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LIBERTY BEFORE PARTY: THE COURTS AS TRANSPARTISAN DEFENDERS OF FREEDOM

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THE LAW OF FREEDOM: THE SUPREME COURT AND DEMOCRACY. By Jacob Eisler. Cambridge: Cambridge University Press. 2023. Pp. xiii, 329.

"Democracy is a uniquely legitimate regime . . . because it operates through self-rule by the polity's constituent members" (p. 3). If elections are to properly serve as "the practical engine via which . . . democratic autonomy is realized," the rules governing elections must "be determined by this same constituent autonomy" (p. 39). In the United States, those rules are indeed determined by the constituents, through their duly elected representatives.

However, like many legislative acts in the United States, election laws are subject to judicial review, often by unelected judges with life tenure. This precipitates what Jacob Eisler calls the counterpopular dilemma. If the laws governing self-rule are dictated by courts which are unaccountable to the people—in the case of Article III judges, by design—"they intrude upon the extent of democratic autonomy" (p. ix). But without an arbiter who is resistant to popular pressure, elections can end up facilitating a mob rule or a tyranny in democratic clothing by enabling the "elites [to] manipulate . . . democratic procedures for their own political gain" (p. 2). How, then, can judicial review of elections be reconciled with democratic self-government?

This question, which Eisler calls the counterpopular dilemma, may be understood as a manifestation of a longstanding, higher-level problem: "the threat of majoritarian tyranny, a concern that has existed as long as America itself" (p. 23). Indeed, the problem of preserving freedom while curbing its excesses is precisely the subject of philosophical classics such as *Leviathan*. Unfettered liberty presents "continual Fear[], and danger of violent death," but the social contract by which individuals cede their liberty to a sovereign to enjoy peace[1] presents the risk of the sovereign becoming a tyrant.[2] Given the sheer import of the problem represented by the counterpopular dilemma, one may think that it would command significant, ongoing scholarly attention.

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[1] THOMAS HOBBES, LEVIATHAN (1651), *reprinted in* LEVIATHAN 92, 132-33 (Jennifer J. Popiel & W.G. Pogson Smith eds. 2004).

[2] JOHN SANDERSON, "BUT THE PEOPLE'S CREATURES": THE PHILOSOPHICAL BASIS OF THE ENGLISH CIVIL WAR 99 (1989) ("Hobbes explains that any sovereign needs absolute power . . . and absolute power always carried with it the potentiality of misuse . . . . But the risk of tyranny is, for Hobbes, one which the rational man would be prepared to take.").

Yet, the counterpopular dilemma has been "strangely neglected in academic research" (p. 1). Some argue that the counterpopular dilemma has already been solved, according to the following syllogism. The Constitution has popular legitimation; the Constitution authorizes judicial review; hence, judicial review of election law is consistent with self-rule. But the originalist-contractarian view fails to explain why the present-day electorate should be bound to the will of, at most, a plurality of the 18th-century U.S. population, if their intentions can be divined at all (pp. 53-62). Others defend judicial review of elections as "necessary to maintain democratic durability," but this claim "deepens rather than resolves the dilemma" (p. 39). Indeed, the irony in saying that undemocratic means justify democratic ends is that those very means may make the democracy undemocratic. In this respect, the problem to which Eisler calls attention is doubly significant. The counterpopular dilemma has not only remained unresolved for hundreds of years. It has also convinced us that it is not a problem or, if it ever was, we solved it long ago.

Eisler's book provides a novel understanding of, and solution to, this problem. According to Eisler, the counterpopular dilemma "is intractable" if the judicial role in elections is understood in conventional terms: "uniquely positioned outside typical political struggles, and thus especially well-suited to guarantee fair elections" (p. 2). Instead of limiting freedom, courts should be viewed as *advancing* freedom in two conflicting forms. The egalitarian view of freedom "seeks to afford all constituents equal opportunity to freely participate in self-rule" (p. 13). Thus, the egalitarian view "demands some 'levelling' of inequities" that influence elections by, for example, limiting campaign spending (pp. 14-15). The libertarian view "prioritizes protecting individuals from state intrusion" (p. 13). Thus, the libertarian view is that "state regulation of campaign finance . . . interfere[s] with personal liberty" (p. 15). By casting Supreme Court election law jurisprudence as a debate over how best to advance constituent freedom, Eisler provides a much-needed understanding of the Court as an institution in service of a common good—particularly at a time when voters see it as motivated by political expediency, and rising public contempt of the Court is becoming an existential threat to the authority of not only the judiciary, but also of government more broadly.

This Review proceeds as follows. Part I outlines Eisler's critique of existing accounts of the courts' role in elections. Part II presents Eisler's own explanation, as well as his description of caselaw through that lens. Part III submits that, for Eisler's theoretically illuminating perspective to become an operationally useful framework for delineating the courts' role in elections, it must provide an objectively discernible standard for what constitutes a "minimal," and thus tolerable, counterpopular intrusion into electoral design.

I. EXISTING EXPLANATIONS OF JUDICIAL REVIEW OF ELECTION LAW: DEUS EX MACHINA

Perhaps the most fitting description of the counterpopular dilemma to existing works is an elephant in the room. It is not simply that existing works neglect to tackle that issue. It is that existing works proceed as if the problem has already been solved, or as if it is something that we will have to live with because we cannot address it. To those who hold the originalist-contractarian view, the Constitution granted democratic legitimation to the undemocratic practice of judicial review, thus resolving the dilemma. To instrumentalists, the undemocratic act of judicial review is necessary to maintain democratic integrity. Put differently, if the counterpopular dilemma is an elephant in the room to existing scholars, their proposed solutions to the dilemma are a deus ex machina—a higher power that grants democracy to the people. Eisler aptly demonstrates that this contrivance is just as jarring to the normative foundation of a democracy as an unexpected god machine is to a screenplay.

