ARTICLES

Reconstructing (The Law of) Democracy

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American democracy is experiencing a stress test, but the field that ought to be preoccupied with democracy seems to have little to say about it. The law of democracy has long grappled with fundamental challenges over political inequality, racial exclusion, and clientelism. For much of its history, the field of election law adjudicated these and similar issues more or less successfully. That mode of adjudication succeeded primarily because the problems of democratic politics could be addressed, for the most part, by applying the core commitments of the extant constitutional order. Significantly, American democracy relied on the Supreme Court to excavate, articulate, and implement those commitments.

In the last few years, however, the challenges to democratic politics have changed. Our politics have become more existential, and so have our constitutional disputes. As a result, in an emergent category of law and democracy cases, the parties now fight over divergent partisan conceptions of democracy. Each side contends that the other is antidemocratic and effectively asks the Court to arbitrate between their competing claims. Because these emergent challenges are about defining liberal democracy itself, they cannot be resolved by invoking the commitments of America's liberal constitutional democracy. These new challenges question the content of the polity's commitments, not its failure to apply them.

The familiar tools of election law were forged under different political conditions. Those tools have limited utility in our era of existential politics. Students and practitioners of the law of democracy need to develop an agenda for reforming our political systems. Election law can no longer depend upon the Court to resolve democracy's pathologies. Courts can buy us time. But to meet the challenge of structural reform, our politics must do much more. In short, the law of democracy is now in its Reconstruction Era.

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INTRODUCTION

American democracy is in crisis, and the law of democracy may not be up to the task. Since its inception, the field has relied upon the Supreme Court to reflect, excavate, and articulate the nation's foundational commitments to self-rule as a liberal democratic constitutional republic.[1] As an institution downstream from divisive political debates, the Court could function as a guardian of democratic politics and remove, within the bounds of its competence, objectionable obstacles that minimize self-government and political accountability. Thus, election law scholars generally viewed courts—particularly the Supreme Court—as necessary to actualize self-government in a constitutional republic and to address the dysfunctions of American democracy.[2] For much of the modern political era, the Court's law and politics jurisprudence could be explained along these lines.

Now, "things have changed." Our increasingly polarized politics have produced a different kind of dispute, altering the type of election cases courts are expected to resolve. An embryonic, and maybe inchoate, set of "law and democracy"[3] cases has emerged. In these cases, the Court is no longer asked to adjudicate between opposing policy preferences, partisan outcomes, or visions of democracy. Instead, the Court is confronted with a task that it has never performed in the modern era of partisan politics: It is asked to save American democracy by adjudicating between democracy and antidemocracy and between liberalism and authoritarianism.[4] To borrow from one prominent election lawyer, "democracy is on the docket."[5] Election law is only beginning to grapple with these tectonic political changes and what they mean for our partisan electoral disputes.[6]

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1. *See* Guy-Uriel E. Charles, *Judging the Law of Politics*, 103 MICH. L. REV. 1099, 1099 (2005) (book review) (recounting the Supreme Court's growing role in regulating a range of election-related matters after its election-law decision in *Baker v. Carr*, 369 U.S. 186 (1962)).

2. *See, e.g.*, Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 32 (2004); Samuel Issacharoff & Richard H. Pildes, *Politics As Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 648–52 (1998) (conceptualizing the Court's role as policing the market failures of the political process).

3. By "law and democracy" literature, we mean academic scholarship focusing on how legal practice shapes and sustains democracy. Such work includes scholarship on election law; it also encompasses a broader set of articles contemplating how legal systems impact the function, practices, and endurance of democracy.

4. *See infra* Section I.B.

5. Marc Elias, *The Courts Protected Democracy in 2022*, DEMOCRACY DKT. (Jan. 10, 2023), https://www.democracydocket.com/opinion/the-courts-protected-democracy-in-2022 [https://perma.cc/AS89-CYHB].

6. Professor James Gardner has been particularly insightful and prescient on these issues. *See generally* James A. Gardner, *New Challenges to Judicial Federalism*, 112 KY. L.J. 703 (2023); James A. Gardner, *Dividing the Body Politic*, 2023 U. CHI. LEGAL F. 1 (2024); James A. Gardner, *The Illiberalization of American Election Law: A Study in Democratic Deconsolidation*, 90 FORDHAM L. REV. 423 (2021) [hereinafter Gardner, *Illiberalization of American Law*]; James A. Gardner, *Illiberalism and Authoritarianism in the American States*, 70 AM. U. L. REV. 829 (2021). Professor Gardner is not without comrades. *See generally* Samuel Issacharoff & Sergio Verdugo, *The Uncertain Future of Constitutional Democracy in the Era of Populism: Chile and Beyond*, 78 U. MIAMI L. REV. 1 (2023); Richard H. Pildes, *The Neglected Value of Effective Government*, 2023 U. CHI. LEGAL F. 185

The field of election law has long operated on a shared understanding that the United States is a liberal—in the classical sense—constitutional republic. As Owen Fiss recently described, the "American Constitution is a constitution of freedom," one that guarantees "political freedom[s]" through "periodic elections" in which "the franchise is distributed to all . . . and [citizens can] vote for the candidate they prefer, with each vote counting as much as another."[7] Put differently, in describing the perceived trajectory of American democracy, James Gardner has explained:

> For nearly a quarter of a millennium, what Americans thought they knew about themselves is that the United States was a liberal republic founded on the principle of popular self-rule and that its history has unfolded, if not in one long, steady march toward a perfected democracy, at least along a serpentine path leading in that general direction.[8]

National politics—and the law and democracy field—have thus been centrally committed to actualizing self-government. This shared understanding of the United States as a liberal constitutional republic set the terms of political contestation and provided a telos for our democratic politics.

Additionally, this understanding framed evaluations of the Court's role in our constitutional republic: the Court's task was to uphold (and sometimes construct) the balustrades that would constrain the pathologies of American democracy and effectuate the ideal of self-governance. In fulfilling that task, the Court was expected to divine the fundamental principles that defined liberal constitutional democracy—and then articulate and apply those principles in the opinions it rendered.

The law of democracy also emerged from a particular background of politics that defined the era of its birth, in the mid-to-late twentieth century.[9] Take as a primary example the ideological positions of the two major political parties: in the middle of the twentieth century, the parties were similarly situated.[10] They were comparable, even mirror images of one another.[11] Partisan polarization was

(2023); Richard H. Pildes, *Political Fragmentation in the Democracies of the West*, 37 BYU J. PUB. L. 209 (2023); Samuel Issacharoff, *Weaponizing the Electoral System*, 74 STAN. L. REV. ONLINE 28 (2022) [hereinafter Issacharoff, *Weaponizing the Electoral System*]; Richard H. Pildes, *Democracies in the Age of Fragmentation*, 110 CALIF. L. REV. 2051 (2022); Richard H. Pildes, *Election Law in an Age of Distrust*, 74 STAN. L. REV. ONLINE 100 (2022); Samuel Issacharoff, *Judicial Review in Troubled Times: Stabilizing Democracy in a Second-Best World*, 98 N.C. L. REV. 1 (2019) [hereinafter Issacharoff, *Judicial Review in Troubled Times*]; Samuel Issacharoff & Richard H. Pildes, *Not by "Election Law" Alone*, 32 LOY. L.A. L. REV. 1173 (1999).

7. OWEN FISS, WHY WE VOTE 3–4 (2024).

8. Gardner, *Illiberalization of American Law*, *supra* note 6, at 425 (footnote omitted).

9. *See infra* Section II.A.

10. *See infra* Section III.B.

11. *See* Geoffrey C. Layman & Thomas M. Carsey, *Party Polarization and "Conflict Extension" in the American Electorate*, 46 AM. J. POL. SCI. 786, 789 (2002); Ronald B. Rapoport, Alan I. Abramowitz & John McGlennon, *Introduction and Methodology*, *in* THE LIFE OF THE PARTIES 3 (Rapoport et al. eds. 1986).

in decline,[12] and the partisan stakes for disputes about law and democracy were comparatively muted. It was possible to debate the preconditions for self-government and political accountability without igniting a proxy fight over conflicting partisan visions of democracy. Moreover, the Court could both supervise democratic politics and credibly claim to be redressing political process defects or giving effect to democratic rights.[13]

Not anymore. The underlying political reality has changed over the last thirty or so years. The parties no longer mirror one another, and the partisan stakes seem existential. A sense of democratic crisis looms, engulfing our politics.[14] Recent scholarship about American democracy is almost universally preoccupied with fears of democratic backsliding and descent into authoritarianism.[15]

This burgeoning democratic crisis and the attendant "weakening of our democratic norms" can be traced, in part, to "extreme partisan polarization."[16] Partisan polarization has long been on the rise—so much so that it is by now almost trite to note that American politics is exceedingly polarized along partisan lines.[17] While polarization is not new, the stakes of extreme polarization are getting higher. As leading scholars of democratic backsliding have recently noted, such "extreme polarization can kill democracies."[18] Moreover, our political cleavages are often layered upon divisions based on race, religion, gender, ethnicity, and class.[19] Tying economic inequality with American society's deep polarization, the political philosopher Michael Sandel remarked: "These two aspects of our predicament—unaccountable economic power and entrenched polarization—are connected. Both disempower democratic politics."[20]

Partisanship and polarization were once relatively low but are now at all-time highs.[21] Where the parties were once considered relatively similar, they now comprise distinct demographic and geographic coalitions.[22] More recently, and perhaps more alarmingly, political scientists have also started to argue that the

12. *See* Hahrie Han & David W. Brady, *A Delayed Return to Historical Norms: Congressional Party Polarization After the Second World War*, 37 BRIT. J. POL. SCI. 505, 506, 516 (2007).

13. *See infra* Section II.A.

14. *See* Samuel Issacharoff, *Democracy's Deficits*, 85 U. CHI. L. REV. 485, 485 (2018) (describing that "democracy has entered an intense period of public scrutiny").

15. *See* David Waldner & Ellen Lust, *Unwelcome Change: Coming to Terms with Democratic Backsliding*, 21 ANN. REV. POL. SCI. 93, 94 (2018) (tracking the rapidly increasing frequency with which the term "democratic backsliding" has appeared in political science literature).

16. STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 9 (2018).

17. *See* Shanto Iyengar, Yphtach Lelkes, Matthew Levendusky, Neil Malhotra & Sean J. Westwood, *The Origins and Consequences of Affective Polarization in the United States*, 22 ANN. REV. POL. SCI. 129, 130, 134 (2019) (arguing that polarization has taken the form of increasingly viewing opposing partisans negatively and copartisans positively).

18. LEVITSKY & ZIBLATT, *supra* note 16, at 9.

19. *See* Iyengar et al., *supra* note 17, at 134.

20. MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: A NEW EDITION FOR OUR PERILOUS TIMES 6 (2d. ed. 2022).

21. *See infra* Section III.B.

22. *See id.*

parties are asymmetrically committed to democracy.[23] Today, hyperpartisanship is no longer reflective of increasingly irreconcilable clashes over policy. The nation's commitment to liberalism and democracy is now in question. It was once alarmist to ask whether the United States remained committed to the principles of liberal constitutionalism. That, however, is now a commonplace inquiry often made by serious domestic and comparative scholars.

Both parties also now level accusations of antidemocratic behavior at one another. For instance, in the 2024 presidential election, Democrats characterized Donald Trump as an authoritarian threat,[24] and Republican elites cast Kamala Harris in the same light.[25] There is no definite or objective basis for adjudicating between these competing claims. Each side believes it is principled; it is the other side that defected from what were once shared norms. The parties push the bounds of appropriate democratic engagement and do so unequally.

These competing assertions are often consumed wholesale by voters, who are increasingly entrenched in the partisan *weltanschauung* because they share political information consistent with their partisan priors.[26] Our cognitive biases, including motivated reasoning and confirmation bias, distort our judgment of accuracy and our ability as voters to assess fact claims.[27] Additionally, we do not have a shared epistemic framework and are often segmented into various information networks.[28] Given these pressures, it should not be surprising that more familiar forms of partisan conflict may be steadily evolving into hyperpartisan conflict over democracy itself—its nature, its existence, and its survival.

This new political reality poses a significant challenge to the Court's law and democracy jurisprudence and the field of election law. Given that adjudication is downstream from our politics, our political disagreements will unavoidably affect the law and politics docket. Partisan disputes over democracy are now coming to the courts, and the fight is cast in existential terms.[29] These disputes are not about

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23. *See, e.g.*, STEVEN LEVITSKY & DANIEL ZIBLATT, TYRANNY OF THE MINORITY: WHY AMERICAN DEMOCRACY REACHED THE BREAKING POINT 94–132 (2023); Derek E. Holliday, Shanto Iyengar, Yphtach Lelkes & Sean J. Westwood, *Uncommon and Nonpartisan: Antidemocratic Attitudes in the American Public*, PNAS, Mar. 2024, at 1, 1 (arguing that the "the clear and present threat to American democracy comes from unilateral actions by [Republican] elites that stand in contrast to the views of their constituents").

24. *See, e.g.*, *Reminder: Donald "Dictator on 'Day One'" Trump Is an Existential Threat to Our Democracy*, DEMOCRATS (June 27, 2024), https://democrats.org/news/reminder-donald-dictator-on-day-one-trump-is-an-existential-threat-to-our-democracy [https://perma.cc/7B8V-48QM].

25. David Harsanyi, *By the Way, Kamala Harris Is a Dangerous Authoritarian*, THE FEDERALIST (July 23, 2024), https://thefederalist.com/2024/07/23/by-the-way-kamala-harris-is-a-dangerous-authoritarian [https://perma.cc/7LVJ-L3ZX].

26. *See* Mathias Osmundsen, Alexander Bor, Peter Bjerregaard Vahlstrup, Anja Bechmann & Michael Bang Petersen, *Partisan Polarization is the Primary Psychological Motivation Behind Political Fake News Sharing on Twitter*, 115 AM. POL. SCI. REV. 999, 999 (2021).

27. *Cf.* Valentina Vellani, Sarah Zheng, Dilay Ercelik & Tali Sharot, *The Illusory Truth Effect Leads to the Spread of Misinformation*, COGNITION, Mar. 2023, at 1, 1.

28. *See* CASS R. SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA 5 (2017); MARTHA MINOW, SAVING THE NEWS: WHY THE CONSTITUTION CALLS FOR GOVERNMENT ACTION TO PRESERVE FREEDOM OF SPEECH 20 (2021).

29. *See infra* Part I.

policy differences or disagreements over the principles necessary to facilitate representative democracy but about mutually incompatible partisan commitments to maintaining a constitutional republic. Both parties claim, and will claim, that their side alone seeks to protect representative democracy while arguing that the other behaves in antidemocratic ways.

When the Court adjudicates these new election law cases it is, therefore, inevitably deciding whether to favor one party at the expense of the other. Each party seeks the imprimatur of the courts—a judgment that their side is preserving democracy while the other party is illegitimate. Put differently, the Court is not only being asked to adjudicate representative democracy itself, but to pick one side's view as the defender of the constitutional republic.

Over the last few years, a growing literature has increasingly deplored the Court's inability to address democratic backsliding,[30] its role in the degradation of our democracy,[31] and its evident failure to resolve our conflicts over American democracy, as it has done for so many decades. For example, Professor Michael Klarman thoroughly and compellingly cataloged the "degradation of American democracy" and "the Supreme Court's contribution" to that degradation.[32] Similarly, Professor Pamela Karlan has perceptively observed how "changes in demography are interacting with constitutional law—both structural features of how political power is allocated and recent Supreme Court decisions—to create a new countermajoritarian difficulty."[33] As she remarked, this countermajoritarian difficulty is not the typical obsession of constitutional law—that of the Court thwarting the preferences of a majoritarian representative body.[34] Rather, it reflects a growing concern of a Court that persists in supervising over a "retrenchment in which we move once again towards government by minority."[35] Against this background, Professor Richard Hasen spoke for many when he declared, after performing an expert survey of the Court's jurisprudence and the field, that

30. *See, e.g.*, Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2025 (2022) ("This *juristocratic* separation of powers is often taken as a natural or inherent feature of American constitutionalism. But it took control of the American imagination only in 1926, after centuries in which a profoundly different understanding of the separation of powers was dominant."); *cf.* Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703, 1717 (2021); Ryan D. Doerfler & Samuel Moyn, *The Ghost of John Hart Ely*, 75 VAND. L. REV. 769, 798 (2022).

31. *See* Pamela S. Karlan, *The New Countermajoritarian Difficulty*, 109 CALIF. L. REV. 2323, 2354 (2021); Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 165 (2018); Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 967 (2018); *cf.* Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430, 1456 (2018) (discussing constitutional norm degradation during the Trump Administration); Jack M. Balkin, *Constitutional Hardball and Constitutional Crisis*, 26 QUINNIPIAC L. REV. 579, 590 (2008) (describing constitutional crises as attempts to obtain power where courts and Congress intervene).

32. Michael J. Klarman, *Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 8 (2020).

33. Karlan, *supra* note 31, at 2324.

34. *Id.*

35. *Id.*

election law was in "a funk."[36] The field does not seem up to addressing the new set of challenges it faces.

One sensible response is to castigate the Court and urge it to rise to the challenge. This response is understandable. As we will argue in this Article, however, that approach is misguided. The Court is not at the center of the fundamental problems that ails American democracy. As Professor Karlan put it recently when describing the Roberts Court, the "Court and its democracy-depleting decisions are a symptom, even more than a cause, of our present condition."[37] The cases the parties bring to the Court reflect a systemic failure because American politics has failed to deliver the material public policy benefits that voters expect and profound dissensus over the constitutional republic's foundational principles.

Fundamentally, election law needs to return to its intellectual moorings—to a time when election law scholars actively attempted to understand the pathologies that afflicted democratic politics (such as the quintessential issue of racial inclusion) and debated solutions to those problems. The critical inquiry for scholars of law and democracy remains as it was framed by Professors Sam Issacharoff and Rick Pildes more than two decades ago: Scholars and practitioners ought to determine how to orient the law of democracy so that it may best address the afflictions of American politics within the confines of a Constitution that "is a curious amalgam of textual silences, archaic social and political assumptions that subsequent developments quickly undermined, and a small number of narrowly targeted recent suffrage amendments that reflect modern conceptions of the electorate but fail to address conceptions of democratic politics more deeply."[38]

To do so, scholars and practitioners must attend to the temporal dynamism, fluidity, and contemporaneous controversies of American politics. As Professors Michael Kang and Tabatha Abu El-Haj convincingly explained—in the context of gerrymandering and campaign finance, respectively—different eras reveal different pathologies.[39] The study of the law of democracy, if it is to be relevant, must be attuned to the pathologies of American democracy as they are contemporaneously presented, and election law must respond antiphonally as those dynamics change.

In this era of existential politics and competing commitments to democracy, it is only by reforming democratic politics that the American polity can arrive at long-lasting solutions. If election law is in such a "funk," it is because the field

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

37. Karlan, *supra* note 31, at 2354. Moreover, the contingency of judicial review of democratic politics is reflected in the structural approach that most scholars of law and politics have used to determine the appropriateness of judicial engagement. *Id.* at 2324. The role of courts was to vindicate multiple democratic principles. *Id.* Courts had to perceive the extent to which institutions of democratic governance reflected these structural values and determine whether certain types of values needed to be traded off against others. *Id.* at 2349. These considerations can point in different directions.

38. Issacharoff & Pildes, *supra* note 6, at 1179.

39. *See* Michael S. Kang, *Hyperpartisan Gerrymandering*, 61 B.C. L. REV. 1379, 1387 (2020); Tabatha Abu El-Haj, *Beyond Campaign Finance Reform*, 57 B.C. L. REV. 1127, 1129, 1154 (2016).

has not yet developed a new set of tools and institutions to address the deep ills of American politics other than courts. If election law is to emerge from this funk, it must be reconstructed and reoriented toward the root causes of our democratic crisis.

We suggest in this Article that law and democracy scholars should not carry on as if we are still living in the 1950s. The field must confront the contemporary structural challenges to American constitutional democracy more straightforwardly. We need to provide an account to explain why American political institutions are not optimized to meet the material needs of the polity and why we are struggling to become a modern multiracial democracy. The field needs to more broadly address why our politics flit between liberalism and illiberalism, self-government and authoritarianism, and democracy and antidemocracy.

Here, we outline how and why election law must change and what it must do to deal with this new problem. To illuminate the dynamics of election law's coming dilemma, this Article explores the difficulties and contradictions that a new set of cases arising from our recently changed politics will present to election law's engagement with democratic politics. It also explains why election law seems irrelevant to the fundamental challenges of American democracy. In Part I, we argue that a small subset of recent cases has placed significant additional pressure on election law's reliance on courts to resolve law and democracy problems. Because both sides make competing claims to the mantle of liberal democracy, the Court cannot do anything that will be regarded as prodemocratic, and whatever it does, it will be viewed as antidemocratic.

In Part II, we contrast the new disputes over the nature of democracy with cases typical of the Court's law and democracy docket. We describe how the Court became the guardian of democratic politics in the first place—and, via that origin story, suggest the limits of the Court's capacity. We then explain why these newest partisan-democracy cases are distinguishable even from complex political cases that the Court has successfully adjudicated in the past.

In Part III, we explain election law's dysfunction (or "funk") is a function of our politics as opposed to the Court's election law jurisprudence. Finally, in Part IV, we argue that election law must reorient itself to focus on the unavoidable, and admittedly difficult, task of democracy reform. By way of illustration, we suggest some specific areas for reform.

Ultimately, the fundamental problems with American politics can be resolved only by the people's politics. We have demanded too little of our politics and too much of our courts. The field can no longer remain fixated on courts, particularly the Supreme Court, as both solution and problem—applying many of the same tools that served us best under different political conditions.[40] We may have to

40. *See, e.g.*, Carolyn Shapiro, *The Independent State Legislature Theory, Federal Courts, and State Law*, 90 U. CHI. L. REV. 137, 142–44 (2022); Scott L. Cummings, *Lawyers in Backsliding Democracy*, 112 CALIF. L. REV. 513, 517–18 (2024); Tanner Lockhead, *Redistricting Immunity*, 112 CALIF L. REV. 461, 465 (2024); Scott L. Kafker & Simon D. Jacobs, *The Supreme Court Summons the Ghosts of* Bush v. Gore: *How* Moore v. Harper *Haunts State and Federal Constitutional Interpretation of Election Laws*, 59 WAKE FOREST L. REV. 60, 63–64 (2024); Michael J. Pitts, *Don't Mess with Reapportionment*, 61 HOU. L. REV. 989, 991–94 (2024).

acknowledge that we are expecting too much of the Court[41]—and perhaps that we *always* expected too much of the Court.[42] Instead, fixing our current political disputes will require fundamental political and constitutional reforms. And it will require sketching a blueprint for our politics and an agenda for structural political reform.

I. ADJUDICATING DEMOCRACY

Political scientists Steven Levitsky and Lucan Way recently issued a warning in *Foreign Affairs* magazine: "The country's vaunted constitutional checks are failing."[43] Levitsky and Way are specifically concerned by the actions of the second Trump Administration. President Trump, they say, "violated the cardinal rule of democracy when he attempted to overturn the results of an election and block a peaceful transfer of power," yet neither faced legal sanctions nor was punished at the polls for those transgressions.[44] Levitsky and Way fault Congress for failing to hold Trump accountable, and castigate the Court for providing Trump with broad immunity via its decision in *Trump v. United States*.[45] And they caution that American democracy will break down during the second Trump administration, entering a period of "competitive authoritarianism"—a regime in which parties continue to compete in regular elections, but the incumbent party deploys the "machinery of government to attack opponents and co-opt critics," and otherwise abuses its power to skew "the playing field against the opposition."[46]

The actions of the second Trump Administration undoubtedly pose challenges to the American constitutional order—and largely do so by design. Commentators have thus described the Administration's early strategy as "shock and awe" or "flood the zone."[47] President Trump has not just "enacted his agenda at breakneck speed as part of an intentional plan to knock his opponents off balance and dilute

41. Though not quite addressing and anticipating these particular questions, Dean Heather Gerken and Professor Michael Kang sounded an early alarm in the same register as this Article. *See* Heather K. Gerken & Michael S. Kang, *The Institutional Turn in Election Law Scholarship*, *in* RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS: RECURRING PUZZLES IN AMERICAN DEMOCRACY 86, 89 (Guy-Uriel E. Charles, Heather K. Gerken & Michael S. Kang eds., 2011) ("Our primary complaint . . . is that election scholars, unsurprisingly, continue to look to the courts for structural solutions.").

42. One of us made a variant of this argument more than twenty years ago. *See* Luis Fuentes-Rohwer, *Doing Our Politics in Court: Gerrymandering, "Fair Representation" and an Exegesis into the Judicial Role*, 78 NOTRE DAME L. REV. 527, 531–32 (2003).

43. Steven Levitsky & Lucan A. Way, *The Path to American Authoritarianism: What Comes After Democratic Breakdown*, FOREIGN AFFS. (Feb. 11, 2025), https://www.foreignaffairs.com/united-states/path-american-authoritarianism-trump.

44. *Id.* at 4.

45. *Id.*; 603 U.S. 593 (2024).

46. Levitsky & Way, *supra* note 43, at 5.

47. Luke Broadwater, *Trump's 'Flood the Zone' Strategy Leaves Opponents Gasping in Outrage*, N.Y. TIMES (Jan. 28, 2025), https://www.nytimes.com/2025/01/28/us/politics/trump-policy-blitz.html; Tina Reed, *Trump's Shock and Awe Tests Americans' Response to Chaos*, AXIOS (Feb. 10, 2025), https://www.axios.com/2025/02/10/trumps-stress-mental-health-americans.

their response,"[48] but also has worked to "disrupt the establishment and bust norms."[49]

The second Trump presidency has also laid claim to an (arguably) unprecedented concentration of executive power. President Trump has, for instance, attempted to single-handedly redefine American citizenship through his birthright citizenship executive order—an action that is contrary to Supreme Court precedent, in conflict with numerous statutes, and in tension with the great weight of the relevant scholarship.[50] The President has claimed the authority to refuse to spend funds allocated by Congress.[51] Relying on the unitary executive theory, he signed an executive order purporting to bring independent agencies under his control.[52] He created an entity ostensibly to reduce government waste—the Department of Government Efficiency (DOGE)—that was, by all accounts, functionally run by Elon Musk; at best, however, Musk's role was legally uncertain, as is the statutory authority for DOGE.[53] The President has targeted public and private universities, threatening to cut off their funding unless they adopt policies prescribed by the Administration.[54] The President has attacked law firms and lawyers he perceives as his political enemies.[55] The President has threatened to acquire Greenland and annex Canada.[56] And he has declared void some of the pardons granted by the previous Administration.[57] In all, the second Trump Administration has issued more executive orders than any other administration in

48. *See* Broadwater, *supra* note 47.

49. *See* Reed, *supra* note 47.

50. *See* Adam Cox, Pamela Karlan, Marty Lederman, Trevor Morrison & Cristina Rodríguez, *The Fundamental Flaws in the Barnett/Wurman Defense of Trump's Birthright Citizenship Executive Order*, JUST SEC. (Feb. 19, 2025), https://www.justsecurity.org/108070/fundamental-flaws-barnett-wurman-birthright-citizenship [https://perma.cc/8ZJ5-JPFA]. Even the few scholars who dissent from the orthodox view on birthright citizenship argue that Congress, not a president, has the power to deny United States citizenship to children who were born in the United States to parents who were unlawfully present in the United States. *See* Peter H. Schuck & Rogers M. Smith, *The Question of Birthright Citizenshi*p, NAT'L AFFS. (2018), https://www.nationalaffairs.com/publications/detail/the-question-of-birthright-citizenship [https://perma.cc/3F45-XCD9]. And to our knowledge, no scholar has argued that a president can deny birthright citizenship to children born in the United States to parents who are lawfully present in the United States.

51. *See* Memorandum from Matthew J. Vaeth, Off. of Mgmt. & Budget, Exec. Off. of the President, on Temporary Pause of Agency Grant, Loan, and Other Financial Assistance Programs to the Heads of Exec. Dep'ts & Agencies (2025).

52. *See* Exec. Order No. 14215, 90 Fed. Reg. 10447 (Feb. 18, 2025).

53. *See* Kate Shaw, *There Is No Musk Exception in the Constitution*, N.Y. TIMES (Mar. 4, 2025), https://www.nytimes.com/2025/03/04/opinion/elon-musk-trump-constitution.html.

54. *See, e.g.*, Alan Blinder, *How Universities Are Responding to Trump*, N.Y. TIMES (Feb. 5, 2026), https://www.nytimes.com/article/trump-university-college.html.

55. *See* Devlin Barrett, *Trump Ramps Up Attacks on Law Firms with Order Targeting Perkins Coie*, N.Y. TIMES (Mar. 6, 2025), https://www.nytimes.com/2025/03/06/us/politics/trump-perkins-coie.html.

56. *See* Michael Crowley & Maggie Haberman, *Inside Trump's Plan to 'Get' Greenland: Persuasion, Not Invasion*, N.Y. TIMES (Apr. 10, 2025), https://www.nytimes.com/2025/04/10/us/politics/trump-greenland-denmark.html.

57. *See* Shawn McCreesh, *Trump Says Biden's Pardons Are 'Void' and 'Vacant' Because of Autopen*, N.Y. TIMES (Mar. 17, 2025), https://www.nytimes.com/2025/03/17/us/autopen-pardons-biden-trump.html.

a comparable time period, in what some have called a "unilateral[] attempt[] to undo the federal structure Congress has built."[58]

The country's intellectual elites are thus debating whether the country is in the midst of a constitutional crisis. Indeed, more than 950 law professors have warned that American democracy is in constitutional crisis, contending that the cumulative effect of the Administration's actions threatens to rewrite the constitutional order.[59] At base, the Administration's opponents resist this revolution because they view it as antidemocratic.[60] And predictably, those objecting to the Administration's actions have taken their case to the courts. Over 200 lawsuits were filed against the Trump Administration within the Administration's first 100 days.[61]

For the Administration's opponents, courts are the first line against authoritarianism. These disputes are a referendum, not on the specific policies of the second Trump Administration, but on whether the Administration, as an institution, is antidemocratic. Though these cases all raise specific legal questions—such as whether the birthright citizenship executive order is unconstitutional under the Citizenship Clause—fundamentally and collectively, litigants are turning to courts and asking judges to save democracy from what they perceive as the Trump administration's antidemocratic assaults.[62]

This is a different type of dispute than we usually see in the domain of law and democracy. These disputes are functionally, though not nominally, asking the courts and the Court to take a side in a fight between those who perceive themselves as defenders of liberalism—and the "rule of law"—and those they perceive as illiberal. The Court and the courts have always been (and remain) essential players in law and democracy. Litigation about democracy and antidemocracy, however, forces courts to see their adjudicative role differently. In the Court's traditional law and democracy cases, the Court assessed the systems and policies that made representative democracy possible.[63] The Court might rule that one set

58. Ezra Klein, *The Breaking of the Constitutional Order*, N.Y. TIMES (Feb. 5, 2025), https://www.nytimes.com/2025/02/05/opinion/ezra-klein-podcast-yuval-levin.html.

59. *See* Kent Greenfield, *"We Believe We Are in a Constitutional Crisis": Law Professors and Law Teachers Stand Against Administration's Illegal and Unconstitutional Actions*, AM. CONST. SOC'Y (Feb. 26, 2025), https://www.acslaw.org/inbrief/we-believe-we-are-in-a-constitutional-crisis-law-professors-and-law-teachers-stand-against-administrations-illegal-and-unconstitutional-actions [https://perma.cc/F7JA-MGFP].

60. *Id.*

61. *See* Jack Queen, *More than 200 Lawsuits and Many Judicial Setbacks in Trump's First 100 Days*, REUTERS (Apr. 29, 2025, at 13:50 ET), https://www.reuters.com/world/us/more-than-200-lawsuits-many-judicial-setbacks-trumps-first-100-days-2025-04-29.

