

THE COUNTERDEMOCRATIC DIFFICULTY

Aziz Z. Huq

ABSTRACT—Since the 2020 elections, debate about the Supreme Court’s relationship with the mechanisms of national democracy has intensified. One important thread of that debate focuses critically on the possibility of a judicial decision flipping a presidential election or thwarting the will of national majorities respecting progressive legislation, and pushes concerns about the Court’s effect on national democracy. A narrow focus on specific interventions, however, does not exhaust the subtle and consequential ways in which the Court influences whether and how the American democratic system thrives or fails. A narrow focus is partial because it construes democracy as merely the aggregation of specific acts or moments, not 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 quality of American democracy. This account is nested in a wider, systemic perspective accounting for both political and economic forces. Drawing on recent empirical work in political science and economics, this Article situates the Roberts Court at the nexus of three intersecting “long crises” of American democracy. The first is the democratic deficit embedded in the Constitution’s original 1787 design. The second is a sharp increase in wealth inequality since the 1970s. The third is the more recent reemergence 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 at different tempos.

The Roberts Court arbitrages between these three counterdemocratic dynamics in ways that impose considerable pressure on the inclusive norms and representative mechanisms through which democracy works. Four lines of precedent merit attention in understanding the convergence of the “long” crises of democracy. These (1) guarantee economic 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.

Through these lines of jurisprudence, economic, social, or cultural capital is parlayed into disproportionate political power. This doctrine hence

entrenches such power into a form of durable incumbency. These decisions, in other words, “encase” extant distributions of economic and sociocultural power from democratic challenge. Drawing out these elements, this Article maps out the “counterdemocratic difficulty” of judicial review as presently employed.

AUTHOR—Frank and Bernice Greenberg Professor of Law, University of Chicago Law School. Many thanks to the editors of the *Northwestern University Law Review* for their judicious and helpful edits; all errors are mine alone. The Frank Cicero Fund supported this research.

INTRODUCTION	1100
I. THE DEMOCRATIC BASELINE	1107
A. <i>Is the Constitution Democratic? (And Does It Need to Be?)</i>	1108
B. <i>Back to Basics: An Aristotelian Baseline of Democracy</i>	1110
II. THE VECTORS OF TWENTY-FIRST CENTURY DEMOCRATIC BACKSLIDING	1115
A. <i>Is Democracy Imperiled?</i>	1116
B. <i>The Constitution’s Imperfect Realization of Democracy</i>	1117
C. <i>The Tension Between Democracy and Wealth Inequality</i>	1122
D. <i>The Rise (or Return) of White Identity Politics</i>	1126
E. <i>The Convergence of Counterdemocratic Dynamics</i>	1131
III. JUDICIAL POWER AND DEMOCRATIC ENCASEMENT	1132
A. <i>Unpacking Encasement</i>	1133
B. <i>The Political Returns on Property</i>	1134
C. <i>Gerrymandering Civil Society</i>	1144
D. <i>The Constitutional Embedding of White Identity</i>	1155
E. <i>Dissolving the Institutional Bases for Democratic Rotation</i>	1164
F. <i>Judicial Power and Democratic Decline Reconsidered</i>	1171
CONCLUSION	1173

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.¹ Federal courts’ refusal to intervene garnered praise: It was taken as evidence that judges “try hard to honestly apply their understanding of the law, without regard to which

¹ *Trump v. Wis. Elections Comm’n*, 141 S. Ct. 1516, 1516 (2021).

political figures will benefit from a decision.”² The federal bench was hailed as “the institutional bulwark . . . saving democracy.”³

Others, however, were not so sure. They instead pointed out that a closely divided Court almost intervened in Pennsylvania’s absentee-ballot count before the November poll.⁴ “Had the results of the 2020 presidential election been a little bit tighter,” critics warned, “a Republican-majority Court would [have] rule[d] in favor of a Republican presidential candidate on the most minimally plausible of legal rationales.”⁵ President Biden felt enough pressure to establish a bipartisan commission to reexamine “the role and operation of the Supreme Court in our constitutional system.”⁶ That commission criticized proposals to disempower the Supreme Court as ineffective and costly.⁷

But the problems persisted: Seven months later, the Court granted certiorari in a case teeing up a constitutional challenge under Article II to state courts’ ability to limit state legislative interference with elections.⁸ This legal theory would “essentially neuter” state law efforts to protect voters

² 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/> [<https://perma.cc/UY43-AA8D>] (quoting Professor Eugene Volokh).

³ Ian Millhiser, *Why Trump’s Attempt to Steal the Election Was Too Much Even for Republican Judges*, VOX (Dec. 15, 2020), <https://www.vox.com/22168109/trump-coup-steal-election-judges-judiciary-supreme-court-gorsuch-kavanaugh-barrett> [<https://perma.cc/647W-P2G2>] (quoting Professor Maya Sen).

⁴ *Republican Party of Pa. v. Boockvar*, 141 S. Ct. 1, 2 (2020) (Alito, J., statement denying motion to expedite appeal). 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 Pa. v. Degraffenreid*, 141 S. Ct. 732, 734, 738 (2021) (Thomas, J., dissenting & Alito, J., dissenting) (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”).

⁵ Michael Klarman, *The Democrats’ Last Chance to Save Democracy*, ATLANTIC (Feb. 22, 2021), <https://www.theatlantic.com/ideas/archive/2021/02/expanding-court-now-or-never/618063/> [<https://perma.cc/5LVH-C7X2>].

⁶ Exec. Order No. 14,023, 86 Fed. Reg. 19569, 19569 (Apr. 9, 2021).

⁷ PRESIDENTIAL COMM’N ON THE SUP. CT. OF THE U.S., FINAL REPORT 154 (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final.pdf> [<https://perma.cc/KL4W-F8UY>]. Justice Stephen Breyer recently made a similar point. See Mark Sherman, *Breyer Says Big Supreme Court Changes Could Diminish Trust*, AP (Apr. 6, 2021), <https://apnews.com/article/joe-biden-politics-stephen-breyer-us-supreme-court-courts-42431b0b8cd8a5f2f3a8e8da84aa0> [<https://perma.cc/3ESZ-E885>].

⁸ *Harper v. Hall*, 868 S.E.2d 499, 510 (N.C. 2022), cert. granted sub nom. *Moore v. Harper*, 142 S. Ct. 2901 (2022).

beyond a federal baseline and also “foment election subversion.”⁹ It seemed that the Court had taken a raincheck on the “saving democracy” business.

Uncertainty over the Court’s relationship to democracy resonates far beyond the 2020 (or 2022, or 2024) elections. The Justices themselves routinely justify decisions by invoking the constitutional virtue of democracy.¹⁰ Critics counter by pointing to the gap between majority preferences and specific judgments.¹¹ A long scholarly tradition worries about a “countermajoritarian” difficulty.¹² The debate is occasionally acrimonious. But it is also inconclusive.¹³

⁹ Richard L. Hasen, *It’s Hard to Overstate the Danger of the Voting Case the Supreme Court Just Agreed to Hear*, SLATE (June 30, 2022), <https://slate.com/news-and-politics/2022/06/supreme-court-dangerous-independent-state-legislature-theory.html>. [<https://perma.cc/FV94-XBP2>]. On the pedigree of that argument, see Vikram David Amar & Akhil Reed Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 SUP. CT. REV. 1, 2.

¹⁰ 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), which explains removal power jurisprudence on the ground that “the Framers made the President the most democratic and politically accountable official in Government,” and *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1988 (2021) (Gorsuch, J., concurring in part and dissenting in part), which argues 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 Cal.*, 140 S. Ct. 1891, 1909 (2020), which requires a new decision from an agency before considering new reasons 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), which explains that “[t]he reasoned explanation 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), which argues 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, 2135 (2019) (Gorsuch, J., dissenting). Democracy has even been invoked as a justification for stripping pregnant persons of their right to reproductive choice. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2243 (2022) (arguing that the Constitution demands abortion be “return[ed] . . . to the people’s elected representatives”).

¹¹ See, e.g., Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 SUP. CT. REV. 111, 182 (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 HUM. RTS. MAG. 2, 2–3 (2005) (the Voting Rights Act); Paul Waldman, *Opinion, The Supreme Court’s New Ruling Confirms It’s the Enemy of Democracy*, WASH. POST (July 1, 2021), <https://www.washingtonpost.com/opinions/2021/07/01/supreme-courts-new-ruling-confirms-its-enemy-democracy/> [<https://perma.cc/2UCS-6GEH>].

¹² The seminal text is ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962). For an analysis of Professor 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).

¹³ For a useful summary of where the argument now stands, at least among progressive scholars, see Jonathan S. Gould, *Puzzles of Progressive Constitutionalism*, 135 HARV. L. REV. 2053, 2056 (2022), and

Yet as rancorous as it has become, this conversation is oddly, and artificially blinkered. It harps relentlessly on specific judgments—i.e., whether the Court will pick an election winner and lock in state legislative gerrymanders, or whether public opinion supports the results of one or another judicial opinion on school desegregation, abortion, or guns.¹⁴ It does not fully attend to the Court’s interactions with the complex network of institutions and norms necessary to enable democratic government. Instead, defenders and critics of the Court 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.”¹⁵ The question whether individual judicial opinions mirror public opinion becomes a crude proxy for whether the Court is itself “democratic.”¹⁶

Yet this reasoning rests on a fallacy of composition. Democracy is not reducible to an accumulation of discrete decisions that either have or lack majority 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 mechanically follow elected superiors’ orders (say, by throwing elections and locking up opponents) would not remain democratic for long.¹⁷ A “countermajoritarian” court can be justified in democratic terms, as Professor John Hart Ely famously argued,

Brandon Hasbrouck, *Movement Judges*, 97 N.Y.U. L. REV. 631, 635 (2022), which advocates for “movement judges” to “serve as a counterweight to the conservative legal project’s influence.” Recently, scholars have started to explore the countermajoritarian quality of other key institutions. See, e.g., Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1759–68 (2021) (demonstrating the mechanisms that make state legislatures countermajoritarian). For a historical perspective on the changing contours of the debate, see generally Jane S. Schacter, *Putting the Politics of “Judicial Activism” in Historical Perspective*, 2017 SUP. CT. REV. 209, and Craig Green, *An Intellectual History of Judicial Activism*, 58 EMORY L.J. 1195 (2009).

¹⁴ For an example from a recent Voting Rights Act case, compare *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2343 (2021), which asserts that “there 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 Justice Kagan’s dissent, *id.* at 2356 (Kagan, J., dissenting), which criticizes “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”).

¹⁵ 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.

¹⁶ A recent, sophisticated empirical study shows that the Supreme Court since 2020 has moved sharply away from the preferences of the average American and expressed preferences closely aligned with the average Republican. Stephen Jessee, Neil Malhotra, & Maya Sen, *A Decade-Long Longitudinal Survey Shows that the Supreme Court Is Now Much More Conservative than the Public*, 119 PROC. NAT’L ACAD. SCI. 1, 1 (2022). This study is again focused on divergences between individual outcomes and popular preferences.

¹⁷ TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 194–95 (2018) (documenting growing use of independent institutions for these purposes).

if it prevents lapses in the other institutions.¹⁸ 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 toward democracy itself. The resulting dynamic would arise not simply because specific judicial opinions reach outcomes at odds with public opinion. It would emerge when judicial action undermines the institutional premises of democratic choice. This is the counterdemocratic difficulty: It is a difficulty that arises when the Court, perhaps acting on a temporary majority sentiment, acts to eliminate the structures that allow democratic choice to endure meaningfully into the future.

This Article develops this counterdemocratic difficulty as a new analytic lens for understanding certain negative effects of judicial power (and in particular, the Supreme Court) on democracy. Rather than considering judicial opinions in isolation, it situates the Supreme Court in the wider institutional and social conditions wherein democratic decline transpires.

Thus, I draw attention to the way in which the Court's relation to democracy turns on its interactions with, and relations to, the economic and sociocultural forces causing democratic decay or slippage. Integrating a close reading of the Roberts Court's jurisprudence with recent empirical political science and macroeconomics scholarship, this Article explores how recent constitutional jurisprudence exacerbates systemic challenges shadowing American democracy. To repeat, this occurs *not* just because the Court is countermajoritarian at the retail level of specific decisions that have a majority's support. It occurs when the Court acts adversely to the continuing operation of democratic choice as a whole.

In mapping out this counterdemocratic difficulty, 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. Using Aristotle's canonical discussion in the *Politics*, I define democracy as a *community of equals that engage in an ongoing practice of being ruled and ruling in turn*.¹⁹ This definition is

¹⁸ See JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 87–88, 103 (1980). The classic statement of the problem is BICKEL, *supra* note 12, at 16–23. Professor 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, 501 (1997). For a challenge to Ely's premises, see generally Ryan Doerfler & Samuel Moyn, *The Ghost of John Hart Ely*, 75 VAND. L. REV. 769 (2022).

¹⁹ For a general introduction to Aristotle's political thought, see Fred Miller, *Aristotle's Political Theory*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta & Uri Nodelman eds.,

compatible with both the Framers' cautious instantiation of democracy in Articles I and II of the Constitution and our more fulsome and inclusive contemporary understanding.²⁰ It also usefully highlights the central question for discerning meaningfully democratic institutions—i.e., whether officials persistently rotate in and out of power.

Second, I offer a detailed contextualization of the pressures on contemporary *American* democracy. Like Tolstoy's unhappy families, each democratic crisis is different.²¹ To understand how the judiciary influences democracy, we cannot use history alone as a template.²² Drawing on recent political science and economics 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 dynamic started separately. Until now, each has moved along separate historical tracks. Today, though, they "are not independent from one another." Instead, "successes in one domain can unleash new resources" in another.²³ The net effect of these crises is greater than the sum of their component parts. In unison, they pose a novel—and more intense—strain on democratic rule.

My third contribution is a novel account of how the Roberts Court interacts with, and reinforces, broader dynamics of democratic backsliding. With close reading of recent precedent, I argue that the Court's role is best understood in terms of *arbitrage*: the Court first helps to parlay certain kinds of economic, social, or cultural capital into present political power. Then, it entrenches the latter kind of power by degrading the institutional grounds of rotation in office. In effect, this arbitrages officeholding at a specific moment into a more temporally durable kind of incumbency.

Toward this counterdemocratic effect, 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

2022), <https://plato.stanford.edu/archives/fall2022/entries/aristotle-politics/> [https://perma.cc/TD4G-N3XC].

²⁰ See *infra* notes 32–44 and accompanying text.

²¹ See ADAM PRZEWORSKI, *CRISES OF DEMOCRACY* 39–77 (2019) (charting varying paths of democratic crisis in Chile, France, Germany, and the United States).

²² 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. 17, 2021), <https://jacobinmag.com/2021/02/the-politics-of-a-second-gilded-age> [https://perma.cc/CK9G-ZWS6].

²³ Alexander Hertel-Fernandez, *Asymmetric Partisan Polarization, Labor Policy, and Cross-State Political Power-Building*, 685 ANNALS AM. ACAD. POL. & SOC. SCI. 64, 72 (2019) (noting, in a different context, the interdependence between branches of government).

democratic rotation. In net, these lines of doctrine naturalize contestable limits on transient majorities to alter background arrangements of power and status. They “encase” existing distributions of economic and sociocultural entitlements against democratic reconsideration. As a result, I argue, Professor Robert Dahl’s famous account of the Court as a lagging indicator of democratic preferences no longer rings exactly true.²⁴

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.”²⁵ Neoliberal intellectuals turned to the international level, emphasizing the priority of formal “rules-as-regulations” as a means to encase national-level democracy.²⁶ Slobodian’s terminology can usefully be extended to a *national* counterdemocratic judicial project that deploys law as a foil to democratic self-ordering and prophylaxis against material or status redistribution. Indeed, one way of understanding my contribution here is as a mapping of a certain neoliberal project advanced using the very different language and tools of American constitutional law.

My account also diverges from the most recent autopsies of American democracy’s decay at the judiciary’s hands. Professor Michael Klarman used the 2020 *Harvard Law Review* Foreword to capture what he called the “degradation” of American democracy.²⁷ Klarman deploys an explicitly partisan lens to understand this process. He thus characterizes the Republican

²⁴ 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, 293–95 (1957); see generally 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 & Patrick C. Wohlfarth, *How Public Opinion Constrains the U.S. Supreme Court*, 55 AM. J. POL. SCI. 74, 74 (2011) (offering empirical evidence that the influence of public opinion on Supreme Court decisions is “real” and “substantively important”); 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 Professor Keith Whittington’s emphasis on institutional foundations of judicial power. See generally 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.

²⁵ QUINN SLOBODIAN, *GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM* 271–72 (2018).

²⁶ *Id.*

²⁷ Michael J. Klarman, *Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1 (2020).