A. Originalism and Contractarianism

Eisler argues that originalism fails to offer a satisfactory resolution to the counterpopular dilemma because it relies on historical intentions that may no longer align with contemporary democratic values and practices. Moreover, the originalist-contractarian account assumes, without sufficient justification, that coherent intentions underlying the initial adoption and continued use of the Constitution exist, and they can be objectively discerned.

Originalism sees the Constitution as a contract that binds the American people—effectively in perpetuity—according to how that document was understood when it was ratified. Richard Tuck argues that the Constitution is "the pre-eminent expression of popular will" that explains "why the state is legitimate" and "how this legitimacy flows from the will of the persons involved" (p. 52). Under this view, "[t]he legislature's lawmaking authority and the courts' power and duty to protect rights flow from the same source – direct popular autonomy" (p. 52). Thus, what may *seem* to be mandarins with life tenure who are unaccountable to the people are actually there to enforce the "constituents' freely made higher-priority constitutional commitment" that overrides the legislative popular will (p. 53). Judges do not interfere with self-rule; they instead conduct a "technical exercise" in law application with "clear popular legitimation" (p. 52). If the originalist-contractarian account is indeed valid, it would not only resolve the counterpopular dilemma as it pertains to judicial review, but also justify any state action that is consistent with the Constitution—even acts that harm the people of the state (p. 53).

Eisler argues that this justification for judicial review presents several problems. First, assuming for the sake of argument that a coherent intention underlies the Constitution, how can contemporary minds objectively discern that intention? Even though originalists agree that the text of the Constitution itself is the "primary source" of original intent, the text alone has often been insufficient, which explains the "diversity" of opinions as to which types of secondary sources are acceptable for "patch[ing] in" where the "meaning [as discernible from the Constitution] is incomplete or unclear" (p. 53). Indeed, even among Supreme Court justices, originalist interpretations of the same constitutional provisions whose meanings were unclear have arrived at the precise *opposite* conclusions by relying on different secondary sources, with both sides in the debate seeming to create more questions than they answered:

> Justice Scalia's opinion for the Court [in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)] relied on the original meaning of the Takings Clause. . . . [Justice Scalia] dismissed evidence that colonists were not protected against regulatory takings as "entirely irrelevant" because they occurred prior to incorporation of the Takings and Just Compensation Clauses. Finally, Justice Scalia relied on the drafting history of the Takings Clause. . . . Justice Scalia interpreted the clause to include protection against regulatory takings.
>
> Justice Blackmun, in dissent, presented an originalist argument that regulatory takings were not part of the original understanding of the Takings Clause. He claimed that the colonists were tolerant of government takings for public use without compensation, and that the Founders intended the Takings Clause to protect only against direct appropriations, not regulatory takings. . . . Commentators found both Justice Scalia's and Justice Blackmun's accounts lacking.[3]

Secondary sources that could support differing interpretations of the Takings Clause are not limited to the drafting history cited by Justice Scalia, or the views of early colonists cited by Justice Blackmun. Twenty-three years after the debate between Justices Scalia and Blackmun, Chief Justice Roberts cited "the principles of Magna Carta," dating to 1215, as evidence of a prevailing belief in a "protection against uncompensated takings of personal property."[4]

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[3] John Greil, Note, *Second-Best Originalism and Regulatory Takings*, 41 HARV. J.L. & PUB. POL'Y 373, 388–89 (2018).

[4] *Horne v. Dep't of Agriculture*, 576 U.S. 350, 358 (2015).

Assuming that contemporary minds *can* objectively discern the intent underlying the Constitution, a second problem in the originalist-contractarian account of judicial review is the propriety of binding future electorates to the will of the 18th-century electorate, which is the unexaggerated position of some of the most prominent originalist voices (p. 53). Setting aside the issue of whether originalism presents practical utility, it fails to resolve the dead hand problem. "Why should we still adhere to the values adopted by those who are long gone (and who held many specific normative commitments that contemporary persons would wholeheartedly reject)," such as "the exclusion of women, racial minorities, and the poor" from the franchise (p. 54-55)? In fact, Thomas Jefferson—an architect of the very Constitution whose intent originalism seeks to preserve—believed that each generation should be able to enact its own constitution, instead of living under that of a past generation.[5]

Some "recognize[] that a constitution is only an expression of popular will at the moment it is passed, and that to give it continued dominance allows an abstract historical concept of 'the people' to override true self-rule" (p. 54). But a constitution enacted long ago would still represent the people's will if the current generation accepts that constitution. Thus, scholars advance the idea of a sovereign that "sleeps" but periodically awakens to create a constitution or express its opinion of that constitution, including one ordained the last time the sovereign fell asleep—which may be decades ago.[6] Under this view, "the fact that the Constitution has not been . . . repealed by the *present* sovereign means that the present sovereign . . . wishes the law to stand."[7] Some argue that we accepted our Constitution in its current form when it was last amended in 1992, by not repealing it.[8] Hence, these scholars would argue, the Constitution and the judicial review it creates are consistent with self-rule even though we, as a sovereign, are "very thoroughly asleep."[9] Eisler finds the "sleeping sovereign" narrative unsatisfactory because it "disregards that . . . even as the direct will of the people 'sleeps,' popular will *is* through representation and . . . the courts . . . must enforce the text of the Constitution that the 'sleeping' sovereign approved of while 'awake'" (p. 54).

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[5] *See* Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 12 THE PAPERS OF JAMES MADISON 382, 385 (Charles F. Hobson et al. eds. 1979) ("The earth belongs always to the living generation . . . . The constitution and the laws of their predecessors extinguished then in their natural course with those who gave them being . . . . Every constitution then, & every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force, & not of right.").

[6] *See generally* RICHARD TUCK, THE SLEEPING SOVEREIGN: THE INVENTION OF MODERN DEMOCRACY (2016).

[7] *Id*. at 282.

[8] *See id*. at 280 (describing the position of Akhil Amar).

[9] *Id*.

