DEMOCRACY HYPOCRISY

*Carolyn Shapiro**

Democracy scholars have established that democracies can turn into authoritarian regimes when autocratic leaders or factions hijack the structures of constitutional democracy, often while claiming meticulous fidelity to constitutional structures and democratic processes. As Kim Lane Scheppele argues, this kind of "autocratic legalism" can facilitate the transition from a functioning democracy to authoritarianism. This essay argues that the Supreme Court is engaged in exactly that kind of dangerous legalism. The Court, particularly in opinions by the conservative Justices, justifies many decisions by invoking democratic values, even as it is regularly consolidating power in itself or in an increasingly unaccountable unitary executive. At the same time, as is well-documented, the Court regularly issues opinions that undermine actual democratic functioning. But as this essay also notes, even when the Court issues pro-democracy rulings, as it did in the spring of 2023, it abandons the pro-democracy rhetoric that is so prevalent in other contexts. This lack of pro-democracy talk in pro-democracy cases is a kind of democracy hypocrisy, and it suggests that the danger of the Court's facilitation of autocratic legalism remains real.

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* Professor of Law, Chicago-Kent College of Law. This paper is part of a much larger project addressing the Supreme Court's failure to protect democracy, the peril that failure holds for the country, and some ways to address it. Thanks are due to participants in the University of Illinois Law Review Symposium in March 2023. For extraordinarily helpful research assistance, my thanks to Seema Karremi.

I. INTRODUCTION

Justice Scalia was fond of comparing the United States Constitution to those of other countries. The constitutional text of the former Soviet Union, he would posit, was "better than ours" because it "guaranteed" not only freedom of speech and of the press but also "of street demonstrations and protests, and [it guaranteed that] anyone who is caught trying to suppress criticism of the government will be called to account."[1] But, he explained, those promises were worthless because the "real constitution" is not promises to protect individual rights but is the "structure" of government that it creates.[2] The people of the Soviet Union, he argued, could not enjoy the rights they were promised because "the real constitution of the Soviet Union did not prevent the centralization of power in one person or in one party. And when that happens, the game is over."[3] In contrast, our structure, including a bicameral legislature, a separately elected chief executive, and (especially, in Justice Scalia's view) an independent judiciary, stand in the way of such consolidation of power and the oppression that it can lead to.[4]

This kind of just-so story about constitutional structure permeates much constitutional analysis. Much of the current Supreme Court's skepticism about aspects of the administrative state is couched in these terms. In striking down the limitation on presidential removal of the director of the Consumer Finance Protection Bureau, for example, the Court explained:

> [T]he Framers made the President the most democratic and politically accountable official in Government. Only the President (along with the Vice President) is elected by the entire Nation. And the President's political accountability is enhanced by the solitary nature of the Executive Branch, which provides "a single object for the jealousy and watchfulness of the people."[5]

Using democratic accountability as a justification for constitutional rulings arises in other contexts as well. In his majority opinion reversing *Roe v. Wade*, Justice Samuel Alito invoked the importance of returning the issue of abortion to the people's "elected representatives" no fewer than eight times.[6] Similarly, in *Obergefell v. Hodges*, each of the four dissenting justices wrote a dissent, and

1. *Considering the Role of Judges Under the Constitution of the United States: Hearing Before the S. Committee on the Judiciary*, 112th Cong. 6–7 (2011) (statement of Antonin Scalia, Associate Justice, United States Supreme Court).

2. *Id.* at 8.

3. *Id.*

4. *Id.* at 9.

5. Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2203 (2020) (quoting THE FEDERALIST NO. 70, at 479 (J. Cooke ed. 1961) (Alexander Hamilton)). The Court has long made similar claims about a different structural feature of the Constitution—"our federalism." *See* Carolyn Shapiro, Democratic Federalism and the Supreme Court: Keynote Address at the 2023 Ira C. Rothgerber Conference, *in* 95 U. COL. L. REV. (2024).

6. *See generally* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

all of them complained bitterly about the Court removing the question of marriage equality from the democratic political process.[7]

Ironically, however, many of these same justices fail to embrace democratic accountability as an animating principle in cases that go directly to the functioning of our democracy. To the contrary, in cases like *Shelby County v. Holder*[8] and *Rucho v. Common Cause*,[9] these justices have enabled antidemocratic entrenchment and exclusion, even while extolling separation of powers and federalism—those aspects of our constitutional structure—that they claim protect liberty and democracy.[10]

The Court's frequent use of pro-democracy rhetoric in cases involving constitutional structure is significant, even potentially dangerous. Democracy scholars have charted the ways in which democracies can turn into authoritarian regimes with one party, faction, or leader entrenched in power.[11] All too often, this transition occurs when authoritarian leaders or factions hijack the structures of a constitutional democracy to undermine it.[12]

Kim Lane Scheppele describes this phenomenon as "autocratic legalism."[13] Autocratic leaders who are democratically elected use both their claimed democratic mandate and "constitutional or legal methods," to attack "the basic principles of liberal and democratic constitutionalism because they want to consolidate power and entrench themselves in office."[14] Or as she says elsewhere, "autocratic legalists often make a giant public show of being governed by and governing within the law, changing the law and even the constitution itself with impeccably legal (if illiberal) methods. But underneath the legal reforms carried out in the name of democracy is the illiberal sensibility of the autocrat and the steady consolidation of power in fewer and fewer hands."[15]

Scheppele is focused in particular on individual "charismatic leaders" like Victor Orban of Hungary,[16] and she warns that the circumstances that allow for such an individual to succeed arise when "the rules of the game are themselves gamed" and the pre-existing structures "have been hollowed out from within."[17] Unfortunately, the dominant majority during the Roberts era has helped to create precisely such conditions, as they issue rulings that entrench power in the

7. Obergefell v. Hodges, 576 U.S. 644, 686–713 (2015) (Roberts, C.J., dissenting); *id.* at 713–20 (Scalia, J., dissenting); *id.* at 721–36 (Thomas, J., dissenting); *id.* at 736–42 (Alito, J., dissenting).

8. *See* 570 U.S. 529, 557 (2013).

9. *See* 139 S. Ct. 2484, 2506 (2019).

10. *See* Shapiro, *supra* note 5.

11. *See, e.g.*, Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 546 (2018); TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 71 (2018).

12. *See, e.g.*, Scheppele, *supra* note 11, at 545; GINSBURG & HUQ, *supra* note 11, at 71; STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 5 (2018).

13. Scheppele, *supra* note 11, at 548 (emphasis omitted).

14. *Id.* at 547.

15. *Id.* at 569.

16. *Id.* at 548–50.

17. *Id.* at 569.

Executive, in itself,[18] or in the Republican party and its allies.[19] Consistent with Scheppele's account of the rise of autocratic legalism, the court has even granted broad, largely undefined, immunity to former President Trump for his actions undermining the peaceful transfer of power in 2021,[20] it has precluded him from being disqualified from office because of them,[21] and even before issuing the immunity decision, the Court made it difficult if not impossible for Trump to be tried for those actions before Election Day.[22] And the Court has done so while embracing precisely the kind of pro-democratic rhetoric that Scheppele warns can facilitate the rise of autocratic legalism. [23]

One of Scheppele's points is that it can be hard to identify this transition to authoritarianism "*in media res*."[24] But as the 2024 general election approaches, the danger is clear. Trump and his allies are planning a much more sweeping and effective takeover of the federal government than he achieved during his first term.[25] And with the broad new presidential immunity the Court has announced, Trump will be even less restrained than he would be otherwise. Wittingly or not, the Court is helping to create the conditions for a second Donald Trump term to track Scheppele's description of autocratic legalism frighteningly closely.[26]

There has already been significant criticism and commentary about how the current Supreme Court's jurisprudence has a profoundly antidemocratic effect,[27] discussion of the reality that aspects of the Constitution are themselves anti-democratic,[28] and evidence that many in the Republican party have abandoned democratic commitments.[29] My point in this piece is somewhat different from those arguments. Here, I am interested in Scheppele's insight that pro-democratic

18. *See* Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 102 (2022).

