THE YALE LAW JOURNAL FORUM
April 14, 2025

Democracy's Distrust: The Supreme Court's Anti-Voter Decisions as a Threat to Democracy

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ABSTRACT. This Essay explores perceived biases within recent Supreme Court decisions affecting voting access and their implications for American democracy. The Supreme Court plays a pivotal role in enforcing democratic principles. This Essay examines historical and contemporary examples of judicial decisions that have privileged powerful political candidates and legislatures to the detriment of voters. As a lens for assessing these decisions, the Essay introduces a conceptual dichotomy between candidate-centered and voter-centered perspectives. The Essay argues that the Court's prioritization of the former perspective has forced citizens to bear the burden of antidemocratic decisions, which in turn has led to widespread distrust of democratic ideals, such as adherence to the rule of law, equal treatment, and fairness. This Essay will discuss these concerns and provide an analysis of the Court's influence on democracy.

INTRODUCTION

Trust in our democratic institutions, including courts, has plummeted over the past several decades. In April 2024, a Pew Research Center study found that less than thirty percent of Americans trust their government.[1] In 1958, when Pew began its trust-in-government study, that number stood at about seventy-three percent.[2] In a 2021 Pew study, eighty-five percent of Americans believed the

1. *Public Trust in Government: 1958-2024*, Pew Rsch. Ctr. (June 24, 2024), https://www.pewresearch.org/politics/2024/06/24/public-trust-in-government-1958-2024 [https://perma.cc/P663-QPSH] ("As of April 2024, 22% of Americans say they trust the government in Washington to do what is right 'just about always' (2%) or 'most of the time' (21%). Last year, 16% said they trusted the government just about always or most of the time, which was among the lowest measures in nearly seven decades of polling.").

2. *Id.*

"political system needs major changes or needs to be completely reformed."[3] Majorities of 2023 Pew survey respondents supported "term limits for Congress, age limits for federal elected officials and Supreme Court justices, and abolishing the Electoral College."[4] This skepticism of government reflects a deep unease about whether our institutions are truly living up to our democratic ideals.

Granted, it is difficult to define a true democracy, and scholars cannot agree on a single definition. Eugene Mazo posits that definitions of democracy span a continuum: certain theories require only "minimum standards," such as elections, while more maximal theories "require[e] democracy also to encompass political, and ultimately group, equality."[5] At its etymological core, democracy literally means "rule by the people."[6] While this fundamental principle remains consistent, the definition of "the people"—including identification of who may participate in governance and to what extent—varies, resulting in different manifestations of democratic governance.

Because "democracy" is so challenging to define, the term is particularly susceptible to varied interpretations by the Supreme Court. Scholars have long questioned the Court's role in the democratic process and argued over whether the Court has adequately and appropriately played its part.[7] Indeed, it has been suggested that "the Supreme Court has not embraced democracy as a core constitutional value, or recognized each citizen's fundamental right to meaningfully

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3. Richard Wike & Michael Dimock, *Can Americans Be Optimistic About Their Democracy?*, PEW RSCH. CTR. (Sept. 13, 2024), https://www.pewresearch.org/short-reads/2024/09/13/can-americans-be-optimistic-about-their-democracy [https://perma.cc/922L-J9Z5] ("In a 2021 Center survey of adults in 17 advanced economies, 85% in the U.S. said their political system needs major changes or needs to be completely reformed. . . . Americans are tired of division and existential, zero-sum political battles—especially since both sides feel like they are losing those battles. And nearly two-thirds of U.S. adults (65%) say they always or often feel exhausted when thinking about politics.").

4. *Id.* (citing *Americans' Dismal Views of the Nation's Politics*, PEW RSCH. CTR. 87-90 (Sept. 19, 2023), https://www.pewresearch.org/wp-content/uploads/sites/20/2023/09/PP_2023.09.19_views-of-politics_REPORT.pdf [https://perma.cc/HH5K-FBXD]).

5. Eugene Mazo, *What Causes Democracy?* 1 (Ctr. on Democracy, Dev. & Rule of L. Working Paper No. 38, 2005), https://ssrn.com/abstract=2779819 [https://perma.cc/BV58-8JV9].

6. Robert A. Dahl & David Froomkin, *Democracy*, ENCYCLOPEDIA BRITANNICA (Nov. 7, 2024), https://www.britannica.com/topic/democracy [https://perma.cc/9S9B-QBRE].

7. For a classic exploration of the structural role of the Court and its relationship to democracy, see JOHN HART ELY, DEMOCRACY AND DISTRUST (1980), to which this Essay's title is obviously indebted. For critiques of how the Court has exercised its role, see, for example, Adam Lamparello, *With All Deliberate Speed:* NLRB v. Noel Canning *and the Case for Originalism*, 40 U. DAYTON L. REV. 1, 5 (2015) (arguing that the Supreme Court "does not embrace democracy as a constitutional value"); and Matthew Michael Calabria, Note, *Remembering Democracy in the Debate over Election Reform*, 58 DUKE L.J. 827, 853-55 (2009) (discussing the implications of the Supreme Court's failure to focus on democracy as an important constitutional value).

participate in governance."[8] Some of this skepticism derives from the fact that the Court is not accountable to the majority and is not necessarily responsive to the majority's will—a structural phenomenon that has long troubled scholars wrestling with the "counter-majoritarian difficulty" posed by an unelected Court.[9] This tension with majoritarian concerns was starkly evident in *Dobbs v. Jackson Women's Health Organization*.[10] Indeed, a majority of Americans support abortion rights.[11] Justice Alito's majority opinion argues that the ruling restores the issue of abortion to "the people's elected representatives,"[12] framing it as a return to democratic deliberation. This perspective suggests that decisions about abortion laws should be made through legislative processes rather than judicial mandates. However, this invocation of democracy has been critiqued for its limited and inconsistent understanding of democratic principles. Scholars argue that in *Dobbs*, the Supreme Court's "invocations of democracy" displayed "a romanticization of democracy rather than its current reality."[13] Scholars Melissa

8. Lamparello, *supra* note 7, at 5.

9. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962); *see also* Daniel Epps & Ganesh Sitaraman, *Supreme Court Reform and American Democracy*, 130 YALE L.J.F. 821, 824 (2021) (discussing the countermajoritarian difficulty's prominence in U.S. constitutional theory).

10. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 292 (2022) (overruling *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and holding that the Constitution does not include a right to an abortion).

11. *See, e.g.*, Carroll Doherty, Jocelyn Kiley & Nida Asheer, *Broad Public Support for Legal Abortion Persists 2 Years After Dobbs*, PEW RSCH. CTR. (May 13, 2024), https://www.pewresearch.org/wp-content/uploads/sites/20/2024/05/PP_2024.5.13_abortion_REPORT.pdf [https://perma.cc/W9AW-8XVT] (finding that, as of April 2024, 63% of Americans support legal abortion in all or most cases, with significant partisan and demographic divides); *see also* Domenico Montanaro, *Poll: Americans Want Abortion Restrictions, but Not as Far as Red States Are Going*, NPR (Apr. 26, 2023, 5:00 AM ET), https://www.npr.org/2023/04/26/1171863775/poll-americans-want-abortion-restrictions-but-not-as-far-as-red-states-are-going [https://perma.cc/B3Q6-5QZ9] (finding that Americans predominantly support abortion rights but with restrictions, with 66% of respondents preferring restricting abortion to the first trimester).

12. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 232 (2022).

13. David Landau & Rosalind Dixon, Dobbs*, Democracy, and Dysfunction*, 2023 WIS. L. REV. 1569, 1612, 1613 ("[T]he democratic justification for *Dobbs* was also rooted in the discourse surrounding the decision, and invoking the name of democracy in aid of an illiberal outcome gives democracy a bad name. Doing so in circumstances where there is patent democratic dysfunction can only breed further disenchantment. If people lose faith in democracy as a system of government, its foundations become fragile.").

Murray and Katherine Shaw contend that this appeal to "democratic deliberation" was rhetorically powerful but fundamentally flawed.[14]

Since the Court issued this decision, trust in the institution has declined significantly; according to an Annenberg Public Policy Center (APPC) survey, less than half of Americans now trust the Supreme Court to act in their best interests.[15] University of Pennsylvania Professor Matthew Levendusky, who directed the APPC survey, explains that *Dobbs* profoundly altered views of the Court and that "the Court's rulings since then have done little to change these perceptions."[16]Accordingly, the Roberts Court has been called biased,[17] partisan,[18] and

14. Melissa Murray & Katherine Shaw, Dobbs *and Democracy*, 137 HARV. L. REV. 728, 806 (2024) ("But even on its own terms, the Court's appeal to democracy fails. Throughout, the *Dobbs* majority opinion presented an extraordinarily limited, even myopic, conception of democracy—one that misapprehended the processes and institutions that are constitutive of democracy, while also reflecting a distorted vision of political power and representation. The opinion compounded these distortions by refusing to grapple with the antidemocratic quality of the interpretive method it deployed to identify fundamental rights that are worthy of judicial protection. Indeed, the majority's adherence to a history-and-tradition analysis binds constitutional interpretation to a less democratic past in which very few Americans were meaningful participants in the production of law and legal meaning.").

15. *Trust in U.S. Supreme Court Continues to Sink*, ANNENBERG PUB. POL'Y CTR. (Oct. 2, 2024), https://www.annenbergpublicpolicycenter.org/trust-in-us-supreme-court-continues-to-sink [https://perma.cc/V74N-692T].

16. *Id.*

17. *See* William Y. Chin, *The Age of Covert Racism in the Era of the Roberts Court During the Waning of Affirmative Action*, 16 RUTGERS RACE & L. REV. 1, 33 (2015) ("The Roberts Court fails to see covert racism and also fails to see the need for affirmative action."); Michele Goodwin, *Complicit Bias and the Supreme Court*, 136 HARV. L. REV. F. 119, 121 (2022) ("These [complicit] biases may incline judges toward advancing particular principles or causes based on their religious, political, or other beliefs and affiliations . . . . even if the result is or appears outcome determinative, infringes on established rights, or perpetuates discrimination."); E.J. Dionne, Jr., *The Supreme Court's Republican Bias Hangs over the Trump Immunity Case*, WASH. POST (May 5, 2024, 7:00 AM EDT), https://www.washingtonpost.com/opinions/2024/05/05/supreme-court-republican-bias-trump-immunity-case [https://perma.cc/3NVM-DUQE]; Leah Litman & Tonja Jacobi, *Does John Roberts Need to Check His Own Biases?*, N.Y. TIMES (June 2, 2020), https://www.nytimes.com/2020/06/02/opinion/john-roberts-supreme-court.html [https://perma.cc/5YNL-GFCB]; *see also* Rachel Reed, *Politics, the Court, and "the Dangerous Place We Find Ourselves in Right Now,"* HARV. L. TODAY (Sept. 21, 2022), https://hls.harvard.edu/today/politics-the-court-and-the-dangerous-place-we-find-ourselves-in-right-now [https://perma.cc/Y6V3-L3AA] (discussing the risk of public perception of a biased Supreme Court).