As Eisler argues, the contractarian view, even aided by the notion of a "sleeping sovereign," fails to resolve the dilemma between self-rule and courts as an institution which curtails that self-rule. In fact, the American sovereign, while awake, has undertaken a series of reforms that unmistakably indicated its *disapproval* of judges who are unaccountable to the people, thus potentially undermining the view that Americans have consistently approved of judicial review by judges with life tenure and, therefore, of the Constitution that authorizes it. "Every state that entered the Union after 1846 gave voters the right to elect some or all of their judges" and, "[a]fter the middle of the century, the popular election of judges was more and more accepted as normal."[10] Separate from the result, reformers believed "that elections would produce judges who were less corrupt, more professional, and . . . committed to putting law above politics."[11] As of 2018, a majority of the states were still "using some form of popular election for their state supreme courts."[12]

This example alone poses a nontrivial challenge to the contractarian solution to the counterpopular dilemma. It would be difficult to deny under the "sleeping sovereign" theory that a near-nationwide adoption of judicial elections is an act of an awake sovereign expressing disapproval of appointed state judges. How are we to reconcile that fact with the sovereign leaving the appointment and political insulation of federal judges undisturbed? Did the sovereign experience an internal conflict? Or is the sovereign that approved the U.S. Constitution separate from the one that approved the election of state judges? The fact that "[t]here were also proposals to subject federal judges to election, but the federal constitution was far more difficult to change"[13] indicates that what contractarian scholars call "the sleeping sovereign" may be the present sovereign being involuntarily bound by the decisions of a past sovereign. That is, the present sovereign *might* have adopted federal judicial elections, if not for the fact that a past sovereign made the U.S. Constitution very difficult to amend.[14] In short, while the counterpopular dilemma would vanish if the Constitution gave perpetual democratic legitimation to judicial review of self-rule through legislatures, the originalist-contractarian account fails to demonstrate that the Constitution creates such perpetual legitimation.

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[10] LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 355 (4th ed. 2019).

[11] JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURT: PURSUING JUDICIAL INDEPENDENCE IN AMERICA 121 (2012).

[12] HERBERT M. KRITZER, JUDICIAL SELECTION IN THE UNITED STATES: POLITICS AND THE STRUGGLE FOR REFORM 1 (2020).

[13] SHUGERMAN, *supra* note 11 at 105.

[14] *See, e.g.*, Thomas W. Merrill, *Interpreting an Unamendable Text*, 71 VAND. L. REV. 547, 549 (2018) ("The U.S. Constitution . . . is now widely declared to be virtually impossible to amend."); Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595, 1665 (2014) (amendment via Article V would require "exorbitant transaction costs").

B. Instrumentalism

Whereas originalism-contractarianism at least tries to imbue judicial review with democratic legitimacy, instrumentalism, for the most part, does not. Instead, instrumentalism appears to concede that judicial review curtails democratic self-rule, but justifies judicial review by arguing that it provides the practical utility of enhancing the integrity of democracy. A problem with instrumentalism according to Eisler is that it fails to show why that practical utility should come from a power that is exogenous to the democratic process. Therefore, instrumentalism also fails to address the counterpopular dilemma.

The main appeal of the instrumentalist justification for judicial review is its practical benefits. "Courts' independence from politics allows them to successfully identify and condemn self-serving misfeasance in the design of election law" (p. 73). There is indeed a broad consensus on the necessity of an independent judiciary, both within[15] and beyond election law.[16] Eisler also acknowledges that the "institutionalist approach elegantly informs one side of the counterpopular dilemma: when . . . courts [are] the right institution to police electoral procedures," which is "whenever the power to set electoral rules lies with those who would benefit from a certain arrangement, such as incumbent[s]" (p. 73). The problem, Eisler says, "comes from the other side of the equation – the normative validity of judicial intervention" (p. 73). "An electoral procedure imposed externally – by a judge or a Solomonic lawgiver – necessarily asserts that there is some value above or beyond the autonomy of the electorate . . . that can legitimately shape democratic procedure" (p. 76). Eisler's reference to Solomon is clearly intended to make the point that, regardless of its utility, any institution exogenous to popular accountability is incongruous with the normative basis of a democracy, regardless of whether that institution is a politically insulated judiciary or an anointed monarch.

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[15] *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 922 (1995) ("Where a State relies on the Department [of Justice]'s determination that race-based districting is necessary to comply with the [Voting Rights] Act, the judiciary retains an independent obligation in adjudicating consequent equal protection challenges to ensure that the State's actions are narrowly tailored to achieve a compelling interest. Were we to accept the Justice Department's objection itself as a compelling interest . . . to insulate racial districting from constitutional review, we would be surrendering to the Executive Branch our role in enforcing the constitutional limits on race-based official action."); Barry Sullivan, *Democratic Conditions*, 51 LOY. U. CHI. L.J. 555, 564 (2019) ("the absence of an independent judiciary committed to ensuring the integrity of the electoral process" is "problematic" for democracy).

[16] *See* Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350, 415 (2011) (importance of independent judiciary in the context of torts); Jonathan M. Wight, Comment, *An Evaluation of the Commercial Activities Exception to the Act of State Doctrine*, 19 U. DAYTON L. REV. 1265, 1287 (1994) (importance of independent judiciary in the context of international rule of law).

But Eisler's reference to Solomon may be more illustrative than the measured rhetorical device he probably intended it to be, given the historical existence of a monarchy-like institution whose express purpose was to defend the integrity of an elected government: the office of dictator in the early to middle Roman Republic. Like U.S. federal judges, Roman dictators were appointed by the state's elected executives.[17] Analogous to how independent courts are viewed as defending the integrity of democracies by curbing the excesses of elected officials or the people themselves, Roman dictators were appointed to solve existential crises facing the Republic when "no official was considered competent or . . . the regular official was . . . incapacitated."[18] Such crises included foreign invasions,[19] rebellions,[20] and the need to replace Senators who were killed in defense of Rome.[21] The Republic may indeed have fallen several times if not for dictators, some of whom made a lasting impression with Americans.[22] Lucius Quinctius Cincinnatus, the namesake of Cincinnati,[23] served as dictator twice—once to repel an invasion[24] and once more to preempt a suspected coup d'état during popular unrest due to a famine[25]—and resigned his dictatorship both times promptly after resolving the crisis, within less than a month. Dictators were no less integral to the survival of the Roman Republic than independent courts are now to the functioning of modern democracy. According to the instrumentalist view, an officer who can singlehandedly wield the entire state apparatus for six months is just as normatively congruous with democracy as independent courts are.

