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ELECTION LAW ORIGINALISM: THE SUPREME COURT'S ELITIST CONCEPTION OF DEMOCRACY

YASMIN DAWOOD*

INTRODUCTION

Election law faces significant, even unprecedented, challenges in our modern social media world. As Richard Hasen argues, these challenges include rapid technological innovation, false and misleading speech, foreign disinformation campaigns, the decline of accepted neutral arbiters of fact and truth, voter mistrust, information silos, and an increasingly hyper-partisan political climate.[1] Professor Hasen develops carefully crafted legal tools to respond to such challenges, including labeling and disclosure laws, but he is attentive to the fundamental dilemma that the cure can often be worse than the disease, and that regulations intended to address these serious problems may pose threats to democratic functioning itself.

Yet even the standard topics of election law—such as campaign finance, electoral redistricting, and voter qualification laws—are likewise facing a deeply uncertain future in large part due to the U.S. Supreme Court's recent decisions. This Essay addresses some of these issues at a macro level by focusing on the larger, conceptual questions at stake. In particular, it considers two inter-related questions. First: How should we conceptualize the role of the Supreme Court as an institution in these decisions? Second: What is the underlying conception of democracy that best elucidates the Court's major election law decisions in the last decade or so? While it is entirely possible that no such underlying

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1. *See* Richard L. Hasen, *Deep Fakes, Bots, and Siloed Justices: American Election Law in a "Post-Truth" World*, 64 ST. LOUIS U. L.J. (2020) (Richard J. Childress Memorial Lecture).

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conception is held by the justices,[2] we can consider the question objectively by evaluating the cases from an external perspective.[3]

To address these questions, this Essay proceeds in three parts. Part I analyzes the Supreme Court's recent election law decisions to determine if there is a consistent approach to the judicial function in supervising the electoral process. In recent years, the Court majority has become increasingly hostile to the regulation of campaign finance and has acted strenuously against measures meant to level the playing field.[4] This active intervention stands in notable contrast to its point blank refusal to intervene in partisan gerrymandering.[5] At the same time, the Court majority intervened to effectively end the preclearance protections under the Voting Rights Act despite the support these provisions had long enjoyed from Congress.[6] Is the Court, or at least the conservative majority, exiting the political thicket? Or is it deregulating the electoral process? Part I argues that the Supreme Court's role cannot be easily reduced to a single or consistent approach. It is a complex picture. The Court's intervention appears to be tactical and results-driven rather than being oriented by a particular theory of the judicial function in supervising the law of democracy.

Part II argues that instead of a consistent theory of the judicial function, the Court majority's recent election law opinions, when viewed from an external perspective, display a particular vision of democracy that is fundamentally elitist in its outlook. This elitist vision of democracy presents a significant challenge to the egalitarian conception of democracy that was evident in the Supreme Court's election law decisions in the decades following the civil rights era. The elitist approach also stands in marked contrast to the egalitarian approach to democracy that is evident in the dissenting opinions of the four liberal justices. It claims further that this elitist conception of democracy is a familiar one—it has certain continuities (and discontinuities) with theories of republicanism that existed at the time of the Founding. To illustrate these continuities, this Part excavates founding era themes from the Court's recent election law decisions.

Given the echo of founding era themes, Part III considers the role of originalism in current election law decisions. It concludes that neither the Court's decisions, nor the emerging elitist conception of democracy, fall within

2. We might also think that there ought not to be a grand theory of democracy that is guiding the Court. *See* Daniel H. Lowenstein, *The Supreme Court Has No Theory of Politics—And Be Thankful for Small Favors*, *in* THE U.S. SUPREME COURT AND THE ELECTORAL PROCESS 245 (David K. Ryden, ed., 2000).

3. In past work, I have addressed the Supreme Court's conceptions of democracy. *See e.g.* Yasmin Dawood, *Democracy, Power, and the Supreme Court: Campaign Finance Reform in Comparative Context*, 4 INTL. J. OF CONST. L. 269, 271 (2006) (arguing that judicial decisions on the electoral process are at base disputes among competing visions of democracy).

4. *See generally* Citizens United v. FEC, 558 U.S. 310 (2010).

5. Rucho v. Common Cause, 139 S. Ct. 2484, 2507 (2019).

6. Shelby Cty. v. Holder, 570 U.S. 529, 557 (2013).

originalism strictly understood. That being said, this Part suggests that some of the Court majority's arguments display an originalist orientation in which original meaning takes a preponderant weight in the analysis even if it does not compel the overall outcome.

In practical terms, this originalist orientation has significant implications for future election law cases because it means that, at least for some issues, the founding era is serving as an implicit baseline for the conservative wing of the Court. Part III identifies three ways in which the Court majority's originalist orientation matters: first, non-originalist precedents would likely carry less precedential weight; second, election law federalism would likely be interpreted in a manner hostile to egalitarian ideals; and third, electoral reform efforts could be thwarted. In future cases, the Supreme Court majority's originalist orientation will likely further erode the egalitarian approach to democracy, thereby rendering democratic self-government less inclusive, less equal, and less responsive to the people.

I. THE JUDICIAL FUNCTION IN THE LAW OF DEMOCRACY

The question of what, if anything, courts ought to do in the supervision of democracy has long been the subject of considerable scholarly debate.[7] In the last decade, however, the Supreme Court has implicitly abandoned many of the theories used to describe its decisions of the preceding decades. John Hart Ely's influential participation-reinforcing justification of judicial review,[8] while reflected in the malapportionment cases,[9] was completely absent in the Court's recent partisan gerrymandering decision.[10] Theories of racial equality were evident in the racial vote dilution cases,[11] but were considerably muted in a recent case that eliminated a key provision of the Voting Rights Act.[12] Arguments about preventing the distorting effects of vast wealth on the electoral process were relied upon in prior campaign finance cases,[13] but were roundly rejected in recent cases.[14] The conspicuous absence of these longstanding

7. For a summary, see Yasmin Dawood, *The Antidomination Model and the Judicial Oversight of Democracy*, 96 GEO. L.J. 1411, 1420–27 (2008).

8. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 181 (1981).

9. Baker v. Carr, 369 U.S. 186, 192 (1962); Wesberry v. Sanders, 376 U.S. 1, 4 (1964); Reynolds v. Sims, 377 U.S. 533, 563 (1964).

10. *See generally* Rucho v. Common Cause, 139 S. Ct. 2484 (2019). For an elaboration of this argument, see Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, SUP. CT. REV. (forthcoming).

11. White v. Regester, 412 U.S. 755, 767 (1973); Rogers v. Lodge, 458 U.S. 613, 617 (1982).

12. Shelby Cty. v. Holder, 570 U.S. 529, 535 (2013).

13. FEC v. Mass. Citizens for Life, 479 U.S. 238, 257 (1986); Austin v. Mich. State Chamber of Comm., 494 U.S. 652, 653 (1990); McConnell v. FEC, 540 U.S. 93, 93 (2003).

14. Citizens United v. FEC, 558 U.S. 310, 354 (2010); McCutcheon v. FEC, 572 U.S. 185, 229 (2014).

theories and justifications marks an extraordinary turn in the Supreme Court's election law jurisprudence.

