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### The Counter-Democratic Difficulty

Aziz Z. Huq

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## **The Counter-Democratic Difficulty**

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Aziz Z. Huq\*

### **Abstract**

*Since the 2020 elections, debate about the Supreme Court's compatibility with democracy has peaked. Much discussion focuses on the possibility of a decision flipping a presidential election or thwarting the will of national majorities respecting progressive legislation. But a narrow focus on specific interventions does not capture the subtle and consequential ways in which the Court influences whether and how American democracy thrives or fails. It misleads by construing democracy as merely the aggregation of specific decisions, rather than a complex system made up of electoral institutions, the rule of law, and parties disposed to accept electoral loss. This Article offers a new analysis of the relation between judicial power and the survival of American democracy nested in that wider, systemic perspective. Using recent empirical work in political science to offer novel glosses on recent jurisprudence, it situates the Roberts Court at the nexus of three intersecting crises of American democracy. The first is the democratic deficit embedded in the Constitution's original design. The second is a sharp increase in wealth inequality since the 1970s. The third is the more recent re-emergence of a sometimes violent "white identity politics" as a rift starkly bisecting the electorate. The fragility of American democracy arises from an untimely confluence of these three forces, which until now have been unfolding along separate tracks. The Roberts Court arbitrages between these three counter-democratic dynamics in ways that impose considerable pressure on inclusive norms and representative institutions. Four lines of precedent merit attention. These (1) guarantee capital, but not associations, a political return; (2) gerrymander civil society by rewarding hierarchical, but not egalitarian, mobilization; (3) facilitate a pernicious form of white identity politics; and (4) undermine electoral and nonelectoral foundations of democratic rotation. Together, they allow economic, social, or cultural capital to be parlayed into disproportionate political power, and entrench such power flipped into durable incumbency. These decisions hence 'encase' extant distributions of economic and sociocultural power from democratic challenge. Drawing out these elements, this paper maps out a 'counter-democratic difficulty' of judicial review.*

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\* Frank and Bernice Greenberg Professor of Law, University of Chicago Law School.

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# The Counter-Democratic Difficulty

## Introduction

On March 8, 2021, the Supreme Court denied a writ of certiorari to the last remaining legal challenge by former president Donald Trump and his allies to the 2020 presidential election counts.<sup>1</sup> Federal courts' refusal to intervene gained praise: It was taken as evidence that judges "try hard to honestly apply their understanding of the law, without regard to which political figures will benefit from a decision."<sup>2</sup> The federal bench was hailed "as the institutional bulwark ... saving democracy."<sup>3</sup> Others, however, pointed out that a closely-divided Court almost intervened in Pennsylvania's absentee-ballot count before the November poll.<sup>4</sup> "Had the results of the 2020 presidential election been a little bit tighter," critics warned, "a Republican-majority Court would [have ruled] in favor of a Republican presidential candidate on the most minimally plausible of legal rationales."<sup>5</sup> President Biden, indeed, felt enough pressure to establish a bipartisan commission to re-examine "the role and operation of the Supreme Court in our constitutional system."<sup>6</sup> That commission went on to assure that public that the Court's role is "essential to constitutional democracy itself."<sup>7</sup>

Discord over the Court's relationship to democracy resonates far beyond the 2020 election. The Justices themselves routinely justify decisions by invoking democracy.<sup>8</sup> Critics

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<sup>1</sup> *Trump v. WI Elections Comm'n*, 141 S. Ct. 1516 (2021).

<sup>2</sup> Richard Wolf, *Donald Trump stood no chance in front of a conservative Supreme Court. Here's why*, USA TODAY (Dec. 12, 2020), <https://www.usatoday.com/story/news/politics/2020/12/12/donald-trump-stood-no-chance-front-conservative-supreme-court/6509869002/> (quoting Prof. Eugene Volokh).

<sup>3</sup> Ian Millhauser, *Why Trump's attempt to steal the election was too much even for Republican judges*, VOX (Dec. 15, 2021), <https://www.vox.com/22168109/trump-coup-steal-election-judges-judiciary-supreme-court-gorsuch-kavanaugh-barrett> (quoting Prof. Maya Sen).

<sup>4</sup> *Republican Party of Pennsylvania v. Boockvar*, 141 S. Ct. 1 (2020). On the case's subsequent consideration in February 2021, three Justices indicated that they would have granted the petition for certiorari in order to rule on a question of the Election Clause's implications. *Republican Party of Pennsylvania v. Degraffenreid*, 141 S. Ct. 732, 732, 738 (2021) (opinions of Thomas and Alito arguing that the Court should grant certiorari on "an important and recurring constitutional question: whether the Elections or Electors Clauses of the United States Constitution, Art. I, § 4, cl. 1; Art. II, § 1, cl. 2, are violated when a state court holds that a state constitutional provision overrides a state statute governing the manner in which a federal election is to be conducted").

<sup>5</sup> Michael Klarman, *The Democrat's Last Chance to Expand Democracy*, THE ATLANTIC (Feb. 22, 2021), <https://www.theatlantic.com/ideas/archive/2021/02/expanding-court-now-or-never/618063/>.

<sup>6</sup> E.O. 14,023, *Executive Order on the Establishment of the Presidential Commission on the Supreme Court of the United States* (Apr. 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/04/09/executive-order-on-the-establishment-of-the-presidential-commission-on-the-supreme-court-of-the-united-states/>.

<sup>7</sup> Presidential Commission on the Supreme Court of the United States, Draft Report 162 (Dec. 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final.pdf>. Justice Stephen Breyer recently made a similar point. See Mark Sherman, *Breyer Says Big Supreme Court Changes Could Undermine Trust*, AP (Apr. 6, 2021), <https://apnews.com/article/joe-biden-politics-stephen-breyer-us-supreme-court-courts-42431b0b8cdbc8a5f2f3a8e8da84aa0>

<sup>8</sup> Since 2019, there has been an explosion of 'democracy talk' by the Justices, especially in cases concerning the structure and functioning of the federal government. In the decade before this, such remarks were rare. For examples in the removal power context, see *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2203 (2020) (explaining removal-power jurisprudence on the ground that "the President the most democratic and politically accountable official in Government"); see also *United States v. Arthrex, Inc.*, -- S. Ct. -- (U.S. June 21, 2021) (Gorsuch, J., concurring) (arguing for "presidential responsibility" because without it "there can be no democratic accountability for executive action"). In respect to agency action, see *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1909 (2020) (reversing an agency decision as a way of "ensuring that parties and the public can respond fully and in a timely manner to an agency's exercise of authority"); *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575–76 (2019) ("The reasoned explanation

counter by pointing to the gap between majority preferences and specific judgments.<sup>9</sup> A long scholarly tradition worries about this “counter-majoritarian” difficulty.<sup>10</sup> The debate is as acrimonious as it is inconclusive. Yet as rancorous as it has become, this debate is blinkered. It relentlessly on specific judgments—i.e., whether the Court will pick an election winner or whether public opinion supports the results of one or another opinion.<sup>11</sup> It does not attend to the Court’s interactions with the complex network of institutions and norms necessary to enable democratic government. Defenders and critics of the Court instead often make “the fallacious assumption that if the overall constitutional order is to be democratic, each of its component institutions must be democratic, taken one by one.”<sup>12</sup>

Yet democracy is not reducible to an accumulation of discrete decisions that either have or lack popular support. Nor does it require that each component institution be under democratic control. To the contrary: A polity in which election administrators, police officers, and prosecutors simply follow elected superiors’ orders (say, by throwing elections and locking-up opponents) would not long remain democratic.<sup>13</sup> A “countermajoritarian” court can be justified in democratic terms, as John Hart Ely famously argued, if it prevents lapses in the people’s rule.<sup>14</sup> Less noticed is the obverse possibility: That a Court focused on enabling the entrenchment of majority preferences would weaken, or even eviscerate, needful democratic institutions and public dispositions. This is the counter-democratic difficulty

This Article develops this *counter-democratic difficulty* a new analytic lens for understanding the effect of judicial power on democracy as an emergent quality of our political system. Rather

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requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public.”); and *Kisor v. Wilkie*, 139 S. Ct. 2400, 2413 (2019) (arguing that “agencies (again unlike courts) have political accountability, because they are subject to the supervision of the President, who in turn answers to the public”). On legislative delegation, see *Gundy v. United States*, 139 S. Ct. 2116, 2140 (2019) (Gorsuch, J., dissenting).

<sup>9</sup> See, e.g., Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 SUP. CT. REV. 111 (2019) [hereinafter “Stephanopoulos, *Anti-Carolene*”] (partisan gerrymandering); RICHARD L. HASEN, PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS 93-94 (2016) (campaign finance); John Lewis, *The Voting Rights Act: Ensuring Dignity and Democracy*, 32 HUMAN R. MAG. 2, 2-3 (2005) (on the Voting Rights Act); Paul Waldman, *The Supreme Court’s new ruling confirms it’s the enemy of democracy*, WASH. POST (Jul. 1, 2021), <https://www.washingtonpost.com/opinions/2021/07/01/supreme-courts-new-ruling-confirms-its-enemy-democracy/>.

<sup>10</sup> The seminal text is ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962). For an analysis of Bickel’s context and legacy, see Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002);

<sup>11</sup> For an example from a recent Voting Rights Act case, compare *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2343 (2021) (asserting that “here is nothing democratic about the dissent’s attempt to bring about a wholesale transfer of the authority to set voting rules from the States to the federal courts”), *with id.* at 2356 (Kagan, J., dissenting) (criticizing “how far from that text the majority strays” from Congress’s intent); see also *Obergefell v. Hodges*, 576 U.S. 644, 687 (2015) (Roberts, C.J., dissenting) (characterizing the recognition of same-sex marriage as “[s]tealing this issue from the people”).

<sup>12</sup> Adrian Vermeule, *Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 6–7 (2009). This is known as a fallacy of division. *Id.* at 9.

<sup>13</sup> TOM GINSBURG AND AZIZ Z. HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* 194-95 (2018) (documenting growing use of independent institutions for these purposes).

<sup>14</sup> See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 87-88, 103 (1980). The classic statement of the problem is ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-23 (2d ed. 1986). Michael Klarman has offered a normative “anti-entrenchment theory of judicial review” in which courts invalidate “legislative self-dealing or the efforts of one-time political majorities to extend their sovereignty into the future.” Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 Geo. L.J. 491, 499 (1997) [hereinafter “Klarman, *Majoritarian Review*”]. For a challenge to Ely’s premises, see Ryan Doerfler and Samuel Moyn, *The Ghost of John Hart Ely*, 75 VAND. L. REV.—(forthcoming 2022).

than considering opinions in isolation, it situates the Supreme Court within the wider institutional and social conditions wherein democratic decline transpires. I argue that the Court's relation to the democracy turns on its interaction with the economic and sociocultural forces causing democratic decay or slippage. By integrated a close reading of Roberts Court's jurisprudence with recent empirical political-science work, the Article explores how recent constitutional jurisprudence exacerbates the large challenges shadowing American democracy—not because it is counter-majoritarian but because it is counter-democratic: It is adverse to the continuing operation of democratic choice as a whole.

In so doing, I also make three analytic contributions to the larger scholarly debate on how judicial power relates to democracy. The first is a new, parsimonious account of democracy fit for the American context. I draw upon Aristotle's canonical discussion in the *Politics* to define democracy as *a community of equals that engage in an ongoing practice of being ruled and ruling in turn*. This definition is compatible with both the Framers' cautious instantiation of democracy in Articles I and II of the Constitution, and also our more fulsome contemporary understanding.<sup>15</sup> It also usefully highlights the central question whether officials persistently rotate in and out of power.

Second, I offer a detailed contextualization of pressures on contemporary American democracy. Like Tolstoy's unhappy families, each democratic crisis is different.<sup>16</sup> To understand how the judiciary influences democracy, we cannot use history as a template.<sup>17</sup> Drawing on recent political-science scholarship, I define the present era of democratic backsliding as a confluence of three different dynamics: Institutional failures, macroeconomic inequality, and sociocultural conflict along the color line. Each started separately. Until now, each moved along separate historical tracks. Today, though, they “are not independent from one another”; because “successes in one domain can unleash new resources” in another,<sup>18</sup> their net effect is greater than the sum of their component parts. In unison, they pose new, more intense strain on democratic rule.

My third contribution is a novel account of how the Roberts Court interacts with, and reinforces, dynamics of democratic backsliding. With close reading of recent precedent, I argue that the Court's role is best understood in terms of *arbitrage*. It first helps to parlay certain forms economic, social, or cultural capital into political power. It then entrenches such power by degrading the institutional grounds of rotation in office—in effect, arbitraging present office-holding into durable incumbency. To this end, the Court has developed four distinct strands of constitutional law. It (1) guarantees a positive political return to capital; (2) gerrymanders civil society by rewarding hierarchical, but not egalitarian, social mobilization; (3) enables a form of white identity politics; and (4) undermines the electoral and nonelectoral foundations of democratic rotation. In net, this doctrine naturalizes contestable limits on transient majorities to alter background arrangements of power and status, and ‘encases’ existing distributions of economic and sociocultural entitlements against democratic reconsideration. Hence, I argue

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<sup>15</sup> See *infra* text accompanying notes 27 to 39.

<sup>16</sup> See ADAM PRZEWORSKI, *CRISES OF DEMOCRACY* 39-77 (2019) (charting varying paths of democratic crisis in Chile, France, Germany, and the United States).

<sup>17</sup> For a usefully cautious comparison between current politics and the Progressive Era emphasizing discontinuities, see Matt Karp, *The Politics of a Second Gilded Age*, JACOBIN (Feb. 2021), <https://jacobinmag.com/2021/02/the-politics-of-a-second-gilded-age>.

<sup>18</sup> Alexander Hertel-Fernandez, *Asymmetric Partisan Polarization, Labor Policy, and Cross-State Political Power-Building*, 685 ANNALS AM. ACAD. POL. & SOC. SCI. 64, 72 (2019).

that Robert Dahl's famous account of the Court as a lagging indicator of democratic preferences no longer holds.<sup>19</sup>

I draw the idea of “encasing” democracy from the work of intellectual historian Quinn Slobodian. In an influential history of neoliberalism, Slobodian argues that twentieth-century neoliberals understood national democracy to pose “a potential threat to the functioning of the market order” through its “legitimation of demands for redistribution.”<sup>20</sup> Neoliberal intellectuals turned to “governance and law” at the international level, emphasizing the priority of formal “rules-as-regulations,” as a means to encase national-level democracy.<sup>21</sup> Slobodian's terminology can usefully be extended to a counter-democratic judicial project that deploys law as a foil to democratic self-ordering and prophylaxis against material or status redistribution.

My account diverges from the most recent autopsies of American democracy's decay at the judiciary's hands. Hence, Professor Michael Klarman used the 2020 *Harvard Law Review* to capture what he called the “degradation” of American democracy.<sup>22</sup> Klarman uses a partisan lens, characterizing the Republican Party as radicalized and anti-democratic.<sup>23</sup> He hence emphasizes decisions by “Republican Justices” to uphold “upheld stringent voter identification laws and purges of the voter rolls,” while invalidating campaign finance laws and leaving partisan gerrymanders untouched.<sup>24</sup> In a similar vein, Professor Nicholas Stephanopoulos argues that “the Roberts Court consistently decides ... cases in the ways preferred by conservative elites.”<sup>25</sup> Their focus on partisanship, however, leaves open the question of why parties might ‘defect’ from democracy. It omits the larger social and economic forces that are mediated by the Court into corrosive pressure on American democracy. Both Klarman and Stephanopoulos hence offer election-focused accounts with incomplete (and potentially misleading) for diagnosis and reform.<sup>26</sup>

Part I sets out an Aristotelian definition of democracy as a baseline, and explains why that definition is useful here. Part II deploys that definition to offer an account of how contemporary American democracy is under strain. It focuses on a triad of converging institutional, economic, and socio-cultural pressures. Part III dives deep into four lines of case-

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<sup>19</sup> Dahl described the Court as “a part of the dominant national alliance,” but stressed how it was able to exercise a measure of “discretion” within bounds set by other elements of that alliance. Robert A. Dahl, *Decision-making in a democracy: The Supreme Court as a national policy-maker*, 6 J. PUB. L. 279, 294-95 (1957); accord BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009); Christopher J. Casillas, Peter K. Enns, and Patrick C. Wohlfarth, *How public opinion constrains the US Supreme Court*, 55 AM. J. POL. SCI. 74, 74 (2011); see also GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 39-172 (2008) (casting doubt on the causal efficacy of judicial review in creating social change). I also depart from Whittington's emphasis on institutional foundations of judicial power. See KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* (2007). My concern here is how judicial power, having already been built, is then used.

<sup>20</sup> QUINN SLOBODIAN, *GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM* 272-73 (2018).

<sup>21</sup> *Id.* at 272-73.

<sup>22</sup> Michael J. Klarman, *Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1 (2020).

<sup>23</sup> *Id.* at 9 (discussing “state measures that Republicans have enacted to entrench themselves in power”)

<sup>24</sup> *Id.* at 9 & 178-214.

<sup>25</sup> Stephanopoulos, *supra* note 9, at 180.

<sup>26</sup> Likewise, Joseph Fishkin and David Pozen argue that “the post-1994 record” reveals “more methodical and unabashed constitutional hardball on the right,” a trend that they predict will continue in the future. Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 938 (2018). They do not focus on how this asymmetrical dynamic influences the quality of democracy. But the causes of asymmetrical hardball they adumbrate, see *id.* at 943-76, have commonalities within the larger social, economic, and cultural forces of backsliding developed below.

law from the Roberts Court to showcase the counter-democratic difficulty. The conclusion considers implication for reform proposals in the scholarship.

## I. The Democratic Baseline

To investigate the present dynamics of democratic decline, a definition of “democracy” is needed. The label alone signals little. Think about the Democratic People’s Republic of Korea. It is striking that neither the Court nor its critics offers a definition of democracy consistent with both the Constitution’s eighteenth-century presumptions *and* contemporary understandings of collective self-rule. This Part fills that gap by drawing from one of the first (Western) sources to define democratic rule.

### A. Is the Constitution Democratic? (And Does it Need to Be?)

Twenty years ago, Robert Dahl asked whether the U.S. Constitution was democratic. His answer was not reassuring. He pointed (among other things) to the malapportionment of the Senate and the Electoral College; the availability of “strong” judicial review; and the indirectly elected presidency.<sup>27</sup> He might have added the Three-Fifth Clause, which “substantially increased Southern representation in Congress” as a means of “credibly commit[ting]” the new Constitution to inaction on slavery.<sup>28</sup> Historians further describe an “elitist theory of democracy”<sup>29</sup> inscribed over the Constitution’s scheme of representation to assure rule by a “natural aristocracy.”<sup>30</sup> For example, the Qualifications Clause of Article I left the question of eligibility in federal elections to the states.<sup>31</sup> The results were predictably dismal. Most Black men had the right to vote in many state elections in 1787, but states “increasingly restricted .. or disenfranchised [them] entirely” in the following decades.<sup>32</sup> Women too were progressively excluded from the franchise due to patriarchal notions of female dependency.<sup>33</sup> So Dahl surely had a point.

Yet the design and enacting context of the original Constitution also leave no doubt that the new government was expected to “derive[] all its powers directly or indirectly from the great body of the people ... not from an inconsiderable proportion or a favored class of it.”<sup>34</sup>

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<sup>27</sup> ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 40-64 (2001). Several of Dahl’s points are echoed and amplified by SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION 6 (2006) (“[I]t is increasingly difficult to construct a theory of democratic constitutionalism, applying our own twenty-first-century norms, that vindicates the Constitution under which we are governed today”).

<sup>28</sup> Sonia Mittal and Barry R. Weingast, *Self-enforcing constitutions: With an application to democratic stability in America’s first century*, 29 J. L. ECON. & ORG. 278, 292 (2013); see also KATE MASUR, UNTIL JUSTICE BE DONE: AMERICA’S FIRST CIVIL RIGHTS MOVEMENT FROM THE REVOLUTION TO RECONSTRUCTION 172 (2021) (noting that the clause not only created “an unfair advantage in apportionment in the House, and therefore in the Electoral College” but also “provided an incentive for southerners to increase slaveholdings”). Over time, the three-fifth clause “failed to build the slaveholding majority many had anticipated” because of rapid population growth in the North. SEAN WILENTZ, NO PROPERTY IN MAN: SLAVERY AND ANTISLAVERY AT THE NATION’S FOUNDING 187 (2018).

<sup>29</sup> GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 517 (1969).

<sup>30</sup> BERNARD MANIN, THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT 112-17 (1997).

<sup>31</sup> U.S. CONST. art. I, § 2.

<sup>32</sup> MASUR, *supra* note 28, at 209. Of the states that joined the union after 1800, only Maine allowed Black men to vote. *Id.*

<sup>33</sup> See Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 979-80 (2002) (explaining that “most nineteenth-century Americans understood voting differently, as a privilege of citizenship exercised by some members of the polity on behalf of others”).

<sup>34</sup> THE FEDERALIST, No. 29, at 241 (Madison) (C. Rossiter ed., 1961); see also THE FEDERALIST, No. 10, at 51 (James Madison) (stating that both voters and candidates are to “be the great body of the people of the United



Contemporaneously labeled both as ‘republican’ or democratic,’ it is best characterized today as aimed at democracy.<sup>35</sup> The Constitution’s text confirms this ambition. Article I, Section 5, not least, anticipates “Elections for Senators and Representatives.”<sup>36</sup> Madison suggested that without a representative pedigree, the national government would not be able to bid for the loyalty of the people with the states.<sup>37</sup>

So a reading of the Constitution as originally drafted in 1787 can generate either strong or weak conceptions of democracy as a regulative norm.<sup>38</sup> Thus lack of a theory of democracy need not be disabling.<sup>39</sup> Rather, it invites inquiry into whether elements of the Constitution’s design can be captured in a general account of democracy useful as a benchmark for evaluating current practices. We should attend, that is, not to whether Constitution *is* democratic, but to whether it affords us the *opportunity* to live democratically.

How then can democracy, as an emergent quality of the polity as a whole, be theorized consistent both with Framers’ understanding—by universal modern agreements, morally and practically deficient—and also with a contemporaneous understanding of democracy? For this forward-facing project, democracy’s deep past offers a profound response.

## **B. Back to Basics: An Aristotelian Baseline of Democracy**

### *1. Aristotle on Democracy*

One way of defining democracy as a useful aspiration consistent with both original design and modern norms looks backward to the origins of political thought. One of the first thinkers to offer a (cautiously) positive account of democracy as a form of government was Aristotle. A definition of democracy drawn from his work can work as a parsimonious yet powerful lodestar for evaluating both the success and failure of contemporary democracy. It can work, that is, as a *regulative ideal* for constitutional law.

In Book Six of the *Politics*, Aristotle offers an account of democracy with several moving parts. I emphasize here two elements that do useful definitional work. For Aristotle, democracy

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States”). Madison was here describing the republican form of government, which was viewed along with democracy, as a variety of popular government. Martin Diamond, *Democracy and the federalist: A reconsideration of the framers’ intent*, 52 AM. POL. SCI. REV. 52, 54 (1959); see also ANDREAS KALYVAS AND IRA KATZNELSON, LIBERAL BEGINNINGS: MAKING A REPUBLIC FOR THE MODERNS 92-93 (2008) (developing late eighteenth century understanding of the difference between those terms).

<sup>35</sup> The idea that the Constitution is “republican” and hence not democratic—as if the two were antipodes—has a long and rather disreputable history. WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. 260-62 (1972) (summarizing this argument as offered by, among others, the John Birch Society).

<sup>36</sup> U.S. CONST. art. I, § 5; see also THE FEDERALIST, No. 52 (Madison), at 295 (“Frequent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured.”).

<sup>37</sup> EDMUND S. MORGAN, INVENTING THE PEOPLE 271 (1988).

