

The Real Enemies of Democracy

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Professor Karlan argues that the Constitution is undemocratic and that the Supreme Court is not helping matters. There is some truth to those claims, but I would urge some perspective. It is not the Supreme Court's job to fix imperfections in our Constitution. And more importantly, democracy faces far worse enemies, namely those who resist the peaceful transfer of power or subvert the hardwired law of succession in office. So we destabilize our current imperfect arrangements at our own peril.

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INTRODUCTION

The Constitution is undemocratic, and the Supreme Court is not helping. That is Professor Karlan's sobering assessment in *The New Countermajoritarian Difficulty*.¹ The charges against the Constitution include the non-majoritarian effects of the Senate and the Electoral College, combined with the demographics and polarization of the American electorate. The charges against the Court include its failure to intervene against voter-identification legislation or partisan gerrymandering while at the same time having the temerity to invalidate part of the Voting Rights Act.

I don't exactly disagree. The Constitution is flawed and hard to amend, and the Supreme Court is not going to fix it. But I would urge some perspective. It isn't the Supreme Court's job to fix the Constitution, it is ours, and we will get to it as best we can.

More fundamentally, however, I worry that democracy faces far worse enemies than the Senate, the Electoral College, or the Supreme Court. The real enemies are those who resist the peaceful transfer of power, those who subvert the hardwired law of succession in office. The shield against those enemies may be more formalism, not less. So we destabilize our current imperfect arrangements at our own peril.

I.

OUR IMPERFECT SYSTEM

A. *The Imperfect Constitution*

Our Constitution is not perfect.² The imperfection of the hour is that the Senate and the Electoral College skew representation in various ways. That does not mean they are indefensible. There are serious defenses of the Electoral College.³ I have had a harder time finding serious defenses of Senate malapportionment (still, at least the Senate is hard to gerrymander!).⁴ But it is simply part of how constitutional structure works that it is rarely perfect, and if

1. Pamela Karlan, *The New Countermajoritarian Difficulty*, 109 CALIF. L. REV. 2323 (2021).

2. See Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981).

3. CLAREMONT INST., THE ELECTORAL COLLEGE: PROVEN CONSTITUTIONAL PILLAR OF FREEDOM (2001), https://americanmind.org/wp-content/uploads/2019/08/M.-Uhlmann_The-Electoral-College.pdf [<https://perma.cc/RQL2-9ZTS>]; Christopher DeMuth, *The Man Who Saved the Electoral College*, NAT'L AFFS., Winter 2020, at 70, 73, <https://www.nationalaffairs.com/publications/detail/the-man-who-saved-the-electoral-college> [<https://perma.cc/8YJE-WMRN>] (describing the importance of these arguments); see also Stephen Sachs, *Election Integrity and the Electoral College*, REASON: VOLOKH CONSPIRACY (March 24, 2019), <https://reason.com/volokh/2019/03/24/election-integrity-and-the-electoral-col/> [<https://perma.cc/7642-T98N>] (arguing that the electoral college guards against fraud); Stephen Sachs, *The Worst Defense of the Electoral College Yet*, REASON: VOLOKH CONSPIRACY (March 25, 2019), <https://reason.com/volokh/2019/03/25/the-worst-defense-of-the-electoral-colle/> [<https://perma.cc/7KBX-ZFVR>].

4. But it is not impossible to gerrymander the Senate, in a sense, by the strategic admittance of new states. See *infra* text accompanying notes 13–15.

enough people agree about its flaws, we will amend it. The truth is that we've maintained these structures because not enough people can agree on something that's better enough to upset the status quo. As Keith Whittington has put it, "The status quo always beckons and always has its adherents, and so path dependence takes over even if no one is very happy about the path that we are on."⁵

Now perhaps that will change. It is encouraging, for instance, that in a recent project by the National Constitution Center to craft improved constitutions from both the progressive and conservative points of view, both contained gerrymandering limitations, Senate reforms, and more.⁶ (The libertarian constitution did not, but that was because "[i]n the spirit of focusing on drafting a *libertarian* Constitution, [they] tried to avoid purely 'good government' reforms, without clear libertarian salience."⁷)

To be sure, the existing rules have a huge incumbency advantage. The very structures and partisan effects that we might wish to reform make amendment very hard. But we have amended the rules for the political process ten times so far⁸—including convincing the Senate to agree to change the basic rule for how Senators are elected—so it is not impossible, and perhaps Professor Karlan will lead us there.

While we are at it, we might also pause to consider making the Constitution somewhat easier to amend. My own pet proposal⁹ would be to focus specifically on making it easier to *propose* amendments, so we could have more national debates about ratification. We could have a constitutional convention charged with proposing constitutional amendments every twenty years. The amendments would become law if ratified any time prior to the next constitutional convention. We could call it a "Jeffersonian" approach to Article V, inspired by Jefferson's

5. Keith E. Whittington, *The Inescapable Pull of Our Unsatisfying Electoral College*, NEW RAMBLER REV. (2020) (reviewing ALEXANDER KEYSSAR, WHY DO WE STILL HAVE THE ELECTORAL COLLEGE? (2020)), <https://newramblerreview.com/book-reviews/history/the-inescapable-pull-of-our-unsatisfying-electoral-college> [<https://perma.cc/72VP-WR6K>].

