NOTES

Election Law as Ideology: Toward a New Historiography of Democracy as a Function of Law

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INTRODUCTION

> And when I speak, I don't speak as a Democrat, or a Republican, nor an American. I speak as a *victim* of America's so-called democracy. You and I have never seen democracy; all we've seen is hypocrisy.
> —Malcolm X[1]

> We're not a democracy.
> —Sen. Mike Lee (R-Utah)[2]

When advocates push for legal reforms expanding voting rights or reining in the political influence of wealthy elites, they frequently allude to the need to "protect"[3] democracy or push back against its "degradation."[4] While these advocates often demand changes that would make the United States' electoral system more inclusive and egalitarian, this language implies that democracy exists outside of law. This rhetoric often overlooks the ways in which undemocratic principles are baked into the very system of laws that create democratic rights for Americans in the first place.

Election law in the United States presents a paradox for proponents of democracy. Law *creates* the legal tools necessary for exercising democratic rights and simultaneously *limits* those rights by excluding certain classes of people from democratic processes and protecting social and economic hierarchies in the arena of electoral politics. On the one hand, all democratic rights are necessarily creatures of law. Election law creates the very rules and mechanisms that enable people to play a role in the selection of their political representatives.[5] Despite the belief espoused by certain theorists and philosophers that democracy is a social arrangement that can prefigure the laws that give it shape, the opposite is actually

1. Malcolm X, *The Ballot or the Bullet*, *in* THE PORTABLE SIXTIES READER 70, 79 (Ann Charters ed., 2003).

2. Mike Lee (@SenMikeLee), TWITTER (Oct. 7, 2020, 9:34 PM), https://twitter.com/SenMikeLee/status/1314016169993670656 [https://perma.cc/GY8A-8TJZ].

3. *See, e.g.*, Protecting Our Democracy Act, H.R. 5314, 117th Cong. (2021); Michael Hais, Doug Ross & Morley Winograd, *Protecting Democracy and Containing Autocracy*, BROOKINGS (May 10, 2021), https://www.brookings.edu/blog/fixgov/2021/05/10/protecting-democracy-and-containing-autocracy/ [https://perma.cc/NCU2-XWDM]; PROTECT DEMOCRACY, https://protectdemocracy.org/ [https://perma.cc/RM5L-YXVQ] (last visited Jan. 25, 2023).

4. *See, e.g.*, Michael J. Klarman, *The Supreme Court, 2019 Term—Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 178 (2020).

5. *See* Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2197–98 (1990).

true.[6] Only through the establishment of and adherence to legal rules can a polity possess and exercise democratic rights.[7] The purpose of legal rules in a democratic society is less about preserving or protecting democracy than it is about setting the terms of collective will formation: the process of creating and allocating political power according to preferences of the majority.[8]

On the other hand, U.S. election law also encompasses certain presumptions that justify and legitimate undemocratic forms of political and social ordering. At the same time that election law creates the foundation and mechanics of Americans' democratic rights, it also enshrines specific political and philosophical principles that restrict and undermine the United States' ability to adhere to democratic values.[9] The result of this tension is a form of government in which most Americans[10] have limited democratic rights but the very rules establishing those rights also preserve political hierarchies and classifications that undermine democratic ideals.

This Note synthesizes critiques of U.S. election law, following the model set by Karl E. Klare's seminal work, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*.[11] In doing so, this Note relies on specific definitions of "democracy" and "election law." First, this Note defines democracy as an ideal type. By contrast, some prominent theorists have used "democracy" as a descriptive term for any political community that uses competitive elections to select government representatives.[12] This conception is incomplete, however, because it fails to account for the democratic defects in political communities whose members do not equally share the right to

6. Some theorists imagine that democracy involves "a collective will already in existence, lying in wait for democratic institutions to discover." *Id.* at 2197. However, "[b]efore institutions are formed, . . . no such collective will exists." *Id.* at 2197–98.

7. *See id.* at 2198.

8. Collective will formation refers to the ability of a polity to make decisions about the "formation and distribution of political influence" by reference to the choices of the majority. Jedediah Purdy, *Beyond the Bosses' Constitution: The First Amendment and Class Entrenchment*, 118 COLUM. L. REV. 2161, 2163 (2018); *see also id.* at 2176 ("[T]he vitality of democratic equality must be oriented toward collective will formation that allows the majority to rule.").

9. *See* Nikolas Bowie, Comment, *Antidemocracy*, 135 HARV. L. REV. 160, 172–73 (2021); Adam Jentleson, *How to Stop the Minority-Rule Doom Loop*, ATLANTIC (Apr. 12, 2021), https://www.theatlantic.com/ideas/archive/2021/04/how-stop-minority-rule-doom-loop/618536/.

10. *See* Erin Duffin, *Number of Registered Voters in the United States from 1996 to 2020*, STATISTA (June 21, 2022), https://perma.cc/465D-2WYC (finding that 168.31 million Americans, a little more than half the national population, were registered to vote in 2020).

11. Karl E. Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 INDUS. RELS. L.J. 450 (1981).

12. *See, e.g.*, JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 241 (Routledge 2010) (1943) (defining democracy as "that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote"); Bowie, *supra* note 9, at 165 (summarizing Schumpeterian approach as concluding "democracy must be synonymous with competitive elections"). *But see* Daniel R. Ortiz, *The Engaged and the Inert: Theorizing Political Personality Under the First Amendment*, 81 VA. L. REV. 1, 26–29, 44–45 (1995) (challenging Schumpeter's assumptions by discussing studies of the psychology of political engagement).

political participation.[13] Under this Note's definition of democracy as an ideal type, the two pillars of democracy are (1) political equality and (2) actual self-determination among the governed.[14]

Second, this Note defines "election law" broadly to include the statutes, institutions, traditions, constitutional provisions, and judicial decisions that determine how elections are conducted, who may participate in them, and what the range of potential outcomes is. Even though states and localities play a crucial role in creating election law, this Note focuses primarily on election law enacted at the federal level with an eye toward its effects on state- and local-level electoral systems.[15]

This Note will "decode" the doctrinal literature of U.S. election law to show how it simultaneously provides a foundation for—and places restraints on—democracy. Part I will argue that liberalism's lack of a coherent theory of rights and inadequate commitment to substantive equality facilitate election law's dual role in enabling and limiting democratic activity. Part II will examine three related areas of election law: voting rights, campaign finance, and redistricting. Part III will discuss the path forward for reconceptualizing election law as a more effective tool for pursuing democratic ends.

I. THEORIES OF DEMOCRACY

Several fundamental characteristics of liberalism undermine the capacity of U.S. election law to serve democratic values. The first is liberalism's presumption that inequality is an inevitable result of individual freedom, which creates tension between liberal capitalism and the democratic value of political equality. Second, liberalism lacks a coherent theory of rights, which weakens law's usefulness in attacking undemocratic forms of political ordering. Third, legal liberalism prioritizes a spurious notion of neutrality that undermines democratic and egalitarian values.

A. THE TENSION BETWEEN DEMOCRACY AND LIBERAL CAPITALISM

Democracy and liberal capitalism are inherently in tension, if not completely incompatible with each other. Liberalism's defenders claim that inequality is a

13. *See* Bowie, *supra* note 9, at 165.

14. *See id.* at 167 ("This distinction between a community of political equals on one hand, and a hierarchy of assets or inheritance on the other, has continued to provide democracy with its definition. To put the point clearly, what has historically distinguished democracy as a unique form of government is its pursuit of *political equality*." (footnote omitted)); KAY LEHMAN SCHLOZMAN, SIDNEY VERBA & HENRY E. BRADY, THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY 4–6 (2012) (arguing that democracy requires not only free expression of political voice but also *equal* political voice); Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 97 (2020) (laying out "a more capacious vision of democracy emerging from today's grassroots movements on the left . . . where people possess the agency and power to self-determine the conditions of their lives").

15. *See, e.g.*, SAMUEL ISSACHAROFF, PAMELA S. KARLAN, RICHARD H. PILDES & NATHANIEL PERSILY, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 1113–30 (5th ed. 2016) (discussing federal interests in state elections).

necessary outcome of societies in which individuals are entitled to freedom of choice and expression. For example, Ronald Dworkin argued that consumer choice is a fundamental instrument of the individual right to pursue the "good in life."[16] Consequently, Dworkin argued, even liberal regimes that strive to redistribute wealth and protect fundamental rights will need to create room for an economic market that necessarily fosters at least some inequality.[17]

Liberalism's belief that economic inequality is a regrettable yet necessary by-product of individual freedom of choice runs in tension with democratic ideals. Economic inequality almost inevitably gives rise to political inequality.[18] Even adopting the most far-reaching electoral reforms would still fail to create true political equality if wealthy elites could continue using their disproportionate economic power to dominate electoral processes and dictate the behavior of elected officials.[19] Accordingly, liberalism's defense of economic inequality is akin to an insistence on preserving deeply rooted obstacles to democracy.

B. THE INCOHERENCE OF LIBERAL RIGHTS THEORY

Because liberal political theory's general model of rights is often incoherent, courts and legislators are able to use pro-democracy rhetoric in defense of undemocratic rules and structures. In *Labor Law as Ideology*, Klare identified liberalism's incoherence with respect to rights and persuasively argued that collective bargaining law reproduces this incoherence in the labor context.[20] To illustrate the "incoherence and potential for manipulation of the labor rights frameworks," Klare pointed to the ways that labor law is unable to resolve the liberal tradition's incoherence on matters of (1) the public–private distinction, (2) the "individual" versus "collective" conceptions of rights, and (3) whether rights are "inalienable" or "waivable."[21]

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16. *See* Ronald Dworkin, *Liberalism*, *in* PUBLIC AND PRIVATE MORALITY 113, 131–32 (Stuart Hampshire ed., 1978).

17. *Id.* at 134–36; *see also* Rosalind Dixon & Julie Suk, *Liberal Constitutionalism and Economic Inequality*, 85 U. CHI. L. REV. 369, 388 (2018) (arguing "significant reductions in economic inequality require the disruption of incumbent power and wealth," which would violate liberalism's commitment to "market-based" solutions); Jeffrey Edward Green, *Has Inequality Led to a Crisis for Liberalism?*, 116 CURRENT HIST. 320, 320 (2017) ("Economically, liberalism indicates the sanctity of private property as well as the mutual advantageousness of markets and the inequalities they generate (when they lead to gains for all).").