19. *See* Michael J. Klarman, *The Supreme Court, 2019 Term–Foreword: The Degradation of American Democracy and the Court*, 134 HARV. L. REV. 1, 181 (2020); Nicholas O. Stephanopoulous, *The Anti-*Carolene *Court*, 2019 SUP. CT. REV. 111, 182. Jenny Breen, *Democratic Erosion and the United States Supreme Court*, 2024 UTAH L. REV. 341, 367 (2024).

20. Trump v. United States, 144 S. Ct. 2312 (2024).

21. Trump v. Anderson, 601 U.S. 100, 117 (2024).

22. Adam Rawnsley & Asawin Suebsaeng, *Team Trump Is Ready to Lose the Supreme Court Immunity Case. They're Celebrating*, ROLLING STONE (April 24, 2024), https://www.rollingstone.com/politics/politics-features/trump-celebrating-supreme-court-immunity-heist-1235009838/ [https://perma.cc/HSD3-HLR6].

23. Scheppele, *supra* note 11, at 578:

> [For these] new autocrats, . . . [p]ortraying themselves a democratic constitutionalists is absolutely essential to their public legitimation; what is missing in the new democratic rhetoric is any respect for the basic tenets of liberalism. They have no respect for minorities, pluralism, or toleration. . . . In short, liberalism is gutted by the new autocrats while they leave the facades of constitutionalism and democracy in place.

24. *Id.* at 556.

25. *See* Melissa Quinn & Jacob Rosen, *What Is Project 2025? What to Know About the Conservative Blueprint for a Second Trump Administration*, CBS NEWS, https://www.cbsnews.com/news/what-is-project-2025-trump-conservative-blueprint-heritage-foundation/ (last updated Aug. 22, 2025, 22:03 PM) [https://perma.cc/WS9E-8HEM].

26. *See* Aziz Z. Huq, *The Counterdemocratic Difficulty*, 117 NW. L. REV. 1099, 1104 (2023) (arguing that the Court may be "act[ing] to eliminate the structures that allow democratic choice to endure meaningfully into the future").

27. *Id.* at 1105.

28. *See, e.g.*, SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION 6 (2008).

29. *See, e.g.*, Richard L. Hasen, *The Supreme Court's Pro-Partisanship Turn*, 109 GEO. L.J. ONLINE 50, 72 (2020).

rhetoric—or what I call here "democracy talk"—cannot substitute for actual commitments to democratic norms and in identifying that gap between rhetoric and commitment in what I see as "democracy hypocrisy" on the current Supreme Court.

Part II of this essay describes the methodology I used to identify and analyze the cases that use democracy talk.[30] Part II lays out some of the reasons why, as a general matter, justices may want to use such rhetoric.[31] Part III discusses two particular subsets of cases—those involving government structure and those involving individual rights—and the role democracy talk plays in them.[32] Part IV then focuses on recent cases that actually deal with the institutions and functioning of democracy, analyzing the role—if any—that democracy talk plays in those cases.[33] That Part also explains why the use of democracy talk in the different types of cases—the current majority's "democracy hypocrisy"—should serve as one warning that conditions are ripe for autocratic legalism and that we cannot rely on the Court itself to protect us from it.[34]

II. BACKGROUND

A. Identifying the Cases

For this project, I wanted to identify when justices use the rhetoric of democracy. To identify this rhetoric, I have a thin definition of democracy. That is, I'm not focused on *theories* of democracy, debates about the advantages and disadvantages of different democratic structures,[35] or questions about precisely how commitments to democratic rule require protections for minorities and individual rights. Instead, I'm looking at rhetoric: when and how the justices use language that invokes political accountability and democracy, regardless of any particular underlying theoretical framework.

To begin, I identified all opinions in argued cases that were issued between January 2017 and June 2023[36] that used certain key words or phrases and used them either to invoke democratic norms or in the process of deciding a case about the functioning of democratic institutions (or, of course, both). Specifically, I ran the following search in Westlaw's Supreme Court database: democra! or elect! or vote! or voting or (political! /2 accountab!) or "the people" and DA(aft2016).[37]

30. *See* discussion *infra* Part II.
31. *See* discussion *infra* Part II.
32. *See* discussion *infra* Part III.
33. *See* discussion *infra* Part IV.
34. *See* discussion *infra* Part IV.
35. Scheppele, *supra* note 11, at 548 (noting that there exists a "wide but normatively justifiable variation in the institutional forms and substantive rules that one can find among constitutional-democratic states").
36. These data parameters meant that I included a small number of cases (seven) that were decided without the participation of Justice Gorsuch.
37. Because I started this project before the end of the October 2022 Term, I subsequently re-ran this search to ensure that I captured the more recently decided cases.

Running this search produced over 600 results,[38] but many of those cases are not relevant. In particular, the search produced a significant number of denials of certiorari or other pleadings where one of the parties had a name that matched one of my search terms.[39] It also produced a fair number of actual opinions that had words matching my search terms but that were completely unrelated. For example, some cases used the word "elect" (or its variants) as a synonym for "choose" (or its variants), or that talked about electricity.[40] After weeding out the cases that did not involve the kinds of discussions I was looking for, I was left with 135 cases. Of those cases, ninety were merits cases, and forty-five were cases that arose on the shadow docket,[41] many of which arose during and in the aftermath of the 2020 election.[42]

The cases include many that directly addressed democratic institutions and processes. There are, for example, several Voting Rights Act and racial gerrymandering cases,[43] cases about partisan gerrymandering,[44] and *Moore v. Harper*, the case that considered, and largely rejected, the independent state legislature theory.[45] But there are many more cases about other subjects altogether, as Part III will explore in more detail.

B. Non-Unanimity and Motivation: Why Use Democracy Talk?

On the merits docket, one of the most striking findings is how rare democracy talk is in unanimous cases. Of the ninety merits cases I identified, only six were fully unanimous—a rate of 6.7%. This unanimity rate is much lower than for the caseload as a whole, even taking into account the fact that there is less unanimity in the current Court than there has been historically.[46] In comparison

38. On December 17, 2023, it produced 641 results. I do not claim that I identified every single case with the kind of discussion I was looking for, but I do not think there is any reason to believe that cases I may have missed would lead me to different conclusions.

39. *See, e.g.*, Kim v. Haw. Off. of Elections, 143 S. Ct. 783 (2023) (mem.) (denying certiorari).

40. *See, e.g.*, Amgen Inc. v. Sanofi, 598 U.S. 594, 598 (2023) (discussing patents).

41. A list of cases I identified is in Appendix A. I counted *Benisek v. Lamone*, 585 U.S. 155 (2018) (per curiam) and *NFIB v. Department of Labor*, 595 U.S. 109 (2022), as merits cases because *Benisek* was fully briefed and argued, and *NFIB*, although it did not have full briefing, had oral argument and extensive amicus participation. *See No. 17-333*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-333.html (last visited June 19, 2024) [https://perma.cc/UDE2-QFG7]; *No. 21A244*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21a244.html (last visited June 19, 2024) [https://perma.cc/P6BG-3TAK]. In contrast, I counted another per curiam opinion, *Thompson v. Hebdon*, 140 S. Ct. 348 (2019) (per curiam), as a shadow docket case because it was issued without full briefing and with no oral argument. *No. 19-122*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-122.html (last visited June 19, 2024) [https://perma.cc/2MGX-KSRX]. The shadow docket cases include denials of certiorari where one or more justice dissented or wrote a statement respecting the denial. *See, e.g.*, Harness v. Watson, 143 S. Ct. 2426 (2023) (Jackson, J., dissenting).

42. *See, e.g.*, Republican Party of Pa. v. Boockvar, 141 S. Ct. 1 (2020).

43. *See, e.g.*, Allen v. Milligan, 599 U.S. 1, 9–10 (2023); Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2330 (2021); Va. House of Delegates v. Bethune-Hill, 139 S. Ct. 1945, 1949–50 (2019).

44. *See. e.g.*, Gill v. Whitford, 585 U.S. 48, 52–54 (2018); Benisek v. Lamone, 585 U.S. 155, 157 (2018); Rucho v. Common Cause, 139 S. Ct. 2484, 2491 (2019).