<sup>38</sup> The Reconstruction Amendments do not wholly resolve this tension, as the continued acceptance of female nonsuffrage and felon disenfranchisement suggests. *Richardson v. Ramirez*, 418 U.S. 24 (1974) (finding no Equal Protection violation in denial of franchise to convicted felons who had completed their sentence and parole).

<sup>39</sup> The Court has cited this gap as a justification for declining to address partisan gerrymandering *Rucho v. Common Cause*, 139 S. Ct. 2484, 2499 (2019) (“[F]ederal courts are not equipped to apportion political power as a matter of fairness . . .”). The Court, of course, faces the same gap for many other constitutional provisions, from free speech to Equal Protection. Its decision to unilaterally disarm, therefore cannot be attributed to Founding-era ambiguity that is distinctive to the democracy question.

is: (1) a political system of “*being ruled and ruling in turn,*” (i.e., durable rotation in office) in which there is (2) “*equality* on the basis of number and not on the basis of merit.”<sup>40</sup>

The idea of a community of equals “being ruled and ruling in turn” is not the only way to read Aristotle on democracy,<sup>41</sup> although it is the most popular and influential.<sup>42</sup> His typology of regime types in Book Four starts with the three “correct” forms of kingship, aristocracy, and polity.<sup>43</sup> Democracy is an undesirable corruption of the third of these ideal types, albeit the “most moderate.”<sup>44</sup> Aristotle explains that a democracy, by definition, is one in which the “free and poor, being a majority, have authority to rule,”<sup>45</sup> such that the “common good” is not always or necessarily pursued.<sup>46</sup>

In Book Six, however, Aristotle recognizes that democracies come in many forms. All, he suggests, aim at a kind of “freedom [that] is being ruled and ruling in turn.”<sup>47</sup> To be free, explains Aristotle, is to live ‘as one wants,’ and, if one is subject to a regime of laws, to periodically participate in that regime in a way “based on equality.”<sup>48</sup> Hence, the “characteristically popular” attributes of democracy include being “not based on any assessment, or based on the smallest possible” but being open to all despite “lack of birth, poverty, or vulgarity.”<sup>49</sup> In drawing the boundaries of the polity, Aristotle further suggested, we should apply democratic values by “adding as many people as possible” in order to “make the people stronger.”<sup>50</sup>

The Aristotelian definition of democracy thus entails two qualities. The first is the fact of “being ruled and ruling in turn.” I take this requirement as focused on the actual holders of political office predictably rotating in and out of power. These personnel cannot be immune from ouster. To the contrary, democracy *requires* a measure of periodic rotation of office-holders out of state power and back into private life. Second, Aristotle links democracy with some kind of equality. He does not answer the question, however, of what kind of equality democracy requires.

Subsequent theorists of democracy such as Niko Kolodny have usefully added that democracy is constituted by an “equal opportunity for influence over the political decisions to which [residents] are subject.”<sup>51</sup> Similarly, Hélène Landesmore suggests that democracy calls

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<sup>40</sup> ARISTOTLE’S POLITICS 1732-83 (Carnes Lord, ed. 2d ed. 2013) [hereinafter “POLITICS”] (emphases added). The typology is prefigured in the Nichomachean Ethics.

<sup>41</sup> PAUL CARTLEDGE, DEMOCRACY: A LIFE 102 (2016) (arguing that, for Aristotle, democracy is “the rule of the poor over the rich”).

<sup>42</sup> BERNARD CRICK, DEMOCRACY: A VERY SHORT INTRODUCTION 17 (2002).

<sup>43</sup> *Id.* at 99.

<sup>44</sup> *Id.* On the idea of deviation from an ideal type, see Hannah Arendt, *The Great Tradition II: Ruling and Being Ruled*, 74 SOC. RES. 942, 943 (2007).

<sup>45</sup> POLITICS, *supra* note 40, at 102-03.

<sup>46</sup> Andrew Lintott, *Aristotle and democracy*, 42 CLASSICAL Q. 114, 115-16 (1992). Notice a slippage here: To the extent that the Framers’ understanding of democracy is aligned with the regulatory ideal of the common good—often associated with the republican tradition of political thought—it is in some tension with the version of democracy that I use here. But since we today are less confident than Aristotle or the classical republicans that we can identify ‘the common good,’ I can disregard this gap between the Aristotelian and the Framers’ view of democracy.

<sup>47</sup> POLITICS, *supra* note 40, at 172-73.

<sup>48</sup> *Id.* at 173.

<sup>49</sup> *Id.* at 173-74.

<sup>50</sup> *Id.* at 177.

<sup>51</sup> Niko Kolodny, *Rule over none II: social equality and the justification of democracy*, 42 PHIL & PUBL. AFF. 287, 308 (2014). Kolodny usefully points out that this kind of political equality “will be important to social equality in a

for a norm of “openness”—which she defines as “the general accessibility of power to ordinary citizens.”<sup>52</sup> This suggests that the “social conditions” necessary for democratic participation should be distributed as widely as possible, that (so far as possible) citizens should stand on an equal footing when it comes to political life,<sup>53</sup> and the sphere of democratic participation should be extended whenever feasible. Kolodny and Landesmore give instructive guidance (if not conclusive answers) to the most difficult question posed by the Aristotelian account of democracy. Taken as aspirations, they can accommodate the largely white and male electorates of the early Republic and also the far more inclusive electorates of today,<sup>54</sup> while at the same time pointing out compelling reasons for doing better.

## 2. *Advantages of the Aristotelian Definition*

The Aristotelian benchmark of democracy—a community of equals being ruled and ruling in turn—offer a straightforward regulatory norm that captures both the Framers’ aspiration for democratic rule, and a richer contemporary ideal. Despite its simplicity, the Aristotelian definition generates powerful intuitions about how democracy works. At the same time, it is capacious enough to leave not just constitutional designers, but also legislators and even judges, with flexibility in terms of what values to pursue, and how, within a larger frame.<sup>55</sup>

Consider then four implications of this seemingly simple summary of democracy.

*First*, Aristotle’s approach draws attention to an oft-ignored but important fact: Democracy is necessarily an intertemporal, perhaps even intergenerational, arrangement. A definition of democracy that can be collapsed into a single moment—such as the fact of an election—fails to capture its essence. For the label to hold true over time, moreover, no one actor or party can be certain they will hold onto power.<sup>56</sup> To persist over time, a democracy be characterized by *durable* rotation in the personnel in charge.<sup>57</sup> On the Aristotelian formulation,

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way that asymmetries in influence over nonpolitical decisions are not.” *Id.* at 307. That is, political equality of the sort that democracy entails is causally prior to social equality. Kolodny is not the only philosopher to argued that some kinds of equality is integral to democracy. See Elizabeth S. Anderson, *What is the Point of Equality?*, 109 ETHICS 287, 313 (1999) (“Democracy is ... collective self-determination by means of open discussion among equals, in accordance with rules accepted by all.”); Robert Post, *Democracy and equality*, 603 ANNALS AM. ACAD. POL. & SOC. SCI. 24, 28 (2006) (“Democracy requires that persons be treated equally insofar as they are autonomous participants in the process of self- government.”). For a skeptical view, see Steven Wall, *Democracy and equality*, 57 PHIL. Q. 416 (2007).

<sup>52</sup> HÉLÈNE LANDEMORE, OPEN DEMOCRACY: REINVENTING POPULAR RULE FOR THE TWENTY-FIRST CENTURY 11 (2020); *id.* at 135 (defining “open democracy” in terms of “participation rights, deliberation, the majoritarian principle, democratic representation, and transparency”). All else equal, a more open democracy, will be less regressive. ROBERT A. DAHL, POLYARCHY 23 (1971) (“As a system becomes more competitive or more inclusive, politicians seek the support of groups that can now particular more easily in political life.”).

<sup>53</sup> Anderson, *supra* note 51, at 289 (arguing that the “proper positive aim” of equality is “to create a community in which people stand in relations of equality to others”).

<sup>54</sup> On the virtue of using democratic values, not democratic procedures, to address this boundary problem, see David Miller, *Democracy’s Domain*, 37 PHIL. & PUB. AFF. 201 (2007).

<sup>55</sup> Accord Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 Mich. L. Rev. 1385, 1404 (2013) (arguing that “there are good reasons ... to leave the elected branches with discretion to choose among reasonable forms of democracy”).

<sup>56</sup> *Id.* at 174 (“With regards to the offices, another popular characteristic is having none of them to be for life.”).

<sup>57</sup> Some democratic theorists celebrate “a government responsive to public interest and opinion” without focusing on rotation as such. HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 234 (1967). The Aristotelian approach is skeptical of the positive claim that responsiveness over time is possible with change in office. Just as small children are taught to ‘take their turn,’ so the Aristotelian offers counsel in patience and delayed gratification.

“rotation in office [is] no mere corollary” of elections, but “literally what democracy consisted of.”<sup>58</sup> Conversely, an electoral system in which one party dominates, and predictably wins, is just not a democracy.<sup>59</sup> This suggests that institutional, economic and social conditions must support durable rotation of offices.

*Second*, Aristotelian democracy cannot be reduced to elections. It is consistent with different sorts of elections, and allows for non-elective mechanics. Hence, it does not require a choice between different contemporary theories of democracy. One ideal for elections, offered by Professor Nicholas Stephanopoulos, is “alignment,” which he defines as “the congruence of voters' and representatives' preferences, with respect to both party and policy, at the levels of both the individual district and the entire jurisdiction.”<sup>60</sup> Alternatively, Lee Drutman argues that electoral systems should “incentivize ... compromise dealmaking,” “scramble political conflicts and create new possibilities for cross-cutting identities that make flexible alliances and stable governing possible.”<sup>61</sup> The Aristotelian framework can encompass both visions. It is also consistent with a growing literature suggesting that elections are not an ideal, or even superior, instrument of democratic choice.<sup>62</sup> Instead, a system of sortition, or “lottocratic,” may be superior to elections,<sup>63</sup> and should be accommodated.

*Third*, the Aristotelian framework is not exhausted by attention to questions of institutional design, but invites an evaluation of broader social, economic, and cultural conditions. Aristotle himself paid attention to the size, the rurality, and relative wealth of polities when thinking about optimal regime choice.<sup>64</sup> He implied that democracy relies on social, cultural, and economic factors.<sup>65</sup> Elections and election law, that is, are not all that count.

*Fourth*, Aristotle’s benchmark suggests that democracy means a periodic change in *personnel*, but more durable governance institutions. The distinction between personnel and institutional fixation is not always easy to apply.<sup>66</sup> A leader might seek to extend her effective

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<sup>58</sup> Robert E. Goodin and Chiara Lepora, *Guaranteed rotation in office: A ‘New’ model of democracy*, 86 POL. Q. 364, 364 (2015). For the Athenian implementation of this idea, see C. HIGNETT, *A HISTORY OF THE ATHENIAN CONSTITUTION TO THE END OF THE FIFTH CENTURY B.C.* 237 (Clarendon Press 1967) (1952) (describing term limits imposed on officials who were selected via sortition).

<sup>59</sup> A related argument justifies term limits on the ground that “[l]ong-term incumbents have brand-name advantages that create high barriers to political entry. By reducing these barriers, term limits can increase competition in legislative and executive races.” Einer Elhauge, *Are Term Limits Undemocratic?*, 64 U. CHI. L. REV. 83, 87 (1997).

<sup>60</sup> Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283, 323 (2014).

<sup>61</sup> LEE DRUTMAN, *BREAKING THE TWO-PARTY DOOM LOOP* 176 (2020).

<sup>62</sup> See, e.g., LANDEMORE, *supra* note 52, at 103 (arguing that “elections are neither a great mechanism for sanctioning rulers ... nor are they, more generally, an ideal way to generate accountability”); accord DAVID VAN REYBROUCK, *AGAINST ELECTIONS: THE CASE FOR DEMOCRACY* (2016); Alexander Guerrero, *Against Elections: The Lottocratic Alternative*, 42 PHIL. & PUB. AFF. 135 (2014).

<sup>63</sup> Guerrero, *supra* note 62, at 154-55.

<sup>64</sup> JENNIFER TOLBERT ROBERTS, *ATHENS ON TRIAL: THE ATHENIAN TRADITION IN WESTERN THOUGHT* 97-98 (1997) (listing and discussing these factors).

<sup>65</sup> Cf. ROBERT DAHL, *ON DEMOCRACY* 51 (1998) (“[D]emocracy could not long exist unless its citizens manage to create and maintain a supportive political culture.”). The connection between democracy (albeit defined in terms of popular consent) and broader material and technological conditions is emphasized by DAVID STASAVAGE, *THE DECLINE AND RISE OF DEMOCRACY* 62 (2020) (arguing that “early democracy was more likely to prevail when leaders were uncertain about production, when people found it easy to exit, and finally when rulers needed their people more than people needed them”).

<sup>66</sup> For an example of this distinction in use, see Eric A. Posner and Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1667 (2002) (distinguishing the “entrenchment of officials against challengers, such as prospective candidates, by means of rigged electoral rules, restrictions on political speech, and so forth”

rule through a proxy or a family member as successor. She can also try to use informal measures, such as new policies or new voting rules, to minimize their risk of losing office.<sup>67</sup> Efforts at functional entrenchment of personnel “exist[] along a continuum,”<sup>68</sup> with no clear line demarcating the permissible from the disallowed. They can also be hard to distinguish from ordinary politics.<sup>69</sup> But the Aristotelian framework at least clarifies the central question: Will there be predictable rotation in office?

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In sum, the Aristotelian definition of democracy as a community of equals bring ruled and ruling in turn has rich implications for understanding the conditions under which democratic regimes survive, and the circumstances in which they break down. It eschews the fetishization of any particular way of instantiating elections. Instead, it draws attention to ways that extrinsic conditions bear on the durable rotation of personnel in office—a specific and predictable change that works as a constant term in any democratic system. Under this lens, democracy is revealed as an emergent product of institutional, political, and social factors that generate political equality and make rotation durable. It is a characteristic of a political system. It does not require that each judgment, or even each component institutions, be maximally responsive to popular will all of the time. Rather, democratic quality turns on the openness and responsiveness of its institutions to public judgment, and the persisting fact of rotation in public office. Its antithesis is a political system that is not open to popular voices, and in which there is no possibility that those in high office will be rotated out in the future. Given these qualities, a democratic system benefits, and arguably requires, institutions insulated from the control of democratic actors.

## II. The Vectors of Twenty-first Century Democratic Backsliding

To understand the Roberts Court’s relation to the democratic project, we need first an account of the forces working to undermine the American community of equals engaged in bring ruled and ruling in turn. The Court’s interventions modulate democracy to the extent they enhance or weaken those dynamics. Not all democratic crises, though, are characterized by the same pressure. So we cannot reason from first principles. In this Part, I develop an account of contemporary countercurrents to the democratic project. I begin by establishing the premise that self-rule by the American people is, indeed, under strain. I then play out three different directions from which democracy is challenged. This sets the groundwork for Part III’s account of the Court’s role as arbitrating between these vectors.

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from the “the enactment of either statutes or internal legislative rules that are binding against subsequent legislative action in the same form”).

<sup>67</sup> Daryl J. Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 124 YALE L.J. 400, 414 (2015). (“Electoral entrenchment strategies take many different forms.”); see also Christopher Serkin, *Public Entrenchment through Private Law: Binding Local Governments*, 78 U. CHI. L. REV. 879 (2011) (developing more examples); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 644 (1998) (exploring “ways in which dominant parties manage to lock up political institutions to forestall competition”).

<sup>68</sup> Klarman, *Majoritarian Review*, *supra* note 14, at 504.

<sup>69</sup> PAUL STARR, ENTRENCHMENT: WEALTH, POWER, AND THE CONSTITUTION OF DEMOCRATIC SOCIETIES 27 (2019). Many of the legal changes that generated a two-party system in the United States—such as ballot access restrictions and fusion bans—were “perceived not as partisan entrenchment, but as part of a larger movement of nonpartisan reform.” Adam Winkler, *Voters’ Rights and Parties’ Wrongs: Early Political Party Regulation in the State Courts, 1886-1915*, 100 COLUM. L. REV. 873, 893 (2000). Entrenchment, that is, can be well-intentioned but effective as well as malign.

## A. Is Democracy Imperiled?

American democracy is not in good shape. In 2017, the Economist Intelligence Unit (EIU) downgraded the U.S. from as “full democracy” to a “flawed democracy.”<sup>70</sup> A year later, Freedom House downgraded its ranking of American democracy to just better than Poland’s or Greece’s, but worse than Latvia’s.<sup>71</sup> In 2021, matters did not improve. For the fifth year running, the EIU ranked the United States as one of the world’s “flawed democrac[ies].”<sup>72</sup> Freedom House again demoted the U.S. in its rankings, “placing it among the 25 countries that have suffered the largest declines” in the quality of democracy in the past decade.<sup>73</sup> In June 2021, more than a hundred leading political scientists signed a joint “statement of concern,” warning that “our entire democracy is now at risk” because of changes to state election regimes that threatened “the minimum conditions for free and fair elections.”<sup>74</sup> Later in 2021, Bright Line Watch’s survey of experts again found profound “reasons to worry” about the quality of democracy.<sup>75</sup>

Why now? Democracy is never ‘consolidated’ once and for all. Instead, its strength ebbs and flows over time as it comes under different strains.<sup>76</sup> The core claim of this Part is that ideals of democratic equality and rotation now face three converging headwinds. The first is the immanent tendency of institutions created in the 1787 Constitution to enable and accommodate minority rule under specific political conditions. The second is an accumulation of wealth inequality since the 1970s. This has led to the emergence of an economic elite with powerful incentives, and some ability, to curb the power of democratic institutions to destabilize wealth’s prerogatives. The third is a reemergence of ethno-racial divisions as an organizing principle of political and affective identification. Critically, this involves the rise (or return) of a distinctive form of white identity politics.

These dynamics—institutional, economic, and sociocultural—unfold at different rates in distinct time-frames. The first has been at work since the 1790s; the second since the 1970s; and the third has ebbed and flowed across American history, but accelerated in the past few decades. Only recently have these vectors converged, like trains moving along different tracks at different speeds that collide at a single point. This confluence generates the conditions for democratic backsliding; it thus sets the stage for a counter-democratic jurisprudence.

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<sup>70</sup> Elena Holodnay, *The US has been downgraded to a ‘flawed democracy’*, BUS. INSIDER (Jan 25, 2017).

<https://www.businessinsider.com/economist-intelligence-unit-downgrades-united-states-to-flawed-democracy-2017-1>.

<sup>71</sup> *Freedom in the World 2017: Populists and Autocrats: the duel threat to global democracy* (2018),

[https://freedomhouse.org/sites/default/files/FH\\_FIW\\_2017\\_Report\\_Final.pdf](https://freedomhouse.org/sites/default/files/FH_FIW_2017_Report_Final.pdf) (assigning the U.S. a grade of 85).

<sup>72</sup> *Global Democracy had a Very Bad Year*, THE ECONOMIST (Feb. 2, 2021), <https://www.economist.com/graphic-detail/2021/02/02/global-democracy-has-a-very-bad-year>

<sup>73</sup> Sarah Repucci and Amy Slipowitz, *Freedom in the World 2021: Democracy under Siege* (2021),

<https://freedomhouse.org/report/freedom-world/2021/democracy-under-siege> (assigning the U.S. a grade of 83); see also STEVEN LEVITSKY AND DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 9 (2017) (“The erosion of [American] democratic norms began in the 1980s and 1990s and accelerated in the 2000s).

<sup>74</sup> *Statement of Concern: The Threats to American Democracy and the Need for National Voting and Election Administration Standards* (June 1, 2021), <https://www.newamerica.org/political-reform/statements/statement-of-concern/>.

<sup>75</sup> Bright Line Watch, *July 2021 Expert Survey* (2020), [http://brightlinewatch.org/still-miles-apart-americans-and-the-state-of-u-s-democracy-half-a-year-into-the-biden-presidency/?mc\\_cid=2a848b91c1&mc\\_eid=9f8dc59390](http://brightlinewatch.org/still-miles-apart-americans-and-the-state-of-u-s-democracy-half-a-year-into-the-biden-presidency/?mc_cid=2a848b91c1&mc_eid=9f8dc59390).

<sup>76</sup> Paul Pierson and Eric Schickler, *Madison’s Constitution Under Stress: A Developmental Analysis of Political Polarization*, 23 ANN. REV. POL. SCI. 37, 38-39 (2020) (developing that argument for the U.S. context).

## B. The Constitution's Imperfect Realization of Democracy

The Constitution creates a framework for democratic rule, but also seeds numerous possible pathways of democratic backsliding and failure. As a result, the way in which the Constitution is operationalized determines whether the democratic ideal of a community of equals being ruled and ruling in turn is strained or sustained. Rather than asking whether the Constitution “is” democratic,<sup>77</sup> we should understand the Constitution as creating a field of possibilities. These range from robustly democratic to downright authoritarian. Indeed, historically the quality of democracy has been uneven geographically—with pockets of authoritarianism<sup>78</sup>—and has fluctuated from period to period<sup>79</sup>—with democratic quality turning on contingent events.<sup>80</sup>

The Constitution's ambiguity about how, and indeed whether, democracy will be realized can be pinned down to a number of textual choices and gaps. Three are important predicates of the counter-democratic difficulty.

*First*, the Constitution's reliance on states in the calculus of representation in the Senate and Electoral College creates the possibility of national rule by a permanent demographic minority. In both bodies, voters from large states have less voting ‘weight’ than those in small states. In practice, this may or may not matter politically. Electoral rules that are “formally stable” vary “in practical importance from one period to the next due to changes in the direction and distribution of voting preferences within the mass public.”<sup>81</sup> In the American two-party system, the practical significance of small/big state variation in voting weight depends on whether there is a correlation between partisanship and state size. Until recently, there wasn't. Until the beginning of the twenty-first century, “senators who hail from states with greater voting weight [did] not tend in their general (ideological) roll-call behavior to oppose senators who come from states with less voting weight.”<sup>82</sup> Though the twentieth century, fissures in the two main parties were as important as the division between the parties.<sup>83</sup> The Constitution's structural asymmetries in representation did not invite minority rule thanks to geographically cross-cutting alliances.

The 2000 election, however, marked the point where shifting partisan dynamics eroded these alliances. Both national parties by 2000 had become significantly more internally

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<sup>77</sup> See sources cited in *supra* note 27; see also Yasmin Dawood, *Election Law Originalism: The Supreme Court's Elitist Conception of Democracy*, 64 ST. LOUIS U. L.J. 609, 620 (2020) (“[T]he Framers established an elitist democracy that deprived the people of equal participation.”).

<sup>78</sup> For more than sixty years, the U.S. Constitution for instance coexisted with racially hierarchical, authoritarian enclaves in the South. These were dominated by “institutions to demobilize white electorates, extrude blacks from electoral politics, and forestall workers’ challenges to state institutions and policies.” ROBERT MICKEY, *PATHS OUT OF DIXIE: THE DEMOCRATIZATION OF AUTHORITARIAN ENCLAVES IN AMERICA'S DEEP SOUTH, 1944-1972*, at 34 (2015).

<sup>79</sup> Early on, a constitution is not self-executing, and must be translated from ‘parchment to practice’ through political effort and entrepreneurship. As a result, it is likely that “authoritarian vestiges” of prior regimes will persist. James Loxton, *Authoritarian Vestiges in Democracies*, 32 J. DEM. 145, 145 (2021).

<sup>80</sup> Colonization, for example, can reinforce authoritarian structures domestically. See HEATHER COX RICHARDSON, *HOW THE SOUTH WON THE CIVIL WAR* 102-03 (2020).

<sup>81</sup> DAVID A. HOPKINS, *RED FIGHTING BLUE: HOW GEOGRAPHY AND ELECTORAL RULES POLARIZE AMERICAN POLITICS* 2-3 (2017).