62. See, for example, *Trump v. CASA, Inc.*, 606 U.S. 831 (2025), the birthright citizenship case.

63. One exemplar of this classic category of case would be the Court's ballot-access cases, in which the Court has reviewed laws dictating qualifications to appear on the state's ballot. *See, e.g.*, Williams v. Rhodes, 393 U.S. 23 (1968); Moore v. Ogilvie, 394 U.S. 814, 814 (1969); Bullock v. Carter, 405 U.S. 134 (1972); *cf. also* Nader v. Keith, 385 F.3d 729, 731 (7th Cir. 2004) (Posner, J.). In these cases, the Court has generally "attempted to strike a balance between the rights of candidates and voters to 'associate for the advancement of political beliefs' and the interests of the state in 'protecting the integrity of the electoral system.'" Robert Yablon, Comment, *Validation Procedures and the Burden of Ballot Access Regulations*, 115 YALE L.J. 1833, 1836 (2006).

of practices is inconsistent with representative democracy.[64] The Court might also, if less frequently, declare that certain political conduct falls beyond the permissible bounds of democratic practice.[65]

But since it entered the political thicket in the late 1960s, the Court has not reached beyond the legal question presented—whether a particular political practice is consistent with our commitment to republican self-governance—to decide a more fundamental question: whether a President is a would-be authoritarian or whether a political party is no longer committed to liberal democracy. Litigants are now asking courts to perform that unique task—and to resolve their irreconcilable *partisan* and ideological understandings of democracy. In these cases, unlike prior election law cases, litigants are placing the Court in a posture where it cannot do anything that will be viewed as supportive of democracy. No matter what the Court does, it will be viewed as favoring one party over the other and one party's claim to the democracy mantle over the other party's claim. The losing party will see the Court as aiding their opponent's efforts to erode democracy.[66]

As discussed in this Part, we are skeptical that courts are equipped to play this new role. Numerous institutional limitations make courts ineffective forums for resolving fundamental conflicts between the major parties over the polity's commitment to democracy. Fundamentally, courts cannot resolve partisan democracy disputes. As an initial matter, we do not have a consensus on the underlying cause or causes of our polity's political and partisan fissures, so no institution—including the judiciary—is equipped to address those causes. Moreover, whatever the causes may be, courts cannot make up for the structural and institutional limitations of our politics. Further, courts are subject to ideological and partisan polarization.[67] Addressing election law's insufficiencies will require significant political and constitutional reform, after which courts can be expected to perform their usual role.

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64. For instance, in its malapportionment cases (discussed more extensively below), the Court announced its "one man, one vote" principle, deciding that large-scale malapportionment of electoral districts was not permissible. *See* Reynolds v. Sims, 377 U.S. 533, 558 (1964).

65. As one prominent example, the Court disallowed political parties from conducting white-only primaries. *See* Smith v. Allwright, 321 U.S. 649, 658, 666 (1944).

66. We do not mean, merely, that one party's choices are democracy-eroding, are somewhat less representative, or embody a less-preferred way of enacting an electoral system. For example, one could argue that using single-choice, rather than ranked-choice, voting systems is "antidemocratic" because it may make voting results less representative. *See* Nathan Atkinson, Edward Foley & Scott C. Ganz, *Beyond the Spoiler Effect: Can Ranked-Choice Voting Solve the Problem of Political Polarization?*, 2024 U. ILL. L. REV. 1655, 1678 (2024). But that kind of dispute over the policies and practices of administering democracy differs in crucial ways from the kind of "antidemocracy" that comes from, for example, attempting to steal an election. When we describe that one party is behaving "antidemocratically" (or that one party is accusing the other of "antidemocratic" behavior), we mean that one party is posing a genuine threat to democracy's continuation in that it is no longer committed to the enduring practice of representative democracy.

67. *See, e.g.*, Richard L. Hasen, *Polarization and the Judiciary*, 22 ANN. REV. POL. SCI. 261, 262 (2019).

For the most part, scholars, litigants, and observers have yet to account for this new kind of partisan adjudication. This Part outlines the evidence that more and more partisan democracy cases lurk on the horizon—and that such cases pose unacknowledged dangers to both courts and democracy. It first details this new case category by drawing on an early and paradigmatic example: *Trump v. Anderson*.[68] It then explains where these conflicts have already appeared. While few cases fit into this emergent model thus far, in light of the litigation generated by the second Trump Administration, we contend that more such cases are likely to come.

A. *TRUMP V. ANDERSON* AND PARTISAN DEMOCRATIC ADJUDICATION

To understand how partisan adjudication of democracy functions in practice, consider *Trump v. Anderson*, which, as we will explain, is a paradigmatic example of this new form of election law dispute. *Anderson* reflects a unique interaction between partisan conflict and fundamental disagreements about democracy. In these new partisan adjudications, courts are asked to both resolve partisan claims that the other party is the harbinger of an authoritarian future and to resolve partisan conflict over preferred electoral policies.

Ostensibly, *Anderson* was about whether a state could exclude a candidate for President from its primary ballot, pursuant to Section 3 of the Fourteenth Amendment.[69] Section 3 provides that "No person shall . . . hold any office . . . under the United States, or under any State, who, having previously taken an oath . . . to support the Constitution of the United States, shall have engaged in insurrection . . . ."[70] Colorado voters sued the Colorado Secretary of State in state court seeking an order to remove President Trump from the state's Republican primary ballots.[71] They argued that President Trump had engaged in "insurrection" on January 6th and was therefore ineligible to hold the office of President under Section 3.[72] Ultimately, the Colorado Supreme Court agreed and ordered the Secretary of State to exclude President Trump from the ballot.[73]

Anderson was remarkable for many reasons. Given that Section 3 was rarely litigated, the case posed a litany of novel legal questions.[74] What did the term

68. 601 U.S. 100 (2024) (per curiam).

69. The question presented, as framed by former President Trump is his briefing to the Court, was whether "the Colorado Supreme Court err[ed] in ordering President Trump excluded from the 2024 presidential primary ballot," after holding that he was "disqualified from holding the office of President because he 'engaged in insurrection.'" Brief for the Petitioner at 1, Trump v. Anderson, 601 U.S. 100 (2024) (No. 23-719).

70. U.S. CONST. amend. XIV, § 3.

71. Anderson v. Griswold, 543 P.3d 283, 296 (Colo. 2023) (per curiam), *overruled by* Trump v. Anderson, 601 U.S. 100 (2024).

72. *Id.*

73. *Id.* at 342.

74. *See* Hasen, *supra* note 36, at 1713.

"insurrection" mean?[75] Is the presidency covered by the "any office" language of Section 3?[76] Is Section 3 self-executing, or does it require enabling legislation? Was Section 3 a historically contingent constitutional provision meant to apply to a particular time and circumstance? A furious interpretive debate soon ignited amongst legal scholars in traditional journal articles[77] and on blogs.[78]

However important these classic legal interpretive questions were, especially to lawyers and academics, the case also presented another, more urgent set of political questions: Did preserving American democracy require President Trump's exclusion because he had engaged in insurrectionist and authoritarian behavior? Or did preserving American democracy compel a rejection of the attempt to exclude President Trump from office because it represented an attempt to interfere with voters' will and punish a successful political rival?[79]

These questions about democracy and antidemocracy were not inconspicuous or subtle. Such arguments were explicitly leveled in the briefing. In the very first paragraph of the brief filed by President Trump, his lawyers declared that the litigation interfered with the "'fundamental principle of our representative democracy' . . . that . . . 'the people should choose whom they please to govern them.'"[80] The brief further warned that a decision in the respondents' favor would "unleash chaos and bedlam."[81] The respondents retorted in kind, arguing that "Trump's position is less legal than it is political," before alleging that the only "bedlam" the nation has witnessed was "unleashed when [President Trump] was *on* the ballot and lost."[82] The stakes were clear, then, to anyone who glanced at the briefs. The litigation was indeed "political" and partisan as much as it was legal, and both sides warned of crushing consequences for democracy if the other side was to prevail.

As the briefing suggests, the conflict at the heart of *Trump v. Anderson* merged a partisan dispute and a dispute about our liberal constitutional republic—the

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75. *See* Brief on the Merits for Anderson Respondents at i, Trump v. Anderson, 601 U.S. 100 (2024) (No. 23-939) (asking whether President Trump's "conduct amount[ed] to 'engag[ing] in insurrection' for purposes of Section 3").

76. *See id.* (asking whether "Section 3 appl[ies] to insurrectionist former Presidents").

77. *See generally* William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. PA. L. REV. 605 (2024).

78. *See, e.g.*, David Lat, *When It Comes to Donald Trump, the Supreme Court Has One Job*, BLOOMBERG L.: U.S. L. WEEK (Jan. 3, 2024, at 04:00 ET), https://news.bloomberglaw.com/us-law-week/when-it-comes-to-donald-trump-the-supreme-court-has-one-job.

79. One discussion and framing of these underlying political stakes came in *The New York Times*, which in December 2023 described the case as "pit[ting] one fundamental value against another: giving voters in a democracy the right to pick their leaders versus ensuring that no one is above the law." *See* Charlie Savage, *Principles at Stake in Push to Disqualify Trump: Will of Voters and Rule of Law*, N.Y. TIMES (Dec. 22, 2023), https://www.nytimes.com/2023/12/22/us/politics/trump-ballot-colorado-supreme-court.html.

80. Brief for the Petitioner at 1, Trump v. Anderson, 601 U.S. 100 (2024) (No. 23-939) (quoting U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 783 (1995)).

81. *Id.* at 1–2.

82. *See* Brief on the Merits for Anderson Respondents at 2, Trump v. Anderson, 601 U.S. 100 (2024) (No. 23-939).

unique nexus with which this Article is centrally concerned. The partisan divisions were easy to identify, as the two sides divided along roughly partisan lines. Democratic officials from Colorado and liberal interest groups lined up behind the attempted exclusion of Trump from the ballot, while Republican officials and conservative interest groups objected, charging interference with democracy.[83] Voters followed, lining up according to their partisan identity. For example, a majority of Democratic voters agreed that President Trump contributed to the insurrection on January 6th and deserved to be disqualified, while more than three-quarters of Republicans believed the Court should keep President Trump on the ballot.[84] Each party's political fortunes also tracked their respective positions. Disqualifying Trump, the leading Republican candidate at the time, clearly benefited Democrats' chances at holding the White House in 2024. By contrast, keeping the former President on the ballot advantaged Republicans.

Not only did the case involve a partisan dispute, but that partisan dispute centered on a conflict over the nature of democracy. This was not a dispute about policy. It was not even a dispute about electoral practice. Nor was it even a form of jostling, designed to gain partisan advantage. Instead, each side accused the other of engaging in behavior fundamentally incompatible with what was presumed to be a shared ethos of liberal constitutional self-government. Each side accused the other of breaching the constitutional, political, and moral contract.

From the perspective of most Democrats, the leader of the Republican Party, a would-be authoritarian, rejected the results of a free and fair election and attempted a coup to prevent a duly elected government from taking office.[85] If Trump were truly a protoauthoritarian and had violated the Constitution, as many of those aligned with the Colorado voters who filed the case contended,[86] safeguarding democracy necessarily required preventing his return to office. Bringing a lawsuit to do so would not itself be antidemocratic and might even be democratically *required* to save democracy.[87]

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83. *See* Zach Montellaro, *Mitch McConnell, Capitol Police Officers and Bill Barr: Who Weighed in Ahead of the Arguments*, POLITICO (Feb. 7, 2024, at 18:41 ET), https://www.politico.com/news/2024/02/07/trump-supreme-court-ballot-amicus-briefs-00140259.

84. Gary Langer, *Americans Divided on How SCOTUS Should Handle Trump Ballot Access: Poll*, ABC NEWS (Jan. 12, 2024, at 06:02 ET), https://abcnews.go.com/US/americans-divided-scotus-handle-trump-ballot-access-poll/story?id=106300304 [https://perma.cc/E78J-VYBG]. Polling also suggests that most Republicans do not believe Trump bore responsibility for the insurrection on January 6th. *See* Sarah Fortinsky, *Fewer Republicans Say Trump Bears Responsibility for Jan. 6: Poll*, THE HILL (Jan. 2, 2024, at 08:25 ET), https://thehill.com/homenews/campaign/4384573-fewer-republicans-trump-responsible-jan-6-poll [https://perma.cc/F7L9-WQEZ].

85. *See* Adam Serwer, *Disqualifying Trump Is Not Antidemocratic*, THE ATLANTIC (Jan. 10, 2024), https://www.theatlantic.com/ideas/archive/2024/01/constitution-democracy-trump-colorado-ruling/677074.

86. *See id.*

87. *Cf.* Michael Sozan & Devon Ombres, *Supreme Court Should Find That Donald Trump Is Disqualified from Holding Future Public Office*, CTR. FOR AM. PROGRESS ACTION (Feb. 1, 2024), https://www.americanprogressaction.org/article/supreme-court-should-find-that-donald-trump-is-disqualified-from-holding-future-public-office [https://perma.cc/X4SY-DGSE] (arguing that a contrary decision

On the other hand, from the perspective of most Republicans, the Democrats were taking a page from the authoritarian playbook by trying to prevent their political rival from running for office, keeping him off the ballot, and subverting a democratic election before it had occurred.[88] If President Trump were a candidate like any other, then falsely accusing him of authoritarian behavior (or exaggerating the extent of his illiberal tendencies) to prevent him from appearing on the ballot would itself be an interference with representative democracy.[89]

Each party thus offered its own definition of antidemocracy. And each claimed to be the true standard bearer of democracy, while portraying the other side as an avatar of antidemocracy. The parties' different understandings of democracy were also, at base, mutually exclusive. Only one party's views could prevail; they could not be reconciled. As such, deciding between them required choosing between fundamentally opposed understandings of democracy and antidemocracy. Thus, *Trump v. Anderson* presented to the Court an irreconcilable *partisan* dispute over democracy—even if that dispute was adorned with the frills of a traditional constitutional interpretive debate.

The combination of partisan and democratic conflict in *Anderson* placed the Court in a potentially untenable adjudicative posture. By deciding the case, the Court risked partially stamping one party or the other as antidemocratic. Because both sides labeled the other as illiberal and implied that their victory was necessary to preserve democracy, in siding with either litigant, the Court could approve of only one party's view of the line between democracy and antidemocracy.

On its face, the Court's decision seemed to avoid that outcome. The Court issued a 9–0 opinion that, on the core question, did not split along ideological lines.[90] All agreed that Trump could remain on the ballot.[91] The opinion, per curiam, held that Congress, not the states, was responsible for enforcing Section 3.[92] The Court also avoided perhaps the most democratically risky decision it could have reached; it did not decide whether President Trump engaged in insurrection.[93]

Although avoiding the most worrisome outcomes, the *Anderson* opinion could not entirely skirt the adjudicative tension inherent in partisan-democracy disputes

"could shake the United States' democratic foundation in the rule of law and set a dangerous precedent").

88. For a compilation of examples of Republicans expressing this sentiment, see Ethan Collier, Nathalie Mathes & Payton Armstrong, *Conservative Media Falsely Attack the Colorado Supreme Court Ruling as "Undemocratic" and "The Ultimate Election Interference*," MEDIA MATTERS FOR AM. (Dec. 20, 2023, at 16:19 ET), https://www.mediamatters.org/fox-news/conservative-media-falsely-attack-colorado-supreme-court-ruling-undemocratic-and-ultimate [https://perma.cc/8GRC-6XTD].

89. *See* Ross Douthat, *The Antidemocratic Quest to Save Democracy from Trump*, N.Y. TIMES (Dec. 23, 2023), https://www.nytimes.com/2023/12/23/opinion/colorado-ruling-trump.html.

90. *See* Amy Howe, *Supreme Court Rules States Cannot Remove Trump from Ballot for Insurrection*, SCOTUSBLOG (Mar. 4, 2024), https://www.scotusblog.com/2024/03/supreme-court-rules-states-cannot-remove-trump-from-ballot-for-insurrection [https://perma.cc/3G9G-E4PX].

91. *See* Trump v. Anderson, 601 U.S. 100, 117 (2024) (per curiam).

92. *Id.*

93. *See* Howe, *supra* note 90.

of this type. Though the per curiam opinion read as a standard doctrinal opinion, there were clear tensions among the Justices and between various factions of the Court.[94] Justice Sotomayor's concurrence accused the majority opinion of departing from the most basic of *Marbury*'s principles by "deciding not just this case, but challenges that might arise in the future."[95] She would have decided the case merely by determining that permitting Colorado to disqualify President Trump would violate principles of federalism by "creat[ing] a chaotic state-by-state patchwork" and would not have expounded on the circumstances under which a Section 3 disqualification could occur—an issue the majority reached.[96] Justice Barrett wrote separately, seemingly only to accuse the liberal Justices' concurrence of wrongly "amplifying disagreement with stridency" in a moment where unity was required.[97]

Further underscoring the difficulty of adjudicating partisan-democracy cases, the per curiam opinion attempted to paper over those tensions by stressing that "[a]ll nine Members of the Court agree with [the] result."[98] Additionally, the opinion oddly implied that its reasoning was not entirely doctrinal; its reasons for concluding that states may not disqualify a presidential candidate from the ballot were not "the only reasons," but they "are important ones."[99] Further, no single reason was determinative. It was "the combination of all the reasons set forth in this opinion . . . that resolve[d] this case."[100] This fractured approach to resolving the case potentially reflects the Court's discomfort with acting as an arbiter of democracy.

The tension in the opinions bled out into public interpretations of the case—perceptions necessarily tied to the Court's institutional legitimacy and long-term efficacy. The case was, for Democrats, viewed as a victory for Trump and the Republicans' vision of democracy. For instance, liberal media sites like *Vox* characterized the opinion as a "major victory" being "handed" to President Trump, protecting him from any future efforts at disqualification.[101] President Trump himself said that he was "very honored by a nine-to-nothing vote."[102]

Even more centrally, for many on the left, the decision was not viewed as merely another partisan opinion aligned with conservative policy preferences (an accusation that Democrats also leveled, for example, when *Dobbs v. Jackson*

94. *See, e.g.*, Mark Joseph Stern, *The Supreme Court's "Unanimous" Trump Ballot Ruling is Actually a 5–4 Disaster*, SLATE (Mar. 4, 2024, at 11:56 ET), https://slate.com/news-and-politics/2024/03/supreme-court-trump-colorado-ballot-disaster.html [https://perma.cc/BB2J-9RBY].

95. *Anderson*, 601 U.S. at 118 (Sotomayor, J., concurring).

96. *Id.* at 118–119.

97. *Id.* at 118 (Barrett, J., concurring).

98. *Id.* at 117.

99. *Id.*

100. *Id.*

101. *See* Ian Millhiser, *The Supreme Court Just Crushed Any Hope That Trump Could Be Removed from the Ballot*, VOX (Mar. 4, 2024, at 11:10 ET), https://www.vox.com/scotus/2024/3/4/24090163/supreme-court-donald-trump-anderson-ballot-disqualification-fourteenth-amendment.

102. Adam Liptak, *Trump Prevails in Supreme Court Challenge to His Eligibility*, N.Y. TIMES (Mar. 4, 2024), https://www.nytimes.com/2024/03/04/us/politics/trump-supreme-court-colorado-ballot.html.

Women's Health Organization[103] was decided).[104] This was something more. The decision confirmed that the Court could not police efforts to erode democracy. Indeed, for some, the Court was not merely an institution captured by conservative ideology. The Court was actually becoming an *antidemocratic* institution. For example, on the day the decision came down, *The Atlantic* published a piece entitled "The Supreme Court Is Not Up to the Challenge," which opened by declaring that "[t]he United States is in a moment of democratic crisis, and the Supreme Court has no idea what to do."[105] Other commentators similarly wrote that the Court had turned the Constitution "upside down,"[106] and charged that the Court's decision was wholly unrelated to the law.[107] The decision had the opposite effect on right-wing commentators, who saw *Anderson* as an affirmation of the Court's ability to successfully supervise democratic politics.[108]

Certainly, as decided, the case predictably generated partisan skepticism about the Court's ability to behave as a democratic institution. More concerning, though, is that it is unclear whether *any* way of resolving the case could have entirely avoided that problem. If the Court had made the opposite decision—whether unanimously or along divided lines—then it seems probable that President Trump and Republicans would have characterized the Court as illiberal. If the Court had agreed with President Trump but decided the case unanimously on the narrower grounds suggested by Justice Sotomayor, perhaps the reaction would have been more muted. With the same bottom-line political outcome, however, it is not clear that many Democrats would have felt heartened simply by better reasoning. The problem with *Anderson* may derive from the very nature of the political dispute and the question posed, not from anything within the particular opinions of any given Justice.

Perhaps, then, the Court should have avoided deciding *Anderson* altogether. But that option, too, was largely unavailable. The Court could not have easily punted on the case, although some commentators laid out potential "off-ramps."[109] Refusing to hear the case and resolve the core issue would have left

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103. 597 U.S. 215 (2022).

104. *See, e.g.*, Andrew Solender, *Scoop: House Dems Try to Make Post*-Dobbs *Comments Haunt GOP*, AXIOS (June 23, 2024), https://www.axios.com/2024/06/23/house-democrats-republicans-roe-v-wade-abortion.

105. Quinta Jurecic, *The Supreme Court Is Not Up to the Challenge*, THE ATLANTIC (Mar. 4, 2024), https://www.theatlantic.com/ideas/archive/2024/03/trump-v-anderson-unanimous-decision/677635.

106. Sean Wilentz, *The Constitution Turned Upside Down*, N.Y. REV. OF BOOKS (Mar. 6, 2024), https://www.nybooks.com/online/2024/03/06/the-constitution-turned-upside-down [https://perma.cc/6CX3-3BHG].

107. George T. Conway III, *The Court's Colorado Decision Wasn't About the Law*, THE ATLANTIC (Mar. 5, 2024), https://www.theatlantic.com/ideas/archive/2024/03/supreme-court-colorado-opinion-trump-disqualify/677646.

108. *See* Carrie Campbell Severino, *Unanimity in the Trump v. Anderson Judgment Refutes the Court's Critics*, NAT'L REV. (Mar. 4, 2024, at 18:07 ET), https://www.nationalreview.com/bench-memos/unanimity-in-the-trump-v-anderson-judgment-refutes-the-courts-critics.

109. *See* Marty Lederman, *A User's Guide to* Trump v. Anderson*, Part Six: The Two "Off-Ramp" Arguments Based Upon Griffin's Case and Sea Clammers That Would Allow the Supreme Court to Avoid Deciding Whether Trump Is Eligible to be President*, BALKINIZATION (Feb. 6, 2024), https://

President Trump disqualified on ballots in some states but not others. The Court likely viewed that situation as untenable, creating a level of instability our democracy could not easily tolerate. *Anderson* was both perilous and, possibly, unavoidable. *Anderson* thus suggests that, when confronted with partisan-democratic adjudication, the Court will have a difficult time issuing a decision that will be accepted as democratically neutral.

In sum, *Anderson* centered on one partisan dispute over democracy—partisan disagreement over the risk to democracy posed by President Trump's behavior on January 6th (and the proper way of addressing such actions within a stable democracy). That disagreement emerged from a broader context. As will be discussed below in Part IV, for years before *Anderson*, advocates have waged a broader *political* war centered on partisan-democratic disputes, with each major party accusing the other party of posing a threat to democracy. In *Anderson*, those advocates turned to the courts, asking them to use the tools of election law to decide, essentially, which party was behaving antidemocratically. As *Anderson* demonstrates, however, by adjudicating cases that combine partisan conflict with conflict over democracy, the Court is placed in a no-win situation, where it must necessarily vouch for one party's claim that it is defending democracy against the other party's antidemocratic tendencies.

B. THE ASCENDANCE OF PARTISAN DEMOCRACY DISPUTES

Cases like *Trump v. Anderson*[110] represent a categorical shift in election litigation. Rather than a one-off case concerning a niche legal question,[111] *Anderson* might instead be understood as representing a new paradigm in election law—one in which partisan litigants now use courts to renegotiate the framework of democracy itself. It is a leading indicator that partisan political litigants will increasingly turn to the courts not to gain partisan advantage—nothing unusual about that—but to attempt to renegotiate the foundational framework of our constitutional republic.

But *Anderson* is not sui generis. As this Section will illustrate, other cases have raised similar issues—and suggest that more such cases may be on the horizon.

To start, in *Trump v. United States*,[112] the Court again confronted a set of partisan-democratic dilemmas parallel to those it faced in *Anderson*. *Trump v. United States* arose from the federal indictment sought by Jack Smith, the Special

balkin.blogspot.com/2024/02/a-users-guide-to-trump-v-anderson-part_6.html [https://perma.cc/UQS5-KA77].

110. 601 U.S. 100 (2024).

111. *See, e.g.*, Derek Muller, *Is the Internal Dispute in* Trump v. Anderson *a Tempest in a Teapot?*, ELECTION L. BLOG (Mar. 6, 2024, at 06:39 ET), https://electionlawblog.org/?p=141778 [https://perma.cc/UB87-GELR]; Ilya Somin, *What the Supreme Court Got Wrong in the Trump Section 3 Case*, LAWFARE (Mar. 8, 2024, at 14:22 ET), https://www.lawfaremedia.org/article/what-the-supreme-court-got-wrong-in-the-trump-section-3-case [https://perma.cc/7FB5-4BUM]; Michael C. Dorf, *Nine Justices in Search of an Excuse to Nullify Section 3 of the 14th Amendment*, DORF ON L. (Mar. 5, 2024), https://www.dorfonlaw.org/2024/03/nine-justices-in-search-of-excuse-to.html [https://perma.cc/S8B3-XQWC].

112. 603 U.S. 593 (2024).

Counsel appointed by then-Attorney General Merrick Garland, to investigate President Trump's potential interference in the 2020 election.[113] President Trump contended that he had immunity from criminal prosecution for these actions taken during his time in office.[114]

The Court was again ostensibly asked to engage in a typical judicial function: interpreting prior precedent, constitutional text, and constitutional structure to determine the scope of presidential power. President Trump's attorneys relied on the separation of powers and the Executive Vesting Clause, amongst other legal hooks, to contend that the Court's prior decisions in cases such as *Nixon v. Fitzgerald*[115] should be extended to provide criminal immunity to the President for acts committed while in office.[116]

Once again, however, beneath the case's interpretive arguments lay another set of partisan, political arguments over democracy. President Trump and his Republican supporters contended that the criminal cases brought against him were antidemocratic.[117] This was lawfare; the ruling party was weaponizing its control over the levers of criminal enforcement to punish a political rival.[118] By contrast, Democratic officials contended that granting immunity was necessarily antidemocratic—converting the president into a king and undermining accountability.[119] As the case was framed, the Supreme Court was not merely deciding an issue with significant *partisan* consequences—although it certainly did have such consequences. Instead, both sides contended that a decision favoring the other party would undermine democracy. At least implicitly, the Court was once again asked to decide between competing and irreconcilable partisan claims about democracy.

Trump v. United States presented these questions in a different context than did *Trump v. Anderson* and also reflected a Court that could not maintain the same discipline that it did in *Anderson*. Unlike the unanimous result reached in *Anderson*, in *Trump v. United States*, the Court split 6–3 along partisan lines in determining that the President has absolute criminal immunity for official acts "core [to his] constitutional powers" and at least presumptive immunity for all

113. Indictment at 1, 45, United States v. Trump, 704 F.Supp.3d 196 (D.D.C. Aug. 11, 2023) (No. 23-257).

114. *Trump*, 603 U.S. at 599.

115. 457 U.S. 731 (1982).

116. *See* Brief of Petitioner at 3–4, Trump v. United States, 603 U.S. 593 (2024) (No. 23-939).

117. *See, e.g.*, Andrew Goudsward, Sarah N. Lynch & Jacqueline Thomsen, *Trump Pleads Not Guilty of Plotting to Overturn Election Loss*, REUTERS (Aug. 3, 2023, at 17:40 ET), https://www.reuters.com/legal/trump-appear-court-charges-that-he-tried-overturn-election-2023-08-03.

118. *See, e.g.*, Speaker Mike Johnson (@SpeakerJohnson), X (July 1, 2024, at 12:23 ET), https://x.com/SpeakerJohnson/status/1807812296003277302 [https://perma.cc/YKC2-5U6T] ("Today's ruling by the Court is a victory for former President Trump and all future presidents, and another defeat for President Biden's weaponized Department of Justice and Jack Smith.").

119. *See, e.g.*, Gillian Brassil, *With Supreme Court's Historic Trump Immunity Decision, How Did California Democrats React?*, SACRAMENTO BEE (July 2, 2024, at 18:27 ET), https://www.sacbee.com/news/politics-government/capitol-alert/article289569792.html [https://perma.cc/V39C-PZW9].

other "remaining official actions."[120] Though one might view *Trump v. United States* as a case about executive power or a criminal law case,[121] it is fundamentally one about law and democracy. The central question in the case—whether a president is immune for acts performed as President—arose in connection with a criminal case attempting to hold President Trump accountable for *election interference*.[122] Thus, many of the same features seen in *Trump v. Anderson* reappeared, even in this disparate context.

Here, too, the Court could not avoid the fundamental tension at the core of partisan-democracy cases. Chief Justice Roberts's majority opinion hinted at the broader stakes in the case: "This case poses a question of lasting significance."[123] As a result, the Court's "perspective must be more farsighted."[124] He repeatedly referred to the unprecedented nature of the litigation, writing, for instance, that "[t]his case is the first criminal prosecution in our Nation's history of a former President for actions taken during his Presidency."[125] For her own part, Justice Sotomayor dissented not with respect but "[w]ith fear for our democracy."[126]

In more categorically partisan terms than with *Anderson*, the decision has since been understood by Democrats as illiberal,[127] and by Republicans as affirming their view of democracy.[128] Liberal commentators have called the opinion a "blueprint for dictatorship,"[129] while Republican-elected officials have called it an affirmation of democracy and "win" for "the rule of law."[130] Such reflections

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

121. *Cf.* Jack Goldsmith, *Broad Reflections on* Trump v. United States, LAWFARE (July 2, 2024, at 18:53 ET), https://www.lawfaremedia.org/article/broad-reflections-on-trump-v.-united-states [https://perma.cc/B4JG-GV7E] (discussing the executive power issues at the core of the case).

122. *Trump*, 603 U.S. at 641.

123. *Id.*

124. *Id.* at 641–42.

125. *Id.* at 605.

126. *Id.* at 686 (Sotomayor, J., dissenting).

127. *See, e.g.*, Jeevna Sheth, Trump v. United States: *A Foundation for Authoritarian Actions an American President Can Now Commit with Impunity*, CTR. FOR AM. PROGRESS (Aug. 7, 2024), https://www.americanprogress.org/article/trump-v-united-states-a-foundation-for-authoritarian-actions-an-american-president-can-now-commit-with-impunity [https://perma.cc/BN6E-WZK8]; David Cole & Brett Max Kaufman, *Supreme Court Grants Trump, Future Presidents a Blank Check to Break the Law*, ACLU (July 3, 2024), https://www.aclu.org/news/civil-liberties/supreme-court-grants-trump-future-presidents-a-blank-check-to-break-the-law [https://perma.cc/2C2B-4BVU].

128. *See Reactions to Supreme Court Ruling on Trump Immunity Case*, US NEWS & WORLD REP. (July 1, 2024, at 11:56 ET), https://www.usnews.com/news/top-news/articles/2024-07-01/reactions-to-supreme-court-ruling-on-trump-immunity-case.

129. Ian Millhiser, *The Supreme Court's Disastrous Trump Immunity Decision, Explained*, VOX (July 1, 2024, at 13:10 ET), https://www.vox.com/scotus/358292/supreme-court-trump-immunity-dictatorship.