45. Moore v. Harper, 600 U.S. 1, 37 (2023).

46. *See, e.g.*, *The Supreme Court—The Statistics*, 132 HARV. L. REV. 447, 452 (2018).

to the 6.7% full unanimity rate in my merits cases, the same Terms (OT 2016 through OT 2023) ranged from a high of 36.8% fully unanimous opinions in OT 2022[47] to a low of 15% in OT 2019.[48]

This significant disparity in the use of democracy talk in nonunanimous and unanimous merits opinions suggests that democracy talk is not random. There are at least three possible (and nonexclusive) explanations for why democracy talk is more likely to arise in nonunanimous cases than unanimous ones. First, as others have observed, cases that directly implicate democratic functioning are often highly contested on the Supreme Court, with sharp divisions between the liberal and conservative justices.[49] So, one possible explanation for the overrepresentation of nonunanimous cases among cases using democracy talk is simply that cases about democracy are more likely to be split decisions.

But the math does not support this theory. I identified seventeen cases that were *about* democratic institutions or functions, one of which was unanimous.[50] Without those seventeen cases in the calculation, the unanimity rate is 6.8%—almost exactly the same. In other words, this factor doesn't explain why democracy talk is significantly more common in nonunanimous cases.

A second possibility, for which there is some evidence,[51] is that justices use democracy talk to defend disputed positions. That can take many forms, but at the highest level of generality, they appear to be claiming that their positions—whether in the majority or not—are more consistent with democratic governance than are those they disagree with.

One example of this use of democracy talk arose in *Pena-Rodriguez v. Colorado*.[52] On its face, the case has little or nothing to do with democratic functioning. Miguel Pena-Rodriguez was convicted of unlawful sexual conduct and harassment.[53] After the jury was dismissed, two jurors approached Pena-Rodriguez's lawyer and reported that "during deliberations, another juror had expressed anti-Hispanic bias toward petitioner and petitioner's alibi witness."[54] The issue in the case was whether this evidence was admissible despite Colorado's Rule of Evidence 606(b), which, like Federal Rule of Evidence 606(b), prohibits evidence about jury deliberations.[55] In an opinion by Justice Kennedy, the Court held that the Sixth Amendment trumps such rules of evidence where there is clear evidence of racial bias in jury deliberations.[56]

47. *See, e.g.*, *The Supreme Court—The Statistics*, 137 HARV. L. REV. 490, 495 (2023).

48. Angie Gou, Ellena Erskine & James Romoser, *STAT PACK for the Supreme Court's 2021-22 Term*, SCOTUSBLOG 14 (July 1, 2022), https://www.scotusblog.com/wp-content/uploads/2022/07/SCOTUSblog-Final-STAT-PACK-OT2021.pdf [https://perma.cc/6WPD-AKEX].

49. *See* Hasen, *supra* note 29, at 70.

50. *See Lamone*, 585 U.S. at 156.

51. *See infra* notes 54–63 and accompanying text.

52. 580 U.S. 206, 210 (2017).

53. *Id.* at 211–12.

54. *Id.* at 212.

55. *Id.* at 213.

56. *Id.* at 225.

The majority opinion does not begin by describing those issues. Instead, the opinion opens with a statement about democracy, declaring:[57]

> The jury is a central foundation of our justice system and our democracy. Whatever its imperfections in a particular case, the jury is a necessary check on governmental power . . . . The jury is a tangible implementation of the principle that the law comes from the people.[58]

In other words, the opinion starts by emphasizing the important role of the jury in a democracy. And the relationship between the jury and democratic rule is likewise central to the opinion's conclusion that eliminating race discrimination in the justice system is both constitutionally compelled and necessary "to ensure that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy."[59]

Justice Alito dissented, joined by Justice Thomas.[60] Justice Alito did not cede the ground of democracy to the majority.[61] To the contrary, he explained that "the process that culminated in the adoption of Federal Rule of Evidence 606(b) was the epitome of reasoned *democratic* rulemaking," and he described that process in detail.[62]

The point here is not that one or other opinion is more persuasive in its use of democracy talk or otherwise—and both opinions included significant discussion and analysis in addition to democracy talk—but rather that when the majority opinion involved the democratic role of the jury, Justice Alito countered by invoking democratic values and structures himself.[63]

Pena-Rodriguez is not alone. My dataset contains a number of cases with multiple opinions that sharply disagree and that engage in competing efforts to invoke democracy in defense of their positions.[64] In *United States v. Davis*, for example, which struck down part of a criminal statute as unconstitutionally vague, Justice Gorsuch's majority opinion began with democracy talk, declaring in its second sentence that "[o]nly the people's elected representatives in Congress have the power to write new federal criminal laws."[65] The opinion went on to explain that vague laws violate separation of powers and democratic principles

57. Democracy talk in cases about juries and the judicial system is common. *See, e.g.*, Buck v. Davis, 580 U.S. 100, 124 (2017) (allowing habeas claim implicating race discrimination to proceed and explaining that "[r]elying on race to impose a criminal sanction 'poisons public confidence' in the judicial process. . . . [and] thus injures not just the defendant, but 'the law as an institution, . . . the community at large, and . . . the democratic ideal reflected in the processes of our courts'") (internal citations omitted); United States v. Haymond, 139 S. Ct. 2369, 2375 (2019) ("Just as the right to vote sought to preserve the people's authority over their government's executive and legislative functions, the right to a jury trial sought to preserve the people's authority over its judicial functions."); Flowers v. Mississippi, 139 S. Ct. 2228, 2238 (2019) ("Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process.").

58. Pena-Rodriguez v. Colorado, 580 U.S. 206, 210 (2017).

59. *Id*. at 224.

60. *Id*. at 235 (Alito, J., dissenting). Justice Thomas also wrote a dissent. *Id.* at 230.

61. *Id.* at 255 (Alito, J., dissenting).

62. *Id*. at 241 (Alito, J., dissenting) (emphasis added).

63. *Id.* (Alito, J., dissenting).

64. *See infra* Part III for a discussion of democracy talk on both sides in cases about government structure and individual rights.

65. 139 S. Ct. 2319, 2323 (2019).

by shifting "the legislature's responsibility for defining criminal behavior to unelected prosecutors and judges."[66] Justice Kavanaugh, dissenting, likewise invoked democracy: "Faced with an onslaught of violent gun crime and its debilitating effects, the American people demanded action. In 1968, Congress passed and President Lyndon Johnson signed the Gun Control Act."[67] These dueling uses of democracy talk suggest that at least sometimes, the justices believe that it is doing some meaningful rhetorical work.

A third possible explanation for the relative ubiquity of democracy talk in nonunanimous opinions (and one that overlaps with the second explanation) is that justices often use democracy talk to make claims about jurisprudential methodology and judicial restraint or to complain about how other justices, courts, or parties are not appropriately respecting the limitations of the judicial role. So, for example, democracy talk is common in cases about statutory interpretation, in particular in opinions championing textualism.[68] Justice Gorsuch, in particular, frequently complains that those he disagrees with are rewriting statutes rather than honoring the work of "the People's representatives."[69] In *Davis*, for

66. *Id.*

67. *Id.* at 2337 (Kavanaugh, J., dissenting).

68. Longstanding claims to the contrary, whether textualism is the most democratically accountable method of statutory interpretation is highly contestable. *See* STEPHEN G. BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 88–105 (2010); Carolyn Shapiro, *What Members of Congress Say About the Supreme Court and Why It Matters*, 93 CHI.-KENT L. REV. 453, 466–68 (2018). Unfortunately, in my dataset, I found only one example of a non-textualist defending a purposive method using democracy talk. *See* Jam v. Int'l Fin. Corp., 586 U.S. 199, 231 (2019) (Breyer, J., dissenting):

> My decision rests primarily not upon linguistic analysis, but upon basic statutory purposes. Linguistic methods alone, however artfully employed, too often can be used to justify opposite conclusions. Purposes, derived from context, informed by history, and tested by recognition of related consequences, will more often lead us to legally sound, workable interpretations—as they have consistently done in the past. These methods of interpretation can help voters hold officials accountable for their decisions and permit citizens of our diverse democracy to live together productively and in peace—basic objectives in America of the rule of law itself.