<sup>82</sup> John D. Griffin, *Senate Apportionment as a Source of Political Inequality*, 31 LEG. STUD. Q. 406, 406 (2006).

<sup>83</sup> DRUTMAN, *supra* note 61, at 85.

coherent and more distinct from each other.<sup>84</sup> Further, ideology was increasingly strongly correlated to population density, with rural districts reliably Republican and urban districts predictably Democratic.<sup>85</sup> Due to this combination of electoral design and demographic geography, one party can control the Senate and win the presidency with fewer votes than the other.<sup>86</sup> Steven Levitsky and Daniel Ziblatt conclude that “[c]onstitutional design and recent political geographic trends — where Democrats and Republicans live — have unintentionally conspired to produce what is effectively becoming minority rule.”<sup>87</sup>

In short, the current alignment between constitutional structure and partisan demography creates asymmetrical incentives for elected actors. For those partisan factions with a structural advantage, it invites forms of political mobilization eschewing the pursuit of majority support. Instead, it creates an incentive to find ways of consolidating minority rule. As a result, the Constitution’s flawed representational architecture creates sharply divergent electoral opportunity structures and incentives for the different partisan formations.<sup>88</sup> It is an engine of counter-democratic energy.

*Second*, the Aristotelian account of democracy recognizes the importance of background economic and sociocultural conditions as essential to democratic rule. The Constitution also speaks to that backdrop—but in vague, lapidary ways. This allows for the possibility of arrangements that tilt against democracy.

Consider the Constitution’s provisions on the public sphere, where democratic life plays out. While the Constitution protects the “freedom of speech,” its text does not define either “freedom” or “speech.”<sup>89</sup> Instead, the First Amendment leaves open the question of how to define and circumscribe speech. Further, the First Amendment has been interpreted to include a right of association.<sup>90</sup> Where other constitutions differentiate between distinct kinds of associations—in particular political parties, unions, and private civic associations,<sup>91</sup> the U.S. Constitution does not sort among “wide variety of political, social, economic, educational, religious, and cultural” associations:<sup>92</sup> It again leaves open questions of which associations will

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<sup>84</sup> *Id.* at 89; see also JACOB S. HACKER AND PAUL PIERSON, OFF CENTER: THE REPUBLICAN REVOLUTION AND THE EROSION OF AMERICAN DEMOCRACY 117 (2005) (identifying the Republican sweep of the south in the 1990s as the main cause of this change).

<sup>85</sup> See James G. Gimpel et al., *The urban–rural gulf in American political behavior*, 42 POL. BEHAV. 1343 (2020); Ron Johnston et al., *The geographical polarization of the American electorate: a country of increasing electoral landslides?*, 85 GEOJOURNAL 187 (2020).

<sup>86</sup> See Kenneth Owen, *Minority Rule Cannot Last in America*, THE ATLANTIC (Dec. 2, 2020), <https://www.theatlantic.com/ideas/archive/2020/12/minority-rule-cannot-last-america/617272/> (“Though Republican senators make up the majority in the chamber [in 2020], they represent more than 20 million fewer Americans than Democratic senators do.”).

<sup>87</sup> Steven Levitsky and Daniel Ziblatt, *End Minority Rule*, N.Y. TIMES (Oct. 23, 2020), <https://www.nytimes.com/2020/10/23/opinion/sunday/disenfranchisement-democracy-minority-rule.html>

<sup>88</sup> Jacob S. Hacker and Paul Pierson, *Policy feedback in an age of polarization*, 685 ANNALS AM. ACAD. POL. & SOC. SCI. 8, 18 (2019) (“Republicans’ sharp movement to the right and their tendency to run for office in safe states or districts ... create very distinct incentives [toward further right-leaning polarization].”).

<sup>89</sup> Cf. Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1767 (2004) (noting scholarly “inattention to the boundaries of the First Amendment”).

<sup>90</sup> *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2382 (2021) (“This Court has long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others.” (quotation and citations omitted)).

<sup>91</sup> Adam S. Chilton and Mila Versteeg, *Do constitutional rights make a difference?*, 60 AM. J. POL. SCI. 575, 579 (2016).

<sup>92</sup> See *Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958) (“Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.”).



be protected, and how.<sup>93</sup> And it does not set forth clearly the rights of political and civic associations that act as critical intermediating bodies with voters. In consequence, the First Amendment's implications for democracy's quality can fluctuate as civil society's relation to democracy shifts.

Similarly, the Constitution as drafted contained no right to vote. Instead, it linked the federal franchise to state rules.<sup>94</sup> In the early Republic, many states imposed gender, race, and property qualifications.<sup>95</sup> While the Fifteenth, Nineteenth, and the Twenty-Fourth Amendment precluded some limitations, the scope and meaning of a constitutional right to cast a vote remain uncertain.<sup>96</sup> Indeed, under the Qualifications Clause, states maintain broad authority to impose many kinds of constraints on the franchise.<sup>97</sup>

At the same time, the Constitution did not cause all of the design decisions that today create conditions for democratic backsliding. For example, those who blame the “rigid two-party system” that arises from an “antiquated first-past-the-post voting system” for thwarting democracy cannot look to the Constitution:<sup>98</sup> Districting for congressional elections was mandated by Congress only in 1842, albeit by the exercise of Congress's Article I powers.<sup>99</sup>

*Third*, many other constitutions globally create independent institutions to manage elections, handle politically sensitive investigations, and lead prosecutions of those elected to the apex of national office. Independence from close political control for these tasks is valuable to democracy. The U.S. Constitution, however, contains no independent institution to investigate similar kinds of corruption and self-dealing. Although the remedy of impeachment is set forth, the Constitution says nothing about how high-level self-dealing is to be investigated, or whether impeachment is an exclusive option.<sup>100</sup>

In sum, the Constitution creates a field of governance possibilities ranging from less to more democratic. I have identified three elements of the constitutional design that index this spectrum of democratic possibilities. All create opportunities and incentives for political elites

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<sup>93</sup> For example, scholars have challenged the empirical premises of the Court's view of associational rights of political parties. See, e.g., Joseph Fishkin and Heather K. Gerken, *The Party's over: McCutcheon, Shadow Parties, and the Future of the Party System*, 2014 SUP. CT. REV. 175, 177 (2014) (“[I]t is more useful to conceptualize a “party” as a group of networked interests that take different forms at different times.”); Tabatha Abu El-Haj, *Networking the Party: First Amendment Rights and the Pursuit of Responsive Party Government*, 118 COLUM. L. REV. 1225, 1229 (2018) (“The Court has long determined that, with respect to political parties, First Amendment rights ought to be allocated in ways that promote democratic values and good governance.”).

<sup>94</sup> U.S. CONST. Art. I, §2.

<sup>95</sup> ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN AMERICA* 5-6 (2000).

<sup>96</sup> A right to vote has been identified under the fundamental rights strand of the Equal Protection Clause, but it is subject to uncertain protection under an inchoate balancing test. See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 190 (2008). Further, commentators have observed that the idea of a right of vote in internally complex, protecting “the expressive interest in equal political standing that inheres to each citizen, taken one by one” and “as a matter of positive law, the interests groups of citizens have in systems of election and representation that distribute political power “fairly” or “appropriately” as between these various groups.” Richard H. Pildes, *What Kind of Right Is “The Right to Vote”?*, 93 VA. L. REV. IN BRIEF 45, 46 (2007).

<sup>97</sup> *Arizona v. Inter-Tribal Council of Arizona*, 570 U.S. 1, 17 (2013) (“Prescribing voting qualifications, ... forms no part of the power to be conferred upon the national government” (citation and punctuation omitted)).

<sup>98</sup> Lee Drutman, *Breaking the Two-Party Doom Loop* 236-37 (2020).

<sup>99</sup> Apportionment Act of 1842, ch. 47, § 2, 5 Stat. 491.

<sup>100</sup> The Constitution does speak directly to impeachment, but this has not successfully executed the function of enabling accountability. Tom Ginsburg et. al., *The Comparative Constitutional Law of Presidential Impeachment*, 88 U. CHI. L. REV. 81, 114 (2021) (noting the “difficulty, and resulting infrequency, of impeachment”).

seeking to entrench themselves in part through appeals to identities and values at odds with the democratic community of equals being ruled and ruling in turn.<sup>101</sup> These three elements of the original constitutional design do important work in Part III as foundations for the counter-democratic difficulty.

### C. The Tension Between Democracy and Wealth Inequality

Between 1945 and 1970, “economic growth was relatively rapid and its fruits were relatively equally distributed.”<sup>102</sup> Starting in the 1970s, the United States experienced a sharp increase in income and wealth inequality.<sup>103</sup> Growth “has predominantly gone to those who are already better off.”<sup>104</sup> Those without college degrees have experienced “a prolonged decline in wages” and “miseries over and above the loss of earnings.”<sup>105</sup> These shifts in the distribution of assets and economic rewards are associated with a “financialization” of the American economy. This is characterized by an increase in “activities relating to the provision (or transfer) of liquid capital in expectation of future interest, dividends, or capital gain,” rather than simple “trade and commodity production.”<sup>106</sup> Increasing wealth inequality has been accompanied by a sharp drop in economic mobility.<sup>107</sup> Racial wealth and income gaps remain stubbornly high, despite employment discrimination laws.<sup>108</sup> Given the United States’ sharp geographic divides, wealth and opportunity have not been uniformly allocated. Instead, economic mobility is linked to geography. Where one grows up and gets educated has a powerful effect on whether one thrives economically as an adult.<sup>109</sup> Those predictions, moreover, arise in the context of an increasingly bimodal distribution of economic goods: Failing to fit into a small tranche of the economic elite translates not into a comfortable middle-class life, but rather economic stagnation or even loss.

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<sup>101</sup> See Gretchen Helmke et al., *Exploiting Asymmetries: A Theory of Democratic Constitutional Hardball* 34 (Aug. 26, 2019), [https://www.gretchenhelmke.com/uploads/7/0/3/2/70329843/exploiting\\_asymmetries.pdf](https://www.gretchenhelmke.com/uploads/7/0/3/2/70329843/exploiting_asymmetries.pdf) (finding that “asymmetrical partisan opportunities to tilt the political playing field can ... result in constitutional hardball”).

<sup>102</sup> ANNE CASE AND ANGUS DEATON, DEATHS OF DESPAIR AND THE FUTURE OF CAPITALISM 149 (2020). Note that the timing of these changes is contestable. Political scientist Mark Blyth, for example, argues that “in the 1960s ... the United States ceased to be a social democracy.” Mark Blyth, *Domestic institutions and the possibility of social democracy*, 3 COMP. EUR. POL. 379, 381 (2005).

<sup>103</sup> Emmanuel Saez, *Income and Wealth Inequality: Evidence and Policy Implications*, 35 CONTEMP. ECON. POL. 7, 9 (2017) (“The top 10% income share has grown from 33% to over 50% in recent years ...”); Emmanuel Saez and Gabriel Zucman, *Wealth inequality in the United States since 1913: Evidence from capitalized income tax data*, 131 Q.J. ECON. 519, 520 (2016) (“[T]he share of wealth owned by the top 1% families has regularly grown since the late 1970s and reached 42% in 2012.”); Thomas Piketty & Emmanuel Saez, *Top Incomes and the Great Recession: Recent Evolutions and Policy Implications*, 61 IMF ECON. REV. 456, 458 (2013) (finding that between 1976 and 2007, the top one percent of all wage-earners garnered nearly sixty percent of the income growth in the United States).

<sup>104</sup> CASE AND DEATON, *supra* note 102, at 149.

<sup>105</sup> *Id.* at 7; *id.* at 59 (documenting rising mortality rates for working class non-Hispanic whites since 1960); accord Lawrence F. Katz and Alan B. Krueger, *Documenting decline in US economic mobility*, 356 SCIENCE 382, 382 (2017).

<sup>106</sup> Greta R. Krippner, *The financialization of the American economy*, 3 SOCIOECON. REV. 173, 174-75 (2005).

<sup>107</sup> Raj Chetty et al., *The fading American dream: Trends in absolute income mobility since 1940*, 356 SCIENCE 398, 398 (2017) (finding that “the fraction of children earning more than their parents fell from 92% in the 1940 birth cohort to 50% in the 1984 birth cohort”).

<sup>108</sup> Dionissi Aliprantis, and Daniel R. Carroll, *What Is Behind the Persistence of the Racial Wealth Gap?* ECON. COMM. (2019), <https://www.clevelandfed.org/newsroom-and-events/publications/economic-commentary/2019-economic-commentaries/ec-201903-what-is-behind-the-persistence-of-the-racial-wealth-gap>.

<sup>109</sup> Raj Chetty and Nathaniel Hendren, *The Impacts of Neighborhoods on Inter-generational Mobility I: Childhood Exposure Effects*, 133 Q.J. ECON. 1107, 1107-08 (2018).

These economic inequalities intersect with democracy in two ways. First, the increasingly asymmetrical allocation of rewards from economic activity is a function of legal choices, not just brute market forces. Second, under conditions of economic inequality, a wealthy class is likely to have the incentive and the assets to influence democratic outcomes so as to protect and sustain its disproportionate gains from economic activity. Law is hence constitutive of economic inequality; it also experiences sustained political pressure as a consequence of such inequality. This can create a positive feedback loop: Legal change enables inequality, and the newly enriched turn to law as a tool for maintaining and protecting such inequality. In this way, wealth inequality bears directly upon the possibility of a community of (political) equals engaged in the long-term enterprise of being ruled and ruling.

A key question for the legal construction of democracy—taken up in more detail in Part III.B—is the extent to which law either permits the propertied to leverage their economic wealth into political influence. Here, I focus on the first arc of the loop: on how law facilitated the rise of wealth inequality in the first instance.

At this front end, law professor Katarina Pistor has powerfully demonstrated, private law rules are deployed as a “shield to protect private gains” in the form of equity, intellectual property, and a transnational network of “private arbitration tribunals [that] scrutinize state courts in their role as national lawmakers and law enforcers.”<sup>110</sup> Economists David Kotz has also identified legislation and regulatory changes that created a new “neoliberal” dispensation in the late 1970s and early 1980s, and allowed economic rewards to flow disproportionately to the top of the income scale.<sup>111</sup> In his careful accounting of this sea-change in regulatory and distributive policy, Kotz flags several pivotal early events: the defeat of labor-law reform under President Carter (1977); the deregulation of the financial sector starting again under President Carter (1980 and 1982); the “significant[] easing of antitrust enforcement (1981), and the weakening or elimination of social safety-net programs (starting in 1980).<sup>112</sup> The subsequent “deregulation of basic industries” and the increasing globalization of supply chains pushed down the labor share of income (and hence wealth), and eroded unions as a political force—disabling the most potent source of future opposition to new deregulation.<sup>113</sup> Legal choices also created positive feedback mechanisms via their economic consequences. With the gradual wind-down of antitrust enforcement, product markets have become increasingly concentrated. This has permitting the exercise of monopolistic or monopsonistic power by a small number of corporations, with predictable deepening effects on inequality and inflationary effects for the lobbying heft of those corporations.<sup>114</sup>

More broadly, the arguments advanced against government regulation from the 1980s onward targeted “public power as such,” challenging in particular “its legitimacy as a means of coordination, its ability to master private power, its capacity to solve social problems, and

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<sup>110</sup> KATHARINA PISTOR, *THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY* 22, 152 (2019). Pistor recognizes the connection between the legal tools she analyze and the rise of inequality, *id.* at 4-5, but her project does not include a detailed accounting of the causal links between legal change and increases in inequality since the 1970s).

<sup>111</sup> DAVID M. KOTZ, *THE RISE AND FALL OF NEOLIBERAL CAPITALISM* 42, tbl. 2.1 (rev ed. 2017).

<sup>112</sup> *Id.* at 21, 71.

<sup>113</sup> *Id.* at 104.

<sup>114</sup> Chad Syverson, *Macroeconomics and market power: Context, implications, and open questions*, 33 *J. ECON. PERSP.* 23, 37 (2019). On the connection between deregulation and increasingly concentrated product markets, see THOMAS PHILIPPON, *THE GREAT REVERSAL* (2019).

the scale at which it can be effectively and accountably deployed.”<sup>115</sup> In other words, the deregulatory campaign of the 1980s challenged a basic premise of democratic participation: that collective action through the state was capable of positive public good.

The ensuing conditions of higher Gini coefficients, concentrated product markets, and lower labor shares of profit all set the stage for a shift in the responsiveness of democratic institutions along wealth lines. Political scientist Larry Bartels has coined the term “unequal democracy” to capture the finding (repeatedly made by political scientists) that elected politicians have become highly sensitive to the policy preferences of high-income constituents and either indifferent to, or only weakly sensitive to, the policy preferences of middle- and lower-income constituents.<sup>116</sup> This effect is obviously more consequential under conditions of greater inequality. Where an “economic system is funneling most of its gains to those at the very top,” welfare gains for the majority will often depend on redistributive measures.<sup>117</sup> This impinges on the interests of the wealthy. The “widening chasm” that ensues between elite and majority interests “encourages the privileged to view democracy itself as a danger to their wealth and status.”<sup>118</sup> The extent to which their resources enable them to act on this fear depends in important part on law—law that we will examine in Part III.B.

Law has also played a role at the more local, mundane level. In an important recent study, for example, Jessica Trounstein has recently demonstrated how wealthier, typically whiter, municipalities can use land-use restrictions (e.g., barring multi-family housing) as a way of both sustaining the production of public goods such as secondary education, while preventing outsiders from enjoying those goods.<sup>119</sup> Law, that is, helps determine not only the overall distribution of rewards from economic activity; it channels how those rewards are shared at the level of the family.

Economic inequality, in summary, is a product of law and also a potentially powerful causal force shaping the democratic institutions that produce law. It is likely to limit responsiveness to the full spectrum of the public’s interests, because it enables and elicits elite capture of policy-making apparatuses. At a minimum, as Bartels’ work famously shows, such inequality raises a concern about democracy’s community of political equals. At the limit, it places into question the possibility of being ruled and ruling in turn given a sufficient elite capacity to constrain democratic outcomes.

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<sup>115</sup> Nancy Fraser, *Legitimation crisis? On the political contradictions of financialized capitalism*, 2 CRIT. HIST. STUD. 157, 188 (2015).

<sup>116</sup> LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* 275 (2008) (“[L]ow-income citizens as a group seem to be getting no representation ....”); see also MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* (2012); KAY LEHMAN SCHLOZMAN, SIDNEY VERBA & HENRY E. BRADY, *THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY* (2012). For some cautions about Bartels’ claims, see Omar S. Bashir, *Testing inferences about American politics: A review of the “oligarchy” result*, 2 RES. & POL. 1, 1 (2015) (finding more politician responsiveness to middle-income voters); Peter K. Enns, *Relative policy support and coincidental representation*, 13 PERSP. ON POL. 1053, 1053-43 (2015) (same).

<sup>117</sup> JACOB S. HACKER AND PAUL PIERSON, *LET THEM EAT TWEETS: HOW THE RIGHT RULES IN AN AGE OF EXTREME INEQUALITY* 19-20 (2020) [hereinafter “HACKER AND PIERSON, LET THEM EAT TWEETS”].

<sup>118</sup> *Id.* at 20.

<sup>119</sup> Jessica Trounstein, *The geography of inequality: How land use regulation produces segregation*, 114 AM. POL. SCI. REV. 443, 443-44 (2020). Criminal law is also used to ensure that educational recourses produced locally are not shared to redistributive effect. Latoya Baldwin-Clark, *Education as Property*, 105 VA. L. REV. 397 (2).

## D. The Rise (or Return) of White Identity Politics

A central sociocultural determinant of democratic weakness is the emergence of ethnic or racial divisions aligned with partisan identities. A society with ethnic rifts is unlikely to yield a stable democracy. Political scientists use the term “pernicious polarization” to describe this threat to democratic stability. Such polarization “changes the incentives for political actors and voters alike in ways that lead them to sacrifice democratic principles rather than risk losing power.”<sup>120</sup> When one group regards another with contempt or disgust, the “community of equals” comes under intolerable strain.<sup>121</sup> Further, when partisan divisions align with ethnic rifts, and where cross-cutting allegiance dissipate, voters will perceive their own electoral defeat with acute distrust or fear; they are unlikely to accept such loss with equanimity.<sup>122</sup> The prospect of being ruled and ruling in turn is thus perceived as unacceptable. Democracy as such falls into disrepute. Even voters who value democracy as such prove “willing to sacrifice fair democratic competition for the sake of electing politicians who champion their interests.”<sup>123</sup> Paradoxically, this diminishes the systemic power of voters, who “cannot be counted on to serve as an effective check on by the exercise of power by political elites.”<sup>124</sup> Democracy loses the foundation in popular support necessary for its persistence.

A key question in the design of democratic institutions, therefore, is whether and how parties and candidates have an incentive to mobilize racial or ethnic resentment in ways that will, over time, corrode the sociocultural foundations of a community of equals being ruled and ruling in turn. That is, does institutional design sharpen or buffer the ethnic and racial rifts that pose a central threat to democracy?

As all know, the United States has a long and anguished history of racialized politics. That history, however, does not fix political destiny.<sup>125</sup> It informs, but does not wholly explain, a pivotal and recent change: The emergence in the 1980s onward of a partisan political identity indexed to whiteness, to racial resentment against Blacks and migrants, and—crucial here—to hostility toward the democratic project of being ruled and ruling in turn by multiracial

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<sup>120</sup> Jennifer McCoy and Murat Somer, *Overcoming polarization*, 32 J. DEM. 6, 8 (2021); see also Matthew H. Graham and Milan W. Svobik, *Democracy in America? Partisanship, polarization, and the robustness of support for democracy in the United States*, 114 AM. POL. SCI. REV. 392, 404 (2020) (presenting evidence that support for democracy declines under conditions of increasing polarization).

<sup>121</sup> See DONALD R. KINDER AND CINDY D. KAM, US AGAINST THEM: ETHNOCENTRIC FOUNDATIONS OF AMERICAN OPINION 233 (2016) (“Ethnocentrism divides the social world into two classes. This invites violation of the first principle of democratic government: political equality.”).

<sup>122</sup> Jennifer McCoy and Murat Somer, *Toward a theory of pernicious polarization and how it harms democracies: Comparative evidence and possible remedies*, 681 ANNALS AM. ACAD. POL. & SOC. SCI. 234, 235 (2019) (noting that “in situations in which people’s identities and interests line up along a single divide ... [the result overshadows] other, normally cross-cutting identities”); DONALD R. KINDER ET AL., DIVIDED BY COLOR: RACIAL POLITICS AND DEMOCRATIC IDEALS 6 (1996) (“If democratic politics is to succeed, citizens must believe that everyone should have a chance to participate.”).

<sup>123</sup> Milan W. Svobik, *Polarization Versus Democracy*, 30 J. DEM. 20, 24 (2019). For a startling empirical demonstration of this point, see Graham and Svobik, *supra* note 120, at 406 (finding, based on surveys and experimental work, that “only a small fraction of Americans prioritize democratic principles in their electoral choices when doing so goes against their partisan identification or favorite policies.”).

<sup>124</sup> Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Judicial Intervention As Judicial Restraint*, 132 HARV. L. REV. 236, 265 (2018).

<sup>125</sup> In the 1990s, white attitudes tended to undergo profound shifts away from racial hostility when Blacks won local political office. Zoltan L. Hajnal, *White residents, black incumbents, and a declining racial divide*, 95 AM. POL. SCI. REV. 603 (2001).

coalitions.<sup>126</sup> This ‘white political identity’ (as it is labeled in the political science literature) is distinct from affective or partisan polarization.<sup>127</sup> While increasingly aligned with the Republican party, this new politically potent ‘white’ identity is a separate and distinct sociocultural phenomenon from partisanship—one that poses a structural threat to contemporary democracy.<sup>128</sup> In important part, however, this identity formation was “born within and not against the neoliberal movement” as a reaction to racial and gender equality claims that proliferated in the 1960s.<sup>129</sup> That is, white identity is genealogically intertwined with the macroeconomic shifts documented above.