130. *See* Maggie Astor, *Reactions and Highlights of the Supreme Court Decision on Trump's Immunity: Republicans Responded to the Ruling with Triumph, and Democrats with Dismay*, N.Y. TIMES (July 1, 2024, at 13:07 ET), https://www.nytimes.com/live/2024/07/01/us/trump-immunity-supreme-court.

on the case (particularly from liberal commentators) have only cemented since President Trump retook the Oval Office.[131]

Trump v. Anderson and *Trump v. United States*—the two cases that have reached the Supreme Court thus far—are emblematic. They are not, however, the only evidence of a new category of partisan-democracy cases. Elsewhere, the Court has also narrowly avoided confronting conflicting partisan accounts of democracy. For example, in the wake of the 2020 election, President Trump's campaign brought more than sixty post-election lawsuits, most of which were dismissed, and none of which reached the Supreme Court.[132] Implicitly, at different stages of litigation and in various postures, courts were repeatedly asked to decide: Was an election stolen? Those lower-court decisions that reached the merits generally focused on narrow, technical legal issues superficially within those courts' wheelhouse. For instance, Judge Brett Ludwig of the Eastern District of Wisconsin determined that Wisconsin officials' issuance of election guidance did not significantly or materially depart from state statutes and did not violate President Trump's rights under the Electors Clause.[133] A significant portion of his opinion focused on the meaning of the word "manner."[134]

There was no doubt that these cases were important and consequential. They implicitly asked courts to resolve a partisan conflict over the validity of a national election. President Trump and many Republicans argued that the election had been stolen and that validating a fraudulent election would be a blow to democracy.[135] President Biden and his party insisted that the election was validly won and that efforts to undermine the election's validity constituted the true threat to democracy.[136]

These conflicting partisan accusations of antidemocracy not only appeared in the press, but also laced the arguments in the cases. For example, Judge Ludwig began his opinion by emphasizing that the case was "*extraordinary*."[137] Moreover, much of the evidence presented in these cases related to the central question of the elections' validity, making the stakes impossible to ignore. For instance, one Arizona court oversaw the two political parties' random sampling

131. *See, e.g.*, Adam Liptak, *Aftershocks of Supreme Court's Immunity Ruling Echo in New Trump Cases*, N.Y. TIMES (Mar. 10, 2025), https://www.nytimes.com/2025/03/10/us/politics/supreme-courts-immunity-ruling-echo.html.

132. *See Results of Lawsuits Regarding the 2020 Elections*, CAMPAIGN LEGAL CTR., https://campaignlegal.org/results-lawsuits-regarding-2020-elections [https://perma.cc/7UAV-7KSU] (last visited Mar. 5, 2026) (surveying post-election cases decided on the merits).

133. *See* Trump v. Wis. Elections Comm'n, 506 F. Supp. 3d 620, 636–38 (E.D. Wis. 2020), *aff'd*, 983 F.3d 919 (7th Cir. 2020).

134. *See id.* at 636–39.

135. *See* Tal Axelrod, *A Timeline of Donald Trump's Election Denial Claims, Which Republican Politicians Increasingly Embrace*, ABC NEWS (Sep. 8, 2022, at 05:03 ET), https://abcnews.go.com/Politics/timeline-donald-trumps-election-denial-claims-republican-politicians/story?id=8916840 8 [https://perma.cc/G5FL-S4U9].

136. *See, e.g.*, *Biden Attacks Trump as Threat to Democracy, Warns Against His Re-Election*, AL JAZEERA (Jan. 6, 2024), https://www.aljazeera.com/news/2024/1/6/biden-attacks-trump-as-threat-to-democracy-warns-against-his-re-election [https://perma.cc/B3A5-RCHY].

137. *Wis. Elections Comm'n*, 506 F. Supp. at 624.

of ballots for potential errors, and the court ultimately tabulated an estimated 99.45% accuracy rate.[138] Judges also implicitly assessed the validity of the claims when making determinations about potential sanctions to impose on litigants for bringing improper lawsuits.[139] Thus, in numerous courtrooms around the country, judges put the most fundamental of political disputes over antidemocracy through the court's factfinding process.

These cases and others[140] indicate that *Trump v. Anderson* and *Trump v. United States* may not be outliers but harbingers. The post-2020 presidential election litigation did not tax courts too much because the lawsuits by the Trump campaign were largely meritless. But we can easily imagine a context where the lawsuits are not patently frivolous or where the lower-court judges are much more susceptible to motivated reasoning or political opportunism. These cases were an early warning signal that there is something profoundly wrong with the foundations of our politics. As the cracks in the Court's various opinions in *Trump v. United States* caution, there is a sell-by date on the courts' ability to resolve the partisan conflicts over democracy that now rend our politics. It would behoove the field to better understand the current pathologies of democratic politics and solutions that are responsive to those pathologies. We will only be able to "do[] our politics in court"[141] for so long.

II. THE OLD PARADIGM

If election law has an article of faith, it is that courts—particularly the Supreme Court—have an exalted role as the guardian of democratic politics.[142] A central inquiry in the field is understanding and coming to terms with the expectation that the Court must "articulate a coherent vision of properly functioning politics."[143] Our politics have long centered the courts as a (and perhaps *the*) site for resolving electoral dysfunction. Election law as a field emerged to make sense of the Court's more muscular role in democratic politics.[144] Thus, it is unsurprising that advocates have turned to the courts to resolve trenchant partisan disputes and that courts have tried to accommodate those efforts.

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138. *See* Ward v. Jackson, No. CV-20-0343-AP/EL, 2020 WL 8617817, at *2 (Ariz. Dec. 8, 2020).

139. *Cf.* David Eggert, *Lawyers Allied with Trump Ordered to Pay $175K in Sanctions*, AP NEWS (Dec. 2, 2021, at 23:35 ET), https://apnews.com/article/donald-trump-joe-biden-michigan-detroit-election-2020-4fd2ba9b84e9d9a6bcddd51872ba3f97.

140. *See, e.g.*, US Dominion, Inc. v. Fox News Network, LLC, 293 A.3d 1002 (Del. Super. Ct. 2023); League of Women Voters of Kan. v. Schwab, 549 P.3d 363 (Kan. 2024); *cf.* Brnovich v. Democratic Nat'l Comm., 594 U.S. 647, 661–62, 690 (2021) (upholding Arizona election statutes prohibiting ballots from being cast in the wrong precinct and from giving mail-in ballots to third parties before they are submitted).

141. Fuentes-Rohwer, *supra* note 42, at 527.

142. *See infra* Section II.B.

143. SAMUEL ISSACHAROFF, PAMELA S. KARLAN, RICHARD H. PILDES, NATHANIEL PERSILY & FRANITA TOLSON, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 2 (6th ed. 2022).

144. *See infra* Section II.B.

Notwithstanding the initial skepticism of the Court's early moves in supervising democratic politics, even critics had to concede that the Court performed its task successfully.[145] Ever since, commentators have offered few objections to the Court's role as overseer of the political process.[146] The assumption—reasonable given the Court's track record—was that the Court possesses a particular institutional capacity to manage the excesses of democratic politics.

As we will suggest in this Part, however, the Court's success occurred in a particular political context. And it may have been as much a function of the political milieu that spawned the cases that formed its docket, rather than the result of any comparative institutional advantage. We will suggest that the emergence of partisan-democracy disputes places in doubt the long-accepted assumption that the Court is capable of successful political supervision.[147]

By way of further clarifying the partisan-democracy cases, this Part first provides a brief account of how the Court came to be viewed as democracy's guardian, describing the conditions under which the Court initially succeeded in adjudicating election law cases.[148] It next discusses two types of election law cases—ballot access and campaign finance—emphasizing how they differed meaningfully from partisan-democracy cases. Finally, to demonstrate how the Court's recent partisan-democracy cases depart from the traditional paradigms of the Court's election law jurisprudence, it considers the Court's adjudication of other cases that might appear more similar to this recent type of partisan-democracy adjudication. This novel litigation differs from the Court's earliest election law cases and other political cases the Court has decided. Critiques of judicial intervention, largely abandoned in the middle of the twentieth century because they were not resonant with the underlying political reality, may be worth reconsidering.

A. HOW WE EMBRACED JUDICIAL SUPERVISION

Though it might seem unimaginable today, for much of its history, the Supreme Court rarely decided—and largely refused to decide—cases that were overtly about the structure and content of representative democracy.[149] The Court did not break with that approach until 1962, when it decided *Baker v. Carr*,[150] the decision that seeded the Court's election law jurisprudence.[151] Despite longstanding skepticism over courts' competence to supervise democratic politics, in *Baker* and its progeny, the Court came to be seen as a democratic savior. Those cases, and their perceived success, helped to develop a foundational view: that

145. *See, e.g.*, Klarman, *supra* note 32, at 8.

146. *See infra* Section II.B.

147. This assumption has been more thoroughly questioned, of late, by constitutional law scholars. *See, e.g.*, Klarman, *supra* note 32, at 8.

148. *See infra* Section II.A.

149. *See* RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER V. CARR TO BUSH V. GORE* 1 (2003).

150. 369 U.S. 186 (1962).

151. *See* HASEN, *supra* note 149, at 2.

the Court both could and should intervene to prevent breakdowns in the systems of representative democracy.

For generations, the Court largely avoided intervention in electoral politics. That longstanding view was perhaps most famously articulated in the 1946 case of *Colegrove v. Green*.[152] There, the Court affirmed a lower court's order dismissing a complaint by three plaintiffs,[153] including Kenneth Colegrove, a Northwestern University political scientist.[154] Colegrove argued that Illinois's congressional districts were unconstitutionally malapportioned.[155] He sought to enjoin the State from holding elections using these electoral districts, arguing they contained significant population disparities between and among them.[156]

Writing for a plurality and announcing the judgment of the Court, Justice Frankfurter famously admonished the Court to stay away from such cases: "It is hostile to a democratic system to involve the judiciary in the politics of the people."[157] Justice Frankfurter offered a number of justifications to support his position of noninterference, but at base, his argument was that judicial supervision of democratic politics raised two fundamental problems.

The first he articulated explicitly. Deciding cases about the composition of voting districts would inextricably involve the Court in partisan politics, what he described as "party contests and party interests."[158] As Frankfurter put it elsewhere in the opinion: "Nothing is clearer than that this controversy concerns matters that bring courts into immediate and active relations with party contests."[159]

The second concern he articulated more implicitly. Frankfurter suggested that addressing the malapportionment might be "beyond [the Court's] competence."[160] The *Colegrove* petitioners argued that Illinois's congressional districts were so malapportioned that any election held under these districts would necessarily be unrepresentative of the preferences of the electorate.[161] Given that the state was unlikely to redraw the lines, Justice Frankfurter argued that the plaintiffs were functionally asking the Court to "remap the Illinois districts so as to bring them more in conformity with the standards of fairness for a representative system."[162] Such remapping, he implied, exceeded the Court's capacities.[163]

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152. 328 U.S. 549 (1946).

153. *See id.* at 550, 556.

154. *See Prof. Kenneth Colegrove Dies; Right-Wing Political Scientist*, N.Y. TIMES (Jan. 4, 1975), https://www.nytimes.com/1975/01/04/archives/prof-kenneth-colegrove-dies-rightwing-political-scientist-booklets.html.

155. *See* Colegrove v. Green, 64 F. Supp. 632, 633 (N.D. Ill. 1946), *aff'd*, 328 U.S. 549 (1946).

156. *See id.* at 632.

157. *Colegrove*, 328 U.S. at 553–54.

158. *Id.* at 554.

159. *Id.* at 553.

160. *Id.* at 552.

161. *See id.* at 550–51, 552. This was the reason they sought an injunction to prevent future elections under the current district configurations. *See* Colegrove v. Green, 64 F. Supp. 632, 632 (N.D. Ill. 1946), *aff'd*, 328 U.S. 549 (1946).

162. *Colegrove*, 328 U.S. at 553.

163. *Cf. id.* at 552.

These concerns led Frankfurter to his famed warning: "Courts ought not to enter this political thicket."[164] The Court's responsibility, Frankfurter explained, was to adjudicate individual disputes and constitutional rights.[165] Nothing in the Constitution provided the Court with a constitutional basis for deciding between competing views of how to organize representative democracy.[166] Indeed, to the extent that the Constitution spoke on the matter, it conferred authority to Congress and to the states, not to the courts.[167]

Frankfurter also warned that judicial intervention would produce dire consequences: If the Court weighed in on these questions, it would not only be perceived as meddling in the people's politics, which was bad enough, but it would also be viewed as a shill for one of the political parties.[168] The parties' respective positions on apportionment reflected their political strategy and understanding of how best to pursue their partisan advantages.[169] Adjudication would amount to picking a partisan winner and a partisan loser.[170]

For sixteen years, Frankfurter's views prevailed. In *Colegrove*'s wake, the Court repeatedly refused to reach the merits of apportionment challenges—or disputes about the structure of the political process and the composition of voting districts.[171] Between 1946 and 1962, it issued at least eleven per curiam opinions rejecting "one man, one vote" claims for lack of jurisdiction.[172]

The Court changed course and effectively reversed its *Colgrove* decision in 1962. The case was *Baker v. Carr*.[173] The plaintiffs in *Baker* challenged Tennessee's refusal, for sixty years, to reapportion its state legislature to reflect population growth and population shifts.[174] They also alleged that the prior apportionment did not follow the State's constitutionally required formula, "but instead arbitrarily and capriciously apportioned representatives in the Senate and House without reference . . . to any logical or reasonable formula whatever."[175] They argued that this failure denied them their right to equal protection of the laws in

164. *Id.* at 556.
165. *See id.*
166. *See id.*
167. *See id.*
168. *See id.* at 553–54.
169. *Cf. id.*
170. *Cf. id.* at 554.
171. *See, e.g.*, MacDougall v. Green, 335 U.S. 281, 282, 287 (1948) (per curiam) (affirming the district court's decision to deny an injunction against enforcement of an Illinois statute requiring that new political party nominees must be supported by a petition with 25,000 signatures by declining to exercise the Court's jurisdiction in equity).
172. *See* Cook v. Fortson, 329 U.S. 675, 678–79 (1946); Colegrove v. Barrett, 330 U.S. 804, 804 (1947); South v. Peters, 339 U.S. 276, 277 (1950); Tedesco v. Bd. of Supervisors of Elections for the Par. of Orleans, 339 U.S. 940 (1950); Remney v. Smith, 342 U.S. 916, 916 (1952); Cox v. Peters, 342 U.S. 936, 937 (1952); Anderson v. Jordan, 343 U.S. 912, 912 (1952); Kidd v. McCanless, 352 U.S. 920, 920 (1956); Radford v. Gary, 352 U.S. 991, 991 (1957); Hartsfield v. Sloan, 357 U.S. 916, 916 (1958); Matthews v. Handley, 361 U.S. 127, 127 (1959).
173. 369 U.S. 186, 234 (1962)
174. *Id.* at 187–88.
175. *Id.* at 192.

violation of the Fourteenth Amendment.[176] Citing *Colegrove*, the lower court dismissed the case on subject-matter jurisdiction and justiciability grounds.[177]

Writing for a six-member majority, Justice William Brennan briefly dispensed with the objection that the federal courts did not have subject-matter jurisdiction over malapportionment cases. He wrote that the "complaint plainly sets forth a case arising under the Constitution," noting there was "[a]n unbroken line of . . . precedents" that "sustains the federal courts' jurisdiction of the subject matter of federal constitutional claims of this nature."[178] The justiciability issue was more difficult. But Justice Brennan was not troubled by the objection that these cases asked the Court to defend political rights. The "mere fact that the suit seeks protection of a political right," he observed, "does not mean it presents a political question."[179] That objection was "little more than a play upon words."[180] Brennan argued that the lower court had "misinterpreted" prior cases, particularly *Colegrove*.[181] The fact that claims "touch[ed] upon matters of state governmental organization"[182] or "relate[d] to political rights" did not inherently make them nonjusticiable.[183] Moreover, "[j]udicial standards under the Equal Protection Clause are well developed and familiar" and thus could be administered within the Court's competence.[184]

With Justice Brennan's decision in *Baker*, the Court interred *Colegrove* and, for the first time, stepped into a new role as the supervisor of democratic politics. Even as the Court changed course, however, it did not yet have an answer for Frankfurter's most pointed objection—that judges should not involve themselves in the politics of the people because doing so was inconsistent with the Court's role in a constitutional republic. Frankfurter pressed this point strongly in his long and sharp dissent in *Baker*. The Court in *Baker*, he complained, "cast aside" an "impressive body of rulings" reflecting a "uniform course of our political history regarding the relationship between population and legislative representation," which is "a wholly different matter from denial of the franchise to individuals because of race, color, religion, or sex."[185] If the Court was going to engage in "a massive repudiation of the experience of our whole past," and exercise such a "destructively novel judicial power," it must also provide "a detailed analysis of the role of this Court in our constitutional scheme."[186]

Not surprisingly, Frankfurter did not find this "destructively novel" exercise of the judicial power justifiable. In a line that Chief Justice Roberts would

176. *Id.* at 194.
177. *Id.* at 188.
178. *Id.* at 200–01.
179. *Id.* at 209.
180. *Id.* (quoting Nixon v. Herndon, 273 U.S. 536, 540 (1927)).
181. *Id.*
182. *Id.* at 218.
183. *Id.* at 210 (quoting Snowden v. Hughes, 321 U.S. 1, 11 (1944)).
184. *Id.* at 226.
185. *Id.* at 267 (Frankfurter, J., dissenting).
186. *Id.* (Frankfurter, J., dissenting).

conceptually sample decades later in the context of partisan gerrymandering,[187] Frankfurter retorted that "there is not under our Constitution a judicial remedy for every political mischief."[188] Just because the political process cannot solve its pathologies does not mean that the Court should do it in its stead. The Court must be careful because its "authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction."[189] Frankfurter further warned that if the Court was to maintain its "position as the ultimate organ of 'the supreme Law of the Land,'" it must be "complete[ly] detach[ed], in fact and in appearance, from political entanglements" and abstain "from injecting itself into the clash of political forces in political settlements."[190]

Despite Frankfurter's objection, after *Baker*, the Court more than doubled down on its newfound mission. It continued to decide a slew of malapportionment cases. This "reapportionment revolution" launched the Court's new role as supervisor of democratic politics.[191]

In 1963, in *Gray v. Sanders*,[192] the Court struck down the Georgia Democratic party's system of counting primary votes using a "county unit system," rather than counting votes proportionally.[193] In rejecting the system, the Court famously wrote that the historical "conception of political equality . . . can mean only one thing—one person, one vote."[194] The following year, in *Wesberry v. Sanders*, the Court extended its reasoning to disparately apportioned congressional districts,[195] as "equal representation in the House for equal numbers of people" was a principle "embodied in the Great Compromise."[196] In 1964, in *Reynolds v. Sims*, the Court acknowledged the trickiness of the "problem" of "determining the basic standards and stating the applicable guidelines for implementing our decision in

187. *See* Gill v. Whitford, 585 U.S. 48, 64–65 (2018) ("[C]ounsel for the plaintiffs argued that this Court *can* address the problem of partisan gerrymandering because it *must* . . . . [However,] '[f]ailure of political will does not justify unconstitutional remedies.' Our power as judges to 'say what the law is,' rests not on the default of politically accountable officers, but is instead grounded in and limited by the necessity of resolving, according to legal principles, a plaintiff's particular claim of legal right." (citations omitted) (first quoting Clinton v. City of New York, 524 U.S. 417, 449 (1998) (Kennedy, J., concurring); and then quoting Marbury v. Madison, 1 Cranch 137, 177 (1803))); Rucho v. Common Cause, 588 U.S. 684, 718 (2019) ("Today the dissent essentially embraces the argument that the Court unanimously rejected in *Gill*: 'this Court *can* address the problem of partisan gerrymandering because it *must*.' That is not the test of our authority under the Constitution; that document instead 'confines the federal courts to a properly judicial role.'" (citations omitted) (first quoting *Gill*, 585 U.S. at 64; and then quoting Town of Chester v. Laroe Est., Inc., 581 U.S. 433, 438 (2017))).

188. *Baker*, 369 U.S. at 270 (Frankfurter, J., dissenting).

189. *Id.* at 267 (Frankfurter, J., dissenting).

190. *Id.* (Frankfurter, J., dissenting).

191. *See generally* GORDON E. BAKER, THE REAPPORTIONMENT REVOLUTION: REPRESENTATION, POLITICAL POWER, AND THE SUPREME COURT (1966) (discussing the role of increasing judicial intervention in "one man, one vote" cases).

192. 372 U.S. 368 (1963).

193. *Id.* at 370.

194. *Id.* at 381.

195. 376 U.S. 1, 2–3 (1964).

196. *Id.* at 14.

Baker v. Carr."[197] Justice Warren in his majority opinion began to sketch a framework for resolving apportionment cases, setting down the basic requirement that "both houses of a state legislature must be apportioned on a population basis," albeit not with "[m]athematical exactness" leading to "each one ha[ving] an identical number of residents."[198] Thus, the so-called "one man, one vote" principle emerged.

In the eyes of the public, the reapportionment revolution would demonstrate that an interventionist election law jurisprudence could protect and enhance American democracy. That success came, in part, from the need for a solution that was not forthcoming from the political process. Writing in 1958, then-Senator John F. Kennedy assailed malapportionment as the "Shame of the States."[199] He was not alone. Malapportionment was in the nation's crosshairs. There were articles in the *Christian Science Monitor*[200] and congressional hearings.[201] On the eve of President Kennedy's inauguration, Edward R. Murrow hosted a CBS hour-long special that dedicated its first half to the malapportionment issue.[202] Despite this consternation over the threat posed by malapportionment, no institution seemed willing to address the issue. This lack of response led Justice Clark to change his mind in the *Baker* litigation, switching his vote from Justice Frankfurter to Justice Brennan.[203] "I have searched diligently" for practical remedies to malapportionment, Justice Clark wrote in his concurring opinion.[204] "I find none other than through the federal courts."[205] The malapportionment story needed a hero. The Court performed this role almost to perfection.

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197. 377 U.S. 533, 559 (1964).

198. *Id.* at 577.

199. *See generally* John F. Kennedy, *The Shame of the States*, N.Y. TIMES MAG., May 18, 1958, at 12.

200. *See Sovereign Rural Voters*, VIRGINIAN-PILOT, July 21, 1959, at 4 (discussing the *Christian Science Monitor*'s reporting on malapportionment); *see also* Guy-Uriel E. Charles & Luis Fuentes-Rohwer, Reynolds *Reconsidered*, 67 ALA. L. REV. 485, 497 & n.80 (2015).

201. *See generally Hearings on Reapportionment of State Legis. Before the S. Subcomm. on Const. Amends. of the Comm. on the Judiciary*, 89th Cong. (1965); *Voting Rights: Hearings on S. 1564, to Enforce the 15th Amend. to the Const. of the United States Before the S. Comm. on the Judiciary*, 89th Cong. (1965); *see also Problems of Fed.-State-Local Relations: Hearing Before the Subcomm. on Intergovernmental Rel. of the Comm. on Gov't Operations*, 87th Cong. 34 (1962) (exhibit 3) ("Up until 1958 more than half of all the States had failed to reapportion even a little bit over a period of 25 years.").

202. *See* Jack Gould, *TV: Behind the Voting: 'C.B.S. Reports' Examines 'Election Day Illusions,' with Murrow and Leanard*, N.Y. TIMES (Jan. 6, 1961), https://www.nytimes.com/1961/01/06/archives/tv-behind-the-voting-cbs-reports-examines-election-day-illusions.html.

203. *See* Anthony Lewis, *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 29, 35–36 (1997).

204. Baker v. Carr, 369 U.S. 186, 259 (1962) (Clark, J., concurring).

205. *Id.*

The success of the Court's intervention was immediate. Public approval for the decision was "immense."[206] In the wake of the decision, *The New York Times* remarked that redistricting was "burning like a prairie fire across the nation."[207] Nine months after the Court's decision, plaintiffs had brought lawsuits in thirty-four states.[208] Robert McCloskey, a political scientist, conjectured that the Court "happened to hit upon what the students of public opinion might call a latent consensus."[209]

By the Court announcing its "one person, one vote" principle in *Reynolds v. Sims*, its political achievement was complete. "That principle," wrote Peter Schuck, "so attractive in its manifest simplicity and in its congruence with commonsense notions of fair representation, drained the opposition of credibility; their appeals to legal process values came to seem abstract, petty, even churlish."[210] Four years after *Reynolds*, Herbert Wechsler could confidently assert that "no decision in the history of the judicial process ever has achieved so much so soon."[211] As *Baker* and *Reynolds* were deified, Justice Frankfurter's objections steadily disappeared from legal discourse, and jurists rarely argued for a wholesale retreat from the "thicket."

Of course, the Court's intervention was not universally accepted, at least not at first. Elite opinion remained critical. In a memo to the Attorney General in August of 1963, Solicitor General Cox expressed skepticism. He contended that those in the "legal profession" likely supported "the invalidation of the egregiously malapportioned legislatures," but warned that "a 'one man-one vote' decision would precipitate a major constitutional crisis causing an enormous drop in public support for the Court."[212] Indeed, after *Reynolds* was handed down, politicians called for a constitutional amendment to overturn the decision,[213] and even introduced bills to limit the Court's jurisdiction or delay court orders.[214] Academics also offered forceful critiques. Alexander Bickel, a former Justice Frankfurter clerk, argued that "it will not prove satisfactory now to leave final

206. Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1380 (1987); *see* Joshua Fougere, Stephen Ansolabehere & Nathaniel Persily, *Partisanship, Public Opinion, and Redistricting*, 9 ELECTION L.J. 325, 325 (2010).

207. Layhmond Robinson, *22 States Battle on Redistricting; Fight Spurred by High Court Ruling Is Spreading Fast*, N.Y. TIMES (Aug. 6, 1962), https://www.nytimes.com/1962/08/06/archives/22-states-battle-on-redistricting-fight-spurred-by-high-court.html.

208. *See* Robert B. McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 MICH. L. REV. 645, 706–10 (1963).

209. Robert G. McCloskey, *Foreword: The Reapportionment Case*, 76 HARV. L. REV. 54, 58–59 (1962).

210. Schuck, *supra* note 206, at 1381.

211. HERBERT WECHSLER, THE NATIONALIZATION OF CIVIL LIBERTIES AND CIVIL RIGHTS 25 (1968).

212. J. DOUGLAS SMITH, ON DEMOCRACY'S DOORSTEP: THE INSIDE STORY OF HOW THE SUPREME COURT BROUGHT "ONE PERSON, ONE VOTE" TO THE UNITED STATES 165 (2014) (quoting Solicitor Gen. Cox).

213. *See* E.W. Kenworthy, *Dirksen Hopeful on Apportionment; Says He Has Senate Vote to Pass Amendment*, N.Y. TIMES (May 23, 1965), https://www.nytimes.com/1965/05/23/archives/dirksen-hopeful-on-apportioning-says-he-has-senate-votes-to-pass.html.

214. *See* Charles & Fuentes-Rohwer, *supra* note 200, at 522.

decisions of such pragmatic questions to lifetime federal appointees responsible only to other lifetime appointees in Washington."[215] He argued elsewhere that "the remedy [for malapportionment] lies with the majoritarian executive, whom we can influence."[216]

Various Justices also continued to voice objection to the Court's expansion of the scope of the *Baker* opinion in the early days. For example, Justice Harlan dissented in *Wesberry v. Sanders*,[217] which extended the reach of the "one man, one vote" principle to Congressional elections.[218] Justice Harlan contended that "[i]t goes without saying that it is beyond the province of this Court to decide whether equally populated districts is the preferable method for electing Representatives,"[219] and declared that the Court's decision "sap[ped] the political process."[220] But even that strident dissent, while hesitant about further expansion of *Baker*, generally did not counsel wholesale overturning of that decision.[221]

Indeed, rather than arguing over whether the Court should ever intervene, debates increasingly focused on the nature and extent of the Court's intervention.[222] Judges and commentators crafted approaches to guide the courts' new role in supervising democratic politics.[223] These approaches were designed to help determine where judicial supervision was necessary to enhance democratic practice, and where judicial review constituted undue interference with an otherwise properly functioning political process.[224]

Public opinion also quickly favored judicial intervention, leaving the critics in the distinct minority. For example, a Gallup poll in 1969 found that a majority of voters supported the then-called "one man, one vote" rule, and only 23% of voters wished to see a return to the Court's pre-*Baker* role.[225] The Court did not face mass resistance to the decisions it issued; for instance, no state legislatures entirely refused to comply with the Court's orders, and *Baker* entered public memory as canon rather than as anticanon.[226]

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215. Alexander M. Bickel, *Reapportionment and the Courts*, NEW REPUBLIC, June 1964, at 7.

216. ALEXANDER M. BICKEL, POLITICS AND THE WARREN COURT 190 (1965).

217. 376 U.S. 1, 20–49 (1964) (Harlan, J., dissenting).

218. *See id.* at 7.

219. *Id.* at 24 (Harlan, J., dissenting).

220. *Id.* at 48 (Harlan, J., dissenting).

221. *See id.* at 47 (Harlan, J., dissenting).

222. *See* William P. Irwin, *Representation and Election: The Reapportionment Cases in Retrospect*, 67 MICH. L. REV. 729, 729–30 (1969) (briefly summarizing the questions still before courts and scholars and noting that the question of jurisdiction is "no longer at issue").

223. *See, e.g.*, Walter L. Carpeneti, *Legislative Apportionment: Multimember Districts and Fair Representation*, 120 U. PA. L. REV. 666, 671 (1972).

224. *See, e.g.*, Daniel G. Zerfas, Comment, *Reapportionment and the Problem of Remedy*, 13 UCLA L. REV. 1345, 1346 (1966).

225. Warren Weaver Jr., *Support Is Found for Redistricting; Gallup Poll Shows Only 23% Back Aim of Dirksen Drive*, N.Y. TIMES (July 17, 1969), https://www.nytimes.com/1969/07/17/archives/support-is-found-for-redistricting-gallup-poll-shows-only-23-back.html.

226. For example, future Attorney General Nicholas Katzenbach told the 1962 graduates of Vanderbilt Law School that *Baker v. Carr* was a "historic decision" that was "both a reward and a tribute, earned by the perseverance and dedication of a bipartisan band of citizens." Nicholas deB. Katzenbach, S*ome Reflections on* Baker v. Carr, 15 VAND. L. REV. 829, 829 (1962). And Professor

As the Court developed this new jurisprudence, academic scholarship eventually turned away from the fundamental question of whether judicial supervision should occur, instead focusing on how it should happen. Most scholars moved on from the justiciability dispute altogether, looking instead to the practical task of determining the standard that the Court might use in adjudicating such cases.[227] Even when scholars contested subsequent expansions of the Court's power, they generally did so without challenging the basic presumption that the Court could resolve at least some partisan electoral litigation disputes.[228]

By 1975, when the *Harvard Law Review* published its annual "developments in the law" feature on election law, it devoted almost no space to the question of whether election contests ought to be justiciable.[229] Instead, the scholarship was designed around questions of how the Court ought to enact its role as electoral adjudicator, and had attended to disputes over, for instance, which sorts of interventions the Court ought to make as new electoral problems arise,[230] and which neutral, democratic principles it should apply.[231]

Thus, in the years after *Baker*, election law scholars tended to praise the Court's law and democracy cases when they thought the Court rightly addressed pathologies in the democratic process. They denounced the Court when they believed the institution shirked its responsibility or performed its role irresponsibly.[232] Scholars criticized the Court's election law cases for simply advancing one set of policy preferences over another without sufficient constitutional warrant.[233] They took the Court to task for failing to yield to the political branches and for picking among various potentially valid approaches to administering democracy.[234] Ultimately, though, if there was one point of agreement that

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James Kirby in 1970 wrote that the Court's 1960s apportionment decisions "gave true meaning to equal protection," and as a result, the Court was "approaching a constitutional rule on voting rights which comes as near political equality as electoral necessities permit." James C. Kirby, Jr., *The Constitutional Right to Vote*, 45 N.Y.U. L. REV. 995, 1013–14 (1970).

227. *See, e.g.*, Stanley H. Friedelbaum, Baker v. Carr*: The New Doctrine of Judicial Intervention and Its Implications for American Federalism*, 29 U. CHI. L. REV. 673, 695–702 (1962).

228. *See, e.g.*, Larry Alexander, *Lost in the Political Thicket*, 41 FLA. L. REV. 563, 564 (1989) (arguing that with its decision in *Davis v. Bandemer*, 478 U.S. 109 (1986), the Court "enter[ed] the political thicket").

229. *See Developments in the Law: Elections*, 88 HARV. L. REV. 1111, 1111–13 (1975).

230. *See, e.g.*, James M. Edwards, *The Gerrymander and "One Man, One Vote"*, 46 N.Y.U. L. REV. 879, 879 (1971) (arguing that Court's 1960s apportionment legacy "will be largely nullified in the 1970's" unless the Court develops "effective rules" to deal with gerrymandering).

231. *See, e.g.*, Robert Barnes, Comment, *Vote Dilution, Discriminatory Results, and Proportional Representation: What Is the Appropriate Remedy for a Violation of Section 2 of the Voting Rights Act?*, 32 UCLA L. REV. 1203, 1247 (1985).