Party as radicalized and antidemocratic.²⁸ He also emphasizes decisions by “Republican Justices” to uphold “stringent voter identification laws and purges of the voter rolls,” while invalidating campaign finance laws and leaving partisan gerrymanders untouched.²⁹ In a similar vein, Professor Nicholas Stephanopoulos argues that “the Roberts Court consistently decides . . . cases in the ways preferred by conservative elites.”³⁰

Klarman’s and Stephanopoulos’s focus on partisanship obviously generates useful insights. They also helpfully push against the harmful tendency in doctrinal scholarship of eliding ideological effects. Their approach leaves open, though, a larger question of why parties might “defect” from democracy: When, that is, does it become rational for a political movement to shift its strategy from winning elections to gaming the democratic system? Under what social and economic conditions do such defections make sense? This broader lens brings into view the larger social and economic forms that are mediated by the Court into corrosive pressure on American democracy. Both Klarman and Stephanopoulos offer election-focused accounts with partial diagnoses and prescriptions for reform.³¹ I aim to build upon and complement their important work.

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 sociocultural pressures. Part III dives deep into four lines of case law from the Roberts Court to showcase the counterdemocratic difficulty. The Conclusion considers implications of foregrounding the counterdemocratic difficulty for current proposals to reform the Supreme Court.

I. THE DEMOCRATIC BASELINE

To investigate the present dynamics of democratic decline, a definition of “democracy” is needed. The label alone signals little. It is striking that neither the Court nor its critics offer a definition of democracy consistent

²⁸ *Id.* at 9 (discussing “state measures that Republicans have enacted to entrench themselves in power”).

²⁹ *Id.* at 9, 178–214.

³⁰ Stephanopoulos, *supra* note 11, at 180.

³¹ Likewise, Professors 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.

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 to (among other things) the malapportionment of the Senate and the Electoral College, the availability of “strong” judicial review, and the indirectly elected presidency.³² He might have added the Three-Fifths Clause, which “substantially increased Southern representation in Congress” as a means of “credibl[y] commit[ting]” the new Constitution to inaction on slavery.³³ Historians further describe an “elitist theory of democracy”³⁴ inscribed over the Constitution's scheme of representation that aimed to assure rule by a natural aristocracy.³⁵ For example, the Qualifications Clause of Article I left the question of eligibility in federal elections to the states.³⁶ 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.³⁷ Women too were progressively excluded from the franchise due to patriarchal notions of female dependency.³⁸ Dahl surely had a point.

Yet the design and enacting context of the original Constitution also left no doubt that the new national government was expected to “derive[] all its

³² ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* 41–65 (2001). Several of Dahl's points are echoed and amplified by Professor Sanford Levinson. *See* 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.”).

³³ Sonia Mittal & 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-Fifths Clause “failed to build the slaveholding majority that 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).

³⁴ *E.g.*, GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 517 (1969).

³⁵ BERNARD MANIN, *THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT* 112 (1997).

³⁶ U.S. CONST. art. I, § 2.

³⁷ MASUR, *supra* note 33, at 209. Of the states that joined the union after 1800, only Maine allowed Black men to vote. *Id.*

³⁸ *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”).

powers directly or indirectly from the great body of the people . . . not from an inconsiderable proportion or a favored class of it.”³⁹ Contemporaneously labeled both as “republican” or “democratic,” it is best characterized today as aimed at “democracy” as we currently understand that term.⁴⁰ The Constitution’s text confirms this ambition. Article I, Section 4 at least anticipates “Elections for Senators and Representatives.”⁴¹ And 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.⁴²

A reading of the Constitution as originally drafted in 1787 can therefore support either a strong or a weak connection to democracy as a regulative norm for understanding the nation’s organic law.⁴³ This lack of a single theory of democracy tied to the Constitution need not be disabling, however, for present analytic purposes.⁴⁴ Rather, it invites inquiry into whether elements of the Constitution’s design can be woven in a general account of democracy that is useful now as a benchmark for evaluating current practices. We should ask, that is, not whether the Constitution *is* democratic, but whether it can be read as embodying a plausible account of democratic government for the current moment.

³⁹ THE FEDERALIST NO. 39, at 241 (James Madison) (Clinton Rossiter ed., 1961); *see also* THE FEDERALIST NO. 57, at 351 (James Madison) (Clinton Rossiter ed., 1961) (stating that both voters and candidates are to “be the great body of the people of the United 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*, 53 AM. POL. SCI. REV. 52, 54 (1959); *see also* ANDREAS KALYVAS & IRA KATZNELSON, LIBERAL BEGINNINGS: MAKING A REPUBLIC FOR THE MODERNS 92–93 (2008) (developing the late-eighteenth-century understanding of the difference between those terms).

⁴⁰ 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. CONSTITUTION 261–63 (1972) (summarizing this argument as offered by, among others, the John Birch Society).

⁴¹ U.S. CONST. art. I, § 4; *see also* THE FEDERALIST NO. 52, at 327 (James Madison) (Clinton Rossiter ed., 1961) (“Frequent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured.”).

⁴² EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 271 (1988).

⁴³ The Reconstruction Amendments did not wholly resolve this tension, as the continued acceptance of female nonsuffrage and felon disenfranchisement after their enactment suggests. *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974) (finding no Equal Protection violation in denial of franchise to convicted felons who had completed their sentence and parole); Nina Morais, Note, *Sex Discrimination and the Fourteenth Amendment: Lost History*, 97 YALE L.J. 1153, 1167–70 (1988) (discussing the treatment of female suffrage under those Amendments).

⁴⁴ 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.

How then can democracy, as an emergent quality of the polity as a whole, be theorized consistently both with the Framers' understanding—which is, by universal modern agreements, morally and practically deficient—and also with a contemporaneous commitment to more inclusive and robust democracy? For this forward-facing project, democracy's deep past offers a profound response that both harmonizes with the 1787 vision of democracy and remains useful today.

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 is to look backward to the origins of political thought. One of the first thinkers to offer a (very cautiously) positive account of democracy as a form of government was Aristotle. A definition of democracy drawn from his oeuvre can operate as a parsimonious, yet powerful, lodestar for discerning both the success and failure of contemporary democracy within terms that would have been familiar in 1787. This model can work, in other words, as a *regulative ideal* for American constitutional law.

In Book Six of the *Politics*, Aristotle offers an account of democracy with several moving parts. I want to emphasize two elements that do useful definitional work. For Aristotle, democracy 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.”⁴⁵

The idea of a community of equals “being ruled and ruling in turn” is not the only way to read Aristotle on democracy.⁴⁶ But it is the most popular and influential.⁴⁷ His typology of regime types in Book Four starts with the three “correct” forms of kingship, aristocracy, and polity.⁴⁸ Democracy is an undesirable corruption of the ideal polity form, explains Aristotle, albeit the “most moderate.”⁴⁹ He explains this by noting that a democracy, by definition, is a polity in which the “free and poor, being a majority, have

⁴⁵ ARISTOTLE, *POLITICS* bk. VI, at 172–73 (Carnes Lord ed., Carnes Lord trans., Chicago Univ. Press 2d ed. 2013) (c. 350 B.C.E.). The typology is prefigured in the *Nicomachean Ethics*.

⁴⁶ PAUL CARTLEDGE, *DEMOCRACY: A LIFE* 102 (2016) (arguing that, for Aristotle, democracy is “the rule of the poor (over the rich)”).

⁴⁷ BERNARD CRICK, *DEMOCRACY: A VERY SHORT INTRODUCTION* 17 (2002).

⁴⁸ ARISTOTLE, *supra* note 45, at 99.

⁴⁹ *Id.* On the idea of deviation from an ideal type, see Hannah Arendt, *The Great Tradition II: Ruling and Being Ruled*, 74 *SOC. RSCH.* 941, 941 (2007).

authority to rule,”⁵⁰ such that the “common good” is not always or necessarily pursued.⁵¹

In Book Six, however, Aristotle seems to modulate his hostility a touch. He notes that democracies come in many forms. All aim at a kind of “freedom [that] is being ruled and ruling in turn.”⁵² To be free 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.”⁵³ 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, and vulgarity.”⁵⁴ In drawing the boundaries of the polity, Aristotle further suggested that we *should* apply democratic values by “adding as many [people] as possible” in order to “make the people stronger.”⁵⁵

How can these two slightly discordant passages be reconciled? Let me offer a partial reconciliation as a foundation for our analysis of American practice. The Aristotelian definition of democracy 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 individuals cannot be immune from ouster. To the contrary, democracy *requires* a measure of periodic rotation of officeholders out of state power and 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 Professor Niko Kolodny have usefully elaborated. They have argued that democracy is constituted by an “equal opportunity for influence over the political decisions to which [residents] are subject.”⁵⁶ Similarly, Professor H el ene Landemore suggests

⁵⁰ ARISTOTLE, *supra* note 45, at 102–03.

⁵¹ 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’ views of democracy.

⁵² ARISTOTLE, *supra* note 45, at 172–73.

⁵³ *Id.* at 173.

⁵⁴ *Id.* at 173–74.

⁵⁵ *Id.* at 177.

⁵⁶ Niko Kolodny, *Rule Over None II: Social Equality and the Justification of Democracy*, 42 PHIL. & PUB. AFFS. 287, 308 (2014). Kolodny usefully points out that this kind of political equality “will be important to social equality in a 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.

that democracy calls for a norm of “openness.” She defines this as the “general accessibility of power to ordinary citizens.”⁵⁷ One implication of her view is that the “social conditions” necessary for democratic participation should be available as widely as possible, so that (as far as possible) citizens should stand on an equal footing when it comes to political life,⁵⁸ and the sphere of democratic choice over policies should be extended whenever feasible. Kolodny and Landemore give instructive guidance (if not conclusive answers) to the most difficult question posed by the Aristotelian account of democracy—its relationship to political equality.

This Aristotelian understanding of democracy can accommodate the aspirations of the largely white and male electorates of the Early Republic as well as the democratic hopes shared by the far more inclusive electorates of today.⁵⁹ Hence, it provides a regulative ideal for reading the Constitution: faithful to the original design, while at the same time pointing out compelling reasons for doing better than that first effort at democratic government.

2. *Advantages of the Aristotelian Definition*

The Aristotelian benchmark of democracy—a community of equals being ruled and ruling in turn—offers a straightforward benchmark that captures both the Framers’ aspirations for democratic rule and a richer contemporary ideal as a way to generate powerful intuitions about how contemporary democracy should work.⁶⁰ Consider four implications of this seemingly simple summary of democracy.

Kolodny is not the only philosopher to argue that some kinds of equality are integral to democracy. *See, e.g.*, 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 acceptable to 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 generally Steven Wall, *Democracy and Equality*, 57 *PHIL. Q.* 416 (2007).

⁵⁷ HÉLÈNE LANDEMORE, *OPEN DEMOCRACY: REINVENTING POPULAR RULE FOR THE TWENTY-FIRST CENTURY* 11 (2020); *id.* at 144 (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: PARTICIPATION AND OPPOSITION* 23 (1971) (“As a system becomes more competitive or more inclusive, politicians seek the support of groups that can now participate more easily in political life.”).

⁵⁸ Anderson, *supra* note 56, at 288–89 (arguing that the “proper positive aim” of equality is “to create a community in which people stand in relations of equality to others”).

⁵⁹ On the virtue of using democratic values, not democratic procedures, to address this boundary problem, see David Miller, *Democracy’s Domain*, 37 *PHIL. & PUB. AFFS.* 201 (2007).

⁶⁰ This definition is capacious enough to leave not just constitutional designers but also legislators and judges with flexibility in terms of what values to pursue and how to do so within a larger frame. *See* 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”).

First, Aristotle’s approach draws attention to an oft-ignored but important fact: Democracy is necessarily an intertemporal, and 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 “democratic” to hold true over time, moreover, no one actor or party can be certain they will hold on to power. To persist over time, a democracy must be characterized by *durable* rotation in the personnel in charge.⁶¹ On the Aristotelian formulation, “rotation in office [is] no mere corollary” of elections, but “literally what democracy consist[s] of.”⁶² Conversely, an electoral system in which one party dominates, and predictably wins, is just not a democracy.⁶³ This suggests that institutional, economic, and social conditions must support and sustain the durable rotation in office.

Second, Aristotelian democracy cannot be reduced to elections.⁶⁴ It is, to the contrary, consistent with different sorts of elections and even allows for nonelective mechanics. 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.”⁶⁵ Alternatively, Lee Drutman argues that electoral systems should “incentivize . . . compromise dealmaking,” as well as “scramble political conflicts and create new possibilities for cross-cutting identities that make flexible alliances and stable governing possible.”⁶⁶ The Aristotelian framework can encompass both of these visions. It is also consistent with a growing literature suggesting that elections are not an ideal, or even superior,

⁶¹ 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.

⁶² Robert E. Goodin & 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 (1952), which outlines the term limits imposed on officials who were selected via sortition.

⁶³ A related argument justifies term limits on the ground that “[l]ong-term incumbents have brandname 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).

⁶⁴ Nor, obviously, does it require that a specific incumbent be defeated. Democracy requires the possibility of rotation in office, not its certainty.

⁶⁵ Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 *COLUM. L. REV.* 283, 323 (2014).

⁶⁶ LEE DRUTMAN, *BREAKING THE TWO-PARTY DOOM LOOP: THE CASE FOR MULTIPARTY DEMOCRACY IN AMERICA* 176 (2020).

instrument of democratic choice.⁶⁷ Instead, a system of sortition, or “lottocratic,” may be superior to elections,⁶⁸ and should be accommodated within our understanding of what democracy entails.

Third, the Aristotelian framework is not exhausted by the attention given to questions of institutional design. It also invites an evaluation of broader social, economic, and cultural conditions as allowing—or hindering—democracy. Aristotle himself paid attention to the size, the rurality, and the relative wealth of polities when thinking about optimal regime choice.⁶⁹ He implied that democracy relies on social, cultural, and economic factors.⁷⁰ 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 also more durable governance institutions. The distinction between personnel and institutional fixation is not always easy to apply.⁷¹ A leader might seek to extend her effective 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 her risk of losing office.⁷² Efforts at functional entrenchment of personnel “exist[] along

⁶⁷ See, e.g., LANDEMORE, *supra* note 57, 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 A. Guerrero, *Against Elections: The Lottocratic Alternative*, 42 PHIL. & PUB. AFFS. 135 (2014).

⁶⁸ Guerrero, *supra* note 67, at 154–55 (“[T]he lottocratic system would be better than electoral systems in terms of both responsiveness and good governance.”).

⁶⁹ JENNIFER TOLBERT ROBERTS, *ATHENS ON TRIAL: THE ANTIDEMOCRATIC TRADITION IN WESTERN THOUGHT* 88–91 (1994) (listing and discussing these factors).

⁷⁰ Cf. ROBERT A. 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: A GLOBAL HISTORY FROM ANTIQUITY TO TODAY* 62 (2020), which argues that “early democracy was more likely to prevail when rulers were uncertain about production, when people found it easy to exit, and finally when rulers needed their people more than people needed them.”

⁷¹ For an example of this distinction in use, see Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1667 (2002), which distinguishes the “entrenchment of officials against challengers, such as prospective candidates, by means of rigged electoral rules, restrictions on political speech, and so forth” from the “enactment of either statutes or internal legislative rules that are binding against subsequent legislative action in the same form.”

⁷² Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 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, 892–915 (2011) (developing more examples of sources of entrenchment); 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”).

a continuum,”⁷³ with no clear line demarcating the permissible from the disallowed. They can also be hard to distinguish from ordinary politics.⁷⁴

All of that is true. But the Aristotelian framework at least clarifies the central question: Will there be predictable rotation in office? Or should the appearance of rotation be taken with a grain of salt, given an underlying absence of fair competition?

* * *

In sum, the Aristotelian definition of democracy as a community of equals being 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 social and economic conditions bear on the durable rotation of personnel in office.

Using this lens, democracy is unveiled as an emergent product of institutional, political, and social factors that generate political equality and make rotation in office a durable possibility. It is a characteristic of a political system. It does not require that each judgment, or even each component institution, 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.

II. THE VECTORS OF TWENTY-FIRST CENTURY DEMOCRATIC BACKSLIDING

To understand the Roberts Court’s relationship to the democratic project in Aristotle’s broad terms, we first need an account of the social, economic, and political forces working to undermine the American community of equals engaged in being ruled and ruling in turn. The Court’s interventions modulate democracy to the extent they enhance or weaken those dynamics.

⁷³ Klarman, *supra* note 18, at 504.

⁷⁴ Cf. PAUL STARR, *ENTRENCHMENT: WEALTH, POWER, AND THE CONSTITUTION OF DEMOCRATIC SOCIETIES* 26–27 (2019) (describing mechanisms of varying subtlety for entrenching institutions and keeping the powerful in power). 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). Well-intentioned entrenchment, that is, can be effective as well as malign.

Not all democratic crises, though, are characterized by the same pressures. 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.

A. *Is Democracy Imperiled?*

American democracy is not in good shape. In 2017, the Economist Intelligence Unit (EIU) downgraded the United States from a “full democracy” to a “flawed democracy.”⁷⁵ A year later, Freedom House lowered its ranking of American democracy to just better than that of Portugal or Greece.⁷⁶ 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].”⁷⁷ Freedom House also demoted the United States in its rankings, “placing it among the 25 countries that have suffered the largest declines” in the quality of democracy in the past decade.⁷⁸ 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.”⁷⁹ Later in 2021, Bright Line Watch's survey of experts again found profound “reasons to worry” about the quality of

⁷⁵ Elena Holodny, *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> [<https://perma.cc/ZN2S-DGBW>].