18. *See* Kay Lehman Schlozman, Benjamin I. Page, Sidney Verba & Morris P. Fiorina, *Inequalities of Political Voice*, *in* INEQUALITY AND AMERICAN DEMOCRACY: WHAT WE KNOW AND WHAT WE NEED TO LEARN 19, 69 (Lawrence R. Jacobs & Theda Skocpol eds., 2005) (concluding "the level of political inequality in America is high" and that "[t]he expression of political voice is strongly related to social class"). *See generally* JANE MAYER, DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT (2016) (cataloguing successful efforts by Charles and David Koch to turn their private fortunes into outsized influence in right-wing American politics).

19. *See* Bowie, *supra* note 9, at 173 ("[E]ven universal ballot access wouldn't level the persistent hierarchies of assets and inheritance that give a few people extraordinary influence over both the electorate and the politicians who must raise upwards of $18,000 per day to compete for reelection.").

20. Klare, *supra* note 11, at 468.

21. *Id.* at 470–80.

Election law similarly reproduces this general incoherence but in the context of political representation. Of the specific incoherencies discussed by Klare, election law most visibly reproduces the arbitrary distinction between "individual" and "collective" rights.[22] For instance, election law sometimes treats voting as an individual right and other times as a collective right. The principle that voting is a "fundamental right" establishes the rule that *individual voters* are protected against deprivation of their voting rights without due process.[23] However, when determining whether an election regulation's "burden" on the right to vote rises to the level of an unconstitutional deprivation, courts balance voting rights *in the collective* against the state's purported interests.[24]

Similarly, the discourse of rights fails to resolve whether racial equality in the electoral process is an "individual" or a "collective" right. Does the doctrinal emphasis on racial equality create a right for individual persons of color to be granted the same access to electoral systems that white persons receive? Or does it create a "collective" right for geographically discrete communities of color to play a role in shaping the composition of legislative bodies? Election law tries to have it both ways. Courts assessing laws that set racial qualifications for democratic participation treat the act of voting as an individualized right that cannot be unevenly granted or deprived on the basis of race.[25] However, when courts consider whether electoral maps divide voters in a racially unequal manner, they analyze those maps in light of their collective effects.[26] Election law's incoherence

22. *See id.* at 473–75.

23. *See* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (describing voting as a "fundamental political right"); *see also* Bartlett v. Strickland, 556 U.S. 1, 10 (2009) (plurality opinion) (describing the right to vote as "one of the most fundamental rights of our citizens"); Reynolds v. Sims, 377 U.S. 533, 561–62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society."); *cf.* Washington v. Glucksberg, 521 U.S. 702, 719–20 (1997) ("The Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint. The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests." (citations omitted)).

24. To analyze the constitutionality of restrictions on voting, courts apply the *Anderson–Burdick* test, which comes from a pair of cases, Anderson v. Celebrezze, 460 U.S. 780 (1983) and Burdick v. Takushi, 504 U.S. 428 (1992). *See infra* notes 78–79 and accompanying text. Courts applying the test tend to weigh the interests of the state against the interests of entire classes of people. *See, e.g.*, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 190–91 (2008) (plurality opinion) (articulating *Anderson–Burdick* as analyzing the "severity of a burden that a state law imposes on a political party, an individual voter, or a discrete class of voters"); Norman v. Reed, 502 U.S. 279, 288 (1992) (applying *Anderson* to weigh state interests against the nebulous "constitutional interest of like-minded voters to gather in pursuit of common political ends, thus enlarging the opportunities of all voters to express their own political preferences").

25. *See* U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."); Smith v. Allwright, 321 U.S. 649, 662 (1944) ("Under our Constitution the great privilege of the ballot may not be denied a man by the State because of his color.").

26. *See* 52 U.S.C. § 10301(a)–(b) (prohibiting "denial or abridgement of the right of any citizen of the United States to vote on account of race or color" where it is shown by "the totality of circumstances" that members of a protected class "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice"); *see, e.g.*, Thornburg v. Gingles, 478 U.S. 30, 56 (1986) (discussing method for determining vote dilution on basis

on the individual–collective rights distinction not only undermines doctrinal consistency but also makes it more difficult for individuals to protect their interests. For example, a person deprived of the ability to vote by an election regulation (such as a voter identification law) will be unable to regain their voting rights in court unless they can show that the regulation also affects enough other people to constitute a "collective," rather than "individual," burden on the vote.[27]

C. SPURIOUS NEUTRALITY

Finally, election law is also fundamentally flawed in its embrace of what law and political economy scholars call the "antipolitics of spurious neutrality."[28] As the cofounders of the Law & Political Economy Project explain in their manifesto, neoliberals in the postwar period reoriented mainstream legal thought around the valorization of economic "efficiency" while obscuring the roles of hierarchy and inequality in matters of public law—a reorientation called the "Twentieth-Century Synthesis."[29] A key component of this shift was the emphasis on neutrality as the desirable character for law and public policy—the view that law should refrain from making distributive decisions better left to economic markets.[30] In addition to its willful ignorance of the ways that existing hierarchies limit individuals' ability to exercise true freedom of choice in the economic market, this view also overlooks that economic markets and hierarchies are themselves creatures of law.[31]

Election law suffers from these same delusions about neutrality and hierarchy. As this Note will discuss further, the doctrinal literature is adamant in its belief that election regulations should neither consider the role of socioeconomic inequality in setting the rules of democratic decisionmaking nor make "political" judgments about the distribution of power.[32] For example, in the contexts of vote dilution and partisan gerrymandering claims, courts have steadfastly invoked the mantra of "neutrality" in refusing to choose between proposed alternatives for electoral structures, regardless of how demonstrably undemocratic a challenged regime may be.[33]

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of race); White v. Regester, 412 U.S. 755, 765–66 (1973) ("[W]e have entertained claims that multimember districts are being used invidiously to cancel out or minimize the voting strength of racial groups.").

27. *See, e.g.*, *Crawford*, 533 U.S. at 200–02 (analyzing impact of voter identification law on "narrow class of voters" and concluding that the law does not impose "'excessively burdensome requirements' on any *class* of voters" (emphasis added) (quoting Storer v. Brown, 415 U.S. 724, 738 (1974))).

28. Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1827 (2020).

29. *Id.* at 1790–91.

30. *See id.* at 1823–24.

31. *See* David M. Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 WIS. L. REV. 720, 743.

32. *See* Purdy, *supra* note 8, at 2165–66.

33. *See, e.g.*, Michael J. Pitts, *The Voting Rights Act and the Era of Maintenance*, 59 ALA. L. REV. 903, 949 (2008) (describing the Court's plurality opinion in *Holder v. Hall*, 512 U.S. 874 (1994), as

Election law's emphasis on spurious neutrality lies at the heart of its dual role as both a facilitator of and a restraint on democratic decisionmaking. Democracy demands not only the creation of tools for the formation and realization of the collective will but also constant readjustments of those tools to ensure equal voice and power.[34] However, election law as shaped by the "Twentieth-Century Synthesis" considers such efforts to be distributive judgments outside the realm of public law.[35] Similarly, election law frequently fails to account for considerations of hierarchy and group dynamics that affect marginalized, poor, and nonwhite people's ability to exercise their facially equal democratic rights.[36]

II. THE POLITICAL THEORY OF ELECTION LAW

This Part will examine the ideology of three related areas of election law: voting rights, campaign finance, and redistricting. Through case studies, references to secondary literature, and examination of the material results of existing legal regimes, this Part will show how these areas of law simultaneously create democratic rights and undermine democracy as a value. More specifically, election law's internal contradictions contribute to the unequal distribution of power and hamper the United States' capacity for truly representative government.

A. VOTING RIGHTS LAW

This Section will begin by summarizing U.S. voting rights doctrine and highlighting the default rules that best reflect election law's tendency to incorporate undemocratic principles into the very foundation of democratic processes. Next, this Section will analyze two voting rights cases that illustrate this tension and demonstrate how liberalism's fundamental flaws permit inequality and unrepresentativeness to persist in the electoral context.

The laws governing who may cast a ballot are inconsistent with political equality and self-determination, the two pillars of democracy. A truly democratic version of election law would enable people to vote in every election that directly affects their legal rights and material interests.[37] However, the doctrine on voting rights law reveals—alongside repeated assurances about the sanctity of the vote—a set of undemocratic presumptions that limit the franchise's capacity to serve democratic values.[38] Specifically, American voting rights law presumes that

rejecting proposed county government restructuring "because of slippery slope concerns" where there was "no clear baseline . . . against which to measure vote dilution").

34. That is, democracy requires both political equality and actual self-determination among the governed. *See* SCHLOZMAN ET AL., *supra* note 14; Bowie, *supra* note 9, at 167.

35. *See* Britton-Purdy et al., *supra* note 28, at 1790–91.

36. *See id.* at 1823–24.

37. *See* Klarman, *supra* note 4, at 232–33; Sara Grossman, *Voting Rights for Immigrants & the Incarcerated; The Case for Inclusion*, UNIV. CAL., BERKELEY: OTHERING & BELONGING INST. (May 11, 2016), https://belonging.berkeley.edu/voting-rights-immigrants-incarcerated-case-inclusion [https://perma.cc/P7W7-Y2BN].

38. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 561–62 (1964) (characterizing "the political franchise of voting" as "a fundamental political right, because [it is] preservative of all rights" (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886))).

voting is a privilege to be exercised by the most deserving individuals—not a right to be exercised by all individuals affected by the results of an election.[39] Within this framework, notions about who is "deserving" of the ability to vote are grounded in the dynamics of race,[40] political conservatism,[41] xenophobia,[42] ableism,[43] and indifference to the needs of the poor.[44] Consequently, voter turnout skews significantly whiter[45] and less amenable to redistributive policies[46] and wealthier[47] than the national population as a whole.

Election law restricts the right to vote using some unique, facially arbitrary categories as well as some categories borrowed from other areas of law. For example, age-based voting restrictions are freestanding legal rules, even though the voting age in most jurisdictions corresponds with the age of majority.[48] Other voting restrictions, such as those applying to noncitizens and to people who have

39. *See* ARI BERMAN, GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA 11–12 (2015).

40. *See* Klarman, *supra* note 4, at 231–32.

41. *See id*. at 232.

42. *See* Monica W. Varsanyi, *Fighting for the Vote: The Struggle Against Felon and Immigrant Disenfranchisement* ("[T]here are currently 11.6 million legal permanent residents — legal immigrants — living in the United States, all of whom do not have the right to vote in local, state, or federal elections."), *in* BEYOND WALLS AND CAGES: PRISONS, BORDERS, AND GLOBAL CRISIS 266, 266 (Jenna M. Loyd et al. eds., 2012).

43. *See* Klarman, *supra* note 4, at 187 ("Justice Stevens later recanted his vote [in *Crawford*], acknowledging that the [Indiana voter ID] law burdened . . . people with disabilities . . . more than he had initially recognized.").

44. *See id*. at 232; Akbar, *supra* note 14, at 94–95.