232. *See, e.g.*, Edwards, *supra* note 230, at 879; Charles A. Askin, Comment, *The Burger Court and Reapportionment: From One Person, One Vote to One Corporation, Many Votes*, 62 GEO. L.J. 1001, 1002 (1974); Daniel Hays Lowenstein, *You Don't Have to Be Liberal to Hate the Racial Gerrymandering Cases*, 50 STAN. L. REV. 779, 783 (1998).

233. *See, e.g.*, Paul C. Neal, Baker v. Carr*: Politics in Search of Law*, 1962 SUP. CT. REV. 252, 326–27 (1962); Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. REV. 1, 4 (1985).

234. *See, e.g.*, Evan Geldzahler, Comment, Davis v. Bandemer*: Remedial Difficulties in Political Gerrymandering*, 37 EMORY L.J. 443, 445 (1988).

characterized the field, it was that the Court had a role in maintaining American democracy. Scholars might have disagreed on the robustness of that role, but there was very little support for anything resembling judicial abdication. Shortly after his retirement in 1969, former Chief Justice Earl Warren even proclaimed the "one man, one vote" decisions as the most important of his time on the Court—more important, in his words, than *Brown v. Board of Education*.[235]

Without a doubt, the Court's intervention in democratic politics has been generally regarded as a success. *Baker*, as reflected by the Court's jurisprudence and in academic scholarship, is largely seen as paradigmatic.[236] It is election law's Big Bang—and set the expectation that there are few pathologies in American politics that cannot be domesticated by the Court.

B. DISTINGUISHING PARADIGMATIC ELECTION LAW CASES

Though election law may view the necessity of judicial supervision of democratic politics as a central article of faith, we may be approaching its limits as a principle. The Court has not so much succeeded in supervising politics as in adjudicating the sorts of cases that came before it. The new partisan-democracy cases now coming to the Court may be less amenable to judicial supervision than were the Court's standard law and democracy cases. In part, this is because the Court is encountering sets of cases that are vastly different from the kinds of adjudicative tasks it was first asked to perform in the 1960s and 1970s, when it developed its election law jurisprudence. These differences matter. The fundamental questions, then, are twofold: How are these new partisan-democracy cases different from the Court's prior law and democracy cases? And will the Court's existing strategies nonetheless work to resolve them?

To help answer these questions, this Section explores two types of traditional categories of election law cases: the Court's ballot access cases and campaign finance cases. It distinguishes these sets of cases from the Court's recent partisan-democracy jurisprudence. In each category, the Court was asked to decide cases that could be framed as political, and perhaps even partisan, in the sense that they reflected different policy preferences and potentially affected the parties differently. Some cases were about the best way to practice democracy and what makes democracy more or less representative. Some cases could be categorized as asking the Court to preserve democracy. These standard cases, however, did not ask the Court to choose between two parties, both claiming to defend democracy against the other. In other words, these cases did not raise the difficulties that Justice Frankfurter feared might have materialized.

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235. 347 U.S. 483 (1954); *Warren Calls Vote Rulings Most Vital; Warren Calls Vote Decisions Most Important by His Court*, N.Y. TIMES (June 27, 1969), https://www.nytimes.com/1969/06/27/archives/warren-calls-vote-rulings-most-vital-warren-calls-vote-decisions.html.

236. *See* John Hart Ely, *Standing to Challenge Pro-Minority Gerrymanders*, 111 HARV. L. REV. 576, 577 n.7 (1997).

1. Ballot Access and Party Cases

As the reapportionment revolution reached its height, the Court began to embark on other branches of electoral adjudication—but still did not find itself adjudicating cases involving fundamental disputes over democracy's survival. Consider, for example, the Court's "ballot access" jurisprudence. The Court opened this line of jurisprudence in 1968, in *Williams v. Rhodes*.[237] The Court struck down Ohio laws that made it "virtually impossible" for the Ohio Independent Party and the Ohio Socialist Party to appear on Ohio's presidential election ballot.[238] Among other things, these laws required new parties to obtain signatures from 15% of those who voted in the last presidential election; parties that had received at least 10% of the votes in the prior presidential election did not need to obtain voter signatures to remain on the ballot.[239] Ohio argued that the court could not adjudicate its ballot access laws, as the challenge constituted a nonjusticiable political question.[240] The Court easily dispatched this contention with "very little discussion," holding that Ohio's argument had "been squarely rejected" in *Baker v. Carr*.[241] From the Court's perspective, the ballot access challenge fell within the same family of cases as the then-recent malapportionment cases.[242]

Ohio further argued that the Constitution, specifically the Electors Clause, gave it "absolute power" to set ballot access rules for presidential elections.[243] It sought to justify its ballot access rules on the grounds that it "may validly promote the two-party system in order to encourage compromise and political stability."[244] Writing for the Court, Justice Hugo Black rejected Ohio's constitutional argument and its explanation for its ballot access rules. Justice Black conceded that "the State is left with broad powers to regulate voting."[245] He wrote, however, that by granting an almost "complete monopoly" to the Republicans and Democrats," the "Ohio restrictive laws taken as a whole impose[d] a burden on voting and associational rights" that amounted to "an invidious discrimination, in violation of the Equal Protection Clause."[246] This monopoly power undermined a value "at the core of our electoral process," namely free "[c]ompetition in ideas and . . . policies."[247]

The Court's decision in *Williams v. Rhodes* prompted further challenges contesting the fairness of laws limiting minor and third-party ballot access. A new branch of supervisory adjudication was soon born. For example, in 1969, in

237. 393 U.S. 23 (1968).
238. *Id.* at 24–26.
239. *Id.*
240. *Id.* at 28.
241. *Id.*
242. *See id.*
243. *Id.* at 28–29.
244. *Id.* at 31–32.
245. *Id.* at 34.
246. *Id.* at 32, 34
247. *Id.* at 32.

Moore v. Ogilvie,[248] the Court struck down a set of Illinois laws that limited independent candidates' access to the ballot.[249] In 1972, the Court struck down a Texas law imposing burdensome filing fees on candidates to have their names appear on a primary ballot.[250] And in 1979, in *Illinois State Board of Elections v. Socialist Workers Party*,[251] the Court struck down an Illinois law imposing a higher signature-gathering burden on minor parties.[252]

Soon, the Court began considering not only the state's oversight of their ballots but also the laws governing parties. For example, in 1974 in *Storer v. Brown*,[253] the Court upheld a California provision that prevented candidates from running as independents if they had been affiliated with a "qualified party" within the past year.[254] In a series of landmark cases, over the next decades, the Court continued to cognize and enforce new dimensions of First Amendment associational rights for parties.[255]

Like the malapportionment cases, the ballot access and party cases were certainly political. They were not partisan, however, in the sense that they did not pit the two major political factions against each other. After all, both major parties were protected—and relatively equally protected—by ballot access laws.

These cases also did not ask the Court to adjudicate charges of authoritarianism. Certainly, the Court was asked to select between different ways of effectuating representative democracy: On the one hand, we might have a competitive system in which the state is entitled to protect the two parties from political competition. That position might allow the state to encourage political stability, incentivizing the parties to control extremist factions, and ensuring some party emerged with a governing coalition.[256] Alternatively, we might have a political system in which upstart parties are more readily encouraged.[257] On this view, an electoral system must accurately reflect the preferences of the electorate. Though there is a real difference between a two-party system and a multiparty system, the choice between the two is not a choice between democracy and fascism. There may be policy reasons for preferring an open primary to a closed primary. These policy choices, however, do not call into question the national goals of the

248. 394 U.S. 814 (1969).
249. *Id.* at 815, 819.
250. *See* Bullock v. Carter, 405 U.S. 134, 149 (1972).
251. 440 U.S. 173 (1979).
252. *Id.* at 175–76, 187.
253. 415 U.S. 724 (1974)
254. *Id.* at 734–35.
255. For instance, in *Democratic Party v. Wisconsin ex rel. La Follette*, the Court struck down a Wisconsin law that governed how the state Democratic Party could allocate its delegates at the National Convention. 450 U.S. 107, 126 (1981). In *Tashjian v. Republican Party*, the Court struck down a Connecticut closed primary requirement on associational freedom grounds. 479 U.S. 208, 210–11 (1986). And, perhaps most paradigmatically, in *California Democratic Party v. Jones*, the Court in 2000 eliminated a ballot-initiative-passed blanket primary law, also on associational freedom grounds. 530 U.S. 567, 586 (2000).
256. *See, e.g.*, *Storer*, 415 U.S. at 735.
257. *See, e.g.*, Williams v. Rhodes, 393 U.S. 23, 32 (1968).

political order and the possibility of self-government. Thus, these cases, too, did not present the kind of fundamental controversy over illiberalism with which the Court now must grapple.

2. Campaign Finance Cases

These same themes appear in a second set of cases. In its campaign finance jurisprudence, the Court carved out yet another supervisory role over electoral politics. Money has long been both a necessary feature of, and a potentially corrosive force within, American political campaigning.[258] The difficulty is properly calibrating money's role in democratic politics.[259] During the early 1970s, in the context of federal elections, Congress debated the issue and, in effect, concluded that money should be minimized.[260] Congress codified its vision in the Federal Election Campaign Act Amendments of 1974 ("FECA"), which strictly limited the amount of money that political actors could spend and the amount that individuals and entities could contribute.[261]

In the 1976 groundbreaking decision of *Buckley v. Valeo*, the Court announced its own view on the proper equilibrium, entering a new realm of electoral supervision. The Court upheld FECA's contribution limit but struck down the campaign spending limits.[262] It concluded that the Act's expenditure limitations "represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech."[263] Expenditure limits posed a problem because "virtually every means of communicating ideas in today's mass society requires the expenditure of money."[264]

In a series of cases since *Buckley*, the Court has continued to regulate the field of campaign finance, consistently upholding *Buckley*'s distinction between expenditure and contribution limits. For example, in the 1978 case of *First National Bank v. Bellotti*[265] the Court struck down a Massachusetts law limiting corporations' contributions or expenditures to referenda campaigns.[266] Massachusetts defended its prohibition partially on the grounds that corporate money would

258. *See generally* Note, *Drowning Out Democracy*, 137 HARV. L. REV. 2386 (2024) (discussing the corrosive effect of expenditures in campaigning, with a focus on how campaign finance can silence speech).

259. The difficulty is certainly longstanding; George Washington famously lost his first campaign because he limited his campaign expenditures—and, specifically, refused to ply voters with alcohol. *See* DANIEL OKRENT, LAST CALL: THE RISE AND FALL OF PROHIBITION 47 (2010); Anthony Gaughan, *Money in Politics . . . in the 1700s*, FACULTY LOUNGE (June 4, 2018, at 12:26 ET), https://www.thefacultylounge.org/2018/06/money-in-politics-in-the-1700s.html [https://perma.cc/C2AV-2CHT]. The same was true of James Madison—who was never again too good for such outright bribery. *See* NOAH FELDMAN, THE THREE LIVES OF JAMES MADISON: GENIUS, PARTISAN, AND PRESIDENT 30 (2017).

260. *See* S. REP. NO. 93-689 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 5587, 5588–90.

261. *See* Buckley v. Valeo, 424 U.S. 1, 12–13 (1976) (per curiam) (describing part of the "intricate statutory scheme" created by Congress in FECA).

262. *Id.* at 143.

263. *Id.* at 19.

264. *Id.*

265. 435 U.S. 765 (1978).

266. *Id.* at 775–76.

overwhelm citizen preferences and, therefore, distort the outcome of any public vote.[267]

Writing for a closely divided Court, Justice Lewis Powell rejected the state's justifications.[268] Justice Powell offered three primary reasons. First, he argued that the state did not present any evidence that "corporate advocacy threatened imminently to undermine democratic processes."[269] Second, he argued that influence over referenda did not pose the same threat to political integrity as influence over candidate elections.[270] Finally, he contended that in a democracy, voters are expected to have the capacity and agency to decide the merits of the issues for themselves.[271]

Stripping away the constitutional cover, the core dispute in the campaign finance cases is over the various policy options for regulating money in a constitutional republic. Congress adopted a reasonable position in FECA, grounded in justifications such as political equality, anticorruption, antidistortion, and the accurate representation of voter preferences.[272] This is a reasonable position and one that other democracies have also adopted.[273] For example, in upholding a similar national expenditure limit, Canada's Supreme Court stated: "The State can restrict the voices which dominate the political discourse so that others may be heard as well. . . . These provisions seek to create a level playing field for those who wish to engage in the electoral discourse."[274]

The United States Supreme Court in *Buckley* took the opposite position: self-government is frustrated when the government functionally limits the amount and nature of information voters can receive by attempting to put voters on an equal footing.[275] In *Bellotti*, Justice Powell offered the standard First Amendment line: courts ought to be suspicious whenever the government attempts to keep information away from citizens, no matter the source of the information.[276] For some time, the Court moved away from this view, embracing an antidistortion rationale similar to the one articulated by Canada's Supreme Court.[277] Then, in

267. *See id.* at 789.

268. *See id.* at 766–67 (noting that the Justices divided five to four).

269. *Id.*

270. *Id.* at 790 ("Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue." (citations omitted)).

271. *Id.* at 791 ("Moreover, the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments.").

272. *See* S. REP. NO. 93-689, *supra* note 260, at 5617.

273. *See, e.g.*, Samuel Issacharoff, *The Constitutional Logic of Campaign Finance Regulation*, 36 PEPP. L. REV. 373, 377 (2009) (discussing election law regulations in countries like Germany and Canada).

274. Harper v. Canada, [2004] S.C.R. 827, 868 (Can.).

275. *See* Buckley v. Valeo, 424 U.S. 1, 19 & n.18 (1976).

276. *See Belotti*, 435 U.S. at 792.

277. *Compare Harper*, 1 S.C.R. at 868, *with* Austin v. Mich. Chamber of Com., 494 U.S. 652, 660 (1990) ("Corporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions.").

2015, in *Citizens United v. FEC*,[278] the Court again returned to the policy it articulated in *Bellotti*. This time, Justice Kennedy wrote for the majority, declaring that "the Government may commit a constitutional wrong when by law it identifies certain preferred speakers" and "tak[es] the right to speak from some [to] giv[e] it to others."[279]

By the time campaign finance returned to the Court in *Citizens United*, the case carried a clear partisan valence. The Court wrote in a nonpartisan way and avoided these implications, just as studiously as it had done in prior litigation. It was a superficially neutral principle, that "[a]ll speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech,"[280] that carried the day. The Court also carefully presented the kind of speech affected as diverse and, implicitly, bipartisan—rather than profoundly linked to business interests—by suggesting that nonprofits are also affected.[281] Nonetheless, the consequences of the case were widely understood. Democrats vociferously opposed the unleashing of mass independent expenditures into the political marketplace and opposed protecting corporate spending rights as something akin to core political speech.[282] In general, Republicans hoped for the opposite.[283] The Court was never understood merely as taking a more libertarian and absolutist view of speech rights, prioritizing rights over democracy, and disregarding the consequences of distorted public debate (though this was how the scholarship would talk of it).[284] The Court was also widely seen as engaging in a fundamental partisan preferencing.[285] The result of its decision both benefitted Republican ideological positions and likely bolstered Republican electoral strategy.[286]

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278. 558 U.S. 310 (2010).

279. *Id.* at 340.

280. *Id.* at 351.

281. *See id.* at 354.

282. *See, e.g.*, Jesse Lee, *President Obama on* Citizens United*: "Imagine the Power This Will Give Special Interests Over Politicians,"* OBAMA WHITE HOUSE ARCHIVES: BLOG (Jul. 26, 2010, at 15:07 ET), https://obamawhitehouse.archives.gov/blog/2010/07/26/president-obama-citizens-united-imagine-power-will-give-special-interests-over-polit [https://perma.cc/Q29P-X5Q7]; *Durbin: Constitutional Amendment Would Protect Rights of Millions of Americans That Are Being Silenced By Corporate Wealth and Multimillionaires*, OFF. OF U.S. SEN. DICK DURBIN (Sep. 8, 2014), https://www.durbin.senate.gov/newsroom/press-releases/durbin-constitutional-amendment-would-protect-rights-of-millions-of-americans-that-are-being-silenced-by-corporate-wealth-and-multimillionaires [https://perma.cc/4TEF-DAL5].

283. *See* Chris Good, Citizens United *Decision: Republicans Like It, Liberals Don't*, THE ATLANTIC (Jan. 21, 2010) https://www.theatlantic.com/politics/archive/2010/01/citizens-united-decision-republicans-like-it-liberals-dont/33935.

284. *Contrast* Jeffrey Toobin, *Money Unlimited: How Chief Justice John Roberts Orchestrated the* Citizens United *Decision*, NEW YORKER: ANNALS OF LAW (May 14, 2012), https://www.newyorker.com/magazine/2012/05/21/money-unlimited [https://perma.cc/C9R6-LXDP], *with* Steven J. Heyman, *The Third Annual C. Edwin Baker Lecture for Liberty, Equality, and Democracy: The Conservative-Libertarian Turn in First Amendment Jurisprudence*, 117 W. VA. L. REV. 231, 261 (2014).

285. *See* David D. Kirkpatrick, *Courts Roll Back Limits on Election Spending*, N.Y. TIMES (Jan. 8, 2010), https://www.nytimes.com/2010/01/09/us/politics/09donate.html.

286. *See generally* Nour Abdul-Razzak, Carlo Prato & Stephane Wolton, *After* Citizens United*: How Outside Spending Shapes American Democracy*, ELECTORAL STUD., Aug. 2020, at 67.

Although the case exhibited this more apparent partisan valence, it did not involve a partisan conflict over *democracy*. One may disagree with the Court's reasoning in *Belotti*, *Buckley*, and *Citizens United*. Many have,[287] and—in our view—rightly so. Still, in these cases, the Court was not compelled to choose between democracy and its opposite. Neither side accused the other of attempting to engage in authoritarianism nor asked the Court to intervene to save us from authoritarianism. Instead, a valid debate was held over two plausible views on how best to conduct representative democracy. Different ways of understanding speech, political equality, representation, and the like were on the docket. But no one could credibly claim that democracy itself was on the docket.

C. DISTINGUISHING PATHBREAKING ELECTION LAW CASES

The malapportionment, ballot access, and campaign finance cases are emblematic of various core functions of electoral jurisprudence. But they are also, in many respects, the tamest sort of election law cases. The Court has heard more difficult cases—cases that are more partisan or that involve more fundamental democratic disputes. Those cases have caused great consternation, but both democracy and the Court have survived. The newly emergent partisan-democracy cases might be distinguishable from traditional modes of electoral adjudication, but what makes them different from tougher cases the Court has previously heard and successfully adjudicated?

Courts have heard highly partisan cases and cases that required adjudicating threats to democracy. Courts have yet to contend, however, with disputes that combine these challenges in modern political history. That unique nexus makes this new litigation category unprecedented and uniquely problematic. To demonstrate that partisan-democracy cases have not appeared before, this Section considers three of the most difficult cases for the Court: the reapportionment cases previously discussed; the race cases, which involved fundamental concerns about antidemocracy; and *Bush v. Gore*,[288] perhaps the most highly partisan case to appear before the Court.

1. Malapportionment

As described above, the malapportionment cases have long been synonymous with judicial supervision of democratic politics. After the Court's decisions in *Baker* and *Reynolds*, almost every state reapportioned its state legislative and congressional districts.[289] The Court heard more than a dozen reapportionment cases in 1964 alone.[290] These cases also provide the classic argument for judicial interference, serving as proof of concept for the proposition that there is a kind of

287. *See, e.g.*, Richard L. Hasen, Citizens United *and the Illusion of Coherence*, 109 MICH. L. REV. 581, 582–85 (2011).

288. 531 U.S. 98 (2000).

289. Gary W. Cox & Jonathan N. Katz, *The Reapportionment Revolution and Bias in U.S. Congressional Elections*, 43 AM. J. POL. SCI. 812, 812 (1999).

290. *See* Lucas v. Forty-Fourth Gen. Assembly of Colo., 377 U.S. 713, 739 (1964); WMCA, Inc. v. Lomenzo, 377 U.S. 633, 653–54 (1964); Md. Comm. for Fair Representation v. Tawes, 377 U.S. 656,

case that the Court is almost uniquely positioned to address. There is no better example of the "ins . . . choking off the channels of political change"[291] than malapportionment. Politicians refused to reapportion for decades because they knew that they would lose political power if they did so.[292] By refusing to draw new districting lines after each census, they became what Sam Issacharoff termed "an electorally unshakable group."[293] The political process was broken. This is when the justification for judicial intervention is at its highest.[294]

Adjudicating these cases, though, did not require the courts to grapple with the same sorts of political questions that they must now confront in the new partisan-democracy jurisprudence. Certainly, the apportionment cases were political, in the banal sense that they were quite literally about politics. Overseeing the apportionment of districts involved the Court in political processes and, in turn, affected the politics of the impacted districts and states.[295]

The apportionment cases were also political in the Frankfurterian sense: the opposing parties presented the Court with different permissible conceptions of political equality without an obvious textual warrant from the Constitution. In particular, these cases asked the Court to choose between two conceptions of representation: one that permitted representation based on old geographic lines and another that required representation based on population. This choice was rather like choosing between the model of representation in the House and the model of representation in the Senate. From a policy or theory perspective, one might prefer that people, rather than states, be represented. One might even contend that the House's format is more democratic. Nonetheless, both chambers are representative bodies. Neither is contrary to democracy nor fundamentally undermines it.

Similarly, the malapportionment cases may not have presented two *equally* compelling conceptions of representative democracy. There are good reasons to prefer one method of effectuating representation over another. And it is hard to imagine anyone embracing malapportioned districts today. Nonetheless, political equality can be understood as a continuum.[296] A conception of political equality

674–75 (1964); Davis v. Mann, 377 U.S. 678, 692–93 (1964); Roman v. Sincock, 377 U.S. 695, 710–12 (1964); Scranton v. Drew, 379 U.S. 40, 40–42 (1964) (per curiam); Pinney v. Butterworth, 378 U.S. 564, 564 (1964) (per curiam); Hearne v. Smylie, 378 U.S. 563, 563 (1964) (per curiam); Germano v. Kerner, 378 U.S. 560, 560 (1964) (per curiam); Marshall v. Hare, 378 U.S. 561, 561 (1964) (per curiam); Nolan v. Rhodes, 378 U.S. 556, 556 (1964) (per curiam); Williams v. Moss, 378 U.S. 558, 559 (1964) (per curiam); Meyers v. Thigpen, 378 U.S. 554 (1964) (per curiam); *cf.* Scott v. Germano, 381 U.S. 407, 409 (1965) (per curiam); Parsons v. Buckley, 379 U.S. 359, 363 (1965) (per curiam); Fortson v. Toombs, 379 U.S. 621, 622 (1965) (per curiam).

291. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 103 (1980).

292. *See* Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637, 655 (2001); Baker v. Carr, 369 U.S. 186, 259 (1962) (Clark, J., concurring).

293. Issacharoff, *supra* note 295, at 655.

294. *See id.*; *cf.* ELY, *supra* note 294, at 4.

295. *See* Billie A. Rosen, *Fair and Effective Representation: Power to the People*, 26 HASTINGS L.J. 190, 196–198 (1974) (describing the intricacies of the Court's involvement in numerous states' redistricting process post-*Baker*).

296. *See* Guy-Uriel E. Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretive Approach of* Baker v. Carr, 80 N.C. L. REV. 1103, 1106 (2002).

that is less robust than one might prefer need not always be viewed as an assault on the foundations of the constitutional republic.[297] At the extreme end of the continuum, where a voting system is completely unresponsive to voter preferences, one would rightly regard that system as undemocratic. The judgment would need to be more contextual in the middle of the continuum. Thus, one can imagine a political context in which extreme malapportionment interacted with other factors to create a political system that cannot be said to be representative.

On this understanding, *Baker* and the malapportionment cases were not necessarily about the absence of representation. The plaintiffs in the malapportionment cases did not claim that their elected officials were authoritarians or autocrats. They did claim that the districts were not sufficiently representative and that malapportioned districts violated core principles of democracy.[298] But they did not maintain that they no longer lived in a democracy.[299] If anything, the *Baker* appellants' brief struck a cool tone; after all, it was to their advantage to frame their claimed resolution as a natural extension of the existing Constitutional order rather than to emphasize high democratic drama.[300] The appellees did not frame things much differently. The most dramatic statement in their brief was the statement that the "case involves issues . . . at the very heart of the increasingly difficult and delicate field of state and federal relationships."[301] Certainly, no one contended that the other party had set out to destroy democracy. Unlike the partisan-democracy cases now before the Court, the malapportionment cases did not present a choice between representative democracy and oligarchy.

The malapportionment cases were also not highly partisan. Certainly, some commentators argued that reapportionment would differently affect the parties.[302] That framing, though, did not carry the day—probably because the partisan stakes were relatively low. Both states governed by Republicans and Democrats were malapportioned.[303] And though Democrats were arguably more culpable of failing to reapportion states they controlled, the judicial review of malapportionment was not generally viewed as providing a distinctive partisan advantage to one party at the expense of the other.[304]

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297. *See generally* BRUCE E. CAIN, DEMOCRACY MORE OR LESS: AMERICA'S POLITICAL REFORM QUANDARY (2015).

298. *See, e.g.*, Brief for Appellants at 7, Baker v. Carr, 369 U.S. 186 (1962) (No. 103).

299. *Cf. id.* at 28.

300. *See id.* at 48–49.

301. *See* Brief and Argument for Appellees at 7, Baker v. Carr, 369 U.S. 186 (1962) (No. 103).

302. *See generally* Gordon E. Baker, Rural Versus Urban Political Power: The Nature and Consequences of Unbalanced Representation (1955) (discussing the effects of malapportionment in state legislatures as a general matter).

303. *See* Kang, *supra* note 39, at 1398 (noting that "malapportionment . . . during the mid-twentieth century yielded no consistent partisan advantage nationwide").

304. *Cf.* Cox & Katz, *supra* note 292, at 814–16 (describing the decades it took for political scientists to demonstrate any partisan effects of the 1960s reapportionment process); Warren Weaver Jr., *Apportionment: Well, Maybe Two Men, One Vote*, N.Y. TIMES (Feb. 25, 1973), https://www.nytimes.com/1973/02/25/archives/well-maybe-two-men-one-vote-apportionment.html (describing the limited political effects of *Baker*, ten years later).

2. The Race Cases

The Court did not hear its first difficult democracy case in 2024. The Court has previously adjudicated potential threats to democracy and claims of antidemocracy and has done so successfully. Perhaps the most notable example of successful democratic adjudication appears in the Court's race and politics cases. Although not always understood in these terms, at the base, the Court's race cases—particularly those cases dealing with political inequality in the South—required the Court to adjudicate claims of Southern illiberalism, unavoidably compelling the Court to confront myriad antidemocratic practices.

Southern politics was fundamentally illiberal between the end of the nineteenth century and the middle of the twentieth century.[305] Following Reconstruction's end in the 1870s, Southern states were ruled nearly exclusively by the Democratic party, often until well after the passage of the Voting Rights Act almost a century later. Between 1919 and 1948, Democrats won 113 of 114 Southern gubernatorial elections and 131 of 132 Southern senatorial elections.[306]

This outcome was not the result of natural electoral success but well-documented and deliberate racial violence, alongside other antidemocratic efforts to prevent fair elections and drive Black voters—and the Republican party—out of power.[307] After Democrats were pushed out of office by Reconstruction governments, they reclaimed their power using violence. Democratic politicians were linked to assassinations, carried out by the KKK, of the new leaders of Republican Reconstruction governments.[308] Democrats also violently intimidated Black Republican voters in order to change electoral outcomes. Take the election of 1874 in Gibson County, Tennessee. Democrats and Republicans had swapped power back and forth in the prior two elections, and Democrats were determined to claim a victory. A federal marshal observing the election described the manifestation of that determination: On the day of the August election, there was "a mob at every poll," which "created a perfect reign of terror."[309] The result, according to another marshal, was mass voter suppression—and Democrats winning by roughly twice the margin by which they likely would have lost had the elections been free from violence.[310]

Once Democrats began to regain political power and "control of the electoral machinery," they skewed election results to ensure their control would be ongoing.[311] Often, they used entirely antidemocratic methods, including stuffing

305. *See* DAVID LUBLIN, THE REPUBLICAN SOUTH: DEMOCRATIZATION AND PARTISAN CHANGE 10–12 (2004).

306. *See* James W. Ely, Jr. & Bradley G. Bond, *Politics & Ideology*, *in* 10 THE NEW ENCYCLOPEDIA OF SOUTHERN CULTURE: LAW & POLITICS 143, 226 (Charles Reagan Wilson ed., 2008).

307. *See* LUBLIN, *supra* note 308, at 10–12.

308. *See* Ely & Bond, supra note 309, at 273.

309. William Gillette, *Anatomy of a Failure: Federal Enforcement of the Right to Vote in the Border States During Reconstruction*, *in* RADICALISM, RACISM, AND PARTY REALIGNMENT: THE BORDER STATES DURING RECONSTRUCTION 265, 271 (Richard O. Curry ed., 1969).

310. *Id.*

311. *See* LUBLIN, *supra* note 308, at 11.

ballot boxes and committing outright election fraud.[312] In many Louisiana parishes, for example, Democrats counted all Black voters' ballots as having been cast for Democrats—regardless of whether the voter voted for a Democrat.[313] Once elected, Democrats passed voter suppression laws to ensure their opponents would not be elected again.[314] And when many of those laws disenfranchised poor white voters (and not only the Black Republicans who were their primary targets), those in power enacted the now-familiar "grandfather clause" to reenfranchise them.[315] In nine of eleven states, they also cemented their power by enacting new state constitutions[316] that were both abhorrently racist and deliberately entrenched anticompetitive political structures.[317] The result of these mass disenfranchisement efforts was that Southern politicians were chosen by a self-selected and unrepresentative group of voters—what David Lublin and others have termed a "selectorate"—allowing them to cyclically entrench their own power, suffocating the possibility of Black Republican political participation.[318]

Even if political equality can be understood on a spectrum, these tactics fell nowhere along that spectrum. They were not part of a debate over how representative democracy ought to be conducted, but rather, constituted repeated and outright efforts to prevent democracy from being meaningfully practiced at all. Perhaps the best way of understanding the Southern politics of this period is offered by Robert Mickey in his remarkable book *Paths out of Dixie*.[319] Mickey described twentieth-century southern states as "eleven enclaves of authoritarian rule"[320] within "a federal polity of representative democracy at the national level."[321]

As Black people resisted the South's enclaves of authoritarianism, they and their allies took their disputes to the courts. These disputes could have been adjudicated as either partisan-democracy cases or as race cases. As illustrated above, these cases did involve, in part, a partisan clash between the Democratic and Republican Parties. But these cases were not framed or understood as partisan cases. Instead, they were almost always adjudicated as race cases—cases about the individual right to equality and inclusion. Putting them in the frame of race and individual equality provided a more compelling basis for judicial involvement and avoided the perils associated with adjudicating partisan democracy.

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312. *Id.*

313. *Id.*

314. *See id.* at 11–12.

315. *Id.*

316. *See* Numan V. Bartley, *In Search of the New South: Southern Politics After Reconstruction*, 10 REVS. AM. HIST. 150, 154 (1982).

317. *See* LUBLIN, *supra* note 308, at 12.

318. David Lublin & Benjamin Reilly, *Encouraging Cooperation and Responsibility*, *in* MORE THAN RED AND BLUE: POLITICAL PARTIES AND AMERICAN DEMOCRACY 138, 140 (John Ishiyama et al. eds. 2023).

319. ROBERT MICKEY, PATHS OUT OF DIXIE: THE DEMOCRATIZATION OF AUTHORITARIAN ENCLAVES IN AMERICA'S DEEP SOUTH,1944–1972, at 33 (2015).

320. *Id.*

321. *Id.* at 32.

One notable exception—the infamous case of *Giles v. Harris*[322]—proves the rule. In 1901, the Democrat-controlled Alabama Legislature adopted a new state constitution, imposing a series of antidemocratic restrictions on suffrage.[323] The cumulative effect of these disenfranchisement devices removed all but 3,000 of the State's previously 181,471 eligible Black voters.[324] As importantly, and relatedly, Alabama's disenfranchising provisions eliminated challenges to the hegemony of the Democratic Party to "ensure one-party, Democratic rule . . . from this moment forward through most of the 20th century in the South."[325]

Jackson Giles, a Black citizen of Alabama, alleged that he applied to register to vote "and was refused arbitrarily on the ground of his color, together with large numbers of other duly qualified negroes, while all white men were registered."[326] His suit sought an injunction requiring the Montgomery County Board of Registrars to register him and all otherwise qualified Black men who tried to register to vote.[327] Giles and the Black men of Alabama wanted to register before January 1, 1903, because those registered by that date would be registered for life, and those seeking to register after that date would have to take a literacy test designed to keep Black men off the voting rolls.[328]

Giles is a case about both white supremacy and political oligarchy. In a brilliant article highlighting *Giles*, Professor Richard Pildes argued elegantly that Alabama's antidemocratic purpose could not have been achieved without its racism.[329] Conversely, its totalizing white supremacy was fueled by one-party rule.[330] The Alabama Democrats' racism motivated the creation of a state of de facto authoritarianism.