6. CAROLINE FREDERICKSON, JAMAL GREENE & MELISSA MURRAY, NAT'L CONST. CTR., THE PROGRESSIVE CONSTITUTION (2020), https://constitutioncenter.org/media/files/The_Progressive_Constitution.pdf [<https://perma.cc/MH59-ALBL>]; ROBERT P. GEORGE, MICHAEL W. MCCONNELL, COLLEEN A. SHEEHAN & ILAN WURMAN, NAT'L CONST. CTR., THE CONSERVATIVE CONSTITUTION, (2020), https://constitutioncenter.org/media/files/The_Conservative_Constitution.pdf [<https://perma.cc/8N65-VJ4L>].

7. ILYA SHAPIRO, TIMOTHY SANDEFUR & CHRISTINA MULLIGAN, NAT'L CONST. CTR., THE LIBERTARIAN CONSTITUTION 9 (2020) https://constitutioncenter.org/media/files/The_Libertarian_Constitution_1.pdf [<https://perma.cc/EL4G-XHDG>].

8. Karlan, *supra* note 1, at 2335 n.85 (listing ten constitutional amendments that involved altering electoral arrangements).

9. For a similar if less radical proposal, see Jason Mazzone, *Amending the Amendment Procedures of Article V*, 13 DUKE J. CONST. L. & PUB. POL'Y 115 (2018). For another good proposal, see Michael B. Rappaport, *Reforming Article V: The Problems Created by the National Convention Amendment Method and How to Fix Them*, 96 VA. L. REV. 1509 (2010).

argument that “[e]very Constitution then, and every law, naturally expires at the end of 19 years.”¹⁰

But if amendments are too difficult or distant a response, Professor Karlan’s critique could lead us in another direction. Perhaps she will set the stage for *subconstitutional* changes, such as the federal regulation of partisan gerrymandering,¹¹ the elimination of the statutory requirement for single-member districting,¹² or the strategic admission of states to alter the balance of the Senate.¹³ (There is of course a case on the merits for the admission of Puerto Rico and the District of Columbia, but that case surely derives more urgency from the presumed partisan advantage it would provide the party in power.¹⁴)

This is all fair enough, and likely subject to its own democratic limits. For instance, even if it is legal to admit the District of Columbia as 127 separate states,¹⁵ it is hard to imagine even a partisan majority doing it, and hard to imagine the constitutional experiment lasting if it were somehow pushed through. We will amend the Constitution if enough people agree it is necessary, and we will change some of the subconstitutional rules if there is enough support for doing so. If Professor Karlan’s argument contributes to such efforts, that is part of the American tradition of coping with our imperfect Constitution.

B. *The Imperfect Supreme Court*

If the Constitution is not perfect, the Supreme Court is not going to be the one to fix it. Once upon a time, that might have been different. Mid-twentieth-century case law and academic theories, such as those championed by John Hart Ely, called upon the Court to take a more reformist role. In Ely’s vision, the Court should defer to democratically enacted policies but keep an eye out for misfires

10. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), <https://founders.archives.gov/documents/Jefferson/01-15-02-0375-0003> [https://perma.cc/AW4W-UBRT]. To be sure, Jefferson would not have accepted it, for he insisted that “the power of repeal is not an equivalent.” *Id.* I may write this up some day, but no promises.

11. H.R. 1, 117th Cong. §§ 2400–2435 (2021).

12. Act of June 25, 1842, ch. 47, § 2, 5 Stat. 491, 491; see Karlan, *supra* note 1, at 2324–25; see also JOSH CHAFETZ, *DEMOCRACY’S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS* 175 (2007) (noting that this requirement had been held unconstitutional by an early congressional committee).

13. See Karlan, *supra* note 1, at 2336–38; see also Michael J. Klarman, *Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 238 (2020) (“In the second half of the nineteenth century, Republicans regularly created new states to expand their advantage in the Senate and the Electoral College. Democrats would be more justified to do the same today because they would not simply be pursuing partisan advantage, but also seeking to undo the unfair disadvantage created by the Senate’s malapportionment.”).

14. That said, people seem to forget that the 2016 Republican Party Platform also called for Puerto Rico statehood. *2016 Republican Party Platform*, AM. PRESIDENCY PROJECT (July 18, 2016), <https://www.presidency.ucsb.edu/documents/2016-republican-party-platform> [https://perma.cc/Z9XX-KEQE].