45. BLOOMBERG GOV'T, VOTER DEMOGRAPHICS AND REDISTRICTING: BREAKING DOWN DEMOGRAPHIC DATA, THE DIVERSIFYING U.S. POPULATION, AND WHAT IT MEANS FOR THE 2022 ELECTIONS AND BEYOND 2–3 (2022), https://about.bgov.com/reports/voter-demographics-redistricting; Ruth Igielnik & Abby Budiman, *The Changing Racial and Ethnic Composition of the U.S. Electorate*, PEW RSCH. CTR. (Sept. 23, 2020), https://www.pewresearch.org/2020/09/23/the-changing-racial-and-ethnic-composition-of-the-u-s-electorate/ [https://perma.cc/55YS-QUW6].

46. *See* Jentleson, *supra* note 9 (describing how voter suppression measures since 2013 "targeted at reliably Democratic constituencies" have created a conservative skew among active voters).

47. *See, e.g*., DAVID DALEY, RATF**KED: THE TRUE STORY BEHIND THE SECRET PLAN TO STEAL AMERICA'S DEMOCRACY 213 (2016) ("The most comprehensive study yet of voters, non-voters and presidential-year-only voters shows . . . only a quarter of all Americans voted in [the elections of 2006, 2008, 2010, and 2012]. That quarter of the population was disproportionately whiter, wealthier and older than those who stayed home."); Sean McElwee, *The GOP's Stunning Election Advantage: How Republicans Captured Congress—and How Democrats Can Win It Back*, SALON (Dec. 5, 2015, 2:29 PM), https://www.salon.com/2015/12/05/the_gops_stunning_election_advantage_how_it_captured_congress_and_how_democrats_can_win_it_back/ [https://perma.cc/QW5F-8DW5] (describing study by Brian Schaffner and Stephen Ansolabehere, referenced in DALEY, *supra*); JAN E. LEIGHLEY & JONATHAN NAGLER, WHO VOTES NOW?: DEMOGRAPHICS, ISSUES, INEQUALITY, AND TURNOUT IN THE UNITED STATES 6 (2014) ("Since 1972 the wealthy have always voted more than the poor, and hence have always been overrepresented at the polls (in both presidential and congressional elections)."); Annalyn Censky, *Why the Rich Vote More*, CNN BUS. (Sept. 24, 2012, 5:46 AM), https://money.cnn.com/2012/09/24/news/economy/rich-vote-more/index.html [https://perma.cc/E6RU-PX3Z].

48. *See* U.S. CONST. amend. XXVI, § 1 ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."). *See generally* SHERI J. CAPLAN, OLD ENOUGH: HOW 18-YEAR-OLDS WON THE VOTE & WHY IT MATTERS (2020) (discussing significance of Twenty-Sixth Amendment).

been convicted of felonies, disenfranchise people based on their membership in a category defined by immigration law or criminal law, respectively.[49]

In most states, election law reserves the vote for American citizens who are adults, have no felony convictions, have not been judicially declared mentally unfit,[50] and have affirmatively registered to vote.[51] The Constitution limits the grounds upon which states can restrict the right to vote, but the document does not create an affirmative right to vote in the first place.[52] Even though the Constitution prohibits race-based[53] and gender-based[54] restrictions on the right to vote, the franchise itself is a creature of state law, and states have no affirmative duty to create the right to vote.[55] As recently as *Bush v. Gore*, the Supreme Court explicitly reaffirmed this rule in the context of presidential elections, noting that the "individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature" grants such a right.[56] Even though the Court has repeatedly emphasized the notion that voting is a "fundamental" right that cannot be unduly burdened, it has never abandoned the default rule that state laws, rather than the U.S. Constitution, are the source of voting rights.[57] Accordingly, although federal election law includes little guidance on who possesses the ability to vote, it includes a long and comprehensive tradition of cases upholding different ways that states can restrict the franchise.

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49. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 118, 176–77, 198–99 (10th anniversary ed. 2020); Bowie, *supra* note 9, at 173 ("Every Election Day, there are still millions of people who are disenfranchised, including immigrants, children, incarcerated people, and unregistered people. Millions more live in the many territories and parts of Indian Country that remain in a colonial relationship with Congress." (footnote omitted)).

50. *See* Matt Vasilogambros, *Thousands Lose Right to Vote Under 'Incompetence' Laws*, PEW CHARITABLE TRS. (Mar. 21, 2018), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/03/21/thousands-lose-right-to-vote-under-incompetence-laws [https://perma.cc/X343-Y3G2] (cataloguing state laws allowing disenfranchisement based on judicial declarations of mental unfitness).

51. As of January 2022, twenty-two states and the District of Columbia had automatic voter registration. Everywhere else, voters must take affirmative steps to register. *Automatic Voter Registration*, NAT'L CONF. OF STATE LEGISLATURES (June 23, 2022), https://www.ncsl.org/research/elections-and-campaigns/automatic-voter-registration.aspx [https://perma.cc/JW46-WV5T].

52. Even though it includes references to "the right to vote," U.S. CONST. amend. XIV, § 2, and guarantees "to every State in this Union a Republican Form of Government," *id.* art. IV, § 4, the Constitution does not create an affirmative right to vote. *See* Minor v. Happersett, 88 U.S. (21 Wall) 162, 178 (1875) (stating unanimously that "the Constitution of the United States does not confer the right of suffrage upon any one . . . .").

53. U.S. CONST. amend. XV, § 1.

54. *Id.* amend. XIX.

55. *See* McPherson v. Blacker, 146 U.S. 1, 25–26 (1892) (explaining that state legislatures possess "plenary authority to direct the manner of appointment" of elected representatives).

56. 531 U.S. 98, 104 (2000) (per curiam).

57. *See* Harper v. Va. Bd. of Elections, 383 U.S. 663, 667 (1966) (summarizing cases describing voting as "fundamental" right); *see also* Sugarman v. Dougall, 413 U.S. 634, 647 (1973) ("'[E]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen.' . . . And this power and responsibility of the State applies . . . to the qualifications of voters." (quoting Boyd v. Nebraska *ex rel.* Thayer, 143 U.S. 135, 161 (1892))).

Election law is less concerned with who should be permitted to cast a vote than with the rationales that states can invoke to prevent people from casting votes. States can restrict the franchise based on intellectual competency to ensure the "intelligent use of the ballot"[58] by an electorate composed entirely of people deemed capable according to metrics promulgated by dominant power structures.[59] States and localities can also restrict voting rights based on residency, regardless of whether such rules disenfranchise people who commute to work within a particular jurisdiction[60] or who are otherwise directly affected by local regulatory decisions, including taxation.[61] Citizenship requirements for voting can disenfranchise immigrants, including those who have permanent resident status.[62] Age-based restrictions can disenfranchise people under the age of eighteen.[63] States can also deny citizens the right to vote based on a past felony conviction or failure to pay all the fines and penalties associated with such a conviction.[64] Voting restrictions based on citizenship and criminal history in particular have enabled states to effectively hollow out the political power of communities of color.[65]

Election law doctrine thus creates a system in which voting is a fundamental right that cannot be unduly burdened once granted but can be *withheld* by state governments from entire categories of people. The root of this system is liberalism's incoherence on rights, and the outcome is deeply ingrained democratic defects in U.S. political representation.

1. Residency-Based Disenfranchisement: *Holt Civic Club v. Tuscaloosa* (1978)

The case that perhaps best illustrates the incongruity between democratic values and election law's permissive standard for disenfranchising entire categories

58. Lassiter v. Northampton Cnty. Bd. of Elections, 360 U.S. 45, 51 (1959).

59. *See, e.g.*, Vasilogambros, *supra* note 50; *cf.* Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 627 (1969) (explaining that state may "grant[] the right to vote to some bona fide residents . . . and den[y] the franchise to others" if the "exclusions are necessary to promote a compelling state interest").

60. *See* Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 68–69 (1978).

61. *See* Brown v. Bd. of Comm'rs, 722 F. Supp. 380, 399 (E.D. Tenn. 1989).

62. *See* Varsanyi, *supra* note 42 ("[T]here are currently 11.6 million legal permanent residents — legal immigrants — living in the United States, all of whom do not have the right to vote in local, state, or federal elections."); Virginia Harper-Ho, *Noncitizen Voting Rights: The History, the Law and Current Prospects for Change*, 18 MINN J.L. & INEQ. 271, 285–94 (2000); *see also* Cabell v. Chavez-Salido, 454 U.S. 432, 444–47 (1982) (holding a state can impose a citizenship requirement and exclude permanent residents from probation officer jobs).

63. *See* Gaunt v. Brown, 341 F. Supp. 1187, 1188, 1191 (S.D. Ohio 1972); *cf.* U.S. CONST. amend. XXVI, § 1 (prohibiting denial or abridgment of right to vote, based on age, for U.S. citizens eighteen or older).

64. *See* Richardson v. Ramirez, 418 U.S. 24, 56 (1974) (upholding voter restrictions disenfranchising people with past felony convictions); Jones v. Governor of Fla., 975 F.3d 1016, 1035, 1045–46 (11th Cir. 2020) (upholding statute conditioning re-enfranchisement on full payment of criminal fines and penalties).