69. Henson v. Santander Consumer USA Inc., 582 U.S. 79, 90 (2017) ("[T]he proper role of the judiciary . . . [is] to apply, not amend, the work of the People's representatives."); *see also* Wis. Cent. Ltd. v. United States, 585 U.S. 274, 284 (2018) ("Congress alone has the institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes in light of new social problems and preferences."); Sessions v. Dimaya, 584 U.S. 148, 181 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) (internal quotations and citations omitted):

> It is for the people, through their elected representatives, to choose the rules that will govern their future conduct. . . . Meanwhile, the Constitution assigns to judges the "judicial Power" to decide "Cases" and "Controversies." Art. III, § 2. That power does not license judges to craft new laws to govern future conduct, but only to "discer[n] the course prescribed by law" as it currently exists and to "follow it" in resolving disputes between the people over past events.

Va. Uranium, Inc. v. Warren, 139 S. Ct. 1894, 1908 (2019) (plurality):

> [I]n piling inference upon inference about hidden legislative wishes we risk displacing the legislative compromises actually reflected in the statutory text—compromises that sometimes may seem irrational to an outsider coming to the statute cold, but whose genius lies in having won the broad support our Constitution demands of any new law.

Nestle USA, Inc. v. Doe, 141 S. Ct. 1931, 1942 (2021) (Gorsuch, J., concurring) ("A self-governing people depends on elected representatives—not judges—to make its laws. So, what may have been a 'proper function for common-law courts' in England is no longer generally appropriate 'for federal tribunals' in this country.") (internal quotations omitted). *See also Davis*, 139 S. Ct. at 2323:

> Only the people's elected representatives in Congress have the power to write new federal criminal laws. . . . [Vague laws] hand off the legislature's responsibility for defining criminal behavior to unelected

example, Justice Gorsuch explained: "When Congress passes a vague law, the role of courts under our Constitution is not to fashion a new, clearer law to take its place, but to treat the law as a nullity and invite Congress to try again."[70] But other justices make the same claims,[71] sometimes even on the opposite sides of the same case.[72]

Here, democracy talk is generally not an essential part of the reasoning. Rather, the justices appear to be using it rhetorically as a way to promote the legitimacy of their own views and methodologies, as well as of the Court itself. Presumably, the justices who use this language believe that it will resonate with readers of their opinions.

III. CONSTITUTIONAL STRUCTURE AND INDIVIDUAL RIGHTS

Noting the reasons why justices might be more inclined to use democracy talk in nonunanimous cases than in unanimous ones does not necessarily provide insight into the subject matter of those cases and the relationship between that subject matter and the democracy talk. Nor does it illuminate the extent to which democracy talk in different subject areas might help to facilitate the rise of autocratic legalism.

To evaluate these questions, I looked closely at two subsets of cases. First, I wanted to see the extent to which justices invoke democracy talk in cases about government structure—in particular about separation of powers. Consistent with Scheppele's observations about how the "façades of constitutionalism and democracy" can mask autocratic legalism,[73] is the Court, or are some justices, using

prosecutors and judges. . . . When Congress passes a vague law, the role of courts under our Constitution is not to fashion a new, clearer law to take its place, but to treat the law as a nullity and invite Congress to try again.

70. 139 S. Ct. at 2323.

71. *See, e.g.*, Sackett v. EPA, 598 U.S. 651, 715 (2023) (Kagan, J., concurring):

> [T]he Court substitutes its own ideas about policymaking for Congress's . . . . The Court, rather than Congress, will decide how much regulation is too much . . . . Because that is not how I think our Government should work—more, because it is not how the Constitution thinks our Government should work—I respectfully concur in the judgment only.

Husted v. A. Phillip Randolph Inst., 584 U.S. 756, 779 (2018) ("The dissents have a policy disagreement . . . with Congress. But this case presents a question of statutory interpretation, not a question of policy. We have no authority to second-guess Congress."); Gamble v. United States, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring) ("The Constitution, federal statutes, and treaties are the law, and the systematic development of the law is accomplished democratically. Our judicial task is modest: We interpret and apply written law to the facts of particular cases.").

72. *See* Bostock v. Clayton County, 590 U.S. 644, 654–55 (2020) ("If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives."); *id.* at 782–83 (Kavanaugh, J., dissenting):

> If judges could, for example, rewrite or update securities laws or healthcare laws or gun laws or environmental laws simply based on their own policy views, the Judiciary would become a democratically illegitimate super-legislature—unelected, and hijacking the important policy decisions reserved by the Constitution to the people's elected representatives.

73. Scheppele, *supra* note 11, at 578.

democracy talk while nonetheless facilitating "the steady consolidation of power in fewer and fewer hands?"[74]

Second, I returned to *Dobbs* and to other cases about individual rights.[75] As Scheppele notes, pure majoritarianism can be antidemocratic because it undermines the long-term ability of a democracy to function.[76] Respect for individual rights is thus an essential part of ensuring that "democratic electorates [remain] in charge of their own destiny, with political power controlled and checked in ways that would guarantee the continued respect for individuals and their ideas about self-governance."[77]

A. Constitutional Structure

Democracy talk appears frequently in cases about government structure—in particular about federalism and about separation of powers in the federal government. Nowhere is this more apparent than in the conservative justices' assault on the administrative state.

Consider *Gundy v. United States*.[78] Gundy involved the Sex Offender Registration and Notification Act (SORNA), which generally requires sex offenders to register with the government before being released from prison.[79] The provision of SORNA challenged in *Gundy* authorized the Attorney General to "specify the applicability" of SORNA registration to sex offenders who had already been released from prison at the time the statute was enacted—and so could not comply with SORNA's general requirement as written—and to "prescribe rules" setting out how these pre-Act offenders should register.[80]

The issue in the case was whether this provision violated the "nondelegation doctrine," the principle that Congress cannot delegate its legislative powers,[81] despite the fact that only two laws have ever been struck down on this basis—and both of them in 1935.[82] Indeed, years of case law has established that the realities of governing "in our increasingly complex society replete with ever changing and more technical problems" mean that "Congress simply cannot do its job absent an ability to delegate power under broad general directives."[83] "So we have held, time and again, that a statutory delegation is constitutional so long as Congress lays down by legislative act an intelligible principle to which [the delegated action must] confirm."[84]

74. *Id.* at 569.
75. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 215 (2022).
76. Scheppele, *supra* note 11, at 557.
77. *Id.* at 560.
78. 139 S. Ct. 2116, 2121 (2019).
79. *Id.*
80. 34 U.S.C. § 20913(d).
81. *Gundy*, 139 S. Ct. at 2121.
82. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388, 433 (1935).
83. Mistretta v. United States, 488 U.S. 361, 372 (1989).
84. *Gundy*, 139 S. Ct. at 2123 (internal quotation marks and citations omitted).

The Court, operating with only eight justices,[85] upheld the statute, but three of the conservative justices, in dissent, indicated their eagerness to revisit and expand the nondelegation doctrine to restrict what Congress can delegate,[86] while Justice Alito, concurring only in the judgment, indicated that "if a majority of this Court were willing to reconsider" the nondelegation doctrine, he "would support that effort."[87]

Much of the disagreement between the plurality opinion, written by Justice Kagan, and the dissent, written by Justice Gorsuch, turned on statutory interpretation: just how broad was the discretion the statute gave to the executive branch.[88] Justice Kagan understood the statute to provide the Attorney General the discretion only to consider the "feasibility" of requiring pre-Act offenders to register, easily meeting the nondelegation doctrine's requirement that Congress provide the executive branch with an "intelligible principle" by which to exercise delegated discretion.[89] Justice Gorsuch, on the other hand, read the statute to improperly "give the executive branch a blank check to write a code of conduct governing private conduct for a half-million people."[90]

Justice Gorsuch's interpretation of the statute allowed for a broad attack on the nondelegation doctrine, replete with democracy talk, starting with the very first sentence of the opinion: "The Constitution promises that only the people's elected representatives may adopt new federal laws restricting liberty."[91] From there, Justice Gorsuch laid out several pages of discussion about constitutional design—including why the Framers insisted on restricting the power of the federal government and creating a difficult and deliberative lawmaking process with many types of representation.[92] He explained:

> Without the involvement of representatives from across the country or the demands of bicameralism and presentment, legislation would risk becoming nothing more than the will of the current President. And if laws could be simply declared by a single person, they would not be few in number, the product of widespread social consensus, likely to protect minority interests, or apt to provide stability and fair notice. Accountability would suffer too. Legislators might seek to take credit for addressing a pressing social problem by sending it to the executive for resolution, while at the same time blaming the executive for the problems that attend whatever measures he chooses to pursue. In turn, the executive might point to Congress as the source of the problem.[93]

85. Justice Kavanaugh did not participate in the case. *Id.* at 2118.

86. *Id.*

87. *Id.* at 2131 (Alito, J., concurring). As commentators have noted, there is almost certainly now a majority on the Court prepared to do just that. *See, e.g.*, Lisa Heinzerling, *Nondelegation on Steroids*, 29 N.Y.U. ENV'T L.J. 379, 381, 381 n.9 (2021).