15. Note, *Pack the Union: A Proposal to Admit New States for the Purpose of Amending the Constitution to Ensure Equal Representation*, 133 HARV. L. REV. 1049 (2020).

in the democratic process.¹⁶ When there was a misfire, when the machinery of democracy seized up, the Court should clear the channels of democratic change. This vision was a powerful one, although it always had its critics.¹⁷ But those days are over.¹⁸

Instead, there is a different vision from Ely's that may now hold favor at the Court. It is more modest in some respects and more radical in others. That vision is one where the judiciary neither champions particular substantive values nor pursues procedural values such as perfecting democracy. Instead, it focuses on following the rules enacted by "We the People" and our agents. This vision explains the Court's general lack of enthusiasm for unenumerated voting rights cases.

Professor Karlan focuses on *Crawford v. Marion County Election Board*, where the Supreme Court upheld Indiana's voter-ID law.¹⁹ Karlan criticizes the decision, arguing that the voter-fraud justifications for such laws were overstated, and that the partisan motivation for the laws were understated.²⁰ But the decision makes much more sense when viewed from one step further back. The Constitution contains many different provisions dealing with the franchise—a rule tethering the right to vote in federal elections to the right to vote in state elections; rules against discrimination on the basis of race, color, previous condition of servitude, sex, or age; and so on.²¹ But it contains no explicit universal suffrage principle and no anti-partisanship principle.²² And it is unlikely that these principles can be found stashed away in the enacted meaning of other constitutional principles either. The Court's deference in *Crawford* may thus reflect a skepticism about the positive law pedigree for the entire enterprise.

We could say the same thing about some of the more recent Supreme Court decisions repeatedly stopping the lower federal courts from stopping states from burdening the right to vote, such as the 2020 decision in *Republican National*

16. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

17. E.g., Douglas Laycock, *Taking Constitutions Seriously: A Theory of Judicial Review*, 59 TEX. L. REV. 343 (1981) (reviewing JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980)).

18. See generally Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 SUP. CT. REV. 111 (2020).

19. Karlan, *supra* note 1, at 2347 (citing *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008)).

20. *Id.* at 2347–48.

21. U.S. CONST. art. I, § 2; U.S. CONST. amend. XVII; U.S. CONST. amend. XV; U.S. CONST. amend. XXVI.

22. Heather K. Gerken, *The Right to Vote: Is the Amendment Game Worth the Candle?*, 23 WM. & MARY BILL OF RTS. J. 11, 11 (2014) ("The Constitution doesn't guarantee Americans the right to vote . . . you will search the Constitution in vain for any such guarantee . . ."); *Cox v. Larios*, 542 U.S. 947, 952 (2004) (Scalia, J., dissenting) (noting that in drawing congressional districts, partisanship is "a traditional criterion, and a constitutional one, so long as it does not go too far").

Committee v. Democratic National Committee.²³ There, the Supreme Court quite controversially intervened to stay a federal court decision, early in the COVID-19 pandemic, extending a Wisconsin deadline for counting absentee votes.²⁴ Much ink has been spilled about the Court's use of the so-called *Purcell* Principle²⁵ as a justification for such interventions.²⁶ But I suspect that a more fundamental formalism animated this decision as well. What in the Constitution actually authorizes federal district judges to extend state deadlines, and otherwise micromanage the franchise? A skepticism about this kind of judicial activity makes it especially natural to stay the lower courts.

This same vision also explains the Court's unwillingness to supervise partisan gerrymandering, now memorialized in *Rucho v. Common Cause*.²⁷ Many of the Court's previous decisions about partisan gerrymandering emphasized the perceived difficulty in finding a "manageable standard" under the Court's political question doctrine.²⁸ This sent advocates on a decades-long search for ways to measure political gerrymandering in a way that would be rigorous and manageable.²⁹ As if the Court would happily impose a new constitutional standard on redistricting, if only it were manageable.

But in *Rucho* it became clear that manageability was not the real issue. The Court rejected the regulation of partisan gerrymandering instead because the Constitution simply did not require it. This is especially evident, for instance, in the majority's back-and-forth with the dissent about state constitutional restrictions on gerrymandering. The majority noted (with seeming approval) the example of Florida:

In 2015, the Supreme Court of Florida struck down that State's congressional districting plan as a violation of the Fair Districts Amendment to the Florida Constitution.³⁰ The dissent wonders why we

23. 140 S. Ct. 1205 (2020); see also *Little v. Reclaim Idaho*, 140 S. Ct. 2616 (2020); *Clarno v. People Not Politicians Or.*, 141 S. Ct. 206 (2020) (granting a stay of a district order pending Ninth Circuit decision).

24. See *Republican Nat'l Comm.*, 140 S. Ct. at 1205.

25. The principle, obliquely stated in *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006), is that court orders affecting imminent elections are disfavored.

26. See, e.g., Richard L. Hasen, *Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic, and How to Treat and Cure Them*, 19 ELECTION L.J. 263, 282 (2020) (arguing that the principle should not apply in pandemic situations due to the resulting disenfranchisement); Michael T. Morley, *Postponing Federal Elections Due to Election Emergencies*, 77 WASH. & LEE L. REV. ONLINE 179, 210–12 (2020); David Gans, *The Roberts Court, the Shadow Docket, and the Unraveling of Voting Rights Remedies*, AM. CONST. SOC'Y, Oct. 2020, <https://www.theconstitution.org/wp-content/uploads/2020/10/ACS-Purcell-Voting-Rights-IB-Final-Version.pdf> [<https://perma.cc/A5QU-G5HP>].