18. Lee Epstein, *Partisanship "All the Way Down" on the U.S. Supreme Court*, 51 PEPP. L. REV. 489, 489 (2024); Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301, 301-02 (2016); *see also* Maxwell Wamser, Note, *Voting Rights at the Intersection of Electoral Legislation and Judicial Theories of*

elitist.[19] Yasmin Dawood notes that this elitism aligns with the country's origins: "[T]he Constitution established an elitist democracy in which power was intended to be held for the most part by a privileged few who were to have an outsized influence on the course of governance."[20] She argues that "similar themes . . . are evident in the Supreme Court's recent election law decisions."[21] But Dawood's critique also emphasizes the role of the people as an essential check on the excesses of those who sought to govern: "The role of the people was anticipated to be episodic but their participation, while contained, was nonetheless crucial as a preventative defense against the abuse of power."[22] Thus, there have always been at least two centers of authority in electoral politics: those who seek and obtain power through elections, and the voters who support and—just as crucially—limit them. This prompts crucial questions: Where does the Supreme Court stand in relation to these two centers of authority, and what role does it play in mediating between them? Is it a guardian that expands and protects voters and their rights, or a gatekeeper that prefers the powerful?

Elections and voting are the linchpins of our democracy. When a candidate or a court hijacks the ability of voters to enjoy an equal opportunity to participate in the electoral process, democracy is denied. In a healthy democracy, the perspectives of both voters and candidates should presumably be oriented toward

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Democracy: Lessons Learned from Brnovich v. Democratic National Committee, 95 TEMP. L. REV. 371, 404-05 (2023) ("Scholars have made many attempts to characterize the Roberts Court's approach to democracy within election law jurisprudence. Its approach has been referred to as 'neoliberal jurisprudence,' 'free market democracy,' and 'election law originalism.' Some scholars have further identified the Roberts Court as taking an ad hoc approach to election law. Much of this analysis has referred to the Roberts Court's approach to campaign financing in the wake of *Citizens United v. FEC*, but the general understanding of its approach to matters of law regarding principles of American democracy apply across the board." (first quoting Timothy K. Kuhner, Citizens United *as Neoliberal Jurisprudence: The Resurgence of Economic Theory*, 18 VA. J. SOC. POL'Y & L. 395, 397 (2011); then quoting David Schultz, *The Case for a Democratic Theory of American Election Law*, 164 U. PA. L. REV. ONLINE 259, 261 (2016); and then quoting Yasmin Dawood, *Election Law Originalism: The Supreme Court's Elitist Conception of Democracy*, 64 ST. LOUIS U. L.J. 609, 609 (2020))).

19. Yasmin Dawood, *Election Law Originalism: The Supreme Court's Elitist Conception of Democracy*, 64 ST. LOUIS U. L.J. 609, 616 (2020) ("Whether intended or not, the decisions by the Roberts Court result in a vision of democracy that is decidedly elitist in nature. This claim is not meant to establish a causal explanation of these cases; instead, it is an assessment of what the cases amount to when considered objectively as a whole. To be sure, the elitist approach may be the accidental result of a combination of the following factors: the Court's absolutist approach to the First Amendment, its restrictive approach to the equal protection clause, and its pro-states interpretation of federalism.").

20. *Id.* at 621.

21. *Id.*

22. *Id.*

the same goals: allowing those entitled to vote to do so, and counting each vote fairly. Moreover, all participants faithful to democracy should want the candidate who received the majority of votes cast within the relevant electoral framework to be declared the winner. However, in this Essay, I argue that the Roberts Court has demonstrated a systematic preference for those in power and those seeking it over voters in democratic matters.[23] This preference manifests in decisions that favor candidates and incumbent legislatures while disadvantaging voters. The Court's decisions favoring the powerful over the people threaten the careful balance of voter-centered and candidate-centered perspectives that democracy requires.

Other scholars have written about the Court's anti-voter jurisprudence. Richard L. Hasen provides a comprehensive analysis of election law's current and future state. He writes that the field of election law is stagnant and "retreating from the protection of voters," and argues for a "pro-voter approach."[24] Joshua Douglas argues that the Supreme Court's election-law decisions contribute to voter suppression and disenfranchisement and adversely impact communities of

23. In addition to its election law holdings, recent Supreme Court precedent benefits public officials and candidates for public office through limiting the scope of federal bribery laws. For example, *Snyder v. United States*, 603 U.S. 1 (2024) held that state and local officials could accept gratuities for past official acts. *Id.* at 10. Justice Jackson pointed out in her dissent that the defendant, the Mayor of Portage, Indiana, solicited the gratuity because he "need[ed] money" after helping a car dealership win a city contract. *Id.* at 33 (Jackson, J., dissenting); *see* Daniel I. Weiner & Eric Petry, *Supreme Court Weakens Safeguards Against State Public Corruption*, BRENNAN CTR. FOR JUST. (July 2, 2024), https://www.brennancenter.org/our-work/analysis-opinion/supreme-court-weakens-safeguards-against-state-public-corruption [https://perma.cc/Q9XE-4KEM] ("*Snyder* is likely to be viewed as the latest in a series of cases in which the Court has curtailed the so-called criminalization of politics."); *see also* McDonnell v. United States, 579 U.S. 550, 577 (2016) (holding that a former Governor of Virginia accepting $175,000 in loans and gifts to assist corporate representatives in scheduling meetings with state government officials did not fit the definition of an "official act" for the purposes of violating the federal bribery statute); Sloan Renfro, Note, *The Need for a Clear Statement After "Bridgegate": Combating SCOTUS's Narrowing View of Corruption with an "Abuse of Functions" Offense*, 59 AM. CRIM. L. REV. 197, 199 (2022) ("[B]ecause of the Court's narrow interpretation of criminal corruption offenses . . . current U.S. laws, when benchmarked against international standards, do not sufficiently guard against certain internationally recognized forms of public corruption that Congress has intended to criminalize."). In sum, these decisions prioritize the candidate for public office over criminalizing conduct that can harm democracy.

24. Richard L. Hasen, *The Stagnation, Retrogression, and Potential Pro-Voter Transformation of U.S. Election Law*, 134 YALE L.J. 1673, 1677, 1682-83 (2025).

color.[25] He highlights the ways that the Court's recent rulings diminish the right to vote.

While in agreement with these scholars, this Essay argues that we should view the Court through an additional prism: one where the Court's preference for the powerful dictates its candidate-friendly decisions, to the detriment of voters. Accordingly, this Essay will discuss the role that the Supreme Court has played in fostering distrust in democracy through its pro-candidate, anti-voter decisions. Part I discusses the redefinition and distortion of terms in the election vernacular in ways that have tended—both historically and contemporaneously—to privilege the perspective of the powerful over that of the people. Part II assesses the Supreme Court's role in promoting or obstructing democracy through various eras and the impact of its interventions on democratic principles. Part III focuses on the Roberts Court and several of its decisions that, this Essay argues, have privileged the powerful and penalized the people through a candidate-centered approach. In closing, Part IV argues that we have become over-reliant on the Supreme Court as an institution that can safeguard democracy. We must rather look to "We the People" to ensure that democracy endures.

I. THE LANGUAGE PROBLEM DISTORTING DEMOCRACY

America, we have a language problem. Political operatives are skilled at manipulating the plain and traditional meanings of words to allow antithetical meanings to become prevailing definitions, which in turn fosters a fundamental distrust of democracy. Misinformation and disinformation spread false or misleading information and create confusion and distrust. And the oversaturation of misleading information can lead people to no longer trust official sources of information or have confidence in their understanding of important issues. To be clear, voter deception is not a new phenomenon, but the tools of voter deception have become increasingly efficient. As Ronald J. Krotoszynski observes, "Throughout time and history, incumbent office holders routinely have sought to exploit voters' lack of access to full, complete, and truthful information in order to retain their grip on power. . . . Contemporary efforts at voter deception can be accomplished on a massive scale, at very low cost, with great precision, and with an astonishingly high success rate."[26] Misinformation and

25. *See generally* JOSHUA A. DOUGLAS, THE COURT V. THE VOTERS: THE TROUBLING STORY OF HOW THE SUPREME COURT HAS UNDERMINED VOTING RIGHTS (2024) (discussing the implications of the Court's recent voting-rights decisions for democracy).

26. Ronald J. Krotoszynski, *Disinformation, Misinformation, and Democracy: Defining the Problem, Identifying Potentially Effective Solutions, and the Merits of Using a Comparative Legal Approach*, *in* DISINFORMATION, MISINFORMATION, AND DEMOCRACY: LEGAL APPROACHES IN COMPARATIVE CONTEXT 1, 4 (Ronald J. Krotoszynski, Jr., András Koltay & Charlotte Garden eds., 2024).

disinformation "distort[] the process of democratic deliberation and, ultimately, undermine[] the electoral process itself. At this point, it is clear that disinformation and misinformation constitute a clear and present danger to democratic deliberation and, more generally, to democratic self-government."[27]

Unfortunately, this country has had a language problem since its founding. "We the People," a foundational and profound phrase, is featured in the Preamble of the U.S. Constitution, epitomizing the democratic aspirations of a nation founded as an alternative to monarchical rule.[28] But who exactly comprises "We the People"? This fundamental question has shaped American democracy since the drafting of the Constitution in 1787, when citizens who had recently overthrown the autocratic governance of the British monarchy sought to establish a system that allowed them a voice in their own governance.[29] Yet the Constitution largely delegated control of elections and voting qualifications to the states.[30] Most states restricted voting to white, male property owners, creating a narrow definition of democratic participation that limited the phrase "We the People" to a privileged few.[31]

With voting rights reserved almost exclusively for white, male property owners, the three-fifths compromise further exemplified this proscription, counting enslaved individuals as fractions of persons for representation while denying them any citizenship rights.[32] This foundational prohibition set a precedent for a prolonged struggle over the inclusiveness of American democracy as

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27. *Id*. at 6.

28. U.S. CONST. pmbl.

29. *See* Richard R. Beeman, *The Constitutional Convention of 1787: A Revolution in Government*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/white-papers/the-constitutional-convention-of-1787-a-revolution-in-government [https://perma.cc/LPD5-HXRW].

30. Article I, Section 4, Clause 1 of the Constitution states: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." This clause, known as the Elections Clause, grants states the authority to regulate the time, place, and manner of congressional elections while also allowing Congress to override state regulations.

31. *See Voting Rights: A Short History*, CARNEGIE CORP. N.Y. (Nov. 18, 2019), https://www.carnegie.org/our-work/article/voting-rights-timeline [https://perma.cc/WHD5-66YT].

32. The three-fifths compromise provided the following:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

U.S. CONST. art. I, § 2, cl. 3.

the concept of "We the People" continued to evolve. As a result, the prevailing conception among the states held that "We the People" was reserved for certain persons who alone possessed the full capacity to exercise the rights and privileges of citizens under the Constitution. Challenging that discriminatory conception, Frederick Douglass proclaimed:

> But it has been said that Negroes are not included within the benefits sought under this declaration. This is said by the slaveholders in America . . . but it is not said by the Constitution itself. Its language is "we the people;" not we the white people, not even we the citizens, not we the privileged class, not we the high, not we the low, but we the people; not we the horses, sheep, and swine, and wheel-barrows, but we the people, we the human inhabitants; and, if Negroes are people, they are included in the benefits for which the Constitution of America was ordained and established.[33]

Over the centuries, the interpretation of this phrase has evolved. But in recent years, the Supreme Court has played a pivotal role in narrowing the scope not only of "We the People," but of democracy itself.[34]

Our predicament—allowing the distortion of language to promote the powerful few over the majority—persists. Language is inextricably tied to democracy. The words written in the Founding documents profoundly shape the aspirational democratic principles by which we seek to live. But the obvious gap between rhetoric and reality can lead to skepticism about whether those democratic ideals continue to serve as a guide. In recent years, Republican politicians have proved particularly adept at generating new terms and refashioning old terms in the election nomenclature.

For example, President Donald Trump and his attorneys have repeatedly claimed that his criminal prosecutions constitute "election interference."[35] This

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33. Frederick Douglass, The Constitution of the United States: Is It Pro-Slavery or Antislavery?, Speech Delivered in Glasgow, Scotland (Mar. 26, 1860), *in* FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS 380, 387 (Philip S. Foner & Yuval Taylor eds., 1999).

