# THE LAW OF FREEDOM: THE SUPREME COURT AND DEMOCRACY

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Forthcoming Cambridge University Press, Summer 2023

23 November 2022

'Opposition is true Friendship.' - WB

'Man errs as long as he strives.' – JWvG

'All is not lost; the unconquerable Will…' – JM

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*To Darel, John, and George*

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## Introduction

The Supreme Court has transformed American democracy in the last century. It has mandated numerical equality in the process of allocating voters to districts, heralding the 'reapportionment revolution.' It has strictly curtailed campaign finance regulation, allowing private wealth to dominate political discourse. It has influenced the processes by which increasingly polarized parties select their candidates. It has defined the constitutional bounds within which legislatures may seek racial justice. When constituents engage in self-governance, they now do so in the shadow of a judiciary that – by institutional design and the moral requirements of the rule of law – can act with impunity, insulated from political pressure.

The federal judiciary's influence over the democratic process has created a fundamental difficulty. Democracy has unique moral legitimacy as a mode of governance because it directly allocates power over governance to its constituent members. Yet to realize legitimate self-rule, constituents must not only be able express their will through democratic procedures (typically elections); they must also have the authority to construct and validate these procedures. When politically neutral (i.e. non-accountable) courts make decisions that impact democratic procedure, this directly challenges the foundation of democracy as autonomous constituent self-rule.

The foundational moral question – *how can non-accountable judicial authority over democratic process be legitimate?* – has been strangely neglected in academic research. The last major analysis – which addressed the moral difficulties of judicial authority over democratic process as a significant aspect of constitutional review generally – is John Hart Ely's influential but controversial *Democracy and Distrust*, and is now almost half a century old.[1] Subsequent scholarly debates over constitutional interpretation have generally overlooked the unique challenges posed by this transformation of democratic process. While the rapid growth of election law studies echoes the Court's impact on democratic process, research in this field has predominantly deployed a structural lens, interrogating what electoral features and practical designs the Court should advance. Election law scholars have treated the judiciary as merely another player in the game of power politics; they have ignored its distinctive normative mandate and obligations and asserted that election law is now driven by partisan conflict on the bench.[2]

This book addresses this gap in the research in two parts. First, in Chapters 1 to 3, it presents a theoretically rigorous, philosophically and jurisprudentially informed account of the challenge posed by judicial oversight of democratic process. This challenge, which I call the *counterpopular dilemma*, is based on the confrontation between the competing normative implications of judicial oversight of electoral process. The first implication is that democracy is a uniquely legitimate mode of governance because it allocates causal power over governance to the constituent members of the polity. Constituent autonomy requires both (1) the authority to establish the procedures that realize that autonomy and (2) participating in those procedures. Allocating this authority to a non-accountable (i.e. rule-of-law neutral) judiciary limits constituent autonomy and subordinates the

[1] Both Ely's work and his critiques are discussed extensively in Chapter 2.
[2] See, e.g., Nicholas O. Stephanopoulos, "The Anti-Carolene Court" (2019) 2019 *Supreme Court Review* 111, 177–180. Richard L. Hasen, "The Supreme Court's Pro-Partisanship Turn" (2020) 109 *The Georgetown Law Journal* 50. As discussed in the Conclusion, while some trends in modern election law support this claim, a comprehensive analysis of the doctrine reveals that a far more nuanced philosophical conflict is taking place on the bench.

moral role of constituent freedom to some other value.This undermines the constituency's autonomy – and with it, democracy's moral value.

However, the value of impartial, politically neutral, and institutionally insulated review of electoral process evokes the second normative implication of judicial oversight of democracy. Without judicial review, representatives and elites can manipulate the integrity of democratic procedures for their own self-interested political gain. The most prevalent scholars in election law have observed that political actors tend to adopt self-serving democratic procedures and manipulate election law to entrench themselves and their allies. This practice taints the imprimatur of democratic autonomy in subsequent elections. These scholars have argued that the judiciary is uniquely positioned outside typical political struggles, and thus especially well-suited to guarantee fair elections.

No prior account of judicial review can reconcile these competing values. I argue in this book that this dilemma is intractable, but that its intractability can be crafted into a virtue. The best judicial approach is to focus on the highest value of democracy, constituent freedom, and to recognize the conflicting mandates that the judiciary faces – deferring to the validity of political autonomy, and highlighting the need to prevent the abusive use of processes that serve such autonomy. The resulting judicial analysis is most legitimate when it addresses the tension that emerges from this conflict. Thus, *judicial review of election law is most legitimate when it engages in continual and unsettled struggle and debate over the principles of constituent self-rule*.

The second part of the book (Chapters 4–7) demonstrates that the Supreme Court's review of election law is, at its heart, such a philosophical struggle between egalitarian and libertarian conceptions of constituent self-rule. Each chapter offers a coherent, theoretically rich analysis of the development and substance of the doctrine to demonstrate that the bench has debated the ideal of constituent liberty. Chapter 4 outlines the debate surrounding the notion of one person, one vote (1p-1v), which consisted of a struggle, and the ultimate emergence of a consensus, that liberal democracy demands minimal procedural equality in constituent political power. Chapter 5 describes how campaign finance regulation has been driven by the question of whether state intervention or the unequal deployment of private wealth in campaigns constitutes a greater threat to an individual's ability to reason freely about politics. Chapter 6 explores how prior analysis of parties' constitutional status has been driven by a debate over whether parties, as extra-constitutional organizations including both elites and rank-and-file members, enhance or threaten constituents' capacity to realize their self-rule. Chapter 7 investigates the issue of race in elections; it traces the multifaceted debate about whether the constitutional command for racial equity requires the state and courts to advance only minimal procedural equality that disregards past racial injustices, or whether racial equity demands correcting past racial harms by enhancing the representative power of groups that have endured discrimination.

These debates highlight a singular battle over the meaning of self-rule on the bench. This struggle is between (1) a Rawls-aligned 'egalitarian' understanding of liberal self-governance that considers the normative priority to be establishing a shared baseline for all constituents and (2) a Nozick-aligned 'libertarian' understanding that prioritizes protecting individuals' pre-political identities from state overreach. This struggle between egalitarianism and libertarianism calls into question whether election law should aim to ensure that all constituents have a shared equal baseline of political influence, or whether it should protect individuals' pre-electoral endowments from being nullified in electoral competition. While this struggle crystallizes along progressive–conservative lines, it also demonstrates that a shared commitment to constituent self-rule is the foundational value of American democracy. It thereby suggests a way forward for dialogue instead

of conflict even in the context of judicial polarization. Yet the doctrine's long-running emphasis on freedom is threatened by a loss of a philosophical focus on freedom from both pure tribal partisanship (a risk exemplified by *Bush v. Gore*) and an increasing reliance on summary disposition of critical election law questions.

That philosophical struggle can offer a coherent account of American election law doctrine confirms the centrality of constituent autonomy to election law decision-making, and the capability of this account to best ameliorate the counterpopular dilemma. Thus, this book synthesizes a discussion of the philosophical problem of judicial review with democratic self-governance with a descriptive account of American election law. It therefore represents a transformative starting point for understanding election law, and offers a new understanding of how the mandate of judicial constitutionalism can inform the role of courts in a free and democratic polity.

**Starting Principles: Popular Autonomy, the Counterpopular Dilemma, and Reconciliation through Philosophical Dispute**

Democracy is a uniquely legitimate regime type – likely the *only* valid regime type – because it is defined by self-rule by the polity's constituent members. The rulers and the ruled are the same. Such self-determination allows for a morally sound and accountable political system, because it satisfies the requirement that moral evaluation be attributable to free will. While this book focuses on philosophical accounts of democracy as legitimated by freedom, more popular and applied accounts also accept this as a premise.[3] Without this freedom, just conduct and the idea of the good are imposed upon individuals, crowding out the space for moral value. The basis of the premise regarding the relationship between morality and freedom is at root Immanuel Kant's statement that free will is, morally, the "jewel that shines with its own light."[4] In other words, free will is the self-justifying (or reflexive) foundation of morality. The most influential contemporary manifestation in political theory is John Rawls's lexical ordering of liberty as the highest priority.[5] This ideal is now interwoven throughout political and legal thinking on democracy.[6]

The claims that free self-determination of the constituency is a prerequisite for democratic legitimacy, and that such freedom gives democracy its unique moral standing, are polestars of the liberal democratic tradition. This root commitment to freedom stands as a starting point of

[3] See, e.g., Francis Fukuyama, *The End of History and the Last Man* (New York: Free Press, 1992), p. 45.
[4] Immanuel Kant, *Groundwork for the Metaphysics of Morals*, Mary Gregor (trans.), ed. 4 (Cambridge: Cambridge University Press, 1998), p. 394. Chapter 3 sketches the relevant Kantian understanding of freedom, and touches upon the extensively researched relationship between morality, free will, and political justice.
[5] John Rawls, *Theory of Justice: Revised Edition*, ed. 2 (Cambridge, MA: Harvard University Press, 1999).
[6] For example, according to James Fleming, "Securing Deliberative Democracy" (2004), 72 *Fordham Law Review* 1435 at 1437, the "*free* exercise of [citizens'] capacity for a conception of the good" undergirds democracy. (emphasis added). The prominent legal and political theorist Richard Bellamy asserts that "we value democracy as giving effect to the status of individuals as autonomous rights-bearers." Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2009), p. 90. There are of course challenges to these views from a variety of perspectives. Some challenge the foundational relationship between morality and freedom. P. F. Strawson, "Freedom and Resentment" (1962) 48 *Proceedings of the British Academy* 1–25. More relevant to the book's legal argument, the relationship between democracy and constituent freedom has also faced a challenge from descriptive political scientists who query whether democratic governance is, as an empirical matter, a response to reasoned will. Christopher Achen and Lawrence Bartels, *Democracy for Realists* (Oxford: Princeton University Press, 2017); Martin Gilens and Benjamin I. Page, "Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens" (2014) 12 *Perspectives on Politics* 564.

consensus even where subsequent debates lead to foundational disagreements regarding liberal democracy. This is strikingly demonstrated by Barbara H. Fried, who quotes a statement that mirrors Rawls's lexical prioritization of liberty – and then reveals that the quote is not from Rawls or an egalitarian working in the Rawlsian tradition, but from libertarian stalwart Loren Lomasky.[7] It is this point of consensus regarding the priority of liberty that is the foundation for this book's treatment of the doctrine as a debate over the meaning of this liberalism. Even those who are less than wholly committed to the normative premise that freedom is the foundation of legitimate democracy but are interested in (and committed to) American democracy should be moved by the observation that conceiving of the Supreme Court doctrine as a prolonged dispute over liberal freedom offers the most compelling and unified understanding of the law.