27. 139 S. Ct. 2484 (2019); see also Karlan, *supra* note 1, at 2349–51 (discussing *Rucho*).

28. *Vieth v. Jubelirer*, 541 U.S. 267, 277–81 (2004); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006).

29. See, e.g., Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831 (2015).

30. *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363 (Fla. 2015).

can't do the same.³¹ The answer is that there is no "Fair Districts Amendment" to the Federal Constitution.³²

In other words, manageable standards do exist; the problem is that they aren't contained in the U.S. Constitution. The Court still labeled its holding as part of the political question doctrine, likely because previous cases had done so, but it shifted from a focus on manageability to a focus on the absence of positive law:

[W]e have no commission to allocate political power and influence in the absence of a constitutional directive or legal standards to guide us in the exercise of such authority. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch, at 177. In this rare circumstance, that means our duty is to say "this is not law."³³

To be sure, if the Court is adhering to this kind of positivism, it is not doing a perfect job. For instance, the Court likely should have demonstrated more interest in several recent alleged violations of the Twenty-fourth and Twenty-sixth Amendments. The Twenty-fourth Amendment allegation was that Florida had abridged the right to vote "by reason of failure to pay any poll tax or other tax,"³⁴ because it allowed felons to vote only if they paid the fines, fees, or restitution they owed as part of their sentence.³⁵ The Twenty-sixth Amendment allegation was that Texas had abridged the right to vote "on account of age"³⁶ when it made early voting by mail voting available for all of those over sixty-five, but required younger people to prove absence, illness, etc.³⁷

The Court declined to intervene in both cases.³⁸ Perhaps that was for procedural reasons. Perhaps these claims will ultimately fail on a close reading of the Amendments. But the Court should not let its healthy skepticism of *unenumerated* constitutional voting rights claims spill over to *enumerated* voting rights claims.³⁹

There is also the usual problem of how to deal with conflicts between text and precedent. It is no secret that the sorts of formalist arguments I describe here would not have yielded the Court's famous one-person, one-vote cases. Instead, they would yield modest or no federal limits on the unequal apportionment of

31. See *Rucho*, 139 S. Ct. at 2524–25.

32. *Id.* at 2507.

33. *Id.* at 2508.

34. U.S. CONST. amend. XXIV.

35. *Jones v. Governor of Fla.*, No. 20-12003, slip op. at 30 (11th Cir. Sept. 11, 2020).

36. U.S. CONST. amend. XXVI.

37. *Tex. Democratic Party v. Abbott*, No. 20-50407, slip op. at 38 (5th Cir. Sept. 10, 2020).

38. *Raysor v. DeSantis*, 140 S. Ct. 2600 (2020); *Tex. Democratic Party v. Abbott*, 140 S. Ct. 2015 (2020) (mem.).

39. To its credit, for instance, the Fifth Circuit did recognize that an earlier case about the unenumerated right to an absentee ballot should not be automatically transposed to a Twenty-sixth Amendment claim. *Tex. Democratic Party*, No. 20-50407, slip op. at 36–37 (discussing *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807 (1969)).

state districts.⁴⁰ The Court has not overruled the one-person, one-vote cases, or even forthrightly admitted this. Instead, the Court's approach to precedent in this area has been the same as its general approach in other areas where it faces precedent that can't be justified as a matter of first principles: the Court has retained some aspects of its precedent, narrowed others, and noticeably refused to extend or replicate the reasoning of its precedent to future cases. The Court can do better, but this is a general problem not unique to the law of democracy.⁴¹

Finally, there is the Court's most infamous voting rights decision, *Shelby County v. Holder*.⁴² *Shelby County* denied the constitutionality of the preclearance requirements of the Voting Rights Act, even though a series of earlier versions of that requirement had been upheld in a series of earlier decisions.⁴³ Unlike the previous examples, this was a sin of commission rather than omission. And *Shelby County* is vulnerable as a matter of first principles, since the Reconstruction Amendments explicitly grant Congress an enforcement power⁴⁴ and were ratified against the background of dramatic federal enforcement against a group of recalcitrant states.⁴⁵ To the extent that *Shelby County* relied on an unwritten principle that the states must be treated equally, it is not clear that the principle has a legal warrant or that it would invalidate the Act.⁴⁶

Shelby County was indeed an overstep by the Court, but it is a closer question than many of the Court's critics would have it. Congress's authority to enforce the Reconstruction Amendments relies on the verb "enforce,"⁴⁷ and Justice Scalia had a point when he wrote that "one does not, within any normal meaning of the term, 'enforce' a prohibition by issuing a still broader prohibition directed to the same end. One does not, for example, 'enforce' a 55-mile-per-hour speed limit by imposing a 45-mile-per-hour speed limit."⁴⁸ Even the

40. Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103 (2000) (describing modest limits from the Republican Form of Government Clause, U.S. CONST. art. IV, § 4); Earl M. Maltz, *Inconvenient Truth: Originalism, Democratic Theory and the Reapportionment Cases*, 86 MISS. L.J. 1, 23 (2017) (rejecting even these limits).

