 536 U.S. 765, 781-82 (2002).

c. Expanding Voting Rights Through the Initiative Process

Not every state allows voters to protect and expand voting rights through initiative. But voters have taken advantage of the opportunity in those states where it is possible. One recent survey noted the use of initiatives for "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."[476]

Some of these reforms were adopted in swing states.[477] For example, Michigan voters adopted citizen redistricting commissions in 2018.[478] That same year, Florida voters restored voting rights for those with felony convictions who completed their sentences, an initiative that the Republican legislature and governor have tried to counteract.[479] Some Republican officials have tried to curtail the initiative power, perhaps because of opposition to some of these laws.[480] Emerging partisan realignment may reduce Republican opposition or increase Democratic opposition to this use of the initiative power.

3. Reforms Aimed at Protecting the Press and Online Information Environment

Political action to protect the press and the online information environment is essential for civic competence and voter choice. Under the pro-voter approach, voters need reliable access to truthful information, fairly presented.

The poor state of journalism creates challenges for civic competence and vibrant civic participation. We have already seen how the era of cheap speech has undermined the market for traditional journalism and made it easier for false campaign-related speech to spread online and affect both elections and voter confidence in the integrity of the election process.[481] As Dahl noted, free expression and a vibrant press are essential for a healthy democracy.[482] Fair, accurate

476. Campbell Streator, *Ballot Initiatives and Pro-Voter Reform*, EVERY VOTE COUNTS (Nov. 7, 2023), https://www.evcnational.org/the-evc-blog/ballot-initiatives-and-pro-voter-reform [https://perma.cc/B7HX-GJR2].

477. *Id.*

478. *Redistricting Proposal Passes in Michigan*, MICH. PUB. (Nov. 6, 2018, 11:50 PM EST), https://www.michiganpublic.org/politics-government/2018-11-06/redistricting-proposal-passes-in-michigan [https://perma.cc/NC5R-S72P].

479. I chronicle the passage of the amendment and the Republican legislature and governor's successful efforts to stymie its enforcement elsewhere. *See* HASEN, *supra* note 1, at 70-76.

480. *See supra* note 347 and accompanying text.

481. *See supra* note 283 and accompanying text.

482. *See supra* note 395 and accompanying text.

information from a free press gives voters the tools to hold politicians accountable and ensure greater responsiveness.[483]

Things now stand to get worse in terms of a free press and the online information environment. Donald Trump entered his second administration with a long track record of attacking the press as the "ENEMY OF THE PEOPLE."[484] Even before Trump took office again in 2025, there were signs of capitulation from old and new media. Prior to the election, Trump had threatened to jail the head of Meta, Mark Zuckerberg.[485] Meta announced just before Trump reassumed office that it would end its fact-checking program,[486] further facilitating the spread of online falsehoods that had already been accelerating on Elon Musk's X.[487]

Before the 2024 elections, Jeff Bezos, the owner of both Amazon and the *Washington Post*, quashed an editorial that would have endorsed Trump's 2024 opponent, Kamala Harris.[488] Zuckerberg and Bezos separately met Trump at his

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483. Further, technological change drives the atomization of politics and the insulation of voters from serendipitous exposure to news that should help them evaluate political choices. HASEN, *supra* note 38, at 114. As 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. *See, e.g.*, Richard H. Pildes, *Democracy in the Age of Fragmentation*, 110 CALIF. L. REV. 2051, 2051-52, 2059-68 (2022). A vicious cycle of distrust ensues.

484. Michael M. Grynbaum & Eileen Sullivan, *Trump Attacks the Times, in a Week of Unease for the American Press*, N.Y. TIMES (Feb. 20, 2019), https://www.nytimes.com/2019/02/20/us/politics/new-york-times-trump.html [https://perma.cc/UA5N-YFX8].