However, such political self-determination is only realized if the procedures that support it are legitimate and effective. An essential aspect of this efficacy is the fair and equal implementation of self-rule, a quality that depends significantly on the judiciary. The judiciary has an institutional obligation to protect constitutional rights, and the moral authority to advance the equal position of citizens in line with politically neutral rule of law. Yet if the judiciary curates the terms of democratic self-rule in fulfilling this role, it necessarily comes at the cost of constituent authority over self-governance. The anti-democratic potential of judicial review is familiar, but the problem for democratic procedure is unique.

Liberal democratic self-rule therefore faces an intrinsic tension: it must simultaneously realize and discipline the freedom of the constituency. According to Samuel Issacharoff, "successful liberal democracies…must enable majority rule while also institutionally limiting it."[8] The reason for this Janus-faced quality is itself the intrinsic tension in collective freedom: state governance must be beholden to the will of its constituent members, yet for their will to be free, even a popularly governed state must protect individual constituents from oppressive state overreach so that they may continue to make free choices (including about their contributions to collective self-governance). Tom Ginsberg and Aziz Huq capture this weighing of the collective freedom of self-governance and the individual freedom of rights in their account of the three features of successful liberal democracies.[9] In practice, achieving liberal democratic rule in a polity of any meaningful size and duration does not involve the unadulterated conversion of free will into state action; instead, it relies on institutions and embedded practices that aggregate, channel and modulate such will.

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[7] Barbara H. Fried, "The Unwritten Theory of Justice," in Jon Mandle and David A. Reidy (eds.), *A Companion to Rawls* (Chichester: Wiley-Blackwell, 2014), p. 436.

[8] Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge: Cambridge University Press, 2015), p. 2.

[9] Tom Ginsberg and Aziz Z. Huq, *How to Save a Constitutional Democracy* (Chicago: University of Chicago Press, 2019), pp. 8-14. In addition to holding sound majoritarian elections, such democracies must vigorously protect rights essential to individual political freedom (such as speech and political association) and respect the rule of law. Although I do not take a technical perspective on it, there is a fierce debate over whether the rule of law and rights protection can be considered singular and entwined – i.e. whether neutral rule-of-law adjudication *entails* certain rights protection. This debate pitches HLA Hart and his student Joseph Raz against Lon Fuller. Since neutral rule of law is necessary for the effective realization of both majority rule and the protection of individual rights, I posit that liberal democracies that realize the moral freedom of their constituents adhere to a 'thicker' conception of the rule of law. However, seeking to inform how the judiciary should address intervention in democratic process by reverting to principles of legality faces the evergreen difficulty of imposing substantive values upon a free electorate, and thus constricting freedom in a context that is meant to enable it; this parallels the difficulties facing general accounts of constitutional review.

**The Counterpopular Dilemma: Critiques of Judicial Review and Courts as Guardians of Process**

Some institutions and practices that contribute to the sustainability of democratic self-rule can be easily traced to collective popular will. Some structures are established by mechanisms that are directly democratically accountable (e.g. statutes that set terms of electoral administration), or that can be allocated at least in principle to the constituent body itself, such as widely held value of democracy within civil society. Yet the rule of law's centrality to democracy points to an institution that cannot be as neatly reconciled with the primacy of constituent self-rule – the judiciary. The judiciary plays a central role in safeguarding (through its neutral advocacy for the rule of law and rights protection) the equal individual freedom of individuals whose collective will legitimates collective democratic governance.[10] By protecting individual freedom (both as the capacity to act without state constraint with a protected zone of wholly personal freedom, and as the capacity to contribute to collective self-determination, a duality reflected in the baseline-versus-endowment debate over liberalism on the Supreme Court), the judiciary advances the most morally critical feature of democracy as self-rule and remains a pivotal institution for successful democracies.

This puzzle of judicial intervention in electoral processes is increasingly important, particularly in the United States. Over the past 60 years there has been an efflorescence of federal case law that directly bears on elections. The result – which Richard Pildes aptly calls "the constitutionalization of democratic politics"[11] – has been a restructuring of multiple aspects of electoral practice. The Supreme Court's enforcement of constitutional rights does more than incidentally impact electoral practice. It has set in motion the reapportionment revolution of 1p-1v and the radical innovation of anti-corruption law to regulate campaign finance, and aggressively interpreted the mandate for racial equality to shape electoral process. These interventions have structurally transformed various aspects of elections, and the election law jurisprudence advances substantive and specific views of democratic representation. The Court's jurisprudence on electoral procedures has thus radically transformed US democratic governance in a remarkably forthright manner. Decisions that identify and delineate unequivocally individual rights can have far-reaching consequences (e.g. *Roe v. Wade* or *Gideon v. Wainwright*). Yet with a wide-ranging declaration of constitutional authority over election law, the Court has consistently adapted right-protecting provisions to rework the general framework by which citizens rule themselves – and thus the content and context of all other law.[12]

The judiciary's centrality to successful democracy poses a dilemma for the primacy of self-determination (the practical aspect of the dual need of democratic process to express and discipline popular will). A defining feature of sound judicial decision-making is judges' neutrality and independence – i.e. political non-accountability.[13] If democracy is morally vindicated by the self-

[10] This role is seminally articulated in Tom Bingham, *The Rule of Law* (London: Allen Lane, 2010). There is of course debate over how extensively rule of law advances substantive justice. See, e.g., Joseph Raz, 'The Rule of Law and Its Virtue' in *The Authority of Law: Essays on Law and Morality* (ed. 2) (Oxford: Oxford University Press, 2009).

[11] Richard H. Pildes, "The Constitutionalization of Democratic Politics" (2004) 118 *Harvard Law Review* 29, at 42.

[12] Scholars have typically been critical of the rights-based understanding of judicial oversight of electoral practice. For a seminal example, see Pamela S. Karlan and Daryl J. Levinson, "Why Voting is Different" (1996) 84 *California Law Review* 1201.

[13] The nature of this independence is widely debated, but its presence as a quality of sound judging is incontrovertible. See, e.g., Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964); Irving R. Kaufman, "The Essence of Judicial Independence" (1980) 80 *Columbia Law Review* 671; Cass R. Sunstein,

determination of the constituent members, how can the realization of their autonomy through the democratic process be vetted and subject to the will of a body that is itself politically non-accountable? Meaningful freedom requires that an outside entity does not overdetermine the ultimate constituent power over politics (here, the processes by which constituents make political choices).[14] Just as a person who votes a particular way under physical threat would not be said to act freely, a polity that only makes choices within a decision framework imposed upon it from the outside cannot be considered wholly free. Thus, where the judiciary exogenously determines the conditions of their self-rule, the people are not wholly autonomous.

The role of judicial review in shaping elections therefore poses what I call a *counterpopular dilemma*: the integrity of self-rule requires sound (i.e. neutral) judicial advancement of equal constituent rights in the democratic process, yet such intervention (at least when it assumes the structurally transformative forms that have characterized modern American election law) contravenes the principle that authority over processes of self-rule must come from the constituents rather than an external, non-accountable authority. While some have argued that action initiated by the judiciary is not necessarily less democratic than activities undertaken by accountable institutions (such as legislatures), Alexander Bickel's classical formulation still resonates: "nothing can finally deprecate the central function that is assigned…to the electoral process; nor can it be denied that the policymaking power of representative institutions, born of the electoral process, is the distinguishing characteristic of the system. Judicial review works counter to this characteristic."[15]

Judicial restructuring of democratic process poses this problem in two linked, distinctive ways. First, the purpose of elections is to convert constituent will into political action, and thereby validate the power of the state by attributing it to constituents. While in many contexts judicial intervention (typically through rights protection) can be vindicated as preventing majoritarian mistreatment of vulnerable individuals or marginal groups, this is not sufficient to justify judicial intervention in elections in general. *Democracy has moral power because it realizes the collective will; interdicting that will cannot be a guiding principle of democratic procedure*. Second, as a structural corollary to this normative problem, where the judiciary intercedes to redefine legitimate terms of democracy, it redefines the baseline of the collective will itself. Any subsequent expression of popular will – including future electoral rules – following a judicial intervention into democracy reflects this judicially curated version of constituent expression. Since this externally determined

"Neutrality in Constitutional Law" (1992) 92 *Columbia Law Review* 1; Paul Gowder, "The Rule of Law and Equality" (2013) 32 *Law and Philosophy* 565.