34. *See infra* Part III.

35. April Rubin, *Trump Casts Upcoming Sentencing Date in N.Y. Case as Election Interference*, AXIOS (Aug. 15, 2024), https://www.axios.com/2024/08/15/trump-sentencing-hush-money-case-delay-election [https://perma.cc/DE4N-HTJA]; *see* Ben Protess, Kate Christobek & Jonah E. Bromwich, *Trump Seeks to Delay His Sentencing Until After the Election*, N.Y. TIMES (Aug. 15, 2024), https://www.nytimes.com/2024/08/15/nyregion/trump-delay-sentencing-election.html [https://perma.cc/CJ7L-GB47] ("'By adjourning the sentencing until after that election—which is of paramount importance to the entire nation,' [Trump's lawyers] added, 'the court would reduce, even if not eliminate, issues regarding the integrity of any future proceedings.'").

is a distortion of the traditional meaning of the term. "Election interference," in any ordinary sense of the term, does not describe the process of calling a candidate to account for alleged criminal wrongdoing in court under generally applicable laws.[36] Rather, "election interference" properly refers to efforts to interfere with voting, including voter intimidation, closing polling places early, and voter deception.[37] The original meaning of election interference was thus voter-centered and focused on the ways in which *voters* were prevented from exercising their constitutional right to vote. In contrast, the new meaning is candidate-centered: it is rooted in the perspective of aggrieved candidates who invoke their right to seek office as a shield against prosecution for unlawful behavior.

Consequently, the meaning of the term "election interference" has been inverted and is now being used to undermine the health of democracy. Trump's claims of political persecution are unfounded. Repeated claims of election interference or fraud without substantial evidence can erode public trust in the electoral process. When people lose faith in the integrity of elections, they may become disillusioned with the democratic system.[38] Moreover, questioning the legitimacy of election results can undermine the authority of elected officials,

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36. Delay has been an essential part of Mr. Trump's legal strategy. "When facing legal woes, as he has for decades in civil courts, Mr. Trump seeks to manipulate the schedule. Whether or not the facts are in his favor, he plays a game of calendar calculus to pit one case against the other, in hopes of pushing them past the election." Ben Protess, Alan Feuer, William K. Rashbaum & Maggie Haberman, *Stalling: A Time-Tested Legal Strategy that Keeps Working for Trump*, N.Y. TIMES (Mar. 16, 2024), https://www.nytimes.com/2024/03/16/nyregion/donald-trump-trial-delay-strategy.html [https://perma.cc/93NR-2AGA].

37. Several federal laws prohibit interference with voting or interference with registering to vote in a U.S. election. Additionally, a number of criminal laws prohibit election interference targeting voters. At the federal level, these crimes can include, but are not limited to the following: paying voters to register to vote or to vote, 52 U.S.C. § 10307(c) (2018); paying voters to influence voting behavior, 18 U.S.C. § 597 (2018); giving false information to establish eligibility to vote, 52 U.S.C. § 10307(c) (2018); intimidating voters through physical duress or intimidating voters concerning registration to vote, 18 U.S.C. §§ 245(b)(1)(A), 594 (2018); election malfeasance committed by election officials, 52 U.S.C. § 20511 (2018); approving fictitious individuals by placing fictitious names on voter registration rolls or through color of law, 52 U.S.C. §§ 10307(c), 20511 (2018); preventing or impeding exercise of rights under federal law, 18 U.S.C. §§ 241-242 (2018); voting through disseminating false information about voting, 18 U.S.C. §§ 611, 1015(f) (2018); falsely claiming U.S. citizenship in registering to vote or in voting, 18 U.S.C. §§ 911, 1015(f) (2018); providing false information concerning a voter's name, address, or residency to register to vote or to vote in a federal election, 52 U.S.C. §§ 10307(c), 20511 (2018); and causing the submission of voter registrations that are materially defective, 52 U.S.C. § 20511 (2018).

38. *See, e.g.*, *Cornell Democracy Expert: Trump's Election Comments "Reject Democratic Principles,"* CORNELL UNIV., https://government.cornell.edu/news/cornell-democracy-expert-trumps-election-comments-reject-democratic-principles [https://perma.cc/QS77-KGM4].

which can lead to a lack of respect for the rule of law and the decisions made by those in power.[39]

Likewise, "election integrity" has become synonymous with unfounded allegations of voter fraud.[40] President Trump has raised countless claims of "fraud" and faulty ballot counting that, though unfounded, have helped spread distrust in the integrity of the electoral system.[41] Indeed, for many today, the term "election integrity" evokes the specters of fraud, "stopping the steal,"[42] and disinformation.[43] Ironically, this warped rhetoric around election integrity threatens to undermine the actual integrity of elections. For example, while claiming to care about fraud, organizations on the political right have taken steps to dismantle a

39. *See, e.g.*, *What the Election of Donald Trump Says About Democracy Globally*, CORNELL UNIV. (Nov. 7, 2024), https://as.cornell.edu/news/what-election-donald-trump-says-about-democracy-globally [https://perma.cc/LXF7-9XWR] ("Democratic backsliding is occurring in an unprecedented number of wealthy countries, the U.S. among them, with leaders using existing democratic institutions to concentrate power in the executive and limit checks on the strongman, to restrict democratic rights, liberties, and participation. With the return of President Trump to the White House via the ballot box, with a popular vote victory, the case suggests that this new form of democratic erosion from within is the modal pathway for long-established democracies to decline.").

40. *See, e.g.*, Lora Kelly, *What Election Integrity Really Means*, ATLANTIC (Oct. 29, 2024), https://www.theatlantic.com/newsletters/archive/2024/10/election-integrity-denial-efforts/680454 [https://perma.cc/R7Z9-TZXE] ("Election deniers have co-opted the term to undermine trust in the voting process."); *see also Background on Trump's "Voter Fraud" Commission*, BRENNAN CTR. FOR JUST. (July 18, 2017), https://www.brennancenter.org/our-work/analysis-opinion/background-trumps-voter-fraud-commission [https://perma.cc/8RT5-DQTP] (commenting on then-President Trump's Presidential Advisory Commission on Election Integrity that "[t]here is strong reason to suspect this Commission is not a legitimate attempt to study elections, but is rather a tool for justifying discredited claims of widespread voter fraud and promoting vote suppression legislation").

41. *See* Glenn Kessler & Salvador Rizzo, *President Trump's False Claims of Vote Fraud: A Chronology*, WASH. POST (Nov. 5, 2020, 5:59 PM EST), https://www.washingtonpost.com/politics/2020/11/05/president-trumps-false-claims-vote-fraud-chronology [https://perma.cc/8XCL-BCW5]; Jérôme Viala-Gaudefroy, *Why Do Millions of Americans Believe the 2020 Presidential Election Was 'Stolen' from Donald Trump?*, CONVERSATION (Mar. 3, 2024, 10:55 AM EST), https://theconversation.com/why-do-millions-of-americans-believe-the-2020-presidential-election-was-stolen-from-donald-trump-224016 [https://perma.cc/2M39-UNX9].

42. *See* Scott Detrow, *Stopping the Steal Documents the Efforts to Help Trump*, NPR (Sept. 14, 2024, 5:43 PM ET), https://www.npr.org/2024/09/14/nx-s1-5107592/stopping-the-steal-documents-the-efforts-to-help-trump [https://perma.cc/NT2J-R6LA].

43. *See* Julia Ingram, *In Elon Musk's "Election Integrity" Community on X, False Claims Proliferate*, CBS NEWS (Nov. 2, 2024, 7:40 PM EDT), https://www.cbsnews.com/news/elon-musk-election-integrity-x-false-claims [https://perma.cc/7ZYD-AFR3]. Musk's Election Integrity Community on X has been described as a "repository for election misinformation, galvanizing more than 58,000 members to report instances of 'voter fraud or irregularities' that are often unsubstantiated, misleading or flat-out fabricated." *Id.*

key fraud-prevention tool, the Electronic Registration Information Center (ERIC).[44] ERIC is a nonpartisan tool used to maintain accurate voter rolls and reduce fraud by identifying ineligible registrations.[45] Despite the effectiveness of ERIC, several states, influenced by claims of fraud after Trump's 2020 loss, withdrew from the program.[46] This trend has accompanied broader legislation to restrict voting access. Ten states, for instance, have curtailed the use of ballot drop boxes.[47] Ohio and Iowa now allow only one drop box per county, while Georgia restricts counties to one box per 100,000 voters.[48] These measures, rooted in baseless fraud claims, represent a broader effort to restrict voter access under the guise of election integrity.[49] Historian Carol Anderson likened the new restrictions lacking any evidence of fraud

> to a quack doctor holding up an X-ray, pointing to something going, "See, see, see?" and getting the person to believe that there's something really there on that X-ray that requires expensive and dangerous surgery . . . . We had an election that was amazing in the midst of a pandemic. And instead of applauding themselves for it, they went with a Trumpian lie.[50]

As with other terms, the understanding of "election integrity" thus focuses more on the perspective of an aggrieved candidate or political party than on the

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44. Jesse Wegman, *Republicans Are No Longer Calling This Election Program a 'Godsend,'* N.Y. TIMES (June 6, 2023), https://www.nytimes.com/2023/06/06/opinion/republican-voter-fraud-eric.html [https://perma.cc/97MD-ZPCE] (discussing the Republican Party's shift in stance towards the Electronic Registration Information Center, a program once praised for maintaining accurate voter rolls).

45. *See* Miles Parks, *How the Far Right Tore Apart One of the Best Tools to Fight Voter Fraud*, NPR (July 1, 2023, 8:01 AM ET), https://www.npr.org/2023/07/01/1185623425/how-the-far-right-tore-apart-one-of-the-best-tools-to-fight-voter-fraud [https://perma.cc/ZJ7P-SGSJ].

46. *See* Miles Parks, *Republican States Swore Off a Voting Tool. Now They're Scrambling to Recreate It*, NPR (Oct. 20, 2023, 5:00 AM ET), https://www.npr.org/2023/10/20/1207142433/eric-investigation-follow-up-voter-data-election-integrity [https://perma.cc/58UB-6BJY].

47. *See Voting Laws Roundup: September 2024*, BRENNAN CTR. FOR JUST. (Sept. 26, 2024), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-september-2024 [https://perma.cc/DF7N-38RH] (citing state statutes).

48. *Id.* (citing 2021 Iowa Legis. Serv. Ch. 12 (West) (codified at IOWA CODE § 53.17(1)(c) (2024)); 2022 Ohio Laws File 175 (codified at OHIO REV. CODE ANN. § 3509.05(3) (2023)); and 2021 Ga. Laws 9 (codified at GA. CODE. ANN. § 21-2-382(c) (2021))).

49. *See* Geoffrey Skelley, *How the Republican Push to Restrict Voting Could Affect Our Elections*, FIVETHIRTYEIGHT (May 17, 2021), https://fivethirtyeight.com/features/how-the-republican-push-to-restrict-voting-could-affect-our-elections [https://perma.cc/76NW-F76V].

50. *Id.*

perspective of the voter, and it is too often wielded as a vehicle to effectuate voter suppression.

This candidate-centered perspective ignores the cries of disenfranchised voters. The primary question becomes how or why the candidate lost. Claims of election interference are made as retrospective explanations for the reality of defeat. Prospectively, cries of "election interference" are made in reference to a candidate's inability to campaign or to appear on the ballot—even where there are substantial legal arguments for such restrictions.[51] Thus, familiar terms like "election interference" have taken on unfamiliar, candidate-centered meanings. American rhetoric and jurisprudence need a correction: our focus should not center on candidates but on how the democratic process involves and impacts voters.