88. *Gundy*, 139 S. Ct. at 2123–24 (citing Reynolds v. United States, 565 U.S. 432, 435 (2012)); *id.* at 2144 (Gorsuch, J., dissenting).

89. *Id.* at 2123–24.

90. *Id.* at 2144 (Gorsuch, J., dissenting).

91. *Id.* at 2131 (Gorsuch, J., dissenting).

92. *Id.* at 2133 (Gorsuch, J., dissenting).

93. *Id.* at 2135 (Gorsuch, J., dissenting) (internal citations omitted).

Relying on this description, Justice Gorsuch attacked the nondelegation doctrine's "intelligible principle" standard and argued for reigning it in.[94] Democracy talk was thus central to his argument.

Similar arguments and use of democracy talk arise with respect to the Major Questions Doctrine ("MQD")—a new and increasingly robust approach to the interpretation of statutory delegations to the executive branch.[95] A kind of nondelegation doctrine "light,"[96] the MQD is a newly articulated requirement of "clear congressional authorization" when "agencies seek to resolve major questions."[97] The Court has relied on the MQD to limit the Environmental Protection Agency's ability to regulate carbon emissions under the Clean Air Act[98] and OSHA's ability to require employers to impose protections from COVID-19,[99] to nullify the Center for Disease Control's power to declare an eviction moratorium during the pandemic,[100] and to invalidate President Biden's student loan forgiveness program.[101]

Although the most far-reaching majority opinions invoking the MQD are either per curiam opinions[102] or were authored by Chief Justice Roberts,[103] Justice Gorsuch has provided the most elaborate—and democracy-talk-laden—justifications for it.[104] According to Justice Gorsuch, the MQD, like the nondelegation doctrine, is essential to protect a number of pro-democratic features of our Constitution.[105] "[T]he framers believed that a republic—a thing of the people—would be more likely to enact just laws than a regime administered by a ruling class of largely unaccountable 'ministers.'"[106] And the difficulty of federal lawmaking "requir[es] a broad consensus to pass legislation . . . ensur[ing] that any new laws would enjoy wide social acceptance . . . The need for compromise inherent in this design also sought to protect minorities by ensuring that their votes would often decide the fate of proposed legislation—allowing them to wield real power alongside the majority."[107] Finally, the framers thought that "the difficulty of legislating at the federal level aimed as well to preserve room for lawmaking 'by governments more local and more accountable than a distant federal' authority."[108] Justice Gorsuch even invokes the dangers of autocracy if too much authority is shifted to the Executive: "Legislation would risk becoming

94. *Id.* at 2139 (Gorsuch, J., dissenting) (internal citations omitted).

95. *See* Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 267 (2022).

96. *See id.* (suggesting an understanding of the MQD as a "pragmatic type of light-touch nondelegation").

97. West Virginia v. EPA, 597 U.S. 697, 742 (2022) (Gorsuch, J., concurring); *see also id.* at 723–24 (describing the MQD).

98. *Id.* at 698–99.

99. NFIB v. Dep't of Lab., 595 U.S. 109, 117 (2022) (per curiam); *id.* at 121 (Gorsuch, J., concurring).

100. Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2486 (2021) (per curiam).

101. Biden v. Nebraska, 143 S. Ct. 2355, 2360 (2023).

102. *NFIB*, 595 U.S. at 662*; Ala. Ass'n of Realtors*, 141 S. Ct. at 2486.

103. West Virginia v. EPA, 597 U.S. 697, 702 (2022)*; Nebraska*, 143 S. Ct. at 2361.

104. Readers may have already noticed that Justice Gorsuch is an extremely frequent user of democracy talk.

105. *EPA*, 597 U.S. at 737 (Gorsuch, J., concurring).

106. *Id.* (quoting THE FEDERALIST NO. 11, 85 (C. Rossiter ed. 1961) (Alexander Hamilton)).

107. *Id.* at 738–39.

108. *Id.* at 736.

nothing more than the will of the current President, or, worse yet, the will of unelected officials barely responsive to him."[109] The bottom line, according to Justice Gorsuch, is that the MQD and the nondelegation doctrine require important policy decisions to be made by Congress, the most democratically accountable branch.

Such claims are hardly unique to Justice Gorsuch.[110] But note what, as a practical matter, reviving the nondelegation doctrine would do. It might well, as Justice Kagan noted, call into question the constitutionality of vast swaths of the federal government,[111] undermine well-established regulatory regimes and statutes, and it would do so at a time of particular congressional dysfunction. It would transfer power from the executive branch to the Court—the least democratically accountable branch.[112] And it would also transfer power from Congress to the Court because congressional efforts to legislate effectively about complex and evolving matters would be subject to invalidation by the Court.

Likewise, the dissenters in the various MQD cases reiterated that under the MQD, the Court "usurps a decision that rightfully belongs to others,"[113] in particular "experts, acting within the sphere Congress marked out and under Presidential control."[114] Dissenting from a decision invalidating President Biden's first student loan forgiveness program, Justice Kagan complained that "the majority decides a contested public policy issue properly belonging to the politically accountable branches and the people they represent."[115] And in responding to the Court's narrow reading of the EPA's authority under the Clean Air Act, she explained:

> Congress knows what it doesn't and can't know when it drafts a statute; and Congress therefore gives an expert agency the power to address issues—even significant ones—as and when they arise. That is what Congress did in enacting [the Clean Air Act]. The majority today overrides that legislative choice.[116]

In other words, Justice Kagan argued that the MQD, like the nondelegation doctrine, transfers power from both Congress and the executive to the Court.[117]

Democracy talk arises in other types of separation of powers and government structure cases as well, often in settings where it—at least arguably—is transferring power away from the political branches. In several cases about Congress's power to structure administrative agencies, for example, the Court has

109. *Id*. at 738–39.

110. Christopher J. Walker, *Responding to the New Major Questions Doctrine*, 46 REG. 26, 28 (2023).

111. Gundy v. United States, 139 S. Ct. 2116, 2130 (2019).

112. NFIB v. Dep't of Lab., 595 U.S. 109, 112–13 (2022) (Breyer, J., dissenting).

113. *Id*. at 139.

114. *Id*. at 137–38. *See also* Biden v. Nebraska, 143 S. Ct. 2355, 2385 (2023).

115. *Nebraska*, 143 S. Ct. at 2400 (Kagan, J., dissenting).

116. West Virginia v. EPA, 597 U.S. 697, 755–56 (2022) (Kagan, J., dissenting). Justice Kagan also complained bitterly that the MQD is inconsistent with the avowed textualism of a number of justices in the majority. *Id.* at 756.