The question of the Supreme Court's role was central to the Court's most recent election law decision, *Rucho v. Common Cause*,[15] in which a five to four majority of the Court held that partisan gerrymandering is a nonjusticiable political question.[16] At issue in *Rucho*, and its companion case *Lamone v. Benisek*, were the North Carolina and Maryland congressional districting maps, which had been struck down by lower courts as unconstitutional partisan gerrymanders.[17] Writing for the majority, Chief Justice Roberts noted that the districting plans were "highly partisan, by any measure"[18] and that the record contained evidence that the maps were drawn deliberately to entrench partisan advantage.[19] For the majority, the central issue was whether the problem of partisan gerrymandering amounted to "claims of *legal* right, resolvable according to *legal* principles, or political questions that must find their resolution elsewhere."[20] The Court concluded that "partisan gerrymandering claims present political questions beyond the reach of the federal courts"[21] and moreover, that 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."[22]

The Court majority's first set of arguments concerned the Elections Clause, and here the majority essentially reproduced Justice Frankfurter's analysis in *Colegrove v Green*.[23] In *Colegrove*, a four to three plurality of the Court held that the malapportionment of state legislatures was not justiciable.[24] Drawing on an analysis of the Elections Clause in Article I Section 4 of the Constitution, Justice Frankfurter argued that "the Constitution has conferred upon Congress exclusive authority to secure fair representation by the States,"[25] leaving no role for the judiciary. The majority opinion in *Rucho* provided a similar analysis of the Elections Clause and concluded on a similar note: under the terms of the Constitution, and as endorsed by the Framers, the solution for partisan gerrymandering lay with Congress and not with the federal judiciary.[26]

15. *Rucho*, 139 S. Ct. at 2490–91. The majority consisted of Chief Justice Roberts joined by Justices Thomas, Alito, Gorsuch, and Kavanaugh.

16. *Id.* at 2506–07.

17. The North Carolina map, which was at issue in *Rucho*, disfavored Democrats, while the Maryland map, which was at issue in *Lamone*, disfavored Republicans. *Id.* at 2487.

18. *Id.* at 2491.

19. *Id.* at 2492.

20. *Rucho*, 139 S. Ct. at 2494.

21. *Id.* at 2506–07.

22. *Id.* at 2507.

23. Colegrove v Green, 328 U.S. 549, 550 (1946).

24. *Id.* at 556.

25. *Id.* at 554.

26. *Rucho*, 139 S. Ct. at 2494-96.

The Court majority then provided reasons as to why there are no standards to adjudicate partisan gerrymandering. One reason is that partisan gerrymandering involves fundamental questions about fair representation and the allocation of political power—a matter that falls outside of the Court's authority and expertise.[27] The majority's analysis was reminiscent of Justice Frankfurter's dissenting opinion in *Baker v. Carr*,[28] in which he argued that:

> Talk of "debasement" or "dilution" is circular talk. One cannot speak of "debasement" or "dilution" of the value of a vote until there is first defined a standard of reference as to what a vote should be worth. What is actually asked of the Court in this case is to choose among competing bases of representation—ultimately, really, among competing theories of political philosophy—in order to establish an appropriate frame of government . . . for all the States of the Union.[29]

In a similar vein, the Court majority argued that it is impossible to know what fairness looks like, illustrating the difficulty with various alternate scenarios of how political fairness could be measured.[30] Not only are these different visions of fairness political rather than legal in nature, argued the majority, they also do not shed light on the dividing line between permissible and unconstitutional partisanship.[31] In addition, the majority posited that partisan gerrymandering claims are ultimately rooted in a desire for proportional representation, a concept that is alien to the Constitution and the Framers' vision.[32]

In the remainder of the opinion, the Court majority considered and ultimately rejected all the proposed standards for adjudicating partisan gerrymandering. The majority dismissed the standards from the malapportionment and racial gerrymandering cases.[33] It rejected the standard of non-partisanship because this approach "would essentially countermand the Framers' decision to entrust districting to political entities."[34] Instead, the standard must identify when partisan gerrymandering is excessive—an objective which has eluded the Court in all its prior partisan gerrymandering cases.[35] The Court majority also rejected all the other proposed approaches, including the

27. *Id.* at 2499–2500.
28. *Baker*, 369 U.S. at 300; for a similar argument, see Stephanopoulos, *supra* note 10.
29. *Baker*, 369 U.S. at 300 (Frankfurter, J., dissenting).
30. *Rucho*, 139 S. Ct. at 2500.
31. *Id.* at 2501.
32. *Id.* at 2499.
33. *Id.* at 2501–02.
34. *Id.* at 2497.
35. *Rucho,* 139 S. Ct. at 2497–98 (discussing Gaffney v. Cummings, 412 U.S. 735 (1973), Davis v. Bandemer, 478 U.S. 109 (1986), Vieth v. Jubelirer, 541 U.S. 367 (2004), and LULAC v. Perry, 548 U.S. 399 (2006)).

plaintiffs' tests,[36] associational rights arguments,[37] and the argument that state officials did not have the authority under the Elections Clause to disfavor the supporters of a particular candidate when drawing district lines.[38]

As Justice Kagan's powerful dissent makes clear, and as various commentators have observed, the Court majority's decision is vulnerable to criticism on a number of fronts.[39] The majority's claim that there are no judicially manageable standards is belied by the fact that the lower courts have applied standards to identify extreme gerrymanders. As Justice Kagan pointed out, the three part test consisting of (1) intent; (2) effects; and (3) causation around which the lower courts had coalesced was not an unfamiliar one and has been used to determine similar types of claims.[40] These standards, noted the dissent, do not depend on judges' views on electoral fairness nor do they involve courts too deeply in the political process as they are designed to correct only the most egregious partisan gerrymanders.[41] And while it is true that a line has to be drawn somewhere to identify the threshold at which a partisan gerrymander is too extreme, courts are routinely called upon to engage in this kind of line-drawing.[42]

By refusing to step in to address extreme partisan gerrymandering in *Rucho*, we might conclude that the Court has retreated from the political thicket in keeping with Justice Frankfurter's opinion in *Colegrove v Green*. The same logic could be applied more generally: on this view, we would expect the Roberts Court to adopt a general posture of judicial restraint and non-intervention in election law cases. But then we immediately run into a problem. How do we explain *Shelby County v. Holder*?[43] In *Shelby County*, the Court majority did

36. *Rucho*, 139 S. Ct. at 2502.

37. *Id.* at 2504–05.

38. *Id.* at 2506.

39. *See* Stephanopoulos, *supra* note 10; Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Dirty Thinking About Law and Democracy in* Rucho v. Common Cause, 3 AM. CONST. SOC. SUP. CT. REV. 293, 295 (2019) https://www.acslaw.org/wp-content/uploads/2019/10/ACS-Supreme-Court-Review-2018-2019.pdf [https://perma.cc/FE2P-J22Y] [hereinafter, "*Dirty Thinking*"] (arguing that the *Rucho* majority engages in a "narrative of non-intervention"); Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Judicial Intervention as Judicial Restraint*, 132 HARV. L. REV. 236, 239–40 (2018) (describing the narrative of non-intervention).

40. *Rucho*, 139 S. Ct. at 2516 (Kagan, J., dissenting).

41. *Id.* at 2509 (Kagan, J., dissenting). Neutrality is assured because the baseline is the state's own characteristics rather than some abstract notion of an "ideally fair" map. The state's actual map is compared to a series of maps that could have been drawn if politicians had not been trying to maximize partisan gain. *Id.* at 2520 (Kagan, J., dissenting). For the Court majority, however, taking into account the state's individual characteristics meant that there is no uniform standard in operation since the criteria will shift from state to state. *Id.* at 2505. But as Justice Kagan observed, this is "a virtue, not a vice—a feature, not a bug" because it prevents judges' own preferences from affecting the analysis. *Id.* at 2521 (Kagan, J., dissenting).

42. *Id.* at 2522 (Kagan, J., dissenting).

43. Shelby Cty. v. Holder, 570 U.S. 529, 529 (2013).

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intervene to strike down a longstanding provision of the Voting Rights Act—a statute that has had overwhelming bipartisan congressional support for decades.[44] The Court majority invalidated a provision containing the "coverage formula" which identified those jurisdictions that had to seek prior federal approval, known as preclearance, for all changes to voting procedures.[45] The decision effectively gutted the preclearance process which had for years blocked discriminatory voting practices. A similar pattern emerges in the campaign finance context. In *Citizens United v. FEC*[46] the Court majority struck down provisions of the Bipartisan Campaign Reform Act which restricted independent expenditures for political communications by corporations. Likewise, the Court majority held in *McCutcheon v. FEC*[47] that aggregate contributions limits in the Federal Election Campaign Act were unconstitutional.