485. Charlie Savage, Maggie Haberman, Jonathan Swan & Michael Gold, *Trump Steps Up Threats to Imprison Those He Sees as Foes*, N.Y. TIMES (Sept. 9, 2024), https://www.nytimes.com/2024/09/09/us/politics/trump-prison-threats-opponents.html [https://perma.cc/B285-W84K].

486. Bruna Horvath, Jason Abbruzzese & Ben Goggin, *Meta Is Ending Its Fact-Checking Program in Favor of a 'Community Notes' System Similar to X's*, NBC NEWS (Jan. 7, 2025, 10:54 AM EST), https://www.nbcnews.com/tech/social-media/meta-ends-fact-checking-program-community-notes-x-rcna186468 [https://perma.cc/W3R8-Y79K].

487. Stuart A. Thompson, *5 Days with Elon Musk on X: Deepfakes, Falsehoods, and Lots of Memes*, N.Y. TIMES (Sept. 27, 2024), https://www.nytimes.com/2024/09/27/technology/elon-musk-x-posts.html [https://perma.cc/5GUZ-DD4D].

488. Benjamin Mullin & Katie Robertson, *Inside the Washington Post's Decision to Stop Presidential Endorsements*, N.Y. TIMES (Oct. 27, 2024), https://www.nytimes.com/2024/10/27/business/media/washington-post-president-endorsement.html [https://perma.cc/C467-ZZTP]. The owner of the *Los Angeles Times* similarly blocked the newspaper from endorsing Trump's opponent in 2024. Katie Robertson, *L.A. Times Editorial Chief Quits After Owner Blocks Harris Endorsement*, N.Y. TIMES (Oct. 23, 2024), https://www.nytimes.com/2024/10/23/business/media/la-times-editor-quits-patrick-soon-shiong-endorsement.html [https://perma.cc/6F9A-YDLX].

Mar-a-Lago home before he assumed office for the second time.[489] "The world's five biggest tech firms each gave at least $1 million [to the 2025 Trump inauguration fund], either directly or through their chief executives. So did the CEOs of Uber and OpenAI."[490] ABC News settled for $16 million in a questionable multimillion-dollar defamation suit that Trump brought against the company.[491] On the heels of that settlement, Trump sued the *Des Moines Register* and its pollster Ann Selzer, making a weak claim that its poll showing Trump was losing in Iowa violated an Iowa consumer-fraud statute.[492]

These developments demonstrate that the ability of traditional media and social-media platforms to promote an "enlightened citizenry" through "a press that is alert, aware, and free"[493] and to ensure the free flow of truthful information appear increasingly in doubt, at least during Trump's tenure.

Political action to protect the press and the online information environment therefore is urgent. Such action should include a federal press-shield law,[494] reexamination of defamation laws to ensure they continue to protect the production and dissemination of truthful content,[495] and subsidies for public-interest

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489. Marianne LeVine & Meryl Kornfield, *Jeff Bezos and Donald Trump Met for Dinner at Mar-a-Lago, Joined by Elon Musk*, WASH. POST (Dec. 19, 2024), https://www.washingtonpost.com/politics/2024/12/19/trump-bezos-musk-dinner [https://perma.cc/796J-N8M4]; Theodore Schleifer & David Yaffe-Bellany, *In Display of Fealty, Tech Industry Curries Favor with Trump*, N.Y. TIMES (Dec. 14, 2024), https://www.nytimes.com/2024/12/14/technology/trump-tech-amazon-meta-openai.html [https://perma.cc/XA6S-A2WB].

490. Alice Miranda Ollstein, Caitlin Oprysko & Irie Senter, *'Everyone's Trying to Kiss the Ring': Trump's Inauguration Devours Corporate Cash, Smashing Records*, POLITICO (Jan. 17, 2025 10:24 AM EST), https://www.politico.com/news/2025/01/16/trump-inauguration-corporate-donors-004242 [https://perma.cc/QY29-WF5C]. Top tech and information leaders also attended the Trump inauguration. Ali Swenson, *Trump, a Populist President, Is Flanked by Tech Billionaires at His Inauguration*, AP NEWS (Jan. 20, 2025, 10:04 PM EST), https://apnews.com/article/trump-inauguration-tech-billionaires-zuckerberg-musk-wealth-0896bfc3f50d941d62cebc3074267ecd [https://perma.cc/WVJ2-5YQL].