41. William Baude, *Precedent and Discretion*, 2019 SUP. CT. REV. 313, 325–29 (2020) (discussing the general problem posed by retaining erroneous precedents).

42. 570 U.S. 529 (2013).

43. See, e.g., *Lopez v. Monterey Cnty.*, 525 U.S. 266, 283–84 (1999) (upholding Act as constitutional); *City of Rome v. United States*, 466 U.S. 156, 172–83 (1980) (same); *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) (same).

44. U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XV, § 2.

45. Akhil Reed Amar, *The Lawfulness of Section 5—and Thus of Section 5*, 126 HARV. L. REV. F. 109 (2013) (arguing that the Voting Rights Act mirrors the process of enacting the Fourteenth Amendment through Reconstruction).

46. Compare Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207 (2016), with Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L.J. 1087 (2016).

47. U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XV, § 2.

48. *Tennessee v. Lane*, 541 U.S. 509, 558 (2004) (Scalia, J., dissenting).

broader enforcement principles of *McCulloch v. Maryland*,⁴⁹ which the majority in *Shelby County* invoked, have their limits.⁵⁰ And it is not fanciful to think that even the proponents of Reconstruction themselves would have recognized that *at some point* the misbehaving states were supposed to be returned to regular order within the union.

The problem with *Shelby County* was rather that none of these points were sufficiently firm to justify disregarding federal legislation. In invalidating an Act of Congress premised on such evidence, the Court bears the burden of proof. If that burden is supposed to be a heavy one, it is not clear that the Court met it.

Just as the Constitution is not perfect, the Supreme Court is not perfect either. But the Court is not going to fix the democratic imperfections in the Constitution, and that is not its job. Law, not democracy, is the ultimate touchstone of the Court's work. While it is fair to criticize the Court for inadequate fidelity to law, and it is fair to debate how these laws should be interpreted, fidelity and fair reading are the most we can reasonably expect from the Court.

One final point on democracy and the Supreme Court: some might argue that I have artificially separated the Court from the antidemocratic structure. Because the Justices are appointed by the President and confirmed by the Senate, the Court's membership is itself a downstream consequence of our electoral system.⁵¹ But this does not result in a *special* problem for the Court any more than anything else done by the national government. For the Justices are not supposed to represent their indirect electoral supporters at all. They are supposed to "administer justice without respect to persons."⁵² Thus, the Court should be evaluated based on whether this broader goal is achieved, irrespective of how the Justices arrive there.

49. 17 U.S. (4 Wheat.) 316 (1819); *see also* Michael G. Collins, *McCulloch and the Turned Comma*, 12 GREEN BAG 2D 265 (2009).

50. *Shelby County*, 570 U.S. at 555 ("The dissent proceeds from a flawed premise. It quotes the famous sentence from *McCulloch v. Maryland*, with the following emphasis: 'Let the end be legitimate, let it be within the scope of the constitution, and *all means which are appropriate, which are plainly adapted to that end*, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.' But this case is about a part of the sentence that the dissent does not emphasize—the part that asks whether a legislative means is 'consist[ent] with the letter and spirit of the constitution.'" (citations omitted)); *see also Tennessee*, 541 U.S. at 564 (Scalia, J., dissenting) ("[P]rincipally for reasons of *stare decisis*, I shall henceforth apply the permissive *McCulloch* standard to congressional measures designed to remedy racial discrimination by the States. I would not, however, abandon the requirement that Congress may impose prophylactic § 5 legislation only upon those particular States in which there has been an identified history of relevant constitutional violations.").

51. *See* Klarman, *supra* note 13, at 248; Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 156 (2019).

52. 28 U.S.C. § 453.

When speaking publicly, members of the Court stress their detachment from ordinary electoral politics. They tell us that they “call balls and strikes,”⁵³ or if they concede that metaphor is too “robotic,” they reassure us that “[a]s a judge, you are on nobody’s team.”⁵⁴ They tell us that “[w]e do not have Obama judges or Trump judges, Bush judges or Clinton judges,”⁵⁵ that the Justices “do not sit on opposite sides of an aisle” and “do not caucus in separate rooms.”⁵⁶ They remind us that they “don’t believe in red judges or blue judges. . . . We wear black,”⁵⁷ and that “[o]nce that black robe goes on, you are a judge. And there is no point, and I haven’t seen it, deciding things on political ground.”⁵⁸

Of course, sophisticated people do not believe this stuff, but they still recognize the importance of this story: “[t]he judiciary’s self-presentation as standing outside of the interbranch contest for power is meant to make it appear more trustworthy, and the courts therefore accrue more power precisely to the extent that the public buys into this self-presentation.”⁵⁹ And indeed, expecting that judges *should* be representatives of indirect electoral constituencies would lead to strange and troubling consequences. It would cast doubt on the independent-mindedness of, say, Justice Souter, for failing to be a right-wing

53. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of Hon. John G. Roberts, Jr.).