⁷⁶ ARCH PUDDINGTON & TYLER ROYLANCE, FREEDOM HOUSE, FREEDOM IN THE WORLD 2017: POPULISTS AND AUTOCRATS: THE DUAL THREAT TO GLOBAL DEMOCRACY 21–24 (2017), https://freedomhouse.org/sites/default/files/FH_FIW_2017_Report_Final.pdf [<https://perma.cc/M4J6-YR83>] (assigning the United States an aggregate score of 89, down from 90 the previous year).

⁷⁷ *Global Democracy Has a Very Bad Year*, ECONOMIST (Feb. 2, 2021), <https://www.economist.com/graphic-detail/2021/02/02/global-democracy-has-a-very-bad-year> [<https://perma.cc/DAG5-HQ9U>] (describing a category of “flawed” democracies in which democratic choice is still possible but hindered in important ways).

⁷⁸ SARAH REPUCCI & AMY SLIPOWITZ, FREEDOM HOUSE, FREEDOM IN THE WORLD 2021: DEMOCRACY UNDER SIEGE 10 (2021), <https://freedomhouse.org/report/freedom-world/2021/democracy-under-siege> (assigning the United States a grade of 83) [<https://perma.cc/5STV-4JGD>]; *see also* STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 9 (2018) (“The erosion of [American] democratic norms began in the 1980s and 1990s and accelerated in the 2000s.”).

⁷⁹ *Statement of Concern: The Threats to American Democracy and the Need for National Voting and Election Administration Standards*, NEW AM. (June 1, 2021), <https://www.newamerica.org/political-reform/statements/statement-of-concern/> [<https://perma.cc/S4GQ-CVSW>].

democracy.⁸⁰ Political scientists hence increasingly recognize that democracy is never “consolidated” once and for all. Instead, its strength ebbs and flows over time as it comes under different strains.⁸¹ American democracy has had periods of strength, but the fact that it once seemed durable doesn’t guarantee its persistence now.

Why are these alarm bells ringing at this historical moment? The core claim of this Part is that ideals of democratic equality and rotation now face three mutually reinforcing headwinds. The first is the immanent tendency of political institutions created in the 1787 Constitution to enable and accommodate minority rule, at least under specific political conditions. The second is a rising 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 check the wealthy’s prerogatives. The third is a reemergence of ethnoracial divisions as an organizing principle of political and affective identification. Critically, this last dynamic involves the rise (or return) of a distinctive form of white identity politics which resonates to earlier periods of stratification in American history.

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. They are now like trains moving along different tracks at different speeds that have collided at a single point. This confluence generates the conditions for democratic backsliding. And it thus sets the stage for a counterdemocratic jurisprudence.

B. The Constitution’s Imperfect Realization of Democracy

The Constitution fashions a framework of sorts for democratic rule. But it also seeds numerous possible pathways of democratic backsliding and failure. As a result, post-ratification political choices matter: The way in which the Constitution is operationalized through specific rules and distinctive institutional choices powerfully shapes whether the democratic ideal of a community of equals being ruled and ruling in turn is strained or

⁸⁰ *Still Miles Apart: Americans and the State of U.S. Democracy Half a Year into the Biden Presidency: Bright Line Watch June 2021 Surveys*, BRIGHT LINE WATCH (June 2021), 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 [https://perma.cc/DQ6D-DXJ8].

⁸¹ Paul Pierson & 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).

sustained. Rather than asking whether the Constitution “is” democratic,⁸² we should therefore understand the Constitution as creating a field of possibilities. These range from robustly democratic to downright authoritarian. These possibilities can be realized either at the federal level or at a subnational level. Indeed, historically, the quality of democracy has been uneven geographically—with pockets of authoritarianism⁸³—and has fluctuated from period to period,⁸⁴ with democratic quality turning on contingent and unpredictable events.⁸⁵

The Constitution’s ambiguity about how, and indeed whether, democracy will be realized can be pinned to a number of textual choices and gaps. Three are important predicates of the counterdemocratic difficulty and are worth setting out as a preliminary matter.

First, the Constitution’s reliance on states as basic units 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.”⁸⁶

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. Before the beginning of the twenty-first century, “senators who hail[ed] from states with greater voting weight [did] not tend in their general (ideological) roll-call behavior to oppose senators who [came] from states with less voting

⁸² See *supra* note 32; 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.”).

⁸³ For instance, for more than sixty years the U.S. Constitution 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).

⁸⁴ 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. DEMOCRACY 145, 145 (2021).

⁸⁵ Colonization, for example, can reinforce authoritarian structures domestically. See HEATHER COX RICHARDSON, *HOW THE SOUTH WON THE CIVIL WAR: OLIGARCHY, DEMOCRACY, AND THE CONTINUING FIGHT FOR THE SOUL OF AMERICA* 102–03 (2020).

⁸⁶ DAVID A. HOPKINS, *RED FIGHTING BLUE: HOW GEOGRAPHY AND ELECTORAL RULES POLARIZE AMERICAN POLITICS* 2–3 (2017).

weight.”⁸⁷ Through the twentieth century, fissures within the two main parties were hence as important as the division between the parties.⁸⁸ The Constitution’s structural asymmetries in representation did not invite minority rule because of the persistence of geographically crosscutting alliances.

The 2000 election, however, marked the point where shifting partisan dynamics eroded these alliances. By 2000, both national parties had become significantly more internally coherent and more distinct in preferences from each other.⁸⁹ Further, ideology was increasingly strongly correlated with population density. In brief, rural districts became reliably Republican and urban districts predictably Democratic.⁹⁰ Due to this combination of electoral design and demographic geography, one party can now reliably expect to control the Senate and win the presidency with fewer votes than the other.⁹¹ As Professors Steven Levitsky and Daniel Ziblatt put it, this means 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.”⁹²

In short, the current alignment between constitutional structure and partisan demography creates an asymmetrical array of incentives for elected actors depending on where their supporters live. For those partisan factions with a structural advantage in translating votes into political power, it invites forms of popular mobilization that do not aspire toward majority support. Instead, the current interaction of structure and demography creates an incentive for one party 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

⁸⁷ John D. Griffin, *Senate Apportionment as a Source of Political Inequality*, 31 LEGIS. STUD. Q. 405, 406 (2006).

⁸⁸ See DRUTMAN, *supra* note 66, at 85.

⁸⁹ *Id.* at 89; see also JACOB S. HACKER & 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).

⁹⁰ See James G. Gimpel, Nathan Lovin, Bryant Moy & Andrew Reeves, *The Urban–Rural Gulf in American Political Behavior*, 42 POL. BEHAV. 1343, 1362 (2020); Ron Johnston, David Manley, Kelvyn Jones & Ryne Rohla, *The Geographical Polarization of the American Electorate: A Country of Increasing Electoral Landslides?*, 85 GEOJOURNAL 187, 196 (2020).

⁹¹ See Kenneth Owen, *Minority Rule Cannot Last in America*, ATLANTIC (Dec. 2, 2020), <https://www.theatlantic.com/ideas/archive/2020/12/minority-rule-cannot-last-america/617272/> [<https://perma.cc/K6ZG-NJX9>] (“Though Republican senators make up the majority in the chamber [in 2020], they represent more than 20 million fewer Americans than Democratic senators do.”).

⁹² Steven Levitsky & Daniel Ziblatt, Opinion, *End Minority Rule*, N.Y. TIMES (Oct. 23, 2020), <https://www.nytimes.com/2020/10/23/opinion/sunday/disenfranchisement-democracy-minority-rule.html> [<https://perma.cc/PFY5-8Z2W>].

partisan formations.⁹³ It is thus an engine of counterdemocratic energy, as well as a source of resistance to such efforts.

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 and lapidary ways. This allows for the possibility of arrangements that tilt against democracy.

Consider the Constitution’s provisions on the regulation of the public sphere, which is the zone in which democratic debate plays out. While the Constitution protects the “freedom of speech,” its text does not define either “freedom” or “speech.”⁹⁴ Instead, the First Amendment leaves open the question of how to define and circumscribe those terms. Further, the First Amendment has been interpreted to include a right of association.⁹⁵ Where other constitutions differentiate between distinct kinds of associations—in particular political parties, unions, and private civic associations⁹⁶—the U.S. Constitution does not sort among the “wide variety of political, social, economic, educational, religious, and cultural” associations:⁹⁷ It again leaves open questions of which associations will be protected, and how.⁹⁸ And it does not set forth clearly the rights of political and civic associations that act as critical intermediating bodies with voters, such as parties, unions, and the

⁹³ Jacob S. Hacker & 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].”).

⁹⁴ 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”).

⁹⁵ *Ams. 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.” (internal quotation marks omitted)).

⁹⁶ See Adam S. Chilton & Mila Versteeg, *Do Constitutional Rights Make a Difference?*, 60 AM. J. POL. SCI. 575, 580 (2016).

⁹⁷ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). See *NAACP v. Alabama 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.”).

⁹⁸ For example, scholars have closely examined and critiqued the Court’s view of associational rights of political parties. See, e.g., Joseph Fishkin & Heather K. Gerken, *The Party’s Over: McCutcheon, Shadow Parties, and the Future of the Party System*, 2014 SUP. CT. REV. 175, 177 (“[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) (arguing that in its jurisprudence on political parties, the Court “has adopted a set of theoretical assumptions that do not hold true in the real world of contemporary politics”).

like. 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 defining voter eligibility.⁹⁹ In the Early Republic, many states imposed gender, race, and property qualifications.¹⁰⁰ While the Fifteenth, Nineteenth, and Twenty-Fourth Amendments eventually precluded some such limitations on the franchise, the scope and meaning of the constitutional right to cast a vote remain uncertain today.¹⁰¹ This is important in part because the Qualifications Clause of Article I, Section 2 gives states a broad authority to institute many kinds of constraints on the franchise.¹⁰²

At the same time, the Constitution's design did not cause all of today's 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 Constitution¹⁰³: districting for congressional elections was mandated by Congress only in 1842, and then through the exercise of Congress's Article I powers.¹⁰⁴

Third, many other constitutions globally create independent institutions to manage elections, handle politically sensitive criminal investigations, and lead prosecutions of those elected to the apex of national office.¹⁰⁵ 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

⁹⁹ U.S. CONST. art. I, § 2.

¹⁰⁰ See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 5–6 (2000).

¹⁰¹ 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, 189–90 (2008). Further, commentators have observed that the idea of a right to vote is 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).

¹⁰² *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 17 (2013) ("Prescribing voting qualifications . . . forms no part of the power to be conferred upon the national government . . ." (internal quotation marks omitted)).

¹⁰³ DRUTMAN, *supra* note 66, at 236–37.

¹⁰⁴ Apportionment Act of 1842, ch. 47, Pub. L. No. 24-47, § 2, 5 Stat. 491, 491.

¹⁰⁵ For a transnational survey, see GINSBURG & HUQ, *supra* note 17, at 192–97.

impeachment is an exclusive remedial option.¹⁰⁶ It thus leaves open the question whether there will be effective institutional means to prevent incumbents from engaging in unlawful acts to preserve their political power.

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 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.¹⁰⁷ These three elements of the original constitutional design do important work in Part III as foundations for the counterdemocratic difficulty.

C. *The Tension Between Democracy and Wealth Inequality*

Between 1945 and 1970, American “economic growth was relatively rapid and its fruits were relatively equally distributed.”¹⁰⁸ However, starting in the 1970s, the United States experienced a sharp increase in income and wealth inequality.¹⁰⁹ Since then, the fruits of economic growth have “predominantly gone to those who are already better off.”¹¹⁰ Those without college degrees have experienced “a prolonged decline in wages” and “miseries over and above the loss of earnings.”¹¹¹ These shifts in the

¹⁰⁶ The Constitution does speak directly to impeachment, but this has not successfully executed the function of enabling accountability. Tom Ginsburg, Aziz Huq & David Landau, *The Comparative Constitutional Law of Presidential Impeachment*, 88 U. CHI. L. REV. 81, 114 (2021) (noting the “difficulty, and resulting infrequency, of impeachment”).

¹⁰⁷ See Gretchen Helmke, Mary Kroeger & Jack Paine, *Exploiting Asymmetries: A Theory of Democratic Constitutional Hardball* 34 (Aug. 26, 2019) (unpublished manuscript), https://www.gretchenhelmke.com/uploads/7/0/3/2/70329843/exploiting_asymmetries.pdf [<https://perma.cc/S62U-KJSF>] (finding that “asymmetric partisan opportunities to tilt the political playing field can . . . result in constitutional hardball”).

¹⁰⁸ ANNE CASE & 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 democratic state.” Mark Blyth, *Domestic Institutions and the Possibility of Social Democracy*, 3 COMPAR. EUR. POL. 379, 381 (2005).

¹⁰⁹ Emmanuel Saez, *Income and Wealth Inequality: Evidence and Policy Implications*, 35 CONTEMP. ECON. POL’Y 7, 9 (2017) (“The top 10% income share has grown from 33% to over 50% in recent years . . .”); Emmanuel Saez & 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 1% of all wage earners garnered nearly 60% of the income growth in the United States).

¹¹⁰ CASE & DEATON, *supra* note 108, at 151.

¹¹¹ *Id.* at 7, 59 (documenting rising mortality rates for working-class non-Hispanic whites since 1960); accord Lawrence F. Katz & Alan B. Krueger, *Documenting Decline in U.S. Economic Mobility*, 356 SCIENCE 382, 382 (2017) (showing that intergenerational absolute income has substantially declined).

distribution of assets and economic rewards have been associated with a growing “financialization” of the American economy. The latter is centrally characterized by an increase in “activities relating to the provision (or transfer) of liquid capital in expectation of future interest, dividends, or capital gains,” rather than simple “trade and commodity production.”¹¹² Increasing wealth inequality has been accompanied by a sharp drop in economic mobility.¹¹³ Racial wealth and income gaps remain stubbornly high despite employment discrimination laws.¹¹⁴

Just as the United States’ sharp geographic divides lead to persisting partisan imbalances in electoral power, wealth and opportunity have not been uniformly allocated either. For example, economic mobility is linked to geography. Where one grows up has a powerful effect on whether one thrives economically as an adult.¹¹⁵ 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 to economic stagnation—or even loss—rather than a comfortable middle-class life.

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 to protect and sustain its disproportionate gains from economic activity. Law is hence constitutive of economic inequality, and it 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.

¹¹² Greta R. Krippner, *The Financialization of the American Economy*, 3 SOCIO-ECON. REV. 173, 174–75 (2005).

¹¹³ Raj Chetty, David Grusky, Maximilian Hell, Nathaniel Hendren, Robert Manduca & Jimmy Narang, *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”).

¹¹⁴ Dionissi Aliprantis & Daniel Carroll, *What Is Behind the Persistence of the Racial Wealth Gap?*, ECON. COMMENT. (Feb. 28, 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> [<https://perma.cc/2E8D-3SST>].

¹¹⁵ Raj Chetty & Nathaniel Hendren, *The Impacts of Neighborhoods on Intergenerational Mobility I: Childhood Exposure Effects*, 133 Q.J. ECON. 1107, 1107–08 (2018).

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

At this front end, as law professor Katarina Pistor has demonstrated, private law rules are often deployed “as a shield to protect private gains” in the form of financial assets, intellectual property, and a transnational network of “private arbitration tribunals [that] scrutinize state courts in their role as lawmakers and law enforcers.”¹¹⁶ Economist 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.¹¹⁷ In his detailed 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 (beginning in 1977); the deregulation of the financial sector starting again under President Carter (1980 and 1982); the significant easing of antitrust enforcement (after 1981); and the weakening or elimination of social safety-net programs (starting in 1980).¹¹⁸ A subsequent “[d]eregulation 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.¹¹⁹ 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 permitted the exercise of monopolistic or monopsonistic power by a small number of corporations with predictable (aggravating) knock-on effects—growing inequality and greater lobbying heft on the part of those corporations.¹²⁰

More broadly, the arguments advanced against government regulation from the 1980s onward targeted “public power as such,” challenging “its

¹¹⁶ KATHARINA PISTOR, *THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY* 4–5, 22, 152–53 (2019). Pistor recognizes the connection between the legal tools she analyzes 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.

¹¹⁷ See DAVID M. KOTZ, *THE RISE AND FALL OF NEOLIBERAL CAPITALISM* 42 tbl.2.1 (2015).

¹¹⁸ *Id.* at 16, 18, 21–24.

¹¹⁹ *Id.* at 104.

¹²⁰ See Chad Syverson, *Macroeconomics and Market Power: Context, Implications, and Open Questions*, 33 *J. ECON. PERSPS.* 23, 37 (2019). On the connection between deregulation and increasingly concentrated product markets, see THOMAS PHILIPPON, *THE GREAT REVERSAL: HOW AMERICA GAVE UP ON FREE MARKETS* 153–54, 279–83 (2019).

legitimacy as a means of coordination, its ability to master private power, its capacity to solve social problems, and the scale at which it can be effectively and accountably deployed.”¹²¹ In this way, the deregulatory campaigns of the 1980s by politicians and industry put into doubt 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 while remaining either indifferent to, or only weakly sensitive to, the policy preferences of middle- and low-income constituents.¹²² This effect is obviously more consequential under conditions of greater inequality. Where an “economic system is funneling most gains to those at the very top,” welfare gains for the majority will often depend on redistributive measures.¹²³ 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.”¹²⁴ The extent to which their resources enable them to act on this fear depends in important part on the content of the law—law that we will examine in Section III.B.