491. *See supra* note 310.

492. Elahi Ezadi, Laura Wagner & Meryl Kornfield, *Trump Sues Des Moines Register and Iowa Pollster, Escalating Attacks on Media*, WASH. POST (Dec. 17, 2024), https://www.washingtonpost.com/style/media/2024/12/17/trump-des-moines-register-ann-selzer-lawsuit [https://perma.cc/B3A4-J72B].

493. New York Times Co. v. United States, 403 U.S. 713, 728 (1971) (Stewart, J., concurring).

494. Editorial, *A Reporter's Shield Law Is Vital to Prevent Abuses of Power*, N.Y. TIMES (Oct. 14, 2024), https://www.nytimes.com/2024/10/14/opinion/editorials/press-act-reporters-leaks-whistleblower.html [https://perma.cc/69T5-XR7G].

495. Lyrissa Lidsky, *Defamation Law and the Crumbling Legitimacy of the Fourth Estate*, KNIGHT FIRST AMENDMENT INST. (July 11, 2024), https://knightcolumbia.org/blog/defamation-law-and-the-crumbling-legitimacy-of-the-fourth-estate [https://perma.cc/F7S2-EQLP] ("Defamation *should* be recalibrated to reward journalists who adhere to professionally developed standards for getting the facts right.").

journalism.[496] Voters and consumers can also demand from social-media platforms and other new information sources that they do more to assure the flow of fair and truthful information.

D. How Election-Law Theory Also Can Advance the Pro-Voter Agenda

Transformative pro-voter scholarship must focus on the conditions for continued free and fair elections and peaceful transitions of power. Fortunately, this work need not start from scratch. Indeed, recent discrete scholarly advances, when viewed together, further aspects of the pro-voter approach. For example, the pro-voter imperative to protect peaceful transitions of power is bolstered by recent doctrinal and historical work investigating the interaction between the Constitution's provisions on presidential selection and statutes such as the ECRA;[497] by recent empirical work testing the best forms of election reform to deter extreme candidates and bolster those who are more likely to support the rule of law;[498] and by recent comparative work surveying the risks of democratic backsliding in other countries and how some have pulled back from the brink,[499] the challenge of fragmented politics,[500] the rise of neo-authoritarian populism and polarization,[501] and unique features of the U.S. political system that present special vulnerabilities or defenses to such backsliding.[502]

Similarly, some recent scholarship furthers the voter-equality aspects of the pro-voter approach. On the doctrinal and historical side, such scholarship considers the vast reservoir of congressional power to protect voting rights under the Elections Clause and the power to enforce the Fourteenth and Fifteenth

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496. HASEN, *supra* note 38, at 152-55.

497. *See, e.g.*, Muller, *supra* note 326, at 1024-28. More broadly, on the risks of election subversion under our current constitutional structure, see Muller, *supra* note 339, at 331-48 (exploring the risk that election officials who refuse to certify results might pose to elections and discussing mandamus as a strategy to counteract it); Lisa Marshall Manheim, *Election Law and Election Subversion*, 132 YALE L.J.F. 312, 314-16 (2022) (summarizing the categories of scholarly research on election subversion). *See generally* LAWRENCE LESSIG & MATTHEW SELIGMAN, HOW TO STEAL A PRESIDENTIAL ELECTION (2024) (identifying weaknesses in the electoral system that could be used to subvert legitimate results).

498. *See supra* notes 459-465 and accompanying text.