II. DENYING OR DEFENDING DEMOCRACY: THE SUPREME COURT'S ROLE

The Supreme Court has a pivotal role to play in preserving democracy. The decisions of the Court can either expand democracy by fostering inclusion—a voter-centered approach—or can undermine democracy by upholding exclusionary policies and practices. From the 1870s through the early twentieth century, the Supreme Court curtailed the protections of the Fifteenth Amendment, often by refraining from enforcing voting-rights statutes and from hearing cases that challenged racial discrimination in voting, thereby allowing discriminatory practices to persist. For example, the Court's decision in *Giles v. Harris* undermined the Fifteenth Amendment's guarantee of racial equality in voting[52] and thus enabled the entrenchment of Jim Crow-era voter suppression in the South.[53] The Court conceded that, even if the racist Jim Crow restrictions on

51. *See* Anderson v. Griswold, 543 P.3d 283, 342 (Colo. 2023), *rev'd sub nom.* Trump v. Anderson, 601 U.S. 100 (2024) ("[B]ecause President Trump is disqualified from holding the office of President under Section Three, it would be a wrongful act under the Election Code for the Secretary to list President Trump as a candidate on the presidential primary ballot.").

52. *See* 189 U.S. 475, 488 (1903) (reasoning that even if "the great mass of the white population intends to keep the blacks from voting . . . a name on a piece of paper will not defeat them").

53. Pamela S. Karlan, Tribute, *From Logic to Experience*, 83 GEO. L.J. 1, 2 (1994) ("*Giles v. Harris* . . . gave Southern racists a green light to disenfranchise black citizens." (footnote omitted)).

voter registration violated the Fifteenth Amendment, the Court either could not or would not address such "political wrong[s]."[54]

Unlike its predecessors, the Warren Court (1953-1969)[55] embraced a pro-democracy jurisprudence that significantly broadened the scope of Americans eligible to participate in democracy. Alongside the Marshall Court (1801-1835), the Warren Court presided over one of the two most impactful periods in constitutional law.[56] Through its pro-democracy rulings, the Warren Court played a key role in fostering democratization, inclusion, and the expansion of civil rights and liberties. *Baker v. Carr*, for example, established that redistricting issues are justiciable, thus allowing for judicial review of unequal districting plans.[57] Two years later, in *Reynolds v. Sims*, the Court firmly established the principle of "one person, one vote," emphasizing that "the right of suffrage is a fundamental matter in a free and democratic society."[58] As the Court highlighted, the franchise must be exercised "in a free and unimpeded manner" because it is "preservative of other basic civil and political rights," which in turn means that any restrictions on it must be "carefully and meticulously scrutinized."[59] Expanding on this voter-centered doctrine, the Court held in *Harper v. Virginia Board of Elections* that poll taxes violated the Equal Protection Clause of the Fourteenth Amendment, reasoning that "[v]oter qualifications have no relation to wealth nor to paying or not paying this or any other tax."[60] Through these rulings, the Warren Court broadened the concept of "We the People" by ensuring that all

54. *Giles*, 189 U.S. at 488 ("Unless we are prepared to supervise the voting in that state by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form. Apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a state and the state itself, must be given by them or by the legislative and political department of the government of the United States."); *see also* Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295, 297 (2000) ("*Giles* permit[ted] the virtual elimination of black citizens from political participation in the South.").

55. *The Warren Court, 1953-1969*, SUP. CT. HIST. SOC'Y, https://supremecourthistory.org/history-of-the-courts/warren-court-1953-1969 [https://perma.cc/2SUV-9HA2].

56. *See* Ronald J. Krotoszynski, Jr., *A Remembrance of Things Past?: Reflections on the Warren Court and the Struggle for Civil Rights*, 59 WASH. & LEE L. REV. 1055, 1073 (2002) ("[T]he Warren Court's overall importance is second only to that of the Marshall Court . . . .").

57. 369 U.S. 186, 208 (1962) ("A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution . . . . They are entitled to a hearing and to the District Court's decision on their claims.").

58. 377 U.S. 533, 561-62 (1964).

59. *Id.* at 562.

60. 383 U.S. 663, 666 (1966) (footnote omitted).

citizens, regardless of economic standing, could actively participate in the democratic process.[61]

If we conceptualize democratic participation as a mountain, the Warren Court era represents the peak, where the principles of inclusion reached their highest expression. The periods before the Warren Court can be likened to the arduous climb toward this pinnacle, and the eras following it, a gradual descent. This descent was subtle at first, as the Burger Court (1969-1986) displayed mixed adherence to Warren Court principles, later followed by a more pronounced shift under the Rehnquist Court (1986-2005).[62] The 1976 case of *Buckley v. Valeo*[63] is illustrative: the Burger Court upheld campaign-contribution limits to prevent corruption—a voter-centered approach—but simultaneously invalidated campaign-spending restrictions, emphasizing candidate autonomy.[64] The Rehnquist Court continued the latter trajectory. For example, in *Shaw v. Reno*, the Court's analysis of racial gerrymandering under the Equal Protection Clause reflected a more restrictive approach to voting-rights protections.[65] *Shaw v. Reno*[66] marked a significant shift in how racial considerations were treated in redistricting, promoting a less voter-centered approach by emphasizing the shape and intent of districts over the practical impact on voters. In this case, the Court ruled that North Carolina's creation of a bizarrely shaped majority-Black district constituted an unconstitutional racial gerrymander.[67]

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61. *See Reynolds*, 377 U.S. at 555 ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.").

62. *See generally* MICHAEL J. GRAETZ & LINDA GREENHOUSE, THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT (2016) (examining the impact of the Burger Court (1969–1986) in shaping the modern judicial landscape, and suggesting that the Burger Court paved the way for conservative judicial thought.).

63. 424 U.S. 1 (1976).

64. 424 U.S. at 3-5. *Buckley* addressed the constitutionality of various provisions of the Federal Election Campaign Act of 1971, mainly focusing on campaign contributions and expenditures limits. *Id.* at 1. The Court upheld limits on individual donations to political campaigns but struck down limits on campaign expenditures, equating money with speech under the First Amendment. *Id.* at 3.

65. 509 U.S. 630, 631 (1993). *Shaw* considered the constitutionality of North Carolina's congressional reapportionment plan, which was challenged under the Equal Protection Clause of the Fourteenth Amendment for racial gerrymandering. *Id.* at 630. The Court focused on the shape of districts to determine if they met the constitutional standard. *Id.* at 631.

66. *Id.*

67. *Id.* at 644 (The Court described the district as "so bizarre on its face that it is 'unexplainable on grounds other than race'").

The Court's reasoning focused on the Equal Protection Clause, asserting that districts drawn predominantly based on race—even with the intention of enhancing minority representation—could undermine the principle of equal treatment under the law.[68] This decision shifted the focus from the practical effects of redistricting on voter representation to the process and intent behind the district's creation. By prioritizing the aesthetics of the districts and the avoidance of racial classifications, the ruling arguably moved away from centering the needs and interests of voters, particularly minority groups. Through these shifts, the Court has gradually retreated from the expansive democratic vision that defined the Warren Court; that trend has continued under the Roberts Court, as discussed in Part III.

The normative stakes are significant. In *Brnovich v. Democratic National Committee,* Justice Kagan opined that "[i]f a single statute represents the best of America, it is the Voting Rights Act. It marries two great ideals: democracy and racial equality . . . . If a single statute reminds us of the worst of America, it is the Voting Rights Act. Because it was—and remains—so necessary."[69] The Supreme Court plays a pivotal role in preserving the principles of democracy by safeguarding rights, ensuring equality, maintaining checks and balances, upholding the rule of law, protecting the electoral process, and promoting judicial independence. It protects individual rights and liberties that are essential for a functioning democracy, such as freedom of speech, freedom of assembly, and the right to vote. By ensuring these rights are upheld, the Court fosters an environment in which democratic processes can thrive.

III. THE ROBERTS COURT: PRIVILEGING THE POWERFUL, PENALIZING THE PEOPLE

While the Warren Court reinforced the strength of the Reconstruction Amendments to maintain democratic principles and a voter-centered approach, the Roberts Court has moved in the other direction. Overt examples of discrimination and disenfranchisement have lessened in this era, but the impact on democracy remains. As Michele Goodwin notes, in the realm of voting-rights

68. *Id.* at 643 ("[C]lassifications of citizens solely on the basis of race are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.").

69. Brnovich v. Democratic Nat'l Comm., 594 U.S. 647, 690-91 (2021) (Kagan, J., dissenting).

violations, the Roberts Court has failed to acknowledge contemporary forms of voter suppression.[70]

A. *Weakening the Voting Rights Act in* Shelby County *and* Brnovich

The Roberts Court's refusal to confront contemporary forms of voter suppression has been evident in decisions related to voting rights, campaign finance, and the balance of power in government. Together, these cases work to disenfranchise and silence the voices of those who operate outside of traditional power structures. Key rulings on issues from gerrymandering to campaign-finance reform have dramatically reduced the political influence of ordinary citizens in favor of the powerful within a short span of time. Particularly troubling from a voter-centered perspective is the one-two punch delivered to the Voting Rights Act of 1965 (VRA)[71] by *Shelby County v. Holder*[72] and *Brnovich v. Democratic National Committee*.[73] With these two cases, the Court substantially diminished the VRA's ability to preempt voter discrimination and shifted the focus to the states.

In *Shelby County*, the Supreme Court invalidated Section 4(b) of the VRA, which established criteria for federal preclearance of voting-law changes in jurisdictions with histories of discriminatory practices.[74] The majority considered the preclearance requirements outdated and intrusive on states' "equal sovereignty."[75] Chief Justice Roberts concluded that the legislative formula for preclearance must mirror "current conditions" in order to justify differentiating between the states, implying that the issues of racial discrimination in voting were largely resolved.[76] He wrote that "[n]early 50 years later, things have changed dramatically. 'Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.'"[77]

However, the significant progress made in addressing such discrimination was largely attributable to the effectiveness of the VRA itself, particularly

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70. Michele Goodwin, *Complicit Bias and the Supreme Court*, 136 HARV. L. REV. F. 119, 123-24 (2022); *see* GILDA R. DANIELS, UNCOUNTED: THE CRISIS OF VOTER SUPPRESSION IN AMERICA 2 (NYU Press, 2020); *see also* Gilda R. Daniels, *Ending the Cycle of Voter Suppression*, HARV. C.R.-C.L. L. REV. (forthcoming 2025) (discussing the ways to end the 100-year cycle of voter suppression).

71. Voting Rights Act of 1965, 52 U.S.C. §§ 10101, 10301-10702 (2018).

72. 570 U.S. 529 (2013).

73. 594 U.S. 647 (2021).

74. *Shelby County*, 570 U.S. at 529-30.

75. *Id.* at 535.

76. *Id.* at 553-54.

77. *Id.* at 531 (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 202 (2009)).