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[17] *See* FRANCISCO PINA POLO, THE CONSUL AT ROME: THE CIVIL FUNCTIONS OF THE CONSULS IN THE ROMAN REPUBLIC 189 (2011) ("The appointment of a dictator had to be made by a consul . . . .").

[18] CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 23 (6th ed. 2009)

[19] *See id*. at 21 (describing the Roman dictator as "the man called upon by the people to assume all powers and save the state from the threat of total defeat in war").

[20] *See id*. (describing dictators appointed for "suppressing civil insurrection").

[21] *See* JEREMIAH MCCALL, CLAN FABIUS, DEFENDERS OF ROME: A HISTORY OF THE REPUBLIC'S MOST ILLUSTRIOUS FAMILY 110 (2018) (Marcus Fabius Buteo was appointed as dictator to designate replacements for Senators who were killed at the Battle of Cannae).

[22] *Cf.* Jason S. Lantzer, *Washington as Cincinnatus: A Model of Leadership, in* GEORGE WASHINGTON: FOUNDATION OF PRESIDENTIAL LEADERSHIP AND CHARACTER 33, 46 (Ethan Fishman, William D. Pederson & Mark J. Rozell eds. 2001) ("[George] Washington's . . . belief was further grounded in the Cincinnatus model of putting country before self.").

[23] *See* BRIAN KLASS, CORRUPTIBLE: WHO GETS POWER AND HOW IT CHANGES US 244 (2021).

[24] *See id*. at 243 (Cincinnatus "resigned on the sixteenth day" of his dictatorship after repelling an Aequian invasion, even though his term "was to last at least six months").

[25] *See* MICHAEL J. HILLYARD, CINCINNATUS AND THE CITIZEN-SERVANT IDEAL: THE ROMAN LEGEND'S LIFE, TIMES AND LEGACY 102-06 (2001) (describing Cincinnatus' appointment as dictator during the famine of 439 BC); KLASS, *supra* note 23 at 243 (Cincinnatus resigned his second dictatorship after 21 days).

My reference to Rome is intended to further illustrate Eisler's critique of instrumentalism by showing that judicial review, separate from its utility, may have about as much democratic justification as an emergency dictator—the office that eventually became permanent and replaced a republic with an empire.[26] The instrumentalist's sincere response to this argument may be to argue that this is what instrumentalism means, and that it is not a problem. Judicial review has served democracies well, just as the dictator served the Roman Republic well (at least while checks against the officeholders, such as legal liability for acts in office after the dictator's term expired, worked).[27] Hence, the instrumentalist may say that the usefulness of the Roman dictator to the Republic's survival absolutely does justify it in a normative sense. In fact, this was what many of the architects of our own republic appear to have believed on the eve of the Revolutionary War. "If someone suggested the appointment of a dictator in eighteenth-century Virginia, it would have been understood that the suggestion was not for a leader with unlimited power or tenure," but an emergency leader like George Washington during the war.[28]

But the undeniable utility of judicial review to modern democracy alone does not create a *democratic* normative justification for that device. Assume, for the sake of argument, that "judges have the moral knowledge or political authority to impose conditions of self-rule and can define democracy in a manner lexically prior to constituent freedom," as instrumentalism must be understood as saying (pp. 8-9). Judicial review still requires a democratic normative justification because, without it, the people may reject the courts' wisdom. We Americans are aptly described as contrarian, especially against things that are imposed by those who claim to know what is good for us better than we do. Although Eisler does not rely on the following in his argument, Chief Justice Roberts' dissent in *Obergefell v. Hodges*, 576 U.S. 644 (2015), made an argument that stresses the necessity of a democratic normative basis for judicial review, even if and when the courts are doing the "right" thing:

> When decisions are reached through democratic means, some people will inevitably be disappointed with the results. But those whose views do not prevail at least know that they have had their say, and accordingly are—in the tradition of our political culture—reconciled to the result of a fair and honest debate. In addition, they can . . . raise the issue later, hoping to persuade enough on the winning side to think again. . . .

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[26] *See* PAUL CHRYSTAL, ROME: REPUBLIC INTO EMPIRE 116-17 (2019).

[27] *See* BENJAMIN STRAUMANN, CRISIS AND CONSTITUTIONALISM: ROMAN POLITICAL THOUGHT FROM THE FALL OF THE REPUBLIC TO THE AGE OF REVOLUTION 72-73 (2016).

[28] JOHN RAGOSTA, PATRICK HENRY: PROCLAIMING A REVOLUTION 69 (2017).

> But today the Court puts a stop to all that. By deciding this question under the Constitution, the Court removes it from the realm of democratic decision. There will be consequences to shutting down the political process on an issue of such profound public significance. Closing debate tends to close minds. People denied a voice are less likely to accept the ruling of a court on an issue that does not seem to be the sort of thing courts usually decide.[29]

In retrospect, Chief Justice Roberts' argument was prescient. The Supreme Court created a constitutional right to abortion in *Roe v. Wade*, 410 U.S. 113 (1973), and that right was a welcome relief to millions of Americans. But the Court reversed itself less than half a century later, citing the need to "return the power to weigh those arguments [for and against legal abortion] to the people and their elected representatives."[30] A mere year after the reversal, 25 states had banned or restricted access to abortions,[31] showing that the Supreme Court's creation of a constitutional right to abortion in 1973 failed to end the debate. This example shows the limitations of the instrumentalist justification for judicial review: even if and when the courts do what is "right" for the people, the people themselves may reject the courts' wisdom absent a sufficient democratic normative justification for having it imposed on them.