65. *See* ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 335–36 (2016); ALEXANDER, *supra* note 49; Akbar, *supra* note 14, at 94 ("Mass criminalization is an engine of political, economic, and social disenfranchisement that has devastated Black, brown, poor, and working-class communities.").

of people is *Holt Civic Club v. Tuscaloosa*.[66] In *Holt*, the Supreme Court upheld Alabama laws providing for the disenfranchisement of extraterritorial residents.[67] Alabama, like thirty-four other states at the time, had enacted statutes allowing municipalities to exercise regulatory authority over unincorporated adjacent areas.[68] A group of Alabamians inhabiting the unincorporated areas surrounding Tuscaloosa brought a constitutional challenge alleging that the state could not subject them to the municipality's police powers without also giving them the right to vote in the municipality's local elections.[69] The plaintiffs alleged violations of their right to vote and their right to equal protection of the laws.[70] The Court held that the right to vote was not implicated by this arrangement.[71] Because extraterritorial residents never had the right to vote in Tuscaloosa's municipal elections in the first place, there was no right for the state to deprive.[72] Accordingly, rather than using the more stringent analysis under strict scrutiny, the Court analyzed the statutes and upheld them under rational basis review.[73]

The framework for voting rights law articulated in *Holt* runs contrary to democratic ideals. Because the residents of unincorporated territories surrounding Tuscaloosa were directly subject to the regulatory authority of the city's elected leaders, democracy would have demanded that they have a say in the selection of those leaders.[74] Accordingly, even though Tuscaloosa's voting rights law created democratic rights for people with home addresses within the city limits, it fell short of maximizing democracy because it excluded entire classes of similarly situated people from democratic decisionmaking. As some legal commentators have argued, the Court's endorsement of nonresidency as a valid basis for disenfranchisement effectively severs voting rights law from considerations about whether otherwise-eligible voters are being governed by a political body they had no role in selecting.[75] A 1980 note argued that "[r]esidency is an inadequate criterion to determine whether the franchise should be granted," and "[t]hus, the only meaningful way to examine whether voting rights are at stake is by focusing on the effect that the exercise of governmental power has on people."[76] Even though residency is usually considered a fair prerequisite for participation in a

66. 439 U.S. 60 (1978).
67. *Id.* at 61–63, 75.
68. *Id.* at 72.
69. *Id.* at 62–63.
70. *Id.* at 62–63, 65.
71. *Id.* at 68–69.
72. *See id.* at 69–70.
73. *Id.* at 70, 75.
74. *See* Eleanor Knott, *The Extra-Territorial Paradox of Voting: The Duty to Vote in Extra-Territorial Elections*, 24 DEMOCRATIZATION 325, 340 (2017); Camil-Alexandru Pârvu, *Extraterritorial Voting Rights from a Cosmopolitan Perspective*, 15 ROMANIAN POL. SCI. REV. 159, 159 (2015) ("[T]he normative requirement for extending voting rights is . . . based on conceptions of shared responsibility, universal community of fate, and the commitment to articulate the idea of a basic equal human dignity for all human beings.").
75. *See, e.g.*, Richard Thompson Ford, *Law and Borders*, 64 ALA. L. REV. 123, 130–33 (2012).
76. Andrew J. Reames, Note, Holt Civic Club v. City of Tuscaloosa*: Extraterritorials Denied the Right to Vote*, 68 CALIF. L. REV. 126, 138 (1980).

jurisdiction's electoral process, *Holt* went even further by enshrining the rule that a municipality may extend the reach of its taxation and regulatory authority beyond the boundaries of its eligible-voter community.[77] In holding that the geographic scope of a government's power need not be coterminous with that of the government's electorate, the Court omitted the democratic value of self-determination from its consideration of a voting law's validity.

2. Photo Identification Requirements: *Crawford v. Marion County Election Board* (2008)

In addition to allowing for category-based restrictions on voting, election law also facilitates disenfranchisement by granting states and localities substantial leeway to make voting itself more difficult. When assessing the constitutionality of proposed new voting regulations, courts take an interest-balancing approach, guided by the Court's sliding-scale *Anderson–Burdick* test.[78] Rules that create severe restrictions on the right to vote trigger strict scrutiny analysis, but rules that create reasonable, nondiscriminatory obstacles to voting trigger only rational basis review.[79] Under this test, barriers to exercise of the franchise that place a "more-than-minimal but less-than-severe burden" on voters are consistent with the Constitution so long as they are justified by relevant and significant state interests.[80] In practice, however, the state interests that justify barriers to voting can be completely imaginary as long as they are articulable.[81]

An exemplary case on this point is *Crawford v. Marion County Election Board*.[82] There, a plurality of Justices used the *Anderson–Burdick* test to uphold "one of the most restrictive voter identification laws in the country."[83] The case concerned a statute, enacted by Indiana's Republican-led legislature, requiring voters to produce photo identification at the polls to be able to cast a vote.[84] The statute represented a transparent effort to suppress Democratic votes; Indiana was unable to point to *any* evidence that in-person voter impersonation presented a threat to the state's elections, but the record *did* show that Black Indiana voters

77. *See id.* at 138–39.

78. *See* Burdick v. Takushi, 504 U.S. 428, 434 (1992); Anderson v. Celebrezze, 460 U.S. 780, 788 (1983).

79. *Burdick*, 504 U.S. at 434 ("[W]hen those rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.' But when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." (first quoting Norman v. Reed, 502 U.S. 279, 289 (1992); and then quoting *Anderson*, 460 U.S. at 788)).

80. Daunt v. Benson, 956 F.3d 396, 406–07 (6th Cir. 2020) (quoting Ohio Democratic Party v. Husted, 834 F.3d 620, 627 (6th Cir. 2016)).

81. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 194–97 (2008) (plurality opinion) (determining that, despite the lack of any evidence of in-person voter impersonation in Indiana history, the state could properly restrict voting for the purposes of preventing such nonexistent fraud).

82. *Id.*

83. Klarman, *supra* note 4, at 184.

84. *Crawford*, 553 U.S. at 185, 203 n.21.

were less likely to possess an acceptable form of photo identification.[85] Nonetheless, the Court concluded that Indiana's interests in advancing "election modernization," guarding against the illusory threat of voter fraud, and protecting "public confidence" in election integrity—the latter two interests articulated by the state but unsupported by any concrete evidence—outweighed any burdens on the right to vote.[86] According to the Court, the challenged statute's immediate effect of disqualifying 43,000 Indianans of voting age was not a constitutional violation because these disqualified individuals could regain the franchise by collecting the necessary documentation, visiting a government office, and purchasing a state-issued photo identification.[87]

Even if this ruling did not overlook the logistical obstacles that poor people face in carving out the time and producing the money necessary to complete the task of obtaining photo identification, it would still evoke a conception of voting that runs afoul of democratic ideals.[88] *Crawford* demonstrates that voting rights law views the franchise as a privilege that individuals can obtain through affirmative measures rather than a right that individuals inherently possess as members of specific political communities.[89] A more democratic version of voting rights law would have either precluded the implementation of Indiana's voter identification law or at least required the state to distribute photo identification to all citizens of voting age. Under Indiana's electoral process, upheld in *Crawford*, voting rights law is simultaneously the source of eligible voters' right to participate—and a barrier to full participation by the governed—in the selection of their policymakers.

Crawford illustrates how the liberal tradition's incoherence on rights undermines the potential of election law to advance democracy. The arbitrary distinction between "individual" and "collective" rights was central to the *Crawford* plurality's determination that the challenged statute satisfied the *Anderson–Burdick* test. As Justice Souter's dissent pointed out, the magnitude of a voting law's burden on the right to vote can plausibly refer to either the severity of the

85. *See id.* at 194 ("The record contains no evidence of any such fraud actually occurring in Indiana at any time in its history."); Klarman, *supra* note 4, at 184–87; *see also id.* at 187 ("Justice Stevens later recanted his vote [in *Crawford*], acknowledging that the [Indiana] law burdened the poor, people with disabilities, the elderly, and people of color more than he had initially recognized . . . . The conservative Justices, however, have given no hint of reconsidering the matter.").

86. *Crawford*, 553 U.S. at 192, 197–98.

87. *Id.* at 188, 198.

88. *See* RICHARD SOBEL, CHARLES HAMILTON HOUSTON INST. FOR RACE & JUST., HARVARD L. SCH., THE HIGH COST OF 'FREE' PHOTO VOTER IDENTIFICATION CARDS 2 (2014), https://www.charleshamiltonhouston.org/wp-content/uploads/2014/08/FullReportVoterIDJune2014.pdf [https://perma.cc/DA5F-48FP] ("[T]he expenses for documentation, travel, and waiting time are significant—especially for minority group and low-income voters—typically ranging from about $75 to $175 . . . . Even when adjusted for inflation, these figures represent substantially greater costs than the $1.50 poll tax outlawed by the 24th amendment in 1964."); *see also* Frank v. Walker, 773 F.3d 783, 791–92 (7th Cir. 2014) (Posner, J., dissenting) (describing how photo identification voting laws "appear to be aimed at limiting voting by minorities" and citing *id.* to rebut "misconception" that obtaining photo identification entails "negligible" cost).

89. *See* BRENNAN CTR. FOR JUST., THE CASE FOR AUTOMATIC VOTER REGISTRATION 4, 14 (2015).

burden on an individual voter or the number of individuals affected.[90] However, the plurality concluded that because the Indiana statute imposed "only a limited burden" on the rights of affected voters, no matter how numerous that class might be, the *Anderson–Burdick* test was satisfied.[91] In essence, the Court used an "individual" rights analysis to avoid considering a regulation's collective effects.

As the *Holt* and *Crawford* decisions demonstrate, voting rights law creates the tools necessary for Americans to possess and exercise democratic rights but does not create universal rights—a result that runs counter to the democratic ideals of political equality and the right to participate in the election of one's political decisionmakers. Election law is not concerned with maximizing popular participation in the electoral process because it presumes that voting rights should be reserved for an electorate that is whiter, wealthier, and more conservative than the body politic as a whole.[92]

B. CAMPAIGN FINANCE LAW

This Section will begin by summarizing the doctrine of U.S. campaign finance regulation, underscoring the Supreme Court's aversion to regulatory limits on campaign spending. Next, this Section will consider two recent cases that exemplify how campaign finance law's adherence to spurious neutrality creates a legal regime engineered to preserve political inequality.

The law governing financial donations and expenditures aimed at influencing the electoral process is not only inconsistent with—but outright hostile to—the value of political equality. Campaign finance law is an important source of democratic rights because it endows Americans with an array of political speech tools that extend beyond voting.[93] Legal mechanisms through which people can spend money on political speech multiply the avenues through which they can register their political preferences.[94]

The opportunity for political spending also empowers people to endorse political platforms and ideas different from those associated with specific candidates or parties. A voter who supports a position not embraced by either major party in their district can register their political preferences by donating to an advocacy

90. *Crawford*, 553 U.S. at 218 (Souter, J., dissenting).

91. *Id.* at 202–03 (plurality opinion) (quoting Burdick v. Takushi, 504 U.S. 428, 439 (1992)).

92. *See supra* notes 40–47 and accompanying text. Additionally, recent Supreme Court decisions have exacerbated this dynamic by removing crucial layers of federal oversight from states' ability to enact restrictive and burdensome voting rules. *See, e.g.*, Jentleson, *supra* note 9; Richard L. Hasen, *The Supreme Court's Latest Voting Rights Opinion Is Even Worse Than It Seems*, SLATE (July. 8, 2021, 10:16 AM), https://slate.com/news-and-politics/2021/07/supreme-court-sam-alito-brnovich-angry.html [https://perma.cc/S4DP-SVT8] (discussing Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021)); BERMAN, *supra* note 39, at 286–314 (discussing aftermath of Shelby County v. Holder, 570 U.S. 529 (2013)); *The Effects of* Shelby County v. Holder, BRENNAN CTR. FOR JUST. (Aug. 6, 2018), https://www.brennancenter.org/our-work/policy-solutions/effects-shelby-county-v-holder [https://perma.cc/P5T5-J2C5].

93. *See, e.g.*, Kate Andrias, *Hollowed-Out Democracy*, 89 N.Y.U. L. REV. ONLINE 48, 50–51 (2014) ("[E]fforts to influence the electoral process include a variety of activities beyond pure speech.").