Sections 4(b) and 5.[78] In her dissent, Justice Ginsburg poignantly criticized the majority's reasoning, likening the elimination of preclearance—despite its proven effectiveness—to "throwing away your umbrella in a rainstorm because you are not getting wet."[79] Despite Ginsburg's warning, the Roberts Court demonstrated in *Shelby County* that it is willing to curtail the VRA's protections for voters of color based on abstract concerns about federalism and assertions that the landmark law has already effectuated enough progress. Indeed, Michele Goodwin has observed:

> At the same time, continued voter suppression—in the form of systemic and persistent partisan gerrymandering, racial gerrymandering, mandated payment of fines and fees as a condition to vote, deceptive robocalls, barriers to assistance, voter intimidation, strict voter identification laws, the broadscale and strategic closing of voter registration sites, ex-felon disenfranchisement laws, lack of early voting, and polling place relocations and reductions—apparently falls short [of violating voters' rights to cast their ballots].[80]

The Roberts Court considered the protections of Section 5 a burden on the states and failed to address the protections provided to the voters.[81]

While *Shelby* dismantled Section 4(b) of the VRA, *Brnovich* diminished the protections offered to voters under Section 2, which provides a nationwide prohibition against discrimination in voting.[82] Section 2 prohibits any voting qualification or procedure that "results in [the] denial or abridgment of the right . . . to vote" based on race, color, or membership in a language minority group.[83]

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78. *See, e.g.*, H.R. REP. NO. 109-478 at 2 (2006) ("Substantial progress has been made over the last 40 years. Racial and language minority citizens register to vote, cast ballots, and elect candidates of their choice at levels that well exceed those in 1965 and 1982. These successes are the direct result of the extraordinary steps that Congress took in 1965 to enact the VRA and in reauthorizing the temporary provisions in 1970, 1975, 1982, and 1992.").

79. *Shelby County*, 570 U.S. at 590 (Ginsburg, J., dissenting).

80. Goodwin, *supra* note 70, at 123-124.

81. *See supra* note 72.

82. 594 U.S. 647, 653-55 (2021); Voting Rights Act of 1965 § 2, 52 U.S.C. § 10301(a) (2018) (providing, in pertinent part, that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color").

83. 52 U.S.C. § 10301(a) (2018). Section 2(a) of the Voting Rights Act provides: "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or

In *Brnovich*, the Court upheld restrictive Arizona voting laws concerning precinct voting and ballot collection, instituting a new standard for Section 2 vote-denial claims that favors the state and burdens voters.[84] These laws disproportionately affected minority voters—a point that the dissent emphasized.[85] Instead of applying the results test, Justice Alito developed an "equally open" examination that supplants an inquiry into the voter's perspective and advantages the state and its elected officials. The majority attempted to redefine and realign the wording of Section 2 of the VRA in a way that diminished voters and elevated elected officials' ability to burden the right to vote. The Court opined that

> equal openness and equal opportunity are not separate requirements. Instead, equal opportunity helps to explain the meaning of equal openness. And the term "opportunity" means, among other things, "a combination of circumstances, time, and place suitable or favorable for a particular activity or action." Putting these terms together, it appears that the core of § 2(b) is the requirement that voting be "equally open."[86]

Additionally, Alito, writing for the Court, introduced five new "guideposts" for assessing future vote-denial claims under Section 2's "totality of circumstances" requirement: (1) "the size of the burden imposed by a challenged voting rule," (2) "the degree to which a voting rule departs from what was standard practice when § 2 was amended in 1982," (3) "[t]he size of any disparities in a rule's impact on members of different racial or ethnic groups," (4) "the opportunities provided by a State's entire system of voting," and (5) the "strength of the state interests served by a challenged voting rule."[87]

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applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b)." *Id.*

84. 594 U.S. at 653-55.

85. *Id.* at 695-98 (Kagan, J., dissenting).

86. *Id.* at 668 (citations omitted).

87. *Brnovich*, 594 U.S. at 669-71; *see also* Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439, 442 (2015) ("[V]ote denial . . . concerns impediments to voting and the counting of votes. Vote denial cases thus implicate the value of *participation*: specifically, being able to register, vote, and have one's vote counted. Historically, vote denial included literacy tests, poll taxes, and registration barriers, all of which were notoriously common in the South prior to enactment of the VRA in 1965. More recent vote denial claims concern voter ID, limits on early and absentee voting, voter registration restrictions, and the rejection of provisional ballots. Vote dilution, on the other hand, refers to practices that diminish a group's political influence, thus implicating the value of *representation*: a group's members being able to aggregate their votes to elect candidates of their choice." (footnotes omitted)).

The Court considered the continued application of the disparate-burden test a "radical project" and rejected the consideration of historical factors in examining contemporaneous voting discrimination.[88] The Court found the disproportionate impact on minority voters in Arizona "unremarkable" and consistent with the "usual burdens of voting,"[89] thereby disregarding the voters' perspective and elevating the state's unsubstantiated fraud claims.

Brnovich effectively narrowed the scope of Section 2 of the VRA, weakening safeguards against racially discriminatory voting laws and making it easier for states to enact suppressive measures. Scholars believe that the new criteria are "intended to, and will, protect the states against many Section 2 lawsuits. They will make Section 2 claims less likely to be filed by plaintiffs, and more likely to be lost when they are."[90] Given that Section 2 aims explicitly to protect voting rights from infringement on account of "race or color," persons of color will bear the burden of these augmented criteria. Justice Kagan admonished the Court for departing from Congress's "broad intent," made manifest by its "broad text," to ensure that voters of color "can access the electoral system as easily as whites."[91] Kagan also noted the lack of deference to Congress.[92] The absence of deference to Congress is particularly striking when compared with the remarkable level of deference afforded to state laws discussed in the next Section.

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88. *Brnovich*, 594 U.S. at 674. The majority accuses the dissent of "discussing matters that have little bearing on the questions before us. The dissent provides historical background that all Americans should remember, but that background does not tell us how to decide these cases." *Id.* (citation omitted).

89. *Id.* at 678 (citing Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 198 (2008)).

90. Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *The Court's Voting-Rights Decision Was Worse than People Think*, ATLANTIC (July 8, 2021), https://www.theatlantic.com/ideas/archive/2021/07/brnovich-vra-scotus-decision-arizona-voting-right/619330 [https://perma.cc/6EQU-RE7T].

91. *Brnovich*, 594 U.S. at 701, 710 (Kagan, J., dissenting); *see id.* at 730 ("No matter what Congress wanted, the majority has other ideas.").

92. *Id.* at 711 ("Think of the majority's list as a set of extra-textual restrictions on Section 2—methods of counteracting the law Congress actually drafted to achieve the purposes *Congress* thought 'important.' The list—not a test, the majority hastens to assure us, with delusions of modesty—stacks the deck against minority citizens' voting rights. Never mind that Congress drafted a statute to protect those rights—to prohibit any number of schemes the majority's non-test test makes it possible to save.").

B. Deferential Democracy: States and Standards

In the opera *Porgy and Bess*, the main character Porgy sings, "I got plenty o' nuttin' and nuttin's plenty for me."[93] In the cases discussed in this Section, the Supreme Court has effectively ruled that the states are not required to provide evidence of their rationale for passing legislation that harms voters. The severity with which the Court has restricted Congress's power to ensure representative voting through the VRA stands in marked contrast to the extreme deference with which the Court treats efforts by state legislatures to prevent voter fraud. Accordingly, the deference the Roberts Court affords legislative bodies, except Congress,[94] amounts to requiring *nuttin*' to implement anti-voter legislation. The Court has found that the "the State's interest in counting only the votes of eligible voters" and ensuring "orderly administration and accurate recordkeeping" is "a sufficient justification for carefully identifying all voters participating in the election process"—even when the state's methods have raised voting-rights concerns.[95] Unfortunately, "[t]he Supreme Court has already held that deterring voter fraud is a legitimate policy to enact an election law, even in the absence of any record evidence of voter fraud."[96] Under the extreme lower standard for the state, merely saying the words (for example, asserting without evidence that voter fraud exists) meets the nonstandard standard.

In *Rucho v. Common Cause*, the Court held that partisan gerrymandering is a political question outside the competence and jurisdiction of federal courts.[97] It was a curious result given decades of precedent of courts "remedy[ing]violations of constitutional rights resulting from politicians' districting decisions," and given the harm that partisan gerrymandering does to democracy.[98] Nonetheless, despite its acknowledgment in *Rucho* that partisan gerrymandering as a tactic is

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93. GEORGE GERSHWIN, *I Got Plenty o' Nuttin*,' *on* PORGY AND BESS ORIGINAL SOUND TRACK RECORDING (Gonzo Distrib. 2018) (lyrics by DuBose Heyward & Ira Gershwin).

94. Arguably, the Roberts Court imposed restrictive standards on Congress. *See supra* notes 91-92 and accompanying text.

95. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 196 (2007) (upholding an Indiana law requiring voters to provide photo identification over plaintiffs' concerns about Fourteenth Amendment rights); *see also* Brnovich v. Democratic Nat'l Comm., 594 U.S. 647, 685-86 (2020) (upholding Arizona's statutory restrictions on counting certain out-of-precinct ballots and returning third parties' ballots despite concerns that these laws violated the Voting Rights Act).

96. Greater Birmingham Ministries v. Sec'y of State, 992 F.3d 1299, 1334 (11th Cir. 2021) (citing *Crawford*, 553 U.S. at 192-97).

97. 588 U.S. 684, 718 (2019).

98. *Id.* at 747-48 (Kagan, J., dissenting); *see also id.* at 751 ("And gerrymandering is, as so many Justices have emphasized before, anti-democratic in the most profound sense.").

"incompatible with democratic principles"[99] and "leads to results that reasonably seem unjust,"[100] the Court in *Alexander v. South Carolina State Conference of the NAACP* made it easier for states to get away with racial gerrymandering by upholding South Carolina's congressional map, which effectively gutted the voting power of Black residents in Charleston.[101] Justice Kagan in dissent argued that "[i]n every way, the majority today stacks the deck against the [c]hallengers."[102] She further objected to the majority's ruling in favor of the state despite the "extensive evidence, including expert statistical analyses, that the State's districting plan was the product of racial sorting" and despite the state "offer[ing] little more than strained and awkward denials."[103] Moreover, when "racial classifications in voting are at issue, the majority says, every doubt must be resolved in favor of the State, lest (heaven forfend) it be 'accus[ed]' of 'offensive and demeaning' conduct."[104]

The Court's asymmetrical treatment of Congress and state legislatures maps onto the Court's asymmetrical treatment of voters and candidates. The Court is very lenient toward state efforts to prevent voter fraud, even in the absence of any empirical evidence. This is a candidate-centered view rooted in extreme deference to the states. Specifically, it privileges incumbent candidates who benefit from the electoral inertia afforded by gerrymandered districts. Voters—as well as prospective challengers—lose out. But the Court conducts an exacting review of efforts to vindicate voting rights under the VRA. The Court is thus upending the priorities of both the Fourteenth and Fifteenth Amendments, which by their very terms prevent states from curtailing fundamental civil and political rights. The Roberts Court now does the opposite by allowing states to privilege candidates and restrict voting, while preventing Congress and lower federal courts from enforcing constitutional protections to preserve voting rights.

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99. *Id.* at 718 (quoting Ariz. State Legislature v. Ariz Indep. Redistricting Comm., 576 U.S. 787, 791 (2015)).

100. *Id*.

101. 602 U.S. 1, 14-15, 38-39 (2024).

102. *Id*. at 98 (Kagan, J., dissenting).

103. *Id.* at 99; *see also id.* at 98 ("They must lose, the majority says, because the State had a 'possible' story to tell about not considering race—even if the opposite story was the more credible.").

104. *Id.*at 99 (citing *id.* at 11 (majority opinion)) (alteration in original).

C. *Privileging the Powerful over the People: A Case Study Comparing* Trump v. Anderson *and* Merrill v. Milligan

An examination of *Trump v. Anderson*[105] and *Merrill v. Milligan*[106] can help draw into particularly sharp focus the contrast between how the Court treats the concerns of voters and how it treats the concerns of candidates.