It would appear at first glance that in *Shelby County*, *Citizens United*, and *McCutcheon*, the Court actively intervened in the democratic process to strike down statutory provisions that had received widespread congressional support. The Court did not exercise judicial restraint nor did it exit the political thicket. However, the net effect of the *Shelby County* decision was to effectively eliminate the preclearance process and therefore remove certain types of election issues from judicial or executive oversight. As for the campaign finance decisions, the net effect was to circumscribe the ability of *legislatures* to make rules in the first instance. This stands in contrast to the aftermath of *Shelby County,* which removed federal executive and judicial oversight over state legislatures, thereby freeing them to enact laws untrammeled by the preclearance process.

The judicial function in these cases could be described as a kind of deregulation. But we ought to be careful in how we use that term. In some instances, it means that there will be classic deregulation in the sense of fewer rules. In other instances, however, what we have is not an absence of rules or rule-making so much as an absence of guidelines or oversight cabining legislative discretion to regulate. The Court majority has intervened to shield from oversight certain kinds of legislative rule-making with respect to certain voting rules (*Shelby County*), while in other areas, it has prevented legislatures from regulating certain aspects of the electoral process (*Citizens United*). In other cases, it has refused to intervene in the electoral process thereby providing legislatures with a green light to pass electoral laws (*Rucho*). The net result consists of a patchwork: for some issues, such as voter qualification rules and

44. Richard L. Hasen, *Shelby County and the Illusion of Minimalism*, 22 WM. & MARY BILL OF RIGHTS J. 713, 713–14, 726–27 (describing the majority decision as an "audacious" opinion which displays false minimalism).

45. *Shelby Cty,.* 570 U.S. at 550–51.

46. Citizens United v. FEC, 558 U.S. 310, 310 (2010).

47. McCutcheon v. FEC, 572 U.S. 185, 185 (2014).

partisan gerrymandering, there is extensive and often unchecked legislative activity, while with respect to other areas, such as campaign finance, legislatures have increasingly less discretion to regulate.

According to Nicholas Stephanopoulos, the common thread underlying these cases is that the Supreme Court is now an anti-*Carolene* court in that it fails to remedy obvious malfunctions in the political process while simultaneously blocking other institutions from doing so.[48] I agree that *Rucho* and the Court's other decisions do not follow Ely's theory of judicial review, and, as I elaborate in Part II below, a possible reason for this is that the Court majority's decisions, whether intended or not, are increasingly espousing an elitist conception of democracy. Guy-Uriel Charles and Luis Fuentes-Rohwer argue that in *Rucho* the conservative justices have subscribed to a traditional understanding of politics in which dirty, partisan politics are viewed as being a normal part of the political process.[49] On this view, the Court is ill-equipped to clean up what is an inherently sordid and unfair process. While the argument I set out in Part II below differs in the details, I agree that what is at stake in the cases is a particular understanding of representative government.

Another possibility is that the differences among the cases are the product of the underlying constitutional provisions: the First Amendment versus the Equal Protection Clause of the Fourteenth Amendment—and I think this is right to some degree. But it is also the case that the First Amendment means what it does today because of how the Court majority has chosen to interpret it in recent years—and the same is true of the Fourteenth Amendment.[50] Given the empirical research on judicial decision-making,[51] it is also possible that the justices' voting patterns in these cases boil down to simple partisan politics, a position that is persuasively defended by Professor Stephanopoulos.[52] On this view, the justices will likely opt for those outcomes that favor the political party that matches their partisan preferences. A related possibility is that the justices have opted for those outcomes that are favored by like-minded elites who belong to the same social, political, and professional networks.[53]

48. Stephanopoulos, *supra* note 10.

49. Charles & Fuentes-Rohwer, *Dirty Thinking*, *supra* note 39, at 298.

50. Daniel P. Tokaji, *Denying Systemic Equality: The Last Words of the Kennedy Court*, 13 HARV. L. & POL. REV. 539, 539 (2019). *See generally* ROBERT C. POST, CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION (2014).

51. There is an extensive scholarly literature on judicial decision-making, which either builds upon or reacts to the attitudinal model. *See generally* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).

52. Stephanopoulos, *supra* note 10, at 21 (arguing that the Court's decisions can be understood on partisan grounds).

53. LAWRENCE BAUM & NEAL DEVINS, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT 15 (2019).

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The main point, though, is that it is a complex picture when it comes to the Supreme Court's role in the law of democracy. With respect to the Court's conservative majority, it is not straightforwardly an exit from the political thicket nor a straightforward commitment to deregulation. Nor is the Court majority simply a passive actor even when apparently exercising judicial restraint. Its decision to not intervene in partisan gerrymandering, for example, is an active choice to the extent that it cements in place the status quo.[54] Instead, the Court majority appears to have adopted a results-oriented approach that relies on a suite of tactical moves.

II. ELITIST VS. EGALITARIAN CONCEPTIONS OF DEMOCRACY

Rather than setting forth a consistent theory of the judicial function in a democracy, the Supreme Court's election law decisions are better understood as instantiating a particular vision of democracy. Whether intended or not, the decisions by the Roberts Court result in a vision of democracy that is decidedly elitist in nature. This claim is not meant to establish a causal explanation of these cases; instead, it is an assessment of what the cases amount to when considered objectively as a whole. To be sure, the elitist approach may be the accidental result of a combination of the following factors: the Court's absolutist approach to the First Amendment, its restrictive approach to the equal protection clause, and its pro-states interpretation of federalism.[55] That being said, the emerging elitist conception of democracy displayed in recent election law decisions is troubling because it represents a direct challenge to the egalitarian conception of democracy that was largely supported by the Supreme Court in the decades following the civil rights era.

Under an elitist conception of democracy, power is held in the hands of a privileged few, and political structures and state policies are oriented to a large degree, though not necessarily exclusively, to benefit their interests. Elitist democracy can be contrasted with an egalitarian conception of democracy under which the structures of governance and state policies tend to follow the principle of political equality. In an egalitarian democracy, power is held by the people and is deployed to benefit their interests on a more or less equal basis. One advantage to using the term "elitist," rather than "undemocratic," is that the concept of elitism better captures a crucial feature of elitist democracy, which is the co-existence of anti-egalitarian impulses with otherwise democratic processes. Without doubt, an elitist democracy is clearly "undemocratic" by contemporary egalitarian understandings of democracy.

One possible objection to the argument that the Supreme Court's recent decisions instantiate an elitist approach to democracy is that when the Court

54. CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 68–92 (1993) (defining and elaborating the concept of status quo neutrality).

55. My thanks to Chad Flanders for very helpful comments on the ideas in this paragraph.

intervenes (or fails to intervene) it is not benefitting all elites but rather conservative Republican ones.[56] Under an elitist approach, government laws and policies favor the few. As such, the elitist approach will disfavor Democratic/left elites in various dimensions and particularly when Democratic elites are trying to implement egalitarian policies and rules. For this reason, the elitist approach is often in line with the policy preferences of Republican elites but not Democratic elites. More generally, the elitist/egalitarian divide at times maps on to the partisan Republican/Democratic divide.

This elitist conception of democracy, I further suggest, has certain continuities and discontinuities with historic approaches to democracy, in particular with republican theories of representation and governance at the time of the Founding.[57] This Part argues that the Constitution established an elitist democracy, and that the Framers, in particular James Madison, favored an elitist conception of democracy. It then discusses conceptual resemblances between the Court's election law cases and elitist themes from the time of the framing with respect to three issues: the role of the wealthy, the role of the people, and the management of elections. It claims that the cases taken together amount to an elitist approach to democracy, one which echoes certain framing-era ideas about who should rule and why.