Arguably, it was the combination of racism and authoritarianism that convinced Justice Oliver W. Holmes, who wrote the opinion for a 6–3 majority, that this was not a case fit for judicial determination.[331] Justice Holmes did not gainsay Giles's devastating claim: that Alabama devised a legal scheme to disenfranchise all of its Black male voters.[332] Ultimately, though, Justice Holmes characterized Alabama's disenfranchisement program, as alleged, as a "political wrong" and a violation of "political rights."[333] Justice Holmes then argued that

322. 189 U.S. 475 (1903).

323. *Id.* at 482–83.

324. Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMM. 295, 302–04 (2000).

325. *Id.* at 302.

326. *Giles*, 189 U.S. at 482.

327. *Id.*

328. *Id.* at 482–83.

329. Pildes, *supra* note 327, at 299–305.

330. *Id.* at 301–02.

331. *See Giles*, 189 U.S. at 488.

332. *See id.* at 483 ("As we have said, according to the allegations of the bill this part of the Constitution, as practically administered and as intended to be administered, let in all whites and kept out a large part, if not all, of the blacks, and those who were let in retained their right to vote after 1903, when tests which might be too severe for many of the whites as well as the blacks went into effect.").

333. *Id.* at 487–88.

"traditional limits of proceedings in equity have not embraced a remedy for political wrongs."[334] In a suit at law, the plaintiff might be entitled to damages for individual legal wrongs, but in a partisan political fight, "relief from a great political wrong, if done, as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political department of the government of the United States."[335] In other words, if "the great mass of the white population intends to keep the blacks from voting," there was nothing the Court could do to stop them.[336] Confirming *Giles*'s status as a partisan dispute over democracy, Justice Frankfurter would cite *Giles* forty years later, in *Colegrove*, in the face of arguments that the Court must intervene to fix democracy.[337]

But the Court did not retreat from adjudicating all such cases. To the contrary, when the cases were understood as *race* cases, rather than partisan cases, they performed adjudication much like what they were asked to perform in *Giles*. Consider first the Court's framing of *Gomillion v. Lightfoot*,[338] the famous municipal racial gerrymandering case out of Alabama. In *Gomillion*, the Court considered the legislative redrawing of the city of Tuskegee's boundary lines under Act 140.[339] Before passage of Act 140, the city's boundaries resembled a square, with a population of 5,397 African Americans and 1,310 whites.[340] Of these, 400 African Americans and 600 whites were qualified to vote.[341] Act 140 redefined the city boundaries from a square to a shape that "resemble[d] a sea dragon."[342] More importantly, according to the district court, "[t]he effect of the Act is to remove from the municipality of Tuskegee all but four or five of the qualified Negro voters and none of the qualified white voters."[343] The plaintiffs argued that this was a case of race discrimination, actionable under the Fifteenth Amendment.[344]

These facts bring to mind Charles Black's riposte to Herbert Wechsler's criticism of *Brown*. "I was raised in the South," he wrote, "in a Texas city where the pattern of segregation was firmly fixed. I am sure it never occurred to anyone, white or colored, to question its meaning."[345] The same must have been true of Tuskegee in 1957 and the passage of Act 140. And yet, the district court concluded, "[t]his Court has no control over, no supervision over, and no power to change any boundaries of municipal corporations fixed by a duly convened and

334. *Id.* at 486.
335. *Id.* at 488.
336. *Id.*
337. *See* Colegrove v. Green, 328 U.S. 549, 552 (1946).
338. 364 U.S. 339 (1960).
339. *Id.* at 340–41.
340. *See* Gomillion v. Lightfoot, 167 F. Supp. 405, 407 (M.D. Ala. 1958), *aff'd*, 270 F.2d 594 (5th Cir. 1959), *rev'd*, 364 U.S. 339 (1960).
341. *Id.*
342. *Id.*
343. *Id.*
344. *See Gomillion*, 364 U.S. at 340.
345. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424 (1960).

elected legislative body, acting for the people in the State of Alabama."[346] A panel of the Fifth Circuit Court of Appeals affirmed the judgment.[347]

The United States Supreme Court disagreed. Writing for a unanimous Court, Justice Frankfurter explained that at this stage of the litigation, the allegations, if uncontradicted or unqualified at trial would be "tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote."[348] In a relatively brief opinion, Justice Frankfurter held that the states did not have an unrestricted power to alter their political subdivisions: "We freely recognize the breadth and importance of this aspect of the State's political power," he acknowledged, but this power was not absolute.[349] To conclude otherwise, he wrote, "would sanction the achievement by a State of any impairment of voting rights whatever so long as it was cloaked in the garb of the realignment of political subdivisions."[350] In *Gomillion*—understood then and now as a "race case"[351]—the Court thus performed adjudication of antidemocratic practices.

Consider also the Court's "White Primary Cases," which offer a similar story. These cases have their origins in the 1915 case *Guinn v. United States*.[352] Twelve years earlier, in *Giles*, the Court had explicitly refused to decide voting rights questions. Yet, in *Guinn*, the Supreme Court struck down the grandfather clause.[353] Though racially neutral on its face, the Court recognized the law for what it was and declared it, "as a matter of law, repugnant to the Fifteenth Amendment."[354] What had been a political question in *Giles* turned into a judicial question about race in *Guinn*. The Court decided *Guinn* unanimously.[355]

The Southern states would not sit idly by. Their response was the white primary.[356] In a noncompetitive, one-party environment, this made all the difference.[357] In Texas, for example, a 1923 state law declared that "in no event shall a negro be eligible to participate in a Democratic party primary election held in the State of Texas."[358] Many other Southern states created similar processes, with one key difference: whereas most states established the all-white primary through

346. *Gomillion*, 167 F. Supp. at 410.
347. Gomillion v. Lightfoot, 270 F.2d 594, 594 (5th Cir. 1959), *rev'd*, 364 U.S. 339 (1960).
348. *See Gomillion*, 364 U.S. at 341.
349. *Id.* at 342.
350. *Id.* at 345.
351. *See* Guy-Uriel E. Charles, *Democracy and Distortion*, 92 CORN. L. REV. 601, 628 (2007).
352. 238 U.S. 347 (1915). This series of cases will be referred to as the *White Primary Cases*.
353. *Id.* at 368.
354. *Id.* at 361, 367–68.
355. *Id.* at 347.
356. *See* Leo Alilunas, *The Rise of the "White Primary" Movement as a Means of Barring the Negro from the Polls*, 25 J. NEGRO HIST. 161, 162 (1940). The use of the term "negro" is harmful today. This Article solely uses it to represent how racial issues were discussed historically.
357. *See* Issacharoff & Pildes, *supra* note 2, at 655–56 (1998); Ellen D. Katz, *Resurrecting the White Primary*, 153 U. PA. L. REV. 325, 349 (2004).
358. Nixon v. Herndon, 273 U.S. 536, 540 (1927) (quoting 1923 Tex. Gen. Laws 74–75).

internal party rule, Texas imposed the rule by law.[359] This made Texas an inviting legal target, as the law explicitly disadvantaged Black voters and excluded them, and only them, from the one election of consequence. This made the white primary a tool both of white supremacy and a device to keep partisans in line. Hence, our question: Would the Court view the white primary as a tool of politics or racial discrimination?

In *Nixon v. Herndon*, the Supreme Court considered the Texas white primary law and unanimously concluded that "the answer does not seem to us open to a doubt."[360] Justice Holmes authored the opinion, writing that "it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth. That Amendment, while it applies to all, was passed, as we know, with a special intent to protect the blacks from discrimination against them."[361] This was a remarkable opinion, even if straightforward to modern ears. While true that the state law explicitly discriminated against Black voters, the Court could have sought cover in history—particularly the fact that the Fifteenth Amendment was needed precisely because the Fourteenth Amendment was not understood to reach political rights.[362] The Court might also have looked to *Giles*, reiterating its refusal to intervene in the name of racial justice. Instead, all Justices signed on to Justice Holmes' majority opinion. Justice Holmes himself was not a race progressive; Justice McReynolds was a known racist; and Justice Harlan had complex, contradictory views on race relations.[363] Yet, the Court concluded, "[s]tates may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case."[364] Formal equality won.

We could say much more about the *White Primary Cases*, which represent a fascinating and important moment in the history of the Court and the scope of its power.[365] For our current purposes, we are interested in emphasizing that the *White Primary Cases* are classified in the election law canon as race cases rather than partisan cases. Like in the newly emergent partisan-democracy cases, in these race cases, the Court was asked to address genuine antidemocractic behavior by political elites, and to police extreme interferences with the democratic

359. LUCAS A. POWE, JR., AMERICA'S LONE STAR CONSTITUTION: HOW SUPREME COURT CASES FROM TEXAS SHAPE THE NATION 18 (2018).

360. 273 U.S. at 540.

361. *Id.* at 541.

362. *See, e.g.*, Minor v. Happersett, 88 U.S. 162, 175 (1874) (explaining that the Fifteenth Amendment was needed to protect the right to vote, which the Fourteenth Amendment did not protect).

363. *See, e.g.*, Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 69 n.102 (2000); Alexander Lian, *The Jobbist*, *in* THE PRAGMATISM AND PREJUDICE OF OLIVER WENDELL HOLMES, JR. 9, 9 (Seth Vannatta ed. 2019); Davison M. Douglas, *The Surprising Role of Racial Hierarchy in the Civil Rights Jurisprudence of the First Justice John Marshall Harlan*, 15 J. CONST. L. 1037, 1040 (2013).

364. *Nixon*, 273 U.S. at 541.

365. *See, e.g.*, Michael J. Klarman, *The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking*, 29 FLA. ST. U. L. REV. 55, 57–58 (2001).

process. The Court seemed willing to engage with the democracy problem, however, only if it was classified as a problem of racial exclusion and not as disputes between parties. Thus, even in adjudicating a clear-cut problem of antidemocracy, the Court sought to avoid the perils that could accompany partisan-democracy disputes by clothing the dispute in the familiar, and arguably less controversial, garb of race.

3. *Bush v. Gore*

Just as the Court has previously addressed antidemocratic behavior, it has also heard numerous highly partisan cases. Indeed, for the past quarter century, the Court's typical election law jurisprudence has increasingly required resolution of intrinsically and unavoidably partisan disputes.[366] Consider now *Bush v. Gore*,[367] perhaps the most strikingly partisan case in pre-Trump memory. There, the Court heard a challenge to the Florida Supreme Court's interpretation of Florida's election code and its supervision of the Florida recount that followed the 2000 election.[368] The Court was asked whether the Florida Supreme Court violated Article II, Section 1, Clause 2 of the Constitution by "establish[ing] new standards for resolving Presidential election contests" and whether "the use of standardless manual recounts violates the Equal Protection and Due Process Clauses."[369]

The Court's opinion, ruling for President Bush, was not framed in partisan or political terms.[370] The partisan, political, and ideological consequences of the case, however, were self-evident. To disallow the Florida Supreme Court's recount procedures was to affirm the certification of the presidency for George W. Bush. On the day the opinion was handed down, Linda Greenhouse opened her coverage in *The New York Times* by writing that "[t]he Supreme Court effectively handed the presidential election to George W. Bush tonight."[371] CNN noted the "5-4 split along ideological lines, with the conservative faction ruling against

366. *See supra* Section I.A.

367. 531 U.S. 98 (2000).

368. *Id.* at 102–03.

369. *Id.* at 103.

370. The Court found a violation of Equal Protection, resting its decision on neutral principles, and loftily proclaiming that "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Id.* at 104–05. The Court contemplated at what point attempts to recount "undervotes"—ballots infamously afflicted by "hanging chads"—would undermine that principle of nonarbitariness, because such counting required discerning a voter's intent and under the circumstances, that "search for intent [could not] be confined by specific rules designed to ensure uniform treatment." *Id.* at 106, 120 (Rehnquist, C.J., concurring). The Court also considered the state supreme court's disparate treatment of different counties' recounts, and the adequacy of recount procedures. *Id.* at 109. In other words, the opinion built an equal protection argument on everything but partisanship—stopping to acknowledge the extraordinary conditions of the case only implicitly, when concluding the opinion by noting the Justices' "conscious[ness] of the vital limits on judicial authority," while arguing that the Court nonetheless bore an "unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront." *Id.* at 111.

371. Linda Greenhouse, *Bush Prevails; By Single Vote, Justices End Recount, Blocking Gore After 5-Week Struggle*, N.Y. TIMES (Dec. 13, 2000), https://www.nytimes.com/2000/12/13/us/bush-prevails-single-vote-justices-end-recount-blocking-gore-after-5-week.html.

the recounts and the liberal wing arguing the case lacked merit and the recounts must continue."[372] Thirty-five percent of Americans told Gallup that they believed the Court was influenced by their "personal feelings about Bush," rather than the "legal merits of the case."[373]

Ultimately, however, *Bush* did not involve a partisan dispute *over democracy*. No mainstream commentator alleged that President Bush or his party were active authoritarians.[374] In general, Democrats argued not that the Court had sanctioned *authoritarianism* as practiced by Republicans. Rather, the fear was that the Court had evaluated the law through a partisan lens, rather than judging the constitutional arguments in a neutral fashion.[375] Similarly, Republicans were certainly enraged by Vice President Gore's efforts to seek a recount, casting him as a sore loser.[376] But they did not frame the litigation as a fundamental threat to the ongoing operation of American democracy.

This was clearly a battle between Democrats and Republicans for the presidency. Maybe a majority of the Justices had a partisan preference and perhaps they did not. Though both Democrats and Republicans asked the Court to enforce the rules of the game, the Court was not backed into an adjudicative posture where it had to choose between opposing superficially plausible claims to save democracy from the other party.

Bush v. Gore is, therefore, distinguishable from the emergent class of cases involving partisan adjudication of democracy. The Court can perform its adjudicative function even when it does so in a partisan, political, or ideological manner. Thus, one might characterize *Bush v. Gore*,[377] *Crawford v. Marion County Election Board*,[378] *Rucho v. Common Cause*,[379] *Citizens United v. FEC*,[380] or

372. Raju Chebium, *U.S. Supreme Court Rules Manual Vote Recounts Unconstitutional*, CNN (Dec. 13, 2000, at 12:05 EST), https://www.cnn.com/2000/LAW/12/13/scotus.election.05/[https://perma/cc/7J74-YGCM].

373. David W. Moore, *Eight in Ten Americans to Accept Bush as "Legitimate" President*, GALLUP (Dec. 14, 2000), https://news.gallup.com/poll/2212/eight-ten-americans-accept-bush-legitimate-president.aspx [https://perma.cc/BR4U-MHJC].

374. Perhaps the most extreme sort of critique came from commentators who accused the Court of "the unpardonable sin of being a knowing surrogate for the Republican Party instead of being an impartial arbiter of the law." Vincent Bugliosi, *None Dare Call It Treason*, THE NATION (Jan. 18, 2001), https://www.thenation.com/article/archive/none-dare-call-it-treason [https://perma.cc/R5TT-EC3D].

375. *See id.*; Ron Klain, *My Florida Recount Memory: Refusing to Settle*, N.Y. TIMES (Nov. 20, 2010), https://www.nytimes.com/2010/11/21/opinion/21florida.html ("[W]e were hurled into a no-holds-barred battle, with hard-core partisans in control of the vote certification, and a Republican-dominated Supreme Court at the end of the line.").

376. *See, e.g.*, *Is Al Gore a Sore Loser or a Crusader?*, GREENSBORO NEWS & REC. (Dec. 10, 2000), https://greensboro.com/is-al-gore-a-sore-loser-or-a-crusader/article_1187f777-fb76-5f56-8eaf-d98df60d9c02.html; *Object: Sore Loserman*, NAT'L MUSEUM AM. HIST., https://americanhistory.si.edu/collections/object/nmah_1339363 [https://perma.cc/MV4W-E9JP] (last visited Mar. 5, 2026).

377. 531 U.S. 98 (2000).

378. 553 U.S. 181, 185, 200 (2008) (declining to conclude Indiana's voter ID law was unconstitutional).

379. 588 U.S. 684, 718 (2019) (declaring partisan gerrymandering nonjusticiable).

380. 558 U.S. 310, 340 (2010).

Shelby County v. Holder[381] as partisan, political, or ideological. Partisan-democracy cases like *Trump v. United States* and *Trump v. Anderson*, however, push the limits of even the Court's most controversial cases. It has not before resolved partisan disputes over democracy and antidemocracy. The Court is now asked to determine the fault line between democracy and antidemocracy. It is being asked to do so in the absence of democratic consensus and against significant partisan contestation. This is precisely the worry Justice Frankfurter anticipated but did not come to pass, until now.

III. CHANGES TO THE BACKGROUND POLITICS

Why now? What accounts for election law's apparently sudden impotence and arguable irrelevance in addressing the central issues of law and democracy? As we will show in this Part, the success or failure of the Court's law and politics jurisprudence has long been parasitically dependent on the stability of the democratic order. Adjudication does not occur in a political vacuum. The field has focused most of its attention on the demand side of adjudication but has failed to account for the supply side. Fundamentally, this is the best way of understanding Justice Frankfurter's key insight and why he warned the Court not to enter the political thicket. It is also a critical oversight of the field. The success of judicial engagement is dependent on the nature and scope of democratic dysfunction.

When the Court endeavors to supervise democratic politics, it is taking responsibility for domesticating a dynamic organism. The probability of success and degree of coherence of judicial oversight are always contingent on the soundness, rationality, health, and stability of the institutions that form the political ecosystem. When democratic institutions are relatively healthy and stable, judicial oversight is likely to be coherent and compelling. When democratic institutions are deeply dysfunctional and unstable, judicial supervision will not be up to the task. Judicial supervision can enforce a democratic bargain. It cannot manufacture it where it does not exist. A field of study that has judicial supervision as its primary remedy for institutional dysfunction will find itself unable to provide a coherent account of judicial supervision where judicial supervision is operating in the vacuum of fundamental democratic disagreement or significant political instability.

The election law cases the Court decided in the 1960s, 1970s, and even early 2000s were successful because they were responding to specific institutional failures within a stable political system.[382] Take the reapportionment cases, for example. The one-person, one-vote principle that emerged from the malapportionment

381. 570 U.S. 529, 539, 553 (2013) (striking down Section 5 of the Voting Rights Act, which provided a formula for determining which states must obtain federal approval for their voting policies to ensure they are not racially discriminatory).

382. We're grateful to Sam Issacharoff for pushing us on this point and also for offering a useful terminology.

of legislative districts was aimed at a clear and specific institutional failure in an otherwise functional political system.[383]

This is even more true of the race cases. The *White Primary Cases* were not attempting to remedy broad, catastrophic institutional dysfunction. Rather, the principle of nondelegation that undergirded the *White Primary Cases* was directed at a singular and specific, though egregious, failure of representation in an otherwise functional political system. The dispute in the *White Primary Cases* was not about whether the political system ought to be representative. The dispute was about whether the principle of representation ought to be extended to Black people.

The Court's law and politics jurisprudence could be interpreted in the patois of political process theory, which assumed a largely operational and rational political order that needed intermittent correction. The purpose of judicial supervision was to correct distortions in the political marketplace.[384] Political process theory assumes congruence between what courts are asked to do and what courts can do.[385] The set of cases that formed the core of the Court's law and politics canon was justified because it fit that description.

But what happens when there is a mismatch between the institutional capacity and the reality of how democratic politics and political institutions actually function? One can criticize the Court for being anti-*Carolene Products*.[386] *Carolene* generally directed that "legislation affecting ordinary commercial transactions is [generally] not to be pronounced unconstitutional" and "explained the Court's deference to the elected branches in most cases."[387] That is, making "ruling[s] blocking an attempt by a nonjudicial actor, like Congress or a state government, to regulate electoral funding and so to fight corruption, promote majoritarianism, and enhance competition."[388] Or, one can face up to the fact that it is not the Court, but our politics, that have changed dramatically. The current cases are attempting to address multiple and catastrophic institutional failures against the backdrop of a deeply unstable and evolving democratic order.

We have entered a period of significant institutional and political instability. One need only look at the transformation of our political parties to understand the change. The parties were once regarded as occupying adjacent spaces on the ideological political spectrum. The nature and stakes of their political disputes were comparatively low. That is no longer the case.

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383. *See* Reynolds v. Sims, 377 U.S. 533, 567 (1964) (holding that reapportionment preserves the basic principle of representative government).

384. *See* ELY, *supra* note 294, at 101-02 ("[R]epresentation-reinforcing orientation . . . is entirely supportive of, the American system of representative democracy. . . . policing the mechanisms by which the system seeks to ensure that our elected representatives will actually represent.").

385. *See id*. at 87.

386. *See* Nicholas O. Stephanopoulos, *The Anti*-Carolene *Court*, 2019 SUP. CT. REV. 111, 169–170, 177–178 (discussing United States v. Carolene Prods. Co., 304 U.S. 144 (1938)).

387. *See id*. at 117 & n.40.

388. *Id*. at 164

When the Court decided the reapportionment cases, which gave rise to its modern election law jurisprudence, American politics looked very different then from what it looks like today. Between roughly the 1950s and 1980s, our politics experienced a remarkable lull in its partisanship.[389] Bitter partisan rifts are part of our political inheritance, from Jeffersonian clashes with Federalists to threats of court-packing in the 1930s. That cycle of rancor, though, dipped precipitously after the end of World War II.[390] Partisan alignment, or the rate at which people identify with a political party, declined throughout the 1960s and 1970s, reaching all-time lows in the late 1970s and early 1980s.[391] In the 1970s, some political scientists even predicted that the historical tradition of party competition might soon reach some "lower limit" and all but disappear.[392]

Partisan polarization, or the ideological distance between the two parties, was also exceptionally low in the period preceding the Court's decision in *Baker*. During "the 1950s and early 1960s, liberal voters often vote[d] for Republican[s]," while many "conservative voters ch[o]se Democratic [c]andidates."[393] Such cross-party voting was enabled by "[t]he blurring of partisan lines on key national issues"[394] and the parties' substantial ideological overlap.[395] As a result, there were markedly higher levels of bipartisan cooperation.[396] For

389. This is not to say that this is the only such partisan lull we have ever experienced. Partisanship has long come in waves. For example, hyperpartisan peaks crested in the late-eighteenth and mid- to late-nineteenth centuries, each time followed by lulls in partisan contestation. And the same concerns raised by mid-twentieth century political scientists also appeared in the writings of de Tocqueville in the 1830s: for instance, he explained that "America has had great parties"—those parties "more attached to . . . ideas rather than to personalities"—but that "they no longer exist." *See* Geoffrey C. Layman, Thomas M. Carsey & Juliana Menasce Horowitz, *Party Polarization in American Politics: Characteristics, Causes, and Consequences*, 9 ANN. REV. POL. SCI. 83, 83 (2006) (quoting ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 161 (1835)).

390. *See* Morris P. Fiorina, *Parties and Partisanship: A 40-Year Retrospective*, 24 POL. BEHAV. 93, 94–96 (2002).

391. *See* NORMAN H. NIE, SIDNEY VERBA & JOHN R. PETROCIK, THE CHANGING AMERICAN VOTER 49 (1979). By 1980, the number of voters identifying as independents was equal to the number of voters identifying as Democrats. *See* Edward G. Carmines, John P. McIver & James A. Stimson, *Unrealized Partisanship: A Theory of Dealignment*, 49 J. POL. 376, 377 (1987). Voters who formally identified with one party increasingly voted for candidates of the other party. *Id.* at 378. And the rate at which voters had a "strong" party identification was decreasing. *Id.*

392. *See* Fiorina, *supra* note 394, at 95. In 1978, for example, some argued that America had witnessed the end of the "old-fashioned party organization" and suggested it was "unlikely that political parties [could] ever exist again" absent major reforms. Anthony King, *The American Polity in the Late 1970s: Building Coalitions in the Sand*, *in* THE NEW AMERICAN POLITICAL SYSTEM 371, 395 (Anthony King ed., 1978).

393. Han & Brady, *supra* note 12, at 515–16.

394. *Id.* at 506.

395. *See* Layman & Carsey, *supra* note 11, at 789.

396. *See* Jason M. Roberts & Steven S. Smith, *Procedural Contexts, Party Strategy, and Conditional Party Voting in the U.S. House of Representatives, 1971–2000*, 47 AM. J. POL. SCI. 305, 305 (2003); *see also* Han & Brady, *supra* note 397, at 509 (noting that there was "an unprecedented level of overlapping voting in both the House and the Senate in the years immediately after the Second World War," and that in 1967, "over 13 per cent of House Democrats were more conservative than the 10 per cent most liberal House Republicans, and almost 7 per cent of Democrats were more conservative than the 25 per cent most liberal Republicans").

instance, there were far fewer "party" votes,[397] and congressional polarization "plummet[ed] to its lowest level" around 1950.[398] Party organizations also came to be seen as ideologically weak and porous political networks that could not vigorously compete with one another.[399] Midcentury political scientists fretted over the lack of polarized ideologies,[400] so much so that the *American Political Science Review* in 1950 called for a more partisan two-party system, arguing that the two parties must become sufficiently ideologically distinct to effectively oppose one another.[401]

During the 1950s and 1960s, the parties also exhibited striking demographic parallelism. Most salient characteristics did not categorically align with either party. For instance, voter age did not yet meaningfully distinguish the parties,[402] nor were income differences particularly pronounced.[403] Perhaps most centrally, the electorate of the 1950s and 1960s was almost entirely white, and the parties were therefore racially parallel. The Immigration and Nationality Act of 1952 had only just become law; prohibitions on Asian American citizenship were just being lifted; and Jim Crow-era voter restrictions were still in full force across much of the country. Thus, in the 1950s, only 5%–7% of Democratic voters and 1%–2% of Republican voters were Black.[404] And even as late as 1970, only 0.7% of national voters were neither white nor Black.[405]

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397. *See* David R. Jones, *Party Polarization and Legislative Gridlock*, 54 POL. RSCH. Q. 125, 125 (2001).

398. Han & Brady, *supra* note 397, at 509.

399. *See* Rapoport et al., *supra* note 11 at 2 (noting that prior to the "era of party reform" that began in 1968, "American political parties at the national level were generally characterized as loose-knit coalitions of state and local organizations controlled by pragmatic politicians for whom issues and ideology were subservient to the goal of winning elections").

400. As one scholar put it, "With few exceptions, the scholarly consensus on contemporary American political parties" at that time "center[ed] on party decline." Marc J. Hetherington, *Resurgent Mass Partisanship: The Role of Elite Polarization*, 95 AM. POL. SCI. REV. 619, 619 (2001) (citation omitted). Even into the 1970s and 1980s, observers commented that "the so-called dealignment of the electorate" and widespread "erosion of party loyalties" had become "a source of widespread speculation by journalists and political scientists alike." Carmines et al., *supra* note 395, at 376–77.

401. *See* COMM. ON POL. PARTIES, AM. POL. SCI. ASS'N, TOWARD A MORE RESPONSIBLE TWO-PARTY SYSTEM 1–2 (1950).

402. Control of the youth vote continued to flip between the parties even as late as 1992. *See Election Results 2008: National Exit Polls Table*, N.Y. TIMES (Nov. 5, 2008), https://www.nytimes.com/elections/2008/results/president/national-exit-polls.html. By contrast, in the 2020 election, Biden took 60% of the youth vote, while Trump claimed 36%. *See National Exit Polls: How Different Groups Voted*, N.Y. TIMES (Nov. 3, 2020), https://www.nytimes.com/interactive/2020/11/03/us/elections/exit-polls-president.html.

403. Robert Axelrod, *Where the Votes Come From: An Analysis of Electoral Coalitions, 1952–1968*, 66 AM. POL. SCI. REV. 11, 15, 17 (1972). Notably, however, others have suggested that there were some partisan or class-based cleavages, still driven by the lingering legacy of the New Deal, with many middle-class homeowners voting for Republicans and working-class union members voting for Democrats. *See* Gary Miller & Norman Schofield, *Activists and Partisan Realignment in the United States*, 97 AM. POL. SCI. REV. 245, 245 (2003).

404. *See* Axelrod, *supra* note 407, at 15, 18.

405. *See* U.S. CENSUS BUREAU, U.S. DEPT. OF COM., P20-228, CURRENT POPULATION REPORTS: POPULATION CHARACTERISTICS 2 (1971) (providing statistics on voting and registration in the election of November 1970).

It was against this political backdrop, characterized by partisan cooperation and partisan parallelism, that the Court initially succeeded in its new role as supervisor of democratic politics. Justice Frankfurter's fears, articulated in *Baker*, initially seemed misplaced; the Court's involvement in the malapportionment cases did not undermine the democratic process, nor did the Court's reputation erode. To the contrary, the public generally accepted the Court's intervention—even seeing this new adjudicatory project as a way of enhancing, defending, and expanding American democracy.[406] Within a decade of *Baker*, the Court's new role was heralded by the public and generally embraced by scholars.

This Part will track the underlying partisan politics that contribute to current conditions in our courts. It will first outline the existential politics of democracy that has recently arisen in the United States—a staple obsession of the political science literature and even of some constitutional scholars, but not always fully acknowledged in the field of election law, though there are exceptions. It will then partially explain how this change in our politics came about. Drawing on the political science literature, it will demonstrate that, since the middle of the twentieth century, we have transitioned from a nation of relative partisan symmetry to one of hyperpolarization and asymmetry.

We are not the first to attend to these changed politics.[407] But scholars have not examined why these changes in our politics limit the efficacy of judicial supervision in democratic politics, and, as importantly, demand a focus on fundamental structural reform of our political institutions. As this Part will aim to show, our jurisprudence cannot be understood as separate from our political moment. To the contrary, election law today—and the Court's turn toward partisan adjudication of democracy—is part and parcel of a broader electoral and democratic crisis.

A. PARTISAN CONFLICT RETURNS

It is probably trite to observe that our politics have become more fractious along many dimensions since the *Carolene Products* Court, which emerged in an era of relative partisan peace. After a dip in the 1960s and 1970s, numerous studies in the 1990s and 2000s tracked a sharp rise in partisan identification amongst voters and party elites.[408] One can see this resurgence in partisanship by

406. *See* Friedelbaum, *supra* note 227, at 702–03.

407. *See, e.g.*, Karlan, *supra* note 31, at 2325–34 (explaining how geographic sorting and the alignment of race, religion, ideology, and class have produced two polarized partisan "mega-identities" in the American electorate); Richard H. Pildes & G. Michael Parsons, *The Legality of Ranked-Choice Voting*, 109 CALIF. L. REV. 1773, 1775 (2021) (examining ranked-choice voting as a structural response to rising polarization in the American electorate, intended to discourage the divisive campaign tactics fostered by plurality elections).

408. *See* Larry M. Bartels, *Partisanship and Voting Behavior, 1952–1996*, 44 AM. J. POL. SCI. 35, 36–37 (2000); Hetherington, *supra* note 404, at 619; Alan I. Abramowitz & Kyle L. Saunders, *Is Polarization a Myth?*, 70 J. POLITICS 542, 547 (2008). *See generally* BRUCE E. KEITH ET AL., THE MYTH OF THE INDEPENDENT VOTER (1992); DAVID W. ROHDE, PARTIES AND LEADER IN THE POSTREFORM HOUSE (1991).

examining data on voting behavior. The number of independent voters waned dramatically, accounting for just 9% of voters by 1996.[409] Voters also became more likely to vote for candidates nominated by the party they identified with or leaned toward.[410] They began to exhibit far higher levels of straight-party voting than those of the 1970s and 1980s.[411] And the number of "strong" partisan identifiers steadily increased between the late-1970s and 1990s.[412]

The resurgence in partisan identity was soon followed by increased party polarization.[413] As party identities resurged, the parties became more ideologically divergent and distinct.[414] Beginning in the 1980s, and accelerating in the 1990s and early 2000s, "Democrats and Republicans in the electorate" became more "divided ideologically," with the "issue opinion differences between them" steadily "widening."[415] So-called "elite" polarization was observable first.[416] State party representatives became more unified with the national parties' ideological preferences.[417] Members of Congress also became substantially more unified in their partisan preferences—Democrats more categorically liberal and Republicans more categorically conservative.[418] As a result, "[t]he bipartisan coalitions of the 1950s and 1960s" soon "g[ave] way to the party-line voting of the

409. Bartels, *supra* note 412, at 36–37.

410. *See id*. at 39–40.