499. LEVITSKY & ZIBLATT, *supra* note 363, at 6-9; LARRY DIAMOND, ILL WINDS: SAVING DEMOCRACY FROM RUSSIAN RAGE, CHINESE AMBITION, AND AMERICAN COMPLACENCY 3-5 (2019); STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 3-6 (2018).

500. Pildes, *supra* note 459, at 164.

501. *See, e.g.*, ISSACHAROFF, *supra* note 456, 15-80 (analyzing the rise of populism after the fall of authoritarian regimes in World War II).

502. *See generally* LEVITSKY & ZIBLATT, *supra* note 363 (discussing the risks of democratic backsliding in the United States).

Amendments,[503] as well as continued barriers to full Black participation in U.S. democracy.[504] This scholarship also surveys tools of democratic experimentation,[505] along with empirical examinations of other enfranchisement tools such as online and automatic voter registration.[506] And comparatively, it examines things like the treatment of Indigenous minority groups and methods of fair representation,[507] the various procedures states use to administer elections,[508] and voting-rights protections in state statutes and constitutions.[509]

A key scholarly question in promoting voter equality under the pro-voter approach is how to harness the forces of federalism to maximize protections for the franchise and fair representation in the states. Such scholarship exploring state and local improvements may be especially important during the second Trump Administration, which is likely to curtail the federal enforcement of voting-rights laws[510] and federal support for election security,[511] focusing instead

503. *See generally* TOLSON, *supra* note 466 (discussing Congress's role in overseeing elections); Travis Crum, *The Unabridged Fifteenth Amendment*, 133 YALE L.J. 1039 (2024) (investigating the Fifteenth Amendment's historical record).

504. Joshua S. Sellers, *Race, Reckoning, Reform, and the Limits of the Law of Democracy*, 169 U. PA. L. REV. 1995, 1998 (2021) (critiquing contemporary law-of-democracy scholarship as underconcerned with the structural impediments to Black political participation).

505. *See generally* Greenwood & Stephanopoulos, *supra* note 202 (evaluating state voting-rights acts); Bulman-Pozen & Seifter, *supra* note 92 (contrasting state constitutions with the Federal Constitution, and proposing a method of state-constitutional adjudication based on proportionality).

506. *See generally* Holly Ann Garnett, *Registration Innovation: The Impact of Online and Automatic Voter Registration in the United States*, 21 ELECTION L.J. 34 (2022) (evaluating the impact of online registration and automatic voter registration on individuals' probability of registering to vote and voting using data collected from ten elections in forty-nine states).

507. *See, e.g.*, Fiona Barker & Hilde Coffé, *Representing Diversity in Mixed Electoral Systems: The Case of New Zealand*, 71 PARLIAMENTARY AFFS. 603, 611-21 (2017) (analyzing the impact of the mixed-member-proportional electoral system in New Zealand on minority representation in the New Zealand Parliament).

508. Stack, *supra* note 230.

509. *See supra* Section III.C.2.b.

510. Dustin Gardiner, *Trump's DOJ Civil Rights Pick Built Her Name Antagonizing California Democrats*, POLITICO (Dec. 12, 2022, 9:00 AM EST), https://www.politico.com/news/2024/12/12/trumps-doj-civil-rights-pick-00193920 [https://perma.cc/5MFK-BV73] ("Dhillon's nomination, though she faces few obstacles in the GOP-controlled Senate, has sparked worry among some legal observers who say her tactics could paralyze the DOJ's long-running efforts to protect voting rights and other safeguards for minority groups.").

511. Eric Geller, *The Top Cybersecurity Agency in the U.S. Is Bracing for Donald Trump*, WIRED (Dec. 16, 2024, 6:30 AM), https://www.wired.com/story/cisa-cuts-trump-2 [https://perma.cc/6KWZ-L9V3] ("CISA is also bracing for changes to its election security mission. The agency has already dramatically scaled back conversations with social media companies

on false claims of voter fraud[512] as a potential pretext for legislation or administrative actions that make it harder for people to register and vote.[513] Scholars have much to offer state courts, state legislators, and voters acting through the initiative process to advance voting rights and protect elections in the face of federal retrenchment.