94. *See id.* at 50.

group or independent candidate associated with that position.[95] At the same time, however, campaign finance law prioritizes spurious neutrality over the value of political equality, working to protect wealthy people's ability to turn their resources into disproportionate political power.[96] Indeed, the doctrinal literature for this area of law emphasizes that the equalization of political power is an unacceptable goal for election regulations.[97]

The doctrinal literature emphasizes that campaign finance law is unconcerned both with the political inequality that results from economic inequality and with identifying the role of law in protecting and facilitating political inequality. Since *Buckley v. Valeo*,[98] which concerned the constitutionality of post-Watergate campaign finance reforms, the courts have consistently held that the First Amendment's free speech guarantee also protects the right to spend money on elections.[99] This right extends not just to wealthy individuals but also to nonhuman legal entities, such as corporations, even though these entities are little more than abstract mechanisms for the accumulation and disbursement of capital.[100]

Based on the principle that expenditures are a form of protected political speech, election law severely restricts the government's ability to impose limitations on direct campaign contributions.[101] Neither Congress nor state governments can impose unduly low limits on campaign contributions.[102] Congress also lacks the constitutional authority to limit the total amount spent by an individual donor on various campaign contributions within a given year or election cycle.[103] More significantly, although the government can limit direct contributions, the Court has held that the government cannot constitutionally impose any limits on the ability of donors—human and nonhuman alike—to spend money on "independent" political activity that is not formally affiliated with a campaign.[104] In defense of this regime, the Court has asserted that the only legitimate goal of campaign finance law is the prevention of both actual quid pro quo corruption

95. For example, a voter that supports ranked-choice voting (RCV) is able to register their position by donating to an electoral reform advocacy group even in an election cycle where no local candidates are pledging to support RCV.

96. *See* Purdy, *supra* note 8, at 2171.

97. *See, e.g.*, Davis v. FEC, 554 U.S. 724, 741 (2008); McConnell v. FEC, 540 U.S. 93, 227 (2003); Buckley v. Valeo, 424 U.S. 1, 48–49 (1976) (per curiam).

98. 424 U.S. 1 (1976).

99. *See, e.g.*, *id.* at 15–17; Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 385 (2000).

100. *See* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 789 (1978) (rejecting unsupported argument that "corporations are wealthy and powerful and their views may drown out other points of view . . . thereby denigrating rather than serving First Amendment interests"); *cf.* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 810–11 (1935) (describing "metaphysical" nature of corporations and "terms of transcendental nonsense" used to analyze corporations).

101. *See* Randall v. Sorrell, 548 U.S. 230, 248–49 (2006) (plurality opinion); *see also* FEC v. Cruz, 142 S. Ct. 1638, 1650, 1656 (2022) (limiting Congress's ability to restrict candidates from using personal loans to satisfy campaign debt).

102. *See* Randall, 548 U.S. at 248–49.

103. *See* McCutcheon v. FEC, 572 U.S. 185, 192–93 (2014) (plurality opinion).

104. *See* Citizens United v. FEC, 558 U.S. 310, 356–57, 365–66 (2010).

and the appearance thereof—a concern implicated by donors' ability to shower politicians with unlimited cash but allegedly not by donors' "independent" political activity.[105] Election law prevents the government not only from blocking donors' ability to pour unlimited funds into "independent" political speech but also, at times, from being able to require certain disclosures from political organizations.[106]

Campaign finance law applies spurious neutrality to the electoral arena by insisting that decisions about the distribution of power should be left to economic markets rather than government actors. Wealth creates tools—unavailable to most voters—for influencing election outcomes. However, because wealth is ostensibly amassed in the economic market rather than the result of deliberate government policy, liberal theory holds that election law must refrain from interfering in the unequal distributions of voice and power that economic markets have effectuated. Two specific areas that demonstrate this dynamic are the legal rules governing independent campaign expenditures and public campaign financing.

1. The Unfettered Right to "Independent" Campaign Expenditures: *Citizens United v. FEC* (2010)

The best encapsulation of the undemocratic principles underlying campaign finance law is the Supreme Court's 2010 decision in *Citizens United v. FEC*.[107] In a 5–4 vote, the Court struck down several provisions of the Bipartisan Campaign Reform Act (BCRA) and held that Congress has virtually no constitutional authority to limit corporate spending on political campaigns.[108] Applying the logic of previous campaign finance cases, the Court struck down all limits on corporate independent expenditures,[109] affirming the principle that campaign regulations targeting corporations are invalid identity-based restrictions on speech.[110] The Court also explicitly disavowed the political aim of equalizing political power through campaign finance regulation.[111]

Several prominent law and political economy scholars have proposed useful frameworks for decoding *Citizens United* and other doctrinal literature on campaign finance law. For example, Jedediah Purdy of the Law & Political Economy Project has argued:

> The implicit standpoint of the campaign-finance cases, then, is the following: The constitutional evil to be avoided is manipulation by the political class of

105. *See* McConnell v. FEC, 540 U.S. 93, 153–54, 217 (2003).

106. *See* Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2384–85 (2021); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 348–53 (1995); Van Hollen v. FEC, 811 F.3d 486, 500–01 (D.C. Cir. 2016).

107. 558 U.S. 310 (2010).

108. *See id.* at 365.

109. *Id.*

110. *Id.* at 340–41.

111. *Id.* at 350.

> the rules for later elections, which would "deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration" and will receive majoritarian endorsement. Seen in this way, limiting campaign spending is a usurping attempt to predetermine the course of democratic self-rule, just like prohibiting antiwar pamphleteering or banning Karl Marx's writings.[112]

However, as Purdy further points out, this philosophical perspective is, in reality, incompatible with democracy as an ideal type.[113] By presuming that election law should remain neutral on questions of distribution and relative economic power, campaign finance law reproduces economic inequality within the context of the electoral process. By precluding any efforts to use electoral regulations to mitigate unequal spending power, election law actively ensures that economic inequality creates political inequality. For example, early in the 2016 presidential election cycle, fewer than four hundred families were responsible for almost half the money raised for campaign spending.[114] Similar concentrations of political donors also characterize state and local races, such as in New York, where just 100 big (and primarily white and wealthy) donors contributed more in the 2018 state elections than all 137,000 small donors combined.[115] Even though this framework for campaign finance law does, to a limited extent, empower nonelites by allowing nonprofits and labor unions to engage in unconstrained political spending in ways that their grassroots members and donors would not be able to, this power comes at the expense of the disproportionate empowerment of private interests.[116]

2. Restrictions on Public Campaign Financing: *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* (2011)

A year after deciding *Citizens United*, the Court expanded its jurisprudence concerning the role of capital in elections by preventing states from using public campaign financing laws to serve democratic values. In *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, the Court struck down Arizona's public funding scheme that included a "trigger" matching provision.[117] Under this provision, candidates for public office could opt in to receive public subsidies for their campaigns.[118] If a privately funded opponent received more than a specified limit

112. Purdy, *supra* note 8, at 2165 (footnotes omitted) (quoting *Citizens United*, 558 U.S. at 341).

113. Purdy uses the phrase "democratic will formation" to describe the process of realizing democratic ideals. *Id.* at 2176.

114. Nicholas Confessore, Sarah Cohen & Karen Yourish, *Small Pool of Rich Donors Dominates Election Giving*, N.Y. TIMES (Aug. 1, 2015), https://www.nytimes.com/2015/08/02/us/small-pool-of-rich-donors-dominates-election-giving.html.

115. Chisun Lee & Nirali Vyas, *Analysis: New York's Big Donor Problem & Why Small Donor Public Financing Is an Effective Solution for Constituents and Candidates*, BRENNAN CTR. FOR JUST. (Jan. 28, 2019), https://www.brennancenter.org/our-work/research-reports/analysis-new-yorks-big-donor-problem-why-small-donor-public-financing [https://perma.cc/9THK-BA43].

116. *See* Andrias, *supra* note 93, at 49–50.

117. 564 U.S. 721, 748 (2011).

118. *Id.* at 728–29.

from a combination of private contributions and independent expenditures opposing the publicly subsidized candidate, this private money would "trigger" the automatic release of additional funds for the publicly subsidized candidate.[119] As a result, "[t]he more the self-financed candidate spent, the more subsidy would be provided to the candidate relying solely on those funds."[120] Consequently, privately funded candidates were incentivized to limit personal spending on their campaigns to prevent their publicly subsidized adversaries from unlocking even greater subsidies.[121] Similarly, private citizens were motivated by this scheme to reduce their independent expenditures on elections so that their preferred candidates would not be harmed by the matched amount that the candidates' opponents would receive.[122] The Court reasoned that this system could not be justified or explained by an interest in mitigating the corrupting influence of high-dollar campaign contributions, but only by an interest in equalizing political power among candidates, which is an unconstitutional aim for election regulations.[123] Further, the Court explained that this system would have the effect of dissuading privately funded candidates from raising funds above the "trigger" threshold—an unconstitutional identity-based restriction on political speech.[124]

As with *Citizens United*, the Court's decision in *Bennett* evinces a presumption that election law must preserve the ability of elites to wield unequal political power commensurate with their wealth.[125] It affirms the principle that campaign finance law must protect, instead of hinder, the free flow of capital as a guarantor of the government's "neutrality" in the electoral process.[126] The result is a legal regime that preserves political inequality at the same time that it creates tools for members of the polity to voice their political preferences and engage in self-advocacy and self-determination.

Recent research confirms that the concentration of political power in the hands of a wealthy donor class harms the interests of the country as a whole, but especially those of the poor and of racial minorities.[127] Not only does the overwhelmingly white pool of high-dollar political donors fail to represent non-white and working-class interests in its spending habits, but it also marshals its power in support of policies that further exploit and disenfranchise poor communities of

119. *Id.*

120. Lyle Denniston, *Opinion Analysis: Campaign Subsidies in Peril?*, SCOTUSBLOG (June 27, 2011, 6:02 PM), https://www.scotusblog.com/2011/06/opinion-analysis-campaign-subsidies-in-peril/ [https://perma.cc/XBE5-F9C8].

121. *See id.*

122. *See id.*

123. *Bennett*, 564 U.S. at 749–50.

124. *See id.* at 737, 753.

125. *See* Purdy, *supra* note 8, at 2162.

126. *See id.* at 2163, 2165.