In November 2021, a coalition of civil-rights organizations and Black registered voters brought suit against the Alabama Secretary of State and the cochairs of the state legislature's redistricting committee.[107] The lawsuit challenged Alabama's congressional redistricting plan,[108] which failed to create a second Black majority or plurality district in the state's "Black Belt," a multicounty, historically rural region characterized by stark socioeconomic disparities and some of the nation's highest rates of poverty.[109] The plaintiffs argued that Alabama's congressional plan was enacted with the intent to racially discriminate against African American voters in violation of the Fourteenth Amendment's Equal Protection Clause.[110] Further, the plaintiffs asserted that the congressional plan was enacted with the intent to dilute African American voting strength, violating Section 2 of the VRA.[111]

On January 24, 2022, the district court issued an opinion granting in part the plaintiffs' request for a preliminary injunction.[112] The court found that the plaintiffs were "substantially likely" to establish the existence of a Section 2 violation in Alabama's congressional redistricting plan.[113] The court determined that Black Alabamians were "sufficiently geographically compact to constitute a voting-age majority in a second congressional district."[114] Further, the district court found that voting in the challenged districts was intensely racially

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105. 601 U.S. 100 (2024).

106. 142 S. Ct. 879 (2022) (mem.).

107. *See Court Case Tracker:* Allen v. Milligan *(Formerly* Merrill v. Milligan*)*, BRENNAN CTR. FOR JUST. (July 18, 2022), https://www.brennancenter.org/our-work/court-cases/allen-v-milligan-formerly-merrill-v-milligan [https://perma.cc/X4TM-EUNL].

108. *Id.*

109. Terance L. Winemiller, *Black Belt Region in Alabama*, ENCYCLOPEDIA ALA. (July 2, 2024), https://encyclopediaofalabama.org/article/black-belt-region-in-alabama [https://perma.cc/N827-8Y6X].

110. Singleton v. Merrill, 582 F. Supp. 3d 924, 935 (N.D. Ala. 2022).

111. *Id.*

112. *Id.* at 936.

113. *Id.*

114. *Id.*

polarized," and "under the totality of circumstances . . . Black voters ha[d] less opportunity than other Alabamians to elect candidates of their choice."[115] Consequently, the court ordered the state legislature to pass a remedial redistricting plan within fourteen days with either a second majority-Black congressional district or a second district in which Black Alabamians could elect the candidate of their choice.[116] After an extensive hearing, resulting in a 227-page opinion, the district court had concluded that "the question of whether [Alabama's congressional redistricting plan] likely violated § 2 was not 'a close one.'"[117] Accordingly, the district court decided not to stay the injunction with the general election approximately ten months away and a primary election more than two months away.[118] It would not authorize an election under a discriminatory plan. The voters of Alabama deserved a fair and equal opportunity to cast meaningful ballots under a plan that did not violate the Voting Rights Act and the U.S. Constitution, as the Supreme Court ultimately found.[119]

Nonetheless, the Supreme Court granted a stay of the implementation of the redistricting plan.[120] In doing so, it delayed democracy. Justice Kavanaugh, in his concurring opinion, rationalized the stay due to the principle laid out fifteen years earlier in *Purcell v. Gonzalez*:

> That principle—known as the *Purcell* principle—reflects a bedrock tenet of election law: When an election is close at hand, the rules of the road must be clear and settled. Late judicial tinkering with election laws can lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others. It is one thing for a State on its own to toy with its election laws close to a State's elections. But it is quite another thing for a federal court to swoop in and re-do a State's election laws in the period close to an election.[121]

Kavanaugh's pronouncement favored the powerful state legislature and harmed voters. Allowing candidates to exploit an unfair, undemocratic, and

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115. *Id.*

116. *Id.* at 936-37.

117. Allen v. Milligan, 599 U.S. 1, 16 (2023) (quoting Singleton v. Merrill, 582 F. Supp. 3d 924, 1002 (N.D. Ala. 2022)).

118. *Singleton*, 582 F. Supp. 3d at 1028.

119. *See Allen*, 599 U.S. at 9 (affirming the district court's decision rendered more than sixteen months prior).

120. Merrill v. Milligan, 142 S. Ct. 879, 879 (2022).

121. *Id.* at 880-81 (footnote omitted) (citing Purcell v. Gonzalez, 549 U.S. 1, 5-6 (2006)).

discriminatory redistricting plan to tighten their grip on power unfortunately outweighed providing voters an opportunity to cast a ballot in a fair districting system.

Indeed, the stay allowed the state of Alabama to conduct elections under the discriminatory plan despite the lower court's decision that the people of Alabama were entitled to an additional majority-minority district. On remand, the lower court found that

> [t]he Plaintiffs already suffered irreparable injury once in this ten-year census cycle, when they voted under the unlawful 2021 Plan in 2022. The Secretary has made no argument that if the Plaintiffs were again required to cast votes in 2024 under an unlawful districting plan, that injury would not be irreparable. Accordingly, we find that the Plaintiffs will suffer irreparable harm absent injunctive relief.[122]

The Court ultimately concluded that the districting plan likely discriminated against Black voters, but only after an election had occurred under the discriminatory plan.[123]

A similar pattern was at play in the Louisiana redistricting case of *Robinson v. Ardoin*.[124] There, as in *Milligan*, the lower court ordered states to draw new congressional districts before the 2022 elections.[125] In both cases, the Supreme Court granted stays, leaving the racially dilutive maps in place, and opted to review the merits, even though no party had asked the Court to do so.[126] *Milligan* and *Ardoin* highlight how the Supreme Court deprioritizes democracy by disfavoring the most critical actors in democracy: voters.

Further, *Milligan* provides a sharp contrast to other cases, such as *Trump v. Anderson*, in which the Court acted with notable speed to preserve a candidate's ability to participate electorally and seek office.[127] Six months before primary balloting began, Colorado voters filed their case challenging Colorado's decision

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122. Singleton v. Allen, 691 F. Supp. 3d 1343, 1355 (N.D. Ala. 2023).

123. *See Allen*, 599 U.S. at 23.

124. 605 F. Supp. 3d 759 (M.D. La. 2022), *cert. granted before judgment*, 142 S. Ct. 2892 (2022), *cert. dismissed as improvidently granted*, 143 S. Ct. 2654 (2023), *vacated*, 86 F.4th 574 (5th Cir. 2023); *see also* Ardoin v. Robinson, 142 S. Ct. 2892, 2892 (2022) (mem.) ("The case is held in abeyance pending this Court's decision in *Merrill, AL Sec. of State, et al. v. Milligan, Evan, et al.* (No. 21-1086 and No. 21-1087) or further order of the Court.").

125. *Robinson*, 605 F. Supp. 3d at 858.

126. *The Supreme Court's Role in Undermining American Democracy*, CAMPAIGN LEGAL CTR. 9-10 (July 13, 2022), https://campaignlegal.org/document/supreme-courts-role-undermining-american-democracy [https://perma.cc/F54R-VTYF].

127. 601 U.S. 100, 105-08 (2024).

to disqualify former President Trump from state ballots for having violated Section 3 of the Fourteenth Amendment[128] with his actions on January 6, 2021.[129] The Colorado Supreme Court rendered its decision in December 2023.[130] The U.S. Supreme Court hastily heard arguments and provided a decision in less than three months.[131] The Court ruled in favor of the candidate over the people, finding that only Congress, not individual states, can enforce Section 3 of the Fourteenth Amendment against federal officeholders and candidates who engage in insurrection or rebellion.[132]

Compare that exercise in speed with the Court's response in *Milligan*, where voters whose voices were silenced by discriminatory maps would suffer the primary harm in question. The lower court issued its preliminary injunction in January 2022, when the midterm elections were still ten months away.[133] That injunction would have required Alabama to redraw its maps within fourteen days.[134] The Court stayed that order the following month—leaving the discriminatory maps in place—and forestalled a hearing on the merits until October.[135] When the Court finally ruled on the merits, it ruled in favor of the Black voters who had challenged the map as discriminatory.[136] But Alabama voters had already suffered irreparable harm, as they had no choice but to vote in the midterms under a discriminatory map.

The contrast in swiftness and urgency is striking. When in a position to protect voters—as it was in *Milligan*—the Court moved slowly even as it intervened in a manner that restricted equal access to voting rights. But in *Trump v.*

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128. Section 3 of the Fourteenth Amendment provides:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

U.S. CONST. amend. XIV, § 3.

129. *See Anderson*, 601 U.S. at 106.

130. *See id.* at 107.

131. *See id.* at 117.

132. *Id.*

133. Singleton v. Merrill, 582 F. Supp. 3d 924, 936, 976 (N.D. Ala. 2022).

134. *Id.* at 936-37.

135. Merrill v. Milligan, 142 S. Ct. 879, 880-81 (2022). The Court heard arguments on the merits in October of 2022 in *Allen v. Milligan*, 599 U.S. 1 (2023).

136. *Allen*, 599 U.S. at 10.

Anderson, the Court acted with great urgency to preserve the candidate's access to the ballot. While some might argue that *Anderson* also preserved voters' rights by making sure that American voters who wanted to vote for their preferred candidate (Trump) could do so, the concern for the candidate stands in sharp contrast to the disregard of voters' access to a fairly drawn districting plan under a similar time frame. Granted, removing a candidate from consideration inevitably limits voter choice, and some might consider this limitation antidemocratic.[137] On the other hand, scholars point to the value of Section 3's prophylactic qualities, such as "democracy preservation."[138] Rules regarding candidate fitness arguably "ensur[e] that officeholders are at least minimally qualified, barring candidates who are likely to undermine democracy by promoting authoritarianism, and excluding those who threaten basic civil liberties and other liberal values."[139] The *Anderson* decision has accordingly been criticized for potentially weakening democratic accountability and allowing individuals who have engaged in insurrection to evade consequences, which some see as undermining the principles of democracy and the rule of law.[140]

D. *Concentrating Power and Privilege:* Trump v. United States *and* Citizens United

Two other decisions, *Trump v. United States*[141] and *Citizens United v. FEC*,[142] merit additional consideration for their impact on democracy and how they further concentrate power and privilege in the hands of the already powerful and

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137. Ilya Somin, *A Lost Opportunity to Protect Democracy Against Itself: What the Supreme Court Got Wrong in* Trump v. Anderson, 2023-2024 CATO SUP. CT. REV. 319, 356 (2024).

138. *Id.* at 356-57 ("But once the Justices chose to rely heavily on practical consequentialist considerations about a 'patchwork' of state decisions, they should have considered consequentialist considerations on the other side, as well. Democracy-preservation looms large among them. The potential consequences of an insurrectionist returning to power—especially to the most powerful office in the nation—are sufficiently grave that they could well easily outweigh any potential harm caused by "patchwork" determinations. This is especially true since judicial review can constrain the latter.").

139. *Id.* at 357 ("Both the U.S. Constitution and the laws of many other democracies include various provisions disqualifying people from officeholding.").

140. *See, e.g.*, Thomas Wolf, *Supreme Court's Radical Immunity Ruling Shields Lawbreaking Presidents and Undermines Democracy*, BRENNAN CTR. FOR JUST. (July 2, 2024), https://www.brennancenter.org/our-work/analysis-opinion/supreme-courts-radical-immunity-ruling-shields-lawbreaking-presidents-and [https://perma.cc/E9LK-V7CZ].

141. 603 U.S. 593 (2024).

142. 558 U.S. 310 (2010).

privileged. Both *Trump* and *Citizens United* further enhance the power and advantage of those already privileged in electoral democracy in more indirect ways.