411. *See* Alan I. Abramowitz & Steven Webster, *The Rise of Negative Partisanship and the Nationalization of U.S. Elections in the 21st Century*, 41 ELECTORAL STUDS. 12, 12–13 (2015). Voters were also more likely to vote for the candidate nominated by the party that they identify with or lean toward. *See id*.

412. *See* Bartels, *supra* note 412, at 36.

413. *See* BARBARA SINCLAIR, PARTY WARS: POLARIZATION AND THE POLITICS OF NATIONAL POLICY MAKING 36 (2006); NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES 165 (2006); ALAN I. ABRAMOWITZ, THE DISAPPEARING CENTER: ENGAGED CITIZENS, POLARIZATION, & AMERICAN DEMOCRACY 34–61, 139–157 (2010). A veritable cottage industry of political science literature sprung up that was devoted to explaining this new polarization. *See* THOMAS E. MANN & NORMAN J. ORNSTEIN, IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM 31–80 (2016) (examining how ideological realignment strengthened partisan identities and set the stage for heightened polarization); NELSON W. POLSBY, HOW CONGRESS EVOLVES: SOCIAL BASES OF INSTITUTIONAL CHANGE 153 (2004); Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 292–93 (2011) (arguing that contemporary hyperpolarization stems from the 1965 Voting Rights Act and its transformation of America's political parties).

414. *See* Alan I. Abramowitz & Kyle L. Saunders, *Ideological Realignment in the U.S. Electorate*, 60 J. POLITICS 634, 636 (1998); Richard Fleisher & John R. Bond, *The Shrinking Middle in the US Congress*, 34 BRIT. J. POL. SCI. 429, 445 (2004).

415. *See* Laura Stoker & M. Kent Jennings, *Of Time and the Development of Partisan Polarization*, 52 AM. J. POL. SCI 619, 619 (2008).

416. *Id*. at 620.

417. *Cf*. Boris Shor & Nolan McCarty, *The Ideological Mapping of American Legislatures*, 105 AM. POL. SCI. REV. 530, 549–50 (2011) (finding that state legislatures parallel national patterns of increasing polarization, though considerable heterogeneity remains across states).

418. *See, e.g*., PARTY UNITY ON VOTES AT NEAR-RECORD LEVELS DESPITE DISSENSION, CONG. Q. ALMANAC B-6 to B-7 (2015).

twenty-first century."[419] Voters and party activists also polarized, in line with party elites.[420] The parties became ideologically distinct in just a few decades.[421]

While the parties were experiencing shifts in partisanship and polarization, their coalitions also changed, becoming far more asymmetric. The most crucial and central aspect of this asymmetry was race. After a partisan realignment in the wake of the Civil Rights Movement, most Black voters were driven out of the Republican party, and most white Southern voters into it.[422] By the late 1970s and early 1980s, the Republican party had become nearly entirely white, while people of color voted nearly universally for Democrats.[423] Until recently,[424] the evidence suggested that these demographic differences only hardened as the new century progressed.[425] The Republican party became even more exclusively white,[426] while voters of color continued to favor the Democratic party heavily.[427] For example, between 2008 and 2016, Republicans further improved their performance with white male voters,[428] while Black voters' support for Democrats increased.[429] Latinx support for Democrats dramatically increased between 2004 and 2016.[430] And by 2018,

419. Michael Barber & Nolan McCarty, *Causes and Consequences of Polarization*, *in* NEGOTIATING AGREEMENT IN POLITICS 19, 19 (Jane Mansbridge & Cathie Jo Martin, eds., 2013).

420. *See* ABRAMOWITZ, *supra* note 417, at 34–36.

421. *See* Layman et al., *supra* note 393, at 84 (summarizing the literature).

422. For a data-informed analysis of this well-worn paradigm shift, see generally Ilyana Kuziemko & Ebonya Washington, *Why Did the Democrats Lose the South? Bringing New Data to an Old Debate*, 108 AM. EC. REV. 2830 (2018). For studies demonstrating the decline in white Democratic support in the South since the 1960s and charting the racial attitudes that drove that realignment, see, for example, EARLE BLACK & MERLE BLACK, THE VITAL SOUTH: HOW PRESIDENTS ARE ELECTED 141–75 (1992); John R. Petrocik, *Realignment: New Party Coalitions and the Nationalization of the New South* 49 J. POLITICS 347, 347 (1987); WARREN E. MILLER & J. MERRILL SHANKS, THE NEW AMERICAN VOTER 160 (1996).

423. *See* Peter Hanson & Yuejun Chun, *The Demographic Profiles of Democrats and Republicans*, GRINNELL COLL.: DATA ANALYSIS & SOC. INQUIRY LAB (May 2, 2020), https://dasil.sites.grinnell.edu/2020/05/the-demographic-profiles-of-democrats-and-republicans [https://perma.cc/X6P5-FZKL]; *see also* Janai Nelson, *Symposium: Parsing Partisanship and Punishment: An Approach to Partisan Gerrymandering and Race*, 96 N.Y.U. L. REV. 1088, 1092–95 (2021); Sean J. Westwood & Erik Peterson, *The Inseparability of Race and Partisanship in the United States*, 44 POL. BEHAV. 1125, 1125 (2022); Charles S. Bullock III et al., *The Consolidation of the White Southern Congressional Vote*, 58 POL. RSCH. Q. 231, 231 (2005).

424. *See, e.g.*, Matthew Yglesias, *The Electorate Is Becoming Less Racially Polarized*, SUBSTACK: SLOW BORING (Oct. 17, 2024), https://www.slowboring.com/p/the-electorate-is-becoming-less-racially [https://perma.cc/P8YH-4HZL].

425. But for literature that suggests that these asymmetries are incomplete, see, for example, ZOLTAN L. HAJNAL & TAEKU LEE, WHY AMERICANS DON'T JOIN THE PARTY: RACE, IMMIGRATION, AND THE FAILURE (OF POLITICAL PARTIES) TO ENGAGE THE ELECTORATE (2011).

426. *See, e.g.*, CHRISTOPHER T. STOUT, THE CASE FOR IDENTITY POLITICS 46 (2020).

427. *See, e.g.*, Alexander Kuo, Neil Malhotra & Cecilia Hyunjung Mo, *Social Exclusion and Political Identity: The Case of Asian American Partisanship*, 79 J. POLITICS, 17, 17 (2016).

428. *See* STOUT, *supra* note 430, at 46.

429. *See id.*; *see also* Christopher T. Stout & Jennifer R. Garcia, *The Big Tent Effect: Descriptive Candidates and Black and Latino Political Partisanship*, 43 AM. POL. RSCH. 205, 206 (2015).

430. *See* STOUT, *supra* note 430, at 46.

only 3% of registered Black voters, 14% of registered Latinx voters, and 12% of Asian American voters identified as Republicans.[431]

Though race is perhaps the most salient element of demographic partisan asymmetry, there are other stark demographic divides. Since the mid-1990s,[432] there has been a consistent and pronounced gender gap between the parties, with a larger share of women supporting Democrats and a larger share of men supporting Republicans.[433] That gap has only increased,[434] in part because there is a much sharper gender-based partisan divide amongst millennials compared to older generations.[435] The parties similarly divide on religion. On average, Republicans tend to be more religious than Democrats.[436]

Additionally, the parties appeal asymmetrically to voters based on age. As Pew put it, "age is strongly associated with partisanship – and this pattern has been in place for more than a decade."[437] Until recently, following a decisive and sharp rise in the association of younger voters with the Democratic party beginning in 2006,[438] the Democratic coalition included

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431. *See 1. Trends in Party Affiliation Among Demographic Groups*, PEW RSCH. CTR. (Mar. 20, 2018), https://www.pewresearch.org/politics/2018/03/20/1-trends-in-party-affiliation-among-demographic-groups [https://perma.cc/XGV7-TV4W] [hereinafter *Trends in Party Affiliation*]. The political leadership also tracks partisan, racial identity. For example, approximately 80% of the nonwhite members of the 118th Congress are Democrats. *See 118th U.S. Congress Continues to Grow in Racial, Ethnic Diversity*, PEW RSCH. CTR. (Jan. 9, 2023), https://www.pewresearch.org/short-reads/2023/01/09/u-s-congress-continues-to-grow-in-racial-ethnic-diversity [https://perma.cc/3VYZ-7YNX].

432. In the 1960s and 1970s there was a relatively small gender-based partisan divide. *See* Karen M. Kaufmann & John R. Petrocik, *The Changing Politics of American Men: Understanding the Sources of the Gender Gap*, 43 AM. J. POL. SCI. 864, 864 (1999).

433. For instance, Pew surveys beginning in 1994 and ending in 2018 show anywhere from a 6 to 19-point pro-Democratic lean amongst women voters. *See Trends in Party Affiliation*, *supra* note 435. The partisan gap amongst men is generally narrower, and in 2010 Democratic-leaning men briefly outnumbered Republican-leaning men. *See id.*

434. *See* Ruth Igielnik, *Men and Women in the U.S. Continue to Differ in Voter Turnout Rate, Party Identification*, PEW RSCH. CTR. (Aug. 18, 2020), https://www.pewresearch.org/fact-tank/2020/08/18/men-and-women-in-the-u-s-continue-to-differ-in-voter-turnout-rate-party-identification [https://perma.cc/NC8J-DGHV]. For example, the gender gap in Trump's approval rating was far wider than for prior presidents. *See* Hannah Hartig, *Gender Gap Widens in Views of Government's Role – and of Trump*, PEW RSCH. CTR. (Apr. 11, 2019), https://www.pewresearch.org/short-reads/2019/04/11/gender-gap-widens-in-views-of-governments-role-and-of-trump [https://perma.cc/Y52A-LC9C].

435. *See Trends in Party Affiliation*, *supra* note 435.

436. For example, in 2020, Republicans had an estimated 20-point advantage amongst those who attend a religious service at least once per week. By comparison, while about 75% of Democratic voters identified as Christian in 2008, that number was down to about 50% in 2020. *See* Carroll Doherty & Jocelyn Kiley, *In Changing U.S. Electorate, Race and Education Remain Stark Dividing Lines*, PEW RSCH. CTR. (June 2, 2020), https://www.pewresearch.org/politics/2020/06/02/in-changing-u-s-electorate-race-and-education-remain-stark-dividing-lines [https://perma.cc/7W2W-QCSM].

437. *See 4. Age, Generational Cohorts and Party Identification*, PEW RSCH. CTR. (Apr. 9, 2024), https://www.pewresearch.org/politics/2024/04/09/age-generational-cohorts-and-party-identification [https://perma.cc/S2R8-5YZ2].

438. *See* Jeffrey M. Jones, *Young Americans' Affinity for Democratic Party Has Grown*, GALLUP (Mar. 28, 2014), https://news.gallup.com/poll/168125/young-americans-affinity-democratic-party-grown.aspx [https://perma.cc/6SHL-9RFN]. But the trend of increasing youth support of Democrats is complicated by young peoples' general dislike of parties, and the low attentiveness to partisan politics amongst Gen Z voters. *See, e.g.*, Vianney Gómez & Andew Daniller, *Younger U.S. Adults Less Likely to*

more younger voters than the Republican coalition, which included more older voters.[439]

The parties also appeal to voters differently based on the voters' education level and socioeconomic status. Over the past thirty years, voters without any college education were roughly evenly divided between Republicans and Democrats, and voters who graduated from college or have postgraduate education leaned Democratic.[440] Until recently, less wealthy voters also generally favored Democrats, and wealthier voters tended to favor Republicans.[441] In April 2024, Pew Research found that about six in ten voters with lower family incomes associated with the Democratic Party, while Republicans had "a modest edge among upper-middle-income voters."[442] In the 2024 presidential election, on average, voters from households that earned less than $50,000 per year voted for Donald Trump.[443] By contrast, those who earned more than $100,000 per year voted for Kamala Harris.[444] Similarly, voters with a college education were more likely to vote for Harris, and voters without a college education were more likely to vote for Trump.[445] Those gaps are particularly pronounced by race and gender.[446]

It is worth acknowledging, of course, that while the 2024 presidential election reflected some of these trends, it also appears to have disrupted some of them. This partisan age gap narrowed significantly in the 2024 presidential election. According to one exit poll, voters under 45 preferred Harris by two percentage points over Trump, a 17-point swing from the 2020 presidential election between Joe Biden and Trump.[447] That swing was driven almost

See Big Differences Between the Parties or to Feel Well Represented by Them, PEW RSCH. CTR. (Dec. 7, 2021), https://www.pewresearch.org/fact-tank/2021/12/07/younger-u-s-adults-less-likely-to-see-big-differences-between-the-parties-or-to-feel-well-represented-by-them [https://perma.cc/B5LU-VTWT].

439. *See Trends in Party Affiliation*, *supra* note 435.

440. For example, polls generally show a roughly 25-point pro-Democratic gap amongst voters with postgraduate experience. *See* Doherty & Kiley, *supra* note 440. Democrats also hold a 13-point advantage with those with a four-year degree. *See id.*; *see also Trends in Party Affiliation*, *supra* note 435.

441. *See, e.g.*, Andrew Gelman, Lane Kenworthy & Yu-Sung Su, *Income Inequality and Partisan Voting in the United States*, 91 SOC. SCI. Q. 1203, 1204 (2010).

442. *See 6. Partisanship by Family Income, Home Ownership, Union Membership and Veteran Status*, PEW RSCH. CTR. (Apr. 9, 2024), https://www.pewresearch.org/politics/2024/04/09/partisanship-by-family-income-home-ownership-union-membership-and-veteran-status [https://perma.cc/N45S-KMJU]. Notably, at the upper-end of the income spectrum, Democrats edged out Republicans. *Id.*

443. *See* Adam Tooze, *America Is Locked in a New Class War*, FOREIGN POL'Y (Jan. 7, 2025, at 00:04 ET), https://foreignpolicy.com/2025/01/07/class-demographics-trump-harris-election.

444. Eva Xiao, Clara Murray, Jonathan Vincent, John Burn-Murdoch & Joel Suss, *Poorer Voters Flocked to Trump – and Other Data Points from the Election*, FIN. TIMES (Nov. 9, 2024), https://www.ft.com/content/6de668c7-64e9-4196-b2c5-9ceca966fe3f.

445. *See* Steve Kornacki, *Gender and Education Emerge as Massive Fault Lines in the Electorate: From the Politics Desk: The Gap Within the Gender Gap*, NBC NEWS (Mar. 18, 2025, at 17:15 EDT), https://www.nbcnews.com/politics/politics-news/gender-education-emerge-massive-fault-lines-electorate-politics-desk-rcna196977 [https://perma.cc/8YHF-W63D].

446. *See id.*

447. *See* Maryann Cousens, *2024 Post-Election Survey: Gender and Age Analysis of 2024 Election Results*, NAVIGATOR RSCH. (Dec. 12, 2024), https://navigatorresearch.org/2024-post-election-survey-gender-and-age-analysis-of-2024-election-results [https://perma.cc/PX5U-LHTE].

entirely by young men.[448] Similarly, in the 2024 presidential election, the GOP made some inroads among Black and Latino men.[449] Some indications suggest moderate Latinx, Asian, and even Black voters are also moving away from the Democratic Party.[450]

It remains to be seen whether those trends continue in future cycles—or are the product of a uniquely lopsided national election. Regardless, however, any such demographic shifts do not appear to have changed the degree of hyperpartisanship. The fundamental fracturing of our society along partisan lines—and the degree to which partisanship subsumes other identities—has persisted through the first years of the second Trump administration.[451] If anything, the first years of the second Trump administration have seen hyperpartisanship escalate—evidenced, for instance, by the killing of Charlie Kirk and the President's promise to crack down on liberal groups in response.[452]

Beyond identity, the parties are also structurally asymmetrical. The most apparent structural difference is geography; the two parties' voters live in different places, and there are apparent regional divides.[453] There is also a clear urban–rural divide, with Democrats far more likely to live in urban areas and Republicans in rural areas.[454] Geographic divides also present even at the micro-level; where Republicans and Democrats live in relative proximity, they are unlikely to live in the same residential communities or neighborhoods.[455]

The transformation of the parties has continued apace over the last two decades. Two phenomena are particularly notable. First, partisanship is no longer merely part of one's political identity, carried to the polls on the day of an

448. *See* Ezra Klein, *Democrats Need to Face Why Trump Won*, N.Y. TIMES (Mar. 18, 2025), https://www.nytimes.com/2025/03/18/opinion/ezra-klein-podcast-david-shor.html ("Eighteen-year-old men were 23 percentage points more likely to support Donald Trump than 18-year-old women, which is just completely unprecedented in American politics.").

449. *See* William H. Frey, *Trump Gained Some Minority Voters, but the GOP Is Hardly a Multiracial Coalition*, BROOKINGS INST. (Dec. 13, 2024), https://www.brookings.edu/articles/trump-gained-some-minority-voters-but-the-gop-is-hardly-a-multiracial-coalition [https://perma.cc/7DVM-7Z3R].

450. *See* Klein, *supra* note 452.

451. Joseph Copeland & Jocelyn Kiley, *Americans Say Politically Motivated Violence Is Increasing, and They See Many Reasons Why*, PEW RSCH. CTR. (Oct. 23, 2025), https://www.pewresearch.org/short-reads/2025/10/23/americans-say-politically-motivated-violence-is-increasing-and-they-see-many-reasons-why [https://perma.cc/838V-PLAM].

452. *See* Katie Rogers & Zolan Kanno-Youngs, *White House Plans Broad Crackdown on Liberal Groups*, N.Y. TIMES, (Sep. 15, 2025) https://www.nytimes.com/2025/09/15/us/politics/jd-vance-charlie-kirk-show.html.

453. *See* David Byler, *Republicans Now Enjoy Unmatched Power in the States. It Was a 40-Year Effort*. WASH. POST. (Feb. 18, 2021), https://www.washingtonpost.com/opinions/2021/02/18/republicans-now-enjoy-unmatched-power-states-it-was-40-year-effort.

454. *See* Jonathan Rodden, *The Geographic Distribution of Political Preferences*, 13 ANN. REV. POL. SCI. 321, 326 (2010); *Trends in Party Affiliation*, *supra* note 435.

455. *See* Jacob R. Brown & Ryan D. Enos, *The Measurement of Partisan Sorting for 180 Million Voters*, 5 NATURE HUM. BEHAV. 998, 998 (2021); Jesse Sussell, *New Support for the Big Sort Hypothesis: An Assessment of Partisan Geographic Sorting in California, 1992–2010*, 46 PS: POL. SCI. & POL. 768, 773 (2013).

election, but constitutive of our social identity in society.[456] Political scientists term this phenomenon "affective polarization."[457] The demographic divergence in the parties, in combination with identity-based partisan sorting,[458] has made voters more personally and deeply attached to their partisan identity.[459] This affective polarization makes cooperation and empathy with the other party all the more difficult.

Second, some political scientists argue that partisan polarization is asymmetric. The parties are not polarizing at the same rates.[460] These political scientists have shown that Republicans are moving to the right further and faster than Democrats are moving to the left.[461]

Building on the evidence of asymmetric polarization, some political scientists have also argued that Republicans are engaging in asymmetric forms of so-called "Constitutional Hardball."[462] Beginning in the 2010s, both parties became more willing to discard democratic practices, bending them until they broke.[463] On this account, however, Republicans exhibited more willingness to break with the typical bounds of electoral competition and an unequal desire to engage in practices that stretched democratic norms.[464] Others have detailed numerous examples of asymmetric resorts to hardball. Characteristic examples include early Republican willingness to shut down the federal government to "gain leverage" during Clinton-era budget negotiations,[465] Republicans' refusal to permit a vote on Merrick Garland's Supreme Court nomination,[466] and Republican explosion of the filibuster.[467]

When we trace the half-century arc of American political evolution, it is clear that fundamental shifts in partisan identification, polarization, and demographic

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456. *See, e.g.*, Iyengar et al., *supra* note 17, at 129.

457. *Id.* at 430.

458. *See, e.g.*, Abramowitz & Webster, *supra* note 415, at 12–13.

459. *See, e.g.*, Barber & McCarty, *supra* note 423, at 40; Ronald Brownstein, *The Four Quadrants of Congress*, NAT'L J., Feb. 2010; Layman et al., *supra* note 425, at 85–86 (summarizing the literature up to 2006); *see also* Sarah A. Binder, *The Disappearing Political Center: Congress and the Incredible Shrinking Middle*, BROOKINGS INST. (Sep. 1, 1996), https://www.brookings.edu/articles/the-disappearing-political-center-congress-and-the-incredible-shrinking-middle [https://perma.cc/NU5E-XARM].

460. *See, e.g.*, JOHN E. OWENS, *The Onward March of (Asymmetric) Partisan Polarisation in the Contemporary Congress*, *in* ISSUES IN AMERICAN POLITICS 7 (John W. Dumbrell ed., 2013); Edward G. Carmines, *Class Politics, American-Style*, 9 PERSPS. ON POL. 645, 645 (2011); Adam Lovett, *The Ethics of Asymmetric Politics*, 22 POL., PHIL. & ECON. 3, 3 (2023); *see generally* SINCLAIR, *supra* note 417 (describing how Republican Party has undergone pronounced ideological shift right since the 1960s, while providing less evidence of comparable shift in Democratic Party).

461. *See* MANN & ORNSTEIN, *supra* note 417, at 52.

462. *See* Fishkin & Pozen, *supra* note 31, at 936–37.

463. David E. Pozen, *Hardball and/as Anti-Hardball*, N.Y.U. J. LEGIS. & PUB. POL'Y 949, 950 (2019); MANN & ORNSTEIN, *supra* note 417, at 53.

464. *See* MANN & ORNSTEIN, *supra* note 373, at 53; *see also* Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 526–27 (2004).

465. Fishkin & Pozen, *supra* note 469, at 922.

466. *Id.* at 917–18.

467. *Id.* at 918.

symmetry fueled increasingly asymmetric politics. Cases like *Trump v. Anderson* and *Trump v. United States* are not hermetically sealed from that crisis. Instead, they are symptoms of the fundamental shifts in our politics, in which two hyper-polarized, fundamentally divergent parties developed different worldviews. Unable to reconcile their differences, they took ever more divergent approaches to political competition while cooperating less and less. That cycle of mistrust eventually, and unsurprisingly, led to current political conditions: both existential fear for American democracy and irreconcilable partisan views of the sources of the threat to democracy.

B. PARTISAN EXISTENTIALISM

Consider first the partisan existentialism that marks our era. Partisans on both sides appear to believe that the other side will adopt authoritarian and illiberal practices, undermining the character of the polity as a liberal constitutional republic if they win. No longer do parties merely fight about the economy, entering unnecessary wars, or undermining family values. The parties also fight about whether the other side's policies and actions are illiberal and undemocratic. The politics appear existential because both sides believe that at stake is not just a particular policy or issue but a fundamental commitment to liberty, individual flourishing, and the American constitutional system of self-governance.

Consider some specific examples. As early as the spring of 2016, liberal commentators, but not exclusively liberal commentators,[468] warned that then-candidate Trump was a threat to democracy.[469] Some went so far as to compare Trump to the Athenian demagogue Cleon, who "persuaded his fellow Athenians to slaughter every man in the city of Mytilene as punishment for a failed revolt."[470]

After Trump became president, the critiques became focused on his actual behavior and policies. During his first year in office, President Trump attempted to launch an investigation into alleged mass voter fraud—something liberal commentators demarcated as a "danger to democracy," while proclaiming that

468. The reality is a bit more complicated. In fact, at least with respect to the democratic threat posed by President Trump, many anti-Trump neoconservatives first accused then-candidate Trump of posing a potential democratic threat. *See, e.g.*, Robert Kagan, *This Is How Fascism Comes to America*, WASH. POST (May 18, 2016, at 23:09 ET), https://www.washingtonpost.com/opinions/this-is-how-fascism-comes-to-america/2016/05/17/c4e32c58-1c47-11e6-8c7b-6931e66333e7_story.html; Eliot A. Cohen & Bryan McGrath, *Open Letter on Donald Trump from GOP National Security Leaders*, WAR ON THE ROCKS (Mar. 2, 2016), https://warontherocks.com/2016/03/open-letter-on-donald-trump-from-gop-national-security-leaders [https://perma.cc/7DDK-8Q3P]. Libertarian and conservative scholars also questioned his view of the Constitution. *See* Adam Liptak, *Donald Trump Could Threaten U.S. Rule of Law, Scholars Say*, N.Y. TIMES (June 3, 2016), https://www.nytimes.com/2016/06/04/us/politics/donald-trump-constitution-power.html.

469. *See, e.g.*, Gabriel Debenedetti, *Democrats Sound Alarm Against Trump*, POLITICO (Mar. 17, 2016, at 05:42 EDT), https://www.politico.com/story/2016/03/democrats-donald-trump-alarm-220910.

470. *See What History Teaches Us About Demagogues Like The Donald*, TIME (June 20, 2016, at 15:05 ET), https://time.com/4375262/history-demagogues-donald-trump [https://perma.cc/6TG7-LRRC].

Russian interference was the true electoral threat.[471] Throughout President Trump's time in office, Democrats also accused him of attempting to suppress free speech and crush the media.[472] Then came the 2020 election and January 6th, which launched a new wave of accusations of authoritarianism and attempts to interfere with an election.[473] Critics at first limited their warnings about antidemocracy to Trump. But as Trump became the undisputed leader of the Republican Party, and as the Republicans came to accept and embrace their nominee and then President, critics turned their sights on the Party.[474]

Admittedly, there were those who criticized the Republican Party for flirting with antidemocracy before Trump arrived on the scene. In particular, critics on the left (and in the center) repeatedly implied[475] that the Tea Party Movement and its agenda were fundamentally antimajoritarian and, perhaps, antidemocratic.[476] In their pre-Trump book *The Tea Party and the Remaking of the Republican Party*, Theda Skocpol and Vanessa Williamson noted that Tea Party politics were marked by a degree of "out-group intolerance and refusal to contemplate compromise" that was "worrisome" for the future of "U.S. democracy."[477] In the last several years, commentators have paid increasing attention to this trajectory, from

471. *See* Liz Kennedy & Danielle Root, *Trump's Threat to Investigate American Voters Is a Danger to Democracy*, CTR. FOR AM. PROGRESS (Jan. 27, 2017), https://www.americanprogress.org/article/trumps-threat-to-investigate-american-voters-is-a-danger-to-democracy [https://perma.cc/AV5Y-P9QS].

472. *See, e.g.*, Matthew Menendez, *Trump Administration's Attack on Free Speech Sets a Dangerous Precedent*, BRENNAN CTR. FOR JUST. (May 2, 2017), https://www.brennancenter.org/our-work/analysis-opinion/trump-administrations-attack-free-speech-sets-dangerous-precedent [https://perma.cc/D883-2D3D].

473. *See, e.g.*, *Rep. Jeffries: "Every Second, Every Minute, Every Hour That Donald Trump Remains in Office Presents a Danger to the American People"* (Jan. 10, 2021), https://jeffries.house.gov/2021/01/10/rep-jeffries-every-second-every-minute-every-hour-that-donald-trump-remains-in-office-presents-a-danger-to-the-american-people [https://perma.cc/ZTY6-HPNR].

474. *See, e.g.*, Peter Wehner, *The GOP Is a Grave Threat to American Democracy*, THE ATLANTIC (Apr. 26, 2021), https://www.theatlantic.com/ideas/archive/2021/04/gop-grave-threat-american-democracy/618693; Zack Beauchamp, *The Republican Revolt Against Democracy, Explained in 13 Charts*, VOX (Mar. 1, 2021, at 07:30 EST), https://www.vox.com/policy-and-politics/22274429/republicans-anti-democracy-13-charts.

475. Critiques of the Tea Party were often lodged in different terms than are critiques of the Republican party today; the Tea Party had not yet been mainstreamed, and so was analyzed by political scientists more as a curiosity than a permanent political force that posed an active danger. *Contrast* Ed Reinke, *'Tea Party' Movement Faces Uncertain Future*, NBC NEWS (Feb. 5, 2010, at 15:09 EST), https://www.nbcnews.com/id/wbna35261088 [https://perma.cc/LEH6-WD9D] (questioning whether the "fledgling" Tea Party is "just a blip" or a "lasting political powerhouse"), *with* Ron Formisano, *The Legacies of the Tea Party and Occupy Wall Street*, NAT'L CONST. CTR.: COSNT. DAILY BLOG (Mar. 22, 2016), https://constitutioncenter.org/blog/the-legacies-of-the-tea-party-and-occupy-wall-street [https://perma.cc/NA6V-NFCK] (tracing the legacy of the Tea Party and its "profound[]" impact on American politics, including in the remaining "caucus of Republican hard-liners").

476. *See, e.g.*, Elbert Ventura, *The Tea Party Paradox*, COLUM. JOURNALISM REV. (Jan. 11, 2012) https://www.cjr.org/review/the_tea_party_paradox.php [https://perma.cc/VH96-J85R].

477. THEDA SKOCPOL & VANESSA WILLIAMSON, THE TEA PARTY AND THE REMAKING OF REPUBLICAN CONSERVATISM 211 (2d ed. 2016).

the Tea Party to Trump.[478] On this view, President Trump alone did not create our current political dynamic; he is a symptom more than a cause. But the charges of antidemocracy seemed more urgent and significant once Trump became the undisputed leader of the Republican Party.

Democrats were not the only ones who launched accusations of antidemocracy. Conservatives and Republicans accused Democrats of engaging in behavior that undermined democracy or the rule of law. For example, Fox News commentators exclaimed that the Democratic political "playbook" was an "existential threat to democracy."[479] Democrats were cast as purveyors of misinformation and promoters of a destructive agenda that threatens democratic discourse.[480]

The conservative think tank the Heritage Foundation levelled charges of authoritarianism at the administration of then-President Biden.[481] "Since Day One," Erin Dwinell wrote for Heritage, "the Biden administration has taken unprecedented authoritarian measures on a range of issues."[482] The examples of the administration's authoritarianism include "repeated attempts at unilateral, unlawful border and immigration policy and draconian COVID-19 lockdown, mask, and vaccine orders."[483] George Will, a conservative columnist for the Washington Post, took matters a step further. "Joe Biden," he observed, "is, like Trump, an authoritarian recidivist mostly stymied by courts."[484] The two politicians share, he argued, a similar "disdain for legality."[485] This disdain is abetted by "party loyalty that breeds subservience to the president, and disloyalty to the Senate as an institution."[486] He, therefore, blamed both "a Democratic executive

478. *See, e.g.*, Robert Draper, *The Arizona Republican Party's Anti-Democracy Experiment*, N.Y. TIMES Mag. (Aug. 23, 2022), https://www.nytimes.com/2022/08/15/magazine/arizona-republicans-democracy.html (describing the right-wing takeover of the Arizona Republican party and its rising commitment to what the writer labels an antidemocratic experiment); David Corn, *It Didn't Start With Trump: The Decades-Long Saga of How the GOP Went Crazy*, MOTHER JONES (Sep. 2022), https://www.motherjones.com/politics/2022/09/it-didnt-start-with-trump-the-decades-long-saga- of-how-the-gop-went-crazy [https://perma.cc/8ZBL-KU3A].

479. *See* CAVUTO COAST TO COAST, *Democrats' Political Playbook Is an 'Existential Threat to Democracy': Don Peebles*, at 3:11 (Fox Business, July 17, 2024), https://www.foxbusiness.com/video/6358312670112; *see also* MORNINGS WITH MARIA, *Democrats Are the Threat to Democracy: Sen. Rick Scott*, at 2:18 (Fox Business, July 25, 2024), https://www.foxbusiness.com/video/6359211490112.