54. Josh Gerstein, *Kagan: Job Requires Real Judgment*, POLITICO (June 30, 2010), <https://www.politico.com/story/2010/06/kagan-job-requires-real-judgment-039227> [<https://perma.cc/DP75-WPBC>].

55. Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks ‘Obama Judge,’* N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html> [<https://perma.cc/J7C9-UBSX>]; see also Julian Routh, *Sotomayor Says Justices Follow Rule of Law, Not Partisan Politics*, PITTSBURG POST-GAZETTE (Dec. 7, 2018), <https://www.post-gazette.com/news/crime-courts/2018/12/07/Supreme-Court-Justice-sonia-Sotomayor-Duquesne-University-liberal-conservative/stories/201812070144> [<https://perma.cc/PEJ5-VJ45>] (“She echoed a recent statement from Chief Justice John Roberts that touched on judicial independence, saying that justices do not belong to a president or party, but ‘to something very different, and much more important to us, and that is to the rule of law.’”).

56. *Judge Brett Kavanaugh’s Opening Statement: Full Prepared Remarks and Video*, N.Y. TIMES (Sept. 4, 2018), <https://www.nytimes.com/2018/09/04/us/politics/judge-brett-kavanaugh-opening-statement-full-prepared-remarks.html> [<https://perma.cc/RH68-N5CC>]; *Remarks by President Trump at Swearing-in Ceremony of the Honorable Brett M. Kavanaugh as Associate Justice of the Supreme Court of the United States*, WHITE HOUSE ARCHIVES (Oct. 8, 2018), <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-swearing-ceremony-honorable-brett-m-kavanaugh-associate-justice-supreme-court-united-states/> [<https://perma.cc/A7HF-8XVU>] (same).

57. Josh Gerstein, *Gorsuch Speech at Trump Hotel Attracts Protests*, POLITICO (Sept. 28, 2017), <https://www.politico.com/story/2017/09/28/neil-gorsuch-trump-hotel-speech-243251> [<https://perma.cc/K56L-KKGW>]; see also Neil M. Gorsuch, *Law’s Irony*, 37 HARV. J.L. & PUB. POL’Y 743, 752 (2014) (“Ours is a judiciary of honest black polyester.”).

58. Associated Press, *Breyer: Nominations Are Political, Justices Aren’t*, YOUTUBE (Oct. 8, 2020), <https://www.youtube.com/watch?v=Oa5Y3NLhKs0> [<https://perma.cc/B542-J7VL>].

59. Josh Chafetz, *Nixon/Trump: Strategies of Judicial Aggrandizement*, 110 GEO. L.J. 128 (2021).

partisan.⁶⁰ And, as I explain in Part II, it could have led us to dark places in the 2020 presidential election.

II.

THE REAL ENEMIES

One principle of democracy is free and fair elections, but an even more fundamental important premise of democracy is that those in power must abide by the results of those elections. This is the principle that requires the peaceful transfer of power. Elections can be more or less free, and more or less fair, and yet still tolerably democratic. But all of those ballots are wasted paper unless the winner takes power and the loser does not.

After the 2020 presidential election, the peaceful transfer of power can no longer be taken for granted. I will first recount the basic law that governs here—the same kind of hardwired constitutional and statutory law as Professor Karlan describes elsewhere.⁶¹ I will then turn to its enemies, and finally to what we should learn from this.

A. *The Law of Transferring Presidential Power*

The basic principles are so easily taken for granted:

- First, Article II of the Constitution says: “[t]he Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.”⁶²
- Congress has determined the “time of choosing electors”⁶³ to be “on the Tuesday next after the first Monday in November,”⁶⁴ also known as Election Day. In 2020, that day was November 3.
- Congress has also chosen “the day on which they shall give their votes.”⁶⁵ That day is “the first Monday after the second Wednesday in December next following their appointment.”⁶⁶ In 2020, that day was December 14.
- The next step is for these votes to be counted according to the Twelfth Amendment: “[t]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—the person having the greatest number of votes for President, shall be the

60. Stephen E. Sachs, *Supreme Court as Superweapon: A Response to Epps & Sitaraman*, 129 YALE L.J.F. 93, 103 (2019).

61. Karlan, *supra* note 1, at 2334–44.

62. U.S. CONST. art. II, § 1, cl. 4.

63. *Id.*

64. 3 U.S.C. § 1.

65. U.S. CONST. art. II, § 1, cl. 4.

66. 3 U.S.C. § 7.

President”⁶⁷ Federal law provides that this happens on January 6.⁶⁸

- And finally, according to the Twentieth Amendment, “the terms of the President and Vice President shall end at noon on the 20th day of January,”⁶⁹ at which point the new President takes office.