[14] Jeremy Waldron calls this general capacity, "on which large numbers of right-bearers act together to control and govern their common affairs" "the right of rights". Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999), pp. 232–3. He notes on p. 283 that the principle of democratic self-determination demands that when "a common decision is needed, every man and woman in the society has the right to participate on equal terms in the resolution of that disagreement," thus showing the continued expression of equality as a facet of freedom. This book focuses on the unique demands of democratic process as such a type of common decision. Waldron's analysis captures the political–philosophical basis of the problem of non-accountable authoritative determination, which Chapter 2 of this book invokes through Isaiah Berlin's description of a "temple of Sarastro" where a concept of freedom is imposed upon others. Henry Hardy (ed.), *Two Concepts of Liberty* in *Liberty* (Oxford: Oxford University Press, 2002). In the most metaphysical sense, this generates a deep debate regarding the nature of free will, particularly the question of compatibilism. See R. Jay Wallace, *Responsibility and the Moral Sentiments* (Cambridge: Harvard University Press, 1994).

[15] Alexander M. Bickel, *The Least Dangerous Branch* (New Haven: Yale University Press, 1986), p. 19. Some prominent responses to Bickel have sought to minimize the tension posed by of rule-of-law rights enforcement by denigrating the significant of elections generally. In Chapter 2 I revisit this issue in my discussion of Dworkin and Eisgruber.

version will influence any later expressions of popular will, this recursively disrupts the foundation of democracy as legitimated by (and expressing) the constituent will.

As discussed further in Chapter 1, the counterpopular dilemma operates at the intersection of two separate contemporary bodies of scholarship. This book is one of the first to bring both robust literatures into meaningful dialogue with each other. On the one hand, scholars skeptical of judicial review – led by Jeremy Waldron, Samuel Moyn, and Richard Bellamy – have argued that increasingly assertive judicial review that displaces or overrides legislative decision-making intrudes upon constituent freedom and fails to generate superior governance outcomes, and thus lacks normative and practical legitimacy. On the other hand, American election law scholars – led by Samuel Issacharoff, Richard Pildes, and Pamela Karlan, and now taken up by Nicholas Stephanopolous, Michael Kang, and Bertrall Ross, among others – identify the judicial role, and specifically its non-accountable nature, as normatively desirable and instrumentally critical to preventing self-serving legislative manipulation of democratic process. These scholars identify the risk that legislators typically undertake such distortion to consolidate their control, with the result that democratic process no longer accurately expresses the free will of the constituency. This approach posits that judicial intervention in elections should act to directly benefit the moral integrity and representative efficacy of democracy (even where that involves overriding legislative will that is more directly accountable, by, for example, striking down partisan gerrymanders).

Recognizing the simultaneous legitimacy (or at least plausibility) of both positions indicates the heart of the counterpopular dilemma: judicial review of electoral process simultaneously contravenes and sustains constituent autonomy, the vindicating moral quality of democratic organization. It contravenes this autonomy by empowering an institution with the defining characteristic (according to its critics as well as many of its staunch advocates) that it lacks political accountability. This implies that popular autonomy is only legitimate if it is subordinated to conditions imposed by an external entity, but this undermines the primacy of popular self-determination. Yet without such non-accountable oversight, the integrity of democratic process is vulnerable to manipulation by political elites. Judges' non-accountability insulates them from such manipulation, and thereby sustains democratic autonomy.

**Between Constituent Self-Rule and Democratic Integrity**

The lack of meaningful engagement between dedicated election law scholarship and criticism of judicial review exposes a fundamental gap in the literature. Since the normative difficulty of non-accountable authority is heightened in the context of electoral process, the casual willingness of election law scholars to treat robust, substantive judicial intervention as acceptable is an especially puzzling lacuna. Prior election law research has presumed that robust judicial intervention is valid, rather than adequately investigating who has the ultimate moral authority to guarantee constituent autonomy.

There are three ways to overcome this dilemma. The first is that some existing justification vindicates judicial intervention into democratic process. However, as Chapter 2 shows, none of the three leading candidates – living interpretivism–deliberativism, originalism–contractarianism, and structuralist instrumentalism – offers a satisfactory explanation. All three justifications contravene democratic autonomy by suggesting that judges have the moral knowledge or political authority to impose conditions of self-rule, and thus can define freedom in a manner lexically prior to freedom itself. Examining these accounts highlights the unique onus of justifying authority over democratic process. Even if these established scholarly explanations can vindicate robust judicial review of 'typical' substantive policymaking by pointing to how the constituency authorizes the courts to

police other branches of government as a constitutional matter, such explanations are insufficient to justify review of democratic self-rule by the constituency itself. This is because democratic process is itself the functional incarnation of the foundational value of democracy, autonomous self-rule. Non-accountable authority over such autonomy cannot be vindicated by referencing some other value or feature of the constitutional order, because this suggests there is a higher priority than autonomy. Such an account would thus contravene the legitimizing principle of democracy – the autonomy (and thus ultimate authority) of the electorate. The normativity of such a claim collapses in on itself.

The two other possible solutions to the dilemma are that judicial review skeptics have simply identified a devastating gap in election law scholarship, or that instrumentalism in election law reveals a devastating limit to democratic self-rule. The former would be surprising regarding the richness of election law scholarship; the latter runs contra to the principle of this book, and would suggest a 'hard' juristocratic limit to Waldron's wry claim that "everything is up for grabs in a democracy."[16] While some defenders of robust constitutional review accept the proposition that democratic autonomy has such limitations,[17] it contradicts the bedrock principle that democratic procedure is morally redeemed by self-determination by the people.

There is a further reason to question the thesis that constituent autonomy faces a 'hard' limit thanks to the role of judicial review: election law scholarship has largely responded to the doctrine developed by the Supreme Court. If there truly is a 'hard' limit to legitimate judicial review, the anti-judicial review critics have identified a deeply troubling feature about America: it is not a democracy in practice, but a blended democracy/juristocracy (to adapt Ran Hirschl's terminology). This would imply that the judicial influence over electoral process has eroded democracy, and jeopardizes the constituent self-rule that legitimizes it. If so, election law scholarship has largely failed as a critical enterprise because it has sought to optimize, rather than minimize, the judiciary's role.

Skepticism of judicial review of election law, however, reveals two foundational complexities of its own. The first is that the doctrinal legacy of judicial intervention has been, by any reasonable understanding of democratic legitimacy, thoroughly mixed (discussed further in Chapters 4–7, which examine the substantive law). Some judicial interventions into democratic process seem, by both popular acclaim and according to any reasonable account of legitimate democratic process, desirable. The interdiction of legislative malapportionment by *Baker v. Carr* and the prohibition of gross racial discrimination in *Gomillion v. Lightfoot* and the White Primaries cases would likely be the most widely accepted examples. Some non-interventions, particularly those related to failures to prevent racial discrimination – *Giles v. Harris* and *Lassiter v. Northampton* – illustrate the Court's unequivocal failure to make democratic process available to all. Other interventions have mixed (*Buckley v. Valeo*) or fiercely disputed (*Shelby County v. Holder*) reputations, as do some non-interventions (*Rucho v. Common Cause*). Still others lack an obvious legitimate judicial reasoning (*Bush v. Gore*). Thus we cannot neatly conclude that judicial intervention in electoral process leads to juristocracy, and non-intervention to more autonomous democracy. Rather, and in line with the instrumental focus of election law scholarship, the impact of judicial intervention depends on its substance and legacy.

The attempt to understand and vindicate judicial review purely on the terms of judicial power, meanwhile, faces a problem of moral justification. If the judicial review critique is fully

[16] Waldron, "Law and Disagreement," 303.

[17] See Theunis Roux, "In Defence of Empirical Entanglement: The Methodological Flaw in Waldron's Case against Judicial Review," in Ron Levy, Hoi Kong, Graeme Orr, and Jeff King (eds.), *Cambridge Handbook of Deliberative Constitutionalism* (Cambridge: Cambridge University Press, 2018), pp. 210–211 (invoking Issacharoff's empirical observations about the value of constitutional courts in challenging Waldron's implicit radical view of political constitutionalism).

accepted and the judiciary excluded from shaping democracy, it leaves the structures of political process wholly subject to political outcomes themselves (a point these critics might well accept as a desirable state of affairs). However, this means that democracy is wholly determined by power – which can impair the legitimacy of a democracy, from malapportionment to racial oppression. The instrumental scholarship is of course directed towards such power-based understandings of elections, and part of its own rich tradition traceable to Schumpeter.[18] But such an account neglects to explain the characteristic moral legitimacy of democracy.

Thus the counterpopular dilemma is profoundly sharpened by simultaneously considering (1) the moral premises of democracy – autonomy of the constituent members of the society, realized as directly as possible and (2) the fact that the abuse of power can undermine the legitimacy of democratic process, which creates at least a tentative case for judicial review, and vindicates some instances of it. Many accounts that seek to vindicate judicial review based on democratic autonomy only do so by ultimately claiming autonomy-displacing moral authority or eroding the rule-of-law neutrality that makes judicial review an effective check on power.[19] In this book I explore whether there is an account that retains the legitimizing primacy of democratic autonomy *and* the conceptual benefits (neutrality, rule of law) and practical inevitably of judicial review.

**Reconciling the Counterpopular Dilemma: Philosophical Dispute over Freedom**

This dilemma, in terms of practice, seems insoluble: democratic procedure must be self-determined to be morally valid, yet certain aspects of it must be exogenously determined if it is to survive. Any solution to this conflict must balance or internalize, rather than eliminate, the tension between the moral primacy of constituent self-determination and the structural necessity of judicial review. That is, a solution will *simultaneously sustain* the two competing values rather than eliminate the conflict.