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.[514] 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 low rates of participation,[515] but rather the uneven levels of participation and influence in an atomized society. New technologies can warp voter realities by creating spaces for conspiracy theories to flourish. Voters are left with insufficient incentives or pathways to recognize their self-interest and band together to further those interests and protect their rights.

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about online misinformation following a right-wing backlash, but Trump's team could force CISA to abandon even more of its election security work. CISA staffers worry that Trump will block the agency from participating in state and local election officials' 'Trusted Info' initiative, which encourages Americans to listen to their local election supervisors instead of provocative online claims.").

512. Beth Reinhard, *How Pam Bondi Boosted Trump's Election Fraud Claims in Key Swing State*, WASH. POST (Dec. 16, 2024), https://www.washingtonpost.com/politics/2024/12/16/pam-bond-attorney-general-2020-pennsylvania [https://perma.cc/X7LR-PDMH] (detailing how Trump's attorney general, Pam Bondi, pushed "baseless" election-fraud conspiracy theories in Pennsylvania following the 2020 election).

513. *Restricting the Vote: Inside the Right-Wing Push to Rewrite Election Rules in 2025*, DOCUMENTED (Dec. 13, 2024), https://documented.net/investigations/restricting-the-vote-inside-the-right-wing-push-to-rewrite-election-rules-in-2025 [https://perma.cc/BNV2-YG8Q].

514. *See generally* Tabatha Abu El-Haj & Didi Kuo, *Associational Party-Building: A Path to Rebuilding Democracy*, 122 COLUM. L. REV. F. 127 (2022) (proposing that political parties develop closer associational bonds with their members to effect policy responsiveness in the government as a whole).

515. Indeed, turnout rates in recent presidential elections have been relatively high in this period of polarization. In 2024, turnout was just below 64% of the voter-eligible population. Election Lab, *2024 General Election Turnout*, U. FLA. (2024), https://election.lab.ufl.edu/2024-general-election-turnout [https://perma.cc/D8YE-JGKF]. This compares to 66.4% in 2020, 60.1% in 2016, 58.6% in 2012, and down to 51.7% in 1996. Election Lab, *National Turnout Rates Graph*, U. FLA. (2024), https://election.lab.ufl.edu/national-turnout-rates-graph [https://perma.cc/HY62-GBYW]. Even with the higher 2024 turnout, almost ninety million eligible voters did not vote in 2024. Alan Kronenberg, *How Many People Didn't Vote in the 2024 Election?*, U.S. NEWS & WORLD REP. (Nov. 15, 2024, 5:22 PM), https://www.usnews.com/news/national-news/articles/2024-11-15/how-many-people-didnt-vote-in-the-2024-election [https://perma.cc/T6CE-2SZE].

I am less sanguine than Abu El-Haj and Kuo that the existing political parties are capable of transforming again to serve a major democratizing role. The weakness of parties as democratizing forces highlights a dilemma fundamental to the path ahead. A political reform program dependent upon Congress and state legislatures has required party organizing. If not through parties, how will this organizing work?

If functional parties as we have understood them cease to exist, other organizational forms for rational collective action will be necessary to secure a vibrant democracy that serves voters' interests. Generative artificial intelligence might have a positive role to play here, despite the already-discussed risks of deepfakes and other forms of digital manipulation.[516] For example, politicians in India have experimented with building support for parties and political organizations in ways that are difficult to achieve with traditional means of communication alone. During the 2024 elections in India, candidates "rel[ied] on AI to help them navigate the nation's 22 official languages and thousands of regional dialects, and to deliver personalized messages in farther-flung communities."[517]

The rise of radio and television changed the nature of parties in the United States 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.[518] Similarly, the ongoing information revolution offers some promise for the revitalization of political

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516. *See supra* notes 284-290 and accompanying text. For more on the risks to democracy, see Raluca Csernatoni, *Can Democracy Survive the Disruptive Power of AI?*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Dec. 18, 2024), https://carnegieendowment.org/research/2024/12/can-democracy-survive-the-disruptive-power-of-ai?lang=en [https://perma.cc/5PCD-ZPFL].