Law has also played a role at the more local, mundane level. In an important recent study, for example, Professor Jessica Trounstein demonstrated how wealthier, typically whiter, municipalities have used land-use restrictions (e.g., barring multifamily housing) as a way of keeping up the local production of public goods, such as secondary education, and at the

¹²¹ Nancy Fraser, *Legitimation Crisis? On the Political Contradictions of Financialized Capitalism*, 2 CRITICAL HIST. STUD. 157, 188 (2015).

¹²² 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 . . .”). For other influential empirical studies of political inequality, see generally 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’s claims, see Omar S. Bashir, *Testing Inferences About American Politics: A Review of the “Oligarchy” Result*, 2 RSCH. & POL. 1, 1 (2015), which finds more politician responsiveness to middle-income voters, and Peter K. Enns, *Relative Policy Support and Coincidental Representation*, 13 PERSPS. ON POL. 1053, 1053 (2015), which suggests the same.

¹²³ JACOB S. HACKER & PAUL PIERSON, LET THEM EAT TWEETS: HOW THE RIGHT RULES IN AN AGE OF EXTREME INEQUALITY 19–20 (2020).

¹²⁴ *Id.* at 20.

same time preventing outsiders from enjoying those goods.¹²⁵ Law not only helps determine the overall distribution of rewards from economic activity; it also channels how those rewards are shared within and between different families.

Economic inequality is a product of private and public law, and is also a potentially powerful causal force shaping the democratic institutions that produce such laws. It is likely to limit responsiveness to the full spectrum of the public's interests. Economic inequality enables and elicits elite capture of policymaking apparatuses. At a minimum, as Bartels's work acutely 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 because it raises questions about the capacity of an economic elite to dictate democratic outcomes.

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 severe ethnic rifts is unlikely to yield a stable democracy. Political scientists use the term “pernicious polarization” to describe such a 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.”¹²⁶ When one group regards another with contempt or disgust, the “community of equals” comes under potentially serious strain.¹²⁷ Further, when partisan divisions align with ethnic rifts,¹²⁸ and where crosscutting allegiances dissipate, voters will perceive their own electoral defeat with acute distrust or fear; they are

¹²⁵ Jessica Trounstein, *The Geography of Inequality: How Land Use Regulation Produces Segregation*, 114 AM. POL. SCI. REV. 443, 443–453 (2020). Criminal law is also used to ensure that educational resources produced locally are not shared to redistributive effect. See LaToya Baldwin Clark, *Education as Property*, 105 VA. L. REV. 397, 398, 406–10, 423–24 (2019).

¹²⁶ Jennifer McCoy & Murat Somer, *Overcoming Polarization*, 32 J. DEMOCRACY 6, 8 (2021); see also Matthew H. Graham & 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, 403–04 (2020) (presenting evidence that under conditions of increasing polarization, voters are more willing to sacrifice democratic principles to support their party).

¹²⁷ See DONALD R. KINDER & CINDY D. KAM, US AGAINST THEM: ETHNOCENTRIC FOUNDATIONS OF AMERICAN OPINION 233 (2009) (“Ethnocentrism divides the social world into two classes. This invites violation of the first principle of democratic government: political equality.”); NATHAN P. KALMOE & LILLIANA MASON, RADICAL AMERICAN PARTISANSHIP: MAPPING VIOLENT HOSTILITY, ITS CAUSES, AND THE CONSEQUENCES FOR DEMOCRACY 44–49 (2022) (documenting the emergence of a form of “racial” partisanship characterized by “animosity and openness to violence”).

¹²⁸ See KALMOE & MASON, *supra* note 127, at 78–87 (finding correlations between radical polarization and “attitudes related to systemic racism and hostile sexism”).

unlikely to accept such loss with equanimity.¹²⁹ 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 a public good prove “willing to sacrifice fair democratic competition for the sake of electing politicians who champion their interests.”¹³⁰ Paradoxically, this diminishes the systemic power of voters, who “cannot be counted on to be an effective check on the exercise of power by political elites.”¹³¹ Democracy loses the foundation in popular support necessary for its persistence.

The key questions in the design of democratic institutions, therefore, are 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 does not fix political destiny.¹³² But it does inform, though not wholly explain, a pivotal and recent change. In the 1980s, a partisan political identity emerged that was 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 coalitions.¹³³ This “white political identity” (as it is labeled in the political

¹²⁹ Jennifer McCoy & 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 & LYNN M. SANDERS, *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 . . .”).

¹³⁰ Milan W. Svobik, *Polarization Versus Democracy*, 30 J. DEMOCRACY 20, 24 (2019). For a startling empirical demonstration of this point, see Graham & Svobik, *supra* note 126, 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”).

¹³¹ Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Judicial Intervention as Judicial Restraint*, 132 HARV. L. REV. 236, 265 (2018).

¹³² 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. 603–09 (2001).

¹³³ 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.

science literature) is distinct from affective or partisan polarization.¹³⁴ While increasingly aligned with the Republican party, this new, politically potent “white” identity is also a separate and distinct sociocultural phenomenon from partisanship—one that poses a structural threat to contemporary democracy.¹³⁵ 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.¹³⁶ That is, the historical evidence suggests that the current, powerful iteration of white identity is genealogically intertwined with the macroeconomic shifts documented above and has effects notwithstanding wide economic disparities within the white population.

The “white” political identity salient to contemporary politics has been found to embody “a desire to protect the in-group and its collective interests . . . independent of out-group prejudice.”¹³⁷ 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.”¹³⁸ 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.”¹³⁹ White political identity hence “factor[s] into whites’ political thinking, primarily with

¹³⁴ 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”).

¹³⁵ For documentation of the gap between white identity and Republican identity, see CHRISTOPHER H. ACHEN & LARRY M. BARTELS, *DEMOCRACY FOR REALISTS: WHY ELECTIONS DO NOT PRODUCE RESPONSIVE GOVERNMENT* 255–57 (2016).

¹³⁶ Quinn Slobodian, *Anti-’68ers and the Racist-Libertarian Alliance: How a Schism Among Austrian School Neoliberals Helped Spawn the Alt Right*, 15 *CULTURAL POL.* 372, 373–74 (2019).

¹³⁷ Ashley Jardina, *In-Group Love and Out-Group Hate: White Racial Attitudes in Contemporary U.S. Elections*, 43 *POL. BEHAV.* 1535, 1540 (2021); see also ASHLEY JARDINA, *WHITE IDENTITY POLITICS* 5–6 (2019) (“Many whites identify with their racial group without feeling prejudice toward racial and ethnic minorities [They are motivated to] protect their power and status.”) [hereinafter JARDINA, *WHITE IDENTITY POLITICS*]; accord ACHEN & BARTELS, *supra* note 135, at 257.

¹³⁸ 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 & Spencer Piston, *The Effects of Dehumanizing Attitudes About Black People on Whites’ Voting Decisions*, 52 *BRIT. J. POL. SCI.* 1076, 1076 (2022).

¹³⁹ Alan Abramowitz & 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 Lillian Mason & Julie Wronski, *One Tribe to Bind Them All: How Our Social Group Attachments Strengthen Partisanship*, 39 *ADVANCES POL. PSYCH.* 257, 259–60, 274 (2018), which notes 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.”

respect to policies that whites see as benefiting or harming their in-group.”¹⁴⁰ It is furthermore often “aligned” with other politically salient identifications, such as “Christian conservative, gun owner, rural and small-town resident, [and] believer in traditional gender roles.”¹⁴¹

Since the 1980s, a “racial divide has increasingly affected the American party system because of how racially conservative white voters have reacted to the growing racial and ethnic diversity of American society.”¹⁴² The resulting “dramatic increase in racial resentment” is now four decades old.¹⁴³ Professors Michael Tesler, Seth Goldman, and Diana Mutz have established that the Obama presidency was associated with an especially sharp increase in racially resentful views.¹⁴⁴ Animosity toward racial minorities measured in 2011 also predicted subsequent support for former President Trump (but not other Republican politicians). He seemed to act as a “lightning rod” for channeling and legitimating those sentiments through his statements and tweets.¹⁴⁵

The increasing salience of white identity is causally rooted in larger macroeconomic changes. At least for some, it seems to be linked to 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 strongly increase white support for candidates who expressly endorse “racial hierarchy” (while, unsurprisingly, having no such effect on Black voters).¹⁴⁶ 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.¹⁴⁷ That identity is hence a way of coping with the experience of a sudden economic

¹⁴⁰ JARDINA, WHITE IDENTITY POLITICS, *supra* note 137, at 213.

¹⁴¹ HACKER & PIERSON, *supra* note 123, at 122.

¹⁴² ALAN I. ABRAMOWITZ, THE GREAT ALIGNMENT: RACE, PARTY TRANSFORMATION AND THE RISE OF DONALD TRUMP 8 (2018).

¹⁴³ *Id.* at 126.

¹⁴⁴ See TESLER, *supra* note 134, 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”); see generally SETH K. GOLDMAN & DIANA C. MUTZ, THE OBAMA EFFECT: HOW THE 2008 CAMPAIGN CHANGED WHITE RACIAL ATTITUDES 4–8 (2014) (same). On the role of white working-class votes (and party switching) in 2016, see generally Stephen L. Morgan & Jiwon Lee, *Trump Voters and the White Working Class*, 5 SOCIO. SCI. 234 (2018).

¹⁴⁵ Lilliana Mason, Julie Wronski & John V. Kane, *Activating Animus: The Uniquely Social Roots of Trump Support*, 115 AM. POL. SCI. REV. 1508, 1515–16 (2021); see also JARDINA, WHITE IDENTITY POLITICS, *supra* note 137, at 225 (“The symbolism of Obama’s election as a displacement of whites’ political dominance is hard to dismiss.”).

¹⁴⁶ Leonardo Baccini & Stephen Weymouth, *Gone for Good: Deindustrialization, White Voter Backlash, and US Presidential Voting*, 115 AM. POL. SCI. REV. 550, 551 (2021).

¹⁴⁷ See Christopher Sebastian Parker, *Status Threat: Moving the Right Further to the Right?*, 150 DAEDALUS 56, 65, 69 (2021).

shock so as to preserve one's affiliation with the socially dominant and economically advantaged.

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.¹⁴⁸ Racial politics increasingly align with, and “reinforce,” economic and cultural conditions. This leads to “a growing divide between the electoral coalitions supporting the two major parties.”¹⁴⁹

In the context of the fragile institutionalization of democracy in Articles I and II of the Constitution described above, this rise in white identity creates a “structural opportunity” for political elites to “undermine democracy and get away with it.”¹⁵⁰ Race enters the picture here. White identity is an increasingly powerful predictor, not just of voting behavior, but—and of even greater importance here—of attitudes toward democracy.¹⁵¹ It is strongly correlated with dissatisfaction with democracy itself, especially in the wake of an election loss.¹⁵² 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[d] the invitation to ‘bend the rules’ or ‘take the law into their own hands.’”¹⁵³

Crucially, increasing unwillingness to tolerate the democratic process has been found to be “primarily 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.¹⁵⁴ Another recent study found that white political identity is “some blend of racial resentment, political loss, and top-down encouragement from political elites[, which] is enough not only to erode satisfaction with

¹⁴⁸ 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 ACAD. SCI.* E4330, E4338 (2018).

¹⁴⁹ ABRAMOWITZ, *supra* note 142, at 15.

¹⁵⁰ Svolik, *supra* note 130, 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.”).

¹⁵¹ JARDINA, *WHITE IDENTITY POLITICS*, *supra* note 137, 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”).

¹⁵² Adam M. Enders & Judd R. Thornton, *Racial Resentment, Electoral Loss, and Satisfaction with Democracy Among Whites in the United States: 2004–2016*, 44 *POL. BEHAV.* 389, 390–91 (2022).

¹⁵³ Larry M. Bartels, *Ethnic Antagonism Erodes Republicans' Commitment to Democracy*, 117 *PROC. NAT'L ACAD. SCI.* 22752, 22753 (2020).

¹⁵⁴ *Id.* at 22756; see also JARDINA, *WHITE IDENTITY POLITICS*, *supra* note 137, at 46–47, 156–64 (further discussing these dynamics).

democracy, but also to spur people to violent action.”¹⁵⁵ 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.¹⁵⁶

In sum, an ethnic rift driven by the rise and radicalization of white political identity is now the “principal line of political cleavage . . . in America’s broader, ongoing struggle to embrace and instantiate democracy.”¹⁵⁷ This rift increasingly overlaps with partisan identity. Among the Republican rank and file, this sensibility is linked with a rising intolerance at the prospect of being ruled and ruling in turn.¹⁵⁸ At the extreme, white identity bleeds into an embrace of political violence directed at democratic institutions. It thus nurtures into existence the “factious public” that has been historically necessary for “[a]spriring autocrats” to succeed in their conspiracies against democratic rule.¹⁵⁹

E. The Convergence of Counterdemocratic Dynamics

In the late 1970s, the postwar 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, more limited 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; that is, it reflected a culmination of increasingly powerful interparty sorting by racial attitudes that had begun as early as the 1930s.¹⁶⁰

By the new millennium, these economic and sociocultural trends were intersecting with fault lines long hidden in the Constitution’s democratic design. These underlying constitutional weaknesses could be exploited by, and become causal drivers of, growing economic and social rifts. The Constitution’s ambiguity about democratic rule interacted with its potential for accommodation with nondemocratic regimes at both the national and the subnational level. Together, they made it feasible to mobilize politically

¹⁵⁵ Enders & Thornton, *supra* note 152, at 405.

¹⁵⁶ 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> [<https://perma.cc/9HM9-BC6K>]; *see also* KALMOE & MASON, *supra* note 127, at 4–5 (situating that violence in a larger context of polarization).

¹⁵⁷ Bartels, *supra* note 153, at 22758.

¹⁵⁸ *Id.* at 22757 (“The powerful effects of ethnic antagonism on Republicans’ antidemocratic attitudes underscore the extent to which this particular threat to democratic values is concentrated in the contemporary Republican party.”).

¹⁵⁹ Svolik, *supra* note 130, at 31.

¹⁶⁰ SCHICKLER, *supra* note 133, at 8–9.

within existing institutions to vindicate a demographic minority's goals while being agnostic or hostile to democracy.

In this way, a collision of three quite distinct vectors—institutional, economic, and sociocultural—have helped foster 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.”¹⁶¹ 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 capital mobility.”¹⁶² However labeled, this confluence puts in doubt the possibility of keeping a community of equals being ruled and ruling in turn. The force of this negative pressure on democracy is greater than that exerted by any one of its constituent parts.

The important synoptic accounts of contemporary democratic crisis offered by political scientists and economists have an important gap. Displacing monocausal explanations, they usefully put into play three distinct dynamics ordinarily working along separate institutional, economic, and sociocultural tracks. But existing analyses do not explain how these three dynamics *interact* so as 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 that it is necessary to consider in some detail the recent interventions of the Supreme Court. It is necessary, that is, to account for the counterdemocratic difficulty.

III. JUDICIAL POWER AND DEMOCRATIC ENCASEMENT

The Roberts Court did not create the institutional, economic, or sociocultural predicates of democratic backsliding. But, this Part argues, it has worked with them to play 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. I contend that this capacity has enabled the Court to translate a temporary hold by an aligned elected officeholder into a more durable grip on that office. I further explore how the Court's recent jurisprudence often

¹⁶¹ HACKER & PIERSON, *supra* note 123, at 173.

¹⁶² Quinn Slobodian, *The Backlash Against Neoliberal Globalization from Above: Elite Origins of the Crisis of the New Constitutionalism*, 38 THEORY, CULTURE & SOC'Y 51, 53 (2021); *see also* Reijer Hendrikse, *The Rise of Neo-Illiberalism*, 41 KRISIS 65, 66 (2021).

knits together the three vectors of institutional weakness, economic inequality, and white identity into a tight 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 general constraint upon the effectual scope of democratic choice that is analytically distinct, and more potent, than any one vector working on its own.

The resulting constitutional law of democratic encasement does not extinguish entirely the community of political equals or foreclose completely the prospect of being ruled and ruling in turn. But it does substantially undermine democracy’s predicates without contradicting the formal apparatuses of elections and shifting appointments. It creates background conditions wherein meaningful rotation in office, and hence “being ruled and ruling in turn,” is unlikely—if not technically impossible.¹⁶³

I draw the term “encasement” (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.¹⁶⁴ Encasement there is a solution to “the intolerable contradiction of democratic rejection of the neoliberal state.”¹⁶⁵ While Slobodian applies the term encasement to describe the insulation of a market ordering from democracy, the German economist Wolfgang Streeck 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.”¹⁶⁶ Following Streeck, I am concerned here with a case law that locks in and

¹⁶³ 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 & Kirk A. Randazzo, *Testing the Effects of Independent Judiciaries on the Likelihood of Democratic Backsliding*, 55 AM. J. POL. SCI. 696, 704–07 (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 701. Second, it focuses on large, negative changes in democratic quality, and not more incremental processes of democratic decay. *Id.* at 701–02.