In *Trump v. United States*, the Court greatly enhanced presidential power in antidemocratic ways by granting presidents broad protections from criminal prosecutions for "official acts."[143] In August 2023, a grand jury indicted former President Donald Trump for actions taken while serving as President and after losing the 2020 presidential election. The four election-related charges brought against Trump alleged that he "conspire[ed] . . . to overturn the legitimate results of the 2020 presidential election by using knowingly false claims of election fraud to obstruct the federal government function by which those results are collected, counted, and certified."[144] Trump and his co-conspirators allegedly sought to achieve this goal through a number of avenues.[145]

The majority issued a sweeping decision establishing broad post-presidential immunity:

> [U]nder our constitutional structure of separated powers, the nature of Presidential power requires that a former President have some immunity from criminal prosecution for official acts during his tenure in office. At least with respect to the President's exercise of his core constitutional powers, this immunity must be absolute. As for his remaining official actions, he is also entitled to immunity.[146]

Justice Sotomayor warned in dissent that the "decision to grant former Presidents criminal immunity reshapes the institution of the Presidency" and that "[s]ettled understandings of the Constitution are of little use to the majority in this case, and so it ignores them."[147] Justice Jackson further implored, "[B]eing immune is not like having a defense *under* the law. Rather, it means that the law does not apply to the immunized person in the first place. Conferring immunity, therefore 'create[s] a privileged class free from liability for wrongs inflicted or injuries threatened.'"[148] In this case, the Court ignored the facts before it and

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143. *Trump*, 603 U.S. at 606.

144. Indictment at 3, United States v. Trump, No. 23-cr-00257 (D.D.C. Aug. 1, 2023).

145. *Id.*at 5-6.

146. *Trump*, 603 U.S. at 606.

147. *Id.* at 657, 666 (Sotomayor, J., dissenting).

148. *Id.* at 686-87 (Jackson, J., dissenting) (alteration in the original) (quoting Hopkins v. Clemson Agric. Coll. of S.C., 221 U.S. 636, 643 (1911)).

sought to "protect imaginary future presidents from imaginary future prosecutions."[149]

Just as *Trump* concentrated power in the hands of the most powerful elected official and threatened the delicate balance between the governing and the governed, *Citizens United* also dangerously concentrated power in the hands of the wealthy. There, the Court substantially eliminated meaningful restrictions on campaign contributions by corporations.[150] As a result of the Court's decision, corporations can spend unlimited funds on campaign advertising.[151] This, in turn, has increased the ability of wealthy donors and corporations to influence electoral outcomes.[152] The Supreme Court effectively opened the financial floodgates and created a massively unlevel playing field between individuals and corporations in the electoral context.

The concentration of electoral power can also indirectly augment the power of politicians and candidates who are closely tied to the wealthy. In so doing, it pulls us further from democracy toward oligarchy by privileging the interests of well-connected and well-funded politicians over the participatory rights of voters. Atiba Ellis thus refers to the "voting rights paradox," which "expressed in its simplest form" is that "the democracy belongs to those with power, and not to all the people."[153]

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149. Wolf, *supra* note 140; *see also* Kevin J. McMahon, *The Supreme Court's Ruling on Presidential Immunity Undermines Democracy*, U.S. NEWS & WORLD REP. (July 1, 2024, 6:13 PM), https://www.usnews.com/opinion/articles/2024-07-01/the-supreme-courts-ruling-on-presidential-immunity-undermines-democracy [https://perma.cc/EUG9-CPNX] ("With their decision today in Trump v. United States, the six justices of the conservative majority will exacerbate the growing perception that the court is motivated mainly by politics, not by the law.").

150. Citizens United v. FEC, 558 U.S. 310, 342-43 (2010); *see also id.* at 479 (Stevens, J., concurring) ("At bottom, the Court's opinion is thus a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt.").

151. *See id.* at 365-66 (majority opinion).

152. *See* Daniel I. Weiner & Tim Lau, *Citizens United Explained*, BRENNAN CTR. FOR JUST. (Jan. 29, 2025), https://www.brennancenter.org/our-work/research-reports/citizens-united-explained [https://perma.cc/7QW5-L2WY] (arguing that the decision "further tilted political influence toward wealthy donors and corporations").

153. Atiba R. Ellis, *The Voting Rights Paradox: Ideology and Incompleteness of American Democratic Practice*, 55 GA. L. REV. 1553, 1578 (2021).

IV. DEMOCRACY FOR THE PEOPLE

The Supreme Court has placed a heavy burden on those who should be the beneficiaries of a truly democratic system: the voters. While in the past the Court has sometimes served as a refuge for the people in civil and human rights, the Court has more recently allowed restrictions that serve as barriers to the ballot. The ability of the states to erect such barriers based on minimal evidence of actual fraud and a feigned interest in election integrity—juxtaposed with the heavy burden borne by voters enduring discriminatory redistricting and stifling requirements of restrictive proof-of-citizenship and voter-identification laws—systemically favors the powerful over the people.[154] These restrictions—whether voter identification, absentee-ballot access, redistricting, or documentary proof of citizenship—represent a "crazy-quilt" of laws that vary from jurisdiction to jurisdiction.[155] Additionally, feigning interest in election integrity has become synonymous with alleging voter fraud. The distorted focus on election integrity has led to legislation that strangles voters' ability to access the ballot.[156]

An approach focused on voters would prioritize access rather than relying on hollow invocations of integrity. A Carter Center study found that "human rights law and democratic best practice say that governments should enable the participation of the broadest possible pool of eligible voters and make the casting of a ballot as simple as possible."[157] The United Nations High Commissioner for Human Rights has declared that "the onus is on States to demonstrate that any restrictions" on the right to vote "are not discriminatory in their purpose or effect."[158] Moreover, the United Nations Human Rights Committee "encourages

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154. *Id.* ("A communal vision that emphasizes the collective nature of democracy to the exclusion of ideological forces that seek to shape democracy for the benefit of a few is the only plausible response to the paradox.").

155. The laws of felon disenfranchisement have been characterized as a "crazy-quilt" due to the confusion that exists over the process of restoring the right to vote to persons who were previously convicted of a felony. *See* Alec Ewald, *A 'Crazy-Quilt' of Tiny Pieces: State and Local Administration of American Criminal Disenfranchisement Law*, SENT'G PROJECT 1 (Nov. 2005), https://www.criminallegalnews.org/media/publications/2005%20sentencing%20project%20report%20on%20voting%20laws.pdf [https://perma.cc/UMK3-TPL3].

156. *See, e.g.*, *Election Integrity*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/issues/defend-our-elections/election-integrity [https://perma.cc/Q55C-CSZV] ("[S]tate legislatures are creating criminal penalties for normal activities like proactively sending out mail ballot applications.").

157. *Ensuring Voter Access While Protecting Election Integrity: When Are Restrictions on Voter Access Justified?*, CARTER CTR. 2, https://www.cartercenter.org/resources/pdfs/peace/democracy/election-integrity-and-voter-access-report-june-2021.pdf [https://perma.cc/LW9B-JPZQ].

158. Off. of the U.N. High Comm'r for Hum. Rts., *Factors that Impede Equal Political Participation and Steps to Overcome Those Challenges*, ¶ 60, U.N. Doc. A/HRC/27/29 (June 30, 2014).

governments to take proactive measures to strengthen the voting rights of women, minorities, and groups that have suffered past discrimination in exercising the right to vote."[159]

The people can no longer trust that the courts will save democracy. We must look elsewhere, including to other branches of the federal government. Congress has attempted on several occasions to pass comprehensive voting-rights legislation. The John R. Lewis Voting Rights Advancement Act of 2021 (VRAA)[160] seeks to address the Supreme Court's dismantling of key parts of the VRA. To restore what was lost in the *Shelby County*[161] decision, the Act proposes two types of preclearance. Geographic coverage would require certain states and local jurisdictions to submit voting changes for approval to either the Department of Justice or the federal district court in Washington, D.C.[162] There would also be nationwide "practice-based" preclearance for certain changes to voting laws, such as adding at-large districts, requiring documentary proof of citizenship, and changing boundaries in majority-minority districts.[163] Additionally, the Act would clarify the language in *Brnovich* and codify a list of factors for assessing voting-rights violations consistent with prior Supreme Court jurisprudence.[164] The VRAA focuses on voters' ability to access the right to vote as opposed to the legislature's or candidate's concerns; the draft language explicitly considers whether voters "fac[e] greater costs" in complying with a new voting rule in light of "social and historical conditions."[165]

Another important reform effort, the Freedom to Vote Act,[166] proposes measures that would make access to the ballot less burdensome and maintain the integrity of the system. The Act would set federal minimum standards on vote by mail and drop boxes and select successful measures nationwide, including automatic voter registration, same-day registration, and a uniform early voting period.[167] The Freedom to Vote Act significantly addresses both prison

159. *Ensuring Voter Access While Protecting Election Integrity: When Are Restrictions on Voter Access Justified?*, *supra* note 157, at 2-3.

160. John R. Lewis Voting Rights Advancement Act of 2021, H.R. 4, 117th Cong. (2021).

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

162. H.R. 4 § 5.

163. *Id.* § 6.

164. *Id.* § 2; *see also supra* notes 82-91 and accompanying text (discussing *Brnovich*).

165. *Id.*

166. Freedom to Vote Act, S. 2747, 117th Cong. (2021). For the House version of the bill, see For the People Act of 2021, H.R. 1, 117th Cong. (2021).

167. S. 2747 §§ 1001-1007, 1031-1032, 1201, 1301-1305.

gerrymandering and campaign finance.[168] These persons would be counted in the census in their home districts rather than the districts where they are incarcerated, which tends to increase population numbers in certain districts. Likewise, the Act introduces several measures to increase transparency and reduce the influence of dark money in elections, which does not require entities to disclose their donors.[169] It expands the prohibition on campaign spending by foreign nationals, requires additional disclosure of campaign-related fundraising and spending, and mandates disclaimers on political advertising. Additionally, it establishes an alternative campaign-funding system for certain federal offices, reducing reliance on large donations by allowing states to opt into a program that matches small-money donors' contributions.[170] The Act also improves trust in the electoral process by implementing federal protections for state and local election officials and safeguarding election records. Finally, it seeks to promote confidence in the electoral process by establishing federal protections for state and local election officials and election records.[171]

While legislation is needed, the road to enactment is filled with obstacles. The VRAA passed the House in 2021 and 2022 but was filibustered in the Senate.[172] It has been reintroduced in subsequent Congresses but has not prevailed.[173] The bills did not receive any support from Republicans, who argued that the bills constituted federal takeovers of elections.[174] With clear partisan lines drawn, Democrats lacked the votes to get through the filibuster; "even

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168. *See id.* §§ 5001-5008, 6001-6202.

169. *Id.* §§ 6001-6202; *What the Freedom to Vote Act Would Do*, BRENNAN CTR. FOR JUST. (July 13, 2023), https://brennancenter.org/our-work/research-reports/freedom-vote-act [https://perma.cc/849J-Z44K].

170. S. 2747 § 8301; *see What the Freedom to Vote Act Would Do*, *supra* note 169.

171. S. 2747 §§ 3205-3206, 3301.

172. *See H.R.4: John R. Lewis Voting Rights Advancement Act of 2021*, CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/house-bill/4?form=MG0AV3 [https://perma.cc/HRK4-H65C]; Michael Sozan, *Senate Must Reform Filibuster to Pass Voting Rights Bills After Senate Republicans Again Block Legislation*, CTR. FOR AM. PROGRESS (Oct. 25, 2021), https://www.americanprogress.org/article/senate-must-reform-filibuster-pass-voting-rights-bills-senate-republicans-block-legislation/?form=MG0AV3 [https://perma.cc/8QGR-YC4F].