517. Nilesh Christopher & Varsha Bansal, *Indian Voters Are Being Bombarded with Millions of Deepfakes. Political Candidates Approve*, WIRED (May 20, 2024, 6:00 AM), https://www.wired.com/story/indian-elections-ai-deepfakes [https://perma.cc/Q3FN-CBD5]; *see id.* ("More than 50 million AI-generated voice clone calls were made in the two months leading up to the start of the elections in April."); *see also* Vandinika Shukla & Bruce Schneier, *Indian Election Was Awash in Deepfakes—But AI Was a Net Positive for Democracy*, CONVERSATION (June 10, 2024, 8:38 AM), https://theconversation.com/indian-election-was-awash-in-deepfakes-but-ai-was-a-net-positive-for-democracy-231795 [https://perma.cc/BK8K-ZWTY] ("The campaigns made extensive use of AI, including deepfake impersonations of candidates, celebrities and dead politicians.").

518. *See* JOHN ALDRICH, WHY PARTIES? A SECOND LOOK 257, 260-69, 282 (2011); Richard L. Hasen, *An Enriched Economic Model of Political Patronage and Campaign Contributions: Reformulating Supreme Court Jurisprudence*, 14 CARDOZO L. REV. 1311, 1312 (1993) (discussing the role of political patronage and calling for a "unified jurisprudence of electoral law that treats political patronage and large campaign contributions similarly"); CIARA TORRES-SPELLISCY, POLITICAL BRANDS 11-13 (2019) (examining the role of branding in political discourse).

organizing, voter registration, voter education, and getting out the vote, whether through parties or newer entities.[519]

CONCLUSION

The mess of American election law and the current precarious state of democracy in the United States lack 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 structural separation of powers in the U.S. Constitution.[520] A closely divided electorate and a decentralized electoral system run partially by the parties led to localized changes in the rules for elections and spurred the voting wars. The lack of an affirmative right to vote in the Constitution and the difficulty of amendment created space for divergent legislative, judicial, and administrative approaches to voting rights and election law, with some states much more protective of voters than others.

The conservative Supreme Court appears hostile to voters and has allowed the gradual stagnation of voting rights. A revolution in political communication has removed key intermediaries that once 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 has heightened polarization. Now, American democracy has retrogressed to the point that we must worry about whether the United States can fairly count votes and whether electoral winners can reliably take office.

But all is not lost amid the funk. A pro-voter approach is possible. Countering stagnation and thwarting retrogression is the first order of business. Beyond that, the pro-voter approach engages legal doctrine, political action, and election-law scholarship to further principles centered on fair elections, easy voting for eligible voters, equal weighting of votes, vibrant institutions in civil society and the press, and fair representation of groups that have faced historical discrimination.

With today's polarized courts, federal judicial action is likely confined to preventing further backsliding and countering threats to fair vote counts and peaceful transitions of power. Some state courts are more fruitful ground for protecting voting rights.

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519. On the general potential positive social benefits of AI-related technology, see generally Orly Lobel, The Equality Machine: Harnessing Digital Technology for a Brighter, More Inclusive Future (2022).

520. Richard L. Hasen, *Political Dysfunction and Constitutional Change*, 61 Drake L. Rev. 989, 992-94 (2013).

Advancing the pro-voter approach politically depends in part on federalism. The polarized Congress today seems unlikely to enact major, new bipartisan voting protections. In some states, new constitutional provisions, voting-rights acts, and election rules can counter extremism and protect voting rights. In states with the initiative process, voters may bypass recalcitrant legislatures to advance pro-voter agendas themselves. The shifting allegiances of voters to the two major parties may create openings for bipartisan voting-rights advances in Congress and state legislatures.