A. *The Framers' Elitist Conception of Democracy*

An examination of James Madison's writings supports the view that the Constitution was designed to establish an elitist democracy.[58] For Madison, one of the greatest threats to the survival of republican government was the instability caused by warring factions organized around the unequal distribution of wealth.[59] Given this existential threat, a fundamental objective of the constitutional framework was to protect the property interests of a wealthy minority from the claims of a propertyless majority, while at the same time protecting the rights of persons in a manner consistent with republican principles.[60] The dilemma, though, was that the interests of the wealthy were in

56. My thanks to Nick Stephanopoulos for a very helpful discussion on the relationship between partisan polarization and the elitist approach to democracy.

57. There is considerable debate about whether the Framers established a democracy or a republic. For the purposes of this Essay, I will use the term "democracy" to describe the representative system of self-government established by the Constitution.

58. This discussion is drawn from Yasmin Dawood, *The New Inequality: Constitutional Democracy and the Problem of Wealth*, 67 MARYLAND L. REV. 123, 126–31 (2007).

59. THE FEDERALIST NO. 10, at 46–48 (James Madison) (Clinton Rossiter ed., 1999).

60. *See* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 395 (Marvin Meyers ed., Univ. Press of New England 1981) [hereinafter *Property and Suffrage*]; JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 5 (1990).

jeopardy in a system of universal suffrage, while the interests of the poor were at risk in a system of restricted suffrage.[61] As Madison put it:

> Allow the right [to vote] exclusively to property, and the rights of persons may be oppressed. The feudal polity alone sufficiently proves it. Extend it equally to all, and the rights of property or the claims of justice may be overruled by a majority without property, or interested in measures of injustice.[62]

The risk presented by universal suffrage was that power would eventually be held by the unpropertied majority.[63] Madison believed that once power was held by a propertyless majority, republican government would not long survive. It, and the liberty that it fostered, would soon be replaced by either a despotic or an oligarchic regime.[64]

For Madison, the solution to this dilemma consisted of two key features: universal suffrage and large electoral districts.[65] In *Federalist No. 57*, Madison emphasized the importance of universal suffrage, stating that both voters and candidates are to "be the great body of the people of the United States," excluding neither the poor, nor the ignorant, nor those of humble birth.[66] Universal suffrage was necessary to ensure that the rights of the majority were protected.[67] Madison's understanding of "universal" suffrage was extremely narrow; while he did include all white males whether propertied or not, he excluded slaves, racial minorities, Indigenous peoples, and women.

Universal suffrage, however, had to be tempered by the extended sphere. As Madison posited in *Federalist No. 10*, in an extended sphere, the "greater variety of parties and interests" would reduce the likelihood that a majority "will have a common motive to invade the rights of other citizens."[68] An extended sphere would also make it more difficult for the citizens to discover and act upon those interests that they did share.[69] Not only did the extended sphere mechanism prevent the formation of possibly dangerous coalitions within society, it also ensured the election of a certain kind of representative.[70] An extended sphere, Madison explained, implied large electoral districts. To get elected from a large district, a candidate would need the support of a large number of citizens in a dispersed area, thereby lessening the chance that he could win the election by

61. *Property and Suffrage*, *supra* note 60, at 395.
62. *Id.*
63. *Id.*
64. James Madison, *Observations on Jefferson's Draught of a Constitution for Virginia*, 11 THE PAPERS OF JAMES MADISON 288 (William T. Hutchinson et al. eds., Univ. Press of Virginia 1977) [hereinafter, "Observations"].
65. *Property and Suffrage*, *supra* note 60, at 399–400.
66. THE FEDERALIST NO. 57, at 319 (James Madison) (Clinton Rossiter ed., 1999).
67. *Property and Suffrage*, *supra* note 60, at 394, 400.
68. THE FEDERALIST NO. 10, at 51 (James Madison) (Clinton Rossiter ed., 1999).
69. *Id.*
70. *Id.* at 50–51.

resorting to the use of fraud and corruption. The result, argued Madison, is that voters "will be more likely to centre on men who possess the most attractive merit and the most diffusive and established characters."[71] Madison's expectation that the design of political structures would lead to the election of established and prominent men is referred to by Bernard Manin as the "principle of distinction."[72] As Manin noted, Madison hoped that representation would elevate this "natural aristocracy" of talent and virtue to public office.[73] The extended sphere, and resulting large electoral districts, would lead to the election of wealthy, prominent, and civic minded men.[74]

Madison's solution was viewed by the Anti-Federalists as precisely the problem: the proposed Constitution would establish an aristocratic tyranny in which a powerful few would rule the people.[75] Modern commentators have likewise argued that the Constitution concentrated power in the hand of the elite. Charles Beard contended, for instance, that the Constitution was designed to protect the interests of the privileged classes.[76] According to Robert Dahl, Madison designed a political system that would guarantee the liberties of a wealthy and powerful minority by constitutionally trammeling the majority.[77] Jennifer Nedelsky noted that since the Madisonian model identified the people as the problem, it was hardly surprising that it did not foster popular participation.[78] Gordon Wood readily characterized the Framers' republicanism as "an elitist theory of democracy."[79]Along the same lines, Emery Lee argued that Madison favored an "elitist theory of self-government, one that greatly reduces the role of the people themselves in their own government."[80] For many scholars, the Framers established an elitist democracy that deprived the people of equal participation.[81]

71. *Id.*

72. BERNARD MANIN, THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT 94 (1997).

73. *Id.* at 112–13, 116–17.

74. THE FEDERALIST NO. 10, at 50–51 (James Madison) (Clinton Rossiter ed., 1999). To be sure, Madison was a realist: although he hoped that virtuous civic-minded men would be elected, the entire governmental structure was designed so that ambition would be made to counteract ambition, thereby harnessing the anticipated self-interest of elected officials in the service of the public good. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1999).

75. HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 43–44, 48–52, 57–58 (1981).

76. CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 152–77 (1913).

77. ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 31 (1956).

78. NEDELSKY, *supra* note 60, at 5.

79. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 517 (1969).

80. Emery G. Lee III, *Representation, Virtue, and Political Jealousy in the Brutus-Publius Dialogue*, 59 J. POL. 1073, 1081 (1997).

81. For a discussion of the democratic deficiencies of the Constitution, see ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?, 15–17, 154–57 (2002); SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION (2006).

B. Elitist Democracy at the Supreme Court

In the Supreme Court's recent election law decisions, there are various continuities with the Framers' vision of democracy. The comparisons are by no means exact; indeed, as noted below, there are important discontinuities as well. Yet there are conceptual resemblances between the Court's decisions and the Framers' approach to democracy that are noteworthy, particularly in light of the Court majority's evident departure in recent cases from egalitarian theories of the judicial supervision of the political process.[82] Taking a broad view, the Constitution established an elitist democracy in which power was intended to be held for the most part by a privileged few who were to have an outsized influence on the course of governance. The role of the people was anticipated to be episodic but their participation, while contained, was nonetheless crucial as a preventative defense against the abuse of power. Similar themes, whether intended or not, are evident in the Supreme Court's recent election law decisions.

1. The Role of the Wealthy

The first continuity concerns the role of the wealthy. In Madison's constitutional vision, the task of governance was to be in the hands of the wealthy and established members of society.