173. *See* Press Release, Congresswoman Terri Sewell, Rep. Sewell Introduces the John R. Lewis Voting Rights Advancement Act Ahead of the 60th Anniversary of Bloody Sunday (Mar. 5, 2025), https://sewell.house.gov/2025/3/rep-sewell-introduces-the-john-r-lewis-voting-rights-advancement-act-ahead-of-the-60th-anniversary-of-bloody-sunday [https://perma.cc/4BES-QXBV].

174. Jordain Carney, *Senate GOP Blocks John Lewis Voting Rights Bill*, HILL (Nov. 3, 2021), https://thehill.com/homenews/senate/579890-senate-gop-blocks-john-lewis-voting-rights-bill [https://perma.cc/QQ5Z-MB28].

President Biden . . . conceded that the outlook was grim."[175] Unfortunately, the filibuster, which is a tool that hearkens back to the nineteenth century, has been used often to block civil-rights and voting-rights legislation.[176] The VRAA and the Freedom to Vote Act have been no exception. The Senate has been unwilling to eliminate the filibuster in legislative debate, even though it has reduced the number of votes needed to approve judicial appointments. Clearly,

> [r]eforming the filibuster to allow key votes on legislation is critical to restoring an operational and responsive Senate that has been increasingly dysfunctional and paralyzed in its ability to carry out the people's will. While the filibuster has had a long history of standing in the way of progress, today's filibuster has gained such outsize power that progress is practically impossible.[177]

This creates quite a quandary. Congressional legislation must address the anti-democratic, anti-voter Supreme Court decisions and what was lost in *Shelby County*.[178]

Ultimately, Congress's inability to govern is why the Supreme Court's decisions have taken on outsize importance and inflicted outsize harm. Without a functioning Congress, we are teetering on the precipice of a dysfunctional democracy. Paradoxically, the failure of the Supreme Court to safeguard voting rights has also imperiled access to the very channels of democratic change that could help spur remedial legislation. However, the antidote to this type of dilemma is and always has been persistent, strategic, and focused movements from the people. Consider the Montgomery Bus Boycott. Alabama gained national attention in 1955 when Rosa Parks powerfully refused to surrender her seat to a

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175. Brian Naylor, *The Senate Is Set to Debate Voting Rights. Here's What the Bills Would Do*, NPR (Jan. 18, 2022, 5:00 AM ET), https://www.npr.org/2022/01/18/1073021462/senate-voting-rights-freedom-to-vote-john-lewis-voting-rights-advancement-act [https://perma.cc/9XHY-J6B5].

176. *See generally* Greta Bedekovics, *How the Racist History of the Filibuster Lives on Today*, CTR. FOR AM. PROGRESS (Apr. 29, 2023), https://www.americanprogress.org/wp-content/uploads/sites/2/2024/04/RacistHistoryFilibuster-brief.pdf [https://perma.cc/6V2K-RR3T] (documenting the usage of the filibuster to prevent passage of civil-rights and voting-rights legislation from the 1890s to today).

177. *Id.* at 7.

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

white passenger, sparking the boycott led by Dr. Martin Luther King, Jr.[179] The community was determined not to ride the segregated buses in Montgomery, and the people organized rides and walked for more than a year before the boycott broke the chains of segregation. Ten years later, the Selma-to-Montgomery marches and the horrific incident now known as "Bloody Sunday" drew national and international outrage as law enforcement officers brutally attacked peaceful protestors while they advocated for voting rights. [180] The shocking violence and determined efforts of activists in Alabama and others across the nation led to the passage of the Voting Rights Act of 1965. Similarly, removing modern barriers to the ballot will require a consistent and steady effort to obtain the prize of equality.

In a previous article, I advocated the adoption of a realistic approach to election law that considers the complex interplay of race and voting.[181] Such an approach would involve acknowledging racial discrimination's historical and ongoing impact and developing innovative legal and policy solutions to address these challenges. As part of these innovative solutions, I suggest an affirmative right to vote in the form of a constitutional amendment. We have more constitutional amendments addressing the right to vote than any other fundamental right.[182] Yet the right remains tenuous due to state legislatures and Supreme Court decisions that do not view the right as absolute. Lani Guinier, an early advocate of a right-to-vote amendment, explained that the Constitution includes "negative proscriptions" that "are not an affirmative guarantee that we really want all citizens of the United States to participate in making the decisions that

179. *See generally* Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999, 1000 (1989) (recalling inter alia Dr. Martin Luther King's speech on December 5, 1955, in which he proclaimed, "'We are not wrong . . . because 'if we are wrong, the Supreme Court of this nation is wrong. If we are wrong, the Constitution of the United States is wrong. If we are wrong, God Almighty is wrong'" (citation omitted)).

180. *See, e.g.*, Caster v. Merrill, No. 21-CV-1536-AMM, 2022 WL 264819, at *31 (N.D. Ala. Jan. 24, 2022), *aff'd sub nom.* Allen v. Milligan, 599 U.S. 1 (2023) ("On March 7, 1965, in what became known as Bloody Sunday, state troopers viciously attacked and brutally beat unarmed peaceful civil rights activists crossing the Edmund Pettus Bridge in Selma, where less than 5 percent of Black voters were registered to vote.").

181. Gilda R. Daniels, *Voting Realism*, 104 KY. L.J. 583, 601 (2016).

182. U.S. CONST. amend. XV, § 1 (prohibiting race discrimination in voting); U.S. CONST. amend. XIX (prohibiting the denial of the right to vote based on sex); U.S. CONST. amend. XXVI, § 1 (prohibiting the denial of the right to vote to citizens over eighteen); U.S. CONST. amend. XXIV, § 1 (prohibiting poll taxes).

affect their lives."[183] After all, the Supreme Court in *Bush v. Gore* informed us that "[t]he individual citizen has no federal constitutional right to vote for electors for the President of the United States."[184] In a case predating the Voting Rights Act, *State of Alabama v. United States*, the dissent proclaimed:

> The privilege to vote in any State is not given by the Federal Constitution, or by any of its amendments. It is not a privilege springing from citizenship of the United States. It may not be refused on account of race, color or previous condition of servitude, but it does not follow from mere citizenship of the United States. In other words, the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution.[185]

Without an explicit right to vote, states are free to grant and revoke the right on the basis of various conditions, such as previous criminal convictions, competency, lack of identification, or payment of a fee. Some scholars contend that a right-to-vote amendment would not add anything to our current voting protections, particularly given the antidiscrimination attributes of the present amendments.[186] But this misses key potential advantages: an amendment would

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183. Martin Newhouse, *Voting Rights and Voting Wrongs: An Interview with Lani Guinier*, MASS HUMANS. (2006), https://web.archive.org/web/20190701114827/http://masshumanities.org/about/news/s06-vrvw [https://perma.cc/7QE3-SCL7]. In full, Guinier stated: "The Constitution itself, as drafted by the framers, never explicitly granted the fundamental constitutional right to vote to anyone. The Constitution created no voters. Rather, it said that the voters would be the people that the states determined could vote. And then you had amendments to the Constitution, which simply state that the state or the United States cannot deny or abridge the right to vote on the grounds of race or the grounds of sex or the failure to pay a poll tax. But those are negative proscriptions. They are not an affirmative guarantee that we really want all citizens of the United States to participate in making the decisions that affect their lives." *Id.*

184. 531 U.S. 98, 104 (2000) (per curiam).

185. Alabama v. United States, 304 F.2d 583, 607 (5th Cir. 1962) (citations omitted) (quoting Pope v. Williams, 193 U.S. 621, 632 (1904)), *aff'd*, 371 U.S. 37 (1962).

186. *See, e.g.*, Heather K. Gerken, *The Right to Vote: Is the Amendment Game Worth the Candle?*, 23 WM. & MARY BILL RTS. J. 11, 12 (2014) ("If an amendment enshrining the right to vote looks anything like its cognates in the Constitution, it will be thinly described, maddeningly vague, and pushed forward by self-interested politicians. At the very least, it's unlikely to persuade judges to mandate large-scale reform."); *see also* Daniels, *supra* note 181, at 603 nn. 127-28 (compiling secondary sources discussing a potential right-to-vote amendment); Charlie Martel, *Power for the People: Recognizing the Constitutional Right to Vote for President*, 45 CARDOZO L. REV. 1789, 1816 (2024) (arguing that five extant amendments already collectively establish a right to vote).

strengthen the legal framework to combat discriminatory voting laws, such as voter ID requirements and gerrymandering, providing a path to challenge these and other suppressive measures in court. Further, an affirmative right-to-vote amendment would reinforce democratic principles and political equality, ensuring that all citizens have an equal voice in the electoral process, which in turn would strengthen public confidence in the democratic system. The amendment could help address historical injustices and systemic barriers that have disenfranchised certain groups of voters, promoting a more inclusive and equitable electoral system.

Voting must be reaffirmed as a right of citizenship.[187] The Second Amendment affirmatively provides the right to bear arms.[188] Likewise, in a democratic society where the right to vote is central to its operation, the Constitution should explicitly and affirmatively guarantee this right.

As Richard Hasen suggests in his comprehensive article advocating for a pro-voter approach,[189] efforts to make election law work *for voters* are grounded in democratic theory and international-human-rights norms, and are based on five fundamental freedoms:

> (1) [A]ll eligible voters should 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 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.[190]

To achieve these objectives, we will need more than a shift in the Supreme Court's jurisprudence. The Court is not going to save us. Accordingly, other branches of government—and, ultimately, the people—must lead the way to a democratic and voter-centered reality.

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187. Richard Briffault, *Three Questions for the "Right to Vote" Amendment*, 23 WM. & MARY BILL RTS. J. 27, 30 (2014) ("Voting is one of the principal ways 'in which citizens protect their liberties from government,' and the right to vote has long been 'understood as a manifestation of full membership' in a political community." (quoting James A. Gardner, *Liberty, Community and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*, 145 U. PA. L. REV. 893, 898 (1997))).

188. U.S. CONST. amend. II.

189. Hasen, *supra* note 24.

190. *Id.* at 1682-83.

CONCLUSION

The Supreme Court's profound and evolving influence on American democracy is reflected in its rulings on voting rights and campaign finance. The civil rights movement ushered in a new era for the Court, marked by increased democratization, inclusion, and the expansion of civil rights and liberties. The Warren Court spearheaded this transformation with rulings that reinforced an important principle: democracy thrives when all citizens have the opportunity to cast their ballots. While the Warren Court marked a high point in expansion of democratic norms, subsequent Courts have regressed from this ideal, and the Roberts Court has sharply shifted toward antidemocratic policies. Its decisions on voting and election-related issues have eroded American democracy, often diluted the power of the vote, and enhanced the influence of candidates and the powerful.

We are witnessing the Court sow seeds of democratic dysfunction. Because of Congress's inability to pass meaningful legislation in the area of voting rights,[191] the Court's antidemocratic and anti-voter decisions continue to harm voters. Democracy requires that the people have the ability to voice their preferences and that the government be responsive to them. However, recent jurisprudence has weakened the democratic system and bred distrust. The balance of power in the federal constitutional system is misaligned: a weak Congress has failed to respond to the Supreme Court, and the Court's ideological beliefs guide its preference for candidates and parties over voters.

Critical reevaluation of the Court's recent jurisprudence and its impact on democracy can help preserve the foundational democratic principles of equality and representation. So, too, can legislative responses. While biases and partisanship are inherent challenges, thoughtful reforms can provide the balance that democracy demands and enhance the Court's legitimacy. We deserve nothing less.

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191. *See, e.g.*, John R. Lewis Voting Rights Advancement Act of 2021, H.R. 4, 117th Cong. (2021); Freedom to Vote Act, S. 2747, 117th Cong. (2021).