Although the new information environment and technological change create difficulties for voter competence, they also allow for new mechanisms of political organizing that move beyond our current conception of political parties. There will be no substitute for collective political action, through political parties or new organizational forms, as the main bulwark of voting rights and democracy.

Transformed pro-voter scholarship must focus on identifying the forms of political association that can best thwart extremism, restore voter access to reliable information, protect peaceful transitions of power, advance voting rights, and assure the fair representation that is a prerequisite to multiracial democracy.[521] Scholarship also must look to lessons from other nations, and to the powers of American federalism, to create the framework to advance these goals in spaces where victory is possible and to prevent backsliding where it is not.

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.

521. On what it will take to achieve multiracial democracy in the United States, see generally Bertrall Ross, *Race and Election Law: Interest-Convergence, Minority Voting Rights, and America's Progress Toward a Multiracial Democracy*, *in* THE OXFORD HANDBOOK OF RACE AND LAW IN THE UNITED STATES (Devon Carbado, Emily Houh & Khiara M. Bridges eds., 2022).

APPENDIX

ROLL CALL VOTES FOR MAJOR FEDERAL ELECTION LEGISLATION, 1970-2006

The 1974 amendments to the Federal Election Campaign Act passed by a vote of 365-24 in the House[522] and 60-16 in the Senate.[523] The 1970, 1975, and 1982 amendments to the Voting Rights Act passed by votes in the House of 272-132,[524] 346-56,[525] and unanimous consent,[526] and in the Senate of 64-12,[527] 77-12,[528] and 85-8,[529] respectively. The National Voter Registration Act of 1993 passed by a

522. 120 CONG. REC. 35148-49 (1974). Republicans voted 145-18 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, https://www.govtrack.us/congress/votes/93-1974/h978 [https://perma.cc/Z5B4-7CQC]. Democrats voted 220-6 in favor of the bill. *Id.*

523. 120 CONG. REC. 34392 (1974). Republicans voted 15-11 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, https://www.govtrack.us/congress/votes/93-1974/s1038 [https://perma.cc/BR4E-XPH3]. Democrats voted 45-4 in favor of the bill. *Id.* One Independent voted against the bill. *Id.*

524. 116 CONG. REC. 20199-200 (1970). Republicans voted 100-76 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, https://www.govtrack.us/congress/votes/91-1970/h274 [https://perma.cc/Y8XE-GM32]. Democrats voted 172-56 in favor of the bill. *Id.*

525. 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 Daniel, a Democrat, voted in favor of the bill, while GovTrack reports that he did not vote). *Id.*; *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, https://www.govtrack.us/congress/votes/94-1975/h328 [https://perma.cc/5HM6-V9JW].

526. 128 CONG. REC. 14933, 14940 (1982) (granting a request for unanimous consent to accept the amendment).

527. 116 CONG. REC. 7336 (1970). Republicans voted 33-1 in favor of the bill. *To Pass H.R. 4249*, GOVTRACK.US, https://www.govtrack.us/congress/votes/91-1970/s342 [https://perma.cc/N8UN-W3BA]. Democrats voted 31-11 in favor of the bill. *Id.*

528. 121 CONG. REC. 24780 (1975). Republicans voted 27-6 in favor of the bill and Democrats voted 49-5 in favor of the bill. *To Pass H.R. 6219*, GOVTRACK.US, https://www.govtrack.us/congress/votes/94-1975/s329 [https://perma.cc/4HAT-KXKU]. One Conservative voted in favor of the bill and one Independent voted against the bill. *Id.*