127. *See* ADAM LIOZ, DEMOS, STACKED DECK: HOW THE RACIAL BIAS IN OUR BIG MONEY POLITICAL SYSTEM UNDERMINES OUR DEMOCRACY AND OUR ECONOMY 10–11 (2014), https://www.demos.org/sites/default/files/publications/StackedDeck2_1.pdf [https://perma.cc/MW6L-RVP8].

color.[128] Further, as Deborah Hellman has argued, *Bennett*'s narrow conception of corruption as the "exchange of money for votes or favors" overlooks the corruption *of democratic values* that occurs in a system where candidates calibrate their speech and political behavior to accommodate the role of capital in elections and maximize their fundraising capacity.[129]

Both *Citizens United* and *Bennett*, as well as their fellow cases in *Buckley*'s progeny, demonstrate how liberalism's commitments to spurious neutrality and defending inequality undermine democratic values. In these specific cases, the Court applied election law to preserve a wider variety of avenues for political speech at the cost of severely undermining political equality. In fact, legal observers barely need to "decode" the doctrinal literature in this area at all. Rather than proceed from implicit presumptions about the relationship between law and sociopolitical hierarchy, the Court has consistently been explicit about its belief that election law necessarily precludes efforts to equalize political power.[130] In other words, election law actively and explicitly seeks to protect political inequality. The philosophical foundation for this belief is the liberal emphasis on spurious neutrality. The jurists and scholars who most vehemently oppose regulatory efforts to equalize political power believe that decisions about the distribution of power are best suited for economic markets rather than government regulation, despite the facts that economic markets are creatures of law and that political inequality has a compounding effect.[131] This belief is also rooted in liberal theorists' assertions that economic inequality is a necessary by-product of individual freedom; if economic inequality is an indelible characteristic of society, then there is no unique reason why election law should work to minimize or eradicate it.

C. REDISTRICTING LAW

This Section will begin by summarizing the rules governing redistricting and political boundaries. The Court has established egalitarian parameters for the redistricting process, but this legal regime is limited in its effectiveness because it delegates the redistricting power to partisan actors and fails to reach some of the

128. *See id.* ("The dominance of big money in our politics restrains the political power of people of color, making it harder to push back successfully against attacks on historically marginalized communities.").

129. Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 MICH. L. REV. 1385, 1387 (2013); *see also id.* at 1388 ("There are . . . other ways to understand corruption. A legislator who decides how to vote based on a calculation of the likely effect that taking a particular position will have on his ability to raise funds could be considered corrupt. A legislator who weighs the preferences of wealthy constituents more heavily than poor constituents could be considered corrupt. If corruption were defined in either of these ways, such a definition would justify a matching-fund law designed to encourage candidates to take public funding and thereby sever the link between private money and public office." (footnotes omitted)).

130. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 48–49 (1976) (per curiam) (rejecting government's asserted "interest in equalizing the relative ability of individuals and groups to influence the outcome of elections" because "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment").

131. *See* Purdy, *supra* note 8, at 2162–63.

principal forces creating inequality between and within legislative districts. For purposes of political equality, the guiding standard for redistricting should be the pursuit of effective, proportional representativeness in electoral outcomes. Next, this Section will analyze two cases that show the limits of redistricting law's commitment to equality and fairness.

The law governing district boundaries in general—and governing the periodic redistricting process in particular—is inconsistent with political equality. In 1962, the Supreme Court enshrined the principle of "one person, one vote," meaning that political boundaries could not be deployed or redrawn for the political disadvantage of any protected group.[132] Since then, however, the Court has repeatedly confronted instances in which political equality among residents of a particular state or political community is unachievable in the face of election law traditions like single-member districts and partisan redistricting.[133] Instead of asserting the primacy of political equality and abolishing practices that thwart democracy, the Court has upheld traditional, regressive methods for drawing boundaries, ingraining into election law the presumption that representativeness is a secondary concern.[134]

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132. *See* Baker v. Carr, 369 U.S. 186, 207–08 (1962); *see also* Reynolds v. Sims, 377 U.S. 533, 558 (1974) (quoting Gray v. Sanders, 372 U.S. 368, 381 (1963)).

133. *See, e.g.*, Bartlett v. Strickland, 556 U.S. 1, 9 (2009) (plurality opinion); Easley v. Cromartie, 532 U.S. 234, 243–44 (2001); Johnson v. De Grandy, 512 U.S. 997, 1006–08 (1994); Shaw v. Reno, 509 U.S. 630, 657 (1993).

134. Boundaries are seriously consequential for American elections. Arguably the most significant example is the role of state boundaries in the composition of the Senate and the Electoral College. The Senate gives equal political representation to every state, which dilutes the voting power of residents of populous states and inflates the power of residents of less populous states. *See, e.g.*, Jentleson, *supra* note 9. It also premises political power on residency in a state, which disenfranchises the residents of the District of Columbia and U.S. territories such as Puerto Rico and Guam. *See* CHRIS MYERS ASCH & GEORGE DEREK MUSGROVE, CHOCOLATE CITY: A HISTORY OF RACE AND DEMOCRACY IN THE NATION'S CAPITAL 379–80 (2017); ROBERT F. ROGERS, DESTINY'S LANDFALL: A HISTORY OF GUAM 209 (rev. ed. 2011); César A. López Morales, *A Political Solution to Puerto Rico's Disenfranchisement: Reconsidering Congress's Role in Bringing Equality to America's Long-Forgotten Citizens*, 32 B.U. INT'L L.J. 185, 187–88 (2014); *cf.* Washington, D.C. Admission Act, H.R. 51, 117th Cong. (2021).

The result is that all Americans are subjected to the priorities of a legislative body whose composition is decided by an electoral process in which rigid state boundaries intentionally create political inequality. A frequent outcome of this process is minority rule; since 1996, every time the Republican Party has controlled the majority of Senate seats, Republican senators represented a minority of the national population. Ed Kilgore, *Republican Senators Haven't Represented a Majority of Voters Since 1996*, N.Y. MAG.: INTELLIGENCER (Feb. 25, 2021), https://nymag.com/intelligencer/2021/02/gop-senators-havent-represented-a-majority-since-1996.html. Some scholars argue that the Senate's malapportionment-by-design is not only a function of the constitutional order but in fact the only unamendable constitutional provision. *See* Douglas Linder, *What in the Constitution Cannot Be Amended?*, 23 ARIZ. L. REV. 717, 717 (1981) ("[T]he guarantee to each state of equal suffrage in the Senate is the only constitutional provision that is now expressly unamendable under the Constitution's own terms." (footnote omitted)). The Electoral College functions in much the same way for the election of the U.S. President: by requiring winning candidates to win a majority of electoral votes from statewide winner-take-all races, the presidential election is not a contest to win the most votes. *See, e.g.*, Jentleson, *supra* note 9 (describing Electoral College as "the same kind of structural welfare [for Republicans] when it comes to the Senate, where they have to win fewer votes than Democrats to control the chamber"). George W. Bush in 2000 and Donald Trump in 2016 won the presidency despite earning fewer votes nationwide than their opponents. *See id.* The political inequality that defines the role

The doctrinal literature of redistricting law ostensibly mandates political equality but limits the viability of this promise by vesting significant power in the hands of political actors with an interest in maintaining inequality. The key drivers of this dynamic are the constitutional provisions that require decennial redistricting and place redistricting power with state legislatures (unless otherwise prescribed by state law),[135] which naturally incentivize redistricting efforts that dilute the political power of communities and voters not aligned with whichever party is in control of the statehouse. A few states have endeavored to solve this problem by delegating redistricting duties to independent commissions, almost all of which succeeded as the result of grassroots-led initiatives and referendum campaigns rather than through the normal legislative process.[136]

In 1962, the Court adopted the principle of "one person, one vote" to require that redistricting procedures produce maps where districts are equal in population.[137] Under this regime, a state's congressional districts must be as close to perfectly equipopulous as possible, but state legislative districts can have certain minor deviations not exceeding ten percent population difference between a state's smallest district and largest district.[138] Apportionment must be based on total population, which raises important questions about representativeness and

of state boundaries in these elections has grown worse as unequal population distribution across the states has increased. *See id.* Political equality would require an end to this arrangement. A version of election law bound to democratic values would require the president to be selected by popular vote and senators to be elected in such a way that geography would not affect the relative power of voters. *See supra* note 8 and accompanying text; Elie Mystal, *The Senate Cannot Be Reformed—It Can Only Be Abolished*, NATION (Nov. 12, 2021), https://www.thenation.com/article/politics/abolish-us-senate/ ("At the very heart of our Constitution is the idea that where people live matters more than what people want."); Jamelle Bouie, *Minority Rule Does Not Have to Be Here Forever*, SLATE (Oct. 14, 2018, 8:30 PM), https://slate.com/news-and-politics/2018/10/minority-rule-not-in-the-constitution.html [https://perma.cc/4MMR-6Y2H] (describing Founding-Era criticisms that states' equal representation in the Senate does not achieve political equality).

135. U.S. CONST. art. I, § 2, cl. 3 ("The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct."). The "Elections Clause" provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." *Id.* art. I, § 4, cl. 1. As David Daley recognizes, states can also use their authority to eliminate gerrymandering and achieve equal representation by establishing multimember legislative districts and ranked-choice voting. *See* DALEY, *supra* note 47, at 195–96.

136. *See, e.g.*, Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 793 (2015) (upholding Arizona's independent redistricting commission created by initiative and referendum); SLAY THE DRAGON (Magnolia Pictures 2019) (documenting the uphill battle faced by the activists who successfully amended the Michigan Constitution to require redistricting by independent commission). As of October 2022, "34 state legislatures have primary control of their own district lines, and 39 legislatures have primary control over the congressional lines in their state." *Who Draws the Lines?*, LOYOLA MARYMOUNT UNIV.: ALL ABOUT REDISTRICTING, https://redistricting.lls.edu/redistricting-101/who-draws-the-lines/ [https://perma.cc/KB3U-G64M] (last visited Jan. 25, 2023).

137. *See Baker*, 369 U.S. at 207–08 (recognizing cognizable injury from voting "classification [that] disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality *vis-à-vis* voters in irrationally favored counties"); *see also Reynolds*, 377 U.S. at 558 (affirming "conception of political equality" represented by "one person, one vote" (quoting *Gray*, 372 U.S. at 381)).