The ‘white’ political identity salient to contemporary politics embodies “a desire to protect the in-group and its collective interests ... independent of out-group prejudice.”<sup>130</sup> White identity, so defined, is not synonymous with racial or ethnic prejudice: It is consistent with viewing Blacks and other minorities not as ‘lesser,’ but rather just as not ‘one of us.’<sup>131</sup> At the same time, studies find that white political identity is now “closely connected to racial resentment,” which is a belief that “racial minorities and immigrants have been favored by government policies while their own [white] communities have been neglected.”<sup>132</sup> White political identity hence “factor[s] into whites’ political thinking, primarily with respect to policies that whites see as benefiting or harming their in-group.”<sup>133</sup> It is also “aligned” with other politically salient identifications, such as “Christian conservative, gun owner, rural and small town resident, [and] believer in traditional gender roles.”<sup>134</sup>

Since the 1980s, a “racial divide has increasingly affected the American party system because of how conservative white voters have reacted to the growing racial and ethnic diversity of American society.”<sup>135</sup> While the “dramatic increase in racial resentment” is now four decades

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<sup>126</sup> Intraparty changes in the 1930s and the 1940s “transformed both parties so that the intraparty pressures in favor of an embrace of racial liberalism were much stronger on the Democratic side.” ERIC SCHICKLER, *RACIAL REALIGNMENT: THE TRANSFORMATION OF AMERICAN LIBERALISM, 1935-1965*, at 8 (2016). Yet by 1965, Schickler shows, Republican attitudes to race were distinct from Democrats’, but not as defined as they are today. *Id.* at 269.

<sup>127</sup> Cf. MICHAEL TESLER, *POST-RACIAL OR MOST-RACIAL?: RACE AND POLITICS IN THE OBAMA ERA* 150 (2016) (noting that racial resentment is a “more powerful” predictor of partisan identification than “more blatant forms of prejudice”).

<sup>128</sup> For documentation of the gap between white identity and Republican identity, see CHRISTOPHER H. ACHEN AND LARRY M. BARTELS, *DEMOCRACY FOR REALISTS* 255-57 (2016).

<sup>129</sup> Quinn Slobodian, *Anti-68s and the Racist-Libertarian Alliance*, 15 *CULT. POL.* 372, 374 (2019).

<sup>130</sup> Ashley Jardina, *In-group love and out-group hate: White racial attitudes in contemporary US elections*, -- *POL. BEHAV.* --, at \*6 (2020); see also ASHLEY JARDINA, *WHITE IDENTITY POLITICS* 5-6 (2019) [hereinafter “JARDINA, WHITE IDENTITY POLITICS”] (“Many whites identify with their racial group without feeling prejudice toward racial and ethnic minorities... [They are motivated to] protect their power and status.”); accord ACHEN AND BARTELS, *supra* note 128, at 257.

<sup>131</sup> That said, there is some evidence of an increase in “dehumanizing attitudes” toward Blacks, particularly among those who voted for former president Trump. Ashley Jardina and Spencer Piston, *The Effects of Dehumanizing Attitudes about Black People on Whites’ Voting Decisions*, -- *BRIT. J. POL. SCI.* 1 (2021).

<sup>132</sup> Alan Abramowitz and Jennifer McCoy, *United States: Racial resentment, negative partisanship, and polarization in Trump’s America*, 682 *ANNALS AM. ACAD. POL. & SOC. SCI.* 137, 141 (2019). For evidence of a growing alignment, see Lilliana Mason & Julie Wronski, *One Tribe to Bind Them All: How Our Social Group Attachments Strengthen Partisanship*, 39 *ADVANCES POL. PSYCHOL.* 257, 259-60 (2018) (finding that “Republican ‘purity’ applies to in-party social homogeneity. A Republican who does not fit the White, Christian mold is far less attached to the Republican Party than one who does fit the mold.”).

<sup>133</sup> JARDINA, *WHITE IDENTITY POLITICS*, *supra* note 130, at 213.

<sup>134</sup> HACKER AND PIERSON, *LET THEM EAT TWEETS*, *supra* note 117, at 122.

<sup>135</sup> ALAN I. ABRAMOWITZ, *THE GREAT ALIGNMENT: RACE, PARTY TRANSFORMATION AND THE RISE OF DONALD TRUMP* 8-9 (2018).

old,<sup>136</sup> Michael Tesler, Diana Mutz, and Seth Goldman have established that the Obama presidency was associated with an especially sharp increase.<sup>137</sup> Animosity toward racial minorities measured in 2010 also predicted support for former President Trump (but not other Republican politicians), who acted as a “lightning rod” channeling and legitimating those sentiments through his statements and tweets.<sup>138</sup>

The increasing salience of white identity is causally rooted in larger macroeconomic changes, and, in particular, the decline of labor-market opportunities for whites at the lower end of the income distribution. A recent study finds that economic shocks—such as mass layoffs—tend to increase strongly white support for candidates who expressly support “racial hierarchy” (while, unsurprisingly, having no such effect on Black voters).<sup>139</sup> White political identity is hence a way of translating an experience of “threatened” status and loss into psychologically manageable terms, and channeling it toward fructifying political ends.<sup>140</sup> This understanding has had a practical political effect. Shifts in white voters’ electoral choices in 2016 have been persuasively ascribed to a racialized logic of blaming Blacks and migrants for economic and perceived cultural marginalization.<sup>141</sup> Racial politics increasingly align with, and “reinforce” economic and cultural divides, leading to “a growing divide between the electoral coalitions supporting the two major parties.”<sup>142</sup>

In the context of the fragile institutionalization of democracy in Articles I and II of the Constitution described above, this creates a “structural opportunity” for political elites to “undermine democracy and get away with it.”<sup>143</sup> For white identity is an increasingly powerful predictor not just of both voting behavior but—of greater importance here—attitudes toward democracy.<sup>144</sup> It is strongly correlated with dissatisfaction with democracy itself, especially in the wake of an election loss.<sup>145</sup> For example, a study of Republican and Republican-leaning voters in January 2020 found that “relatively few Republicans—1 in 4, or 5, or 10, depending on the item—decline the invitation to ‘bend the rules’ or ‘take the law into their own hands.’”<sup>146</sup> Crucially, increasing unwillingness to tolerate the democratic process was “primarily

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<sup>136</sup> *Id.* at 126.

<sup>137</sup> See TESLER, *supra* note 127, at 8, 26-28 (finding that “white Americans’ voting behavior in the 2010 and 2012 congressional elections was more racialized than it was in the pre-Obama period); accord SETH K. GOLDMAN AND DIANA C. MUTZ, *THE OBAMA EFFECT: HOW THE 2008 CAMPAIGN CHANGED WHITE RACIAL ATTITUDES* (2014). On the role of white working-class votes (and party-switching) in 2016, see Stephen L. Morgan and Jiwon Lee, *Trump voters and the white working class*, 5 *SOC. SCI.* 234, 234-45 (2018).

<sup>138</sup> Lilliana Mason, Julie Wronski, and John V. Kane, *Activating Animus: The Uniquely Social Roots of Trump Support*, - *AM. POL. SCI. REV.* --, at \*8 (2021); see also JARDINA, *WHITE IDENTITY POLITICS*, *supra* note 130, at 225 (“The symbolism of Obama’s election as a displacement of whites’ political dominance is hard to dismiss.”).

<sup>139</sup> Leonardo Baccini and Stephen Weymouth, *Gone for good: Deindustrialization, white voter backlash, and US presidential voting*, 115 *AM. POL. SCI. REV.* 550, 551 (2021).

<sup>140</sup> Christopher Sebastian Parker, *Status Threat: Moving the Right Further to the Right?*, 150 *DAEDALUS* 56, 65 (2021).

<sup>141</sup> See JOHN SIDES, MICHAEL TESLER & LYNN VAVRECK, *IDENTITY CRISIS: THE 2016 PRESIDENTIAL CAMPAIGN AND THE BATTLE FOR THE MEANING OF AMERICA* 87-95 (2018); Diana C. Mutz, *Status threat, not economic hardship, explains the 2016 presidential vote*, 115 *PROC. NAT’L ACA. SCI.* E4330 (2018).

<sup>142</sup> ABRAMOWITZ, *supra* note 135, at 15.

<sup>143</sup> Svobik, *supra* note 120, at 24. One recent work about white identity focuses on its implications for election law. Joshua S. Sellers, *Election Law and White Identity Politics*, 87 *FORDHAM L. REV.* 1515, 1521 (2019) (“American law and politics cannot be accurately understood today without understanding white identity politics.”)

<sup>144</sup> JARDINA, *WHITE IDENTITY POLITICS*, *supra* note 130, at 23 (concluding that white identity is connected to efforts “to maintain the racial status quo by opposing political candidates they believe threaten their group ... and supporting those ... they see as restoring their group’s power”).

<sup>145</sup> Adam M. Enders and Judd R. Thornton, *Racial Resentment, Electoral Loss, and Satisfaction with Democracy Among Whites in the United States: 2004–2016*, -- *POL. BEHAV.* --, at \*2 (forthcoming 2021).

<sup>146</sup> Larry M. Bartels, *Ethnic antagonism erodes Republicans’ commitment to democracy*, 117 *PROC. NAT’L ACA. SCI.* 22752, 22753 (2020).

attributable” to “ethnic antagonism”: a belief that whites are the primary victims of discrimination; that American society is changing too fast; and that those on welfare “have it better” than those working.<sup>147</sup> Another recent study found that white political identity is “strongly linked to support for restricting the media’s coverage of the political process, with opposition to protest, with support for unrestricted political power, with condoning political violence, and with skepticism about the integrity of national elections.”<sup>148</sup> These views are at least consistent with the willingness to use violence such as that involved in the January 6, 2021, attack on the U.S. Capitol.<sup>149</sup>

In sum, an ethnic rift driven by the rise and radicalization of white political identity is now the “principle line of political cleavage ... in America’s broader struggle to embrace and instantiate democracy.”<sup>150</sup> This rift is increasingly overlapping with partisan identity, with the Republican rank-and file evincing increasing intolerance at the prospect of “being ruled and ruling” in turn. At the extreme, white identity bleeds into an embrace of political violence directed at democratic institutions. It thus creates the “factious public” necessary for “[a]spirring autocrats” to succeed in their conspiracies against democratic rule.<sup>151</sup>

## **E. The Convergence of Counter-Democratic Dynamics**

In the late nineteen-seventies, the post-war consensus over Keynesian macroeconomics and social welfare buckled under the pressure of stagflation and oil shocks. It gave way to a neoliberal model characterized by less regulation, less social provision, and correspondingly greater inequalities in wealth and income. Around the same time, a white political identity emerged in response to economic loss and perceived in-group threats. In part, this sociocultural shift responded to macroeconomic shifts. In part, it also reflected a culmination of increasingly powerful interparty sorting by racial attitudes that had begun in the 1930s.<sup>152</sup> By the new millennium, these economic and sociocultural trends were intersecting with fault lines long hidden in the Constitution’s democratic design. These weaknesses could be exploited by, and also could become causal drivers of, growing economic and social rifts. The Constitution’s ambiguity about democratic rule, and its potential for accommodation with nondemocratic regimes at both the national and the subnational level, hence made it feasible to mobilize politically within existing institutions to vindicate minority goals while being agnostic or hostile to democracy.

In this way, the collision of three quite distinct vectors—institutional, economic, and sociocultural—have created today an acute political storm. Offering a powerful simplification and synthesis of the present political moment, political scientists Jacob Hacker and Paul Pierson argue that a “plutocracy” striving to insulate its privilege from legislative attack has “enabled ... right-wing populism” to yield a new and distinctive species of “plutocratic populism.”<sup>153</sup> Among critical theorists, the same formation has come to be called “neo-illiberalism,” i.e., a political regime “combining features of ethno-nationalism with elite imperatives of cross-border

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<sup>147</sup> *Id.* at 22756; JARDINA, WHITE IDENTITY POLITICS, *supra* note 130, at 46-47, 156-64 (further discussing these dynamics).

<sup>148</sup> Enders and Thornton, *supra* note 145, at \*2.

<sup>149</sup> Alan Feuer, *Fears of White People Losing Out permeate Capital Rioters’ Towns, Study Finds*, N.Y. TIMES (Apr. 6, 2021), <https://www.nytimes.com/2021/04/06/us/politics/capitol-riot-study.html>.

<sup>150</sup> Bartels, *supra* note 146, at 22758.

<sup>151</sup> Svolik, *supra* note 128, at 31.

<sup>152</sup> SCHICKLER, *supra* note 126, at 7-8.

<sup>153</sup> HACKER AND PIERSON, LET THEM EAT TWEETS, *supra* note 117, at 173.



capital mobility.”<sup>154</sup> However labeled, this confluence places in question the possibility of keeping a community of equals being ruled and ruling in turn; its force is greater than that of any one of its constituent parts.

These important synoptic accounts of contemporary democratic crisis nevertheless have an important gap. Displacing monocausal explanations, they put into play three distinct dynamics ordinarily working along distinct institutional, economic, and sociocultural tracks. Existing analyses do not explain how these dynamics intersect to yield a threat that is greater than the sum of its parts. To fill this gap, and to better understand the linkages between institutional, economic, and sociocultural vectors of democratic backsliding, I will argue, it is necessary to consider in some detail the recent interventions of the Supreme Court.

### **III. Judicial Power and Democratic Encasement**

The Roberts Court did not cause the institutional, economic, or sociocultural predicates of democratic backsliding. Nevertheless, this Part argues, it has played an important causal role in contemporary democratic decay. I unpack here the Court’s ability to *arbitrage* different kinds of economic, social, and political capital into durable forms of political entrenchment, and to translate a temporary hold into the durable possession of an office. I then show how this jurisprudence knits together the three vectors of institutional weakness, economic inequality, and white identity into a lattice of “democratic encasement”—one proofed against shifts in public sentiment.

#### **A. Unpacking Encasement**

I use the terminology of “democratic encasement” to pick out the way in which constitutional law braids together institutional, economic, and sociocultural vectors into a constraint upon democracy that is analytically distinct, and more potent, than any one vector on its own. A constitutional law of democratic encasement, however, does not extinguish either the community of politically equals, or foreclose completely the prospect of being ruled and ruling in term. Rather, it substantially undermines democracy’s predicates without contradicting the formal apparatus of elections and shifting appointments. It creates background conditions wherein meaningful rotation in office, and hence “being ruled and ruling in term,” is unlikely.<sup>155</sup>

The language of “encasement” fits the case-law of the Roberts Court closely. That jurisprudence does not refute any of the external accoutrements of American democracy—such as voting, representation, and legislative log-rolling. To the contrary, Supreme Court majorities make a special point of loudly congratulating themselves on honoring the people’s

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<sup>154</sup> Quinn Slobodian, *The Backlash Against Neoliberal Globalization from Above: Elite Origins of the Crisis of the New Constitutionalism*, -- THEORY, CULT. & SOC. --, at \*3 (2021); Reijer Hendrikse, *The rise of neo-illiberalism*, 41 KRISIS 65, 66 (2021).

<sup>155</sup> Typically, the ideal of judicial independence is associated with the absence of a democratic collapse. Courts stand apart from the democratic fray, and ensure that participants abide by its needful rules. See Douglas M. Gibler and Kirk A. Randazzo, *Testing the effects of independent judiciaries on the likelihood of democratic backsliding*, 55 AM. J. POL. SCI. 696, 705 (2011). There are a number of reasons for doubting that the U.S. case will fall under the general rule posited by Gibler and Randazzo. First, this study has an odd definition of judicial independence as “the ability of the executive to impose policies as severely limited by other domestic actors,” in particular courts. *Id.* at 658. Second, it focuses in large, negative changes in democratic quality, and not more incremental processes of democratic decay. *Id.* at 702

will.<sup>156</sup> At the same time, the jurisprudence of democratic encasement subsidizes the ability of existing economic and sociocultural elites to use their assets to gain disproportionate political power *through those facially democratic institutions*. In contrast, for those disadvantaged by the status quo, the law works as a series of walls, dykes, ditches, and other obstacles with the effect of draining away the force of shifting public preferences, and emaciating the forces that drive rotation in office and enable the project of being ruled and ruling in turn.

The term ‘encasement’ is drawn (with important modifications) from the work of intellectual historian Quinn Slobodian. He uses it to describe the neoliberal project of using international law, in the form of both trade and treaty law, to insulate global free markets from national redistributive or fragmenting efforts.<sup>157</sup> Encasement is hence a solution to “the intolerable contradiction of democratic rejection of the neoliberal state.”<sup>158</sup> While Slobodian applies the term “encasement” to describe the insulation of market ordering from democracy, the German economist Wolfgang Streek has observed that “one might find it more appropriate to use the encasement metaphor for democracy rather than for the economy,” since it entails “the locking in, and indeed locking up [of] democratic politics ... preventing them from getting anywhere close to free markets and private property.”<sup>159</sup> I am concerned here with a case-law that locks in and limits democracy in the sense of profoundly compromising the existence of a ‘community of equals’ and undermining the project of ‘being ruled and ruling in turn. My use of “encasement” is thus closer to Streek’s than Slobodian’s.

Four doctrinal arcs of encasing doctrine do that work of arbitrage by knitting together the diverse pressures upon the democratic project. They are as follows: (1) the guarantee of an asymmetrical and positive political return on property (and in particular capital), in comparison to the organizational inputs available to capital-poor participants in the political process; (2) the creation of a legal topology for civil-society that accentuates the power of hierarchical groups acting in harmony with white political identity politics, while handicapping groups focused on more egalitarian, racially liberal ends; (3) the encoding into constitutional form of white identity politics, coupled to a disabling of other forms of racial identity as a political signifier; and (4) the dilution, or weakening, of both electoral and extra-electoral mechanisms designed to preserve rotation in office.

I develop each of these four doctrinal threads in turn. In respect to each, I closely analyze precedent from the Roberts Court, offering close readings of key arguments. Where necessary, I consider earlier decisions particularly salient to democratic encasement via the forces described in Part II. Throughout, my aim is to show how constitutional law operates as a system-level component of larger democratic backsliding processes.

## **B. The Political Returns on Property**

Democracy requires a community of equals in which participants have a roughly “equal opportunity for influence over ... political decisions to which [they] are subject.”<sup>160</sup> Some measure of “equal influence over political decisions” has a distinctive important because it “plays an important structural role in moderating the threat that other asymmetries would

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<sup>156</sup> See cases cited in *supra* note 8.

<sup>157</sup> SLOBODIAN, *supra* note 20, at 272-73.

<sup>158</sup> PHILIP MIROWSKI, NEVER LET A SERIOUS CRISIS GO TO WASTE 58 (2013).

<sup>159</sup> Wolfgang Streek, *Fighting the State*, 50 DEV. & CHANGE 836, 837 (2019).

<sup>160</sup> Kolodny, *supra* note 51, at 308; Anderson, *supra* note 51, at 313; Post, *supra* note 51, at 28.

otherwise present to social equality.”<sup>161</sup> This kind of political equality is not only consistent with, but constitutes a response to, the countervailing force of social inequality. The latter arises because participants in a democracy typically have different psychological, epistemic, and material entitlements, which modulate both formal and informal opportunities to participate in political life.<sup>162</sup> Against this, a measure of formal ‘equal political influence’ prevents the political system from becoming merely a predictable transmission-belt, replicating background distributions and divisions rather than serving as a site of meaningful political agency. Democracy, therefore, “works better” to the extent that “political processes reduce translation of everyday categorical inequalities into public policies.”<sup>163</sup>

Constitutional law bears upon the quality of democracy because it modulates this buffering between nonpolitical disparities and political equality. In particular, the law determines what I call the *political return* on different kinds of resources. The ‘political return’ on a resource is a measure of its capacity for generating predictable influence on public policies and officials. Across a range of constitutional doctrine, law influences the possibility of political returns on different sorts of resources. Because different resources are distributed spread unevenly across society as a whole, the law’s decisions here influence the political equality necessary to democracy. The legal creation of political returns is a variant on what Professor Katharina Pistor calls law’s “coding” function, whereby legal rules “bestow critical attributes on an asset and thereby make it fit for wealth creation.”<sup>164</sup>

In this section, I argue that different lines of Roberts Court jurisprudence code the political returns on three different sorts of resources. First, capital—understood generically as “legal property assigned a pecuniary value in expectation of a likely future pecuniary income”<sup>165</sup>—is guaranteed a high rate of return through the Court’s treatment of campaign spending. Second, real property is increasingly coded to generate not just economic rents but also political rents in the form of option rights to control political speech needful to democratic voice. Third, those lacking in capital must rely on sheer numbers. The Court’s inconstant, occasionally disparaging, treatment of organizational capital, however, lowers the yield from that asset. In net, these lines of cases arbitrage economic (and in particular wealth) inequities and political imbalances, while throwing up barriers to the compensatory translation of social mobilization into political power. They hence exacerbate the pressure placed on democracy by economic inequalities because the resulting coalitions of wealthy donors and allied officials are able to leverage the representational asymmetries described in Part II.B.

### 1. *Capital*

The first and most obviously salient line of cases, of course, concerns the way in which the First Amendment is construed to constrain state and federal governments from regulating campaign spending. Constitutional limits on the regulation of “express advocacy” date back to 1976.<sup>166</sup> The Roberts Court, however, has issued a series of major rulings dramatically cutting back on the scope of permissible campaign-speech-related regulation.<sup>167</sup> It has, for instance,

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<sup>161</sup> Kolodny, *supra* note 51, at 309.

<sup>162</sup> *Id.* at 289.

<sup>163</sup> CHARLES TILLY, DEMOCRACY 111 (2007).

<sup>164</sup> PISTOR, *supra* note 110, at 13.

<sup>165</sup> Jonathan Levy, *Capital as Process and the History of Capitalism*, 91 BUS. HIST. REV. 483, 487 (2017).

<sup>166</sup> Buckley v. Valeo, 424 U.S. 1, 40-48 (1976).

<sup>167</sup> A 2010 decision is commonly seen as “a clear turning point not just for campaign finance law but for all regulation of the relationship between campaign money and the political process. Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 6 (2012).

invalidated restrictions on independent expenditures of corporate funds,<sup>168</sup> aggregate contribution limits,<sup>169</sup> matching fund provisions in public financing regimes,<sup>170</sup> and even non-aggregate contribution limits.<sup>171</sup> In July 2021, the Court in *Americans for Prosperity v. Bonta* granted a facial injunction against a California law mandating the disclosure of charities' financial documentation.<sup>172</sup> It did so by applying “exacting” constitutional scrutiny used in earlier disclosure cases to protect civil rights organizations facing harassment in the Jim Crow south.<sup>173</sup> Whether campaign finance-related disclosure laws will survive the *Bonta* Court's version of exacting scrutiny remains to be seen.<sup>174</sup> The “exacting” scrutiny applied in *Bonta* might also be extended to threaten contribution limits in new ways.<sup>175</sup>

As the Court crisply explained in 2014, the First Amendment right at stake across these cases is “[s]pending large sums of money in connection with elections, but not in [explicit] connection with an effort to control the exercise of an officeholder's official duties.”<sup>176</sup> That constitutional right to arbitrage capital into political influence is recognized without regard to whether it “actually undermine[s] faith in the democratic process.”<sup>177</sup>

Increasingly clear evidence suggests that campaign spending indexes not just access to politicians<sup>178</sup> but the quality and consequences of representation. First, increased campaign spending has a secular tendency to break the link between representatives and those who elect them. The money entering the political system tends not to flow from home districts but from a small number of wealthy districts nationally.<sup>179</sup> Second, the deregulation of corporate expenditures has tended to increase Republican representation in state legislatures, without

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<sup>168</sup> *Citizens United v. FEC*, 558 U.S. 310, 367-70 (2010); see also *Am. Tradition P'ship, Inc. v. Bullock*, 567 U.S. 516, 517 (2012) (per curiam) (applying *Citizens United*). This decision, in turn, invited the deregulation of PACs in *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686 (D.C. Cir. 2010).