There is no question that members of Congress are generally well-to-do as compared to the average citizen. In addition, empirical research shows that the positions adopted by elected representatives are more responsive to the preferences of the affluent as compared to the preferences of the vast majority of citizens.[83] In keeping with an elitist approach to democracy, the Court's campaign finance decisions have also enhanced the influence of wealthy individuals and corporations. In *Citizens United v. FEC*, for instance, the Court majority struck down provisions of the Bipartisan Campaign Reform Act which restricted independent expenditures for political communications by corporations.[84] In a significant move, the Court majority narrowed the definition of corruption, holding that the only governmental interest strong enough to overcome First Amendment concerns was preventing *quid pro quo* corruption

82. To be sure, this claim is limited to the Court's election law decisions. In other areas of law, the conservative justices may champion the people. *See* RICHARD L. HASEN, THE JUSTICE OF CONTRADICTIONS: ANTONIN SCALIA AND THE POLITICS OF DISRUPTION 75 (2018) (observing that Justice Scalia embraced an anti-elitist populism).

83. LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE 116 (2008); MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA 77–78 (2012); Nicholas O. Stephanopoulos, *Aligning Campaign Finance Law*, 101 VA. L. REV. 1425, 1427, 1433, 1468–72 (2015).

84. Citizens United v. FEC, 558 U.S. 310, 372 (2010).

or the appearance thereof.[85] The Court's position was in tension with prior decisions which had justified campaign finance regulations on a broader understanding of corruption that included access and influence.[86] The Court majority also rejected the antidistortion rationale by overturning the holding in *Austin v. Michigan Chamber of Commerce*[87] that the government has an interest in preventing the distortion created by immense wealth on the electoral system.[88] The net effect of these two developments was to significantly reduce the scope of campaign finance regulations, and, by extension, to amplify the relative influence of wealthy interests.

That being said, there is a crucial discontinuity between the Court's recent campaign finance decisions and the constitutional vision of the Framers. Madison believed that representatives elected by large electorates would be highly independent and less susceptible to undue influence and corruption.[89] The Court majority, however, does not share the Framers' concerns about the independence of elected representatives. In *McCutcheon v. FEC*, for instance, the Court struck down aggregate limits on contributions as a violation of the First Amendment.[90] In an opinion for the majority, Chief Justice Roberts held that the aggregate limits "impose[d] a special burden on broader participation in the democratic process."[91] Although "broader participation" usually means participation by greater numbers of people, for the Court majority it meant more participation by a single wealthy individual—in this case, Mr. McCutcheon, who wished to donate $135,000 in the 2013–2014 election cycle.[92] According to the majority, the First Amendment protects the participatory activity of "contributing to someone who will advocate for [the donor's] policy preferences."[93] The Court set aside fears that such an exchange might amount to corruption.[94] Indeed, the majority endorsed the idea that responsiveness to wealthy donors "embod[ied] a central feature of democracy—that constituents

85. *Id*. at 359–60. For a discussion of the Court's approach to the First Amendment, see James A. Gardner, *Anti-Regulatory Absolutism in the Campaign Arena: Citizens United and the Implied Slippery Slope*, 20 CORNELL J. L. & PUB. POL'Y 673, 679–80 (2011).

86. Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 616 (2011); Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 127–28, 130 (2010).

87. Austin v. Mich. Chamber of Comm., 494 U.S. 652, 660 (1990).

88. *Citizens United*, 558 U.S. at 363-64. For a discussion of the implications, see Richard L. Hasen, *Citizens United and the Orphaned Antidistortion Rationale*, 27 GA. ST. U. L. REV. 989, 990–92 (2011); Mark C. Alexander, *Citizens United and Equality Forgotten*, 35 N.Y.U. REV. L. & SOC. CHANGE 499, 503, 509–11 (2011).

89. THE FEDERALIST NO. 57, at 322 (James Madison).

90. McCutcheon v. FEC, 572 U.S. 185, 193 (2014).

91. *Id*. at 204–05.

92. *Id*. at 194–95.

93. *Id*. at 204.

94. *Id*. at 192.

support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns."[95] For the Court, this responsiveness is "key to the very concept of self-governance through elected officials."[96] For the Framers, however, an exchange of this kind between wealthy donors and elected representatives would have fallen within their more capacious understanding of corruption, which broadly encompassed the use of public power to serve private ends.[97]

2. The Role of the People

The second continuity concerns the people. It is important to emphasize that there is not an exact equivalence between the founding era and the Court majority's approach. Clearly, there are crucial differences, the most important one being slavery. In addition, voting during the framing era was not open to anyone who was not a propertied white male. Despite these important differences, there are conceptual continuities. While it is true that Madison saw elections as a key mechanism to keep the powerful accountable, much of the constitutional infrastructure was designed with a view to contain political participation.

A similar trend of containing popular participation and restricting the franchise is evident in the Court's recent election law decisions. As described above, the Court's recent campaign finance decisions devalue popular participation by providing wealthy interests with an outsized voice.[98] Congress has become increasingly dependent on a tiny minority of the population, namely funders and lobbyists, arguably to the detriment of the public good.[99] The Court majority's hostility to egalitarian principles was also on display in *Arizona Free Enterprise v. Bennett*, in which it struck down part of Arizona's public financing scheme on the grounds that a matching funds provision, under which publicly financed candidates received additional funds if their privately financed opponents exceeded a set spending limit, violated the First Amendment rights of privately financed candidates and independent expenditure groups.[100]

95. *McCutcheon*, 572 U.S. at 192.

96. *Id*. at 227.

97. Yasmin Dawood, *Classifying Corruption*, 9 DUKE J. CONST. L. & PUB. POL. 103, 111–12, 114 (2014).

98. Yasmin Dawood, *Democracy Divided: Campaign Finance Regulation and the Right to Vote*, 89 N.Y.U. L. REV. ONLINE 17, 21–22 (2014).

99. LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT 110 (1st ed. 2011); TIMOTHY K. KUHNER, CAPITALISM V. DEMOCRACY: MONEY IN POLITICS AND THE FREE MARKET CONSTITUTION 219–21 (2014).

100. Arizona Free Enterprise v. Bennett, 564 U.S. 721, 727–28 (2011). *See also* Davis v. FEC, 554 U.S. 724, 726, 729 (2008) (holding "Millionaire's Amendment" in the Bipartisan Campaign Reform Act struck down for violating First Amendment).

Although there are no overt restrictions on voting today because of race or gender, there are barriers to voting, such as voter qualification rules that have a disproportionate impact on minority voters and low-income individuals.[101] The conservative justices on the Supreme Court do not seem to be particularly concerned about these barriers to voting; after all, they effectively eliminated the preclearance procedure in *Shelby County*.[102] The fallout from the decision was swift. In the wake of *Shelby County*, many states passed stringent voter qualification rules, which were justified as promoting electoral integrity but which were arguably designed to make voting harder, in particular for minority voters—what amounts to a new form of voter suppression.[103] This development was aided by the Court's decision in *Crawford v. Marion County Election Board*, which held in a fractured opinion that Indiana's voter identification law did not violate the Constitution.[104] In a subsequent case, *Arizona v. Inter Tribal Council*, the Court majority constrained Congress' power under the Elections Clause, finding that it "empowers Congress to regulate *how* elections are held, but not *who* may vote in them."[105] According to the majority, the states have jurisdiction over voter qualifications.[106] While the Court in *Inter Tribal Council* did find that Arizona's requirement of documentary proof of citizenship was invalid as it was pre-empted by the federal National Voter Registration Act (NVRA), in a more recent decision, *Husted v. A. Philip Randolph Institute*, however, the conservative justices upheld Ohio's voter purge law of non-voters even though the NVRA prohibits states from striking voters off the rolls for failure to vote.[107]

3. The Management of Elections

The third continuity concerns the management of elections. As described by the *Rucho* majority, the Framers' approach to the management of congressional elections is found in the Elections Clause,[108] which provides the states with the power to prescribe the "Times, Places and Manner of holding Elections" for members of Congress, while giving Congress the power to "make or alter such

101. Atiba R. Ellis, *The Cost of the Vote: Poll Taxes, Voter Identification Laws, and the Price of Democracy*, 86 DENV. UNIV. L. REV. 1023, 1023–30 (2009).