138. *See* Harris v. Ariz. Indep. Redistricting Comm'n, 136 S. Ct. 1301, 1307 (2016) (explaining that where smallest and largest state legislative districts have a difference of less than ten percent, a

democracy.[139] For example, states can engage in "prison gerrymandering," counting incarcerated persons in the population of the district where their prison is located—despite the incarcerated persons' ineligibility to vote—which inflates the political power of voters in districts with high prison populations.[140] Similarly, apportionment by total population instead of the population of citizens of voting age may inflate the political power of voters in districts with large numbers of nonvoting immigrants.[141]

The "one person, one vote" doctrine also prohibits redistricting schemes that dilute the political power of geographically defined racial and ethnic communities.[142] Non-white voters can challenge the validity of a proposed redistricting scheme by identifying a "geographically compact," "politically cohesive," and "racially polarized" area where voters of color are legally entitled to a majority-minority legislative district.[143] However, the power to compel the creation of a majority-minority district is limited in a few important ways. For example, voters cannot compel the creation of additional seats in a legislative body to increase the representation of minorities in that body.[144] Voters also cannot compel the creation of new majority-minority districts when the new proposed district would

challenger to the apportionment scheme "must show that it is more probable than not that a deviation of less than 10% reflects the predominance of illegitimate reapportionment factors"). However, deviations of less than ten percent are not per se acceptable. *See* Cox v. Larios, 542 U.S. 947, 949 (2004) (Stevens, J., concurring) (agreeing that "[t]he Court properly rejects [appellant's] invitation" to "weaken the one-person, one-vote standard by creating a safe harbor for population deviations of less than 10 percent, within which districting decisions could be made for any reason whatsoever"), *aff'g on appeal* 300 F. Supp. 2d 1320 (N.D. Ga. 2004). States can also deviate in slim margins from the rule of exact equality in congressional apportionment for the purposes of maintaining the cores of existing congressional districts, preventing contests between incumbents, and keeping whole counties intact within congressional districts. *See* Tennant v. Jefferson Cnty. Comm'n, 567 U.S. 758, 764 (2012) (per curiam); *cf.* Karcher v. Daggett, 462 U.S. 725, 730 (1983) (explaining that if state does not "make a good-faith effort to achieve precise mathematical equality" in drawing congressional districts, it must "justify each [population] variance, no matter how small" (quoting Kirkpatrick v. Preisler, 394 U.S. 526, 530–31 (1969))).

139. *See* Dep't of Com. v. New York, 139 S. Ct. 2551, 2568–69 (2019) (describing importance of decennial census in fairly apportioning representatives); Evenwel v. Abbott, 578 U.S. 54, 64 (2016) (declining to "locate a voter-equality mandate in the Equal Protection Clause" and explaining that "it is plainly permissible for jurisdictions to measure equalization by the total population of state and local legislative districts"); Burns v. Richardson, 384 U.S. 73, 96–97 (1966) (exploring systems that may "contribute to the stability and accuracy of the registered voters figure as an apportionment basis").

140. *See* Marissa Zanfardino, *Prison Populations, the Census, and Prison Gerrymandering*, CITYLAND (Feb. 16, 2022), https://www.citylandnyc.org/prison-populations-the-census-and-prison-gerrymandering/ [https://perma.cc/AXQ8-TFXY].

141. *See Evenwel*, 578 U.S. at 63–64 (holding that districts may be determined using population bases other than only citizens of voting age, including total population).

142. 52 U.S.C. § 10301; *see* Thornburg v. Gingles, 478 U.S. 30, 56 (1986) (describing purpose of determining whether racially polarized voting exists in a district).

143. *See Gingles*, 478 U.S. at 50–51, 56. These majority-minority districts have sometimes been termed "minority opportunity districts." *See, e.g.*, League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 430 (2006) (discussing "Latino opportunity districts"); Bartlett v. Strickland, 556 U.S. 1, 27 (2009) (Souter, J., dissenting) ("I would hold that . . . a district may be a minority-opportunity district so long as a cohesive minority population is large enough to elect its chosen candidate when combined with a reliable number of crossover voters from an otherwise polarized majority.").

144. *See* Holder v. Hall, 512 U.S. 874, 877–79, 885 (1994) (plurality opinion).

bring the number of majority-minority districts above the number proportional to the number of minority voters in the state.[145] Potentially the most significant caveat to the prohibition on racial gerrymanders is the carve-out for partisan gerrymanders.[146] Under existing case law, partisanship is a valid motive for redistricting even where partisanship and race are highly correlated, which can provide cover for redrawn maps that disenfranchise voters of color.[147]

The doctrinal literature of redistricting law demonstrates election law's insufficient commitment to fair representation. When asked to consider challenges to the legality or constitutionality of practices that undermine political equality, courts frequently defer to an undemocratic status quo rather than endorse an alternative institutional arrangement.[148] Courts justify their inaction by claiming that choosing between various political arrangements is the duty of the political, rather than judicial, process.[149] This mantra not only relies on a false distinction between law and politics but also ignores that judicial inaction in the face of unrepresentative arrangements is itself an active choice to allow undemocratic dynamics to persist.[150] Two cases that illustrate this point are *Holder v. Hall*, in which the Court refused to order a change to a government body's number of seats,[151] and *Rucho v. Common Cause*, in which the Court held partisan gerrymandering claims nonjusticiable.[152]

1. Unrepresentative Legislative Arrangements: *Holder v. Hall* (1994)

Holder v. Hall demonstrates how, as a result of the judiciary's unwillingness to engage in comparative analysis, election law has developed a preference for tradition over fair representation. In the mid-1980s, Black voters in Bleckley County, Georgia, who constituted approximately one-fifth of the electorate, brought a challenge to the county's single-commissioner form of government.[153] Under this system, county residents elected a unitary, at-large county commissioner, which allowed the county's white majority to consistently outvote the Black minority.[154] The plaintiffs argued that this structure, in the context of a county defined by racially polarized voting habits, diluted their political power.[155]

145. *See* Johnson v. De Grandy, 512 U.S. 997, 1019–20 (1994).

146. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019) (holding that partisan gerrymandering claims are nonjusticiable political questions).

147. *See* Easley v. Cromartie, 532 U.S. 234, 243–44, 258 (2001).

148. *See* Nicholas O. Stephanopoulos, *Our Electoral Exceptionalism*, 80 U. CHI. L. REV. 769, 772–75 (2013) (criticizing American election law's distaste for comparative analysis).

149. *See* Colegrove v. Green, 328 U.S. 549, 556 (1946) (plurality opinion) ("Courts ought not to enter this political thicket.").

150. *See, e.g.*, *Rucho*, 139 S. Ct. at 2509 (Kagan, J., dissenting) (criticizing majority for its "abdication" of duty in ruling partisan gerrymandering claims nonjusticiable); Akbar, *supra* note 14, at 94–95 (describing Klarman's idea of law "as a terrain and tool of politics: the product of dynamic social forces contending for power").

151. 512 U.S. 874, 885 (1994) (plurality opinion).

152. 139 S. Ct. at 2506–07.

153. *Holder*, 512 U.S. at 876–77.

154. *Id.* at 877–79.

155. *See id.*

Invoking the Voting Rights Act's ban on election regulations with racially disparate impacts, the plaintiffs argued that the county government should be reorganized into a multi-member body that would allow Black voters to select at least one commissioner of their choice.[156] The Court ruled that the plaintiffs had failed to state a claim because they could not identify any "reasonable alternative benchmarks" that courts could use to determine whether the alleged vote dilution had been remedied.[157]

This case demonstrates how election law does not allow courts to consider the effects of boundaries, winner-take-all elections, or single-member districts on the representativeness of elected bodies.[158] Here, the plaintiffs articulated how the single-member-district system of county governance harmed Black residents' ability to engage meaningfully in self-governance.[159] Election after election, Black voters were unable to elect a Black commissioner—if a Black candidate even ran.[160] The result was a form of government that was not representative of the county's full spectrum of political preferences.[161] To correct this system, the plaintiffs identified a workable alternative that would have empowered Black voters to see their political preferences represented in the county's policymaking process.[162] However, a plurality of the Court refused to engage in this kind of comparative analysis and issued a decision that not only preserved a district-based system that worked against the value of self-determination but also explained that the Voting Rights Act can never be invoked to compel the creation of additional seats in an elected body.[163]

Liberalism's incoherence on rights contributed to the outcome in *Holder*. Because election law inconsistently treats the right to vote and the principle of racial equality sometimes as "individual" and sometimes as "collective" rights issues, it fails to present a uniform level of generality at which courts must consider the validity of electoral regulations. If courts always had to consider these rights at the "collective" level relating to a relevant community, the *Holder* Court would have had to consider the effects of the single-commissioner system on Black Georgians' collective political power.

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156. *Id.* at 878–89; *see also* Jamelia N. Morgan, *Disparate Impact and Voting Rights: How Objections to Impact-Based Claims Prevent Plaintiffs from Prevailing in Cases Challenging New Forms of Disenfranchisement*, 9 ALA. C.R. & C.L. L. REV. 93, 103–04 (2018) (discussing *Holder*).

157. *Holder*, 512 U.S. at 885.

158. *See* Pitts, *supra* note 33 ("[T]he Court has never been completely comfortable in its role of choosing between competing theories of representation.").

159. *See Holder*, 512 U.S. at 877–88.

160. *See id.* at 878.

161. *See id.* at 876–78.

162. *See* Pitts, *supra* note 33.

163. *See Holder*, 512 U.S. at 885; *see also id.* at 881 ("[W]here there is no objective and workable standard for choosing a reasonable benchmark by which to evaluate a challenged voting practice, it follows that the voting practice cannot be challenged as dilutive under § 2 [of the Voting Rights Act]."); Pitts, *supra* note 33 ("What is reflected in *Holder* is a Court uncomfortable with the further expansion of the Voting Rights Act to new and novel claims.").

2. Partisan Gerrymandering: *Rucho v. Common Cause* (2019)

Rucho v. Common Cause represented a significant milestone in election law's abandonment of democratic values in the realm of redistricting.[164] There, voters from North Carolina and Maryland brought suits aimed at compelling their respective states to abolish the practice of having state legislators draft their own legislative maps.[165] The plaintiffs claimed that this system inevitably and invariably resulted in lawmakers gerrymandering their states for partisan gain, which diluted the political power of voters supporting parties other than the one in control of the statehouse.[166] The plaintiffs also introduced a mathematical formula—called the Efficiency Gap Model[167]—that courts or nonpartisan redistricting commissions could use to determine whether a legislative map unfairly disenfranchised voters of a particular political affiliation.[168] Ultimately, the Court refused to strike down the challenged practices, holding that partisan gerrymandering claims are nonjusticiable under federal law.[169]

Rucho represents the apotheosis of election law's deference to existing structures that create and define the roles of boundaries in the political process.[170] The plaintiffs presented clear evidence of the political inequality resulting from redistricting systems closely associated with partisan gerrymanders[171] and highlighted the availability of demonstrably fairer alternatives.[172] Nonetheless, the Court's majority affirmed that judges' distaste for considering the relative desirability of political structures overrides the judiciary's duty to protect against rules undermining political equality.[173]

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164. 139 S. Ct. 2484 (2019).

165. *Id.* at 2491–93.