<sup>169</sup> *McCutcheon v. FEC*, 572 U.S. 185, 204-06 (2014).

<sup>170</sup> *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 753 (2011); see also *Davis v. FEC*, 554 U.S. 724, 729, 744 (2008) (striking down a law limiting donations for “non-self-financing candidate” if their self-financed opponent raised more than \$350,000).

<sup>171</sup> *Thompson v. Hebdon*, 140 S. Ct. 348, 350 (2019) (per curiam); see also *Randall v. Sorrell*, 548 U.S. 230, 236 (2006) (invalidating that a Vermont statute limiting campaign contributions).

<sup>172</sup> 141 S. Ct. 2373 (2021).

<sup>173</sup> *Id.* at 2383 (citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958)).

<sup>174</sup> For doubt on this score, see Richard Hasen, *The Supreme Court is Putting American Democracy at Risk*, N.Y. TIMES (July 1, 2021), <https://www.nytimes.com/2021/07/01/opinion/supreme-court-rulings-arizona-california.html>.

<sup>175</sup> *Id.*

<sup>176</sup> *McCutcheon*, 572 U.S. at 208.

<sup>177</sup> ROBERT C. POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* 66 (2014) (proposing a standard for the First Amendment's protection of campaign-related speech).

<sup>178</sup> On the effect of spending on access, Joshua L. Kalla & David E. Broockman, *Campaign Contributions Facilitate Access to Congressional Officials: A Randomized Field Experiment*, 60 AM. J. POL. SCI. 545, 546 (2016) (finding, in a randomized field experiment, that representatives were three to four times more likely to respond to donors than to nondonors). On the strategic use of spending, see Alexander Fourinaies and Andrew B. Hall, *How do interest groups seek access to committees?*, 62 AM. J. POL. SCI. 132, 132 (2018) (finding that corporate interest groups direct disproportionate spending on legislators who exercise control over key veto gates in the legislative process).

<sup>179</sup> See David Fontana, *The Geography of Campaign Finance Law*, 90 S. CAL. L. REV. 1247, 1263 (2017) (“Those with the resources to contribute at meaningful rates and in meaningful amounts reside in a very small number of neighborhoods in a very small number of metropolitan areas. Campaign finance law permits and even privileges their contributions to congressional elections ....”); Anne Baker, *The More Outside Money Politicians Take, The Less Well They Represent Their Constituents*, WASH. POST (Aug. 17, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/08/17/members-of-congress-follow-the-money-not-the-voters-heres-the-evidence/> (“About a quarter of the members of the House of Representatives raise a larger share of their campaign funds from donors outside of their districts.”).

respect to changes in public preferences.<sup>180</sup> That is, it changes the composition of legislative caucuses in a predictable, asymmetrical way decoupled from shifts in constituent preferences. Third, deregulating corporate spending has increased the rightward-lean of representation within districts that were already safe Republican seats.<sup>181</sup> That is, campaign spending leads to both interparty and intraparty preference shifts.

Finally, and most saliently here, constitutional protection for corporate speech changes the policies enacted on the ground by state legislators. In a recently published study, Martin Gilens and colleagues find that the Court's 2010 ruling in *Citizens United* prohibiting legal constraints on corporate expenditures had different effects on state-level policy depending on whether such expenditures had previously been banned. They found “about a 4% reduction in [affected] states’ top corporate income tax rate and about an 8% reduction in those states that had previously banned only corporate independent expenditures,” and also “significant reductions in plaintiff-friendly civil litigation standards—a change consistent with corporate interests.”<sup>182</sup> The seemingly cynical critique of the Court’s campaign finance jurisprudence as plutocratic, in short, turns out to be true.

All this is to say that the Roberts Court’s campaign finance jurisprudence constitutionalizes the political return from capital. Neither state nor federal government can prevent individuals or firms from arbitraging wealth into political outcomes. This would be less significant if the United States were not characterized by wide wealth gaps. But in 2012, two years after *Citizens United*, the top one percent of families owned 42 percent of national wealth.<sup>183</sup> In the first quarter of 2021, the Federal Reserve estimated that the top one percent owned some \$41.52 billion—more than the combined assets (\$39.15 billion) of the combined bottom 90 percent.<sup>184</sup> Under these conditions, unleashing the political returns of capital has a very different effect from the same move under conditions of wealth homogeneity.

## 2. *Land*

A second important line of cases relates to real property. For many centuries, land was “the major source of wealth” and “benefited from greater durability as compared to other assets.”<sup>185</sup> Today, real property is less relevant than intellectual property or financial instruments (e.g., derivatives) as an asset. Rather, it is salient as a platform upon which political speech and organizing—especially by those lacking resources to direct influence political outcomes—happens.

Or at least did happen once. For the Roberts Court has recognized a real property owner’s exclusive right to determine who speaks, and what association occurs, on her land. This right entails a derogation of the state’s interest as sovereign in defining the terms of

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<sup>180</sup> Nour Abdul-Razzak, Carlo Prato, and Stephane Wolton, *After Citizens United: how outside spending shapes American democracy*, 67 ELECT. STUD. 102190 (2020).

<sup>181</sup> Anna Harvey and Taylor Mattia, *Does money have a conservative bias? Estimating the causal impact of Citizens United on state legislative preferences*, -- PUB. CHOICE 1, 19 (2019).

<sup>182</sup> Martin Gilens, Shawn Patterson, and Pavielle Haines, *Campaign Finance Regulations and Public Policy*, -- AM. POL. SCI. REV. -- at \*2 (2021).

<sup>183</sup> Saez and Zucman, *supra* note 103, at 520; Piketty & Saez, *supra* note 103, at 458 (reporting similar trends for income).

<sup>184</sup> Federal Reserve, *DFA: Distributional Finance Accounts* (last visited July 19, 2021), <https://www.federalreserve.gov/releases/z1/dataviz/dfa/distribute/table/#quarter:0;series:Net%20worth;demographic:networth;population:1,3,5,7;units:levels;range:2005.2,2020.2>.

<sup>185</sup> PISTOR, *supra* note 110, at 5

property interests, but expands the fronts along which wealth can be arbitrated into political returns.

Property owners have had a near unbroken streak of wins in the Roberts Court.<sup>186</sup> But these decisions largely had no direct political consequences. In 2021, however, the Court in *Cedar Point Nursery v. Hassid* struck down a California regulation that granted union organizers access to an agricultural employer's property in order to solicit support for unionization.<sup>187</sup> The *Cedar Point* Court held that the regulation violated the Takings Clause because it abrogated growers' "right to exclude," a right "universally held to be a fundamental element of the property right."<sup>188</sup> The regulation "appropriated a right of access to the growers' property" by "allowing union organizers to traverse it at will for three hours a day, 120 days a year."<sup>189</sup> As such, it ranked as "a *per se* physical taking."<sup>190</sup>

Had the Court stopped here, its ruling would have had sweeping enough effect: It would have cast into doubt an immense range of state and federal regulations—from health and safety rules for workplaces and construction sites, to rules against on-site employment discrimination, to anti-discrimination mandates covering housing, rentals, and even public accommodations. The Court, however, carved out a series of broad, hazily drawn and seemingly ad hoc exceptions for trespasses, common law rules, and exactions.<sup>191</sup> It remains to be seen, of course, whether these exceptions are narrowly or tightly drawn. If *Cedar Point* is more than a 'labor only' decision, its most likely extrusion would eliminate speech rights in privately owned spaces at the cost of reinforcing the political influence of the rentier class.<sup>192</sup>

The immediate effect of *Cedar Point* is to assign real property owners a constitutional option to bar speech and association by labor. As such, its immediate effect is to create an expressly political return on real property. Ownership of land, that is, entails a corresponding monopoly on the exercise of speech within that land. Ownership is already flexed by firms to political ends. It is already common for companies "to encourage employees to participate in politics in ways that benefit the firm."<sup>193</sup> As of December 2014, almost half of the managers contacted in a nationally representative survey indicated that their firm solicited political activity from employees.<sup>194</sup> *Cedar Point* effectively amplifies the employer monopoly on political mobilization in physical workplaces.

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<sup>186</sup> John G. Sprankling, *Property and the Roberts Court*, 65 U. KAN. L. REV. 1 (2016) ("Under the leadership of Chief Justice Roberts the Court has expanded the constitutional and statutory protections afforded to owners to a greater extent than any prior Court.").

<sup>187</sup> 141 S. Ct. 2063, 2069 (2021) (citing Cal. Code Regs., tit. 8, § 20900(e)(1)(C) (2020)).

<sup>188</sup> *Id.* at 2072.

<sup>189</sup> *Id.* at 2074.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 2077-80.

<sup>192</sup> In a lone concurring opinion issued in April 2021, Justice Clarence Thomas (one of the *Cedar Point* majority) criticized the treatment of former President Trump by social media platforms. *Biden v. Knight First Amend.* Inst. At Columbia Univ., 141 S. Ct. 1220, 1221 (2021) (opinion of Thomas, J.) To him, a "Twitter account resembled a public forum." *Id.* Although he thought the First Amendment did not apply to Twitter or Facebook, Justice Thomas conjured up "a fair argument that some digital platforms are sufficiently akin to common carriers or places of accommodation to be regulated in this manner." *Id.* at 1224. It is unusual for a Justice to, in effect, invite Congress to pass a law; it is even more unusual for that Justice to do so on behalf of a right he would decisively reject two months later.

<sup>193</sup> Alexander Hertel-Fernandez, *American employers as political machines*, 79 J. POL. 105, 105 (2017).

<sup>194</sup> *Id.* at 107.

To achieve this end, the *Cedar Point* Court engaged in puzzling contortions. Taken at its face, *Cedar Point* distinguishes between labor law and “longstanding background restrictions on property rights” that do not count as takings.<sup>195</sup> Set aside the awkward fact that regulating to protect employees *does* have a “longstanding” historical pedigree.<sup>196</sup> There remains the question *why* labor law is different from the many other categories of regulation the Court excludes from its prohibitory analysis. Because the grounds of its distinction are obscure, *Cedar Point* can easily be read as an exercise in ‘labor exceptionalism,’ whereby egalitarian speech on private property is subject to distinctive constitutional limits not applied to other kinds of property regulation. That is, the Takings Clause in *Cedar Point* seems to be drawn precisely to disable regulation aimed at enabling egalitarian political speech, and only that subgenre of regulation.

One price of this contortion sounds in federalism values. The Court has often stressed that property law is a state, not a federal, creature.<sup>197</sup> Yet *Cedar Point* did not pause to ask whether the property interest at issue in the case counted as an easement under California law. There is a good argument it does not.<sup>198</sup> The case hence reflects a judgment about comparative institutional competence: At least where leveling-up regulation is at stake, states’ democratic processes cannot be trusted, and property law becomes not just a federal but a constitutional matter.<sup>199</sup>

Finally, the *Cedar Point* Court had to distinguish a 1980 precedent that allowed California to mandate that shopping malls opened their doors to political protesters.<sup>200</sup> *Cedar Point* explained this earlier case as involving “a business generally open to the public,” and as such “readily distinguishable from regulations granting a right to invade property closed to the public.”<sup>201</sup> But why should public access makes the two cases “readily distinguishable”? The Court did not give any reason why the distinction between open and closed access regimes should matter if the state forces a property owner to accede to the entry of an unwanted guest. Nor is it clear the distinction is meaningful. *Cedar Point*’s facts can be easily re-described as a case about property ‘open to the public who are willing to work for the growers, but not union organizers.’<sup>202</sup> It is hard to see why *Cedar Point*, in other words, would remain limited to its facts.

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<sup>195</sup> *Cedar Point*, 141 S. Ct. at 2079.

<sup>196</sup> See John T. Nockleby, *Two Theories of Competition in the Early 19th Century Labor Cases*, 38 AM. J. LEGAL HIST. 452, 454-55 (1994) (describing common-law protections for labor).

<sup>197</sup> See, e.g., *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998).

<sup>198</sup> California defines easement by statute. Cal Civ. Code. §§801-13. An easement is “attached to other land as incidents or appurtenance.” § 801. There is a plausible argument that the regulation at issue in *Cedar Point* however, was not “attached” to the land: For instance, had the plaintiffs in those cases turned their land from agricultural to other uses, there is no reason to think the regulation would have applied. Hence, the latter did not run with the land, as state law required for easements.

<sup>199</sup> For a further critique of the Court’s cavalier attitude to state property law, see Maureen E. Brady, *Penn Central Squared: What the Many Factors of Murr v. Wisconsin Mean for Property Federalism*, 166 U. PA. L. REV. ONLINE 53, 70 (2017) (arguing that earlier case-law “weakens constitutional protections for varied state property interests”).

<sup>200</sup> *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).

<sup>201</sup> *Cedar Point*, 141 S. Ct. at 2077.

<sup>202</sup> That 1980 decision hinges on reasoning that eerily tracks the line of argument that *Cedar Point* rejects. The *Pruneyard* Court recognized that:

It is true that one of the essential sticks in the bundle of property rights is the right to exclude others.... And here there has literally been a “taking” of that right to the extent that the California Supreme Court has interpreted the State Constitution to entitle its citizens to exercise free expression and petition rights on shopping center property. But ... not every destruction or injury to property by governmental action has been held to be a ‘taking’ in the constitutional sense.

*PruneYard Shopping Ctr.*, 447 U.S. at 82.

If (or when) that occurs, *Cedar Point* will morph from a case of ‘labor exceptionalism’ to ‘egalitarian speech exceptionalism.’

Like the consequences of campaign finance jurisprudence, the effects of *Cedar Point* are contingent on background economic and social facts: Under more egalitarian conditions, where ample public forums exist, political speakers’ access to the private lands like those at issue in *Cedar Point* will not matter much. But land is not equitably distributed. To the contrary, by a long history of ethnic and racial exclusions from land ownership, America has “constructed a legal system that allocated land to its white citizens, to the exclusion of people of color.”<sup>203</sup> In other words, the constitutionalizing of real property’s political returns—begun in *Cedar Point* but not yet ended—has implications not just for the economic but also the sociocultural vectors of democratic backsliding.

### 3. Organization

Money, of course, is not the only resource needful for political action. In addition, “political organizing is a source of power available to all income groups.”<sup>204</sup> The effect of constitutionalizing the political returns from capital and land depends in part on how other assets—political organization foremost among them—are treated.

I turn to the First Amendment law concerning civil society, including the different law for hierarchical and egalitarian groups, in the following section. Here, I want to make a narrower point about organizational rights more generally: One important way in which the Court mediates the political returns to organizing is simply by refusing to recognize the constitutional status of such efforts. Consider again the *Cedar Point Nursery* case. The majority opinion in that matter emphasizes “the central importance to property ownership of the right to exclude.”<sup>205</sup> But it was absolutely silent about the right of association at issue in the unionization effort in the case at bar—even though the First Amendment right of association played a central role in the *Bonta* decision handed down just a few days later.<sup>206</sup> Rather than recognizing that the facts in *Cedar Point Nursery* presented a conflict between two different constitutional rights—property on the one hand, and political association on the other—the Court’s majority framed the analysis in terms of a single constitutional right. This sort of deck-stacking is an important way of minimizing political returns on organization.

The contrast between how the Court treated associational rights in *Cedar Point* and *Bonta* is all the more striking given the following: The California union in *Cedar Point* was, in fact, hindered from speaking and associating with agricultural workers. In *Bonta*, however, neither

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<sup>203</sup> Jessica A. Shoemaker, *Fee Simple Failures: Rural Landscapes and Race*, 119 MICH. L. REV. 1695, 1721 (2021); accord Sarah Schindler, *Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment*, 124 YALE L.J. 1934, 1939 (2015); Deborah N. Archer, “White Men’s Roads Through Black Men’s Homes”: *Advancing Racial Equity Through Highway Reconstruction*, 73 VAND. L. REV. 1259, 1268 (2020) (explaining how “the nation’s highway system contributed to the concentration of race and poverty and created physical, psychological, and economic barriers that persist to this day”). For a sweeping indictment of the federal government’s role in racial distributions, see generally RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017). For a consideration of non-legal instruments of racial exclusion, see Sarah Schindler, *Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment*, 124 YALE L.J. 1934, 1939 (2015) (documenting “subtle ways that the built environment has been used to keep certain segments of the population—typically poor people and people of color—separate from others”).

<sup>204</sup> Benjamin I. Sachs, *The unbundled union: Politics without collective bargaining*, 123 YALE L.J. 148, 151 (2013).

<sup>205</sup> *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2073 (2021).

<sup>206</sup> *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2382 (2021) (celebrating the right of association).



the two entities challenging California’s charity law produced any evidence of actual (as opposed to hypothetical future) chill.<sup>207</sup> The Court zealously protected associational freedom, that is, when it was not actually in play, and ignored it was it was uncontroversially compromised. Formally denominated an associational rights case, *Bonta* is hence better understood as a case about the terms on which wealth can be used to surreptitiously create organization.

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We are more than a half century from the poll tax.<sup>208</sup> Property is no longer a de jure entry qualification for involvement. Yet, thanks to the threads of case-law described here, material assets are now a de facto, threshold qualification for meaningful political influence. By re-coupling the economic and the political, the Roberts Court has strengthened the forces undermining political equals, enhancing the power of a demographic minority to exploit the Constitution’s representational asymmetries as means to thwart democratic rotation.

### C. Gerrymandering Civil Society

Since the mid-nineteenth century, liberal democratic thinkers have celebrated civil society as “a source of resistance” against the risks of “stultifying majorities and over-strong modern states.”<sup>209</sup> Today, social theorists led by Robert Putnam argue that civil society is necessary to make “democracy work.”<sup>210</sup> But other recent scholarship, exemplified by sociologist Dylan Riley’s important account of European fascism, tells a different story: Voluntary associations can also be seedbeds for authoritarian rule.<sup>211</sup> They can accelerate democracy backsliding.<sup>212</sup> Rather than being necessary allies to democracy, civil society has different effects depending on its composition and orientation.

There are relevant two ways in which the terrain of civil society can mesh with dynamics described in Part II. On the one hand, civil society organizations can serve as a countervailing force to the political returns on capital guaranteed under the First and Fifth Amendments. Under conditions of distributional inequality, they can provide the social infrastructure for the expression of preferences unlikely to be captured by campaign spending. Associations with a

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<sup>207</sup> *Id.* at 2387. Indeed, there was not even a disclosure to the general public in *Bonta*. *Id.* at 2387-88. In another case decided during the October 2020 Term, the Court held that a “concrete harm” had not been made out for the purpose of Article III standing when a credit reporting company had on file a false, negative fact about a customer, but did not disclose that fact to any third party. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2211–12 (2021). Standing would be recognized only if the plaintiffs made a factual showing of a “sufficient likelihood that TransUnion would otherwise intentionally or accidentally release their information to third parties.” *Id.* The *Bonta* plaintiffs were not asked to make that showing. Therefore, the *Bonta* plaintiffs were held to a different Article III standing test from the *TransUnion* plaintiffs.

<sup>208</sup> *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

<sup>209</sup> EDMUND FAWCETT, *LIBERALISM: THE LIFE OF AN IDEA* 61 (2014) (discussing the ideas of Alexis de Tocqueville and Hermann Schultze-Delitzch).

<sup>210</sup> ROBERT D. PUTNAM, ROBERT LEONARDI, AND RAFFAELLA Y. NANETTI, *MAKING DEMOCRACY WORK* 16 (1994) (praising civil society as the source of “civic virtue”: and “active, public-spirited citizenry”); *see also* Hahrie Han, *The organizational roots of political activism: Field experiments on creating a relational context*, 110 *AM POL. SCI. REV.* 296, 305 (2016) (finding a “strong influence of organizational context on people’s choice to participate” in politics).

<sup>211</sup> DYLAN RILEY, *THE CIVIC FOUNDATIONS OF FASCISM IN EUROPE* 21 (2010) (“Fascism emerged out of [a] coincidence of hegemonic weakness and strong civil society”).

<sup>212</sup> *See, e.g.*, Shanker Satyanath et al., *Bowling for fascism: Social capital and the rise of the Nazi Party*, 125 *J. POL. ECON.* 478, 479 (2017) (finding that a standard deviation increase in the density of civil society to be associated with a fifteen percent faster Nazi entry).

“breadth and depth of democracy” internally, moreover, themselves become “great schools of democracy.”<sup>213</sup>

But on the other hand, civil society can also “fragment, rather than unite, a society, accentuating and deepening existing cleavages.”<sup>214</sup> The result is a congeries of “warring factions” that line up alongside extant ethnic or racial rights, placing the necessary community of equals further out of reach.<sup>215</sup> They can hence serve as schools of anti-democracy. Depending on the mix of organizations that exist at any given moment, civil society might sustain a community of democratic equals, or instead accelerate deleterious economic and sociocultural rifts.

Constitutional jurisprudence matters because it assigns privileges or disabilities to different elements of civil society. These entitlements act either as taxes or subsidies. They make certain kinds of organizational activity either more or less likely. By titrating these interventions in different ways, the Court can alter the organizational terrain upon which democracy unfolds.

In two ways, the Roberts Court has facilitated and rewarded the arbitrage of certain forms of sociocultural power, but not others, into political mobilization. What is crucial here is the combined effect of these interventions upon the *mix* of civil society organizations. The first line of important cases here concerns the organization power of labor. These decisions diminish the capacity of labor to mobilize for its interests in the political domain. Not coincidentally, these decisions also arise in the context of a coterminous and functionally parallel campaign of anti-union legislative reform at the state level. The second jurisprudential thread pertains to the entitlements of hierarchical religious organizations that are opposed to ongoing sociocultural shifts. These cases, unlike earlier iterations of religious liberty jurisprudence, generate control rights outside religious organizations, extruding into public contexts. The Court has implicitly recognized specific forms of religious activity, and not others, as imperiled and hence warranting constitutional protection.

In combination, these two lines of cases are reshaping the organizational terrain of civil society active in the public sphere in ways that undermine the community of equals and make democratic rotation less, not more, likely. Under different circumstances, similar constitutional rulings might have rather different effects on democracy.<sup>216</sup> It is the interaction between the specific constitutional claims to associational liberty being recognized and the background dynamics described in Part II that creates a democracy-facing impact.

### 1. *Labor enchained*

Consider first the travails of labor unions. In 2010, in a teaser of sorts to the jurisprudence that would follow, the Court held that the National Labor Relations Board (“NLRB”) was disabled from acting by the lack of a three-member quorum.<sup>217</sup> This

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<sup>213</sup> HAHRIE HAN, HOW ORGANIZATIONS DEVELOP ACTIVISTS: CIVIC ASSOCIATIONS AND LEADERSHIP IN THE 21ST CENTURY 2 (2014).

<sup>214</sup> Sheri Berman, *Civil society and political institutionalization*, 40 AM. BEHAV. SCI. 562, 565 (1997).

<sup>215</sup> *Id.* at 256.

<sup>216</sup> For example, labor unions’ racial politics in the early twentieth century made them problematic vehicles for democratic aspiration. See PAUL FRYMER, BLACK AND BLUE: AFRICAN AMERICANS, THE LABOR MOVEMENT, AND THE DECLINE OF THE DEMOCRATIC PARTY (2008).