These hardwired provisions are the foundation for democracy. They do not attract the level of attention or controversy that the Senate and Electoral College do, but they are more fundamental, closer to the bedrock.

B. The 2020 Election

This past election, the real challenge to democracy came not from the Senate, the Electoral College, or the Supreme Court, but from those who sought to subvert these hardwired rules. The facts are surely well-known by now, but lest they be forgotten:

After the states chose their electors on November 3, some Republican agitators tried to pressure state officials to back alternate choices.⁷⁰ This would violate the law because the electors *had already been chosen* on November 3. Federal law does contain an exception for a state that “has failed to make a choice on the day prescribed by law,” but that was inapplicable.⁷¹ Every state had chosen its electors. It was simply that some Republicans objected to the way they were chosen.

After the electors cast their votes on December 14, some Republican agitators tried to disrupt or derail the count. On January 6, 139 Representatives and 8 Senators, at least some of whom surely knew better, raised baseless objections.⁷² Other agitators tried to convince Vice President Mike Pence that *he*

67. U.S. CONST. amend. XII.

68. 3 U.S.C. § 15.

69. U.S. CONST. amend. XX, § 1.

70. Zach Montellaro, *Could GOP States Ignore Voters and Send Trump Delegates to the Electoral College?*, POLITICO (Nov. 19, 2020), <https://www.politico.com/news/2020/11/19/how-electoral-college-works-437749> [<https://perma.cc/G6HC-ZWSC>].

71. 3 U.S.C. § 2; see also Justin Levitt, *Failed Elections and the Legislative Selection of Presidential Electors*, 96 N.Y.U. L. REV. 1052, 1077–75 (discussing the limits to the failed-election exception of 3 U.S.C. § 2).

72. Karen Yourish, Larry Buchanan & Denise Lu, *The 147 Republicans Who Voted to Overturn Election Results*, N.Y. TIMES (Jan. 7, 2021), <https://www.nytimes.com/interactive/2021/01/07/us/elections/electoral-college-biden-objectors.html> [<https://perma.cc/Q4ZC-RMLE>].

had the authority to reject or remand some of the votes.⁷³ And of course still others simply stormed the Capitol.⁷⁴

These rules, and these events, should put the countermajoritarian difficulty in perspective. Yes, there is something undemocratic about taking advantage of structural voting rules, and something worse about crafting and enforcing voting rules for partisan advantage. But at least those are the rules of the game, constrained by the rule of law. The real enemies of democracy, at a more fundamental level, are those who try to ignore the rules of the game after they have already lost it. This past election, that means the real enemies of democracy were President Donald Trump and those who fought for him.

This is not just about the invasion of the Capitol on January 6, 2020. That was the most eye-catching attempt to subvert the rules, and of course if it had turned more violent more quickly it could easily have led to a constitutional crisis. (Imagine, for just a dark moment, if a large number of members of Congress had been killed or disabled before completing their constitutional duties. Our rules for quorums and continuity of Congress may not be up to such a disaster.)⁷⁵ But because that was such an obvious offense to democracy under law, it was not the most insidious. We will prosecute and punish many of the offenders. We will put it behind us. We will probably even laugh it off.

By contrast, had a few key state legislatures taken the bait to try to unchoose their electors after Election Day, it is easier to imagine them getting away with it. Because the lawlessness of this act turns on technicalities, sly lawyers might well be able to debate it into apparent ambiguity. They would not wear Viking helmets. And for those reasons it may still happen in another close election.

And consider just how much the Republic owes to Vice President Mike Pence. The Vice President has no independent power to judge the validity of electoral votes and had no basis to declare the 2020 electoral votes invalid. Vice President Pence deserves credit for seeing this and sticking to it, even when

73. Peter Baker, Maggie Haberman & Annie Karni, *Pence Reached His Limit with Trump. It Wasn't Pretty.*, N.Y. TIMES (Jan. 12, 2021), <https://www.nytimes.com/2021/01/12/us/politics/mike-pence-trump.html> [<https://perma.cc/YYB2-J544>]. There is an argument that the Vice President might have the provisional power to refuse to count legally invalid electoral votes. See Jack Michael Beerman & Gary Lawson, *The Electoral Count Mess: The Electoral Count Act of 1887 Is Unconstitutional, and Other Fun Facts (Plus a Few Random Academic Speculations) About Counting Electoral Votes 20–24* (Bos. Univ. Sch. of L., Public Law Research Paper No. 21-07, 2021), <https://ssrn.com/abstract=3795421> [<https://perma.cc/ZJN7-JWQP>]. Even if so, there was no good argument made that the votes were illegal.

74. U.S. SENATE, EXAMINING THE U.S. CAPITOL ATTACK: A REVIEW OF THE SECURITY, PLANNING, AND RESPONSE FAILURES ON JANUARY 6, at 1, <https://www.rules.senate.gov/imo/media/doc/Jan%206%20HSGAC%20Rules%20Report.pdf> [<https://perma.cc/A6FU-TAAA>].