¹⁶⁴ SLOBODIAN, *supra* note 25, at 271–73.

¹⁶⁵ PHILIP MIROWSKI, NEVER LET A SERIOUS CRISIS GO TO WASTE: HOW NEOLIBERALISM SURVIVED THE FINANCIAL MELTDOWN 58 (2013).

¹⁶⁶ Wolfgang Streeck, *Fighting the State*, 50 DEV. & CHANGE 836, 838 (2019).

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.

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 logrolling. To the contrary, Supreme Court majorities make a special point of underscoring ostentatiously the notion that they are honoring the people’s will.¹⁶⁷ At the same time, the jurisprudence of democratic encasement subsidizes the ability of existing economic and sociocultural elites to use their political, economic, and social assets to gain disproportionate political power *through facially democratic processes*. In contrast, for those disadvantaged by the status quo, the law works as a series of walls, dikes, ditches, and kindred obstacles. The effect is to drain away the force of shifting public preferences. It emaciates the forces—like rotation in office—that enable the project of being ruled and ruling in turn.

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, while handicapping groups focused on more egalitarian, racially liberal ends; (3) an 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 the larger democratic backsliding processes.

B. The Political Returns on Property

Democracy requires a community of equals. This is one in which participants have a roughly “equal opportunity for influence over . . .

¹⁶⁷ See *supra* note 10.

political decisions to which they are subject.”¹⁶⁸ Some measure of “equal opportunity to influence political decisions” matters because it “moderat[es] the threat that other asymmetries would otherwise present to social equality.”¹⁶⁹ This kind of rough, necessarily imperfect political equality not only is consistent with but constitutes a response to the countervailing force of social inequality. Such inequality arises because participants in a democracy typically have different psychological, epistemic, and material entitlements. These modulate both formal and informal opportunities to participate in political life.¹⁷⁰ 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 hence “works better” to the extent that “political processes reduce translation of everyday categorical inequalities into public politics.”¹⁷¹

Constitutional law bears directly upon this quality of democracy so understood. It configures the buffer between nonpolitical disparity and political equality. It determines what I call the *political return* on different kinds of nonpolitical resources. The “political return” on a resource is a rough 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 unevenly across society as a whole, the law’s decisions here influence the political equality necessary for 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.”¹⁷²

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”¹⁷³—is guaranteed a high rate of political return through the Court’s treatment of campaign spending under the First Amendment. Second, real property is

¹⁶⁸ Kolodny, *supra* note 56, at 308; Anderson, *supra* note 56, at 313; Post, *supra* note 56, at 28.

¹⁶⁹ Kolodny, *supra* note 56, at 309.

¹⁷⁰ *See id.* at 289.

¹⁷¹ CHARLES TILLY, DEMOCRACY 111 (2007).

¹⁷² PISTOR, *supra* note 116, at 13.

¹⁷³ Jonathan Levy, *Capital as Process and the History of Capitalism*, 91 BUS. HIST. REV. 483, 487 (2017).

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 to achieve any measure of political return. The Court's inconstant, occasionally disparaging, treatment of organizational capital, however, lowers the yield from that potential sheer numerosity. Mere strength-in-numbers is not as much of an asset.

In net, these lines of cases arbitrage economic (in particular wealth) inequities and political imbalances, while throwing up barriers to the compensatory translation of social mobilization into political power. They thus exacerbate the pressure placed on democracy by economic inequalities: Coalitions of wealthy donors and allied officials are able to leverage the representational asymmetries described in Section II.B.

1. *Capital*

The first and most obviously salient line of cases concerns the way 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 1976.¹⁷⁴ The Roberts Court, however, has issued a sequence of major rulings dramatically cutting back on the scope of permissible campaign-speech-related regulation.¹⁷⁵ It has, for instance, invalidated restrictions on independent expenditures of corporate funds,¹⁷⁶ aggregate contribution limits,¹⁷⁷ matching fund provisions in public financing regimes,¹⁷⁸ limits on campaign loan repayment,¹⁷⁹ and even nonaggregate contribution limits.¹⁸⁰ As the Court 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

¹⁷⁴ See *Buckley v. Valeo*, 424 U.S. 1, 40–48 (1976) (per curiam).

¹⁷⁵ The 2010 decision *Citizens United v. Federal Election Commission* 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).

¹⁷⁶ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 365, 367–70 (2010); see also *Am. Tradition P’ship, Inc. v. Bullock*, 567 U.S. 516, 516–17 (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, 698 (D.C. Cir. 2010).

¹⁷⁷ *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185, 204–06 (2014).

¹⁷⁸ *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 753 (2011); see also *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 729, 744 (2008) (striking down a law limiting donations for “non-self-financing” candidates if their self-financed opponent raised more than \$350,000).

¹⁷⁹ *Fed. Election Comm’n v. Cruz*, 142 S. Ct. 1638, 1645 (2022) (invalidating a statutory “limit on the use of post-election funds” to repay a candidate’s personal loans).

¹⁸⁰ *Randall v. Sorrell*, 548 U.S. 230, 236 (2006) (invalidating a Vermont statute limiting campaign contributions); *Thompson v. Hebdon*, 140 S. Ct. 348, 350 (2019) (per curiam).

effort to control the exercise of an officeholder’s official duties.”¹⁸¹ That constitutional right to arbitrage capital into political influence is recognized without regard to whether it “actually undermine[s] faith in [or the fact of] democratic responsiveness.”¹⁸²

In July 2021, for example, the Court in *Americans for Prosperity Foundation v. Bonta* granted a facial injunction against a California law mandating the disclosure of charities’ financial documentation.¹⁸³ It did so by applying the “exacting” form of constitutional scrutiny used in earlier disclosure cases to protect civil rights organizations facing harassment in the Jim Crow south.¹⁸⁴ Whether campaign-finance-related disclosure laws will survive the *Bonta* Court’s version of exacting scrutiny remains to be seen.¹⁸⁵ The “exacting” scrutiny applied in *Bonta* might also be extended to threaten contribution limits in new ways.¹⁸⁶

Increasingly clear evidence suggests that campaign spending is positively correlated to not just access to politicians,¹⁸⁷ 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. Money entering the political system tends not to flow from home districts, but from a small number of wealthy districts nationally.¹⁸⁸

¹⁸¹ *McCutcheon*, 572 U.S. at 208.

¹⁸² Cf. 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).

¹⁸³ 141 S. Ct. 2373 (2021).

¹⁸⁴ *Id.* at 2382–83 (citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958)).

¹⁸⁵ For doubt on this score, see Richard L. Hasen, Opinion, *The Supreme Court Is Putting Democracy at Risk*, N.Y. TIMES (July 1, 2021), <https://www.nytimes.com/2021/07/01/opinion/supreme-court-rulings-arizona-california.html> [<https://perma.cc/TNA6-3GG5>].

¹⁸⁶ *Id.*

¹⁸⁷ On the effect of spending on access, see Joshua L. Kalla & David E. Broockman, *Campaign Contributions Facilitate Access to Congressional Officials: A Randomized Field Experiment*, 60 AM. J. POL. SCI. 545, 546, 553 (2016), which found 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 & Andrew B. Hall, *How Do Interest Groups Seek Access to Committees?*, 62 AM. J. POL. SCI. 132, 132 (2018), which found that corporate interest groups direct disproportionate spending on legislators who exercise control over key veto gates in the legislative process.

¹⁸⁸ 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/> [<https://perma.cc/3277-XGDZ>] (“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.”).

Second, the deregulation of corporate expenditures does not have even-handed effects. Rather, it has tended to increase Republican representation in state legislatures without respect to changes in public preferences.¹⁸⁹ That is, it changes the composition of legislative caucuses in a predictable, asymmetrical way decoupled from shifts in constituent preferences.

Third, and relatedly, deregulating corporate spending has increased the rightward lean of representation within districts that were already safe Republican seats.¹⁹⁰ That is, campaign spending leads to both interparty and intraparty shifts in whose preferences are translated into policy.

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, Professor 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."¹⁹¹ The critique of the Court's campaign finance jurisprudence as plutocratic thus turns out to be true in practice.

In short, the Roberts Court's campaign finance jurisprudence directly 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% of national wealth.¹⁹² In the first quarter of 2021, the Federal Reserve estimated that the top one percent owned some \$41.52 trillion—more than the combined assets (\$39.15 trillion) of the bottom 90%.¹⁹³ Under these conditions, unleashing the

¹⁸⁹ Nour Abdul-Razzak, Carlo Prato & Stephane Wolton, *After Citizens United: How Outside Spending Shapes American Democracy*, 67 ELECTORAL STUD. 102190, 102910 (2020).

¹⁹⁰ Anna Harvey & Taylor Mattia, *Does Money Have a Conservative Bias? Estimating the Causal Impact of Citizens United on State Legislative Preferences*, 191 PUB. CHOICE 417, 436 (2022).

¹⁹¹ Martin Gilens, Shawn Patterson Jr. & Pavielle Haines, *Campaign Finance Regulations and Public Policy*, 115 AM. POL. SCI. REV. 1074, 1075 (2021).

¹⁹² Saez & Zucman, *supra* note 109, at 520; *see also* Piketty & Saez, *supra* note 109, at 458 (reporting similar trends for income).

¹⁹³ *DFA: Distributional Finance Accounts*, BD. GOVERNORS FED. RSRV. SYS. (Aug. 5, 2022), <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> [https://perma.cc/C79E-5JU9].

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 private wealth” and “benefited from greater durability as compared to other assets.”¹⁹⁴ Today, real property is less relevant than intellectual property or financial instruments (e.g., derivatives) as an asset for the preservation and intergenerational transfer of wealth.¹⁹⁵ But for those with insufficient resources to directly influence political outcomes, real property still acts as an important platform upon which political speech and organizing happens.¹⁹⁶ For example, the ability to access a private space such as a shopping mall might be essential for a poorly resourced group to reach its intended audience.¹⁹⁷

Or at least might once have happened. 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 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.¹⁹⁸ 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.¹⁹⁹ 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

¹⁹⁴ PISTOR, *supra* note 116, at 5.

¹⁹⁵ On the “pivotal” role of housing equity in intergenerational wealth transfers, see Brett Christophers, *Intergenerational Inequality? Labour, Capital, and Housing Through the Ages*, 50 *ANTIPODE* 101, 101–02 (2018).

¹⁹⁶ Of course, there are now online spaces through which to mobilize. Many of these spaces are located on social media platforms that are owned and controlled by private firms. For an argument that this is a constitutional problem, see Genevieve Lakier & Nelson Tebbe, *After the “Great Deplatforming”*: *Reconsidering the Shape of the First Amendment*, LPE PROJECT (Mar. 1, 2021), <https://lpeproject.org/blog/after-the-great-deplatforming-reconsidering-the-shape-of-the-first-amendment/> [https://perma.cc/3KWU-WGY4].

¹⁹⁷ *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 78 (1980) (recognizing speech rights of visitors to mall).

¹⁹⁸ See John G. Sprankling, *Property and the Roberts Court*, 65 *U. KAN. L. REV.* 1, 1 (2016) (“[U]nder 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.”).

¹⁹⁹ 141 S. Ct. 2063, 2069 (2021) (citing CAL. CODE REGS. tit. 8, § 20900(e)(1)(C) (2020)).

fundamental element of the property right.”²⁰⁰ 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.”²⁰¹ As such, it had to be treated as “a *per se* physical taking.”²⁰²

Had the Court stopped here, its ruling would have had a sweeping effect: It might well have cast into doubt an immense range of state and federal regulations that interfere with a property owner’s right to exclude—from health and safety rules for workplaces and construction sites to rules against on-site employment discrimination, antidiscrimination mandates covering housing, rentals, and even public accommodations. The Court, however, then carved out a series of broad, hazily drawn, and seemingly ad hoc exceptions to its otherwise categorical protection of property owners’ rights for trespass, common law rules, and exactions.²⁰³ 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.²⁰⁴

The immediate effect of *Cedar Point* is to assign real property owners a constitutional option to bar speech and association by labor. In other words, it creates an expressly political return on real property. Ownership of land in practice entails a corresponding monopoly on the exercise of speech within that land. Real property includes the right to exclude. And exclusion is a pretty good way of preventing speech an owner does not like. Corporate ownership is already flexed by firms for political ends. It is thus common for companies “to encourage employees to participate in politics in ways that benefit the firm.”²⁰⁵ As of December 2014, almost half of the managers contacted in a nationally representative survey indicated that their firm

²⁰⁰ *Id.* at 2072 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

²⁰¹ *Id.* at 2074.

²⁰² *Id.*

²⁰³ *Id.* at 2077–80.

²⁰⁴ 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 the social media platform Twitter. *Biden v. Knight First Amend. Inst.* at Columbia Univ., 141 S. Ct. 1220, 1221 (2021) (Thomas, J., concurring). To him, a “Twitter account resembled a public forum.” *Id.* Although he thought the First Amendment did not apply to Twitter or Facebook, *id.* at 1222, 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.

²⁰⁵ Alexander Hertel-Fernandez, *American Employers as Political Machines*, 79 J. POL. 105, 105 (2017).

solicited political activity from employees.²⁰⁶ *Cedar Point* effectively amplifies the employer monopoly on political mobilization in physical workplaces.

To achieve this, the *Cedar Point* Court engaged in puzzling contortions. On its face, *Cedar Point* distinguishes between labor law and “longstanding background restrictions on property rights” that do not count as takings.²⁰⁷ It sets aside the awkward fact that regulating to protect employees does have a “longstanding” historical pedigree.²⁰⁸ This raises 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 so obscure, *Cedar Point* can easily be read as an exercise in “labor exceptionalism,” in which egalitarian speech on private property meant to advance labor’s interests 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 curb regulation aimed at facilitating 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.²⁰⁹ 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.²¹⁰ The decision hence reflects a judgment about comparative institutional competence as between the state and federal government. 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.²¹¹

²⁰⁶ *Id.* at 107.

²⁰⁷ *Cedar Point*, 141 S. Ct. at 2079. For a more detailed analysis of the case, see Aziz Z. Huq, *Property against Legality: Takings after Cedar Point*, 109 VA. L. REV. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4050962.

²⁰⁸ See John T. Nockleby, *Two Theories of Competition in the Early 19th Century Labor Cases*, 38 AM. J. LEGAL HIST. 452, 454–56 (1994) (describing common law protections for labor).

²⁰⁹ See, e.g., *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998).

²¹⁰ California defines easements by statute. CAL. CIV. CODE. §§ 801–13. Easements are “attached to other land as incidents or appurtenances.” *Id.* § 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 that case 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.

²¹¹ 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”).

Finally, the *Cedar Point* Court had to distinguish a 1980 precedent that allowed California to mandate that shopping malls open their doors to political protesters.²¹² *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.”²¹³ But why should public access make 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 in practice. *Cedar Point*’s facts can be easily redescribed as a case about property that is open to those members of the public who are willing to work for the growers, but not to union organizers.²¹⁴

Like the consequences of campaign finance jurisprudence, the effects of *Cedar Point* will depend 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.”²¹⁵ In other words, the constitutionalizing

²¹² 141 S. Ct. at 2076 (distinguishing *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980)).

²¹³ *Id.* at 2077.

²¹⁴ That 1980 decision hinges on reasoning that eerily tracks the line of argument that *Cedar Point* rejects. The *PruneYard* Court recognized that

[i]t 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 (1980) (quoting *Armstrong v. United States*, 364 U.S. 40, 48 (1960)).

²¹⁵ 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) (examining how “the Court, judges, and lawmakers . . . failed to find fault with . . . physical acts of exclusion” aimed at people of color); 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) (“[T]he 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 nonlegal instruments of racial exclusion, see Schindler, *supra*, which documents “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.”

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 and private property, of course, are not the only resources useful for effective political action. In addition, “political organization . . . is a source of power available to all . . . groups” in a democracy.²¹⁶ 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 analyze the First Amendment law concerning civil society, including the different law for hierarchical and egalitarian groups, in the following Section. Before that though, I want to make a narrower point about organizational rights more generally. One important way in which the Court mediates the political returns on organizing is simply by refusing to recognize the constitutional status of such efforts.

Consider once again *Cedar Point*. The majority emphasized “the central importance to property ownership of the right to exclude.”²¹⁷ But it was 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.²¹⁸ Rather than recognizing that the facts in *Cedar Point* 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. It did not recognize the other's existence. This sort of deck stacking is a subtle 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 underlying facts of the cases. The California union in *Cedar Point* was, in fact, hindered from speaking and associating with agricultural workers.²¹⁹ In *Bonta*, however, neither of the two entities challenging California's charity-donor-disclosure law produced any evidence of actual (as opposed to hypothetical future) chill

²¹⁶ Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 YALE L.J. 148, 151 (2013).

²¹⁷ *Cedar Point*, 141 S. Ct. at 2073.

²¹⁸ *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2382 (2021) (celebrating the right of association).

²¹⁹ 141 S. Ct. at 2080.

on donors' associational rights.²²⁰ So the Court zealously protected associational freedom when it was not actually in play but ignored it when it was uncontroversially compromised. Formally denominated an associational rights case, *Bonta* is better understood as a case about the terms on which wealth can be used to surreptitiously create organization. As a doctrinal foil to *Bonta*, *Cedar Point* showcases the Court's hostility toward organizations that might threaten such wealth and its political influence.