Yet another problem with instrumentalism, particularly in the context of election law, is that courts' decisions may not even be "right"—as in being the best decision in an objectively discernible way. To instrumentalists, the "prevalent question is always which legal interventions would yield a good electoral design" (p. 41), and "good electoral design" is invariably defined as some policy goal whose success or failure can be measured quantitatively. One example of such a quantitatively measurable policy goal is to minimize what Nicholas Stephanopoulos and Eric McGhee call the "efficiency gap"—to compare "the number of votes cast for a party with the number of seats obtained, thereby calculating 'wasted' votes" (p. 237). The more wasted votes there are, the greater "the egregiousness of partisan gerrymandering" (p. 34). Stephanopoulos' claim that "the aim of election law [should be] to correct 'misalignment between the preferences of voters and the preferences of their elected representatives'" (p. 34), clearly indicates that his desired goal

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[29] *Obergefell v. Hodges*, 576 U.S. 644, 710 (2015) (Roberts, C.J., dissenting).

[30] *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 259 (2022).

[31] *See* Geoff Mulvihill, Kimberlee Kruesi & Claire Savage, *A Year After Fall of* Roe*, 25 Million Women Live in States with Abortion Bans or Tighter Restrictions*, ASSOCIATED PRESS (June 21, 2023), *available at* https://apnews.com/article/abortion-dobbs-anniversary-state-laws-51c2a83899f133556e715342abfcface.

is to approximate what would happen in a proportional representation system as closely as possible within the current U.S. system. "Stephanopoulos' focus on achieving particular outcomes and offering a mid-level theory to support them exemplifies the dominant trends in election law scholarship" (p. 34).

Assuming arguendo that Stephanopoulos' campaign succeeds so that the goal of court-enforced election law does become the minimization of the efficiency gap, that still may not be the "right" result which instrumentalists would understand as justifying undemocratic judicial review in a democracy. The fact that the success of a policy goal can be quantitatively and objectively measured does not mean that the policy goal *itself* is objectively desirable. Minimizing the efficiency gap is "Stephanopoulos' description[] of what he thinks democracy should look like" (p. 43), and existing scholarship has long warned against mistaking subjective value judgments presented in numbers for objectively discernible facts.[32] In his past works, Eisler has criticized the presentation of subjective values as objectively desirable results specifically in the election law context, arguing that "[j]udicial adoption of a radically new definition of rights as quantitative outcomes would be . . . problematic" because that "would transform the role of statistical analysis from providing evidence of rights violations to defining the content of rights."[33] That would lead to legislative acts being judged as "lawful or unlawful depending upon (non)conformity to" such subjective tests presented in quantitative measures, which in turn would "distort the role and nature of constitutional law."[34]

According to Eisler, the upshot of existing scholarly views on judicial review is their internal inconsistency. Judicial review of election law is seen as necessary for protecting citizens' rights from popular excesses or abuse by elites, such as disenfranchising certain minorities or partisan gerrymandering. This view of judicial review is inconsistent with elections because "elections and rights protection . . . serve different goals" (p. 35). "Elections . . . express popular will, making a government capable of legitimately acting on behalf of the polity," whereas "[r]ights protect individuals from such state action, shielding isolated persons from . . . coercive . . . state power" (p. 35). This may make the counterpopular dilemma, reconciling democracy with judicial review, appear to be a problem without a solution. But Eisler argues that this "odd fit is only a matter of framing" (p. 35): judicial review can be understood as *advancing* the people's freedom, not as curtailing it for their own good.

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[32] *See, e.g.*, Lea Brilmayer & Yunsieg P. Kim, *Model or Muddle? Quantitative Modeling and the Façade of "Modernization" in Law*, 56 WASHBURN L.J. 1 (2017).

[33] Jacob Eisler, *Partisan Gerrymandering and the Constitutionalization of Statistics*, 68 EMORY L.J. 979, 983 (2019).

[34] *Id.*

II. COURTS AS FACILITATORS, NOT INHIBITORS, OF FREEDOM

The counterpopular dilemma is a dilemma because it seeks to reconcile things that seem normatively irreconcilable: democracy and judicial review. Under existing accounts of judicial review of election law, judicial review seems irreconcilable with democracy because it is viewed as curtailing the freedom of the polity to govern itself. Eisler's response to the counterpopular dilemma, in contrast, is that judicial review should be viewed as *advancing* the freedom to self-rule, not as curtailing it. This freedom that courts advance is also not some newfangled invention, but the two strands of freedom that represent a longstanding "struggle between conservatives and progressives involv[ing] a confrontation between two understandings of liberal self-rule – protecting the shared baseline of public membership as opposed to protecting the private individual against state (i.e. collective) oppression" (p. 309).

Part II summarizes Eisler's presentation of the Supreme Court as the facilitator, not inhibitor, of freedom, as indicated by its rulings on election law. In various areas of election law that the Supreme Court has shaped, "the decisive question is whether elections should robustly guarantee political engagement on equal terms, or if elections should just mirror private power," and "the doctrine reveals a struggle between two competing conceptions of the moral aim of democracy, and how the modulation of personal freedom through elections can preserve that freedom" (p. 19). Eisler's presentation of the Supreme Court as engaged in a lasting debate to reconcile two different types of freedom is both positive and normative. It is a positive description in that it reveals a consistent goal of the Court's intervention in election law over the ages. It is also a normative argument for how we should understand the role of the Supreme Court, in the sense that Eisler's view of the Court's role provides a defensible basis for the Court's continued participation in the democratic process—at a time when the Court is increasingly under suspicion of imposing a particular agenda of a few on the many, under color of law.[35]

The "two competing conceptions of the moral aim of democracy, and how the modulation of personal freedom through elections can preserve that freedom" (p. 19) are the egalitarian and libertarian views of freedom. "From the egalitarian perspective, all constituents must have *a shared baseline of*

[35] *See, e.g.*, Richard J. Pierce, Jr., *How Should the Supreme Court Respond to the Combination of Political Polarity, Legislative Impotence, and Executive Branch Overreach*?, 127 PENN ST. L. REV. 627, 635 (2023) ("The Court's standing with the public is at its lowest point in history. . . . [T]he Court's practice of making important decisions without issuing a complete opinion . . . . invit[es] the public to draw the inference that the decision was motivated by politics rather than law.").

electoral power to satisfy legitimate collective self-governance. To achieve this shared baseline[,] . . . . electoral self-rule demands some 'levelling' of inequities that influence electoral access and outcomes" (p. 14). "The other . . . position is that constituent autonomy demands minimal interference with the pre-existing endowments and allocations of power that constituents bring to electoral competition. . . . [So,] libertarianism holds that individuals should be able to bring whatever resources they have prior to politics into politics . . . . Subsequently, the judiciary should protect (or avoid upsetting) the 'natural' outcomes of political power struggles," including elections (p. 15).