102. Shelby Cty. v. Alabama, 570 U.S. 529, 550–51 (2013).

103. Wendy R. Weiser & Max Feldman, *The State of Voting 2018*, N. Y.: BRENNAN CENTER FOR JUST. 5 (June 5, 2018), https://www.brennancenter.org/publication/state-voting-2018 [https://perma.cc/ZV8Q-KZYH]; Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S. C. L. REV. 689, 712, 717–18 (2006).

104. Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 201–04 (2008).

105. Arizona v. Inter Tribal Council, 570 U.S. 1, 16 (2013).

106. *Id*. The states have jurisdiction due to the voter qualification clauses in Art. I, § 2, cl. 1 and the 17th Amendment. *Id.*

107. Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833, 1842–43 (2018).

108. Rucho v. Common Cause, 139 S. Ct. 2484, 2495 (2019).

Regulations" at any time.[109] During the debates at the Constitutional Convention, and subsequently during ratification, noted the majority, the Elections Clause was a subject of dispute.[110] In response to Antifederalist fears of national power of elections, the Federalists argued that congressional authority over electoral rules was necessary in the event that state legislatures undermined fair representation.[111] According to the Court majority, the Framers opted for a "characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress."[112] The majority declined, however, to go so far as to accept the appellants' contention that "through the Elections Clause, the Framers set aside electoral issues such as the one before us as questions that *only* Congress can resolve."[113] It observed instead that "our cases have held that there is a role for the courts with respect to at least some issues that could arise from a State's drawing of congressional districts,"[114] noting in particular two such issues—one-person, one-vote and racial gerrymandering.[115] The *Rucho* majority also emphasized the Framers' familiarity with partisan gerrymandering during the ratification of the Constitution and in subsequent years.[116] This analysis was used by the majority as one of the reasons why partisan gerrymandering lay beyond the purview of the federal judiciary.

The difficulty with the majority's analysis is that it downplays the importance of elections in the Framers' constitutional vision. Although the Framers sought to cabin popular power and influence, they nonetheless believed that elections were an indispensable safeguard and the principal mechanism by which to throw out elected officials who were betraying the public trust. In *Federalist No. 51*, Madison stated that a "dependence on the people is, no doubt, the primary control on the government."[117] To ensure liberty, it was essential that the legislature "have an immediate dependence on, and an intimate sympathy with, the people."[118] According to Madison, "[f]requent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured."[119] Frequent elections force representatives to exercise restraint in the use of their power in order to ensure reelection.[120] Although the

109. U.S. CONST. art. I, § 4, cl. 1.
110. *Rucho*, 139 S. Ct. at 2495.
111. *Id*.
112. *Id*. at 2496.
113. *Id*. at 2495 (emphasis added).
114. *Id*. at 2495–96.
115. *Rucho*, 139 S. Ct. at 2495.
116. *Id*. at 2494–95.
117. THE FEDERALIST NO. 51, at 290 (James Madison).
118. THE FEDERALIST NO. 52, at 295 (James Madison).
119. *Id*.
120. *Id*.

people had a limited role in Madison's constitutional vision it was still a crucial one: the people were the ultimate stopgap against the abuse of power by elected officials. As Justice Kagan observed, "[f]ree and fair and periodic elections are the key to that vision."[121] Contemporary partisan gerrymandering, however, seriously undermines the protective power of elections.[122]

III. ELECTION LAW AND THE COURT'S ORIGINALIST ORIENTATION

The emerging elitist conception of democracy presents a significant challenge to the egalitarian conception of democracy that was evident in the Supreme Court's election law decisions in the decades following the civil rights era. The elitist conception of democracy is relevant for another reason: it sheds light on the increasing significance of the founding era in the Court's recent election law decisions. This Part suggests that while neither the Court's decisions nor the elitist conception of democracy amount to an originalist approach to the Constitution, some of the Court majority's arguments in the cases display an "originalist orientation." The concept of an originalist orientation is meant to capture the idea that the original meaning takes a preponderant weight in the Court's analysis and is consistent with the overall outcome even if it does not strictly speaking compel that outcome. This originalist orientation has significant implications for future election law cases because it means that, at least for some issues, the founding era is serving as an implicit baseline for the conservative wing of the Court. In future cases, this originalist orientation will likely reinforce the elitist conception of democracy, and by extension, further erode the egalitarian approach to democracy.

While a detailed exposition of originalism is beyond the scope of this Essay, it is useful to provide a brief description. According to Lawrence Solum, originalism is best understood as a "family" of constitutional theories that share two key features: first, the Fixation Thesis, which means that "original meaning . . . is fixed at the time each provision is framed and ratified"; and second, the Constraint Principle, which refers to the idea that constitutional actors including judges "ought to be constrained by the original meaning when they engage in constitutional practice[s]" such as deciding cases.[123] Many constitutional theorists think that the "original meaning" is determined by the original public

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121. *Rucho*, 139 S. Ct. at 2511 (Kagan, J., dissenting).

122. *Id.* at 2512, 2514–15. Chief Justice Robert's response to this objection was that it should be grounded in the Guarantee Clause in Article IV, § 4 of the Constitution, which "guarantee[s] to every State in this Union a Republican Form of Government." *Id.* at 2506 (majority opinion) (alteration in original). He concluded, however, that in keeping with past decisions, the Guarantee Clause does not provide the basis for a justiciable claim. *Id.*

123. Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 456 (2013). This brief discussion cannot do justice to Professor Solum's compelling and nuanced account of originalism. It does, however, capture the two core ideas around which the originalist family converges. *Id*.

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meaning, while others think it is determined by the original intention of the Framers or by the original methods of constitutional interpretation.[124] While almost all constitutional theorists (including living constitutionalists) place some weight on original meaning,[125] what distinguishes originalist interpreters is that they are bound by the original meaning of the constitutional text.[126]

The elitist conception of democracy cannot be described as originalist despite its affinities with the Framers' theories of representative government. Overarching conceptions of democratic self-government are not located in any one constitutional provision. Nor is it the case that the majority's election law decisions either individually or collectively could be described as originalist. As for the justices on the Supreme Court, only Justice Thomas and Justice Gorsuch are described as committed originalists, although there is an argument to be made, as John McGinnis suggests, that Chief Justice Roberts and Justice Alito, despite not identifying as originalists, have displayed a limited form of originalism in some of their decisions.[127]

That being said, the Court majority has advanced certain arguments that have originalist elements. These originalist-style arguments appear to be more common in recent election law decisions than they have been in the decisions of decades past, at least with respect to the majority judgments. Consider, for example, the majority's decision in *Rucho v. Common Cause*. As described in Part II, the majority provided an analysis of the Elections Clause that emphasized its original meaning, namely that the Framers had assigned responsibility over districting to Congress and to the states.[128] The majority also provided a detailed analysis of partisan gerrymandering at the time of the framing. In her dissenting opinion, Justice Kagan observed that "[t]o its credit, the majority does not frame that point as an originalist constitutional argument."[129] Justice Kagan went on to say that the reason the Court did not use an originalist lens is that "racial and residential gerrymanders were also once

124. *Id*.

125. *Id*. at 460.

126. Cass R. Sunstein, *Originalism*, 93 NOTRE DAME L. REV. 1671, 1674 (2018).

127. John O. McGinnis, *Which Justices Are Originalist?,* L. & LIBERTY (Nov. 9, 2018), https://www.lawliberty.org/2018/11/09/which-justices-are-originalists/ [https://perma.cc/4TPY-WVUR]. Professor McGinnis observes that while Justice Thomas and Justice Gorsuch are described as the Court's originalists, Chief Justice Roberts and Justice Alito are also originalists in two ways: they follow original meaning in cases of first impression and they "often try to move doctrine in an originalist direction." *Id*. While they will not override non-originalist precedent if it results in "too much uncertainty in the law or the imposition of large social costs," they will be partial to the original meaning when precedent is not too deeply entrenched or too "thick on the ground." *Id*.