* * *

We are just about a half century from the poll tax.²²¹ Property is thus no longer a de jure entry qualification for democratic voice. Yet, thanks to the threads of case law described here, material assets are now a de facto qualification for meaningful political influence. By recoupling the economic with 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.”²²² Social theorists led by Professor Robert Putnam have argued that civil society is necessary to make “democracy work.”²²³ But other recent scholarship, exemplified by sociologist Dylan Riley's important account of European fascism, tells a different story—voluntary associations can also be vehicles for authoritarian

²²⁰ 141 S. Ct. 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 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 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.* at 2212. 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.

²²¹ See *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966).

²²² EDMUND FAWCETT, *LIBERALISM: THE LIFE OF AN IDEA* 65 (2d ed. 2018) (discussing the ideas of Alexis de Tocqueville and Hermann Schulze-Delitzsch).

²²³ ROBERT D. PUTNAM, ROBERT LEONARDI & RAFFAELLA Y. NONETTI, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* 15 (1993) (praising civil society as marked by “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).

rule.²²⁴ They can accelerate democracy backsliding just as well as they can help sustain democracy.²²⁵ Rather than being a necessary ally to democracy, civil society has different effects depending on its composition and orientation.

There are two relevant ways in which the terrain of civil society can interact with the 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 “breadth and depth of activism” internally, moreover, themselves become “great free schools of democracy.”²²⁶ But on the other hand, civil society can also “fragment, rather than unite, a society, accentuating and deepening already existing cleavages.”²²⁷ They can generate a congeries of “warring factions” that line up alongside extant ethnic or racial rights, placing the necessary community of equals further out of reach.²²⁸ And at times they can simultaneously serve as schools of antidemocracy by inculcating beliefs and dispositions antithetical to democratic life.

Constitutional jurisprudence matters in this realm 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. So, it can favor pro- or antidemocratic elements of civil society.

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 on the *mix* of civil society organizations. The first line of

²²⁴ DYLAN RILEY, *THE CIVIC FOUNDATIONS OF FASCISM IN EUROPE* 21 (2010) (“Fascism [has] emerged out of [a] coincidence of hegemonic weakness and strong civil society.”).

²²⁵ See, e.g., Shanker Satyanath, Nico Voigtlander & Hans-Joachim Voth, *Bowling for Fascism: Social Capital and the Rise of the Nazi Party*, 125 J. POL. ECON. 478, 480, 497 (2017) (finding one standard deviation increase in the density of civil society to be associated with at least 15% faster Nazi Party entry).

²²⁶ HAHRIE HAN, *HOW ORGANIZATIONS DEVELOP ACTIVISTS: CIVIC ASSOCIATIONS AND LEADERSHIP IN THE 21ST CENTURY* 2 (2014) (quoting ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 914 (Eduardo Nolla ed., James T. Schleifer trans., Liberty Fund 2010) (1835)).

²²⁷ Sheri Berman, *Civil Society and Political Institutionalization*, 40 AM. BEHAV. SCIENTIST 562, 565 (1997).

²²⁸ *Id.* at 566.

important case law relevant here concerns the organizational power of labor. The Court's 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 change at the state level.

A second jurisprudential thread pertains to the entitlements of hierarchical religious organizations that are generally 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.²²⁹ 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-threatening impact.

1. *Labor Enchained*

Let us look first at 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) cannot act without a three-member quorum.²³⁰ This immediately forced the Board to redo "about 100 cases"²³¹ and 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 the NLRB's opponents in the Senate, "the NLRB as inoperable could be considered progress."²³²

More significant still were a pair of decisions raising the costs of collective political action by workers through or outside the union form. In

²²⁹ 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* 72–73 (2008).

²³⁰ *New Process Steel, L.P. v. NLRB*, 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").

²³¹ Lafe Solomon, *Administering Labor Law in Political Turbulence*, 34 *BERKELEY J. EMP. & LAB. L.* 273, 274 (2013).

²³² Lynn Woolsey, *Why the Labor Board Matters*, HILL (June 25, 2013), <https://thehill.com/opinion/op-ed/307775-why-the-labor-board-matters> [https://perma.cc/Z27E-N6NV] (quoting Senator Lindsey Graham (R-SC)).

June 2018, the Court in *Janus v. AFSCME* held that public employers could not require nonunion employees to pay a “fair share,” or “agency fee,” covering the costs that unions incurred negotiating and administering labor contracts on their behalf.²³³ Like *Cedar Point*, the *Janus* decision is doctrinally puzzling along many dimensions, several of which have been well canvassed in the literature already.²³⁴ For example, it further muddied a well-known distinction between speech laws that compel endorsement of a message and those that do not.²³⁵ Yet it did not overrule past cases that relied on that difference.²³⁶ It also implicitly, and without explanation, treated contributions to unions and corporations as presenting wholly different First Amendment questions.²³⁷ 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 nonunion members a free ride on union negotiations for better wages and conditions. It vitiated employees’ incentive to join the union to begin with. It more immediately pointed to the invalidity of public-sector labor-management contracts in more than twenty states covering millions of state employees.²³⁸ *Janus* also precipitated a wave of further litigation attacks on unions, all of which aimed at recuperating past dues or challenging unions’ status as the exclusive bargaining agents for a workplace.²³⁹ These challenges have not induced a substantial decline in

²³³ 138 S. Ct. 2448, 2486, 2489 (2018) (holding that “fair-share fees” violate the free speech rights of nonunion members).

²³⁴ Kate Andrias, *Janus’s Two Faces*, 2018 SUP. CT. REV. 21, 34–36 (compiling criticisms).

²³⁵ *Id.* at 35 n.92.

²³⁶ 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 the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 221 (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 (internal quotation marks omitted). 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*.

²³⁷ For criticism, see Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 COLUM. L. REV. 800, 803 (2012), which criticizes “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”).

²³⁸ *Janus*, 138 S. Ct. at 2487–88 (Kagan, J., dissenting).

²³⁹ Ann C. Hodges, *The U.S. Labor Relations System After Janus v. AFSCME: An Early Assessment*, 22 EMP. RESPS. & RTS. J. 49, 51 (2021).

membership to date. But this is likely due to unions' substantial countervailing organizing efforts.²⁴⁰

Complementing labor's defeat in *Janus*, *Epic Systems Corp. v. Lewis* held that the Federal Arbitration Act precludes the use of class actions for workplace disputes notwithstanding section 7 of the National Labor Relations Act.²⁴¹ Section 7 protects the right to workplace concerted activity. *Epic* hinged less on the priority of arbitration over litigation,²⁴² and more on the Court's prioritizing "individualized" over collective process.²⁴³ As such, it is well understood as a strike against organization as a resource for labor. *Epic* invites employers to use mandatory arbitration clauses to defeat workers' ability to engage in united activity via class actions.

By blocking two alternative channels of collective action by workers, *Janus* and *Epic* have a combined suppressive effect on their organizational power above and beyond each decision on its own. The whole, once more, is greater than the sum of its parts.

These cases show how the wealthy can use constitutional litigation to create a vicious cycle of decline and decay in redoubts of countervailing political power. This supplements their constitutional right to use resources to advance their own political agenda. *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, it is the same wealthy donors benefiting from campaign finance jurisprudence and funding constitutional litigation challenging agency fees. 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."²⁴⁴ That litigation arose against the backdrop of a concerted political campaign at the

²⁴⁰ *Id.* at 53.

²⁴¹ 138 S. Ct. 1612, 1619 (2018) (reasoning 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) (finding preemption of a state law rule that treated waivers of class action status as unconscionable, where only individualized arbitration was available).

²⁴² Pamela K. Bookman, *The Arbitration-Litigation Paradox*, 72 VAND. L. REV. 1119, 1152-53 (2019) (noting that *Epic* presented a "conflict of arbitration values").

²⁴³ *Epic*, 138 S. Ct. at 1622. The Court described individuation as one of "arbitration's fundamental attributes." *Id.*

²⁴⁴ Noam Scheiber & 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> [<https://perma.cc/N7WZ-KQ54>].

state legislative level for right-to-work laws.²⁴⁵ *Janus* in effect allowed the losers in state political battles a second, constitutional bite at the apple. Moreover, the downstream effect of *Janus* was a predictable decline in both political activity by union members²⁴⁶ and voter turnout for the Democratic party.²⁴⁷ 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.²⁴⁸ 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.²⁴⁹ *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.

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 other, less hierarchical ones) 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.

The Roberts Court has lowered legal barriers to religious activity in the public sphere and the exercise of religious authority over nonbelievers in

²⁴⁵ See generally Alexander Hertel-Fernandez, *Who Passes Business's "Model Bills"?* *Policy Capacity and Corporate Influence in U.S. State Politics*, 12 PERSPS. ON POL. 582, 584 (2014) (describing the role of ALEC in model legislation).

²⁴⁶ Cf. Patrick Flavin & Michael T. Hartney, *When Government Subsidizes Its Own: Collective Bargaining Laws as Agents of Political Mobilization*, 59 AM. J. POL. SCI. 896, 901–02 (2015) (showing that state-level mandatory collective bargaining laws increase teachers' political participation).

²⁴⁷ James Feigenbaum, Alexander Hertel-Fernandez & Vanessa Williamson, *From the Bargaining Table to the Ballot Box: Political Effects of Right to Work Laws* 27 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24259, 2018), https://www.nber.org/system/files/working_papers/w24259/w24259.pdf [<https://perma.cc/74VQ-LHS4>] (finding that "[i]n Presidential elections, Democratic vote share fell about 3.5 percentage points following the passage of RTW laws").

²⁴⁸ Paul Frymer & Jacob M. Grumbach, *Labor Unions and White Racial Politics*, 65 AM. J. POL. SCI. 225, 226 (2021).

²⁴⁹ *Id.*

several ways. Most modestly, it first bolstered a “ministerial” exception to antidiscrimination laws as applied to houses of worship.²⁵⁰ It then extended that exception to religiously affiliated schools.²⁵¹ Ordinarily, compliance with antidiscrimination norms and accommodation mandates will impose potentially large financial costs. As a result, these decisions create a straightforward subsidy for covered religious entities that secular analogs do not receive. Applied to schools, nursing homes, and hospitals,²⁵² they also alter the character of services available to the public at large—even if they 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.²⁵³ At first blush, it would seem that these opinions 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 in care.²⁵⁴ A Catholic charity was excluded from this program because it declined to work with same-sex

²⁵⁰ See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190–91 (2012) (finding ministerial exception under the First Amendment covers “a commissioned minister”).

²⁵¹ *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”).

²⁵² Courts of appeals had applied the ministerial exception to such facilities before *Hosanna-Tabor*. See, e.g., *Shaliesabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 310 (4th Cir. 2004) (nursing home); *Scharon v. St. Luke’s Episcopal Presbyterian Hosps.*, 929 F.2d 360, 362–63 (8th Cir. 1991) (church-affiliated hospital).

²⁵³ *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. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2257 (2020) (invalidating a Montana “no-aid provision” barring financial aid to a religious school 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” (quoting *Trinity Lutheran*, 137 S. Ct. at 2023)); *Carson ex rel. O. C. v. Makin*, 142 S. Ct. 1987, 1998 (2022) (invalidating a state program that “pays tuition for certain students at private schools—so long as the schools are not religious. That is discrimination against religion”).

²⁵⁴ 141 S. Ct. 1868, 1875 (2021).

families.²⁵⁵ 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.²⁵⁶ Under that precedent, *Employment Division, Department of Human Resources v. Smith* held that “the right of free exercise 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.²⁵⁷ A “compelling interest” test, *Smith* concluded, would be “courting anarchy” in a religiously pluralistic society.²⁵⁸

In ruling for the Catholic charity, a majority of the Court declined to overrule *Smith*, even though some of the concurring opinions planted seeds for the case’s unraveling.²⁵⁹ Quoting *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 been made available to a religious entity, strict scrutiny would apply.²⁶⁰ Philadelphia’s law failed that test.²⁶¹

Fulton offers religious organizations a powerful subsidy to enter the public sphere in the form of a distinctive immunity from regulation. 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—a suggestion that would congeal into law the following Term.²⁶² *Fulton* hence went beyond the “equal standing” norm reflected in earlier decisions. It also vested 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—

²⁵⁵ *Id.* at 1875–76.

²⁵⁶ *Id.* at 1876.

²⁵⁷ 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)).

²⁵⁸ *Id.* at 888.

²⁵⁹ Justices Alito, Thomas, and Gorsuch would have overruled *Smith*. *Fulton*, 141 S. Ct. at 1883 (Alito, J., concurring in the judgment).

²⁶⁰ *Id.* at 1877–82 (majority opinion) (quoting *Smith*, 494 U.S. at 884). 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 1878–79. 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.* at 1879 (quoting *Smith*, 494 U.S. at 884).

²⁶¹ *Id.* at 1881–82.

²⁶² *Carson ex rel. O. C. v. Makin*, 142 S. Ct. 1987, 1998 (2022).

already face “disparities and double standards” within the system.²⁶³ “[F]amily acceptance” plays a critical role in modulating those harms,²⁶⁴ but it 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.²⁶⁵ This in effect creates a right for religious organizations to impose negative externalities on others in the public sphere. The state is disabled from regulation meant to prevent those externalities.

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. Of course, not all religious groups are animated by beliefs that justify the imposition of costs on third parties, such as LGBTQ children or same-sex couples. Many religious communities view the imposition of such costs as abhorrent.²⁶⁶ Those groups do not benefit from the religious liberty right created in *Fulton*. Indeed, they cannot even look to government to regulate in ways that reflect their moral views: The First Amendment, as interpreted by the Roberts Courts, protects the interests of discriminatory religious groups while limiting the ability of other groups to advance their moral views by lobbying for new legislative action. 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 the negative externalities one produces.

The kind of religious liberty recognized in *Fulton* is also very different from the claims typically made on behalf of religious organizations prior to *Smith*. The latter tended to be on behalf of minority, somewhat socially marginalized faiths that sought some social or cultural space of their own.²⁶⁷ In contrast, today’s claims are necessarily outward looking. They involve an exercise of dominion by a religious group over the public sphere and the

²⁶³ Adam McCormick, Kathryn Schmidt & Samuel R. Terrazas, *Foster Family Acceptance: Understanding the Role of Foster Family Acceptance in the Lives of LGBTQ Youth*, 61 CHILD. & YOUTH SERVS. REV. 69, 69, 71 (2016).

²⁶⁴ *Id.* at 73.

²⁶⁵ 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).

²⁶⁶ David Masci & Michael Lipka, *Where Christian Churches, Other Religions Stand on Gay Marriage*, PEW RSCH. CTR. (Dec. 21, 2015), <https://www.pewresearch.org/fact-tank/2015/12/21/where-christian-churches-stand-on-gay-marriage/> [https://perma.cc/6Y7Z-AVQG].

²⁶⁷ *See, e.g.*, *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990) (Native American Church); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Amish); *United States v. Lee*, 455 U.S. 252 (1982) (Amish); *Sherbert v. Verner*, 374 U.S. 398 (1963) (Seventh-Day Adventist).

public purse. They are hence most valuable for religious organizations that seek “to convince the country that their moral views describe the correct way to live . . . for everyone.”²⁶⁸ Today, 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 also seems likely that such groups will also be more, rather than less, hierarchical and authoritarian than other secular or sectarian organizations. Without overstating the matter, there is a plausible basis to think that the Roberts Court’s vision of religious liberty will empower that part of the faith community in America least sympathetic to broad and inclusive norms of democracy.

The religious bodies most likely to benefit from recent constitutional rulings on religious liberty tend to be socially conservative churches sympathetic to neoliberal policies and hostile to redistribution. Historian Kevin Kruse has indeed observed that the “postwar revolution in America’s religious identity” was led by “corporate titans [who] enlisted conservative clergymen in an effort . . . to defeat . . . Franklin D. Roosevelt’s New Deal.”²⁶⁹ Similarly, the groups subsidized by the Roberts Court’s account of religious liberty tend to be “libertarian” on economic questions.²⁷⁰ It was only in the 1990s that strands of the American Protestant movement started to contend that “religious freedom . . . demands a radical *intolerance* vis-à-vis the non-normative, that is, immoral expression of sexuality.”²⁷¹

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 “[i]t is not merely that white dominance is challenged by demographic change, but that white *Christian* America is in decline.”²⁷²

²⁶⁸ Cathleen Kaveny, *The Ironies of the New Religious Liberty Litigation*, 149 DAEDALUS 72, 74 (2020).

²⁶⁹ KEVIN M. KRUSE, *ONE NATION UNDER GOD: HOW CORPORATE AMERICA INVENTED CHRISTIAN AMERICA* xiv (2015); *see also* DANIEL K. WILLIAMS, *GOD’S OWN PARTY: THE MAKING OF THE CHRISTIAN RIGHT* 9 (2010) (tracing the connection between evangelical groups and conservative positions in general to the 1950s).

²⁷⁰ KRUSE, *supra* note 269, at 293 (defining the twentieth-century movement as one of “Christian libertarians”).

²⁷¹ MELINDA COOPER, *FAMILY VALUES: BETWEEN NEOLIBERALISM AND THE NEW SOCIAL CONSERVATISM* 291 (2017) (emphasis in original).