The one person, one vote doctrine is perhaps Eisler's most effective example of how judicial review can be recast as a facilitator, not an inhibitor, of constituent freedom. At first sight, one person, one vote may appear to be precisely the kind of "unheralded novelty" that scholars have conventionally understood it as (p. 18). The "orthodox critique" of one person, one vote is that it "lack[s] a clear or logical foundation" (p. 26)—most critically, "[t]he one person, one vote rule lacks a clear prompt from constitutional text and arguably contradicts the Election Clause's clear allocation of authority over voting to the states" (p. 119). Hence, "[i]f the judiciary imposes a norm based solely on moral authority, this suggests that the franchise cannot rule itself through accountable or autonomous processes" (p. 119), which would imply that judicial review is indeed normatively contrary to democratic autonomy.

Eisler does not see one person, one vote as contrary to self-rule. He recasts one person, one vote as advancing the egalitarian vision of freedom by providing for a "bare equality" of electoral power between each voter. If electoral districts are malapportioned so that "a representative is selected by proportionally fewer voters, each of those voters has a proportionally stronger voice than the average voter," and vice versa (p. 118). "Such disparities (at least where they are not explicitly [required by] . . . constitutional design, as . . . in the Senate) result in egregious democratic unfairness by violating the principle of equal citizen power" (p. 118). If legislatures fail to create equally populated districts, as indicated by the fact that "[s]uch malapportionment was endemic" before the 1960s (p. 118), the egalitarian vision would require judicial intervention to level at least some of this inequality in voting power.

Of course, the fact that judicial review can be presented as advancing the egalitarian vision of freedom, alone, does not justify the courts imposing *anything* that would advance the egalitarian vision of freedom to whichever degree courts find appropriate. According to Eisler, the first step the Supreme Court had to take to present judicial review as a tool for advancing freedom was to justify the very idea of judicial intervention in election law. Prior to

Baker v. Carr, 369 U.S. 186 (1962), the Supreme Court had long deferred to "political oversight of districting" (p. 122), with the plurality in *Colegrove v. Green*, 328 U.S. 549 (1946) "declar[ing] that solving malapportionment is 'beyond the Court's competence'" (p. 125). The prevailing view of the Court's remit on election law was that "it is hostile to a democratic system to involve the judiciary in the politics of the people," and that "such judicial intervention 'would cut very deep into the very being of Congress'" (p. 125).

The "sudden and disruptive shift in the Supreme Court's approach to districting" (p. 125) toward judicial intervention in election law began with *Colegrove*'s dissenters. Justice Black "asserted that the malapportionment comprised both a violation of Fourteenth Amendment equal protection and Article I's guarantee that . . . representatives should be chosen by the people, declaring that "individuals 'have a "have a right to votes of 'approximately equal weight,'" and "that voters have the right to "cast an effective ballot" (p. 126). Although Eisler characterizes Justice Black's legal argument for one person, one vote as "interpretive legerdemain" (p. 126), he also describes *Colegrove*'s legacy as beginning a serious debate over the legal (as opposed to practical) propriety of judicial intervention in elections. This is what "[l]eading scholars of the political question doctrine" neglect, by "treat[ing] *Colegrove* as a continuation of the status quo rather than a watershed case" (p. 127). According to Eisler, recasting malapportionment as a constitutional, rather than a political, issue put judicial review of election law in the realm of plausibility by the time *Baker v. Carr* came before the Court (p. 128, 129).

Another required step for judicial review of election law is to minimize the level of intervention. Advancing self-rule through judicial review would not change "the counterpopularism that inevitably results from judicial imposition of norms of self-rule" (p. 141). The greater the intervention, the greater the normative justification required would be. That, according to Eisler, is why the Court's development of the one person, one vote doctrine has consistently "reflected two prevalent trends: (1) the establishment of the principle that an equal number of persons per district is required for legal districts and (2) the emergence of a margin of flexibility in the enforcement of this standard" (p. 141). This resulted in "an unambiguous but substantially minimalist" one person, one vote law that "advances equal self-rule without requiring the judiciary to generate a rich theory of democracy" (p. 141).

Eisler's view is decidedly a "challenge[]" to the "scholarly orthodoxy" (p. 117), because the prevailing criticism of one person, one vote is precisely its minimalism. "[S]cholars have criticized one person, one vote as irruptive, conceptually confused, and constitutionally unprincipled" (p. 117). Perhaps

it is natural for the "mechanical equipopulousness test" to be "extensively criticized as undertheorized and failing to engage with the 'thick' realities of democratic power" (p. 120) from an instrumentalist perspective, given that the objective of instrumentalism is to create the most effective tool to achieve the desired policy end. But this perspective does not consider the importance of democratic normative justifications for policy tools. Thus, instrumentalism neglects the possibility that a "procedurally minimalist, mechanical principle reflected the Supreme Court's recognition that it was imposing a democratic norm upon the polity without a constitutional mandate" (p. 117). One person, one vote set the precedent for judicial review utilizing "the thinnest and least invasive possible requirement for demanding citizen equality" (p. 120).