117. Similar points can be made about *Chevron* deference, which the Supreme Court overruled, 6-3, in Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024).

invalidated those choices under claims of political accountability. *Seila Law LLC v. Consumer Financial Protection Board* is one such case.[118]

In *Seila Law*, the Court, in an opinion by Chief Justice Roberts, held that Congress exceeded its power by precluding at-will removal of the head of the CFPB by the President.[119] *Seila Law* rests not on a particular textual command in the Constitution but rather on a theory of constitutional design known as the "unitary executive."[120] The *Seila Law* majority made democracy talk central as it applied this theory.[121] As the opinion explained, "the Framers made the President the most democratic and politically accountable official in Government. Only the President (along with the Vice President) is elected by the entire Nation. And the President's political accountability is enhanced by the solitary nature of the Executive Branch . . . ."[122] Because of this expressed concern for political accountability, the Court held the statutory restriction on presidential removal of the CFPB head was unconstitutional.[123]

Seila Law is not alone. In *Collins v. Yellen*, another case striking down removal restrictions, Justice Alito's majority opinion put it bluntly:[124] ensuring that the President can remove officials from office "works to ensure that these subordinates serve the people effectively and in accordance with the policies that the people presumably elected the President to promote."[125] He continued: "In addition, because the President, unlike agency officials, is elected, this control is essential to subject Executive Branch actions to a degree of electoral accountability."[126]

Similar concerns for political accountability also arose in a case holding that Congress had not properly designated particular officials as inferior officers.[127] In *United States v. Arthrex*, for example, while declaring unconstitutional the reporting structure for administrative patent judges, Chief Justice Roberts, for the Court, noted that the power exercised by "thousands of officers . . . on behalf of the President in the name of the United States . . . acquires its legitimacy and accountability to the public through 'a clear and effective chain of command' down from the President, on whom all the people vote."[128]

In these cases, too, the more liberal justices disagree about which way political accountability points. In her dissent in *Seila Law*, for example, Justice Kagan described how "the two political branches, acting together," created the CFPB "to protect consumers from the reckless financial practices that had caused

118. 140 S. Ct. 2183, 2197 (2020).
119. *Id.*
120. *Id.* at 2214.
121. *See id.*
122. *Id.* at 2203.
123. *Id.* at 2204.
124. 141 S. Ct. 1761, 1784 (2021).
125. *Id.*
126. *Id.*
127. United States v. Arthrex, Inc., 594 U.S. 1, 23 (2021).
128. *See id.* at 11.

the then-ongoing economic collapse."[129] She continued: "And now consider how the dispute ends—with five unelected judges rejecting the result of that democratic process."[130] Likewise, in *Collins v. Yellen*, Justice Kagan objected to the Court invalidating the agency structure Congress created, arguing that "the right way to ensure that government operates with 'electoral accountability' is to lodge decisions about its structure with, well, 'the branches accountable to the people.'"[131]

These cases are dry and technical. The average person is unlikely to pay much attention to them, although they may have enormous effects on the functioning of the federal government. But those are precisely the kinds of changes that Scheppele warns of.[132] As she puts it, "many of the changes that result in the de-liberalization of constitutional systems are highly technical and therefore hard for the ordinary citizen to understand."[133] But changes that make it more difficult for Congress to address complex problems, as with the nondelegation doctrine and the MQD, and changes that vest more power in the executive—as in *Seila Law* and the other cases just discussed—are precisely the kinds of changes that can lead people to lose faith in democracy by undermining the political branches' efforts to address real-world problems. And they "hollow[] out" the safeguards designed to protect against autocracy,[134] while maintaining the façade of democracy by transferring power away from Congress and consolidating it in the Court and the President. In other words, too much dependence on structure in the absence of meaningful commitments to democratic norms can backfire.[135]

B. Individual Rights

Democracy talk also arises frequently in cases about individual rights. *Dobbs* provides the most high-profile recent example of justices arguing that recognizing individual rights is anti-democratic because it limits the ability of the people to decide what laws and regulations are in effect.[136] But *Dobbs* is not alone. Such rhetoric arises frequently, including when justices argue against recognizing Eighth Amendment limitations on the punishments that states can

129. *Seila L. LLC*, 140 S. Ct. at 2244 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part).

130. *Id.* at 2245 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part). *See also Collins*, 141 S. Ct. at 1800–01 (Kagan, J., concurring in part and concurring in the judgment).

131. *Collins*, 141 S. Ct. at 1800 (Kagan, J., concurring in part and concurring in the judgment).

132. *See* Scheppele, *supra* note 11, at 582.

133. *Id.*

134. *Id.* at 569. *See also* Breen, *supra* note 19, at 367 (explaining that unchecked executive power is a crucial "precipitator of democratic erosion").

135. *Cf. generally* Brandon J. Johnson, *The Accountability-Accessibility Disconnect*, 58 WAKE FOREST L. REV. 65 (2023) (criticizing the Court for using political accountability rationales in the structure cases while undercutting actual political accountability in others). *See also* Breen, *supra* note 19, at 374 (describing as "nonsensical" the Court's "view that the president needs to have unfettered control over the bureaucracy to maintain democratic accountability and protect individual liberties").

136. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 256 (2022).

impose,[137] in complaints about substantive due process outside of the abortion context,[138] in objections to broad First Amendment claims and holdings,[139] and in the dissent to the Court's Second Amendment decision striking down a century-old New York state gun law.[140]

As this list demonstrates, both liberal and conservative justices invoke democracy talk when they disagree about the scope of particular individual rights.[141] But a deeper dive into what the justices say about the relationship between individual rights and democracy is instructive. For example, Justice Thomas justified his conclusion that the Fourth Amendment does not provide particular protections in part because "[t]he People, through ratification, have already weighed the policy tradeoffs that constitutional rights entail."[142] In *Bruen*, he made the same point about the Second Amendment.[143] "The Second Amendment," he said, "is the very product of an interest balancing by the people" and it "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms" for self-defense."[144] Justice Gorsuch echoed that perspective in his majority opinion in *Ramos v. Louisiana*, holding that the Sixth Amendment requires unanimous verdicts in criminal cases and noting that "[w]hen the American people chose to enshrine th[e jury] right in the Constitution, they weren't suggesting fruitful topics for future cost-benefit analyses."[145]

A critique of the originalist project from which those claims arise is beyond the scope of this paper. But it is a rather remarkable claim—"a pretty lie," in the words of Professor Lisa Heinzerling[146]—that the decisions and views of liberty of a group "of elite, white, male, eighteenth-century property owners, many of whom enslaved other humans" should be followed "in the name of 'the people's

137. *See, e.g.*, Bucklew v. Precythe, 587 U.S. 119, 149 (2019) (rejecting method-of-execution challenge and noting that "[u]nder our Constitution, the question of capital punishment belongs to the people and their representatives, not the courts, to resolve"); Moore v. Texas, 581 U.S. 1, 27–30 (2017) (Roberts, C.J., dissenting) (arguing that Eighth Amendment standards should be measured against the objective evidence of state legislative enactments); Carpenter v. United States, 585 U.S. 296, 360 (2018) (Thomas, J., dissenting) (complaining that Court's Fourth Amendment holding because it "invalidates [a] regime . . . that society actually created 'in the form of its elected representatives in Congress'") (citations omitted).

138. Sessions v. Dimaya, 584 U.S. 148, 210 (2018) (Thomas, J., dissenting):

> Tellingly, the modern vagueness doctrine emerged at a time when this Court was actively interpreting the Due Process Clause to strike down democratically enacted laws—first in the name of the "liberty of contract," then in the name of the "right to privacy." . . . This Court also has a bad habit of invoking the Due Process Clause to constitutionalize rules that were traditionally left to the democratic process.

139. Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2395–96 (2021) (Sotomayor, J., dissenting) (in First Amendment challenge to mandatory disclosure laws, complaining that "[b]y forgoing the requirement that plaintiffs adduce evidence of tangible burdens, such as increased vulnerability to harassment or reprisals, the Court gives itself license to substitute its own policy preferences for those of politically accountable actors").

140. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 84 (2022) (Breyer, J., dissenting) ("The question before us concerns the extent to which the Second Amendment prevents democratically elected officials from enacting laws to address the serious problem of gun violence.").

141. *See supra* notes 130–33 and accompanying text.

142. *Carpenter*, 585 U.S. at 361 (Thomas, J., dissenting).

143. *Bruen*, 597 U.S. at 84 (internal citations omitted).

144. *Id.* at 26.

145. 140 S. Ct. 1390, 1402 (2020).