The incontrovertible guiding principle is that if the touchstone of democratic process is free self-rule by the electorate, judicial oversight of democratic process must advance autonomous constituent self-rule. Judicial reasoning must aspire to advance democratic process that allocates power over self-rule to constituents of the polity, rather than impose values on them or interdict, however subtly, the levers of constituent autonomy. *Legitimate judicial decision-making regarding democratic process thus consists of ongoing, unsettled struggle over the principles of freedom that best advance autonomous popular self-rule*.

The three decisive features of this account – its philosophical nature, its substantive focus on freedom, and its tendency toward unsettlement – are critical to balancing the primacy of constituent self-rule and the benefits of neutral judicial adjudication of election law issues. By continuously wrestling with the appropriate terms of constituent self-rule – within individual cases, across cases within doctrinal domains, and across the field through the grand debate between egalitarianism and

[18] Samuel Issacharoff and Richard H. Pildes, "Politics as Markets: Partisan Lockups of the Democratic Process" (1998) 50 *Stanford Law Review* 643 at 649–650 (discussing Anthony Downs and public choice theory).
[19] Eisgruber advances a variation of this by arguing that federal courts are to some degree accountable and thus democratically legitimate. Christopher L. Eisgruber, *Constitutional Self-Government* (Cambridge: Harvard University Press, 2001) p. 60. Lafont maintains that citizen participation in litigation makes judicial review valid. Yet even if describing constituents (who have political attributes such as power and self-interest) as involved in litigation makes judicial review more procedurally democratic, introducing this democratic procedure based on citizen participation erodes the 'strong' neutrality that makes judicial review an effective check on the deployment of democratic power over process. Christine Lafont, *Democracy without Shortcuts: A Participatory Conception of Deliberative Democracy* (Oxford: Oxford University Press, 2020) p.225.

libertarianism – judges help protect freedom without *decisively* imposing terms of autonomy upon the constituency.[20]

As analysis of substantive law demonstrates, the established domains of election law doctrine can be compellingly framed as disputes over appropriate terms of popular self-rule to provide a field-unifying account. This account has two distinct facets. The normative facet observes that struggle over principles of popular autonomy is the best way to reconcile judicial review of electoral process with democratic self-rule. The descriptive facet queries, does the case law reflect such a struggle? Review of the substantive law precisely reveals such a debate. Thus, at the level of abstraction that explores the *aim* of judicial reasoning, the prominent conclusions from case law on electoral procedure are vindicated vis-à-vis democratic procedure. Notably, this does *not* speak to the practical wisdom of the judges' substantive positions; these are questions of policy, the subject of most election law scholarship. Nor does it suggest that the bench has set out to philosophically interrogate freedom in the development of election law. Rather, by interrogating electoral process, the justices have engaged in philosophical debates about the nature of self-ruleThat the Court has has converged on a mode of analysis that explicates the nature of constituent freedom can redeem judicial review.

Defining the substance of judicial review as a struggle over autonomy weakens the moral authority of any specific account of how courts should organize electoral process. However, this less decisive description of judicial authority is a virtue in the context of democratic process for two reasons. First, it offers an account of judicial review that is intrinsically more capacious, because it incorporates multiple conceptions of freedom and legal decision-making (e.g. interpretivism or originalism). Since the legitimating quality of judicial review is service to constituent autonomy, sound judicial reasoning will include the possibility of legal decision-making methods that best serve this autonomy.

The second reason, which is perhaps more important for the character of normative contestation over freedom, is that this contestatory approach lends itself to *perpetual unsettlement* in legal debates rather than the march toward resolution that typically characterizes common law.[21] The debate is not settled until the question at issue is incontrovertible as a matter of unequivocal consensus such that the feature is considered an unequivocal necessary precondition of liberal democratic self-rule. The only domain of election law that has reached such status is the minimum procedural egalitarianism of 1p-1v; the foundations of all others are marked by prolonged dispute over the nature of constituent self-rule. Chapters 4–7 unpack this quality, but quick pairings from each area reveal the instability of election law: *Austin v. Michigan Chamber of Commerce* and *Citizens United v. Federal Election Commission*; *Davis v. Bandemer* and *Rucho v. Common Cause*; *State of South Carolina v. Katzenbach v. Morgan* and *Shelby County, Alabama v. Holder*. In this regard, the level of moral authority asserted by decisions as debate over freedom is weaker than interpretivist–deliberativist understandings, because the bench is not assumed to synthesize all of

[20] While this book remains agnostic in this area, various theorists have proposed substantive bounds on the views that judges advance in this contestation. For example, Pildes synthesizes and contextualizes Robert Dahl's view that organic political realities will ensure the Supreme Court never deviates too far from the views of the electorate as a whole. Richard H. Pildes, "Is the Supreme Court a 'Majoritarian' Institution" (2011) 2010 *The Supreme Court Review* 103, 104. Eisgruber characterizes judges as actors who are still in some sense accountable to a broader political order. Eisgruber, "Constitutional Self-Government," p. 60. Lafont observes how judges judge in response to citizen appeals for justice Lafont, "Democracy without Shortcuts," p. 225.

[21] The nature of such lawmaking is itself the subject of prolonged debate, but typical accounts that treat it as a substantively meaningful endeavor rather than fundamentally arbitrary or overdetermined (eg, critical realist or postmodern accounts) identify some degree of resolution and distinctly legal reasoning. Contrast, for example, H. L. A Hart's account in *The Concept of Law,* 2nd ed. (Oxford: Oxford University Press, 1997) with Ronald Dworkin's in *Law's Empire* (Cambridge: Harvard University Press, 1986).

the community's moral norms.[22] According to this interpretation, judges are merely debating what the norms *might* be, and thus make a weaker claim regarding how a society should be ordered. The traditional moral uniqueness and procedural specificity of legal reasoning is thus sacrificed in this case to maintain the priority of democratic autonomy.

The nature of such judicial decision-making bears some initial resemblance to other prevalent accounts of judicial reasoning, especially the interpretivist–deliberativist approach championed by Dworkin and Rawls. However, it is worth noting the difference. Rawls, for example, famously calls judges "exemplars of public reason,".[23] Dworkin echoes this in his characterization of the ideal judge as a 'Hercules' who coherently integrates a society's values. Normative contestation over freedom, however, does not ascribe judges the same special moral power. In this sense it is somewhat closer to the participatory view of constitutionalism described by Christine Lafont and Lawrence Kramer. Yet unlike the participatory view, normative debate emphasizes the structural role of judges as insulated from normal political competition (the very feature emphasized by election law scholars). This insulation does not give them any special moral authority of reasoning; it is only a structural feature that enables rule-of-law neutrality. The reasoning judges (albeit professionalized by both training and position) undertake thus is closer in nature to the reasoning of rank-and-file constituents in most legitimizing accounts of democracy.[24]

That judges' philosophical engagement is not especially sharply differentiated from that of other constituent members of the polity may seem to lean into the teeth of the anti-judicial review critique. After all, if their reasoning has no special claim to moral insight, why should judges have authority if they are non-accountable? One aspect of the answer is of course the institutionalist explanation, which is largely based on the courts' precise position in representative manipulation and majoritarian abuses. Federal judges stand outside this electoral process, so they have both the disinterest and the insulation from direct political effects to opine on it. Yet this feature highlights the difficulty described in Chapter 1 of simply thwarting popular will and thus defying freedom. Therefore, if non-accountable judges who lack especial moral insight are to have legitimate authority, their decision-making must have two further features: it must be characterized by ongoing philosophical reflection (rather than simply authoritative resolution based on a claim of moral authority) and a continual focus on realizing citizen freedom. Ongoing philosophical engagement destabilizes the imposition of judicial views, and a focus on freedom ensures that the institutional role remains focused on empowering the constituency. As the Conclusion demonstrates through an analysis of *Bush v. Gore*, when these features are lost, the result is dire: the Court becomes a locus of pure partisan power struggle with no legitimacy to its authority.

**Philosophical Contestation in the Doctrine: The Long Arc of Election Law as a Debate over Liberalism**

Most of this book is dedicated to analyzing election law doctrine. Synthesizing the substance of contestation across the doctrine yields a remarkable insight: the case law comprises a grand yet familiar debate over the appropriate understanding of liberalism as a matter of just commitments to basic political structures. John Rawls most prominently advanced the egalitarian view of liberalism, which is derived from the principle that the freedom of constituent members of a polity is most legitimately advanced by ensuring their equal liberty *as members of a public collective*. That is, the

[22] Dworkin, "Law's Empire," p. 225.
[23] John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996).
[24] Such constituent reasoning is pervasive in deliberative democracy; a feature of entry in contractarianism (seminally captured by Hobbes's rationality-based account of entry into the state); and a critical part of the argument that support the design of public institutions in Rawlsian contractualism.

crux of constituent autonomy is egalitarian freedom *within* political life. The prevalent alternative, put forward by Robert Nozick, was derived from the principle that the highest priority is to protect individuals from state intrusion, and that freedom primarily operates by ensuring constituent autonomy *outside* political life. Despite the divergence between these views and the fierce debate they have engendered, they share certain critical roots. They both seek, in the grand tradition of liberalism, to prioritize autonomy as a moral value (even if they deeply disagree about how this should be achieved). Further, they both claim analytic validity by grounding themselves in the commitments that freely reasoning – that is to say, moral – constituents of a polity would make when organizing a society. As such, both are harmonized with the commitments of this book, and the value of democratic process.