529. 128 CONG. REC. 14337 (1982). Republicans voted 43-7 in favor of the bill. *To Pass H.R. 3112. (Motion Passed)*, GOVTRACK.US, https://www.govtrack.us/congress/votes/97-1982/s687 [https://perma.cc/4Y6B-TTEY]. Democrats voted 42-0 in favor of the bill. *Id.* One Independent voted against the bill. *Id.*

mostly party-line vote of 259-164 in the House[530] and 62-36 in the Senate.[531] The Help America Vote Act of 2002 passed by a vote of 357-48[532] in the House and 92-2 in the Senate.[533] The Bipartisan Campaign Reform Act passed by a mostly party-line vote of 240-189 in the House[534] and 60-40 in the Senate.[535] The 2006 amendments to the Voting Rights Act passed by a vote of 390-33[536] in the House and 98-0 in the Senate.[537]

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530. 139 CONG. REC. 9231-32 (1993). Republicans voted 20-150 against the bill. *Roll Call 154 | Bill Number: H. R. 2*, CLERK: U.S. HOUSE REPRESENTATIVES (May 5, 1993, 5:11 PM), https://clerk.house.gov/Votes/1993154 [https://perma.cc/CH23-9WA6]. Democrats voted 238-14 in favor of the bill. *Id.* One Independent voted in favor of the bill. *Id.*

531. 139 CONG. REC. 9640 (1993). Republicans voted 6-36 against the bill. *H.R. 2 (103rd): National Voter Registration Act of 1993*, GOVTRACK.US, https://www.govtrack.us/congress/votes/103-1993/s118 [https://perma.cc/RT57-9Q4C]. Democrats voted 56-0 in favor of the bill. *Id.*

532. 148 CONG. REC. 20333 (2002). Republicans voted 172-37 in favor of the bill. *Roll Call 462 | Bill Number: H. R. 3295*, CLERK: U.S. HOUSE REPRESENTATIVES (Oct. 10, 2002, 10:27 PM), https://clerk.house.gov/Votes/2002462 [https://perma.cc/A3ES-CEAT]. Democrats voted 184-11 in favor of the bill. *Id.* One Independent voted in favor of the bill. *Id.*

533. 148 CONG. REC. 20860 (2002). Republicans voted 44-0 in favor of the bill. *H.R. 3295 (107th): Help America Vote Act of 2002*, GOVTRACK.US, https://www.govtrack.us/congress/votes/107-2002/s238 [https://perma.cc/CQ55-UH8L]. Democrats voted 48-2 in favor of the bill. *Id.*

534. 148 CONG. REC. 1418-19 (2002). Republicans voted 41-176 against the bill. *Roll Call 34 | Bill Number: H. R. 2356*, CLERK: U.S. HOUSE REPRESENTATIVES (Feb. 14, 2002, 2:42 AM), https://clerk.house.gov/Votes/200234 [https://perma.cc/RX5U-Y4BD]. Democrats voted 198-12 in favor of the bill. *Id.* One Independent voted for the bill and one Independent voted against the bill. *Id.*

535. 148 CONG. REC. 3623 (2002). Republicans voted 11-38 against the bill. *H.R. 2356 (107th): Bipartisan Campaign Reform Act of 2002*, GOVTRACK.US, https://www.govtrack.us/congress/votes/107-2002/s54 [https://perma.cc/LP27-YM28]. Democrats voted 49-2 in favor of the bill. *Id.*

536. 152 CONG. REC. 14303-04 (2006). Republicans voted 192-33 in favor of the bill. *Roll Call 374 | Bill Number: H. R. 9*, CLERK: U.S. HOUSE REPRESENTATIVES (July 13, 2006, 5:38 PM), https://clerk.house.gov/Votes/2006374 [https://perma.cc/8Z65-4HYH]. Democrats voted 197-0 in favor of the bill. *Id.* One Independent voted in favor of the bill. *Id.*

537. 152 CONG. REC. 15325 (2006). Republicans voted 53-0 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 of 2006*, GOVTRACK.US (July 20, 2006, 4:28 PM ET), https://www.govtrack.us/congress/votes/109-2006/s212 [https://perma.cc/5SM2-CQL4]. Democrats voted 44-0 in favor of the bill. *Id.*