²⁷² JARDINA, *WHITE IDENTITY POLITICS*, *supra* note 137, at 106.

Similarly, pollster Robert Jones reports tight correlation between “white Christian identity” and “racist and racially resentful attitudes.”²⁷³ Legal scholars Amanda Hollis-Brusky and Joshua Wilson have also documented an emerging Christian identity as “last defenders of freedom . . . blending aggressive anti-communism, . . . racialized anxiety, and conservative Christianity.”²⁷⁴

The Court to date seems unlikely to create a constitutional exception to race discrimination bans under the Free Exercise Clause. Nevertheless, *Fulton* and its progeny represent a triumphal vindication of a social formation closely tied to racial resentment. In this regard, it is telling that the one recent instance in which the Roberts Court rejected a claim of religious discrimination sounding in constitutional terms was one in which the claimants were Muslim, practitioners of a religion who stood firmly outside—and likely were perceived by many as adverse to—white or Christian identity.²⁷⁵

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 (and which religious traditions are privileged). 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.

* * *

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 identity and neoliberal interests. These decisions exacerbate the sociocultural and economic forces now bearing down on democracy. They give an advantage to political formations that are more likely to exploit the Constitution’s immanent potentiality for minority rule.

²⁷³ ROBERT P. JONES, WHITE TOO LONG: THE LEGACY OF WHITE SUPREMACY IN AMERICAN CHRISTIANITY 149 (2020).

²⁷⁴ AMANDA HOLLIS-BRUSKY & JOSHUA C. WILSON, SEPARATE BUT FAITHFUL: THE CHRISTIAN RIGHT’S RADICAL STRUGGLE TO TRANSFORM LAW AND LEGAL CULTURE 27 (2020).

²⁷⁵ 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 result from a justification independent of unconstitutional grounds”). The travel-ban plaintiffs lost (despite evidence of animus) because the government could hypothesize a nondiscriminatory 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.

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.”²⁷⁶ This follows from the “‘personal right[.]’ to be treated with equal dignity and respect.”²⁷⁷ As a result, “strict scrutiny must be applied to any admissions program using racial categories or classifications.”²⁷⁸ On its face, therefore, the constitutional law of racial equality seems to celebrate—not repudiate—the vision of a community of equals necessary to democracy. Indeed, it purports 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.²⁷⁹ On paper, therefore, 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 in practice, a constitutional command of colorblindness is consistent with the empirical claims and political objectives of white political identity. This is, perhaps, not as surprising as it might first seem. While the rhetoric of colorblindness is often traced back to the 1890s,²⁸⁰ its contemporary iteration emerged only in the 1970s out of a “conception of group dynamics in the United States in which racial hierarchy had ceased to operate.”²⁸¹ Nevertheless, in the same period, “grassroots political actors consciously pursued legal strategies to fight [school] integration from the ground up.”²⁸² My argument here is not simply the genealogical one that colorblindness emerges as a counter to calls for racial integration. It is that there are historical and contemporary points of convergence between the

²⁷⁶ *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 730 (2007) (plurality opinion) (emphasis added) (quoting *Miller v. Johnson*, 515 U.S. 900, 911 (1995)).

²⁷⁷ *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989) (quoting *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948)).

²⁷⁸ *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 310 (2013).

²⁷⁹ See *supra* text accompanying notes 126–140.

²⁸⁰ 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) (Harlan, J., dissenting). 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.*

²⁸¹ Ian F. Haney López, “*A Nation of Minorities*”: Race, Ethnicity, and Reactionary Colorblindness, 59 STAN. L. REV. 985, 1034–36 (2007).

²⁸² Ariela Gross, *A Grassroots History of Colorblind Conservative Constitutionalism*, 44 LAW & SOC. INQUIRY 58, 59 (2019).

doctrinal formulation of colorblindness constitutionalism and the contemporary, ascendant form of white political identity quite aside from genealogy.

Three such linkages deserve 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 been 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. It has not done so when recognition of such interests would disrupt that status quo. Third, colorblind constitutionalism 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, those who endorse the white political identity described in Part II can actively leverage that norm to advance their policy objectives—for example, those related to the allocation of educational resources or governmental funding. This claim is distinct from the leading ethical and analytic critiques launched to date against colorblindness.²⁸³ The latter offer forceful accounts of how colorblindness fails to account for racial discrimination or suffers from internal tensions.²⁸⁴ My narrower aim here is to identify correspondences in presuppositions 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.”²⁸⁵ Unsurprisingly, whites tend to be “much less likely to perceive bias and discrimination against blacks than is the case

²⁸³ The leading critique is Neil Gotanda, *A Critique of “Our Constitution in Color-Blind”*, 44 STAN. L. REV. 1, 68 (1991), which argues that colorblindness is “inadequate to deal with today’s racially stratified, culturally diverse, and economically divided nation.”

²⁸⁴ Powerful analytic critiques include David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99, 100, which suggests that “a principle prohibiting accurate racial generalizations has many of the same characteristics as affirmative action” such that if “accurate racial generalizations are unconstitutional [then] failure to engage in affirmative action may also sometimes be unconstitutional,” and Benjamin Eidelson, *Respect, Individualism, and Colorblindness*, 129 YALE L.J. 1600, 1606 (2020), which argues that “a commitment to treating people as individuals does not necessarily require inattention to race, as even opponents of colorblindness have sometimes supposed.”

²⁸⁵ JARDINA, WHITE IDENTITY POLITICS, *supra* note 137, at 145.

among blacks themselves,”²⁸⁶ and more than half of white people believe discrimination exists against whites.²⁸⁷ Drawing on survey data, Jardina has demonstrated that a political “white consciousness” is “significantly linked” to the belief that whites frequently experience discrimination. It is also unrelated to beliefs about the extent of discrimination against minorities.²⁸⁸ She also has found that more powerful in-group preferences among whites tend to be associated with a concern about demographic change at the national level, and particularly a worry that whites are likely soon to become a minority in the United States.²⁸⁹

Other scholars have underscored contemporaneous “moral panics” in the media about “random black-on-white assaults” that have gained currency despite an absence of empirical foundations.²⁹⁰ All this evidence suggests an emerging understanding of white identity as primarily inward-facing and defensive. It is a political identity preoccupied with the preservation of an ethnic identity, not the derogation of another, at a moment it is under attack.²⁹¹

The central idea here of white vulnerability is anticipated in the logic and language of Supreme Court opinions dating back to the 1980s concerning affirmative action. Obviously, this is a policy question that acutely raises the question of which social groups are most likely to face discrimination. This worry about white vulnerability 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

²⁸⁶ Frank Newport, *American Attitudes and Race*, GALLUP (June 17, 2020), <https://news.gallup.com/opinion/polling-matters/312590/american-attitudes-race.aspx> [<https://perma.cc/2P4B-RVWP>].

²⁸⁷ 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> [<https://perma.cc/JTS3-ZVJ4>].

²⁸⁸ JARDINA, WHITE IDENTITY POLITICS, *supra* note 137, at 145–46 & tbl.5.2.

²⁸⁹ *Id.* at 179–86; Maureen A. Craig & Jennifer A. Richeson, *More Diverse Yet Less Tolerant? How the Increasingly Diverse Racial Landscape Affects White Americans’ Racial Attitudes*, 40 PERSONALITY & SOC. PSYCH. BULL. 750, 753–74 (2014).

²⁹⁰ See Mike King, *The ‘Knockout Game’: Moral Panic and the Politics of White Victimhood*, 56 RACE & CLASS 85, 85, 88–90 (2015).

²⁹¹ See Maureen A. Craig, Julian M. Rucker & 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 Jonathan 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”).

rob the “white” plaintiff (expressly and repeatedly identified as such) of material advantage that by right was theirs.²⁹² Eight years later, Justice Scalia drew attention to the “losers” from affirmative action. These losers, he observed, are the “predominantly unknown, unaffluent, unorganized” white men who suffered “injustice” at the Court’s hands.²⁹³ Indeed, through the 1980s, the “principal argument” against affirmative action offered in Supreme Court briefs was “that they violate the rights of innocent white victims.”²⁹⁴ These arguments emerged 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.”²⁹⁵ That is, when Justices such as Rehnquist or Scalia adopted the language of “White victimhood,”²⁹⁶ they were in effect acting as norm entrepreneurs—innovating and introducing new ideas into the public sphere that would be taken up by interest groups outside the judiciary.

White political identity resonates with the doctrine in other ways. Most obviously, the majority of recent constitutional equality claims that prevail in the Supreme Court have been brought by white claimants.²⁹⁷ A superficial overview of the high court’s interventions, therefore, supports 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 when faced with a minority plaintiff. For instance, a (generally white) challenger of a racial gerrymander must show only that “his own district has been so gerrymandered,”²⁹⁸ 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.²⁹⁹ That is, (generally white) racial gerrymandering plaintiffs do not actually need to show a particularized harm to establish Article III standing. The

²⁹² *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 254 (1979) (Rehnquist, J., dissenting).

²⁹³ *Johnson v. Transp. Agency*, 480 U.S. 616, 677 (1987) (Scalia, J., dissenting).

²⁹⁴ Strauss, *supra* note 284, at 103.

²⁹⁵ Erinn Brooks, Kim Ebert & Tyler Flockhart, *Examining the Reach of Color Blindness: Ideological Flexibility, Frame Alignment, and Legitimacy Among Racially Conservative and Extremist Organizations*, 58 SOCIO. Q. 254, 256 (2017).

²⁹⁶ *Id.*

²⁹⁷ See Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1281 (2011).

²⁹⁸ *Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018) (citing *United States v. Hays*, 515 U.S. 737, 744–45 (1995)).

²⁹⁹ Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276, 2277 (1998) (noting that the Court does not require evidence of either vote denial or dilution).

handling of Article III standing and jurisdiction questions in affirmative action cases evinces a similar dialing down of threshold rules.³⁰⁰ But no analogous softening can be observed in cases filed by minority claimants. This selective downward discounting of jurisdictional constraints suggests that the Court sees the problem of *white* victimhood as either more frequent or more serious than other constitutional harms such as discrimination against racial minorities.

In rhetoric, doctrinal structure, and outcome, therefore, the constitutional jurisprudence of colorblindness tracks a presupposition of greater white vulnerability to societal 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.³⁰¹ That identity is hence linked to support for “policies that help to maintain their group’s power and privilege.”³⁰² Jardina tests and confirms this linkage in respect to social welfare spending, legacy admissions, and trade policy.³⁰³ I suggest here that the same concern manifests in Equal Protection doctrine. It takes the form of an inconsistent judicial treatment of countervailing state interests. This variation can be manipulated 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 political agenda.³⁰⁴ Education, this suggests, is perceived as a scarce resource, one that is all the more valuable given declining intergenerational social mobility.³⁰⁵ Funding for primary and secondary education, however, is highly localized in the United States.³⁰⁶ In

³⁰⁰ For a devastating account of justiciability problems in the *University of Texas* litigation, see generally 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 v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 14-981) (struggling with the standing question).

³⁰¹ JARDINA, *WHITE IDENTITY POLITICS*, *supra* note 137, at 141-42.

³⁰² *Id.* at 214.

³⁰³ *Id.* at 211-15.

³⁰⁴ THOMAS BYRNE EDSALL WITH MARY D. EDSALL, *CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS* 95-97 (1991).

³⁰⁵ See *supra* notes 112-115 and accompanying text.

³⁰⁶ Douglas S. Massey, *Still the Linchpin: Segregation and Stratification in the USA*, 12 *RACE & SOC. PROBS.* 1, 5 (2020).

a context of racial segregation and hyper-segregation,³⁰⁷ this leads to large funding gaps between majority-white and majority-nonwhite school districts.³⁰⁸ 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.”³⁰⁹ Residential segregation by race and wealth interacts with localized funding so as to enable “students in predominantly white school districts to hoard the best educational opportunities.”³¹⁰ 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.³¹¹

Equal Protection doctrine is not neutral with respect to the value of local control. Rather, it regards that interest in two quite different ways depending on context. 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, however, the Court has found a constitutional problem when the same kind of local control is exercised to redistribute schooling resources to racial minorities (and hence away from whites).

So, in *Milliken v. Bradley*, the Court rejected an interdistrict remedy for historical segregation for the city of Detroit. It reasoned 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.”³¹² 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 norm of local control could be invoked as a justification for (marginally) race-conscious actions aimed at integrating a

³⁰⁷ *Id.* at 1 (“Although average levels of black–white segregation have moderated over the ensuing decades, the declines have been uneven and black segregation has by no means disappeared. Indeed, in some metropolitan areas, it remains extreme . . .”).

³⁰⁸ *Id.* at 5–6; 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> [https://perma.cc/3LZ9-92NW] (“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 . . .”).

³⁰⁹ Massey, *supra* note 306, at 1 (citing CHARLES TILLY, DURABLE INEQUALITY 15–16 (1998)).

³¹⁰ Erika K. Wilson, *Monopolizing Whiteness*, 134 HARV. L. REV. 2382, 2386 (2021).

³¹¹ JARDINA, WHITE IDENTITY POLITICS, *supra* note 137, at 214; see KATHLEEN BELEW, BRINGING THE WAR HOME: THE WHITE POWER MOVEMENT AND PARAMILITARY AMERICA 9–10 (2018) (drawing this link).

³¹² 418 U.S. 717, 741 (1974).

school district.³¹³ Local control did not count as a compelling state interest in positive efforts to desegregate—but did provide a persuasive basis to limit integration.

While constitutional 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 weight to a postwar 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.”³¹⁴

As in the religious liberty context, the prospect of entrenchment through constitutional law creates an incentive for political mobilization around white identity. In effect, the Constitution provides a subsidy to white communities that use district lines to keep Blacks out, while hindering white communities that seek to integrate. Contrast this with how the Court has responded to Black mobilization: By invalidating municipal minority set-aside programs, Justices have expressly disparaged ethnically informed rent-seeking as repugnant to the Equal Protection Clause.³¹⁵

Notice the political effect of these doctrinal details: Mobilizing for in-group benefits is unconstitutional when pursued by Blacks but shielded by the Equal Protection Clause from challenge when achieved by whites, at least for the purpose of advancing in-group interests. Viewed in the round, therefore, this doctrine elicits and rewards white voters’ identarian claims. It creates an incentive for them to mobilize politically around terms of white political identity. It thereby kindles a concern with federal judicial appointments as a means of preserving the differential access to resources. The Court’s role here is dynamic and arguably self-serving—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.

³¹³ See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 744 (2007) (plurality opinion) (rejecting deference to local decisions as “fundamentally at odds with our equal protection jurisprudence,” without citing *Milliken* (quoting *Johnson v. California*, 543 U.S. 499, 506 n.1 (2005))).

³¹⁴ Rogers M. Smith & Desmond King, *Racial Reparations Against White Protectionism: America’s New Racial Politics*, 6 J. RACE, ETHNICITY, & POL. 82, 85 (2021).

³¹⁵ See, e.g., *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 524 (1989) (Scalia, J., concurring in the judgment) (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”).

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 promote the idea that discrimination against racial minorities is a thing of the past, that its effects do not linger, and that past acts of discrimination cannot lawfully justify claims by racial minorities for greater access to resources today. This understanding of history's relevance (or lack thereof) 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."³¹⁶ Her empirical study does not examine the extent to which white identity is associated with beliefs about the historical timing of racism more generally. Yet Jardina's data about beliefs about the vulnerability of whites qua ethnic group, the present frequency of antiwhite 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.³¹⁷ The data suggest that white political identity is correlated with a belief that anti-Black animus has not only abated, but is also now less morally significant than white disadvantage.³¹⁸

Across several lines of statutory and constitutional doctrine, the Roberts Court has endorsed this diagnosis. It 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 its Voting Rights Act decision in *Abbott v. Perez*.³¹⁹ In developing districting plans, the Texas legislature had acted with discriminatory intent just two years before the districting decision being challenged.³²⁰ The Court, however, did not merely find this irrelevant, but wrote more sweepingly that "[p]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful."³²¹ In school desegregation cases, the Court also has become increasingly reluctant over time to see remedial action as anything other than "temporary and used only to overcome the widespread resistance to the

³¹⁶ JARDINA, WHITE IDENTITY POLITICS, *supra* note 137, at 137.

³¹⁷ See *supra* notes 137–140 and accompanying text.

³¹⁸ 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 & Alexandra Gibbons, *Why Are States Banning Critical Race Theory?*, BROOKINGS (Nov. 21, 2021), <https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory/> [<https://perma.cc/MM3C-DKVL>].

³¹⁹ 138 S. Ct. 2305 (2018).

³²⁰ *Id.* at 2313.

³²¹ *Id.* at 2324 (quoting *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980)).

dictates of the Constitution.”³²² 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.”³²³

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 suppressed.³²⁴ The overall effect is to assert a “sharp break from the past” and to “reject asserted connections between current inequalities and previous eras of explicit state-sanctioned discrimination.”³²⁵ 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, an understanding that is central to white political identity.³²⁶

* * *

The doctrinal structure of colorblindness constitutionalism has powerful links to the emergent political understanding of white identity. These linkages mean that 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 from the Court. In contrast, functionally parallel Black mobilization is cast as pro tanto constitutionally 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.