The case law tracks this debate between egalitarianism and libertarianism in its deep normative justifications, and thus reflects a coherent lineage in interrogating constituent autonomy. The *egalitarian* view advances electoral rules and structures that achieve parity between members of the polity. As such, it is oriented toward protecting the freedom of constituents *as equal members* of the project of governance. The *libertarian* view advances rules and structures that insulate polity members' private endowments from state interference (i.e. libertarians wish to prevent rules that would 'smooth' differences between members if this would involve reallocating or redistributing resources). It is therefore focused on safeguarding the freedom of persons that they possess as individuals who have resources outside the state. Within each area of doctrine, this debate operates in a specific context that is the primary subject of this book's doctrinal analysis. The egalitarianism–libertarianism debate is the umbrella category that structures these debates.

The egalitarian–libertarian debate offers a prospectively redemptive reframing of the election law doctrine. Academics widely treat election law as brutally partisan, pitting progressives against conservatives. Yet recognizing this philosophical backdrop shows that the bench is in fact undertaking a philosophical dispute that can be reconciled with the Court's institutional role as a forum for contesting the nature of constituent freedom. The debate tracks the partisan divide: progressives are egalitarian, and conservatives are libertarian. But rather than expressing pure partisanship (except when it fails, as in *Bush v. Gore*), the doctrine reflects the Court's status as a locus of debate over the nature of freedom.

**Egalitarianism versus Libertarianism in Electoral Procedure**

The egalitarian–libertarian struggle applies to justice generally, and manifests most familiarly in the debate over the distribution of economic resources. Yet it can also be applied to conceptualize competing approaches and values related to electoral design and democratic process. Which approach is considered morally legitimate will directly affect what conclusions the Court reaches when adjudicating election law disputes. From the egalitarian perspective, all constituents must have *a shared baseline of electoral power* as a prerequisite for legitimate collective self-governance. To achieve this shared baseline, state intervention in the practices and conditions of elections is permissible (or obligatory). According to the egalitarian view, electoral self-rule demands some 'levelling' of inequities that influence electoral access and outcomes. This resonates with various progressives' understandings of democracy, such as Dworkin's claim that liberty and equality can be reconciled by redefining political liberty to require some measures of participants' equality.[25] The legislature may advance this baseline, in which case the Court should be restrained in striking down legislation that might otherwise be constitutionally suspect, because the contribution to self-

[25] Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge: Harvard University Press, 2002), pp. 126–7.

governance is valid.[26] Examples of such reasoning include the views that campaign finance legislation should be treated leniently, and that racial categorizations that aid oppressed minorities should pass constitutional muster. The judiciary can also advance the baseline through robust and innovative constitutional interpretation, such as the 1p-1v rule and prohibiting partisan gerrymandering. The Court, in such contexts, is ensuring that all constituents have a shared minimum opportunity to contribute to governance.

The other (typically conservative) position is that constituent self-rule demands minimal interference with the *pre-existing endowments and allocations of power* that constituents bring to electoral competition. According to this view, the legitimate outcome of democratic process directly converts pre-existing allocations of power into electoral outcomes. The legitimacy of the political process derives from its ability to translate individuals' pre-electoral identities into governance, even if these identities seem arbitrary or unequal. This view is most often expressed as suspicion of state overreach (a position made most clearly in the conservative jurisprudence related to campaign finance). A more comprehensive conceptualization would consider the idea that individuals should be able to bring whatever resources they have prior to politics *into* politics, which is closer to a Nozickean view of the minimal state. In constitutional terms, this view indicates that the Court should protect (or avoid upsetting) the 'natural' outcomes of political power struggles. Thus the Court should avoid interfering with legislative action that merely instantiate such struggle, such as when a victorious group aggrandizes itself through partisan districting as a "victory bonus."[27] Such an action is a function of pre-existing private power (here, the coordinating capacity of the successful coalition) that is part of democratic contestation. Yet the Court is also obligated to protect pre-existing endowments when legislative action seeks to 'neutralize' existing private power allocations. Prior to its decontestation of 1p-1v, this view resisted the judiciary correcting malapportionment as a constitutional intrusion into the political thicket. The libertarian position considers state regulation of campaign finance to interfere with personal liberty, even though interdicting such regulation permits the entry of financial inequalities into the political ecosystem. Perhaps most controversially, this view prohibits legislatures from seeking to correct entrenched racial oppression by favoring minorities; it instead demands formalist race blindness in legislation, which protects existing inequities of power that stem from racial discrimination.

This conflict between egalitarianism and liberalism echoes deeply with established competing accounts of democracy. A complete account would require a comprehensive and decisive theoretical tracing of the relationship between constituent freedom and democratic process, which is beyond the scope of this book. The most obvious path would be contractarian in nature. Yet even without exhaustively tracing the path of consent from personal freedom to collective governance, the contractarian account points to the salient feature of the debate: entry into state governance transmutes, rather than destroys, the individual's moral autonomy. The legitimate character of this transmutation when people participate in collective self-governance, accepting the limitations of collective life in exchange for a share in setting those limitations, is the seminal issue. The egalitarian view emphasizes that entry into the state, if legitimate and fair, must guarantee all participants some minimum of recognition and power in collective public governance. This view can be linked to

[26] This ideal is already present in American constitutional thinking, albeit typically partitioned by traditional doctrinal understandings. For one compelling instance oriented around the First Amendment, see Cass R. Sunstein, *Democracy and the Problem of Free Speech* (New York: The Free Press, 1995), p. 37.
[27] Peter H. Schuck, "The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics" (1987) 87 *Columbia Law Review* 1325, 1350.

several strands of political thought,[28] but its most direct analogue is the Rawlsian view that individuals should, when conceiving of the ideal state, seek fair terms of cooperation for *all* citizens rather than merely their own self-interest.[29] The mutualist aspect of collective self-government, and the regard that each participant should have for others, is given normative priority. While participation in a shared project necessarily involves some restraint of individual conduct, the determinative question is how the shared quality of the project can be emancipatory, and how the public character of collective governance can enhance the autonomy of all participants.

The prioritization of pre-existing endowments, however, emphasizes what is sacrificed by participation in collective governance, and seeks to insulate individuals from collective domination even as they participate in public matters. In this view, democracy is a means of coordinating individuals' pre-political capacities; its legitimate scope is primarily concerned with intruding on these capacities no more than is necessary to achieve coordination. This idea that legitimate self-rule does no more than serve and protect the interests of the participants in politics resonates most strongly with the Nozickean ideal of a minimally intrusive state. The corresponding approach to democratic self-rule defines the process as an agonistic struggle over constituent interests,[30] in which any mandated equal standing of participants is instrumental. The purpose of equality in this libertarian view is to ensure that governance remains fair enough so that participants continue participating out of self-interest. The defining moral commitment of this view is individual liberty, and state legitimacy is primarily defined by its minimal intrusiveness upon this liberty. Considering the realities of the issues in election law, however, reveals a quite devastating foundational, Marxist-flavored critique of this view. Many of the existing inequities that adherents of this view would argue are personal and pre-political to justify their insulation from the state only exist because of a past unjust application of state power. This ranges from the role of the state in enforcing (and, through some policies, exacerbating) economic inequality to the legacy of state-endorsed slavery and other discriminatory policies in generating racial inequities. However, the pre-existing endowment view

[28] Influential examples include Dworkin's defense of 'partnership democracy' in *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge: Harvard University Press, 1997), Pettit's concept of republicanism in his eponymous volume, and G. A. Cohen's ideal of deliberation as rationally motivated consensus. See Joshua Cohen, "Deliberation and Democratic Legitimacy," in Alan Hamlin and Philip Pettit (eds.), *The Good Polity: Normative Analysis of the State* (New York: Blackwell, 1989), pp. 17, 23. Practical manifestations of such public-minded governance are described by, inter alia, Bruce Ackerman and James S. Fishkin, "Deliberation Day," in James S. Fishkin and Peter Laslett (eds.), *Debating Deliberative Democracy* (New Jersey: Wiley-Blackwell, 2003); James Fishkin and Cynthia Farrar, "Deliberative Polling: From Experiment to Community Resource," in John Gastil and Peter Levine (eds.), *The Deliberative Democracy Handbook* (San Francisco: Jossey Bass, 2005), pp. 68–79; Robert E. Goodin and John S. Dryzek, "Deliberative Impacts: The Macro-Political Uptake of Mini-Publics" (2006) 94 *Politics & Society* 219; and Archon Fung and Erik Olin Wright, "Deepening Democracy: Innovations in Empowered Participatory Governance" (2001) 29 *Politics & Society* 5, 25–9. However, since the Court is not engaging in whole cloth democratic design but resolving particular disputes, even the progressive justices do not advance conceptions with this level of particularity.

[29] Rawls conceives of this in different ways – through the veil of ignorance, but more broadly through the concept of public reason. See Rawls, "Political Liberalism," pp. 77–80.

[30] Ian Shapiro, *The State of Democratic Theory* (Princeton: Princeton University Press, 2003), p. 51. More recent competitive–democratic theorists are less dismissive of non-elite political participation. See, e.g., Robert A. Dahl, *Preface to Democratic Theory* (Chicago: The University of Chicago Press, 2006), pp. 67–71 (defining democracy as a competitive preference-realizing infrastructure); Adam Przeworski, "Minimalist Conception of Democracy: A Defense," in Ian Shapiro and Casiano Hacker-Cordon (eds.), *Democracy's Value* (Cambridge: Cambridge University Press, 1999), pp. 23, 31. The same limit regarding the judicial application of the philosophical conception applies here.

still elevates the status of the pre-electoral individual at a given moment, despite the prospective origins of such endowments.