480. *See, e.g.*, Joe Schoffstall & Cameron Cawthorne, *Founder of Soros-Funded 'Propaganda' News Network Has Visited Biden's White House Nearly 20 Times*, FOX NEWS: POL. (Apr. 2, 2024, at 04:00 ET), https://www.foxnews.com/politics/founder-soros-funded-propaganda-news-network-visited-bidens-white-house-nearly-20-times [https://perma.cc/Y3Z6-9W78].

481. Erin Dwinell, *Recipe for Biden Authoritarianism: Disinformation Efforts Plus Red Flag Laws*, HERITAGE FOUND. (June 29, 2022), https://www.heritage.org/gun-rights/commentary/recipe-biden-authoritarianism-disinformation-efforts-plus-red-flag-laws [https://perma.cc/4MTY-FX3Z].

482. *Id.*

483. *Id.*

484. George F. Will, *A Constitution-Flouting 'Authoritarian' Is Already in the White House*, WASH. POST (Jan. 3, 2024), https://www.washingtonpost.com/opinions/2024/01/03/biden-disdain-constitution-senate.

485. *Id.*

486. *Id.*

and a Democratic-controlled Senate [that] have cooperated in abusing power while histrionically warning against future authoritarian illegalities."[487]

Similarly, conservative and Republican critics complained that the 2024 Democratic presidential nominee, Kamala Harris, was an authoritarian,[488] and that her ascendance to the Democratic nomination represented an antidemocratic attempt to interfere with the voters' will.[489] The *National Review* warned that there were two versions of Kamala Harris, and that one version "was a dangerous authoritarian with an unlimited appetite for power who displayed contempt for the Constitution and no regard for the rights, dignity, faith, or reputations of anyone in her way."[490] *The New York Post* exclaimed that "Kamala Harris is a dangerous authoritarian and an enemy of core American freedoms."[491]

Rhetoric labelling the American left as antidemocratic has only accelerated since President Trump returned to office. President Trump has repeatedly demarcated as antidemocratic those judges who have enjoined his actions.[492] He has placed similar labels on the systems he seeks to destroy, arguing that they impede the effectuation of democratic values.[493] Meanwhile, those on the left—and those inside many of the institutions facing pressure from the administration—have continued to assert that he is an authoritarian and have suggested that his authoritarianism is accelerating faster than anticipated.[494] His tactics have been openly compared to global dictators.[495]

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487. *Id.*

488. *See, e.g.*, Harsanyi, *supra* note 25.

489. *See, e.g.*, Speaker Mike Johnson (@SpeakerJohnson), X (Jul. 21, 2024, at 14:34 ET), https://x.com/SpeakerJohnson/status/1815093011669516433 [https://perma.cc/L5KR-PDL9].

490. *See* Dan McLaughlin, *Kamala Harris Is Still a Dangerous Authoritarian*, NAT'L REV. (July 22, 2024, at 18:17 ET), https://www.nationalreview.com/2024/07/kamala-harris-is-still-a-dangerous-authoritarian.

491. *See* David Harsanyi, *Kamala Harris Is a Dangerous Authoritarian and an Enemy of Core American Freedoms*, N.Y. POST (July 25, 2024, at 18:43 ET), https://nypost.com/2024/07/25/opinion/kamala-harris-dangerous-authoritarian-and-enemy-of-freedom [https://perma.cc/XML3-TAUH].

492. *See, e.g.*, Chris Megerian, *Trump Says Federal Judge Who Ruled Against Deportation Orders Should Be Impeached*, PBS: NEWSHOUR (Mar. 18, 2025, at 11:33 EST), https://www.pbs.org/newshour/politics/trump-says-federal-judge-who-ruled-against-deportation-orders-should-be-impeached [https://perma.cc/LQD9-73N6]; Luke Broadwater, *Trump Officials Intensify Attacks on Judges as Court Losses Mount*, N.Y. TIMES (May 29, 2025), https://www.nytimes.com/2025/05/29/us/politics/trump-judges-attacks-tariffs.html.

493. *See, e.g.*, Malcolm Ferguson, *Trump's War on "Woke" Finally Hits NPR and PBS*, NEW REPUBLIC (May 2, 2025, at 09:57 ET), https://newrepublic.com/post/194763/trump-attacks-npr-pbs-funding [https://perma.cc/F3LX-LAER].

494. *See, e.g.*, David Smith, *The Trump Administration Is Descending into Authoritarianism*, THE GUARDIAN (Mar. 22, 2025, at 07:00 EDT), https://www.theguardian.com/us-news/ng-interactive/2025/mar/22/trump-administration-authoritarianism [https://perma.cc/4NMA-TWJL].

495. *See, e.g.*, Robert Tait, *Is Trump's Authoritarian Lurch Following the Playbook of Iran's Ahmadinejad?*, THE GUARDIAN (Mar. 30, 2025, at 03:00 EDT), https://www.theguardian.com/us-news/2025/mar/30/donald-trump-authoritarianism-iran-ahmadinejad [https://perma.cc/3PAA-4ZFS].

Although both parties now contend that the other side is antidemocratic, worries about antidemocracy do not look the same on both sides of the aisle.[496] In riling up fear over democratic collapse, the conservative media and Republican political leaders often focus on threats to the *security* of elections. Conservative critics tend to emphasize, for example, that voter fraud is at the root of democratic erosion.[497] Most notably, in the wake of the 2020 election, President Trump and his supporters amplified those concerns.[498] Another major throughline is voter and candidate ineligibility—often of a nativist flavor. Thus, both Barack Obama and now Kamala Harris have been accused of being ineligible for the office of the presidency.[499] Republicans also repeatedly argue that ineligible voters are succeeding in accessing the polls—contending, for example, that noncitizens[500] and dead people[501] are voting.

Those on the left focus on different sets of democratic fears. Security occasionally comes up, such as when concerns centered on foreign interference with the 2016 election.[502] More often, the left suggests that efforts are afoot to undermine valid voters' access to democratic participation, accusing Republicans of voter suppression.[503] Sometimes, the source of the danger is large donors or outsized contributions, which interfere with fairly run campaigns.[504] Other times, it is Republican efforts to limit voter access, particularly for voters of color.[505] Relatedly, Democrats also tend to worry about the erosion of constitutional and

496. Credit is due, in part, to Cass Sunstein, for helping us to imagine this typology of disparate partisan-democracy fears. *See generally* SUNSTEIN, *supra* note 28 (exploring the effects of confirmation bias and online "group polarization" on democracy).

497. *See, e.g.*, *Heritage Explains: Voter Fraud*, Heritage Found., https://www.heritage.org/election-integrity/heritage-explains/voter-fraud [https://perma.cc/L2AY-T2LH] (last visited Mar. 5, 2026).

498. *See Results of Lawsuits Regarding the 2020 Election*, *supra* note 132.

499. *See* Tamara Keith, *Trump's Racist 'Birther' Attacks on Harris Are a Return to Familiar Territory*, NPR (Aug. 15, 2020, at 07:01 ET), https://www.npr.org/2020/08/15/902756963/trumps-attacks-on-harris-are-a-return-to-familiar-territory [https://perma.cc/UDV7-BDSM].

500. *See* Fredreka Schouten & Tierney Sneed, *Trump-Aligned Republicans Make Noncitizen Voting – Already Illegal in Federal Elections – a Top 2024 Target*, CNN (July 10, 2024, at 05:00 EDT), https://www.cnn.com/2024/07/09/politics/republicans-noncitizen-voting-elections-trump/index.html [https://perma.cc/YP4A-XE53].

501. *See, e.g.*, *Tucker Carlson: Yes, Dead People Voted in this Election and Democrats Helped Make It Happen*, FOX NEWS (Nov. 11, 2020, at 22:33 EST), https://www.foxnews.com/opinion/tucker-carlson-2020-presidential-election-voter-fraud-dead-voters [https://perma.cc/Z2VF-7MFS].

502. Mark Hosenball & David Alexander, *Democrats Sue Russia, Trump Campaign for Alleged 2016 Election Conspiracy*, REUTERS (Apr. 21, 2018), https://www.reuters.com/article/world/democrats-sue-russia-trump-campaign-for-alleged-2016-election-conspiracy-idUSKBN1HR2BE.

503. *See, e.g.*, Devon Hesano, *The Anti-Voting Bills Republicans Enacted This Legislative Season*, DEM. DKT. (June 22, 2023), https://www.democracydocket.com/analysis/the-anti-voting-bills-republicans-enacted-this-legislative-season [https://perma.cc/BVY7-SBA4].

504. *See, e.g.*, *Influence of Big Money*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/issues/reform-money-politics/influence-big-money [https://perma.cc/77EV-PLRD] (last visited Mar. 5, 2026).

505. *See, e.g.*, Mark Oliver, *Stacey Abrams Calls Republican Efforts to Restrict Voting in Georgia 'Jim Crow in a Suit'*, THE GUARDIAN (Mar. 14, 2021, at 14:42 EDT), https://www.theguardian.com/us-news/2021/mar/14/stacey-abrams-georgia-bill-restrict-voting-rights [https://perma.cc/D8ZV-CT33].

legal norms. Repeated themes are, for example, the overreach of executive power and the undermining of interbranch balance.[506]

Our purpose here is not to assess the validity of the accusations of antidemocracy made by either party. Nor do we attempt to fully map these claims and their differences. Rather, we aim to point out the cumulative effect of this discourse. The vast majority of the American public now believes that democracy is under threat.[507] And polling suggests that view is widely held on both sides of the aisle.[508] As such, for many average voters, our politics have now become, in part, about the survival of democracy.[509]

Partisan politics is newly existential. While voters largely agree that democracy is under threat, there is rampant disagreement about the source of that threat. Each party identifies the source in a different place—most often laying the blame at the feet of their opponents. Under those conditions, it is not merely politics that is existential but also defeating the other party—perhaps at all costs. In this way, the very quest to save democracy tends to fuel further partisan conflict and incentivize increasingly norm-bending moves to prevent the other party's victory. The stakes of modern partisan politics have rarely been higher, nor the different partisan perspectives more intractable.

But how, exactly, did the parties' views of one another become so extreme? Political scientists have begun to track some of these changes in our politics. Some of the most compelling efforts at explanation have come from political scientists who recount how the two parties have become asymmetrically committed to democracy. Some have argued that Republicans have demonstrated a disproportionate and asymmetric shift toward illiberalism through at least three moves. First, Republicans have engaged in disparate efforts to deploy tools of voter suppression—to build their own form of "selectorate"—particularly through voter ID laws and gerrymandering.[510] Second, moving beyond mere hardball,

506. *See, e.g.*, Sheryl Gay Stolberg & Nicholas Fandos, *Pelosi Declares Nation Is in a 'Constitutional Crisis'*, N.Y. TIMES (May 9, 2019), https://www.nytimes.com/2019/05/09/us/politics/pelosi-constitutional-crisis.html.

507. *See New Poll: 81% of Voters Believe Democracy is Threatened*, GEO.: INST. OF POL. & PUB. SERV. (Mar. 21, 2024), https://politics.georgetown.edu/2024/03/21/new-poll-81-of-voters-believe-democracy-is-threatened [https://perma.cc/KR2D-7UZN].

508. *See id.*

509. Ali Swenson & Linley Sanders, *About 3 in 4 U.S. Adults Say the 2024 Election Will Determine the Fate of U.S. Democracy*, PBS: NEWSHOUR (Aug. 8, 2024, at 09:41 EST), https://www.pbs.org/newshour/politics/about-3-in-4-u-s-adults-say-the-2024-election-will-determine-the-fate-of-u-s-democracy [https://perma.cc/QY4F-GXWH].

510. *See, e.g.*, Zoltan Hajnal, Nazita Lajevardi & Lindsay Nielson, *Voter Identification Laws and the Suppression of Minority Votes*, 79 J. POLITICS 363, 372 (2017); Salvatore M. De Rienzo, Jr., Shelby County v. Holder *and Changes in Voting Behavior*, 67 AM. ECONOMIST 195, 196 (2022). *But see* Matt A. Barreto, Stephen A. Nuño & Gabriel R. Sanchez, *The Disproportionate Impact of Voter-ID Requirements on the Electorate—New Evidence from Indiana*, 42 PS: POL. SCI. & POL. 111, 111 (2009); Rachael V. Cobb, D. James Greiner & Kevin M. Quinn, *Can Voter ID Laws Be Administered in a Race-Neutral Manner? Evidence from the City of Boston in 2008*, 7 Q. J. POL. SCI. 1, 3 (2012); Robert S. Erikson & Lorraine C. Minnite, *Modeling Problems in the Voter Identification—Voter Turnout Debate*, 8 ELEC. L.J. 85, 98 (2009); M. V. Hood III & Charles S. Bullock III, *Much Ado About Nothing? An Empirical Assessment of the Georgia Voter Identification Statute*, 12 STATE POL. & POL'Y Q. 394,

Republicans have refused to seek power only through democratic means. Trump's refusal to accept the results of the 2020 election, and the subsequent raid on the Capitol on January 6th, embody that phenomenon,[511] as did the longer effort to undermine the 2016 election results.[512] Those efforts have often been attributed to Trump, the man. But political scientists like Levitsky and Ziblatt suggest that these efforts can be attributed to the entirety of the party, as most members of the Republican Party also refused to accept the results of the election, supporting the claims made by Trump, although they were clearly false.[513] Third, Republican leaders have also embraced the oft-violent rhetoric from extreme antidemocratic forces within the party, rather than containing them. For instance, several Republicans failed to condemn the outright political violence exhibited during the January 6th attack,[514] and officials and voters alike called for violence against protestors during the summer of 2020.[515]

On this view, a three-part combination—limiting voting, refusal to accept election results, and a turn toward violence—could be characterized as hallmark evidence of the Republican party's disproportionate turn toward illiberalism. That turn toward illiberalism can be measured through tools of political science; it is just one part of a broader democratic backsliding by partisan entities, which is observable around the world.[516] The identification of such illiberalism need not be a moral judgment: Antidemocratic tools have become more appealing to numerous global parties who operate from a minoritarian position and attempt to ensure their party's long-term survival against odds not otherwise stacked in their favor.[517]

This assessment by political scientists gets at something crucial about the way in which our politics have changed, though the diagnosis is admittedly inflammatory and may not fully capture current conditions. There is another, related way of thinking about much of this same evidence—one that perhaps will allow us to find more common ground in thinking about our political future: However much either or both parties might have become illiberal, both parties are now convinced that the *other party* (and only the other party) is behaving in antidemocratic ways. That characteristic of our politics—the complaint by both sides that the other is no longer committed to the core tenets of representative democracy—is a critical fault line for a constitutional republic.

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409 (2012); Jason D. Mycoff, Michael W. Wagner & David C. Wilson, *The Empirical Effects of Voter-ID Laws: Present or Absent?*, 42 PS: POL. SCI. & POL. 121, 121 (2009).

511. *See* LEVITSKY & ZIBLATT, *supra* note 23, at 120–24.

512. *See id.*; *see also* MARK BOWDEN & MATTHEW TEAGUE, THE STEAL: THE ATTEMPT TO OVERTURN THE 2020 ELECTION AND THE PEOPLE WHO STOPPED IT 2 (2022) (discussing Trump's delegitimization of 2020 election results through pre-election claims of fraud).

513. *See* LEVITSKY & ZIBLATT, *supra* note 23, at 121.

514. *See id.* at 124.

515. *See id.* at 123.

516. *See* Waldner & Lust, *supra* note 15, at 94.

517. *See* Levitsky & Way, *supra* note 43.

Underlying these mutual accusations of authoritarianism are a series of disagreements. Some of these disagreements are disputes about the facts; partisan media siloes mean that each side rarely operates from the same information. More fundamentally, though, there seems to be a partisan disagreement over what constitutes democratic behavior and where a party treads into illiberalism. In this way of understanding things, one party, the Democratic Party, asymmetrically embraces a vision of broad, competitive democracy that aligns with the understanding of electoral competition long held by most political scientists. The other party, the Republicans, also cast themselves as defending American democracy, but they embrace a different understanding of what comprises that democracy, one that is more accepting of tools that political scientists might consider minoritarian and anticompetitive. As a result, the parties no longer fully agree about what democracy is or what threatens it.

Why might this be the case? Given Republican ideological commitments (and political strategy), it is unsurprising that the party might tend to embrace a version of republican democracy that includes and emphasizes the many minoritarian features that have long been part of our constitutional system—such as the electoral college. Their vision is not one of an evolving democracy but one of preservation and return to a version of democracy from a past era. Republicans seek "history and tradition" democracy.[518] It is also not surprising that Republicans—who are generally more security-minded across numerous realms, both personal and structural—would focus their worries about democracy protection on security. By contrast, Democrats' ideological positions would tend to center on a vision of democracy rooted in change and transformation. Their vision is of a multiracial democracy not yet realized—and of a more majoritarian system that will allow their more multiracial and urban voters to dominate elections.

Because the parties are differentially advantaged by divergent views of what comprises democracy, they continue to offer these different views, which become increasingly irreconcilable. And because *what* comprises democracy cannot be agreed upon, each sees the other as fundamentally threatening that most guarded value. Given these divergent understandings of democracy, the parties interpret specific instances of potentially antidemocratic behavior differently. For instance, to Democrats, January 6th represents a near-coup and an unfathomable moment of political violence.[519] But to many Republicans, it represented a rightful action

518. *Cf.* Melissa Murray & Katherine Shaw, *Dobbs and Democracy*, 137 HARV. L. REV. 728, 806 (2024).

519. *See, e.g.*, *Read Biden's Full Speech Marking Anniversary of Jan. 6 Attack*, PBS: NEWSHOUR (Jan. 6, 2022, at 17:12 EST), https://www.pbs.org/newshour/nation/read-bidens-full-speech-marking-anniversary-of-jan-6-attack [https://perma.cc/B2ET-HE2X] (former President Biden calling January 6th "an armed insurrection"); Adam B. Schiff, *A Year After the Capitol Attack, Democracy Itself Is on Every Ballot*, L.A. TIMES (Jan. 6, 2022), https://www.latimes.com/opinion/story/2022-01-06/adam-schiff-jan-6-anniversary-capitol-attack-and-aftermath (calling January 6th "a violent attack on the transfer of power, the first in the nation's history").

to try to prevent a false election from being validated before their security concerns could be addressed.[520]

In whatever way we frame current conditions—whether we hold that the parties are committed to divergent visions of democracy or that the parties are asymmetrically committed to democracy—it is the case that our politics has entered a new phase. Each party now views the other as the portent of democracy's fall. Partisan politics have, therefore, taken on an existential tone. To protect democracy is to stop one's opponent. But that very view is, itself, dangerous to democracy.

For our purposes, the democratic asymmetries of the two parties are troubling not only because one or the other party might be willing to undermine democracy, but also because these moves have created a more fundamental partisan conflict over democracy. Amidst this conflict, all sides are looking for answers and for somewhere to turn. Given our long tradition of judicial supervision of democratic politics, litigants are increasingly tempted to look to courts to decide what truly constitutes "democracy." The problem is, courts came to be understood as successful supervisors of democratic politics under an entirely different set of political conditions.

IV. REFORMING REPRESENTATIVE DEMOCRACY

There is no doubt that the court-centric model has been woefully inadequate, and commentators have been brutal in their judgment. For example, Professor Jim Gardner concluded that "the Supreme Court has functioned, in its management of the constitutional jurisprudence of democracy, as a vector of infection, a kind of super-spreader of the conditions in which populist authoritarianism may take root and thrive."[521] Professor Michael Klarman, following an extensive survey of the Court's law and democracy cases, concluded that "the Court failed to protect democracy and instead defended the interests of the Republican Party."[522] Similarly, Professor Pam Karlan has noted that the Court, specifically the conservative Justices, "has abandoned majoritarian, representation-reinforcing judicial review."[523] By comparison, Professor Rick Hasen's recent assessment of the Court's partisan democracy cases seems mild. Focusing particularly on *Trump v. Anderson* and *Trump v. United States*, Professor Hasen concluded that "the courts' ability to thwart attempted election subversion remains a question mark."[524]

520. *See* Abby Springs & Lew Blank, *Voters Are Concerned About a Repeat of the January 6 Insurrection and Other Threats to Democracy*, DATA FOR PROGRESS (Jan. 10, 2024), https://www.dataforprogress.org/blog/2024/1/10/voters-are-concerned-about-a-repeat-of-the-january-6- insurrection-and-other-threats-to-democracy [https://perma.cc/G4LM-Z5L9].

521. Gardner, *Illiberalization of American Election Law*, *supra* note 6, at 425.

522. Klarman, *supra* note 32, at 224.

523. Karlan, *supra* note 31, at 2353–54.

524. *See* Hasen, *supra* note 36, at 1681.

Election law scholars understandably find the approach of the Roberts Court disconcerting. Across almost all categories of election law cases, the Court increasingly presides over a law and politics jurisprudence that imposes few constitutional or judicially enforceable limits on the exercise of political power. The Court has made it harder for Congress and the states to check the power of elected officials, promote political competition, protect racial minorities, or equalize political power among citizens. Some have gone as far as to say that the Justices of the Supreme Court are not only preventing Congress and the states from implementing a prodemocracy vision, but that the Justices are themselves implementing their own partisan and ideological preferences as election law jurisprudence.

Given the changes in our politics, the critical question for scholars of law and democracy is whether it is sensible to expect that the Court would continue to play the role it once played when our politics were less polarized and seemed less existential. In this Part, channeling Justice Frankfurter, we explain why courts cannot be the *deus ex machina* that saves democracy. Courts form a part of the democratic ecosystem. They are not removed from the pathologies of democratic politics. Admittedly, they may be differentially affected by the excesses of democratic politics than other institutions, and courts certainly have different institutional strengths and weaknesses than legislative and executive institutions. The courts' comparative advantages may enable them to respond to certain pathologies of the political process, and their comparative disadvantages may make them unable to provide a remedy or particularly vulnerable.

Section IV.A makes a case for reconceptualizing the Court's role amid a democratic crisis. This Section focuses on the roles we should expect the Court to play given the state of our background politics, and where our expectations should give way to existing political realities. Section IV.B sketches a research agenda for political reform that reaches beyond courts. Our aim here is not to present a comprehensive research agenda but to outline some possibilities. Some of the issues about democracy that the courts are asked to resolve are best given to the political process. These issues require a political consensus about the nature of representative government that only the people and their representatives can make. Courts can build upon a political consensus, but they cannot manufacture a consensus where one does not exist. Election law needs to become less reliant on the judicial supervision model that has long served the field and, for the most part, has done so more than adequately, if not admirably. Adjudication cannot save representative democracy from itself.

A. RECONCEPTUALIZING THE COURT'S ROLE AMIDST DEMOCRATIC CRISIS

One critical purpose of election law scholarship is to provide a compelling normative account of the relationship between "structures of democratic governance"[525] and judicial supervision of representative democracy. The Court began

525. We borrow here Sam Issacharoff's elegant phrase to refer to the rules and institutions that make representative democracy possible. *See* Issacharoff, *Judicial Review in Troubled Times*, *supra* note 6, at 5.

to broadly constitutionalize significant swaths of democratic politics in the decades following its intervention in the malapportionment cases.[526] The Court now rules imperiously over American democracy. But it has always been difficult to discern "any underlying vision of democratic politics that is normatively robust or realistically sophisticated about actual political practices."[527]

The reasons are manifold and understandable. To start, the text of the Constitution is of limited utility in the domain of law and politics. As some commentators have observed, even from inception, the "Warren Court," widely viewed as a liberal democratic Court, "had little basis in text, history, or judicial precedent for developing a robust conception of democratic politics."[528] Moreover, to the extent that one can derive a vision of democratic politics in the constitutional structure, it is mostly anachronistic and outmoded. The more modern parts are in tension with the antiquated parts. Lastly, justifying the Court's role in democracy was an exercise in applied political theory, which was not the Court's strong suit, to put it mildly. Thus, the "American Constitution is a curious amalgam of textual silences, archaic social and political assumptions that subsequent developments quickly undermined, and a small number of narrowly targeted recent suffrage amendments that reflect modern conceptions of the electorate but fail to address conceptions of democratic politics more deeply."[529]

Commentators took up the task of articulating both a descriptive and prescriptive account that the Constitution did not itself provide. The earliest defense of the Court's work came from the legal academy, specifically from John Hart Ely in his path-breaking book, *Democracy and Distrust*.[530] Ely found inspiration for his political process theory in the most famous footnote in history, footnote four in *United States v. Carolene Products*,[531] an otherwise unremarkable case from 1938 upholding the federal government's power to exclude filled milk from the channels of interstate commerce.

In *Carolene Products*, while articulating a default posture of deference to Congress and the political process, Justice Harlan Stone, writing for the Court, dropped arguably the most memorable footnote in the United States Reports. In footnote four of the opinion, Justice Stone raised the possibility that a more searching judicial scrutiny might be warranted in certain cases. For example, the Court might be unwilling to defer to the political process where the government enacts a law that violates a "specific prohibition of the Constitution."[532] Similarly, the Court might step in if the government "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," such as infringing on the right to vote.[533] The Court might also

526. For a thorough review, see Pildes, *supra* note 2, at 3.
527. Issacharoff & Pildes, *supra* note 2, at 646.
528. Issacharoff & Pildes, *supra* note 6, at 1174.
529. *Id*. at 1179.
530. *See generally* ELY, *supra* note 294.
531. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)).
532. ELY, *supra* note 294, at 75 (quoting *Carolene Prods*., 304 U.S. at 152 n.4).
533. *Id*. at 75–76 (quoting *Carolene Prods*., 304 U.S. at 152 n.4).

intervene in the political process to prevent state action that reflects prejudice against national, racial, or "discrete and insular minorities" such that ordinary "operation of those political processes" cannot "be relied upon to protect minorities."[534]

Using *Carolene Products* as a frame, Ely painted a portrait of a Court segregated from the sordid politics of the people. It was not the Court's job to articulate substantive values. Rather, the purpose of judicial review was "to ensure that the political process—which is where such values *are* properly identified, weighed, and accommodated—was open to those of all viewpoints on something approaching an equal basis."[535] Ely argued that judicial intervention was justified to remove obstacles in the political process, to "clear[] the channels of political change," or to "correct[] certain kinds of discrimination against minorities."[536] Ely offered "a participation-oriented, representation-reinforcing approach to judicial review."[537]

Law and democracy scholars elaborated and expanded Ely's political process approach to articulate a muscular role for the courts and guide courts as they confronted the pathologies of the political process. The core of the argument was that courts were comparatively advantaged to check the rapacious impulses of self-interested political agents who sought to hold on to political power by manipulating governance structures to frustrate the will of the majority or suppress the voice of the minority. Methodologically, as Sam Issacharoff and Rick Pildes explained in an influential article more than twenty-five years ago, courts could only perform this role if they were attentive to the structural values that made representative democracy possible and how well governance structures reflected those values.[538] Though election law scholars argued about whether courts ought to enforce structural values or individual rights, just about everyone agreed that the courts were justified in policing the political process by vindicating values expressed in either individual rights or structural terms.[539] Moreover, given that judicial supervision in democratic politics was necessarily an exercise in applied politics and political theory, the structuralists won out. The language of individual rights was simply the way of domesticating structural values to render them justiciable.

1. Institutional Limitations

Muscular judicial supervision became the default assumption and expectation of the field. The successes of the Warren Court seemed to create an impression of the Court as an all-purpose utility tool that could fix everything that ailed democratic politics. There was a sense of failure, if not betrayal, when the Court

534. *Id.* at 76 (quoting *Carolene Prods.*, 304 U.S. at 152 n.4).
535. *Id.* at 74.
536. *Id.*
537. *Id.* at 87.
538. Issacharoff & Pildes, *supra* note 2, at 645–46; *see also* ELY, *supra* note 294, at 74.
539. *See, e.g.*, Pildes, *supra* note 2, at 31–55.

refused to redress what seemed like an evident malfunction of the democratic process.

But commentators seem to have forgotten a corollary lesson of the political process school. Judicial supervision of democratic politics was always contextual. The extent of judicial engagement with the political process was contingent upon the politics of the era in which the Court found itself. The Court was responding to the politics of its time within its current institutional capabilities. Some commentators alluded to this early on. For example, Rick Pildes advised, "the role that courts should play is best derived from functional analysis of the strengths and limitations of this overall institutional system."[540] A functional analysis of the comparative strengths and weaknesses of all the institutions involved in democratic governance, including courts, accounted for the fact that institutions changed over time. The capability of institutions, courts included, waxes and wanes as a function of their political context.

An appreciation of the institutional limitations of courts is as important as an understanding of the actual pathologies of the political process. Courts, like other institutions of democratic politics, have their pathologies and institutional limitations. Moreover, courts are not hermetically sealed from the political process. They, too, are subjected to the pressures of the politics of their day. They may be differentially affected, as compared to legislatures, and there may be a lag effect, but they are not segregated from the political pathologies of their day. Consequently, the overall assessment of the utility and intensity of judicial review is a function of the actual pathologies of democratic politics and an institutional determination of what courts could realistically contribute to addressing those pathologies.

Accounting for current political realities, it is unrealistic to expect the Court to protect democracy from this new flavor of partisan conflict. As a point of departure, partisan adjudication of democracy and authoritarianism present a distinctive challenge to courts because these cases pose significant epistemic problems. Courts are epistemic institutions. They operate on facts, and they purport to apply the law objectively. In this respect, courts are uniquely positioned to address these fundamental challenges to democracy.

But courts are also uniquely vulnerable. Judges, and juries, are not immune to motivated reasoning and cognitive biases.[541] Without a shared sense of fact and with a utilitarian conception of law, once partisan accusations of authoritarianism are lodged, resolving those disputes becomes difficult. Each side is motivated to view the claim, at which everything is at stake, only through its partisan filters.

To make these epistemic difficulties worse, the very process of dispute resolution can also become another tool to erode democracy. The effectiveness and

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540. Pildes, *supra* note 2, at 13.

541. *See, e.g.*, Mary Smith, Hon. Michael B. Hyman & Sarah E. Redfield, *Addressing Bias Among Judges*, STATE CT. REP. (Sep. 14, 2023), https://statecourtreport.org/our-work/analysis-opinion/addressing-bias-among-judges [https://perma.cc/4LC3-S2DN]; Riquel Hafdahl, Charles P. Edwards & Monica K. Miller, *Social Cognitive Processes of Jurors,* 61 WASHBURN L.J. 305, 306 (2022).

legitimacy of courts make them targets of partisan capture. An accusation that one side or the other is acting antidemocratically can, ironically, itself be a tool of authoritarianism, used to stoke fear and disrupt electoral democracy.[542] Both sides are incentivized to claim that the other is authoritarian and justify their strike-first or norm-breaking behavior on the grounds that the other side did it first or would if they could. There is a significant payoff for both sides to enlist the courts to defend their version of democracy and to prevent their understanding of democratic backsliding.

The Court's democratic legitimacy is also potentially compromised by the resolution of these cases. Where the Court decides partisan disputes over democracy, there are necessarily few resolutions that allow them to avoid accusations of partisanship. Of course, these cases are not the only ones casting the Court in a more partisan light. Moreover, democracy can likely tolerate a court that is perceived to be partisan, captured by one party—so long as both sides generally believe that the court is committed to fair competition, and could be recaptured via fair political processes. Jurists do not much like the idea of a partisan court, but it is not *antidemocratic* for a party to control a branch of government, even the judicial branch.[543]

Much more democratic trouble is brewing, however, where one side begins to see the institution not merely as partisan, but as authoritarian, committed to clinging to power. It is therefore particularly concerning that the Court may be unable to resolve these cases without being labeled by one party as an *antidemocratic* institution. The very structure of the cases raises the problem. Where both sides accuse the other of illiberalism, any decision in the case will implicitly reinforce that accusation. As a result, no matter how the case is ultimately decided, the Court will necessarily fail to stop what one major party has labeled as authoritarian behavior. In selecting a winner, the Court is always doomed to sanction a position that one set of partisans views as antidemocratic—and in doing so, risks being perceived by one party as endorsing authoritarianism.

No single decision is likely to entirely erode the Court's legitimacy as a democratic institution. We do not claim that *Anderson* produced such a totalizing erosion. These dilemmas are likely to be repeated, however, as the underlying partisan conflict over democracy is unlikely to fade away anytime soon. Were this same phenomenon to repeat itself on the Court's docket over the years, the consequences could be more extreme. If the Court repeatedly selects a partisan vision of democracy that the other side views as authoritarian, the Court risks convincing one or both sides that authoritarianism has prevailed and the electoral

542. Some have called a variant of this particular strategy "grievance-fueled illiberalism." *See, e.g.*, Thomas Carothers & Benjamin Press, *Understanding and Responding to Global Democratic Backsliding*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Oct. 20, 2022), https://carnegieendowment.org/research/2022/10/understanding-and-responding-to-global-democratic-backsliding [https://perma.cc/2VWF-JM82].