³²² See *Missouri v. Jenkins*, 515 U.S. 70, 125 (1995) (Thomas, J., concurring).

³²³ *McCleskey v. Kemp*, 481 U.S. 279, 298 n.20 (1987).

³²⁴ For an excellent summary of recent studies, see Mario L. Small & Devah Pager, *Sociological Perspectives on Racial Discrimination*, 34 J. ECON. PERSPS. 49, 53–62 (2020).

³²⁵ MARK GOLUB, IS RACIAL EQUALITY UNCONSTITUTIONAL? 42 (2018).

³²⁶ It is also at odds with the more expansive view of relevant history taken in the majority opinions in *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022), and *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022). The way in which the Roberts Court toggles between different uses of historical evidence is a topic meriting separate treatment.

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.”³²⁷ This motivated them to ask federal judges to take “a skeptical view of political lockups.”³²⁸

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.³²⁹ Rather than disallowing lockups as described by Issacharoff and Pildes, the Justices have fashioned a roadmap for personnel and partisan entrenchment both through election law and beyond. They have created, not dissolved, political lockups. This widens, rather than mitigates, the inherent tensions and gaps between the bare lineaments of Constitution’s original design and its prodemocratic orientation.³³⁰ Once a political movement gains political power but anticipates majority opposition and electoral defeat, constitutional law generated by the Roberts Court increasingly 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. Because this is well-trodden ground, I cover it quickly. Then I consider nonelectoral 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 legislative 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;³³¹ interpreting section 2 of the Voting Rights Act narrowly to exclude exclusionary modifications of

³²⁷ Issacharoff & Pildes, *supra* note 72, at 646.

³²⁸ *Id.* at 648.

³²⁹ 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).

³³⁰ See *supra* Section II.B.

³³¹ Compare *Crawford v. Marion Cnty. Election Bd.*, 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), with *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966) (invalidating poll tax on state franchise absent evidence of invidious discrimination).

election rules;³³² and construing the Help America Vote Act to facilitate, rather than impede, disenfranchising voter-rolls purges.³³³ All these lines of cases have 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 shows that partisan bias in the drawing of district lines diminishes both the number and quality of candidates.³³⁴ In *Rucho v. Common Cause*, the Court held that challenges to partisan gerrymanders presented a nonjusticiable political question.³³⁵ *Rucho* focused on Congress's authority to "make or alter" rules concerning the "'Times, Places and Manner of holding Elections' for Members of Congress."³³⁶ In contrast to this explicit congressional authority, the Court found "no suggestion that the federal courts had a role to play" in determining district lines.³³⁷ Supplementing this

³³² 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 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 statutory 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.

³³³ *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 & Elizabeth G. Porter, *The Elephant in the Room: Intentional Voter Suppression*, 2018 SUP. CT. REV. 213, 216 (2018), which notes that "[o]n 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."

³³⁴ See Nicholas O. Stephanopoulos & Christopher Warshaw, *The Impact of Partisan Gerrymandering on Political Parties*, 45 LEGIS. STUD. Q. 609, 613–15 (2020).

³³⁵ 139 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.>").

³³⁶ *Id.* at 2495 (quoting U.S. CONST. art. I, § 4, cl. 1).

³³⁷ *Id.* at 2488. 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 called "dormant Commerce Clause" jurisprudence. *Tenn. 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

textual argument from Article I, the Court made an institutional-competence point. This hinged on “political judgment[s] about how much representation particular political parties *deserve* . . . as a matter of fairness” that partisan gerrymandering claims would require.³³⁸ To parry the objection 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.”³³⁹

Rucho has come under heavy academic fire for its empirical and analytic foundations.³⁴⁰ 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 lockups via gerrymanders. The Elections Clause, to begin with, applies only to federal elections. It therefore does not enable Congress to alter state legislative districts.³⁴¹ Congress might, however, invoke its authority under the Fourteenth Amendment to regulate gerrymandered state legislative districts on the theory that these districts impinge upon a right incorporated against the states pursuant to the Due Process Clause. For

that “Congress has left it to the courts to formulate the rules” to preserve “the free flow of interstate commerce.” *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2090 (2018) (quoting *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 770 (1945)). 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.

³³⁸ *Rucho*, 139 S. Ct. at 2499.

³³⁹ *Id.* at 2507.

³⁴⁰ See, e.g., Stephanopoulos, *supra* note 11, 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 laws”).

³⁴¹ One consequence of this is that Congress has no direct authority under the Elections 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.

example, one commentator has recently suggested that the right to assemble under the First Amendment might play exactly this function.³⁴²

But *Rucho* impedes this pathway. Despite its seeming recognition that partisan gerrymandering presents an obstacle 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”³⁴³ by talking of “*constitutional* political gerrymandering.”³⁴⁴ This means that states can argue that any federal action in respect to state legislative gerrymanders lies 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 *constitutionally excessive* partisan motives in order to demonstrate that legislation pursuant to Section 5 of the Fourteenth Amendment is “congruen[t] and proportional[.]” as the present doctrine requires.³⁴⁵

Compounding the difficulty that Congress would face, the Court has also created a “presumption of legislative good faith” that arguably requires factual ambiguities to be resolved in favor of the state.³⁴⁶ And to make matters worse still, the Court has declined to say how much political consideration is sufficient—the basis of *Rucho*’s political question holding. So, it would be very difficult, or perhaps even impossible, for Congress to know what kind of a record to assemble. In sum, there would be an almost irremediable constitutional fragility built into any federal action meant to ensure fair and unbiased state legislative districting.

Even as to federal elections, Congress’s power might be more constrained than first appears. The Court has never addressed whether the anticommandeering rule that bars “direct orders to the governments of the States”³⁴⁷ applies to Elections Clause-related legislation.³⁴⁸ 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

³⁴² See Nikolas Bowie, *The Constitutional Right of Self-Government*, 130 YALE L.J. 1652, 1740 (2021) (noting an example of a state court exercising this power under its own constitution).

³⁴³ Hasen, *supra* note 340, at 61.

³⁴⁴ *Rucho*, 139 S. Ct. at 2497, 2499 (emphasis added).

³⁴⁵ *City of Boerne v. Flores*, 521 U.S. 507, 519–20 (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 also *Coleman v. Ct. of Appeals of Md.*, 566 U.S. 30, 43–44 (2012) (invalidating part of the Family and Medical Leave Act on this basis).

³⁴⁶ *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018).

³⁴⁷ *Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018).

³⁴⁸ See Rebecca Aviel, *Remedial Commandeering*, 54 U.C. DAVIS L. REV. 1999, 2043 (2021) (noting that certain prior acts that have been enacted under the Elections Clause are “filled with direct instructions to state officials”); Stephanopoulos, *supra* note 11, at 154 (exploring this issue).

state and local elections.”³⁴⁹ 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.”³⁵⁰ 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.”³⁵¹ Although dicta, these suggestions intimate future judicial resistance to the use of the Elections Clause as a remedy against disenfranchising, antidemocratic 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, in 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.³⁵² In a 2015 dissenting opinion, Chief Justice Roberts—*Rucho*’s author—wrote that state legislative power to set rules under the Elections Clause was nontransferable, such that independent redistricting commissions set by referendum were unconstitutional.³⁵³ The Court, as of this writing, has further agreed to hear a case in which the scope of exclusive state legislative authority to set election rules is teed up.³⁵⁴ 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.

³⁴⁹ *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 41 (2013) (Alito, J., dissenting).

³⁵⁰ *Id.*

³⁵¹ *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) (quoting U.S. CONST. art. II, § 1, cl. 2).

³⁵² *Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732, 733 (2021) (Thomas, J., dissenting) (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 (Alito, J., dissenting) (agreeing with Justice Thomas’s approach); *Moore v. Circosta*, 141 S. Ct. 46, 46–47 (2020) (Gorsuch, J., dissenting) (supporting staying a nonlegislative change to election rules).

³⁵³ *See Ariz. State Leg. v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2677–92 (2015) (Roberts, C.J., dissenting); *see also* Stephanopoulos, *supra* note 11, 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”).

³⁵⁴ *Harper v. Hall*, 868 S.E.2d 499, 525 (N.C. 2022), *cert. granted sub nom. Moore v. Harper*, 142 S. Ct. 2901 (2022) (mem.).

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 being ruled and ruling in turn depends not just on competitive elections. It also requires institutions to identify and punish self-dealing by high officeholders. Since the 1870s, federal bodies such as the special counsel³⁵⁵ and the independent counsel³⁵⁶ have investigated financial crimes and the misuse of government power for partisan ends.³⁵⁷ These tools are practically important since the constitutional process of impeachment has become an “ineffective” and “highly politicized” channel.³⁵⁸

The Roberts Court has at best an ambiguous record in respect to nonelectoral protections for democratic rotation. The jurisprudence here echoes its approach to partisan gerrymandering—raising the costs of efficacious action while ostensibly leaving open politically unpalatable pathways. The effect is to preserve an appearance of a safety net for democratic rotation, albeit without there being anything much of substance in practice available.

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.³⁵⁹ These cases mark a sharp break from the more accommodating, functionalist approach taken to removal questions during the Rehnquist Court.³⁶⁰ To be sure, the Court has not yet explicitly overruled *Morrison v. Olson*, the 1988 precedent upholding the insulation of a statutory independent-counsel position from presidential control. So, some capacity for some insulation from presidential control still (nominally) exists. But it is difficult to see how Congress could create an investigative or prosecutorial position not subject to plenary White

³⁵⁵ See 28 C.F.R. §§ 600.1–10 (codifying special counsel regulations).

³⁵⁶ 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)).

³⁵⁷ See Donald C. Smaltz, *The Independent Counsel: A View from Inside*, 86 GEO. L.J. 2307, 2311 (1998).

³⁵⁸ Ginsburg et al., *supra* note 106, at 116.

³⁵⁹ *Collins v. Yellen*, 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” restriction); *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 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”).

³⁶⁰ See *Morrison v. Olson*, 487 U.S. 654, 686 (1988).

House control without running afoul of the Roberts Court's removal jurisprudence.

Of particular note is *Collins v. Yellen*, a 2021 decision concerning the Federal Housing Finance Authority, which rejected an argument that merely “‘modest restrictions’ on the President’s power” could be reconciled with the Constitution.³⁶¹ The increasingly inflexible and categorical nature of the removal power decisions—all the more striking given the doctrine’s lack of any meaningful textual support—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*.³⁶²

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.³⁶³ Legislative inquiries, however, are often more likely to arise during periods of divided government, when different parties control the White House and the legislative branch.³⁶⁴ The judicial process may also move slower than the electoral calendar. This means that the House of Representatives may well experience turnover (and possibly a concomitant change in partisan control)

³⁶¹ *Collins*, 141 S. Ct. at 1787 (quoting *Seila Law*, 140 S. Ct. at 2205). 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).

³⁶² 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 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., concurring) (“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. *See id.* at 1797 (Gorsuch, J., concurring in part) (criticizing the Court’s “novel and feeble substitute” of a remedy).

³⁶³ *See, e.g., Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2035 (2020) (rejecting position that presidents are immune from congressional subpoenas 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).

³⁶⁴ For empirical demonstrations of this point, see Douglas Kriner & Liam Schwartz, *Divided Government and Congressional Investigations*, 33 LEGIS. STUD. Q. 295, 305–06 (2008). *Accord* David C.W. Parker & Matthew Dull, *Divided We Quarrel: The Politics of Congressional Investigations, 1947–2004*, 34 LEGIS. STUD. Q. 319, 321–22 (2009) (revealing similar findings of increased investigatory activity during periods of divided government).

before a subpoena is resolved.³⁶⁵ 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, the Court's interventions respecting the nonelectoral safeguards of democratic rotation uncannily mirror those of its gerrymandering jurisprudence. The most effective adjuncts to democratic rule are disabled. Only fragile, likely futile pathways remain open. A cynical view of these decisions is that the Court is consciously 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 Justices in the majority were "[s]tealing this issue from the people."³⁶⁶ When Justice Kagan objected to the Court's narrowing of the Voting Rights Act, she condemned the way in which the Court strayed far from the law as originally enacted.³⁶⁷ The most sophisticated and generalized argument against judicial review in academic literature has focused on the specific costs and benefits, defined in terms of process and outcomes, in moving a specific rights-related decision from the legislature to the judiciary.³⁶⁸

In this Part, I aimed to show that this retail, case-specific critique is not the only—or even the most consequential—objection to judicial power to be had from the perspective of democracy. Instead of thinking about democracy in a piecemeal fashion and imagining that self-government is parceled out legislative crumb by legislative 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

³⁶⁵ For a similar critique, see Josh Chafetz, *Don't Be Fooled, Trump Is a 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>, which notes that “delays defeat the entire purpose of the subpoenas,” but that delays are endemic with judicial enforcement of subpoenas.

³⁶⁶ *Obergefell v. Hodges*, 576 U.S. 644, 687 (2015) (Roberts, C.J., dissenting).

³⁶⁷ *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2356 (2021) (Kagan, J., dissenting).

³⁶⁸ Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1375–76 (2006).

characteristics and behavior of the units taken individually,”³⁶⁹ 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 demands something else: It requires a contextual inquiry into the relationship between different lines of cases and the particular pressures experienced today by the democratic project.

From this system-level perspective, a clear tension emerges between the Roberts Court’s avowals of fidelity to democracy and the actual consequences of its decisions. The judicial interventions that I’ve discussed in this Article are fairly characterized as “counterdemocratic” because they all 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 popular organizing to egalitarian ends, and dismantling the institutional foundations of democratic rotation. Each of these lines of cases interacts with—and reinforces—a longstanding pressure on the project of maintaining a community of political equals and sustaining democratic rotation of personnel.

An *encasing* effect arises from these decisions in several ways. Some lines of cases—such as those creating political returns on property and white political identity—directly subsidize the forces that are now placing the greatest pressure on democracy. In contrast, decisions on the mechanics and substance of 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 sharpest resonance.

In many of these lines of cases, I have stressed, the significance of judicial interventions cannot be discerned by considering decisions in

³⁶⁹ 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).

isolation. Rather, their encasing consequences arise from the interaction of different decisions that alternatively create penalties and assign subsidies to competing political actors. Or their most important consequences from democracy arise from closing off some mechanisms while leaving other pathways open. Across the spectrum of cases analyzed here, I have also 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

This Article has set forth a new analytic lens for evaluating the relationship of federal judicial power and democracy. It is, to be clear, mainly a positive and not a normative intervention. In concluding, I want to elaborate on some of the normative threads of my argument. Specifically, I want to ask whether the counterdemocratic 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 takeaways 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 been to argue for “a commitment to grassroots contestation” and urges “attention to organizing, social movements, and collective resistance by everyday people.”³⁷⁰ 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.”³⁷¹ Consistent with their sobriquet, movement scholars look to grassroots stakeholders to unlock “potential to democratize our politics.”³⁷² They also argue that institutional change, such as “[e]lectoral reform is unlikely to mobilize a public,” and hence ought to be set to one side.³⁷³

There is no question that social movements are important to democratization projects. But it does not follow that attention to institutional

³⁷⁰ Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 843, 848 (2021).

³⁷¹ *Id.* at 852.

³⁷² *Id.* at 827.

³⁷³ Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 96 (2020).

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,³⁷⁴ had a particularly clear-eyed understanding of the mechanisms through which power was in practice flexed to defeat efforts at redistributive social change.³⁷⁵ My project here can be understood as an effort, consonant with that critical spirit, to grapple with the legal and constitutional impediments that confront the movements for democratic equality.

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.³⁷⁶ Scholars working in this vein do recognize the question of what “role” the Supreme Court has “in a democracy.”³⁷⁷ Their implicit answer seems to have a legalistic quality, linking the Court to the project of maintaining the rule of law. The leading work in this vein also focuses on a “democracy deficit” because the presidents and Senate majorities supportive of recent appointments have the backing of only numerical minorities.³⁷⁸

This Article’s analysis points toward another perspective on that project. It asks, that is, not whether particular decisions line up with popular preferences. It considers how judicial power in general 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

³⁷⁴ Abkar et al., *supra* note 370, at 846 (citing the Italian Marxist Antonio Gramsci).

³⁷⁵ See ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS 161 (Quentin Hoare & Geoffrey Nowell Smith eds., Lawrence & Wishart 1971) (1947) (developing the concept of “hegemony” to illuminate the maintenance of political control with relatively small amounts of violence).

³⁷⁶ 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, 2273–76 (2019) (reviewing RICHARD H. FALLON JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018)).

³⁷⁷ Daniel Epps & Ganesh Sitaraman, *Supreme Court Reform and American Democracy*, 130 YALE L.J. F. 821, 824 (2021).

³⁷⁸ *Id.* at 823.

more deeply, and is more tightly intricately into the case law, than generally recognized. The Court raises concerns about the health of our democracy not because specific decisions that it resolves are properly resolved by the people at large. Rather, it raises such concerns 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 counterdemocratic dynamics. The problem is emphatically not reducible to narrowing the gap between the Court's preferences and those of the median national voter.³⁷⁹ The Court matters not just because it takes specific policy questions out of the public's hand. It also matters because of the arbitrage role that it plays. This role is further nested within other, broader 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 deepen 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.

³⁷⁹ *Id.*