**Synthesizing the Case Law as a Debate over Liberalism**

The individual disputes that comprise the election law doctrine do not, of course, address lofty questions about the conceptualization of liberalism and its implications for democracy; the bench resolves specific questions. Yet synthesized across domains, the doctrine reveals a long-standing debate over what electoral process best advances constituent autonomy that is best framed as an expression of the egalitarian–libertarian divide. Chapters 4–7 prove this claim in doctrinal detail, but the following table provides an overview of the pattern.

| Domain of Law | Egalitarian Position | Libertarian Position |
|---|---|---|
| 1p-1v | Procedural egalitarianism that limits legislative malapportionment | No judicial authority to intervene in malapportionment |
| Campaign finance | Wealth in campaigns threatens popular autonomy | The state has no authority to limit the use of wealth in campaigns |
| Parties in elections | Parties must be constrained as a prospective usurper of constituent political power | Parties are facultative intermediaries that should not be subject to judicial constraint |
| Race in elections | Racial equality requires affording minorities substantive representative power | Racial equity only comprises equivalent access to political power |
| *Synthesis* | *Constituent autonomy requires the constitutional advancement of the egalitarian position of each participant in politics* | *Constituent autonomy is best advanced by ensuring each participant (and their coalitions) can unrestrictedly deploy existing resources and endowments* |

The seminal, characteristic questions in each domain add substance to this framework. The watershed topic of modern election law, whether malapportionment in general is justiciable, raises the decisive threshold question: are elections, the gateway between private life and public power, subject to norms of public justice (specifically, a norm of minimum procedural equality)? As Chapter 4 shows, contrary to prevalent scholarly views, *Baker v. Carr* was not simply an unheralded novelty. Rather was the culmination of a fierce debate that occurred in the first half of the 20th century over if constitutional justice mandated minimum norms of political equality in voting power. Justices debated whether electoral procedure is subject to substantive norms of justice, or if it simply translates existing power allocations – realized here through the drawing of district lines – into governance. The former, ultimately successful, egalitarian view identifies citizenship as a locus of mutualism and equal participation; the latter libertarian view considers elections as no more than a lens for expressing private allocations of power (even where those allocations are later instantiated by state law). 1p-1v thus exemplifies the type of philosophical struggle over the nature of self-rule that has come to mark modern election law – which is far from a coincidence.

The campaign finance jurisprudence has struggled over this question in the context of voters' preference formation. The Court has debated, at root, whether the private power of wealth or the public power of state regulation comprises a greater threat to voters' preference formation. Wealth is of course distributed unequally in a capitalist system, creating a fundamental tension with norms of equal democratic governance. The egalitarian view is that the prospective infiltration of unequal private power into public-natured reasoning about governance is a form of coercion, and that regulatory efforts to limit such infiltration improve the free nature of citizens and are therefore generally legitimate. Libertarians, however, believe the state is the great threat to free reasoning. The underlying question is perhaps the most foundational in all election law: is the very essence of constituent reasoning to participate as equal members of a public, or to engage with, advance, and react to private interests that underlie any public engagement? *Buckley v. Valeo*, with its judicial innovation of the anti-corruption rationale that differentiated the legal status of expenditures and contributions, sought a middle ground. Ever since, it has served as a battlefield for contrasting egalitarian and libertarian views of the impact of wealth on constituent decision-making.

The nature of parties in elections looks to a mode of organization that itself sits on the public–private divide. Parties are structurally extra-constitutional, yet intimately intertwined with governance. As such, they serve as a conduit for constituents' interests and the coalitions they form. The doctrine is driven by the question of whether parties and their influence are subject to the mutualist norms of egalitarianism, or if they can unabashedly deploy private power to coordinate in order to control governance. The White Primaries cases established that, even where nominally private, the Court will subject parties' influence over electoral process to certain minimal public standards. Yet the still-contentious partisan gerrymandering question demonstrates that the question of whether party influence in its pure form is beholden to norms of public mindedness is fiercely debated. The egalitarian view is that the influence of partisanship must conform to values of mutual self-rule, whereas the libertarian view sees the impact of partisanship as a private matter, with no role for judicial enforcement. Since partisan gerrymandering reinforces private power via state action, this raises the question whether private actors may iteratively exploit governance itself.

The role of race in elections would seem to present the easiest legal question. The Fifteenth Amendment declares the right to vote may not be denied on the basis of race, and the Equal Protection Clause (EPC) prohibits discrimination. Beginning with the White Primaries cases and *Gomillion v. Lightfoot*, the Court repeatedly struck down unabashedly discriminatory conduct. Yet race has elicited the most complex struggles regarding the meaning of constituent autonomy, over both the minimum and maximum accommodations to ensure racial equity. The question of the minimum is evoked by what the constitutional amendments themselves require the Court to do in advancing racial equity. The question of the maximum emerges from Congress's efforts to end Jim Crow laws with the Voting Rights Act, which has forced the Court to assess how far legislation may go in seeking substantive political equality. Egalitarians aspire to ensure all members of the public, including disadvantaged minorities, have equitable opportunity to attain political power, whereas libertarians challenge efforts to ensure not only formally equivalent access to electoral process, but meaningful representative outcomes. The question is plainly presented by direct enforcement of the EPC, typically in the context of districting. Equality can be interpreted as formal equality of political access, which prohibits state action that aims to benefit disadvantaged minorities; it can also be perceived as a substantive command to empower minorities to give them an equitable political position in the polity. The former, formalist view is libertarian in nature, for it identifies the legitimate extent of the constitutional mandate as ensuring that all constituents have bare access to process. The latter, substantive position is egalitarian, requiring equitable opportunity to govern for all constituents if an electorate is to rule itself freely. Underlying the debate on race is thus a

fundamental expression of the egalitarian–libertarian debate: may (or must) constituents' power be 'levelled' to ensure free self-rule, or should the domain of private powerholding be protected from state overreach? Race is an intimate characteristic that has been the source of grave injustice in American history, thus giving the debate particular exigency.

In each of these areas, the determinative question is whether elections should robustly guarantee that citizens can participate as mutual members of an egalitarian society, or if elections should just mirror private power, and no more. Thus, a comprehensive view of the doctrinal struggles on the bench reveals a struggle between two competing conceptions of the moral aim of democracy, and how the transformation of personal freedom via entry into public governance can preserve that freedom. This confirms that the Court is undertaking a philosophical endeavor in election law, rather than merely technical lawmaking – thereby vindicating the book's premise. It reveals novel features of these two competing approaches to democracy, specifically how they would inform substantive democratic procedure. In short, I reverse the typical direction of analysis (using a theory to make sense of doctrine) by looking to the doctrine to provide guidance regarding the theory. The case law, in other words, indicates what contrasting positions the competing richly egalitarian and formally minimalist conceptions of democracy adopt as a matter of democratic process.

This unifying account of the Supreme Court's engagement with processes of democratic governance, which are tractable to and derived from the doctrine, can be incorporated into a rich tradition of debating norms of liberal self-rule. Since judicial influence over democratic self-governance is best validated as a struggle over the terms of liberal self-rule, this account legitimizes the Court's modern foray into elections. While the Court's holdings may often be controversial and their policy effects subject to harsh critique, as a philosophical matter it is undertaking its appropriate role as a participant in the development of reasoned public values, not only through the process of contestation, but also by operating within terms that are compatible with liberal constitutional democracy.

**Book Context and Outline**

This book applies the theory laid out in this introduction. It is organized around two ambitions: (1) proposing a theory of how judicial review of democratic process can be reconciled with the vindicating philosophical foundation of democracy, constituent self-determination and (2) demonstrating how one compelling possibility for reconciliation, judicial contestation over freedom, has manifested in Supreme Court case law as a fierce debate over liberalism.

Chapters 1–3 evaluate the problem of judicial review of democratic governance in detail, examine the inadequacy of previous scholarly attempts to resolve the problem through either constitutional law generally or election law specifically, and then offer dispute and struggle over freedom as the best answer. Chapters 4–7 demonstrate that such contestation over freedom provides the best unifying account of the major domains of Supreme Court case law and details the debates over democratic self-rule. The Conclusion unifies this analysis of case law by characterizing the various domains as a whole as a debate between egalitarian and libertarian conceptions of freedom. The Conclusion also notes the key threats to philosophical engagement (and thus compatibility with democratic principles) on the bench – the total domination of decision-making by tribal partisanship, and a reliance on abbreviated modes of decision-making to resolve critical election law questions.

**Background Assumptions**

The book applies an analytically novel method to the conventional topical divisions of case law: 1p-1v, campaign finance, parties in elections, and race in elections. These topics largely track the Supreme Court's own precedent as well as other discipline-spanning accounts.[31] I chose not to recategorize conceptual problems or constitutional rights (such as recognizing vote dilution as a problem that spans partisan gerrymandering and some race-in-elections topics)[32] or to use new higher-order principles to reframe the field.[33]

This project also makes two other substantive commitments about the nature of the law. First, I take the content and reasoning of judicial opinions at face value. I accept them as justices' sincere attempts to resolve legal problems, rather than a (deliberate or unconscious) smokescreen for some ulterior goal. Many prominent methods in US legal scholarship, most notably critical legal studies and related approaches, treat judicial lawmaking as a raw exercise of power that protects existing interests.[34] Such a cynical view of the judging process may find this project's philosophical treatment of doctrine naïve (though the basic tension that drives this book – judges' power to impact human freedom – is broadly sympathetic to critical legal studies). Yet there is value in displaying the philosophical unity of the doctrinal narrative even for those who find earnest treatment of the case law unconvincing. If nothing else, it demonstrates cohesion in judges' instrumental manipulation of the concept of freedom as they debate the egalitarian–libertarian question.