166. *Id.*

167. Common Cause v. Rucho, 318 F. Supp. 3d 777, 885 (M.D.N.C. 2018), *vacated*, 139 S. Ct. 2484 (2019); *see* Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 834 (2015) (introducing "efficiency gap" metric); *see, e.g.*, Mira Bernstein & Moon Duchin, Opinion, *A Formula Goes to Court: Partisan Gerrymandering and the Efficiency Gap*, 64 NOTICES AM. MATHEMATICAL SOC'Y 1020 (2017); More Perfect, *Who's Gerry and Why Is He So Bad at Drawing Maps?*, WNYC STUDIOS (Oct. 3, 2017), https://www.wnycstudios.org/podcasts/radiolabmoreperfect/episodes/whos-gerry-and-why-he-so-bad-drawing-maps [https://perma.cc/J537-X8R8].

168. *See Rucho*, 139 S. Ct. at 2518 n.4 (Kagan, J., dissenting) (describing district court's use of "mathematical measurements" to "assess whether supporters of the two parties can translate their votes into representation with equal ease").

169. *Id.* at 2506–07 (majority opinion).

170. *See, e.g.*, Dahlia Lithwick, *The Supreme Court's Partisan Gerrymandering Ruling Is a Body Blow to Our Democracy*, SLATE (June 27, 2019, 12:56 PM), https://slate.com/news-and-politics/2019/06/john-roberts-supreme-courts-partisan-gerrymandering-rucho-common-cause.html [https://perma.cc/BN57-FPBT] ("The solution, [the Court] would suggest, lies in state courts, constitutional amendments, state redistricting commissions . . . , Congress, and state legislatures, which is a tiny bit like putting the looters in charge of the looting problem.").

171. *See Rucho*, 139 S. Ct. at 2491–93.

172. *See id.* at 2502–06 (discussing attempts by the lower courts to develop an appropriate test).

173. *See id.* at 2506–07 (calling plaintiffs' proposal that the Court deliver on the promise of one person, one vote by imposing reasonable limits on states' ability to engage in partisan gerrymandering a request for "an unprecedented expansion of judicial power").

Since *Baker v. Carr*, the principle of "one person, one vote" and its promise of political equality in the electoral process have proved unreconcilable with the systems in most U.S. jurisdictions, which conduct first-past-the-post elections in single-member districts. To resolve this tension, courts could have recognized a right to proportionate representation by race or political affiliation.[174] The Supreme Court, however, has explicitly disavowed this idea and given up on the goal of racial equality by giving a stamp of approval to electoral regimes that explicitly discriminate according to partisan affiliation and, as a result, effectively discriminate according to race.

III. TOWARD A NEW THEORY OF ELECTION LAW

Given the inability of the rights framework to promote political equality and meaningful self-determination, modest reforms to the existing body of election law will likely be inadequate for advancing the cause of democracy.[175] Even though certain reforms championed by pro-democracy advocates—such as universal suffrage, limits on campaign spending, and protections against gerrymandering—would bring the United States significantly closer to democracy as an ideal type, they can only go so far.[176] A complete overhaul of the American approach to political representation—one that articulates new goals for electoral structures and the separation of powers—would induce a far more effective reorientation of society around democratic ideals. Deeply embedded within the current legal framework, likely outside the reach of reform efforts, are institutions fiercely hostile to democracy, including single-member districts, rigid boundaries around states and political subdivisions, and the tight relationship between geographic residence and legal membership in specific political communities.[177] Abolishing these institutions will require sustained political struggle amid fierce opposition.

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174. *See* Kevin Reyes, *Redistricting or Rethinking? Why Proportional Representation May Be a Better Solution than California's Independent Redistricting Commission*, 20 S. CAL. INTERDISC. L.J. 655, 672 (2011); John R. Low-Beer, Note, *The Constitutional Imperative of Proportional Representation*, 94 YALE L.J. 163, 163–65 (1984).

175. *See* SCHLOZMAN ET AL., *supra* note 14, at 539–40 (concluding that "analysis of the roots of political inequalities makes clear how deeply embedded they are in social, educational, and economic inequalities," which will require more radical change than "mere institutional tinkering"); Akbar, *supra* note 14 (arguing that "[d]emocracy must be a bottom-up project" consisting of "non-reformist reforms").

176. *See* Klarman, *supra* note 4, at 231–32; E.J. DIONNE JR. & MILES RAPOPORT, 100% DEMOCRACY: THE CASE FOR UNIVERSAL VOTING 8 (2022) (arguing that voting should be a universal civic obligation and noting that "[t]he experience of 2020 should thus inspire our nation to take a leap beyond narrow arguments about procedural expansions and restrictions, . . . beyond the fights that have raged since the beginning of the republic over who should have the right to vote"); DALEY, *supra* note 47, at 212–13 ("What is happening here, and how can we fix it? Redistricting is an essential part of the strategy, but it is not the entire plan . . . . Redistricting plus restrictive voter registration laws are a strategy designed to stave off GOP demographic oblivion in a country becoming more diverse each year. A failure to recognize and combat this strategy will lead to electoral apartheid.").

177. *See* Linder, *supra* note 134 (arguing that the Constitution's "guarantee to each state of equal suffrage in the Senate" is unamendable).

At the heart of this project must be a reorientation of election law away from its current obsession with spurious neutrality. Instead of invoking concerns about neutrality to limit law's ability to achieve democratic ends, lawmakers and advocates should explicitly ingrain into election law a commitment to democracy's twin pillars of political equality and actual self-determination.[178] At present, the doctrine presumes that the proper role of election procedures is to provide a neutral platform for eligible voters to register their political preferences.[179] Instead, law and policy analysis should reorient around the commitment to ensuring that election procedures actively promote democratic values in political and social ordering. Jurists and lawmakers should not ask whether election rules create a neutral role for government in the political process but instead whether those election rules are enabling all affected persons to play an equal part in their self-government.

More broadly, proponents of democracy need to devise a political platform that transcends the limitations of the liberal tradition. First, the pro-democracy platform must abandon the discourse of rights and explain, with greater clarity, that democracy concerns not just whether there are popular elections but also the range of potential outcomes. Under the current regime, liberal rights theory fails to account for whether "democracy" is a means (referring only to the procedures used for political decisionmaking) or an end (describing whether the political decisionmaking itself is responsive to the needs and wishes of the governed). Spurious neutrality hinders democracy by treating political inequality as a problem for economic markets to solve without government interference, regardless of how deeply that inequality hurts the potential for widespread self-determination. Similarly, democratic election law cannot simply accept economic (and thus political) inequality as the regrettable yet unavoidable by-product of individual freedom. Democracy demands a continuous effort to eradicate inequality in the electoral process.

To succeed in bringing the United States closer to democracy as an ideal type, advocates must continue to develop a shared vocabulary for describing their vision of a democratic society. For example, Purdy argues for a vision of law that promotes "democratic will formation."[180] Similarly, Adam Jentleson, cofounder of the progressive advocacy group Battle Born Collective, argues that the most important metric for evaluating a polity's level of democracy is alignment between the "agenda of the government and the will of the governed."[181] Kate Andrias complements this results-oriented approach by arguing that the concept of democracy should extend beyond "individualistic" forms of political activity to include the active participation of most citizens, especially low- and middle-

178. *See* Britton-Purdy et al., *supra* note 28, at 1824 ("We suggest orienting law and policy analysis around an ideal of equality—particularly a vision of equality animated by a commitment to self-rule and sensitive to the importance of social subordination along intersectional lines.").

179. *See* Purdy, *supra* note 8, at 2164–65, 2175–76, 2180.

180. *See id*. at 2176.

181. *See* Jentleson, *supra* note 9.

income people, in the political, governmental, and civic institutions that shape their lives.[182] The relevant common thread in these proposals for election law is a focus on broad-based participation and effective results rather than just on procedural mechanisms.

Certain policy interventions could help push election law closer to this new vision. For example, voting rights law needs a constitutional amendment that enshrines an affirmative, universal, and irrevocable right to vote. Such an amendment should also lower the voting age and extend the franchise to noncitizens. To repair campaign finance law, policymakers should severely limit independent expenditures and corporate spending on elections, require disclosures for political action committee and nonprofit donations, and implement effective public campaign financing schemes. Taken together, these reforms would limit, if not eradicate, the role of capital in the electoral process. Finally, redistricting law would be far more democratic in a proportional representation system than the existing winner-take-all system.[183] In winner-take-all races, all voters who supported a candidate other than the winner are effectively shut out of the selection of political representatives. By contrast, in a proportional representation system, the dominant political party in a particular legislative body is still determined by who receives the highest number of votes, but minority-party voters still play a role in selecting some legislators to represent their interests and political preferences.[184] Most of these proposed interventions are inconsistent with current election law. Accordingly, the first step in achieving them is to reorient the entire discipline away from the liberal tradition and toward the active pursuit of political equality and effective self-determination among the governed.

CONCLUSION

Election law sets the rules for operating and maintaining a system of representative governance, but it also proceeds from a set of assumptions and values that are often incompatible with democracy. The result of these deeply rooted underpinnings is the maintenance of hierarchies based on race, wealth, and geography. These roots create a system where conservativism and hostility to legislative action have clear structural advantages over progressive efforts to effectuate everything from climate justice to wealth redistribution.[185] Election law operates in tandem with other areas of law that work to undermine democracy in American life. For example, judicial supremacy and the expansion of executive power have transferred policymaking power from the hands of elected

182. *See* Andrias, *supra* note 93, at 49–51 (arguing that "our democracy might well depend on" attempts to enable or encourage broad-based political participation such as labor unions, civic organizations, and other forms of grassroots political engagement).

183. *See* Reyes, *supra* note 174; Low-Beer, *supra* note 174.

184. Winner-take-all elections also incentivize the entrenchment of a two-party system, compared to the multiparty systems that tend to result from proportional representation, which results in a smaller variety of political platforms being represented in legislative bodies. *See* Reyes, *supra* note 174.

185. *See* Bowie, *supra* note 9, at 173–74; Jentleson, *supra* note 9.

representatives to unelected, appointed judges.[186] Election law plays a key role in defining these trends' undemocratic character, both because the presidents appointing these decisionmakers are elected through undemocratic processes and because the decisionmakers themselves are insulated from anything resembling democratic accountability. To make democracy a reality in America, scholars and activists will need to stop invoking an "erosion" of democratic norms and institutions and reckon with the undemocratic foundation upon which so much of American electoral law is built.

186. *See, e.g.*, Bowie, *supra* note 9, at 174; William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 44 (2019) (considering alternative to "judge-centric tradition of precedent"); Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 319–36 (2002) (calling for the Court to revive the political question doctrine); Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347, 348 (1994) (arguing that "each institution must interpret the Constitution in order to decide how much deference to give to specific decisions by other institutions").