128. Rucho v. Common Cause, 139 S. Ct. 2484, 2495 (2019).

129. *Id*. at 2512 (Kagan, J., dissenting). By the words "that point" she is referring to her assessment that the majority's response to partisan gerrymanders appears to be that they have always been "with us." *Id*.

with us, but the Court has done something about that fact."[130] One possible interpretation, then, is that the Court majority's analysis of the Elections Clause is not originalist; indeed, it is a rejection of originalism because the Court acknowledged two lines of precedents that show that the federal courts do have a role in districting. Another possibility is that while the majority did appear to rely on an originalist-type argument, the status of that argument in the Court's analysis is ambiguous.[131]

A related possibility is that the majority did not reject an originalist interpretation so much as execute a careful dodge around a set of existing precedents.[132] After all, the *Rucho* majority was at considerable pains to emphasize that "[a]t no point was there a suggestion that the federal courts had a role to play [in districting]. Nor was there any indication that the Framers had ever heard of courts doing such a thing."[133] The majority also prefaced its brief description of the two exceptions (one-person, one-vote, and racial gerrymandering) with the observation that "[e]arly on, doubts were raised about the competence of the federal courts to resolve these questions."[134] The discussion of the malapportionment cases is brief and does not even mention *Reynolds v. Sims*.[135] As for racial gerrymandering, the majority stated that laws that "explicitly discriminate on the basis of race . . . are of course presumptively invalid," but the two cases cited are *Gomillion v. Lightfoot* and *Shaw v. Reno*.[136] Carving out an exception for one-person, one-vote and racial gerrymandering could be explained either as deference to existing precedent or as an acknowledgment that these two exceptions are covered by the Fourteenth Amendment. The majority's analysis of the Elections Clause is originalist in its tone, and its refusal to adjudicate partisan gerrymandering is consistent with its interpretation of the text. That being said, the majority's analysis does not appear to comport with the Constraint Principle, which, as described above, is a

130. *Id*.

131. Charles & Fuentes-Rohwer, *Dirty Thinking*, *supra* note 39, at 294, 299 (noting that it is unclear what work Chief Justice Roberts' "reliance on originalism is doing in the analysis"); Stephanopoulos, *supra* note 10 (noting that while the *Rucho* majority relied on the Constitution's text and history, it was unpersuaded by North Carolina's originalist interpretation of the Elections Clause).

132. *See* John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 805 (2009) (arguing that the original meaning should give way to precedent when it is necessary to avoid large social costs, when precedent is entrenched, and when precedent corrects supermajoritarian failures such as the exclusion of African-Americans and women).

133. *Rucho*, 139 S. Ct. at 2496.

134. *Id*.

135. *Id*.

136. *Id*. at 2496–97. These two cases pull in opposite directions since *Gomillion v. Lightfoot* prevented the state from excluding African-Americans from being represented while *Shaw v. Reno* constrained the states' ability to create majority-minority districts.

necessary element of an originalist argument. While consistent with the final outcome, the majority's reliance on original meaning did not compel the result since the majority advanced several arguments, including the analysis of precedents, that also arrived at the same conclusion.

Even if the Court majority's reliance on the text and history of the Constitution in its election law decisions is not originalist in a strict sense, some of the majority's positions in the cases display an originalist orientation. By "originalist orientation," I mean that the arguments about original meaning take a preponderant weight in the analysis and are consistent with the outcome even if they do not compel the overall outcome. William Baude draws a distinction between (1) exclusive originalism, which requires that judges only rely on original meaning; (2) inclusive originalism, which permits judges to also rely on precedent which has an "originalist pedigree"; and (3) pluralist accounts, which hold that there are multiple modalities of constitutional interpretation, including original meaning.[137] An originalist orientation does not fit within Professor Baude's account of exclusive originalism, nor does it necessarily fit within inclusive originalism. But an originalist orientation also seems to differ from pluralist accounts that hold that there is no clear hierarchy among the various modalities of constitutional interpretation.[138] An originalist orientation privileges original meaning where it can but usually defers to non-originalist precedent when the disruption to settled law would be too great.[139] In those instances, an originalist orientation would be less exacting than inclusive originalism but would place more presumptive weight on original meaning than a pluralist approach. Under an originalist orientation, original meaning is authoritative but not compulsory across the board.

The originalist orientation means that, at least for some issues, the founding era is serving as an implicit baseline for the conservative wing of the Court. There are three reasons why this originalist orientation matters. First, under an originalist orientation, non-originalist precedents would likely carry less relative weight than they would for a living constitutionalist, who would also likely consult original meaning but would place greater emphasis on stare decisis. In *Shelby County*, for example, Chief Justice Roberts was willing to strike down a key protection provided by the Voting Rights Act on the basis of an argument that was at least partially based on an originalist interpretation of the Tenth Amendment.[140] According to the majority, the preclearance process departed from basic principles of federalism including state autonomy over the regulation

137. William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2355, 2362 (2015). Professor Baude identifies a fourth category in which originalism is not treated as a source of law. *Id*. at 2355.

138. *Id*. at 2404.

139. *See* McGinnis *supra* note 127; McGinnis & Rappaport, *supra* note 132, at 805.

140. Shelby County v. Holder, 570 U.S. 529, 543–44 (2013).

of elections and the principle of equal sovereignty among the states, and for this reason it could not be justified on the basis of outdated conditions.[141]

In *Rucho*, the majority acknowledged that despite its originalist-style interpretation of the Elections Clause, the Court does have a role to play in districting, at least with respect to one-person, one-vote and racial gerrymandering.[142] One (ominous) possibility, however, is that the same logic does in fact apply to these two exceptions as well; that is, the Framers never contemplated that the federal courts would be engaged in overseeing districting to fix malapportionment and racial gerrymandering.[143] This line of reasoning could be used at some future point to undercut the relevant precedents thereby constraining the judicial role with respect to districting. Although this is a remote possibility given the disruption to settled law, it is not entirely inconceivable particularly in view of Chief Justice Roberts' incrementalist strategy of setting up arguments in one case in order to subsequently deploy them in future cases to overturn or constrain longstanding precedents.

Second, an originalist orientation has a significant impact on election law federalism. While in practice the states are primarily responsible for devising electoral rules, the jurisdictional question as to how to draw a line between state authority over elections and federal authority over elections is complex and subject to continuing dispute.[144] The debate is often couched in the language of state sovereignty versus national sovereignty, with theories tilting towards one or the other. State sovereignty in election law matters could be viewed as consistent with the "laboratories of democracy" tradition[145] or with theories that view states as venues for minority empowerment.[146] That being said, state sovereignty in election law matters has tended, for the most part and certainly as a historical matter, to lead to the adoption of rules that are either anti-democratic or that are consistent with an elitist approach to democracy. The era of Jim Crow and the resistance to the Voting Rights Act, not to mention slavery itself, are emblematic of the serious deleterious consequences of state sovereignty. States have also engaged in practices, such as malapportionment and the adoption of

141. *Id*.

142. Rucho v. Common Cause, 139 S. Ct. 2484, 2497 (2019).

143. For a version of this argument, see Reynolds v. Sims, 377 U.S. 533, 590–91 (Harlan, J., dissenting) (providing an originalist reading of the Fourteenth Amendment that precluded the application of one-person, one-vote to the states).

144. *See* Derek T. Muller, *The Play in the Joints of the Election Clauses*, 13 ELECTION L. J. 310, 311 (2014); Justin Weinstein-Tull, *Election Law Federalism*, 114 MICH. L. REV. 747, 752 (2016).