In a second commitment, this book brackets the broadest forms of debate over constitutional interpretation. Insofar as federal courts apply the Constitution when they settle questions of election law, the account of my proposed doctrine requires a decisive position on this thorny topic. This is no easy task. Michael Perry characterizes some constitutional clauses that establish the terms of democratic governance as "initially intelligible."[35] If language can perform even the minimum expected communicative function, there is no dispute over such clauses' meaning. For example, the semantic and practical meaning of lowering the voting age from 21 to 18 in the 26th Amendment is 'initially intelligible,' as there appears to be no 'space' in which there can be rational (let alone reasonable) disagreement. Some seemingly 'initially intelligible' provisions are quite controversial, such as the procedure of selecting a president through the Electoral College (which Kate Shaw describes as "a profoundly dangerous institution"),[36] but their unequivocally clear

[31] The clearest expressions of these accounts are the leading election law casebooks; their accounts largely match those given here. Samuel Issacharoff, Pamela Karlan, Richard H. Pildes, Nathan Persily, and Franita Tolson, *The Law of Democracy: Legal Structure of the Political Process*, 6th ed. (New York: Foundation Press, 2022); Daniel Hays Lowenstein, Richard L. Hasen, Daniel P. Tokaji, and Nicholas Stephanopoulos, *Election Law: Cases and Materials*, 7th ed. (Durham: Carolina Academic Press, 2022); and James Gardner and Guy-Uriel Charles, *Election Law in the American Political System*, 2nd ed. (Springfield, Mo: Aspen Publishing, 2018).
[32] See, e.g., Issacharoff et al., "The Law of Democracy," 609 (grouping racial and partisan vote dilution).
[33] Examples of this would include Daryl J. Levinson, "Rights and Votes" (2012) 121 *The Yale Law Journal* 1286 (approaching the problem of majoritarianism through the competing ideas of rights and votes) and Bertrall L. Ross, "Democracy and Renewed Distrust: Equal Protection and the Evolving Judicial Conception of Politics" (2013) 101 *California Law Review* 1565 (tracking the change in election law to a switch from pluralism to public choice theory).
[34] For an exhaustive summary of critical legal studies, see Amna A. Akbar, Sameer M. Ashar, and Jocelyn Simonson, "Movement Law" (2021) 73 *Stanford Law Review* 821, 833.
[35] Michael J. Perry, *The Constitution in the Courts: Law or Politics?* (Oxford: Oxford University Press, 1994), p. 38. Perry is no apologist for originalism – he spends much of the rest of the text explaining why the determinacy that originalists attribute to history is, in fact, absent. His criticisms share much with those brought by Fallon.
[36] Kate Shaw, "'A Mystifying and Distorting Factor': The Electoral College and American Democracy" (2022) 120 *Michigan Law Review* 1285.

establishment in the Constitution has prevented them from being the basis for judicial disagreement. If, however, as Richard Fallon notes, in "hard cases, the meaning of statutory and constitutional provisions does not exist as a matter of prelegal linguistic fact… [when] standards are indeterminate – as they typically are in disputed cases – legal interpreters must make constrained normative choices."[37] In sum, the intrinsic ambiguity in the legal meaning of words makes every decision a prospective matter of moral struggle – which this book attributes to the Court in its election law doctrine. Whether Fallon and those sympathetic to him are correct is a general problem for legal reasoning, and past studies have offered a number of answers.[38]

It is tempting to adopt Fallon's conclusion regarding the universal nature of judges' unconstrained normative reasoning as characteristic of election law decision-making for two reasons. First, it seems to be a general form of the claim that the courts engage in a philosophical struggle over freedom when they resolve election law disputes. Second, the Supreme Court's election law jurisprudence has been marked by dramatic shifts in constitutional interpretation that cannot be explained as matters of textual interpretation (e.g. the ramifications of the EPC, the implications of federalism for the preclearance requirement, and the definition of speech in campaign finance). Therefore, it seems plausible that *every* Court decision related to election law could be described as purely normative. However, if every act of constitutional interpretation is wholly normative, why have some plainly constitutional instructions (such as the Electoral College) not become ripe grounds for such disagreement?

A wholly comprehensive account of election law would offer a complete theory of constitutional interpretation that would explain what is contested (e.g. the ramifications of the EPC) and what is not (e.g., the legal status of the Electoral College). Such a theory might include an account of when a constitutional provision that shapes democratic governance is sufficiently determinate to exclude contestation, legitimating it (for example) as a directly contractarian expression of popular will or a fixed point of accepted consensus in political organization. However, this book focuses on the constitutional questions that the Supreme Court has acknowledged, in the doctrine itself, as debatable. This limitation does not reject the virtue of integrating free democratic self-rule with a comprehensive theory of constitutional interpretation. Rather, it expresses the methodological commitment of this facet of the project to close analysis of the actual doctrine.

Relatedly, but even more expansively, this book does not advance a complete theory of democratic organization, or of how democracy should be organized. This would be a vastly broader project even in terms of pure politics, and require engaging with a dizzying array of normative and

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[37] Richard H. Fallon, Jr., "The Meaning of Legal 'Meaning' and its Implications for Theories of Legal Interpretation" (2015) 82 *The University of Chicago Law Review* 1236, 1307.Dworkin raises a similar problem with his attack on 'plain fact' legal interpretation, 'Law's Empire', 7-8, and, in a form more particularized to originalism-textualism, Eisgruber, 'Constitutional Self-Government', 31-32 with his observation regarding the ambiguity of language.

[38] William Baude and Stephen Sachs, The Law of Interpretation (2017) 130 *Harvard Law Review* 1079 have challenged Fallon's conclusion by arguing that lawyers have their own internal-to-the-practice-of-law tools for resolving unclear meaning. More particular to the challenges leveraged against originalism such as those raised by Eisgruber and Dworkin, Michael McConnell has argued that a principle of "interpretive fidelity" is enough to allow original meaning (in the sense of original understanding) to guide judges in applying the constitution. Ronald Dworkin, 'Fidelity as Integrity' (1997) 65 *Fordham Law Review* 1269, 1285. See also Michael McConnell, 'Originalism and the Desegregation Decisions' (1995) 81 *Virginiaa. Law Review* 947, 1101. ("It is widely agreed among originalists that the intentions or understandings of the framers regarding a specific issue, while informative, are not ultimately authoritative, for it is their understanding of the constitutional principles embodied in the constitutional provision-not their analysis of a particular legal phenomenon-that is controlling.") Others have suggested that original meaning of the constitution has an initial power that erodes and is supplanted over time. David A. Strauss, 'Does the Constitution Mean What it Says?' 129 *Harvard Law Review* 1, 57.

descriptive questions. This is a book about the judge-made law of democratic process.[39] Two examples at different levels of abstraction can illustrate the types of issues this book brackets, except as elicited by the case law. A high level example would is the threat of majoritarian tyranny, a concern that has existed as long as America itself,[40] and has continued to animate constitutional and political analysis.[41] To take a much more granular example, the Senate has come under increasing criticism that it lacks democratic legitimacy, despite being a bedrock of the constitutional structure.[42] Both how to address majority tyranny and the validity of the Senate are fundamental to assessing legitimate democratic structure, yet are beyond the scope of this book, except insofar as the questions are activated by doctrine. Thus the question of majoritarian tyranny – which is often invoked to explain constitutional reasoning – at times becomes relevant to the book. Yet the question of the Senate's validity – which lies beyond the Court's remit – does not.

More broadly, democracy is rooted in social and cultural practices as much as in political and constitutional institutions. By focusing on judicial review of electoral rules advanced by the legislature, this text operates within the tradition of what Pippa Norris calls "rational choice institutionalism," which emphasizes the importance of formal electoral rules to a democracy's functioning and success.[43] Rational choice institutionalism assigns direct and independent significance to electoral rules for the behavior of actors (voters, elites, parties) and the operation of the democratic system as a whole, and thus predicts "major consequences" from formal changes to the rules.[44] However, this does not mean that I overlook the fact that a host of cultural and social factors are a prerequisite of functional democratic society. It would be, as Ernest Gellner notes, "naïve" to suggest that the successful realization of democracy can be detached from "institutional and cultural" conditions.[45] Yet the book focuses on what Stephanopolous calls one aspect of 'law's domain'[46] – the legally established (by legislature, judiciary, and constitution) aspects of democracy.

**Book Outline**

The book is divided into two main parts. In part 1, three chapters lay out the theoretical problem by: outlining the counterpopular dilemma of judicial review of democratic process (Chapter 1); discussing the inadequacy of existing scholarly accounts to reconcile judicial review with constituent democratic autonomy (Chapter 2); and explaining why a normative dispute over freedom on the bench is the best way out of the dilemma (Chapter 3). In part 2, four chapters examine how normative struggle offers the best description of election case law: 1p-1v (Chapter 4), campaign finance (Chapter 5), parties in elections (Chapter 6), and race in elections (Chapter 7). Each describes how the given area of law is best framed as contestation over popular self-determination and the status of each in the egalitarian–libertarian debate. The Conclusion synthesizes the doctrinal dispute and its redemptive potential in election law and more broadly while noting the threats to this potential from partisan overdetermination and the increasing use of summary procedures.