Judicial review of election law has also advanced the libertarian view of freedom with the egalitarian. "[T]he campaign finance debate epitomizes the battle between egalitarian-public and libertarian-private conceptions of popular self-rule" (p. 158). Existing scholarship "typically (and unhelpfully) frame[s] [campaign finance law] as a balance between free speech rights and preventing corruption" (p. 158). "Reasoning on campaign finance has . . . taken on the tone of a policy debate, with conservatives arguing that the state is the threat and progressives countering that plutocratic inequality is the threat" (p. 160). Progressives argue that "wealthy persons have vastly [more] power in politics," while conservatives reply "in kind with policy arguments and denying that economic inequality is a problem in politics" (p. 160).

Again, Eisler points out that these arguments rely on the utility of judicial intervention in election law (or lack thereof), instead of a normative defense of judicial intervention in a democracy. "Even if economic inequality disrupts politics, it is contestable that the judiciary should modulate the First Amendment's constraint on state power" to limit campaign finance (p. 160-61). This "dominance of corruption as the analytic lens has resulted in a debate about whether unequal wealth can corrupt governance and society" (p. 161). Eisler argues that "the real question . . . in campaign finance," which does engage with the normative justification for judicial review of election laws, is "whether the more imminent threat to voter autonomy is the state action or the inequality of wealth in politics" (p. 161). To address the issue of normative justification, the existing debate over whether campaign finance laws do or do not create economic inequality can be recast as: whether having or not having campaign finance limits—such as on the amount of money one can accept or spend on elections—would better serve constituent autonomy.

According to Eisler, "in *Buckley v. Valeo* [424 U.S. 1 (1976)], the Court . . . conclud[ed] that campaign finance contributions can be distortive,

but that expenditures are not" (p. 158), "str[iking] down expenditure restritions but uph[olding] contribution restrictions" in the Federal Election Campaign Finance Act (p. 162). "[T]he Court reasoned that . . . contributions were more likely to be used as bribes in a *quid pro quo* exchange," whereas "expenditures would only provide information to voters" and "could not serve as bribes" (pp. 162-63). Even though the Court's reasoning is presented in "anti-corruption rationale" (pp. 162-63), Eisler recasts this logic in terms of advancing constituent autonomy. "If the electorate ceases to have final authority" over their representatives because the representatives are captured by "non-democratic principals (i.e. the bribe payers)," then "constituents no longer self-govern" (p. 163). At the same time, "the opportunity to engage in discourse and debate" is "[c]entral" to the freedom to "make political choices freely" (p. 163). Eisler argues that "*Buckley*'s decision to strike down expenditure limits was designed to protect this aspect of self-governance by refusing to allow direct state curation of discourse and debate" (p. 163).

Eisler does not argue that every Supreme Court decision concerning election law can be explained as a debate on advancing constituent freedom; he describes *Bush v. Gore*, 531 U.S. 98 (2000) as "lack[ing] a clear basis in judicial reasoning" (p. 23). Among the cases that Eisler presents as indicating an intent to advance freedom, he does not argue that all of them succeeded; Eisler argues that "[h]istory has proven the *Buckley* compromise woefully naïve" (p. 163). Rather, Eisler provides an explanation for judicial review as a whole that is more normatively compatible with democracy and does in fact coherently explain a substantial share of the Court's intervention in election law. In that respect, Eisler's argument is descriptive *and* prescriptive: he offers a new interpretation of the motivations underlying the Court's past work, which can also be a suggested future direction for the Court—as well as scholars seeking to reform election law—to consciously strive towards.

III. BEYOND THEORY: THE NEED FOR OBJECTIVELY DISCERNIBLE PARAMETERS

Eisler's theory is highly illuminating, in that it addresses a need that existing works overlook by assuming that the counterpopular dilemma has already been solved, or neglect by arguing that judicial review is justified because its utility outweighs its undemocratic nature. Eisler's theory could also be practically useful because it provides a democratic justification for the Supreme Court's existence, at a time when its existence is increasingly in question due to the suspected undemocratic motives underlying its rulings. If the Court could be perceived as advancing constituent freedom through judicial interventions that are carefully designed to be minimally intrusive,

the public could be persuaded to accept the Supreme Court as an institution in service of advancing the common goal of maintaining self-rule, instead of an institution that advances certain partisan ideologies under color of law.[36]

But Eisler's theory falls short of an operationally useful framework for that purpose, because it lacks an objectively discernible standard for what constitutes a "minimal" and hence acceptable counterpopular intrusion into elections. Under Eisler's presentation, the struggle between egalitarian and libertarian views of freedom "crystallize[s] along progressive-conservative lines" (p. 3), and each judicial intervention into election law unavoidably chooses which strand of freedom to prioritize over the other: for example, one person, one vote prioritizes the egalitarian view by imposing a baseline of equality among voters. Regardless of what the stated justification for the judicial intervention is, the losing partisan side may suspect that the winning side intervened further than is necessary so as to advance the winning side's partisan goals. Hence, a necessary condition for the losing side in a judicial intervention to accept that it was for the public good instead of a partisan goal is for the losing side to be persuaded that the intervention was sufficiently minimal—not much more than needed to achieve the public good at issue.

The lack of an objectively discernible standard for "minimal" makes it difficult to distinguish between a judicial intervention which is a good faith attempt to make a difficult choice between egalitarian and libertarian views of liberty, and one that advances partisan interests in the name of advancing freedom. For example, Eisler's explanation of *Baker v. Carr* as "advanc[ing] equal self-rule without requiring the judiciary to generate a rich theory of democracy" via "an unambiguous but substantially minimalist" one person, one vote doctrine (p. 141) is highly plausible—far more so than the existing explanation of the same case as an "unheralded novelty" which "lack[s] a clear or logical foundation" (pp. 18, 26). Now imagine the Supreme Court imposing another modification to election law whose common criticism is not that it is illogical, but that it is politically motivated: the National Popular Vote Interstate Compact (hereinafter NPV).[37] How could Eisler's theory coherently and, just as importantly, objectively explain why one person, one vote is a sincere attempt to advance self-rule, while NPV is not (or also is)?

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[36] *See* Pierce, *supra* note 35.