<sup>217</sup> *New Process Steel, L.P. v. N.L.R.B.*, 560 U.S. 674, 681 (2010) (reasoning that allowing the Board to act with two members “dramatically undercuts the significance of the Board quorum requirement by allowing its permanent circumvention”).

immediately forced the Board to redo “about 100” matters,<sup>218</sup> but in the long-term made it easier for labor’s foes to disable federal labor law by blocking Board appointments. In the words of one of its Senate opponents, “the NLRB as inoperable could be considered progress.”<sup>219</sup>

More significant were a pair of decisions raising the costs of collective political action by workers though or outside the union form. In June 2018, the Court in *Janus v. AFSCME* held that public employers could not require non-union employees to pay a “fair share,” or “agency fee,” covering the costs that unions incurred negotiating and administering labor contracts on their behalf.<sup>220</sup> Like *Cedar Point*, the *Janus* decision is puzzling doctrinally along several margins, several of which have been well canvassed in the literature already.<sup>221</sup> For example, it seemingly abandons a well-known distinction between legal compulsions that plausibly imply an endorsement of a message, and those that do not—and yet did not overrule past cases that relied on that difference.<sup>222</sup> It also implicitly, and without explanation, treated contributions to unions and corporations as presenting wholly different First Amendment questions.<sup>223</sup> Like *Cedar Point*, *Janus* again raises questions as to whether labor organizing has a specially disfavored status in constitutional law.

As a practical matter, *Janus* allowed non-union members to free-ride on union negotiations for better wages and conditions, thereby vitiating the incentive to join the union to begin with. It immediately invalidated public-sector labor management contracts in more than twenty states covering millions of state employees.<sup>224</sup> *Janus* further precipitated a wave of further litigation attacks on unions aimed at recuperating past dues or challenging unions’ status as exclusive bargaining agent for a workplace.<sup>225</sup> These challenges to date have not induced a substantial decline in membership, although this is likely due to unions’ substantial countervailing organizing efforts.<sup>226</sup>

Complementing labor’s defeat in *Janus*, *Epic Systems v. Lewis* held that the Federal Arbitration Act precluded the use of class actions for workplace disputes notwithstanding Section 7 of the National Labor Relations Act, which protects the right to workplace concerted

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<sup>218</sup> Lafe Solomon, *Administering Labor Law in Political Turbulence*, 34 BERKELEY J. EMP. & LAB. L. 273, 274 (2013).

<sup>219</sup> Lynn Woolsey, *Why the labor board matters*, THE HILL (June 25, 2013), <https://thehill.com/opinion/oped/307775-why-the-labor-board-matters> (quoting Sen. Lindsay Graham (R-SC)).

<sup>220</sup> 138 S. Ct. 2448 (2018) (holding that “fair share fees” violate the free speech rights of nonunion members).

<sup>221</sup> Kate Andrias, *Janus’s Two Faces*, 2018 SUP. CT. REV. 21, 34-36 (2018) (compiling criticisms).

<sup>222</sup> Consider, for example, the Court’s prior holding that “[t]he First Amendment permits a public university to charge its students an activity fee used to fund a program to facilitate extracurricular student speech if the program is viewpoint neutral.” Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth, 529 U.S. 217, 221 193 (2000). The fees in *Janus* covered “the costs incurred in ‘the collective bargaining process, contract administration[,] and pursuing matters affecting wages, hours [,] and conditions of employment’” for all employees. *Janus*, 138 S. Ct. at 2461. That is, both the activity fees and the agency fees were used in a neutral manner. The *Janus* Court does not explain why the distributional neutrality saved the compelled subsidy in *Southworth*, but not the agency fee. Indeed, it does not even cite *Southworth*.

<sup>223</sup> For criticism, see Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 COLUM. L. REV. 800, 803 (2012) (criticizing “asymmetric rules regarding opt-out rights for employees and shareholders”); cf. James D. Nelson, *Corporations, Unions, and the Illusion of Symmetry*, 102 VA. L. REV. 1969, 2026 (2016) (arguing that “union-dissenters’ rights protect employees from complicity in expression that infringes on their ethical integrity” while “the structure of modern public corporations, including pervasive financial intermediation through institutional investors, attenuates the link between shareholders’ wallets and their consciences”).

<sup>224</sup> *Janus*, 138 S. Ct. at 2487-88 (Kagan, J., dissenting).

<sup>225</sup> Ann C. Hodges, *The US Labor Relations System after Janus v. AFSCME: an Early Assessment*, 22 EMPLOYEE RESPONSIBILITIES & R.J. 49, 49 (2021).

<sup>226</sup> *Id.*

action.<sup>227</sup> *Epic* hinged less on the priority of arbitration over litigation,<sup>228</sup> and more on the Court's prioritizing "individualized" over collective process.<sup>229</sup> As such, it is well understood as an a strike against organization qua resource for labor. *Epic* invites employers to use mandatory arbitration clause to defeat workers' ability to engage in concerted action via class actions. By blocking two alternative channels of collective action, *Janus* and *Epic* have a collective suppressive effect on the organizational power of workers above and beyond each decision on its own. The whole, once more, is greater than the sum of its parts.

These cases show how wealth, as well as seeking to shield its own political returns, can use constitutional litigation to create a vicious cycle of decline and decay in countervailing vectors of political power. *New Process Steel*, *Janus*, and *Epic* align with *Cedar Point* in undermining the political returns on labor at a time when the political returns on wealth are increasingly shielded by law. Unsurprisingly, constitutional litigation challenging agency fees is funded by wealthy donors. The *Janus* litigation, for instance, was funded by "Richard Uihlein, an Illinois industrialist who has spent millions backing Republican candidates in recent years, including Gov. Scott Walker of Wisconsin, Senator Ted Cruz of Texas and Gov. Bruce Rauner of Illinois."<sup>230</sup> And that litigation arose in the context of a concerted political campaign at the state legislative level for right-to-work laws.<sup>231</sup> *Janus* in effect allowed the losers in state political battles a second, constitutional bite at the apple. Moreover, the downstream effect of *Janus* on agency fees is a predictable decline in both political activity by union members<sup>232</sup> and voter turnout for the Democratic party.<sup>233</sup> Wealth hence induces the conditions for its continued political success.

Finally, union membership is associated with a substantial reduction in racial resentment among white members.<sup>234</sup> The Roberts Court's interventions against labor, in short, do not just tilt the democratic playing field further in the direction of wealth as the de facto currency of political power. They also weaken "a critical organization associated with promoting racial toleration," even as they open the door wider to the white identity formation described above.<sup>235</sup> *Janus*, *Cedar Point*, and *Epic* may not look like race cases, let alone subsidies for white identity politics. But under the conjoined force of contemporary economic and sociocultural dynamics, that is precisely what they are.

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<sup>227</sup> 138 S. Ct. 1612, 1619 (2018) (holding that "the Arbitration Act and the NLRA have long enjoyed separate spheres of influence and neither permits this Court to declare the parties' agreements unlawful"); see also *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011) (funding preemption of a state-law rule that treated waivers of class-action status as unconscionable, where only individualized arbitration was available).

<sup>228</sup> Pamela K. Bookman, *The Arbitration-Litigation Paradox*, 72 VAND. L. REV. 1119, 1153 (2019) (noting that *Epic* presented a "conflict of arbitration values").

<sup>229</sup> *Id.* at 1622. The Court described individuation as one of "arbitration's fundamental attributes." *Id.*

<sup>230</sup> Noam Scheiber and Kenneth P. Vogel, *Behind a Key Anti-Labor Case, a Web of Conservative Donors*, N.Y. TIMES (Feb. 25, 2018), <https://www.nytimes.com/2018/02/25/business/economy/labor-court-conservatives.html>.

<sup>231</sup> Alexander Hertel-Fernandez, *Who passes business's "model bills"? Policy capacity and corporate influence in US state politics*, 12 PERSP. POL. 582, 584 (2014) (describing the role of ALEC on right to work laws).

<sup>232</sup> Patrick Flavin and Michael T. Hartney, *When government subsidizes its own: Collective bargaining laws as agents of political mobilization*, 59 Am. J. Pol. Sci. 896, 902 (2015).

<sup>233</sup> James Feigenbaum, Alexander Hertel-Fernandez, and Vanessa Williamson. *From the bargaining table to the ballot box: Political effects of right to work laws* 30 (No. w24259. National Bureau of Economic Research, 2018) (finding "in Presidential elections, Democratic candidates received about 3.5 percentage points fewer votes following the passage of RTW laws").

<sup>234</sup> Paul Frymer and Jacob M. Grumbach, *Labor unions and White racial politics*, 65 AMJ. POL. SCI. 225, 226 (2021).

<sup>235</sup> *Id.*

## 2. *Arming the Church Militant*

Even as labor has been disarmed, the Court has empowered social conservative Evangelical and Catholic denominations through reconstructions of the First Amendment's Free Exercise and Establishment Clauses. The ensuing case-law extends the reach of socially conservative, generally hierarchical religious organizations (but not others) beyond their institutional bounds into the public sphere. This creates a tension with the norm of political equality upon which democracy rests. Further, the case-law's indirect effect has been to subsidize a political movement intertwined with white identity claims.

In several ways the Roberts Court has lowered legal barriers to religious activity in the public sphere and the exercise of religious authority over nonbelievers in several ways. Most modestly, it first bolstered a “ministerial” exception to antidiscrimination laws as applied to houses of worship,<sup>236</sup> and then extended that exception to religiously affiliated schools.<sup>237</sup> Ordinarily, compliance with antidiscrimination norms and accommodation mandates will impose potentially large financial costs. So these decisions create a straightforward subsidy for covered religious entities that secular analogs do not receive. Applied to schools, retirement homes, and hospitals,<sup>238</sup> they also alter the character of services available to the public at large—but do not touch on democracy as such.

Second, and more significantly, the Court has invalidated state-law exclusions of religious organizations from programs in which the government offers discretionary benefits.<sup>239</sup> At first blush, it would seem that these cases merely place religious organizations on an equal footing with secular peers when competing for state funds. But subsequent decisions complicate that inference. They at least suggest that any time a state denies funding to a religious entity, it has ipso facto violated the First Amendment—even if it does so to avoid harm to a third party. In tandem with *Janus*, it means labor cannot constitutionally be subsidized while public-facing religious groups must receive any subsidies for which they compete.

To illustrate, consider the 2021 decision in *Fulton v. City of Philadelphia*. At issue in *Fulton* was a municipal foster-care program that contracted with private entities to place children.<sup>240</sup> A Catholic charity was excluded from this program because it declined to work with same-sex families.<sup>241</sup> It disputed this exclusion in federal court, seeking not just participation in the program, but also challenging a three-decade old precedent establishing the rule for Free Exercise claims.<sup>242</sup> Under that precedent, *Employment Division v. Smith*, “the right of free exercise

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<sup>236</sup> See *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 565 U.S. 171, 190-91 (2012) (finding ministerial exception under the First Amendment covers “a commissioned minister”).

<sup>237</sup> *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020) (extending the ministerial exception to “religious education and formation of students”).

<sup>238</sup> Courts of appeal have applied the ministerial exception to such facilities before *Hosanna Tabor*. See, e.g., *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 301 (4th Cir. 2004) (retirement home); *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 362 (8th Cir. 1991) (hospital).

<sup>239</sup> *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017) (invalidating a state exclusion of religious schools from a state program allocating funds for playground repair on the ground that it “expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character” in violation of the Free Exercise Clause); *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2257 (2020) (invalidating a Montana “no-aid provision” barring financial aid to a religious school was invalid because it singled out the school “‘simply because of what it is,’ putting the school to a choice between being religious or receiving government benefits”).

<sup>240</sup> 141 S. Ct. 1868, 1875 (2021).

<sup>241</sup> *Id.* at 1875-76.

<sup>242</sup> *Id.* at 1876.

does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability” because of its burden on religious belief or activity.<sup>243</sup> A disparate-impact test, *Smith* concluded, would be “courting anarchy” in a religiously pluralistic society.<sup>244</sup>

In ruling unanimously for the Catholic charity, a majority of the Court declined to overrule *Smith*, even as they planted seeds for its unraveling.<sup>245</sup> Citing *Smith*, the *Fulton* majority ruled that where a legal regime contains a “mechanism for individualized exemptions” to the nondiscrimination rule for foster parents, and where the exception had not made available to a religious entity, strict scrutiny would apply.<sup>246</sup> Philadelphia’s law failed that test.<sup>247</sup>

*Fulton* offers religious liberty organizations a powerful subsidy to enter the public sphere. To begin with, it suggests that whenever a religious organization is denied a discretionary benefit (e.g., as a government contractor providing social services), this is likely a constitutional violation. *Fulton* hence goes beyond the ‘equal standing’ rule of earlier decisions. It vests religious bodies with something akin to a constitutional right to government funds. Moreover, the *Fulton* Court did not give any weight—indeed, did not even mention—the interests of gay and lesbian foster children who may be placed by the Catholic charity without regard for the risks of harm correlated to their sexuality. Those children—who may not be readily identifiable—already face “disparities and double standards” within the system.<sup>248</sup> “[F]amily acceptance” plays a critical role in modulating those harms,<sup>249</sup> but is categorically unavailable given the Catholic charity’s position on same-sex families. One reading of *Fulton* is that constitutional religious liberty claims in the public sphere must prevail even in the teeth of severe harms to third parties, including children otherwise incapable of avoiding being hurt.<sup>250</sup> This in effect creates a subsidy for religious organizations—a right to impose negative externalities on others in the public sphere.

The right recognized in *Fulton* is denominated ‘religious liberty.’ But there are many ways in which that value might be realized as doctrine. The Roberts Court has elected to shape the law in ways that predictably benefit some religious groups, but not others. As defined in *Fulton* and related cases, the constitutional right to free exercise is an entitlement to participate in public life—and to receive public monies—without regard to negative externalities. This kind of religious liberty is very different from the claims made on behalf of religious organizations prior to *Smith*. These tended to be on behalf of minority, somewhat socially marginalized, faiths that sought some social or cultural space of their own.<sup>251</sup> In contrast,

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<sup>243</sup> 494 U.S. 872, 879 (1990)

<sup>244</sup> *Id.* at 888.

<sup>245</sup> Justices Alito, Gorsuch, and Thomas would have overruled *Smith*. *Fulton*, 141 S. Ct. at 1833 (Alito, J., concurring).

<sup>246</sup> *Id.* at 1877-82. It was not clear that the exception applied to refusals to work with parents (as opposed to refusals to place children). The Court had to reject the City’s reading of its own contract to find otherwise. *Id.* at 1899. Further, it was undisputed that no exception had ever been granted. The Court responded that this was irrelevant because “government [still has] to decide which reasons for not complying with the policy are worthy of solicitude.” *Id.* (citation omitted).

<sup>247</sup> *Id.* at 1881-82.

<sup>248</sup> Adam McCormick, Kathryn Schmidt, and Samuel R. Terrazas, *Foster family acceptance: Understanding the role of foster family acceptance in the lives of LGBTQ youth*, 61 CHILDREN & YOUTH SERVS. REV. 69, 71 (2016).

<sup>249</sup> *Id.* at 73.

<sup>250</sup> In an earlier statutory decision, the Court dismissed the question of third-party harms as a “policy concern.” *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2381 (2020). An earlier constitutional case had, however, suggested that racial discrimination created unacceptable spillover harms. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1727 (2018).

<sup>251</sup> See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Amish); *United States v. Lee*, 455 U.S. 252, 254 (1982) (same); *Sherbert v. Verner*, 374 U.S. 398 (1963) (Seventh Day Adventist).

today's claims are necessarily outward looking. They involve a measure of dominion over the public sphere and the public purse. They are most valuable for religious organizations that seek "to convince the country that their moral views describe the correct way to live ... for everyone."<sup>252</sup> This right is of greatest value to groups that *reject* the claims to inclusion made through gender and sexuality-related antidiscrimination law. It seems likely that denominations most likely to value and use this constitutional subsidy are unlikely to be sympathetic to an inclusive account of democracy as a community of equals regardless of gender or sexuality. It seems plausible to suppose that such groups will also be more, rather than less, hierarchical and authoritarian, than other secular or sectarian organizations. Without overstating the case, it seems plausible to find here a tension with norms necessary to democracy that would not have arisen with other potential specifications of religious liberty.

Instead, the religious bodies most likely to benefit from recent constitutional rulings on religious liberty tend to be socially conservative churches sympathetic to first free-market, neoliberal policies and hostile to redistribution. Historian Kevin Kruse has indeed observed that the "postwar revolution in American religious identity" was led by "corporate titans [who] enlisted conservative clergymen in an effort ... to defeat ... Franklin D. Roosevelt's New Deal."<sup>253</sup> Similarly, the groups subsidized by the Roberts Court's account of religious liberty tend to be "libertarian" on economic questions.<sup>254</sup> Only in the 1990s did strands of the American Protestant movement start to contend that "religious freedom demands a radical intolerance vis-à-vis the non-normative, that is, immoral expression of sexuality."<sup>255</sup>

More recently, a nexus has emerged between socially conservative faith as protected by *Fulton* and the white political identity charted in Part III. In her pathbreaking analysis of white political identity, political scientist Ashley Jardina explains that a key element of the latter is the shared perception that it is "not merely white dominance ... challenged by demographic change, but that white *Christian* America is in decline."<sup>256</sup> Similarly, pollster Robert Jones reports tight correlation between "white Christian identity" and "racist and racially resentful attitudes."<sup>257</sup> Legal scholars Amanda Hollis-Brudsky and Joshua Wilson have documented an emerging Christian identity as "last defenders of freedom ... blending aggressive anti-communism, ... racialized anxieties, and conservative Christianity."<sup>258</sup> Even if the Court to date seems unlikely to create a constitutional exception to race discrimination bans under the Free Exercise Clause, the doctrine culminating (for now) with *Fulton* represents a triumphal vindication of a social formation closely tied to racial resentment. In this regard, it is telling that the one instance in which the Roberts Court rejected a claim of religious discrimination sounding in constitutional terms was one in which the claimants stood firmly outside—and likely were perceived by many as adverse to—white or Christian identity.<sup>259</sup>

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<sup>252</sup> Cathleen Kaveny, *The Ironies of the New Religious Liberty Litigation*, 149 DÆDALUS 72, 74 (2020).

<sup>253</sup> KEVIN M. KRUSE, *ONE NATION UNDER GOD: HOW CORPORATE AMERICA INVENTED CHRISTIAN AMERICA*, at xiv (2015); see also DANIEL K. WILLIAMS, *GOD'S OWN PARTY: THE MAKING OF THE CHRISTIAN RIGHT 9* (2012) (tracing the connection between evangelical groups and conservative positions in general to the 1950s).

<sup>254</sup> KRUSE, *supra* note 253, at 293 (defining the twentieth century movement as one of "Christian libertarians").

<sup>255</sup> MELINDA COOPER, *FAMILY VALUES: BETWEEN NEOLIBERALISM AND THE NEW SOCIAL CONSERVATISM* 291 (2017).

<sup>256</sup> JARDINA, *WHITE IDENTITY POLITICS*, *supra* note 130, at 106 (emphasis in original).

<sup>257</sup> ROBERT P. JONES, *WHITE TOO LONG: THE LEGACY OF WHITE SUPREMACY IN AMERICAN CHRISTIANITY* 184 (2020).

<sup>258</sup> AMANDA HOLLIS-BRUDSKY AND JOSHUA WILSON, *SEPARATE. BUT FAITHFUL: THE CHRISTIAN RIGHT'S RADICAL STRUGGLE TO TRANSFORM LAW AND LEGAL CULTURE* 27 (2020).

<sup>259</sup> See *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018) (upholding the travel ban disproportionately targeting Muslim noncitizens, and justified by anti-Muslim speech on the ground that it can "reasonably be understood to

None of this is to say that religious liberty *must* have an affiliation with the capital-owner classes or with a defensive-crouch white identity politics. Of course, it doesn't. These are *contingent*, historically constructed linkages that flow from *choices* made by the Court about how religious liberty is formulated. Nevertheless, in our particular historical moment, the Roberts Court has constructed religious liberty as a subsidy for a specific sector of civil society tightly aligned with the economic and sociocultural pressures on democracy.

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The Roberts Court, in sum, has disempowered egalitarian labor organizations (and their close substitutes) while subsidizing the influence of hierarchical, exclusionary sects closely tied to white identarian and neoliberal interests. These decisions mediate the sociocultural and economic forces now bearing down on democracy. Their asymmetrical effects is to give an advantage to political formations that are more likely to exploit the Constitution's immanent potentiality for minority rule.

#### **D. The Constitutional Embedding of White Identity**

The Roberts Court has emphatically endorsed a 'colorblind' reading of the Equal Protection Clause. On this account, constitutional equality commands that "the Government must treat citizens as *individuals*, not as simply components of a racial, religious, sexual or national class."<sup>260</sup> This follows from the "'personal right[]' to be treated with equal dignity and respect."<sup>261</sup> As a result, "strict scrutiny must be applied to any admissions program using racial categories or classifications."<sup>262</sup> On its face, therefore, the constitutional law of racial equality seems to celebrate—not repudiate—the community of equals necessary to democracy. It seems, indeed, to set its face firmly against the kind of ethnic or racial rifts that can motivate dangerous political polarization, and, ultimately disaffection with democracy as such.<sup>263</sup> The constitutional doctrine defining and applying racial equality would seem a singularly unlikely place to look for resonances with the white political identity generating contemporary pressure on the democratic community of equals.

Yet a constitutional command of colorblindness is consistent in practice with both the empirical premises and also the political objectives of white political identity. This is, perhaps, not as surprising as might first seem. While the rhetoric of colorblindness is often traced back to the 1890s,<sup>264</sup> its contemporary iteration emerged only in the 1970s out of a "conception of

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result from a justification independent of unconstitutional grounds"). The travel ban plaintiffs lost (despite evidence of animus) because the government could hypothesize a non-discriminatory reason. In contrast, the *Fulton* plaintiffs won despite the absence of animus, and even though the government had in fact behaved in an even-handed manner.

<sup>260</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 730 (2007) (plurality op.)

<sup>261</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (quoting *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948)).

<sup>262</sup> *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 310474 (2013).

<sup>263</sup> See *supra* text accompanying notes 120 to 133.

<sup>264</sup> Justice Harlan's statement that "[t]here is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law," in *Plessy v. Ferguson* is often taken as its origin. 163 U.S. 537, 559 (1896). Justice Harlan, it is worth remembering, prefaced that comment by saying that "[t]he white race deems itself to be the dominant race in this country.... So, I doubt not, it will continue to be for all time...." *Id.*



group dynamics in the United States in which racial hierarchy had ceased to operate”<sup>265</sup> but nevertheless “grassroots political actors consciously pursued legal strategies to fight [school] integration from the ground up.”<sup>266</sup> My argument here is not simply the genealogical one that colorblindness emerges as a response to claims for racial integration. It is that there are historical and contemporary points of convergence between the doctrinal formulation of colorblindness constitutionalism and the contemporary ascendant form of white political identity quite aside from genealogy.

Three such linkages deserve our attention here. First, the doctrine is formulated around, and embodies, the idea that whites are victims of discrimination to an extent racial minorities are not. Second, the Court has inconsistent in the weight it assigns to countervailing, non-race-based interests. It has recognized countervailing interests when doing so preserves status-quo allocations of entitlements central to white political identity, but not when recognition of such interests disrupts that status quo. Third, white political identity shares a conception of political time with white political identity: a periodization of American history in which racial discrimination against minorities (and in particular) Blacks occurred in the past, does not continue to occur (except in discrete and isolated cases), and has no vestigial causal effects on either status or material outcomes.

Given these three commonalities, I suggest, the white political identity described in Part II is not just consistent with a colorblindness norm. It can actively leverage that norm to advance its material, policy objective. This claim is distinct from the leading ethical and analytic critiques that have been launched against colorblindness.<sup>267</sup> The latter offer forceful accounts of how colorblindness fails to account for racial discrimination, or suffers from internal tensions.<sup>268</sup> My distinct and narrower aim here is to identify correspondences in presupposition and consequences between the constitutional logic of colorblindness and the political logic of white identity.