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[39] It thus can be differentiated from a general account of voting rights, exemplified by Alexander Keyssar's *The Right to Vote* (New York: Basic Books, 2009).
[40] James Madison, "The Federalist No. 51," *Independent Journal*, June 2, 1788.
[41] This is most extensively addressed in contemporary scholarship by the structuralists described in Chapter 2. Majority tyranny has also inspired an interest in alternative voting methods such as ranked-choice voting, Borda counting, and so forth, most visible in Maine. See, e.g., Jack Santucci, "Maine Ranked-Choice Voting as a Case of Electoral-System Change" (2018) 54 *Representation* 297.
[42] See, e.g., Aaron-Andrew P. Bruhl, "The Senate: Out of Order?" (2011) 43 *Connecticut Law Review* 1041.
[43] Pippa Norris, *Electoral Engineering: Voting Rules and Political Behaviour* (Cambridge: Cambridge University Press, 2012).
[44] *Ibid*., p. 8. Norris calls the alternative understanding "cultural modernization theory," which asserts that embedded social norms and habits are decisive. *Ibid.,* p. 16.
[45] Ernest Gellner, *Civil Society and its Discontents* (London: Hamish Hamilton, 1994), p. 186.
[46] Nicholas O. Stephanopoulos, "Elections and Alignment," (2014) 114 *Columbia Law Revie*w 283 at 360.

***Chapter 1: The Counterpopular Dilemma***

The first chapter defines the counterpopular dilemma that courts face when, as an individual-rights-protecting, state-limiting institution, they are mandated to opine on the collective expression of political freedom. By enforcing rights – or, as is more typically advanced as the correct understanding of election law, restructuring democratic process to prevent abuses by those in power – politically non-accountable courts are mandated to constrain the realization of democratic will. This creates a fundamental tension between the principle of democracy as empowered by and empowering the constituent members of the polity and judicial authority.

***Chapter 2: Constitutionalism and the Counterpopular Dilemma***

This chapter evaluates whether any accounts of general constitutionalism can reconcile judicial review with popular autonomy. It evaluates three prevalent approaches: the Constitution as a fixed contract among the people (originalism) that includes judicial review; the Constitution as a fluid, dynamic instrument (living constitutionalism); and instrumental institutionalist accounts. Despite their insights and merits, none of these accounts can explain how the power to shape democratic process can be legitimately allocated to a non-accountable, apolitical actor while fully recognizing the normative weight of democratic self-determination.

***Chapter 3: Traversing the Dilemma: Philosophical Dispute over Freedom***

Even if the tension between democratic autonomy and judicial authority over democratic process cannot be wholly resolved, courts must adopt a coherent approach to problems of election law. The best way to balance this dilemma incorporates, rather than resolves or eliminates, an unsettling reality about the freedom that vindicates democratic self-rule: the values and realization of freedom are necessarily the subjects of ongoing intractable struggle over its moral meaning. This perpetual contestability not only clarifies the difficulty facing the courts; it also offers the possibility of reimagining judicial review. This chapter exploits the election law doctrine's fiercely unsettled case law to suggest that continual judicial debate about the appropriate terms of democratic freedom is the best way to reconcile judicial review with constituent self-determination. Conceiving of judicial review of election law as a dispute over self-rule answers the challenge at three levels: it (1) explains how nonaccountable courts can play a legitimate institutional role in democratic self-determination; (2) allows courts to opine on self-rule without overdetermining the meaning of freedom, and thus undermining its moral value; and (3) offers the best account of the doctrine as a battle over the meaning of liberalism.

***Chapter 4: One Person, One Vote: The Triumph of Minimal Procedural Equality***

Chapter 4 examines the most stable point in election law – 1p-1v – to establish that judicial contestation over freedom has been present since the inception of modern election law. While 1p-1v is now a settled and widely accepted principle, its reception has been far more varied. Jurists and activists have celebrated it as advancing democratic fairness and breaking the rural stranglehold over state legislatures. Yet scholars have criticized it as lacking a clear or logical foundation. This chapter challenges that orthodox critique by reconstructing the legal development and moral significance of 1p-1v. The idea that malapportionment is unconstitutional, far from being woven from whole cloth in *Baker v. Carr*, was fiercely debated in the first half of the 20$^{th}$ century. The further development of the 1p-1v doctrine demonstrates how a requirement of equipopulous districting advances minimum standards of legitimate democratic self-rule. As a normative innovation, 1p-1v represents the culmination of a hard-fought debate, the conclusion of which established that minimal procedural egalitarianism is morally obligatory in a liberal democracy.

***Chapter 5: Campaign Finance: Contesting Voters' Cognitive Capacities***

Since *Buckley v. Valeo*, campaign finance jurisprudence has been riven by the constitutional limits on the regulation of funded campaign speech. The Court's enduring but unpopular compromise that contributions can be limited to prevent corruption but that the right to free speech prevents the restriction of expenditures has been assailed as both too restrictive and insufficiently robust. The debate is typically cast as a straightforward question of which source of power is the greater threat: plutocratic wealth that can corrupt leaders, or a state that can oppress its citizens? However, this intractable conflict can be unified by considering democratic governance as a matter of constituent self-rule. Neither private nor state influence over campaign media overdetermines the results of elections; both operate to influence voters. The critical question is what poses the greater threat to voter cognition and preference development. This observation, framed by a Kantian understanding of free will, captures the true core of the judicial debates – contestation over what circumstances pose the greatest threat to the autonomy of voter preference formation.

***Chapter 6: Parties in Democracy: Facilitators or Usurpers of Popular Self-Rule?***

Political parties indisputably serve as intermediaries in converting individual political will into collective state governance. The driving question is, when they do so, are they servants or usurpers of constituent self-governance? While the White Primaries cases established that the Court intervenes when parties effect unequivocally illegitimate (i.e. racially exclusionary) democratic practice, when party affiliation activates constitutional scrutiny on a standalone basis remains unsettled. In areas such as state control over primary design and ballot access, the Court has struggled with parties' dual status as public utilities and private organizations. This dual character has led to fierce debate regarding when the Court should police parties, and when they should be protected. Parties' unsettled status has recently been exemplified by the partisan gerrymandering litigation, which, despite its unhelpful framing as a matter of justiciability, epitomizes the debate over whether partisan coordination's centrality to American governance facilitates or threatens popular self-rule. The Court has been hesitant to explicitly acknowledge that this raw question of parties' impact on citizen self-rule drives its constitutional jurisprudence.

***Chapter 7: Race and Elections: Equality of Access or Equality of Power?***

Given America's history of racial oppression, addressing racial discrimination has been the Court's most sustained and transformative engagement with democratic governance. The Reconstruction Amendments' explicit prohibition of racial discrimination directly legitimizes judicial advancement of racial equity in elections. Relying on this mandate during the Civil Rights era, the Court struck down explicitly discriminatory laws (and permitted robust congressional action) with little controversy. However, in recent decades the Court has been fiercely divided over the substance of racial equity. Conservatives have argued that racial equity requires only ensuring formal equality in terms of race, a view that prohibits legislation that benefits minorities to correct past injustice and interprets the Reconstruction amendments to advance a minimalist conception of equality. Progressives, conversely, have argued for a substantive constitutional conception of racial equity that would permit laws and rulings that benefit disadvantaged minorities and afford them substantive political power. The chapter first observes the unity of this debate across the long-debated doctrinal questions posed by race and elections – applying the EPC to districting, Section 2 of the Voting Rights Act, and the preclearance requirement of the Voting Rights Act. It then explores the philosophy behind the question of which conception of racial equity (as formally equal access or as equitable substantive power) better sustains the legitimacy of collective self-rule by analogizing it to Rawls's and Nozick's famous debate over the fair allocation of resources. This analogy shows that the underlying question is what treatment of disadvantaged racial groups is necessary to legitimate collective decision-making.

***Conclusion: The Debate over Liberalism, the Partisan Alternative, and the Future of Election Law***

This chapter synthesizes the unifying theme across the different domains by mapping each conflict onto the egalitarian–libertarian debate: does autonomous constituent self-rule demand ensuring that all constituents enjoy a baseline substantive opportunity to contribute to public governance, or require non-interference with the application of private power and constituent preferences (including by powerful or privileged constituents who will enjoy disproportionate practical influence over politics)? This debate, while often fiercely partisan, falls within a liberal tradition that prizes autonomy of both the person and the body politic. This captures the unifying thread of the contestation in the Court's treatment of election law, and further contextualizes and softens the conservative–progressive partisanship that has riven the bench's decision-making. Such partisanship frames and even facilitates the dispute over liberalism that underlies the election law doctrine.

The Conclusion also describes the prominent threats to the Court's normative engagement with democracy – threats that could both delegitimize the coexistence of judicial review and constituent autonomy, and directly jeopardize the practical realization of democracy. There are two related trends. First, there is the threat – most clearly expressed in *Bush v. Gore* – that purely tribal partisanship will overdetermine election law outcomes, and displace rather than frame the debate over freedom. Second, the parallel rise of the use of summary modes of disposition further erodes the opportunities for philosophical engagement by the bench. These two trends could compound each other, which threatens to turn the Court into an institution that illegitimately overdetermines electoral outcomes on the basis of the justices' partisan allegiances and without even the pretense of adequate moral reflection. This is a serious threat to the broader integrity of liberal democratic constitutionalism.

The book thus ends on twinned notes of hope and caution. Despite the political nature of election law, the doctrine has shown the potential to serve as a forum where the appropriate terms of democratic freedom are assayed. The Court has, with this legacy, avoided the unitary, concerted displacement of popular will. However, the rising tide of partisanship threatens to displace the character of the Court's reasoning, turning it from a debate over political philosophy into another pure domain of party politics. Given the mandates of the rule of law and the counterpopular nature of judicial decision-making, this is profoundly dangerous. Philosophizing on the bench, while often disdained, is the preferable mode of intervention in democratic governance. The Conclusion ends by observing how such moral engagement, while most immediately exigent and relevant in judicial review of democracy governance, could structure analysis of constitutional law and judicial review more generally.