[37] *See* David B. Froomkin & A. Michael Froomkin, *Saving Democracy from the Senate*, 2024 UTAH L. REV. 397, 472 (2024) (NPV "suggests that state governments can be motivated by partisan interests to act against their apparent interest qua state."); EDWARD B. FOLEY, PRESIDENTIAL ELECTIONS AND MAJORITY RULE: THE RISE, DEMISE, AND POTENTIAL RESTORATION OF THE JEFFERSONIAN ELECTORAL COLLEGE 142 (2020) ("[A]ll the states that have adopted the plan are solid blue . . . based on the perception that the Electoral College favors Republicans, a perception reinforced by the [presidential election] result in 2016").

The many similarities between one person, one vote and NPV make it difficult to distinguish them according to the parameters that Eisler uses. One person, one vote "lacks a clear prompt from constitutional text and arguably contradicts the Election Clause's clear allocation of authority over voting to the states" (p. 119). Much ink has been spilled arguing that NPV is unconstitutional[38] because it circumvents the Electoral College to change the election for the President of the United States from a state-by-state election into a national one, thus violating the Constitution's implied guarantee that "states are sovereigns, not mere political subdivisions of the United States."[39] Whereas one person, one vote provides for "bare equality" of electoral power between each voter in elections for the House of Representatives, NPV would equalize voting power in presidential elections. Under Eisler's theory, if the Supreme Court imposed NPV, would it be an attempt to "advance equal self-rule without requiring the judiciary to generate a rich theory of democracy" (p. 141), just as one person, one vote is? Or would it be an act of "defin[ing] democracy in a manner lexically prior to constituent freedom" (p. 9)? The difficulty of distinguishing NPV from one person, one vote is highlighted by the fact that many scholars do equate them, some even saying that "if one is in support of the Electoral College, he or she cannot simultaneously support the concept of 'one person, one vote' in the selection of the President."[40]

One might argue that NPV is not the "minimally intrusive a procedure as possible to remedy an exceedingly unique condition."[41] However, it is not immediately apparent that courts directing how each state draws its electoral districts is *less* intrusive a measure than courts directing each state's electors to vote for the popular vote winner. Assuming arguendo that one person, one vote is less intrusive than NPV, that alone would not establish that NPV is so intrusive that it cannot be interpreted as a good-faith attempt to advance the egalitarian view of freedom; that fact would merely establish that one person, one vote is less intrusive of a judicial intervention than NPV would be.

Another argument for why one person, one vote can be accepted as an attempt to advance egalitarian freedom but NPV cannot be, may be that one person, one vote has been decontested but NPV has not. "Despite [a] . . . short-lived resistance, one-person, one vote has now become an uncontested

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[38] *See, e.g.*, Norman R. Williams, *Why the National Popular Vote Compact Is Unconstitutional*, 2012 B.Y.U. L. REV. 1523, 1523 (2012).

[39] Edward A. Hartnett, *The Pathological Perspective and Presidential Election*, 73 SMU L. REV. 445, 451 (2020) (internal quotations and citation omitted).

[40] James A. Beckman, *A Constitutional Anachronism: Why the Electoral College Should Be Abolished or Its Operation Re-Configured*, 52 CUMB. L. REV. 163, 197 (2022).

[41] Keaton Barnes, Comment, *The National Popular Vote on Trial*, 74 ARK. L. REV. 495, 523 (2021).

cornerstone of the constitutional canon and a widely accepted principle of democratic legitimacy."[42] In contrast, NPV has been criticized for an alleged "partisan bias of its supporters," as indicated by the fact that "only blue states have joined the compact, as they have been on the wrong side of the Electoral College's recent inverted outcomes."[43] Thus, one may argue that one person, one vote is acceptable as an attempt to advance freedom, whereas a judicial imposition of NPV would advance partisan interests in the guise of freedom. But such an argument would still be unsatisfactory. The constitutionalization of one person, one vote, could very well be a historical accident, just as NPV could still be adopted in the future. Hence, the current level of support for an idea could not serve as an objectively discernible standard for distinguishing between good-faith attempts at advancing freedom and partisan power grabs.

CONCLUSION

Eisler does not claim to provide objectively discernible standards for distinguishing good-faith attempts at advancing constituent freedom from politically motivated interventions. But the lack of such a standard is what hinders Eisler's persuasive argument from being not just an eloquent theory, but also an operationally useful framework for charting the future course of judicial review. The argument that the Supreme Court is engaged in a struggle to advance the common good of constituent freedom is sorely needed at a time when the Supreme Court is increasingly seen as a partisan tool to benefit the first political party to get its hands on any vacancy.[44] What we need to deploy that argument in practice is a means of persuading someone who doesn't already agree—a way to convince those who are willing to listen that the "winning" side in a judicial dispute put country before party, and to show objectively if and when the "winners" put party before country. The lack of such a means is resulting in perceptions that "[t]he Supreme Court does not act like a court of law," but a "supreme veto council that acts according to the ideological preferences of its members."[45] With an objectively discernible standard in place, Eisler's theory could become a starting point for restoring confidence in the Supreme Court as a legal, not a partisan, institution.

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[42] Paul A. Diller, *Reorienting Home Rule: Part 1—The Urban Disadvantage in National and State Lawmaking*, 77 LA. L. REV. 287, 303 (2016).

[43] Rick LaRue, *Electoral Structure Matters: Fixing the Creaks and Cracks in the Constitution by Its Quarter Millennium*, 56 IDAHO L. REV. 193, 200 (2020).

[44] Daniel Epps, Essay, *Nonpartisan Supreme Court Reform and the Biden Commission*, 106 MINN. L. REV. 2609, 2623 (2022) (court-packing "likely would significantly undermine the [Supreme] Court's legitimacy among those on the losing side," and "Democrats are increasingly unwilling to simply accept the results of the Court's decisions").

[45] Eric J. Segall, *Foreword II: To Reform the Court, We Have to Recognize It Isn't One*, 2023 WIS. L. REV. 461, 461–62 (2023).