### 1. *White and Black Victims*

An important component of white political identity is “the belief that whites experience discrimination, and ... opposition to the notion that blacks are discriminated against.”<sup>269</sup> Unsurprisingly, whites tend to be “much less likely to perceive bias and discrimination against blacks than is the case among blacks themselves,”<sup>270</sup> and (again in general), more likely to

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<sup>265</sup> Ian F. Haney López, “*A Nation of Minorities*”: Race, Ethnicity, and Reactionary Colorblindness, 59 STAN. L. REV. 985, 1034 (2007).

<sup>266</sup> Ariela Gross, *A Grassroots History of Colorblind Conservative Constitutionalism*, 44 LAW & SOC. INQUIRY 58, 59 (2019).

<sup>267</sup> The leading critique is Neil Gotanda, *A Critique of ‘Our Constitution in Color-Blind’*, 44 STAN. L. REV. 1, 68 (1991) (arguing that colorblindness is “inadequate to deal with today’s racially stratified, culturally diverse, and economically divided nation”).

<sup>268</sup> Powerful analytic critique include David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99, 100 (arguing that “a principle prohibiting accurate racial generalizations has many of the same characteristics as affirmative actions” such that if “accurate racial generalizations are unconstitutional” then “failure to engage in affirmative action may sometimes be unconstitutional”), and Benjamin Eidelson, *Respect, Individualism, and Colorblindness*, 129 YALE L.J. 1600, 1606 (2020) (arguing that “a commitment to treating people as individuals does not necessarily require inattention to race, as even opponents of colorblindness have sometimes supposed”).

<sup>269</sup> JARDINA, WHITE IDENTITY POLITICS, *supra* note 130, at 144-45.

<sup>270</sup> Frank Newport, *American Attitudes and Race*, Gallup (June 17, 2020), <https://news.gallup.com/opinion/polling-matters/312590/american-attitudes-race.aspx>.

perceive discrimination against whites.<sup>271</sup> Drawing on survey data, Jardina has demonstrated that a political “white consciousness” is “significantly linked” to the belief that whites experience discrimination, but unrelated to the beliefs about the extent of discrimination against minorities.<sup>272</sup> She also finds that more powerful in-group preferences among whites are associated with the perception of demographic change, and particularly the belief that whites are likely soon to become a minority in the United States.<sup>273</sup> Other scholars have underscored contemporaneous “moral panics” in the media about “random black-on-white assaults” that gained currency despite an absence of empirical foundations.<sup>274</sup> All this evidence suggests an emerging understanding of white identity as primarily inward-facing and defensive—a political identity preoccupied with the defense of an ethnic identity, not the derogation of another.<sup>275</sup>

The central idea of white vulnerability is anticipated in the logic and language of Supreme Court opinions dating back to the 1980s. It can first be observed in dissenting opinions resisting, in strident terms, statutory affirmative action measures. Hence, in 1979, then-Justice Rehnquist bemoaned the way in which affirmative action operated as a the “*numerus clausus*” mechanism to rob the “white” plaintiff (expressly, and repeatedly identified as such) of material advantage that by right was theirs.<sup>276</sup> Eight years later, Justice Scalia highlighted the “losers” from affirmative action: the “predominantly unknown, unaffluent, unorganized” white men who suffered “injustice” at the Court’s hands.<sup>277</sup> Through the 1980s, indeed the “principal argument” against affirmative action offered in Supreme Court briefs was “that they violate the rights of innocent white victims.”<sup>278</sup> arguments arose in the context of a “public debate over affirmative action in the late 1970s and 1980s [in which] whites increasingly framed whiteness as a liability.”<sup>279</sup> That is, Justices such as Rehnquist or Scalia either adopted the language of “White victimhood,”<sup>280</sup> or else acted as norm entrepreneurs—innovating and introducing new ideas into the public sphere.

White political identity resonates with the doctrine in other ways. Most obviously, the majority of constitutional equality claims that prevail in the Supreme Court are brought by white claimants.<sup>281</sup> A superficial overview of the high court’s interventions, therefore, supports

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<sup>271</sup> Don Gonyea, *Majority Of White Americans Say They Believe Whites Face Discrimination*, NPR (Oct. 24, 2017), <https://www.npr.org/2017/10/24/559604836/majority-of-white-americans-think-theyre-discriminated-against>.

<sup>272</sup> JARDINA, WHITE IDENTITY POLITICS, *supra* note 130, at 145-46 & tbl. 5.2.

<sup>273</sup> Maureen A. Craig and Jennifer A. Richeson, *More Diverse Yet Less Tolerant? How the Increasingly Diverse Racial Landscape Affects White Americans’ Racial Attitudes*, 40 PERSONALITY & SOC. PSYCH. BUL. 750, 753-74 (2014).

<sup>274</sup> See Mike King, *The ‘Knockout Game’: Moral Panic and the Politics of White Victimhood*, 56 RACE & CLASS 85, 88-90 (2015).

<sup>275</sup> See Maureen A. Craig, Julian M. Rucker, and Jennifer A. Richeson, *Racial and political dynamics of an approaching “majority-minority” United States*, 677 ANNALS AM. ACAD. POL. & SOC. SCI. 204, 206 (2018) (collecting evidence that exposure to evidence of demographic change leads to “increased feelings of anxiety and negative affect among white Americans” and “more sympathy for whites”). This is consistent with post hoc justificatory beliefs aimed at explaining Blacks’ material disadvantage. See John Knuckey, *Racial resentment and the changing partisanship of southern whites*, 11 PARTY POL. 5, 9 (2005) (defining racial resentment as a belief that Blacks belong “at the bottom of the socio-economic ladder, not as a result of in-born abilities, but rather as a result of not meeting the values embodied by the ‘protestant work-ethic’ of self-reliance, hard work, obedience and discipline”).

<sup>276</sup> *United Steelworkers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193, 254 (1979) (Rehnquist, J., dissenting).

<sup>277</sup> *Johnson v. Transportation Agency, Santa Clara Cty.*, 480 U.S. 616, 677 (1987) (Scalia, J., dissenting).

<sup>278</sup> David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99, 103.

<sup>279</sup> Erinn Brooks, Kim Ebert, and Tyler Flockhart, *Examining the reach of color blindness: Ideological flexibility, frame alignment, and legitimacy among racially conservative and extremist organizations*, 58 SOCIOLOGICAL Q. 254, 258 (2017).

<sup>280</sup> *Id.*

<sup>281</sup> Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1287 (2011).

the belief that discrimination against whites is more prevalent than discrimination against racial minorities.

More subtly, the strength of Article III standing doctrine is dialed down when the Court is faced with a white Equal Protection claimant, but not a minority plaintiff. For instance, a (generally white) challenger of a racial gerrymander must show only that “his own district has been so gerrymandered,”<sup>282</sup> and not that the quality of his representation has diminished. Residency, though, has no logical connection to a deterioration of political representation or an impediment to effective political action.<sup>283</sup> That is (generally white) racial gerrymandering plaintiffs do not actually need to show harm to establish Article III standing. The handling of Article III standing and jurisdiction questions in affirmative-action cases evinces a similar watering down.<sup>284</sup> But no analogous softening can be observed in cases filed by minority claimants. This selective downward discounting of jurisdictional constraints implies that the Court perceives the problem of *white* victimhood is either more frequent or more serious than other constitutional harms such as discrimination against racial minorities.

In rhetoric, doctrinal structure, and outcome, therefore, the jurisprudence of colorblindness tracks a presupposition of greater white vulnerability to discrimination. In this regard, it is a public and highly salient confirmation of that aspect of white political identity.

## 2. *Constitutionalizing the Status-Quo*

A second correlate of white identity is the perception of “zero sum competition” over jobs and other resources between different racial groups.<sup>285</sup> That identity is also linked to support for “policies that help maintain their group’s power and prestige.”<sup>286</sup> Jardina tests and confirms this linkage in respect to social welfare spending, legacy admissions, and trade policy.<sup>287</sup> I suggest here that the same concern manifests in Equal Protection doctrine through the Court’s inconsistent treatment of countervailing state interests that can be deployed either to limit or to advance racially redistributive policies.

Since the 1950s, school integration has been a central front in conflicts over race and inclusion. In the 1970s, President Nixon made opposition to busing a central part of his appeal.<sup>288</sup> Education, this suggests, is perceived as a scarce resource, one that is all the more valuable given declining intergenerational social mobility.<sup>289</sup> Funding for primary and secondary education, however, is highly localized in the United States. In a context of racial segregation and hyper-segregation,<sup>290</sup> this leads to large funding gaps between majority-white

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<sup>282</sup> *Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018) (citing *United States v. Hays*, 515 U.S. 737, 744–745 (1995)).

<sup>283</sup> Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276, 2277 (1997) (noting that the Court does not require evidence of either vote denial or dilution).

<sup>284</sup> For a devastating account of justiciability problem in the University of Texas litigation, see Adam D. Chandler, *How (Not) to Bring an Affirmative-Action Challenge*, 122 YALE L.J. ONLINE 85 (2012); see also Transcript of Oral Argument at 54-56, *Fisher vs. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345) (struggling with the standing question).

<sup>285</sup> JARDINA, WHITE IDENTITY POLITICS, *supra* note 130, at 141-42.

<sup>286</sup> *Id.* at 214.

<sup>287</sup> *Id.* at 211-15.

<sup>288</sup> THOMAS BYRNE EDSALL WITH MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS 95-97 (1991).

<sup>289</sup> See *supra* text accompanying notes 106 to 109.

<sup>290</sup> Douglas S. Massey, *Still the Linchpin: Segregation and Stratification in the USA*, 12 RACE & SOC. PROB. 12, 12 (2020) (“Although average levels of black–white segregation have moderated over the ensuing decades, the

and majority-nonwhite school districts.<sup>291</sup> The ensuing patchwork of educational opportunities are thus properly characterized as white “opportunity hoarding” through the medium of “social structures ... that limit the access of outgroup members to resources controlled by the ingroup.”<sup>292</sup> Residential segregation by race and wealth hence interlaces with localized funding to allow “students in predominantly white school districts ... [to] hoard the best educational opportunities.”<sup>293</sup> It seems likely that the white identity interest in ‘policies that help maintain their group’s power and prestige’ extends to the question of how educational resources are allocated.<sup>294</sup>

Equal Protection doctrine is not neutral with respect to local control. It treats that interest, however, in two divergent ways. In some cases, the Court treats local control as a state interest important enough to limit judicial power to enforce the Equal Protection Clause in favor of Blacks. In other cases, where local control is exercised to redistribute schooling resources to racial minorities (and hence away from whites), the Court treats it as a constitutional nullity. Hence, in *Milliken v. Bradley*, the Court rejected an interdistrict remedy for historical segregation for the city of Detroit, reasoning that “the notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country.”<sup>295</sup> That is, “local control” was sufficiently important to foreclose remedial action under the Equal Protection Clause. In contrast, some thirty years later in *Parents Involved v. Seattle School District*, the Court disparaged the idea that the same value of local control could be invoked as a justification for (marginally) race-conscious actions aimed at integrating a school district.<sup>296</sup> Local control did not count as a compelling state interest.

If this doctrine is internally inconsistent in its treatment of local control, it is wholly consistent in its treatment of attempts, whether by local federal courts or local school boards, to redistribute educational opportunity away from whites. By hook or crook, those efforts are placed out of bounds. The doctrine as a whole, therefore, assigns a large value to a status quo in which access to quality secondary education is titrated by race. And by “slowing school desegregation” more generally, the Court has “aided those white Americans who wished to see many of their systemic advantages continue.”<sup>297</sup>

This inconsistent treatment of local control in the doctrine operates as a constitutional shield for white political identity. As in the religious liberty context, the prospect of entrenchment though constitutional law creates an incentive for political mobilization around

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declines have been uneven and black segregation has by no means disappeared. Indeed, in some metropolitan areas, it remains extreme”).

<sup>291</sup> *Id.* at 12; see also Sarah Mervosh, *How Much Wealthier Are White School Districts than Nonwhite Ones? \$23 Billion, Report Says*, N.Y. TIMES (Feb. 27, 2019), <https://www.nytimes.com/2019/02/27/education/school-districts-funding-white-minorities.html> (“School districts that predominantly serve students of color received \$23 billion less in funding than mostly white school districts in the United States in 2016, despite serving the same number of students ...”).

<sup>292</sup> Massey, *supra* note 290, at 12 (citing CHARLES TILLY, *DURABLE INEQUALITY* (1998)).

<sup>293</sup> Erika K. Wilson, *Monopolizing Whiteness*, 134 HARV. L. REV. 2382, 2386 (2021).

<sup>294</sup> See KATHLEEN BELEW, *BRINGING THE WAR HOME: THE WHITE POWER MOVEMENT AND PARAMILITARY AMERICA* 9-10 (2018) (drawing this link).

<sup>295</sup> 418 U.S. 717, 745 (1974).

<sup>296</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 744 (2007) (plurality op.) (rejecting deference to local decisions as “deference “is fundamentally at odds with our equal protection jurisprudence,” without citing *Milliken* (citation and quotation marks omitted).

<sup>297</sup> Rogers M. Smith and Desmond King, *Racial reparations against white protectionism: America's new racial politics*, 6 J. RACE, ETHNICITY, & POL. 82, 85 (2021).

white identity. Contrast this with how the Court has responded to Black mobilization: Invalidating municipal minority set-aside programs, Justice have expressly disparaged ethnically informed rent-seeking as repugnant to the Equal Protection Clause.<sup>298</sup> In effect, mobilizing for in-group benefits is unconstitutional when pursued by Blacks, but shielded by the Equal Protection Clause from challenge when achieved by whites.

Viewed in the round, therefore, the doctrine elicits and rewards white voters' identarian claims. It creates an incentive for them to mobilize politically around in terms of white political identity, thereby kindling a concern with federal judicial appointments as a means of preserving the differential access to resources. The Court's role here is dynamic: Creating material payoffs that incentivize slices of the public to engage in political action that, over time, reinforce the existing ideological tilt of the judiciary.

### 3. *The Periodization of Racial Discrimination*

A final point of correspondence between white identity politics and colorblind constitutionalism is a shared conception of historical time. Both share the idea that discrimination against racial minorities is a thing of the past; that its effects do not endure; and that past acts of discrimination cannot justify claims by racial minorities for greater access to resources today. This sense of history is implicit in the structure of white political identity. It is explicit, however, in the Roberts Court's analytics of racial discrimination.

In her account of white political identity, Jardina quotes a survey respondent as saying that serious racism against Blacks "was a very long time ago and should be dropped and left in the past."<sup>299</sup> Her empirical study does not examine the extent to which white identity is associated with beliefs about the historical timing of racism. Yet Jardina's data about beliefs about the vulnerability of whites qua ethnic group, the frequency of anti-white discrimination, and the need for resource husbanding all suggest that anti-Black racism is perceived as a thing of the past by those with a strong sense of white identity.<sup>300</sup> They suggest that white political identity is correlated with a belief that anti-Black animus has not only abated, but is now less important now than white disadvantage.<sup>301</sup>

Across several lines of statutory and constitutional doctrine, the Roberts Court has limited the role of historical evidence of anti-Black animus in constitutional analysis. Perhaps the Court's most overt effort on this front is to be found in the Voting Rights Act decision *Abbott v. Perez*.<sup>302</sup> Texas legislature had discriminated just two years before the decision being challenged.<sup>303</sup> The Court, however, did not merely find this irrelevant, but wrote more sweepingly that "past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful."<sup>304</sup> In the school desegregation cases, the Court

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<sup>298</sup> See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 524 (1989) (criticizing a minority set-aside program in Richmond as "clearly and directly beneficial to the dominant political group, which happens also to be the dominant racial group").

<sup>299</sup> JARDINA, WHITE IDENTITY POLITICS, *supra* note 130, at 137.

<sup>300</sup> See *supra* text accompanying notes 130 to 133.

<sup>301</sup> The 2021 panic about 'critical race theory' provides indirect evidence of widespread belief that the United States had a "racist past" but is now "an equitable democracy." Rashawn Ray and Alexandra, *Why are States Banning Critical Race Theory?* BROOKINGS INST. (July 2, 2021), <https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory/>.

<sup>302</sup> 138 S. Ct. 2305 (2018).

<sup>303</sup> *Id.* at 2313.

<sup>304</sup> *Id.* at 2324 (internal quotation marks omitted) (quoting *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980)).

also became increasingly reluctant over time to see remedial action as anything other than “temporary and used only to overcome the widespread resistance to the dictates of the Constitution.”<sup>305</sup> And in its important 1987 decision rejecting a discrimination challenge to Georgia’s capital sentencing scheme, the Court ruled that “historical evidence” of “purposeful discrimination” had to be “reasonably contemporaneous with the challenged decision” else it would have “little probative value.”<sup>306</sup>

In all these decisions involving minority claimants to racial equality, the Court has adopted a narrow “transactional lens” in which equality questions are evaluated in terms of the temporally proximate actions of parties; historically distal events are presumptively irrelevant to legal questions; and the substantial empirical evidence of how organizational norms and durable legal structures can transmit racial effects over time is ignored.<sup>307</sup> Their overall effect is to assert a “sharp break from the past” and to “reject asserted connections between current inequalities and previous eras of explicitly state-sanctioned discrimination.”<sup>308</sup> This understanding of past racial discrimination as discontinuous with—and, indeed, fundamentally apart from—the present resonates with an understanding of the past as another country that is central to white political identity.

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The doctrinal structure of colorblindness constitutionalism has powerful correspondences with the emergent political formation of white identity. These correspondences mean the Court may be providing legitimating cues for that political formation. They also suggest that political mobilization around white identity goals gains a measure of constitutional subsidy; in contrast, functional parallel Black mobilization is cast as constitutional suspect. The net effect is, again, judicial subsidies for a political formation that rejects the community of equals and democratic rotation of power, and is more likely to leverage the Constitution’s representational asymmetries to pursue a strategy of durable minority rule.

## **E. Dissolving the Institutional Bases for Democratic Rotation**

Just over twenty years ago, democracy scholars Samuel Issacharoff and Richard Pildes penned an important critique of the academic and judicial focus on democratic rights, and proposed “view[ing] appropriate democratic politics as akin in important respects to a robustly competitive market.”<sup>309</sup> This motivated them to ask federal judges to take “a skeptical view of political lockups.”<sup>310</sup> This focus on personnel entrenchment meshes well with the Aristotelian account of democracy. But it is instructive to observe that it has had little purchase with the Court.<sup>311</sup> Rather than disallowing lock-ups, the Justices have fashioned a roadmap for personnel entrenchment both through election law and beyond. This widens, rather than mitigates, the gaps in the original Constitution’s democratic design.<sup>312</sup> Once a political

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<sup>305</sup> See *Missouri v. Jenkins*, 515 U.S. 70, 1225 (1995) (Thomas, J., concurring op.).

<sup>306</sup> *McCleskey v. Kemp*, 481 U.S. 279, 298 n.20 (1987).

<sup>307</sup> For an excellent summary of recent studies, see Mario L. Small and Devah Pager, *Sociological perspectives on racial discrimination*, 34 J. ECON PERSP. 49, 53-61 (2020).

<sup>308</sup> MARK GOLUB, IS RACIAL EQUALITY UNCONSTITUTIONAL? 42 (2018).

<sup>309</sup> Issacharoff & Pildes, *supra* note 67, at 646.

<sup>310</sup> *Id.* at 648.

<sup>311</sup> Their article has been cited only once by the Supreme Court, and then only in a dissent. *Vieth v. Jubelirer*, 541 U.S. 267, 350, n.5 (2004) (Souter, J., dissenting).

<sup>312</sup> See *supra* Part II.B.

movement gains political power but anticipates majority opposition and electoral defeat, the law provides it tools to translate present incumbency into durable future political power.

I begin here with the question of how judicial doctrine allocates power over redistricting. Then I consider non-electoral mechanisms of accountability—such as investigations and prosecutions of senior elected officials—that are needful adjuncts to durable rotation in office.

### 1. *Democratic Rotation Through Election Law*

I begin with decisions on districting, which has been a major thread of Roberts Court jurisprudence. But it is telling that a similar exercise could be done with decisions weakening the fundamental right to vote pursuant to the Equal Protection Clause<sup>313</sup>; interpreting Section 2 of the Voting Rights narrowly to exclude exclusionary modifications of election rules<sup>314</sup>; and construing the Help America Vote Act to facilitate, rather than impede, disenfranchising voter rolls purges.<sup>315</sup> All undermined protections for individual political participation. Yet all also left open the possibility of remedial intervention by Congress or a state legislature. The Court's treatment of districting, in contrast, concerns not just the immediate quality of democracy—but also the opportunities for subsequent remedial action.

Districting directly influences the possibility of democratic rotation. Recent empirical work hence shows that partisan bias in the drawing of district lines diminishes both the number and quality of candidates.<sup>316</sup> In *Rucho v. Common Cause*, the Court held that challenges to partisan gerrymanders presented a nonjusticiable political question.<sup>317</sup> *Rucho* focused on Congress's authority to “make or alter” rules concerning the “‘Time, Place of Holding Elections’ for members of Congress.”<sup>318</sup> In contrast to this explicit congressional authority, the Court found “no suggestion that the federal courts had a role to play” determining district lines.<sup>319</sup>

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<sup>313</sup> *Crawford v. Marion County Election Board*, 553 U.S. 181, 189 (2008) (ruling that only laws that “invidiously discriminate” in relation to voting receive strict scrutiny pursuant to the Equal Protection clause); *cf.* *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1968) (invalidating poll tax on state franchise absent evidence of invidious discrimination).

<sup>314</sup> In *Brnovich v. Democratic National Commission*, a six-Justice majority of the Court defined narrowly the scope of protection offered by Section 2 of the Voting Rights Act against election process and access rules in terms of the “‘the totality of circumstances’ that have a bearing on whether a State makes voting ‘equally open’ to all and gives everyone an equal ‘opportunity’ to vote.” 141 S. Ct. 2321, 2341 (2021). Of particular relevance, the Court added to the statute evaluation of “the degree to which a voting rule departs from what was standard practice when § 2 was amended in 1982.” *Id.* at 2338. This intertemporal test (for which there is no textual hook in the statute, and which has no relation to the statute's putative goal of avoiding racial vote suppression) has the practical effect of dramatically lowering the risk of liability, and facilitating the selective suppression of the vote.

<sup>315</sup> *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1843 (2018) (finding no preemption under the Help America Vote Act of an Ohio law that “removes registrants only when they have failed to vote *and* have failed to respond to a change-of-residence notice”). For analysis, see Lisa Marshall Manheim and Elizabeth G. Porter, *The Elephant in the Room: Intentional Voter Suppression*, 2018 SUP. CT. REV. 213, 216 (2018) (“On its face, Ohio's voter-list maintenance regime is a neutral measure that helps to combat fraud and maintain accurate records. Yet measures like Ohio's tend to have the effect, and often the purpose, of suppressing eligible votes.”).

<sup>316</sup> Nicholas O. Stephanopoulos and Christopher Warshaw, *The impact of partisan gerrymandering on political parties*, 45 LEG. STUD. Q. 609, 613 (2020).

<sup>317</sup> 139 S. Ct. 2484, 2507 (2019) (“Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions.”).

<sup>318</sup> *Id.* at 2495.