75. See John Bryan Williams, *How to Survive a Terrorist Attack: The Constitution's Majority Quorum Requirement and the Continuity of Congress*, 48 WM. & MARY L. REV. 1025 (2006); see also Josh Chafetz, *Leaving the House: The Constitutional Status of Resignation from the House of Representatives*, 58 DUKE L.J. 177, 226 n.323 (2008).

pressed.⁷⁶ But what would have happened if he had given in to the urging that he try? We are fooling ourselves if we are confident that he would have failed. Between crafty lawyering, partisan motivation, and the power of focal points, he may well have been able to sow uncertainty or rally Republican elites to resist the lawful President-elect Joseph Biden.

It is too soon to say that these antics are behind us. Protecting democracy requires careful attention to the rules governing the peaceful transfer of power. And it requires those rules to be upheld by those of the losing party. Without that, we won't need to worry about the Electoral College.

Again, some might argue that I have artificially separated litigation over state-level gerrymandering and ballot access from this bigger threat. In some circles, supporting restrictions on voting is becoming a way to signal one's sympathy with the "big lie" that Donald Trump was the rightful winner of the 2020 election. This is not a good trend. But if I am right, it is most important to repudiate the "big lie" itself. Treat the disease to ease the symptoms.

C. *The Future*

By all means, let us pay more attention to the basic mechanics of democracy, but we should not let long-term imperfections in our democratic structure distract us from more immediate threats. Indeed, there is a tension between surfacing the flaws in our rules for democracy and enforcing those rules against democracy's enemies. It is no more than a tension—one can very well say that it is important to enforce the Constitution's rules for transferring power and also that those rules can and should be improved or understood in freer or fairer ways. But it is important to be careful of the tension lest we get carried away. Attack the legitimacy of the Constitution too much, and those attacks might catch on. If those attacks catch on, it is harder to convince members of the other party that they are bound by the rules they don't like. A very strong norm of saying "I'm sorry, those are the rules, and we don't accept special pleading" turns out to be a very useful thing to have during an emergency—especially when the only person standing between the transfer of power and a constitutional crisis is the Vice President.

The calls for courts to improve the democratic process and to respond to cries that an election was unfair can also be abused in obvious ways. Over the course of a few months, President Trump and his supporters filed forty-two lawsuits challenging various aspects of the election results.⁷⁷ Most of these

76. See Letter from Michael R. Pence, Vice President of the United States (Jan. 6, 2021), <https://int.nyt.com/data/documenttools/pence-letter-on-vp-and-counting-electoral-votes/9d6f117b6b98d66f/full.pdf> [<https://perma.cc/Z9XG-VPMJ>].

77. Jacob Shamsian & Sonam Sheth, *Trump and His Allies Filed More Than 40 Lawsuits Challenging the 2020 Election Results. All of Them Failed.*, BUS. INSIDER (Feb. 22, 2021), <https://www.businessinsider.com/trump-campaign-lawsuits-election-results-2020-11> [<https://perma.cc/9LMF-SB5S>].

lawsuits were found to have no basis in law or fact. But they were fueled by a general allegation that the election had been unfair, and that it was the job of the courts to do something about that. In my view, the allegations of unfairness were false. But it is more important that they were irrelevant. Many of the lawsuits went before judges who had been selected by Republicans, some even by President Trump himself.⁷⁸ Our constitutional system was more secure because the courts were not tasked with deciding who *should* have been elected, or even whether the election rules were fair ones, but only with the less glamorous, positivist task of law application.

Indeed, these cases show the real vice of thinking of courts in representative terms.⁷⁹ If we accept a picture of the courts' legitimacy as hinging on having the right numbers of Democrats and Republicans, it too easily follows that the judges will be expected to live up to their partisan billing. The courts did not do this, they should not do this, and we ought to tread very carefully in politicizing the courts in ways that would encourage them to judge law through partisan politics.

CONCLUSION

Much of legal debate takes place at a surface level of policy—what rules should govern our society? Much of the law of democracy operates at a deeper level—who should write those rules, and how should those writers be chosen? But the biggest enemies of democracy today operate at an even deeper level—what if we simply ignore those rules, and take power lawlessly? The higher level debates are important. But we cannot afford to take the deepest ones for granted.

78. See, e.g., *Texas v. Pennsylvania*, 141 S. Ct. 1230 (2020) (mem.); *Trump v. Wis. Elections Comm'n*, 983 F.3d 919 (7th Cir. 2020); *Pearson v. Kemp*, 831 F. App'x 467 (11th Cir. 2020); *Donald J. Trump for President, Inc. v. Sec'y of Pa.*, 830 F. App'x 377 (3d Cir. 2020); *Trump v. Wis. Elections Comm'n*, 506 F. Supp. 3d 620 (E.D. Wis. 2020); *Wood v. Raffensperger*, 501 F. Supp. 3d 1310 (N.D. Ga. 2020).

79. See *supra* notes 52–61 and accompanying text.