146. Heinzerling, *supra* note 87, at 401 (quoting Gundy v. United States, 139 S. Ct. 2116, 2133–35 (2019) (Gorsuch, J., dissenting)).

sovereign choice' in ratifying the Constitution in the eighteenth century . . . ."[147] And whatever one thinks about the persuasiveness of such originalist claims,[148] they do not evince a concern for how or whether our democracy *currently* functions.

The Justices' democracy talk about individual rights does sometimes focus on the present and the functioning of our current democracy, however. Justices sometimes argue that protecting freedom of speech and association are essential in a democracy,[149] although at least with respect to campaign finance regulation, some argue that democracy also requires some restrictions.[150] And in the context of the religion clauses, justices on both sides of the ideological sometimes note the need for tolerance and pluralism in our diverse society—the kinds of values that Scheppele notes are essential for liberal constitutional democracies.[151] But overall, in the area of individual rights, democracy talk is largely divorced from how democracy actually works.[152]

IV. THE DEMOCRACY CASES

Democracy talk arises in lots of different types of cases, but in the two areas just discussed—government structure and individual rights—it is particularly common.[153] Whichever particular opinions one agrees with, whichever particular arguments one finds persuasive, however, it is worthwhile to heed Scheppele's caution. The trappings of democracy—its basic institutions, the fact of having elections, etc.—may not alone be enough to stave off autocracy. What matters is a deep commitment to democratic norms, which too much and too rigid attention to structure can undermine.

That necessary commitment to democratic norms, unfortunately, appears lacking. Others have noted that some of the same justices who regularly use

147. *Id.*

148. *Id.* at 401 (quoting Gundy v. United States, 139 S. Ct. 2116, 2133–35 (2019) (Gorsuch, J., dissenting)); *see also* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 371–72 (2022) (Breyer, Sotomayor, and Kagan, JJ., dissenting) ("But, of course, 'people' did not ratify the Fourteenth Amendment. Men did.").

149. *See, e.g.*, FEC v. Cruz, 596 U.S. 289, 308 (2022) (striking down campaign finance regulation and noting that "influence and access 'embody a central feature of democracy—that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns'" (quoting McCutcheon v. FEC, 572 U.S. 185, 192 (2014)); Packingham v. North Carolina, 582 U.S. 98, 104 (2017) (striking down restriction on access to social media for sex offenders and explaining that "[w]hile in the past there may have been difficulty in identifying the most important places . . . for the exchange of views, today the answer is clear. It is cyberspace—the 'vast democratic forums of the Internet' in general . . . and social media in particular") (quoting Reno v. ACLU, 521 U.S. 844, 868 (1997)); City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 596 U.S. 61, 78 (2022) (Breyer, J., concurring) ("The First Amendment helps to safeguard what Justice HOLMES described as a marketplace of ideas. . . . A democratic people must be able to freely 'generate, debate, and discuss both general and specific ideas, hopes, and experiences.'") (quoting Barr v. Am. Ass'n Pol. Consultants, Inc., 140 S. Ct. 2335, 2358 (2020)).

150. *Cruz*, 596 U.S. at 327 (2022) (Kagan, J., dissenting) ("Democracy works only if the people have faith in those who govern. . . . And the people cannot have faith in representatives who trade official acts for financial gain.") (quoting Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377, 390 (2000)).

151. Scheppele, *supra* note 11, at 562 (describing the "liberal values of toleration, pluralism, and equality").

152. *See supra* notes 141–43 and accompanying text.

153. *See supra* Part III.

democracy talk in some arenas are conspicuously unwilling to preclude state-level practices that undermine meaningful representative government, limit minority voice, or make voting more difficult in targeted ways.[154] In split decisions, with the liberal justices in dissent, the Court has decided cases like *Shelby County v. Holder*, which eviscerated the preclearance requirement of the Voting Rights Act, *Brnovich v. Democratic National Committee*, which dramatically restricted the scope of section 2 of the Voting Rights Act, and *Rucho v. Common Cause, Inc.*, which held that extreme partisan gerrymandering is not justiciable in federal court.[155] The anti-democraticanti-democratic nature of its rulings was not always lost on even the Court; in *Rucho*, the Court majority itself acknowledged that extreme partisan gerrymandering is "incompatible with democratic principles."[156] Even more alarmingly, the Supreme Court has granted immunity to former President Trump for many of his actions undermining the peaceful transfer of power in 2021.[157] In other words, there is plenty of evidence from the Court's anti-democratic precedent that, at least for the conservative justices, the paeans to democracy are hollow.

But during the October 2022 Term, there were two notable pro-democracy rulings. One was *Allen v. Milligan*, in which the Court affirmed a finding that Alabama had likely violated the Voting Rights Act with its congressional redistricting map."[158] The second case was *Moore v. Harper*, in which the Court rejected the most extreme forms of the independent state legislature theory.[159] These cases contributed to some court watchers' suggestions that the Court was moderating.[160]

Neither *Allen* nor *Moore* support significant claims of moderation or a robust commitment to democracy, however. The cases did no more than to maintain the status quo against strikingly far-reaching claims. Moreover, the majority opinions in those cases, both written by Chief Justice Roberts, are very short on democracy talk. In other words, whatever the Court's reasons for ruling as it did in *Allen* and *Moore*, a commitment to democratic norms does not appear to be high on the list.

154. *See supra* note 11 and accompanying text.

155. Shelby County v. Holder, 570 U.S. 556 (2013); Rucho v. Common Cause, Inc., 2139 S. Ct. 2484 (2019); Brnovich v. Democratic National Committee, 141 S. Ct. 2321 (2021).

156. 139 S. Ct. at 2506 (quotation marks and citations omitted).

157. Trump v. United States, 144 S. Ct. 2313 (2024).

158. *See* Allen v. Milligan, 599 U.S. 1, 24 (2023); Moore v. Harper, 600 U.S. 1, 34–36 (2023). I filed an amicus brief in *Allen v. Milligan*, on behalf of several members of the Congressional Black Caucus, supporting the appellees. Brief of Representatives Terri Sewell, Joyce Beatty, Gregory Meeks, and G. K. Butterfield as Amici Curiae for Appellees and Respondents, Allen v. Milligan, 599 U.S. 1. (2023) (No. 21-1086), 2022 WL 2873381.

159. Moore v. Harper, 600 U.S. 1 (2023). I was an amicus in *Moore*. *See* Brief of Carolyn Shapiro, Nicholas O. Stephanopoulos, and Daniel P. Tokaki as Amici Curiae for Respondents, Moore v. Harper, 600 1 U.S. (2023) (No. 21-1271), 2022 WL 16630888.

160. *See, e.g.*, Debra Cassens Weiss, *Was Supreme Court Term a 'Reversion to the Mean'? Statistics Show Some Moderation*, ABA JOURNAL (July 13, 2023), https://www.abajournal.com/news/article/was-supreme-court-term-a-reversion-to-the-mean-stats-show-some-moderation [https://perma.cc/9AUM-QHKU].