<sup>319</sup> *Id.* at 2496. The Court's textual argument is in tension with two other lines of cases. First, *Rucho* drew a negative inference respecting judicial power from the Elections Clause of Article I in respect to judicial power. But the same negative inference could be drawn from the Commerce Clause of Article I respecting what is now

Supplementing this textual argument from Article I, the Court made an institutional competence argument training on the “political judgment[s] about how much representation particular political parties *deserve* . . . as a matter of fairness” that partisan gerrymandering claims would require.<sup>320</sup> To parry the concern that judicial abstention would leave districting to “a void,” the majority adverted to Congress’s authority under the Elections Clause and the states’ power to “restrict[] partisan considerations in districting through legislation,” for instance “by placing power to draw electoral districts in the hands of independent commissions.”<sup>321</sup>

*Rucho* has come under heavy academic fire for its empirical and analytic predicates.<sup>322</sup> Here, I want to underscore, the way in which the supposed reform paths mapped out by the Supreme Court are narrower than might first appear, and the fact that their winnowing is a consequence of the Court’s own decisions on federal and state power.

a. *Federal Power*

Consider first the scope of congressional reform-related authority to remedy partisan lock-ups via gerrymanders. The Election Clause, to begin with, applies only to federal elections.<sup>323</sup> It hence does not enable Congress to alter state legislative districts.<sup>324</sup> Congress, however, might invoke its authority under the Fourteenth Amendment to regulate state legislative districts on the theory that these impinge upon a right incorporated against the states pursuant to the Due Process Clause. For example, one commentator has recently suggested that the right to assembly under the First Amendment might play exactly this function.<sup>325</sup>

But *Rucho* encumbers this pathway. Despite its seeming recognition that partisan gerrymandering presents a challenge to the basic job of elections (i.e., enabling democratic rotation), the Court “appeared to have recognized for the first time a constitutional right of a state to engage in partisan gerrymandering”<sup>326</sup> by talking of “constitutional” political

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called “dormant Commerce Clause” jurisprudence. *Tennessee Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2460 (2019). The reason Justice Alito gave for refusing to draw that negative inference there is that it would leave “a constitutional scheme that those who framed and ratified the Constitution would surely find surprising.” *Id.* Precisely the same argument from surprising effects, of course, would make partisan gerrymandering claims justiciable. Similarly, the Court has suggested that “Congress has left it to the courts to formulate the rules” to preserve “the free flow of interstate commerce.” *S. Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2090 (2018). Because no federal statute directs courts to enforce the dormant Commerce Clause, this argument is necessarily an inference from congressional silence. Again, the same silence exists in respect to partisan gerrymandering.

Second, the Fourteenth and Fifteenth Amendments to the Constitution explicitly grant Congress authority to interpret the substantive elements of those provisions. Despite this express grant, the Court has asserted its interpretive priority to Congress, and limited the latter’s power. *City of Boerne v. Flores*, 521 U.S. 507, 508 (1997). *Rucho* offers no account of why a textual commitment to Congress would in one case oust courts of interpretive authority, and in the other foreclose the legislature’s interpretive discretion.

<sup>320</sup> *Rucho*, 139 S. Ct. at 2499.

<sup>321</sup> *Id.* at 2507.

<sup>322</sup> See, e.g., Stephanopoulos, *Anti-Carolene*, *supra* note 9, at 114 (“*Rucho* is . . . anti-*Carolene* in both result and analysis.”); Richard L. Hasen, *The Supreme Court’s Pro-Partisanship Turn*, 109 GEO. L.J. ONLINE 50, 61 (2020) (arguing that *Rucho* places “much more of a thumb on the scale in favor of the constitutionality of partisan-driven election”).

<sup>323</sup> *Rucho*, 139 S. Ct. at 2499.

<sup>324</sup> One consequence of this is that Congress has no direct authority under the Election Clause to act against a gerrymandered state legislature that is deploying its control over the administration of election rules (e.g., registration, the modalities for voting, and the location and capacity of polling places) to entrench itself. As I develop below, its authority under the Reconstruction Amendments is also limited.

<sup>325</sup> Nikolas Bowie, *The Constitutional Right of Self-Government*, 130 YALE L.J. 1652, 1740 (2021).

<sup>326</sup> Hasen, *supra* note 322, at 61.



gerrymandering.<sup>327</sup> This opening means that states can argue that any federal action in respect to state legislative gerrymanders beyond Congress’s power. If some political consideration is valid, that is, Congress would have to assemble a record not just of gerrymanders but of *constitutional excessive* partisan motives in order to demonstrate that legislation pursuant to Section 5 of the Fourteenth Amendment was “congruent and proportional” as the doctrine requires.<sup>328</sup> Compounding the difficult Congress faces, the Court has created a “presumption of legislative good faith” that arguably requires factual ambiguities to be resolved in favor of the state.<sup>329</sup> To make matters worse still, because the Court has decline to say how much political consideration is sufficient—the basis of *Rucho*’s political-question holding—it is impossible for Congress to know what kind of a record to assemble—rendering any federal action against the states almost irremediably constitutionality fragile.

Even as to federal elections, Congress’s power might be more constrained than first appears. The Court has never addressed whether the anti-commandeering rule that bars “direct orders to the governments of the States”<sup>330</sup> applies to Election Clause-related legislation.<sup>331</sup> As Justice Alito pointedly observed, “any federal regulation in [relation to elections] is likely to displace not only state control of federal elections but also state control of state and local elections.”<sup>332</sup> For example, it would “be very burdensome for a State to maintain separate federal and state registration processes with separate federal and state voter rolls.”<sup>333</sup> Elaborating on these state sovereign-related concerns in a separate opinion, Justice Thomas has warned of “substantial constitutional problems” if a federal law interfered with states’ authority “to determine the qualifications of voters in federal elections, which necessarily includes the related power to determine whether those qualifications are satisfied.”<sup>334</sup> Although dicta, these suggestions intimate future judicial resistance to the use of the Elections Clause as a remedy against disenfranchising gerrymanders.

#### b. State Power

What of state legislative action? State legislatures, of course, are populated by personnel with both strong incentives and the ability to entrench themselves. Yet, a series of concurring and dissenting opinions, various Justices have suggested that no other state actor and no federal court can share in this power.<sup>335</sup> In a 2015 dissenting opinion, Chief Justice Roberts—*Rucho*’s author—wrote that state legislative power to set rules under the Elections Clause was non-

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<sup>327</sup> *Rucho*, 139 S. Ct. at 2499.

<sup>328</sup> *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (holding that “[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end” for legislation under Section 5 of the Fourteenth Amendment to be valid); see *Coleman v. Court of Appeals of Md.*, 566 U.S. 30, 36 (2012) (invalidating part of the Family and Medical Leave Act on this basis).

<sup>329</sup> *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018).

<sup>330</sup> *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1476 (2018).

<sup>331</sup> Rebecca Aviel, *Remedial Commandeering*, 54 U.C. DAVIS L. REV. 1999, 2075 (2021) (noting that federal election law is “filled with direct instructions to state officials”); Stephanopoulos, *Anti-Carolene*, *supra* note 9, at 154 (exploring this issue).

<sup>332</sup> *Arizona v. Inter-Tribal Council of Arizona, Inc.*, 570 U.S. 1, 41, (2013) (Alito, J., dissenting).

<sup>333</sup> *Id.*

<sup>334</sup> *Id.* at 23 (Thomas, J. dissenting). In presidential election years, states might also argue that “the ‘Electors Clause,’ which confers upon the states the *exclusive* power to appoint their electors ‘in such Manner as the Legislature thereof may direct,’” that Congress cannot limit, even indirectly. John J. Martin, *Mail-in Ballots and Constraints on Federal Power Under the Electors Clause*, 107 VA. L. REV. ONLINE 84, 85 (2021).

<sup>335</sup> *Republican Party of Pennsylvania v. Degraffenreid*, 141 S. Ct. 732, 733 (2021) (opinion of Thomas, J.) (urging the Court “to address just what authority nonlegislative officials have to set election rules,” implicitly in order to rule out that power); *id.* at 738 (opinion of Alito, J.) (same); *Moore v. Circosta*, 141 S. Ct. 46, 47 (2020) (Gorsuch, J., dissenting) (same).

transferrable, such that independent redistricting commissions set by referendum were unconstitutional.<sup>336</sup> Were this opinion to become the law, the most politically plausible path to nonpartisan redistricting would be blocked. Its availability would be at the discretion of legislators whose political careers would be directly threatened by that reform.

In *Rucho*, the Court pointed to a logical possibility of reform. But the Court itself has diminished that possibility. As a result, electoral loss can be met with redistricting that mitigates the prospect of democratic rotation.

## 2. *Democratic Rotation Beyond Elections*

The project of bring ruled and ruling depends not just on competitive elections. It also requires institutions to identify and punish self-dealing by high office-holders. Since the 1870s, federal bodies such as the special counsel<sup>337</sup> and the independent counsel<sup>338</sup> have investigated financial crimes and the misuse of government power for partisan ends.<sup>339</sup> These tools are practically important since the constitutional process of impeachment has become an “ineffective” and “highly politicized” channel.<sup>340</sup>

The Roberts Court has an ambiguous record in respect to non-electoral protections for democratic rotation. Its jurisprudence echoes its approach to partisan gerrymandering—raising the costs of efficacious action while leaving open politically implausible pathways. The net effect is to preserve an appearance of a safety net for democratic rotation, albeit without much of substance.

In a series of cases concerning independent federal agencies, the Court has invalidated statutory provisions that constrain the President’s power to remove officials exercising significant forms of federal power.<sup>341</sup> These cases mark a sharp break from the more accommodating, functionalist approach taken to removal questions during the Rehnquist Court.<sup>342</sup> That said, the Court has not yet explicitly overruled *Morrison v. Olsen*, the 1988 precedent upholding the insulation of a statutory independent counsel position from presidential control.

It is difficult to see, however, how Congress could create an investigative or prosecutorial position not subject to plenary White House control without running afoul of the Roberts Court’s removal jurisprudence. Of particular note is *Yellin v. Collins*, a 2021 decision concerning the Federal Housing Finance Authority, which rejected an argument that merely

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<sup>336</sup> See *Ariz. State Leg. v. Ariz. Independent Redistricting Comm’n*, 135 S Ct 2652, 2677-92 (2015) (Roberts, CJ, dissenting); see also Stephanopoulos, *Anti-Carolene*, *supra* note 9, at 115 (arguing that this position “would preclude not just independent commissions adopted through voter initiatives ... but also state court suits and maybe even gubernatorial vetoes of gerrymandered maps”).

<sup>337</sup> See 28 C.F.R. §§ 600.1-10 (codifying special counsel regulations).

<sup>338</sup> The Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (1978) (codified as amended at 28 U.S.C. §§ 591-599 (1994)).

<sup>339</sup> Donald C. Smaltz, *The Independent Counsel: A View from Inside*, 86 GEO. L.J. 2307, 2311 (1998).

<sup>340</sup> Ginsburg et. al., *supra* note 100, at 116.

<sup>341</sup> *Collins v. Yellin*, 141 S. Ct. 1761, 1784-87 (2021) (finding that the Director of the Federal Housing Finance Authority could not be protected by a “for cause” restrictions); *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2197 (2020) (finding that the Consumer Finance Protection Bureau’s “leadership by a single individual removable only for inefficiency, neglect, or malfeasance violates the separation of powers”); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 492 (2010) (holding that “the dual for-cause limitations on the removal of Board members contravene the Constitution’s separation of powers”).

<sup>342</sup> See *Morrison v. Olson*, 487 U.S. 654, 686 (1988).

“modest restrictions’ on the President’s power” could be reconciled with the Constitution.<sup>343</sup> The increasingly inflexible and categorical nature of the removal power decisions—all the more striking given its lack of a textual warrant—suggests that exceptions to presidential control will be few and far between. It therefore seems likely that the Roberts Court’s removal decisions rule out *ex ante* statutory schemes for independent prosecution or even investigation of high-level malfeasance of the kind envisaged in *Morrison*.<sup>344</sup>

In contrast, the Roberts Court has permitted subpoenas against the president in respect to personal matters (but not official actions) to proceed when they are pressed by Congress or a local (municipal) prosecutor.<sup>345</sup> Legislative inquiries, however, are only likely to arise during periods of divided government. The judicial process may also move slower than the electoral calendar, meaning that the House of Representatives may experience turnover (and possibly changes in partisan control) before a subpoena is resolved.<sup>346</sup> State criminal authority, in contrast, is unlikely to reach all conduct that imperils future democratic rotation. No district attorney, for example, is likely to have jurisdiction over allegations that a president solicited the Justice Department’s filing of fabricated charges against a political opponent.

In net effect, therefore, the Court’s interventions respecting the non-electoral safeguards of democratic rotation mirror uncannily those of its gerrymandering jurisprudence. The most effective adjuncts to democratic rule are disabled. Fragile and likely futile pathways remain open. A cynical view of these decisions is to understand the Court as maintaining a measure of plausible deniability, and hence public-facing legitimacy, even as it unravels important structural supports of democratic rule.

## F. Judicial Power and Democratic Decline Reconsidered

The dominant critique of judicial power from the vantage point of democracy focuses on the discrete effects of judgments that alienate an issue from public scrutiny and determination. For example, disputing the Court’s ruling on same-sex marriage, Chief Justice Roberts complained that the other Justices were “[s]tealing this issue from the people.”<sup>347</sup> When Justice Kagan objects to the Court’s narrowing of the Voting Rights Act, she condemned

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<sup>343</sup> *Collins*, 141 S. Ct. at 1787. Another argument for distinguishing the independence of an office tasked with investigating or prosecuting presidential malfeasance would be the narrower scope of that office’s authority. I suspect that Justice Scalia’s dissenting opinion in *Morrison*, asserting the centrality of the prosecutorial function to Article II, would be invoked against such arguments, despite its dubious historical pedigree. *Morrison*, 487 U.S. at 703-05 (Scalia, J., dissenting).

<sup>344</sup> It is striking to note that the private litigants who bring removal power challenges obtain minimal practical changes, and in one case merely a remand so they could make try to make a showing that a specific action had been taken despite a presidential wish to the contrary. *See, e.g., Collins*, 141 S. Ct. at 1789 (remanding for a lower court to determine whether “the unconstitutional removal provision inflicted harm”). The *Collins* plaintiffs will likely fail to make that showing. *Id.* at 1795 (Thomas, J.) (“I seriously doubt that the shareholders can demonstrate that any relevant action by an FHFA Director violated the Constitution.”). As a result, the litigation will have gained them delay and little else. *Cf. id.* at 1797 (Gorsuch, J., concurring in part) (criticizing the Court’s “a novel and feeble substitute” of a remedy).

<sup>345</sup> *See, e.g., Trump v. Mazars*, 140 S. Ct. 2019, 2035 (2020) (rejecting position that presidents are immune from congressional subpoenas oversight absent an impeachment inquiry); *Trump v. Vance*, 140 S. Ct. 2412, 2431 (2020) (rejecting claim that presidents were totally immune from state grand jury subpoenas).

<sup>346</sup> For a similar critique, see Josh Chafetz, *Don’t Be Fooled: Trump is the Winner in the Supreme Court Tax Case*, N.Y. TIMES (July 9, 2020), <https://www.nytimes.com/2020/07/09/opinion/trump-taxes-supreme-court.html> (noting that “delays defeat the entire purpose of the subpoenas,” but that delays are endemic with judicial enforcement of subpoenas).

<sup>347</sup> *Obergefell v. Hodges*, 576 U.S. 644, 687 (2015) (Roberts, C.J., dissenting).

the way in which the Court “strays” “far” from the law as originally enacted.<sup>348</sup> Even the most sophisticated and generalized argument against judicial review in the law reviews focuses on the specific costs and benefits, defining in terms of process and outcomes, in moving a specific rights-related decision from the legislature to the judiciary.<sup>349</sup>

In this Part, I have aimed to demonstrate that this retail, case-specific critique is not the only—or even the most consequential—objection to be had from democracy to judicial power. Instead of thinking about democracy in a piecemeal fashion, and imaging that self-government is parceled out legislative crumb by crumb, we ought to recognize that democracy is a system-level quality. Because it “has emergent properties—i.e., its characteristics and behavior cannot be inferred from the characteristics and behavior of the units taken individually,”<sup>350</sup> a piecemeal style of analysis will necessarily miss important ways in which the system is being sustained or coming under strain. The relationship between judicial power and the democratic project of maintaining a community of equals being ruled and ruling in turn instead requires a contextual inquiry into the relationship between different lines of cases and the specific pressures experienced by the democratic project at a given moment in time.

From this system-level perspective, a clear tension emerges between the Roberts Court’s avowals of fidelity to democracy and the consequences of its decisions. These interventions are fairly characterized as counter-democratic because they reinforce and accelerate the three converging pressures imposed on the democratic project at our distinctive historic moment.

I have explored here how the Court has been constitutionalizing the political power of wealth and land ownership, assigning rewards to white identity politics, sapping the effect of organizing to egalitarian ends, and dismantling the institutional foundations of democratic rotation. Each of these lines of cases interacts with—and reinforces—an existing pressure on the democratic project of maintaining a community of political equals and sustaining democratic rotation of personnel. An encasing effect arises in varying ways. Several lines of cases—such as those creating political returns on property and white political identity—directly subsidize the forces that are placing the greatest pressure now on democracy. In contrast, decisions on civil society disempower the forms of social mobilization most likely to maintain an economically and racially egalitarian order. Yet other lines of cases—such as decisions on gerrymandering and removal—make democratic rotation less likely by lowering the expected cost of entrenchment. In net, this jurisprudence subsidizes (sometimes dramatically) the power of economic and social incumbents to maintain status quo arrangements against the potentially transformative force of popular preferences. It is in this sense—the sense of law as a friction on the liberating and redistributive potential of democratic action—that the term “encasement” has the clearest resonance.

In many of these lines of cases, I have stressed, the significance of judicial interventions cannot be discerned by considering decisions in isolation. Rather, their encasing consequences arise from the interaction of different decisions that alternatively create penalties and assign subsidies to competing political actors. Or consequences arise from closing off some mechanisms while leaving other pathways open. Across the spectrum of cases analyzed here, I have also

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<sup>348</sup> *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2356 (2021) (Kagan, J., dissenting).

<sup>349</sup> Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346, 1375–76 (2006).

<sup>350</sup> Robert Jervis, *Counterfactuals, Causation, and Complexity*, in *COUNTERFACTUAL THOUGHT EXPERIMENTS IN WORLD POLITICS: LOGICAL, METHODOLOGICAL, AND PSYCHOLOGICAL PERSPECTIVES* 309, 309 (Philip E. Tetlock & Aaron Belkin eds., 1996); see generally ROBERT JERVIS, *SYSTEM EFFECTS: COMPLEXITY IN POLITICAL AND SOCIAL LIFE* 3-25 (1997) (discussing emergent properties of systems).

stressed ways in which the Roberts Court has exacerbated the economic and sociocultural pressure on democracy while eviscerating slowly the institutional resources needful to its maintenance. In this light, the panegyrics to democracy littering recent Supreme Court reports have a distinctly meager, compensatory flavor.

## Conclusion

The Article has set forth a new analytic lens for evaluating the relationship of federal judicial power and democracy. It is, therefore, primarily a positive and not a normative intervention. Of course, my decision to consider democracy from a system-level perspective, and my willingness to give close, skeptical, to the Court's claims of benevolent intercession, will betray a commitment to democracy. In concluding, I want to press on that implicit normative threads of my argument—and ask whether the counter-democratic difficulty of judicial action has implications for desirable reforms, and in particular whether it casts light on larger debates about the distributive and democratic potential of public law.

I focus here on two cautionary take-aways for leading reform proposals. I leave the task of building a more constructive agenda of *democratic enrichment* to future work. First, a recent trend in legal scholarship has argued for “a commitment to grassroots contestation” and urges “attention to organizing, social movements, and collective resistance by everyday people.”<sup>351</sup> Scholars working under the banner of “movement law” hence urge us to “study[] how movements build and shift power—beyond courts and the Constitution--and prefigure the economic, social, and political relationships of the world they are working to build.<sup>352</sup> Consistent with their sobriquet, movement scholars look to grassroots to unlock “potential to democratize our politics.”<sup>353</sup> They also argue that institutional change, such as “[e]lectorate reform is unlikely to mobilize a public,” and hence ought to be set to one side.<sup>354</sup>

There is no question that social movements are important to democratization projects. But it does not follow from this observation that attention to institutional design, including the superstructures of constitutional law or election law, is unjustified. To the contrary: A normative commitment of social movements capable of durable forms of redistributive social, political, or economic change demands careful attention to the legal tools that avail social groups presently defending the status quo through constitutional law. A recognition that the mobilization of previously marginalized groups has intrinsic and instrumental value to democracy, that is, is consistent with an assiduous documenting of the ways in which popular power is defused, dispersed, and countered. Indeed, the leading critical theorist that movement scholars invoke as inspiration, Antonio Gramsci,<sup>355</sup> had a particularly clear-eyed understanding of the mechanisms through which power was in fact exercised to defeat redistributive social change.<sup>356</sup> My project here can be understood as an effort, consonant with that critical spirit, to take seriously the legal and constitutional impediments that confront the sort of movements for redistribution.

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<sup>351</sup> Amna A. Akbar, Sameer M. Ashar, and Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 843, 848 (2021).

<sup>352</sup> *Id.* at 852.

<sup>353</sup> *Id.* at 837.

<sup>354</sup> Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 96 (2020).

<sup>355</sup> Abkar et al. *supra* note 351, 846 (citing the Italian Marxist Antonio Gramsci).

<sup>356</sup> See ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS 161 (Q. Hoare & G. Nowell Smith eds., 1971) (developing the concept of “hegemony” to illuminate the maintenance of political control with relatively small amounts of violence).

A second line of relevant scholarship focuses on the Supreme Court, and asks whether it should be ‘reformed.’ This work commonly leaps off from the premise that there is “a grave threat to the Court’s legitimacy,” and then develops reforms to stave this off.<sup>357</sup> Scholars working in this vein do recognize the question of what “role” the Supreme Court has “in a democracy.”<sup>358</sup> Their implicit answer seems to have a legalistic quality, linking the Court to the project of maintaining the rule of law. The leading work also focuses on a “democracy deficit” because the presidents and Senate majorities supportive of recent appointments have the backing of only numerical minorities.<sup>359</sup>

This Article suggests a different perspective on that project. It begins with a different puzzle: It asks not whether particular decisions line up with popular preferences, but how judicial power either exacerbates or mitigates present pressures on democratic rule. The analysis presented in Parts II and III offers a more precise account of the relationship between judicial power in the Roberts Court and the quality of democracy. It suggests that the tension between federal judicial power and democratic rule runs more deeply, and is more tightly intricately into the case-law, than generally recognized. The Court raises concerns about democracy not because specific decisions that it resolves are properly resolved by the people at large. It raises concern because its decisions sustain and amplify exogenous economic and social forces unraveling democratic rule.

A reform agenda focused on the Supreme Court, on this view, should start from a clear-eyed accounting of the Court’s specific role in counter-democratic dynamics. The problem is emphatically not reducible to narrowing the gap between the Court’s preferences and those of the median national voter.<sup>360</sup> The Court matters not because it takes specific policy questions out of the public’s hand. It matters because of the linking and arbitrage role that it plays, nested within other, ambient processes of democratic unraveling. To the extent that democracy provides a normative lodestar for debate on Supreme Court reform—and not the puzzlingly vacuous ideal of legitimacy as an intrinsically worthy end in itself—that debate has been ill-served by not yet asking when or how reforms would in fact be likely to disrupt the larger dynamics of democratic backsliding in which the Court is simply one link.

The positive analysis developed here, in sum, can broaden and complicate debates already unfolding about the relations between law, legal institutions, and the quality of American democracy. By dilating the analytic lens, by nesting the Court’s actions within a tractable, system-level definition of democracy, and by carefully specifying the pressures upon that public good, my aim has been to clarify what has now been an occluded premise of ongoing contestation over the relation of the Roberts Court to American democracy, as it stands, fragile and wavering, today.

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<sup>357</sup> Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 151 (2019); Tara Leigh Grove, *The Supreme Court’s Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2270 (2019).

<sup>358</sup> Daniel Epps and Ganesh Sitaraman, *Supreme Court Reform and American Democracy*, 130 YALE L.J. FORUM 821, 824 (2021).

<sup>359</sup> *Id.* at 823.

<sup>360</sup> *Id.*