145. The phrase "laboratories of democracy" was used by Justice Brandeis for the idea that a "[s]tate may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

146. Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1794 (2005); Heather K. Gerken, *Foreword: Federalism All The Way Down*, 124 HARV. L. REV. 4, 52 (2010).

restrictive voter qualification laws, that have served to undermine political equality, entrench power, and reduce democratic accountability. By contrast, the national government has been an important source of laws, such as the Voting Rights Act, the National Voter Registration Act, and the Help America Vote Act, which promote democratic access and equality.

While the Supreme Court in years past addressed and remedied malapportionment,[147] removed restrictions on voting,[148] prevented racial vote dilution,[149] and upheld the Voting Rights Act,[150] the current conservative wing of the Court has been far more deferential to state sovereignty in election-law matters, even when such deference is not warranted. Franita Tolson argues, for instance, that the framework of dual federalism is not appropriate for the Elections Clause because the Clause provides Congress with a broader scope of power than is recognized by the Court.[151] Under the Elections Clause, the federal government holds ultimate power over federal elections even in the face of state sovereignty, subject to a qualified exception involving voter qualification rules.[152] Rather than treating the federal government and states as sharing power over federal elections, states should be treated as subordinate to federal authority. Professor Tolson further urges that because the Elections Clause is an underenforced constitutional provision, the true scope of federal authority over elections is misunderstood.[153] For this reason, even extensive federal legislation relying on the Elections Clause, such as the H.R. 1 bill overhauling the federal election system, should be treated as a valid exercise of federal authority rather than as an unconstitutional encroachment on state authority.[154]

An originalist orientation to election law federalism often results in outcomes that are inconsistent with an egalitarian vision of democracy. As Professor Charles and Professor Fuentes-Rohwer argue, the states are "winning the federalism battle" and there is "scant evidence" that the states are interested

147. Baker v. Carr, 369 U.S. 186, 266 (1962).

148. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 663 (1966) (holding poll taxes unconstitutional under the 14th Amendment).

149. White v. Regester, 412 U.S. 755, 755 (1973); Rogers v. Lodge, 458 U.S. 613, 613 (1982).

150. South Carolina v. Katzenbach, 383 U.S. 301, 336–37 (1966).

151. Franita Tolson, *Election Law "Federalism" and the Limits of the Antidiscrimination Framework*, 59 WM. & MARY L. REV. 2211, 2216–17 (2018). *See also* Jamal Greene, *Judging Partisan Gerrymanders under the Elections Clause*, 114 YALE L. J. 1021 (2005).

152. Franita Tolson, *The Spectrum of Congressional Authority over Elections*, 99 B. U. L. REV. 317, 382 (2019) (arguing that although the Court majority has held that the states have exclusive jurisdiction over voter qualifications, "Congress can intervene when a state voter qualification standard has significant implications for participation and turn out in federal elections.").

153. Franita Tolson, *The Elections Clause and the Underenforcement of Federal Law*, 129 YALE L. J. F. 171, 173–74 (2019).

154. *Id*. at 174.

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in protecting minority voting rights.[155] The Court's decision in *Shelby County* eviscerated the national oversight of discriminatory electoral practices by covered jurisdictions. The rationale was to protect the equal sovereignty of states. Professor Hasen argues that by broadening the scope of state autonomy under the Tenth Amendment, the *Shelby* majority ignored how the Fifteenth Amendment "changed the state-federal balance of power and the scope of the Tenth Amendment."[156] By contrast, Justice Ginsburg emphasized in her dissenting opinion that Congress's power to enforce the Fourteenth and Fifteenth Amendments should be treated with substantial deference by the Court.[157] Not only does an originalist orientation discount longstanding precedents, it also privileges the first framing over the second framing, thereby further diluting the influence of the Reconstruction Amendments. In addition, it ultimately reinforces a general trend in which the conservative wing of the Court reserves election law matters to the states. The net outcome is likely to erode egalitarian democracy and encourage the implementation of an elitist vision of democracy or, at the very least, not stand in its way.

Third, an originalist orientation could make reform efforts more difficult. Not only is the Court majority less inclined to view the judicial function through an Ely-inspired lens, it also takes an originalist and hence formalist view of the function of Congress and the state governments, treating these institutions as first responders to democratic malfunctions such as partisan gerrymandering notwithstanding current political realities of gridlock and partisan self-entrenchment.[158] An originalist orientation could also thwart reform efforts that are viewed as incompatible with the constitutional text. In *Arizona State Legislature v. Arizona Independent Redistricting Commission*,[159] a majority of the Court upheld an Arizona ballot measure that established an independent redistricting commission. Chief Justice Roberts wrote the dissenting opinion, arguing that the word "Legislature" in the Elections Clause referred to a representative body, and not the people at large, and hence, the congressional redistricting authority of the state legislature could not be transferred by ballot initiative to an independent redistricting commission.[160] In *Rucho*, however, Chief Justice Roberts listed independent redistricting commissions as one of the

155. Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Race, Federalism, and Voting Rights*, 2015 UNIV. OF CHI. L. F. 113, 117, 134 (2015).

156. For an analysis, see Hasen, *supra* note 44, at 731–32.

157. Shelby County v. Holder, 570 U.S. 529, 560 (2013) (Ginsburg, J., dissenting).

158. In *Rucho*, for instance, the Court majority identified a number of ways that Congress and the states had and could respond to the problem of partisan gerrymandering. Rucho v. Common Cause, 139 S. Ct. 2484, 2507–08. For a discussion of the Court's formalist approach to institutions, see generally Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 1 SUP. CT. REV. 1 (2013).

159. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652 (2015).

160. *Id*. at 2677–78 (Roberts, C.J., dissenting).

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ways in which the states are addressing partisan gerrymandering,[161] even though, as Justice Kagan pointed out, this solution was inconsistent with his earlier dissent in *Arizona State Legislature*.[162] To the extent that future reform efforts may rely on provisions in the U.S. Constitution, the Court majority's originalist orientation could stymie these efforts particularly given the new configuration of the Court's conservative majority.

CONCLUSION

This Essay has argued that the Supreme Court's recent election law decisions can be understood as instantiating a conception of democracy that is distinctly elitist in its nature. This elitist conception of democracy is gradually displacing the egalitarian vision of democracy that was ushered in by the Supreme Court during the civil rights era. In recent years the Court majority has refused to check the undemocratic impulses emanating from the states and indeed has tacitly allowed such impulses in keeping with the emerging elitist model of democracy. Future election law decisions will no doubt involve a similar clash between an elitist approach to democracy, as espoused by the Court's conservative wing, and an egalitarian approach to democracy, as defended by the liberal wing.

The Court's emerging elitist vision of democracy has significant continuities with the founding era. Even if not originalist in the strict sense, the Court majority's orientation to the framing era has significant implications for the future of election law. All three of the trends that result from its originalist orientation—discounting non-originalist precedents, favoring the states over the national government when deciding jurisdictional questions, and making reform efforts more difficult—also have the consequence of reinforcing elitist democracy and eroding egalitarian democracy. If 1789 is the Court majority's implicit baseline, many phenomena that are problematic from an egalitarian democratic perspective will not seem particularly troubling. The Court's originalist orientation is also selective; for instance, it gives insufficient weight to the Reconstruction Amendments, which can be understood in egalitarian terms, and which are part of the constitutional text after all, but which are playing an increasingly constrained role in the majority's decisions. In sum, the Court majority's orientation to the founding era poses a direct threat to all the gains that have been achieved over the last several decades which have rendered democratic self-government more inclusive, more equal, and more responsive to the people.

161. *Rucho*, 139 S. Ct. at 2507.

162. *Id*. at 2524 (Kagan, J., dissenting). According to Professor Stephanopoulos, Chief Justice Roberts' position in *Arizona State Legislature* "plainly amounts to a perverse *Carolene* position," since it prevents other political actors from taking steps to remedy democratic malfunctions. Stephanopoulos, *supra* note 10.

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