A. Allen v. Milligan

In *Allen v. Milligan*, to the surprise of many, the Supreme Court, in a 5-4 opinion, ruled in favor of the plaintiffs in a challenge to Alabama's 2021 congressional redistricting under section 2 of the Voting Rights Act.[161] The plaintiffs in *Allen* argued that when Alabama drew only one majority-Black congressional district, its congressional map gave Black voters "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," in violation of section 2.[162] Between the 2010 and 2020 censuses, Alabama's Black population grew as a proportion of the total population from 26.2% to 27.2% while the white population shrank to 64.1%, down from 68.5% ten years earlier.[163] In its 2021 redistricting, however, Alabama continued to have only one (out of seven) majority Black congressional districts.[164] Following a preliminary injunction hearing involving "live testimony from 17 witnesses, . . . more than 1000 pages of briefing and upwards of 350 exhibits," the district court "concluded in a 227-page opinion that the question whether [the new redistricting plan] likely violated § 2 was not 'a close one.'"[165] Alabama would have to draw either a second majority Black district or a crossover district that would allow Black voters, in coalition with other voters, to elect the representatives of their choice.[166]

The state of Alabama appealed to the Supreme Court, where Chief Justice Roberts wrote the majority opinion affirming the district court.[167] In the opinion's opening section, he described the reality that before the 1965 enactment of the VRA, with its "stringent new remedies . . . attempting to forever 'banish the blight of racial discrimination in voting,'"[168] the Fifteenth Amendment was "little more than a parchment promise."[169] And he acknowledged that only sixteen years after its original enactment, "many considered the VRA 'the most successful civil rights statute in the history of the Nation.'"[170] He likewise described the "avalanche of criticism" that followed the Court's decision in *City of Mobile v. Bolden*, which imposed a narrow reading of the VRA that recognized liability only for intentional discrimination, the debate within Congress about how to respond to that decision, and the ultimate compromise that led to the amendments to section 2 that remain in effect today.[171]

161. I filed an amicus brief in *Allen v. Milligan*, on behalf of several members of the Congressional Black Caucus, supporting the appellees. Brief of U.W. Clemon, Fred D. Gray, Henry Sanders, the Alabama Legislative Black Caucus, and Social Science Professors as Amici Curiae for Appellees and Respondents, Allen v. Milligan, 599 U.S. 1 (2023) (No. 21-1086), 2022 WL 2898334.

162. 52 U.S.C. § 10301(b).

163. *Allen*, 599 U.S. at 55 (Thomas, J., dissenting).

164. *Id.*

165. *Id.* at 16.

166. *Id.* at 19–20.

167. *Id.* at 8–10.

168. *Id.* at 10 (citing South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966)).

169. *Id.* at 10.

170. *Id.*

171. *Id.* at 11.

Given that opening, it would be inaccurate to say that the Chief Justice ignored the significance of the VRA both historically and for our democracy. But it is fair to say that he did not celebrate it either. And the operative parts of the opinion are remarkably devoid of democracy talk.

The opinion first provides a careful review of the pre-existing precedent and its application to the evidentiary record in this case.[172] This area of the law is technical and complex, and the Court reviewed the record in detail. The opinion then turns to "Alabama's attempt to remake our § 2 jurisprudence anew."[173] Alabama's fundamental argument was that the Court should require plaintiffs to show that the map the state drew could be explained *only* by considerations of race, while prohibiting them from showing that more minority representation would be possible.[174] The Court rejected that approach, noting that it was inconsistent with "the hard-fought compromise that Congress struck" in its 1982 amendment and that it "runs headlong into our precedent."[175]

The rest of the opinion accurately explains and adheres to that longstanding precedent for evaluating Section 2 claims, explains why Alabama's proposed approach is unworkable, and rejects a constitutional challenge to the VRA.[176] It is a careful and, in places, fairly technical opinion. What it does not do, however, is engage in democracy talk. In fact, the opinion mentions democracy or "the democratic process" precisely once, in a parenthetical quote from *Gingles*.[177]

Allen v. Milligan is an important case, even if the opinion broke no new ground. Chief Justice Roberts' vote was not a foregone conclusion, nor was the fact that Justice Kavanaugh joined, along with the three liberal justices, to make up the majority.[178] But given Roberts' use of democracy talk in *Seila Law*, its absence in *Allen* is notable. And, of course, some justices who routinely invoke democracy talk—most notably Justice Gorsuch—dissented.[179]

B. Moore v. Harper

Moore v. Harper is similar. In that case, the Court rejected the broadest versions of the independent state legislature theory ("ISLT"). ISLT proponents claimed that because the Electors and Elections Clauses of the Constitution give state "legislatures" the power to regulate aspects of federal elections, such regulations are not subject to state judicial review or state constitutional limitations.[180] Democratic norms should have been highly salient to the case. As retired Judge Michael Luttig explained, the ISLT "was the centerpiece of the effort to

172. *Id.* at 18–23.

173. *Id.* at 23.

174. *Id.* at 24.

175. *Id.* at 25.

176. *Id.* at 25–42.

177. *Id.* at 18 (quoting Thornburg v. Gingles, 478 U.S. 30, 36–38 (1986)). All other uses of any variation of the word "democracy" in the majority opinion appear in case names.

178. *Id.* at 8.

179. *See id.* at 45.

180. For a detailed discussion of the ISLT, see Carolyn Shapiro, *The Independent State Legislature Theory, Federal Courts, and State Law*, 90 U. CHI. L. REV. 137 (2023).

overturn the 2020 presidential election by the former president."[181] Amici from across the political spectrum urged the Court to reject the theory, pointing to a variety of negative impacts it would have on the functioning of our democracy.[182] The ISLT could have, for example, forced states to operate federal and state elections under inconsistent or contradictory rules, undermined the state courts' ability to enforce the express protections of the right to vote that appear in some state constitutions, and disrupted longstanding professional election administration.[183]

Moore itself arose when the North Carolina Supreme Court took up *Rucho*'s invitation for state constitutions and state courts to remedy the anti-democratic practice of extreme partisan gerrymandering.[184] But in *Moore*, again by the Chief Justice, none of the opinions used democracy talk. Instead, the majority opinion leans heavily on historical understandings, practice, and precedent, while the dissent focuses on arguments about government structure and constitutional text. The underlying reasons for robust protections for democratic functioning are not discussed, nor are the extraordinarily disruptive consequences that the ISLT would have caused.

Allen and *Moore* are, in some sense, the inverse of cases like *Seila Law* and the MQD cases. The issues in those cases are dry and technical, and the extravagant claims about democracy may obscure the underlying consolidation of power. *Allen* and *Moore*, on the other hand, which could involve flowery discussions of the importance of a multiracial democracy and the deep tradition of state-level democracy,[185] are instead written as dryly and technically as possible. Their holdings may be pro-democratic, but the reasoning is unconcerned with such principles.

V. CONCLUSION

The insight that the Roberts court often invokes democracy talk even as it had issued one anti-democratic decision after another is hardly unique to me. Recognizing those facts, while recognizing its lack of democracy talk in the cases it would seem to fit the best, helps us be clear-eyed in what we can expect from this Court. Some saw *Allen* and *Moore* as harbingers of a more moderate

181. J. Michael Luttig, *The Court Is Likely to Reject the Independent State Legislature Theory*, THE ATLANTIC (April 13, 2023), https://www.theatlantic.com/ideas/archive/2023/04/independent-state-legislature-theory-moore-harper/673690/ [https://perma.cc/JZF3-CFH5].

182. *See, e.g.*, Brief of Benjamin L. Ginsberg as Amicus Curiae Supporting Respondents, Moore v. Harper, 600 1 U.S. (2023) (No. 21-1271), 2022 WL 16555981; Brief for Former Republican Elected and Executive Branch Officials as Amici Curiae Supporting Respondents, Moore v. Harper, 600 1 U.S. (2023) (No. 21-1271), 2022 WL 16555249; Brief of Amici Curiae Bipartisan Group of Former Public Officials, Former Judges, and Election Experts From Pennsylvania Supporting Respondents, Moore v. Harper, 600 1 U.S. (2023) (No. 21-1271), 2022 WL 16555258.

183. Shapiro, *supra* note 180, at 185-90.

184. Harper v. Hall (*Harper I*), 868 S.E.2d 499, ¶¶ 1–3 (2022). Following an election in which the partisan make-up of the North Carolina Supreme Court switched from Democratic to Republican control, the court revisited the justiciability of partisan gerrymandering under the state constitution and overruled *Harper I*. *See generally* Harper v. Hall, 886 S.E.2d 393 (2023).

185. *See generally* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV, 859 (2021).

direction for the Court.[186] The lack of democracy talk in those cases, however, suggests something different. The Court has reserved for itself the ability to intervene in elections and democracy, and it has given us little reason to believe that its interventions will be informed by a commitment to democratic norms and functioning. To the contrary, the failure to invoke democratic norms in the very cases in which they are both salient and vindicated, coupled with the Court's undermining of democracy in other cases, suggests that those norms play little, if any, role when the justices make up their minds. The Court's democracy hypocrisy demonstrates that the danger of the Court's facilitation of autocratic legalism remains real.

186. *See* Weiss, *supra* note 160.

APPENDIX A

Merits Cases

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