543. *See* Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 579 (2005).

game is no longer being fairly played. Such conditions only incentivize more antidemocratic behavior from the losing party.[544]

Perhaps such erosion would be worthwhile in the short term if it proved useful in reestablishing democratic stability. But courts are also likely ill-suited to addressing partisan disputes over democracy. Constrained by their institutional limitations, courts are poorly equipped to guard against democratic backsliding. Courts see litigation only as it is presented to them. Whatever the broader significance of the case, the most basic of jurisprudential principles demands that only the dispute between the individual parties can be resolved.[545] They also have little control over the shape of the narratives from which they issue opinions. Further, courts are not well-positioned to make risk-risk tradeoffs—the kind of broader, societal decisions that might be required in the moment. And they have no large-scale communications apparatus, nor many other tools with which to reach the public, and with which to establish political trust.[546]

Nonetheless, even if the Court understands these dangers, it may be difficult to avoid them. Given the immensity of their consequences, the Court cannot easily dodge these cases. Few expected that the Court would simply refuse to hear either *Trump v. Anderson* or *Trump v. United States* (or argued that it ought to do so)—likely in part because it felt as if the Court was the only place to search for solutions to the intractable political problems presented.[547] Moreover, even refusing to hear groundbreaking cases can send a partisan message. Consider the debate over nonjusticiability that emerged in the wake of the Court's decision in *Rucho v. Common Cause*. There, the Court declared that partisan gerrymanders were no longer justiciable.[548] The Court was then widely accused of partisan preferencing, given that Republicans appear to be somewhat advantaged by the practice of gerrymandering.[549] As *Rucho* illustrated, even nonjusticiability may be understood as carrying a partisan valence that mirrors the partisan valence of the underlying substantive issues.

It is too tall an order to expect the Court to functionally declare that one of our two major political parties is antidemocratic or that the standard bearer for one of our major political parties is an authoritarian. Half the country might dismiss it as a shill for one party and a tool of the other party's antidemocratic campaign. It

544. *See* Issacharoff, *supra* note 14, at 486.

545. *See, e.g.*, Gill v. Whitford, 585 U.S. 48, 54 (2018).

546. *See, e.g.*, Rucho v. Common Cause, 588 U.S. 684, 719–19 (2019).

547. *See* Aziz Z. Huq, *Structural Logics of Presidential Disqualification*, 138 HARV. L. REV. 172, 175 (2024) (describing the "outcome's seeming inexorability" in *Trump v. Anderson*); Amy Howe, *Supreme Court Takes Up Trump Immunity Appeal*, SCOTUSBLOG (Feb. 28, 2024), https://www.scotusblog.com/2024/02/supreme-court-takes-up-trump-immunity-appeal [https://perma.cc/QBN6-V8DJ] (recounting lower courts' procedural delays in anticipation of Supreme Court's potentially rapid grant of cert in *Trump v. United States*).

548. *See Rucho*, 588 U.S. at 687.

549. *See, e.g.*, Jelani Cobb, *The Supreme Court Just Legitimized a Cornerstone Element of Voter Suppression*, NEW YORKER (July 3, 2019), https://www.newyorker.com/news/daily-comment/the-supreme-court-just-legitimized-a-cornerstone-element-of-voter-suppression.

should surprise no one if the Court is unwilling to play that role. These are decisions that ought to be made by the people themselves.

2. What the Court Can Do: Prevent Democratic Disorder

Our assessment casts doubt on the default assumption of muscular judicial review in law and politics cases. It suggests that past theories of judicial supervision have paid insufficient attention to the limitations imposed by our politics. Here, we use the recent partisan democracy cases to articulate an approach that ties together the institutional capacities of courts within the parameters of partisan challenges to democracy. Given the recency of these cases, it is understandable that the focus so far has been on the internal logic of the opinions.[550]

The fact that the Court is largely withdrawing from active regulation of democratic politics does not mean that the Court should withdraw entirely from the field of electoral adjudication. Nor does it mean that the Court is withdrawing completely. Despite the many challenges that the Court faces in adjudicating partisan democracy cases (and despite the Court's attempts to withdraw from the field), there is still something that the Court can do and may be willing to do.

If one wants to be charitable, one can say that the vision of democracy that the conservative wing of the Court promotes is very much consistent with the competition model that Sam Issacharoff and Rick Pildes advanced in their landmark article, *Politics as Markets*.[551] Recall that Issacharoff and Pildes, building from the political process school, offered a theory of judicial regulation with two complementary parts.[552] Democratic politics is "akin in important respects to a robustly competitive market—a market whose vitality depends on both clear rules of engagement and on the ritual cleansing born of competition."[553] Additionally, because "politics shares with all markets a vulnerability to anticompetitive behavior," courts ought to be particularly attentive to anticompetitive rules and behaviors and strike them down "in order to ensure an appropriately competitive partisan environment."[554] In our view, the political markets approach best describes what the Court is currently doing, and what it can do, given our fights over democracy.

There is an important distinction, however, between the Court's current approach and that advocated by Issacharoff and Pildes. Whereas Issacharoff and Pildes advocated and contemplated a more active role for the Court—a type of judicial dirigisme[555]—the Roberts Court has taken on a more laissez-faire

550. For recent papers on these cases, see generally Neil S. Siegel, *Narrow but Deep: The* McCulloch *Principle, Collective-Action Theory, and Section Three Enforcement*, 39 CONST. COMMENT. 219 (2024); Derek T. Muller, *Administering Presidential Elections and Counting Electoral Votes After* Trump v. Anderson, 60 WAKE FOREST L. REV. 327 (2025); Huq, *supra* note 552, at 175–84; and Shalev Gad Roisman, Trump v. United States *and the Separation of Powers*, 173 U. PA. L. REV. ONLINE 33 (2025).

551. *See* Issacharoff & Pildes, *supra* note 2, at 646, 703.

552. *See id*. at 648.

553. *Id*. at 646.

554. *Id*. at 646, 648.

555. *See id*. at 643.

approach. The Court generally assumes a competitive political market and sees any type of regulation as inhibiting free political competition. It views politics as about the "survival of the fittest."[556]

Nevertheless, the conservatives do have their limits. Within a view of politics as a war against all, there must be a set of basic rules. Even wars have rules. And for the conservatives on the Court, the rule might be "no chaos." As Jeannie Suk Gersen and Cass Sunstein have recently noted, the Court's decisions in *Trump v. Anderson* and *Trump v. United States* could be understood as an effort to address "democratic disorder."[557] That observation is representative of some of the Court's most recent and most salient law and politics cases.

Consider in this vein *Chiafalo v. Washington*, *Moore v. Harper*, and the two Trump cases, *Trump v. Anderson* and *Trump v. United States*.[558] These cases are hard to square with conventional modalities of constitutional interpretation—such as text, original public meaning, and structure. As Cass Sunstein said of *Trump v. United States*, "For those who insist on fidelity to the legal sources, the most charitable verdict on *Trump v. United States* is Scottish: Not proven."[559] Sunstein's verdict could have easily applied to *Chiafalo*, *Moore*, and *Trump v. Anderson*.

Chiafalo examined the independence of electors chosen by the party to participate in the Electoral College.[560] After the 2016 election, some electors who were alarmed by the prospect of a Trump presidency tried to coalesce around a different candidate.[561] Under state law, however, they must cast their vote in the Electoral College for the candidates of the party that selected them.[562] They had no independence, no discretion to do as they deemed best.[563] The electors challenged the state law in federal court, and the 10th Circuit agreed with them.[564] They clearly had the best historical argument. "If you take the text and structure of the Constitution and you take into account both the drafting history and the intention of the Framers," two of us wrote in our analysis of the case, "the best read of the text is that the Constitution created a federal office, of presidential 'electors,' with a distinctive, prescriptive, and consequential responsibility."[565] In

556. Lynn Adelman, *The Roberts Court's Assault on Democracy*, 14 HARV. L. & POL'Y REV. 131, 147 (2019).

557. *See* Cass R. Sunstein, Presidential Immunity and Democratic Disorder 8 (July 16, 2024) (unpublished manuscript) (on file with author).

558. Chiafalo v. Washington, 591 U.S. 578 (2020); Moore v. Harper, 600 U.S. 1 (2023); Trump v. Anderson, 601 U.S. 100 (2024); Trump v. United States, 603 U.S. 593 (2024).

559. Sunstein, *supra* note 562, at 9.

560. *See Chiafalo*, 591 U.S. at 592.

561. *See id.* at 586.

562. *See id.*

563. *See id.*

564. *See id.* at 587.

565. Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, Chiafalo: *Constitutionalizing Historical Gloss in Law and Democratic Politics*, 15 HARV. L. & POL. REV. 15, 22 (2020).

a unanimous opinion authored by Justice Kagan (and which originalist scholars branded an "originalist disaster"), however, the Supreme Court disagreed.[566]

The oral argument offered strong clues about why the Court turned away from the original public meaning and toward historical gloss in *Chiafalo*. One does not have to listen very closely to recognize that the Justices, and particularly the conservative Justices, were "concerned about fraud, bribery, and chaos—particularly chaos."[567] For example, Justice Alito asked Chiafalo's lawyer, Professor Lawrence Lessig:

> Those who disagree with your argument say that it would lead to chaos, that in—where the election—where the popular vote is close and changing just a few votes would alter the outcome or throw it into the House of Representatives, there would be—the rational response of the losing political party or elements within the losing political party would be to launch a massive campaign to try to influence electors, and there would be a long period of uncertainty about who the next President was going to be.[568]

Moments later, Justice Kavanaugh offered a stronger defense. "I want to follow up on Justice Alito's line of questioning and what I might call the avoid chaos principle of judging," he said, "which suggests that if it's a close call or a tie-breaker, that we shouldn't facilitate or create chaos."[569] Professor Lessig answered that such an outcome had not happened, but Justice Kavanaugh was undeterred. "[W]e have to look forward, and just being realistic, judges are going to worry about chaos. So what do you want to say about that?"[570] A clear constitutional text and a persuasive original public meaning proved no match for avoiding the mere risk of electoral chaos.

Consider now *Moore v. Harper*.[571] The Court in *Moore* addressed whether state legislatures have the exclusive authority to change the rules for federal elections without constraint from state courts or the state's governor.[572] This is the so-called Independent State Legislature Theory (ISLT), derived from the Elections Clause.[573] Some of the best work on the ISLT has concluded that it has very little, if any, foundation in the Constitution's text, structure, and history.[574] In fact, two

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566. Mike Rappaport, *The Originalist Disaster in* Chiafalo, L. & LIBERTY (Aug. 7, 2020), https://lawliberty.org/the-originalist-disaster-in-chiafalo [https://perma.cc/2QKK-EK3D].

567. Charles & Fuentes-Rohwer, *supra* note 570, at 48.

568. Transcript of Oral Argument at 21, Chiafalo v. Washington, 591 U.S. 578 (2020) (No. 19-465).

569. *Id.* at 33.

570. *Id.*

571. 600 U.S. 1 (2023).

572. *See id.* at 9–10.

573. Kafker & Jacobs, *supra* note 40, at 64.

574. *See, e.g.*, Vikram David Amar, *The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?*, 41 WM. & MARY L. REV. 1037, 1041 (2000).

well-known scholars once called the theory "rubbish."[575] Much of the amicus briefing on the case similarly emphasized that adoption of the ISLT would lead to chaos.[576] Nevertheless, at oral argument, the conservative Justices did not seem to be willing to reject ISLT outright.[577] A majority of the Court eventually rejected the strong version of the ISLT, though the Court did not reject the ISLT root and branch.[578] Admittedly, one does not know for sure. The explanation that makes the most sense of the Court's rejection of the strong version of the ISLT, however, is that chaotic consequences would befall the administration of elections if state legislatures were given a free hand.

Whatever one thinks of the Court's recent electoral jurisprudence, it might be possible for the Court to continue to address the pathologies of the political process if the pathology coincides with the aversion of the Court's conservatives against democratic disorder.

B. BEYOND THE COURTS

Outside of that limited set of cases, one should not expect courts to solve the deep and fundamental disagreements that are about the structure and viability of democracy. While "[i]t is the American habit, extraordinary to other democracies, to resolve many of our social, economic, philosophical, and political questions in lawsuits,"[579] not all questions can be resolved by adjudication. As we have described above, rendering any decision in these cases may threaten the legitimacy of the judicial branch, while doing little to address the growing rifts in our democracy. Democracy is hard work, and maintaining a dynamic constitutional republic that can respond to the vagaries of the times is among the highest expectations of human endeavor. That work must be done by the people collectively and severally. These include political elites, economic actors, public intellectuals, institutions of various sorts, and the like.

If we recommend judicial restraint, though, what exactly ought to take the place of judicial decisionmaking? In this Section, we briefly sketch out a menu of options. These options center our politics. None of them are novel. The only novelty here is our argument that, at bottom, America's democracy crisis is not doctrinal, but political and constitutional. Consequently, political solutions might be the best, and perhaps the only, options for resolving our current problems.

We sort these options into three approaches: those that could be executed relatively immediately; those that are more challenging to implement given political

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575. Vikram David Amar & Akhil Reed Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 SUP. CT. REV. 1, 1 (2022).

576. *See, e.g.*, Brief of Democracy and Race Scholars as Amici Curiae in Support of Respondents at 24, Moore v. Harper, 600 U.S. 1 (2023).

577. *See, e.g.*, Transcript of Oral Argument at 8, 13, 42, Moore v. Harper, 600 U.S. 1 (2023).

578. *Harper*, 600 U.S. at 22, 36.

579. William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 2 (1965).

obstacles but do not require fundamental change; and those that need more dramatic structural overhauls, such as a constitutional amendment.

1. Feasible Reforms

American politics is increasingly polarized and antidemocratic in part because extreme candidates exercise disproportionate influence on electoral institutions.[580] Such candidates may represent few of us, but nonetheless, they control the national conversation and influence public understanding of our democracy.

The capture of parties by extreme factions may be attributable, in part, to the relative weakness of both political parties.[581] As many students of American political parties have noted, American political parties are relatively weak institutions, notwithstanding the fact that American politics suffers from significant partisan polarization and American voters have strong partisan identities.[582] It is quite unclear who is in charge of any given party. Certainly, not the formal party leader (it was not, for example, up to Jaime Harrison whether President Biden would resign or who would replace him).[583]

Thus, perhaps ironically, one way to depolarize and recenter our asymmetric parties may be to strengthen internal party structures. Reinvigorating party organizational structures could reverse some of the extremism on both sides, pushing parties back toward the middle. Doing so may be relatively feasible, even without political compromise or fundamental structural change.

There are several party-strengthening reforms that each political party could voluntarily adopt. Perhaps most centrally, the parties could take greater control over spending power in elections. Donations could be more centrally channeled through party coffers, and the carrot of financial distributions (or stick of withdrawn financial support) could be used to consolidate power in the party leadership.

Parties could also return to more centralized mechanisms of choosing candidates—a direction Democrats, in particular, might now be more willing to move in, given recent events in the selection of their nominee. At the extreme end, parties might end primary selection systems, and in doing so, reduce candidates' fears of facing more extreme members of their own parties, and being "primaried" out of their seat. In more mild form, these reforms might include changes to presidential nomination systems that restore power back to the hands of party members. Parties might also change systems of how party leadership is selected, making formal leadership both more powerful and more respected. These

580. *See* RACHEL M. BLUM, HOW THE TEA PARTY CAPTURED THE GOP: INSURGENT FACTIONS IN AMERICAN POLITICS 6, 8–9 (2020).

581. *See* FRANCES MCCALL ROSENBLUTH & IAN SHAPIRO, RESPONSIBLE PARTIES: SAVING DEMOCRACY FROM ITSELF 1–12 (2018).

582. *See id.* at 95–97.

583. *Cf.* Sam Cabral & Brandon Drenon, *Who Are the Democrats Calling Time on Joe Biden?*, BBC (July 19, 2024), https://www.bbc.com/news/articles/c4ngd0dve6lo [https://perma.cc/P3SJ-5DFG] (describing how Jaime Harrison did not call for President Bident to drop out and encouraged others to "stop nitpicking").

suggestions are in the interests of both major parties and party elites in both parties should be incentivized to shift power away from individual star candidates to the party apparatus.

We recognize that there are drawbacks to this approach. Scholars, including Dean Heather Gerken, have raised the problem of capture.[584] To the extent that parties become more powerful, they simply become more attractive and valuable spoils. To borrow from Dean Gerken, perhaps we are better off by "adapting our institutions to our politics" instead of trying to bend our politics to our institutions.[585] This is a sensible and important position, though it is unclear which direction this observation cuts. In any event, these are the types of discussions about tradeoffs that election law scholars ought to have. What kind of politics do we want? Will suggested reforms move us in that direction, or will they move us away? Are we better off catering to our politics or attempting to change them? These inquiries are more promising than slinging arrows at the Court.[586]

2. More Challenging Reforms

Consider now a more controversial, contested, and challenging set of reform suggestions. One possible root cause of our comparatively extremist and bimodally polarized politics is our voting system. Thus, a potentially promising reform would be moving from a "first past the post" (FPTP) system to a proportional system. Conducting elections by single-member district—rather than by proportional means—persistently advantages and entrenches a two-party system. Duverger's law,[587] and the mountainous political science literature that builds upon it, has conclusively demonstrated that single-member districts functionally advantage two-candidate races. The procedure of single-member districting also necessarily demands FPTP rather than proportional voting systems. After all, you cannot proportionally split a single seat. FPTP, therefore, encourages the strength of two parties rather than permitting minor parties to rise. Although the exact articulation of how this advantage plays out is widely debated, the basic principle is easily grasped: under single-district, FPTP conditions, voters strategically winnow their choices to the viable, top contenders to avoid vote-wasting.[588]

Despite (or perhaps because of) this nearly indisputable and widely recognized phenomenon, Congress requires, by statute, that states create and elect congressional

584. Heather K. Gerken, *Playing Cards in a Hurricane: Party Reform in an Age of Polarization*, 54 HOU. L. REV. 911, 917 (2017).

585. *Id.* at 920.

586. With apologies to Rick Pildes and Elizabeth Anderson. *See generally* Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121 (1990).

587. *See generally* MAURICE DUVERGER, POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE (Barbara North & Robert North trans. 1954); William H. Riker, *The Two-Party System and Duverger's Law: An Essay on the History of Political Science*, 76 AM. POL. SCI. REV. 753 (1982); William H. Riker, *Duverger's Law Revisited*, *in* ELECTORAL LAWS & THEIR POLITICAL CONSEQUENCES 19, 19–42 (Bernard Grofman & Arend Lijphard eds., 1986).

588. *See* Greg D. Adams, *Legislative Effects of Single-Member Vs. Multi-Member Districts*, 40 AM. J. POL. SCI. 129, 131 (1996).

representatives via single-member districts (although this was not always the case, nor is it constitutionally required).[589] Most states have similar requirements for their state legislatures.[590] As a result, even many of our electoral system's most basic and familiar structures presume the necessity of our particular, extant mode of two-party competition.

But that model is not working, or at least not working well. Abandoning FPTP would be one way of giving our partisan system an exogenous shock, disrupting the rapid polarization of parties, the congealing of partisan identity and ideology, and the partisan siloing of information, all of which make our current democratic disputes particularly difficult to bridge.

Absent immediate adoption of proportional voting, other more minor vote reforms might also be considered. First, our voting systems could move toward ranked-choice voting—a system increasingly adopted in some cities, like New York and San Francisco, and in states like Maine.[591] Under this system, voters would not merely select one candidate to vote for but would rank options. The system is likely to have a depolarizing effect. Some evidence suggests that it will encourage more independent candidates and third-party candidates to enter the race, limiting the control of the two major parties.[592] More moderate candidates, who may be more tolerable to both sides of the political spectrum and thus receive few low-ranked votes, arguably have a much better shot under this kind of system (or at least some versions of it).[593] Similarly, ranked-choice voting may promote partisan cooperation rather than rancor, as candidates may ask each other's supporters to rank them "one and two," for example.

Another major option for reform is a shift to a top-four or top-five primary system. Given the geographic partisan divide, there are large swaths of the country where only one party is genuinely competitive.[594] In these locales, the party

589. *See* Uniform Congressional District Act, 2 U.S.C. § 2c.

590. At least six states affirmatively employ multimember districts to elect state legislators. The Arizona house of representatives elects two house members from each district. *See* Lilliard E. Richardson, Jr., Brian E. Russell & Christopher A. Cooper, *Legislative Representation in a Single-Member Versus Multiple-Member District System: The Arizona State Legislature*, 57 POL. RSCH. Q. 337, 337 (2004); *see also* Jeremy Duda, *'It's Not Really Practical' : Republican Wants to Go from 30 House Districts to 90*, ARIZ. MIRROR (Jan. 28, 2022, at 14:04 ET), https://azmirror.com/2022/01/28/its-not-really-practical-republican-wants-to-go-from-30-house-districts-to-90 [https://perma.cc/9DGY-9EUE] (describing the existing system in 2022 and one legislator's desire to change the system to 90 single-member districts). The same is true of the lower chambers of the state legislatures in New Jersey, South Dakota, and Washington. *See* Thomas F. Schaller, *Multi-Member Districts: Just a Thing of the Past?*, CTR. FOR POL. AT THE UNIV. OF VA. (Mar. 21, 2013), https://centerforpolitics.org/crystalball/articles/multi-member-legislative-districts-just-a-thing-of-the-past [https://perma.cc/27WS-3PLJ]. West Virginia and Vermont use multi-member districts for both houses. *Id.*

591. *See Where Is RCV Used?*, RANKED CHOICE VOTING RES. CTR., https://www.rcvresources.org/where-is-rcv-used [https://perma.cc/LD9B-3225] (last visited Mar. 5, 2026).

592. *See* Andrew Spencer, Christopher Hughes & Rob Richie, *Escaping the Thicket: The Ranked Choice Voting Solution to America's Districting Crisis*, 46 CUMB. L. REV. 377, 404 (2016).

593. *Id.* at 418–19. One of the most used kinds of ranked choice voting, which involves "instant-runoffs" between candidates, may not have these benefits. *See* Atkinson et al., *supra* note 66, at 1682.

594. *Cf.* Byler, *supra* note 457 (describing areas of Republican dominance); Rodden, *supra* note 458, at 326 (describing areas of Democrat dominance).

primary becomes the de facto election. That dynamic, though, ensures more extreme outcomes, as a partisan subset of the electorate in effect chooses the winner, rather than the whole of the electorate. Top-four or top-five primary systems combat this dynamic by allowing the top four or five people from any party to advance to the general election, often allowing a more moderate candidate to prevail even in a place that is not particularly purple.[595] The state of Alaska adopted a top-four system via ballot initiative in 2020, and an early assessment by scholars found that the system "gave Alaskan voters a greater range of choices and injected more competition into general elections compared to the standard primary model."[596]

That said, some of these reforms have already fallen into the crosshairs of partisan sniping over the nature and shape of our democracy. Voter access carries a distinctly partisan valence, striking directly at partisan disputes over the illiberalism of denying voter access versus impinging on vote security.[597] Thus, it is unclear whether these reforms, even if they could be implemented, would provide the best starting place for healing democratic rifts or reversing the mutual cycle of partisan extremism. Nevertheless, election law scholars would do well to explore whether electoral system reform would address our current pathologies and deliver material public policy benefits for the electorate.

3. Structural Overhauls

Other kinds of reforms ought to be discussed, but they would require amending the Constitution. Because amending the Constitution is politically challenging (to say the least), Americans are cynical about amending the Constitution, and reforms that require a constitutional amendment are generally nonstarters. Professor Jill Lepore reminds us, however, we have a tradition of amending the Constitution, and if we need to save American democracy, we need to amend the Constitution.[598] If given the choice today, would we adopt the Electoral College? Would we grant representation to the states in the Senate or apportion the Senate on an equal population basis? How would we address political parties in the Constitution? How would we think about fascist, authoritarian parties? Would we provide for public funding for our politics, or would we depend on private donors? Would we essentially allow Congress to make its own internal governance rules, or would we entrench those in our foundational charter? How majoritarian should our system be? Would we be better off with a

595. *See* Christian R. Grose, *Reducing Legislative Polarization: Top-Two and Open Primaries Are Associated with More Moderate Legislators*, 1 J. POL. INSTS. & POL. ECON. 267, 284 (2020).

596. Benjamin Reilly, David Lublin & Glenn Wright, *Alaska's New Electoral System: Countering Polarization or "Crooked as Hell"?*, 15 CAL. J. POL. & POL'Y, at 5, 16 (2023).

597. *See supra* Section II.B.

598. Jill Lepore, *The United States' Unamendable Constitution*, NEW YORKER (Oct. 26, 2022), https://www.newyorker.com/culture/annals-of-inquiry/the-united-states-unamendable-constitution; *see also* Jill Lepore, *The Philosophy of Amendment*, 112 CALIF. L. REV. 2249, 2249 (2024) ("The idea of constitutional repair, correction, and improvement through revision was so essential to the founding of the United States that it can best be described as a system of thought . . . .").

parliamentary system in which a winning majoritarian coalition is empowered to run its program, or ought we preserve the right of the minority to limit the rule of the majority?

Political scientists like Levitsky and Ziblatt have argued that asymmetric partisan illiberalism is attributable to the minoritarian systems in our politics; to them, solving the "tyranny of the minority," in which straightforward political competition becomes less possible and disincentivized, would address many of the systems that incentivize one of our two major political parties to stretch and break democratic norms.[599] An end to minoritarian systems could include an end to Senate malapportionment and the Electoral College. We might include a right to vote provision in the Constitution that makes possible expanded access to voting—such as automatic, same-day, and online voter registration; extensions of early voting windows; and changes to the accessibility of the location of polling stations, including for early voting locations. Or we might consider making voting mandatory.

Important and crucial issues are not discussed publicly because we refuse to consider amending the Constitution as an option for addressing democratic dysfunction. We do not talk sufficiently about the democratic politics we want—unless we are talking to courts. Courts may not be up to the task of healing our democratic rifts. But we need not rely on courts to do so. The fact that political change is difficult does not make courts the right place to go looking for answers; the difficulty of political transformation, in fact, requires us to work harder to witness its realization.

CONCLUSION

The field of election law has admirably addressed a long list of important issues. Scholars have hashed out the types of democratic principles the Court should apply[600] and the appropriate frameworks to understand the Court's supervision of electoral systems.[601] Scholars have explored the importance of electoral

599. *See* LEVITSKY & ZIBLATT, *supra* note 23, at 224–58.

600. *See* SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS vi (1998) (noting that to study elections is to engage in a "systematic exploration of the historical struggles over the structure of democratic institutions, or of the theoretical principles that underlie the choice of different democratic forms"); *see also* SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000, at 3 (2001) (stating that partisan electoral contests may be studied as a means of "think[ing] critically about the complex interaction between democratic politics and the formal institutions of the state," informing our understanding of a "democratic politics" that is "always and inevitably itself a product of institutional forms and legal structures").

601. *See, e.g.*, Charles, *supra* note 1, at 1101.

competition to democratic outcomes[602] and offered critical values important for sustaining democracy.[603]

Moreover, in the wake of *Bush v. Gore*, scholars raised concerns about the dangers of partisan adjudication and the proper scope of the judiciary's role in policing elections.[604] That debate subsided, however, as the relevance of the 2000 election waned.[605]

More recently, a group of scholars has engaged in what Lisa Marshall Manheim has called the "rule of law" turn in election law scholarship following the 2020 election and January 6th.[606] On this view, election law has started to contend with the possibility that the election system is not itself functional and that democracy—and the rule of law—cannot be entirely presumed.[607] In related work, others have assessed some of the most troubling post-2020 cases, resurrecting the *Bush* precedent and arguments that followed from it and reasserting the wrongheadedness of that decision.[608]

Our field, however, has yet to address the sense that American democracy is in crisis and that courts cannot provide a solution. By contrast, constitutional law scholars more broadly have done yeoman work highlighting the erosion of the Court's legitimacy as a Constitutional adjudicator.[609] Many have attended to the

602. *See* Issacharoff & Pildes, *supra* note 2, at 716 ("Our aim is to read into the Constitution an indispensable commitment to the preservation of an appropriately competitive political order."). *But see* Richard L. Hasen, *The "Political Market" Metaphor and Election Law: A Comment on Issacharoff and Pildes*, 50 STAN. L. REV. 719, 730 (1998) ("Issacharoff and Pildes have begun articulating such a vision [of good politics] in their functional lockup theory by focusing on political competitiveness. But the theory will have only limited usefulness until we know how competitive is competitive enough.").

603. *See, e.g.*, Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283, 287 (2014); Pamela S. Karlan, *Democracy and Disdain*, 126 HARV. L. REV. 1, 29–41 (2012).

604. *See* Charles, *supra* note 299, at 1107 (arguing "judicial review would be warranted only where politics fail to give effect to core democratic principles"); Fuentes-Rohwer, *supra* note 42, at 530 (arguing the Court "should play a passive, minimalist role"); Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 650 (2002) (arguing "in favor of a judicial retreat from the political thicket").

605. *Cf.* Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1, 3–5 (2007) (arguing "the promise of election reform inspired by the case is now dead"). Instead, questions about the Court's role once again took a backseat, as scholars continued to interrogate neutral principles, and numerous leading scholars turned their attention to defending the validity of judicial review of the political process. *See* Pildes, *supra* note 544, at 12. This includes scholars defending the increasingly partisan aspects of that review.

606. Lisa Marshall Manheim, *Election Law and Election Subversion*, 132 YALE L.J. F. 312, 317 (2022).

607. *See* Miriam Seifter, *Saving Democracy, State by State?*, 110 CALIF. L. REV. 2069, 2074 (2022); Issacharoff, *Weaponizing the Electoral System*, *supra* note 6, at 30; Richard L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, 135 HARV. L. REV. F. 265, 270–76 (2022).

608. *See, e.g.*, Amar & Amar, *supra* note 580, at 2–9.

609. *Cf.* RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 21–24 (2018) (providing a framework and language for discussing the scope of legitimacy or illegitimacy in the face of increasing critiques of the Court). *See generally* Klarman, *supra* note 31 (examining the Supreme Court's contribution to antidemocratic developments in America).

nature of recent constitutional crises[610]—and the ways in which those constitutional crises are fueled by polarization, sometimes drawing on the political science literature.[611]

By comparison, election law has lost its way and seems superfluous in parts. In this Article, we suggested that the old paradigm that guided the field may not be well-suited to our current politics. As American politics devolves into fights about democracy and antidemocracy, liberalism and illiberalism, authoritarianism and constitutional republicanism, the old principles can no longer work. The current model was built for a different time, with a different kind of politics.

Election law scholars need to develop new principles that reflect our current politics. Given the new partisan-democracy cases that the Court is beginning to hear—and the likelihood that more cases of this ilk will soon arise—this Article has suggested that a reevaluation may be necessary. Rather than turning to courts, democracy might be better served by turning to our politics. Election law needs to articulate a set of electoral reforms that are capable of addressing extant pathologies of the democratic process. A new approach must include guidance for dealing with the fact that our partisan lens colors our disputes about democracy and antidemocracy. A new approach must provide a roadmap for constitutional and political transformation. It must articulate anew our foundational commitments and make concrete the promise of a multiracial constitutional republic.

610. *See generally* K. Sabeel Rahman, *(Re)Constructing Democracy in Crisis*, 65 UCLA L. REV. 1552 (2018) (discussing the "ways [in which] democracy [has] been chronically or systemically weakened and prevented, and [the] kinds of new institutional and organizational forms [that are needed] to realize democratic aspirations in the twenty first century").

611. *See* Aziz Z. Huq, *The Counterdemocratic Difficulty*, 117 NW. U. L. REV. 1099, 1116–26 (2023); Fishkin & Pozen, *supra* note 31, at 940; *see also* David E. Pozen, Eric L. Talley & Julian Nyarko, *A Computational Analysis of Constitutional Polarization*, 105 CORN. L. REV. 1, 2–3 (2019) (utilizing computational analysis to "explore broadly how the constitutional utterances of different partisan and ideological camps have evolved in comparison with one another").