

Electoral Adequacy

Joshua S. Sellers

ABSTRACT. This Essay considers the function of election law, as an academic field, in strengthening democratic institutions and improving democratic accountability. In undertaking this inquiry, this Essay advocates an interdisciplinary research program oriented around the concept of electoral adequacy. Electoral adequacy's premise is that states are obligated to provide a minimal set of entitlements, or a baseline level of election services, to all voters.

Electoral adequacy seeks to unite institutional political theory, empirical research on election systems, and strategic political thinking, with the goal of improving the electoral process. It is centered on three policy components: adequate funding, competent management, and democratic structures. Finding success in these policy areas would mitigate many specific election-administration disputes.

INTRODUCTION

As American democracy staggers further into the twenty-first century, the peculiarities and vulnerabilities of our democratic arrangements are conspicuous. The profoundly undemocratic Electoral College threatens the legitimacy of our presidential elections.¹ Election administration—the array of administrative rules and decisions impacting elections—is now a disconcertingly partisan arena.² The U.S. Supreme Court, in its current composition, routinely impedes

-
1. See Trevor Potter & Charles Fried, Opinion, *The Electoral College Isn't Supposed to Work This Way*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/2021/01/06/opinion/electoral-college.html> [<https://perma.cc/F5RW-ZJJQ>] (“[T]he Electoral College is a fragile institution, with the potential for inflicting great damage on the country when norms are broken.”); Katherine Shaw, “A Mystifying and Distorting Factor”: *The Electoral College and American Democracy*, 120 MICH. L. REV. 1285, 1296 (2022) (reviewing Jesse Wegman, LET THE PEOPLE PICK THE PRESIDENT: THE CASE FOR ABOLISHING THE ELECTORAL COLLEGE (2020)) (“In many ways, the Electoral College system is the worst of all possible worlds.”).
 2. See Alexandra Berzon, *In Races to Run Elections, Candidates Are Backed by Key 2020 Deniers*, N.Y. TIMES (June 5, 2022), <https://www.nytimes.com/2022/06/05/us/politics/america-first->

political equality.³ Congress, despite possessing ample authority over elections,⁴ failed to pass either of two pieces of major election-reform legislation recently under consideration.⁵ Alarmism, despondency, and anger figure prominently in the commentary.⁶

Given these dynamics, it is worth considering the function of election law, as an academic field, in strengthening democratic institutions and improving democratic accountability. How can those of us working in the field, situated on our own “independent intellectual terrain,”⁷ aid in mounting an effective defense against “antidemocracy”?⁸ In facing this challenge, this Essay advocates an interdisciplinary research program oriented around the concept of *electoral adequacy*. Electoral adequacy’s premise is that states are obligated to provide a minimal set of entitlements, or a “baseline level of election services,” to all voters.⁹

secretary-of-state-candidates.html [https://perma.cc/5BEJ-RZUD] (describing the heightened politicization of secretary-of-state races); Isaac Arnsdorf, Doug Bock Clark, Alexandra Berzon & Anjeanette Damon, *Heeding Steve Bannon’s Call, Election Deniers Organize to Seize Control of the GOP—and Reshape America’s Elections*, PROPUBLICA (Sept. 2, 2021, 5:00 AM), <https://www.propublica.org/article/heeding-steve-bannons-call-election-deniers-organize-to-seize-control-of-the-gop-and-reshape-americas-elections> [https://perma.cc/HPC9-Y7VY] (describing the GOP’s precinct recruitment strategy).

3. See Pamela S. Karlan, *The New Countermajoritarian Difficulty*, 109 CALIF. L. REV. 2323, 2344-45 (2021) (“The Roberts Court’s decisions regarding the political process have exacerbated the countermajoritarian drift in our politics. In sharp contrast to the Warren and Burger Courts, the current Supreme Court has done virtually nothing to make elections more inclusive or more responsive.”).
4. See generally Nicholas O. Stephanopoulos, *The Sweep of the Electoral Power*, 36 CONST. COMMENT. 1 (2021) (arguing that, under the Constitution, Congress both does and should have broad power to regulate elections).
5. Both the Freedom to Vote Act and the John R. Lewis Voting Rights Advancement Act were blocked in the Senate. David Meyers, *Election Reform Advocates Regroup, Plan Next Steps*, FULCRUM (Jan. 20, 2022), <https://thefulcrum.us/voting-reform-2656441557> [https://perma.cc/3RKR-F8BM]; Reid J. Epstein & Nick Corasaniti, *With Voting Bills Dead, Democrats Face Costly Fight to Overcome G.O.P. Curbs*, N.Y. TIMES (Jan. 15, 2022), <https://www.nytimes.com/2022/01/15/us/politics/voting-rights-democrats.html> [https://perma.cc/P5ZT-6XG3].
6. See, e.g., Thomas B. Edsall, Opinion, *Trump Poses a Test Democracy Is Failing*, N.Y. TIMES (Apr. 13, 2022), <https://www.nytimes.com/2022/04/13/opinion/trump-democracy-decline-fall.html> [https://perma.cc/K8VX-94PL].
7. Heather K. Gerken, *Keynote Address: What Election Law Has to Say to Constitutional Law*, 44 IND. L. REV. 7, 9 (2010).
8. Nikolas Bowie, Comment, *Antidemocracy*, 135 HARV. L. REV. 160, 172-76 (2021) (explicating antidemocracy).
9. Joshua S. Sellers & Roger Michalski, *Democracy on a Shoestring*, 74 VAND. L. REV. 1079, 1125 (2021); see also Yasmin Dawood, *The Right to Vote: Baselines and Defaults*, 74 STAN. L. REV. ONLINE 37, 51 (2022) (promoting the identification of normative baselines that “enable the greatest possible level of voting by all citizens, while nonetheless ensuring that the

Elsewhere, I have described electoral adequacy as encompassing three components: the right to adequate funding, the right to competent management, and the right to democratic structures.¹⁰ In this Essay, I consider what a research program built around electoral adequacy might entail. In short, I endorse uniting “institutional political theory,”¹¹ empirical research on election systems, and strategic political thinking.¹²

What are the benefits of this approach? A research program built around electoral adequacy can help identify practical reforms that effectively balance competing values and governance priorities. It can, for instance, establish where financial resources are most needed, the relative effectiveness of election systems, and whether constituents are afforded meaningful opportunities to engage election administrators. These findings can, in turn, inform state legislatures when drafting election legislation, secretaries of state, attorneys general, county recorders, and other election administrators when making administrative choices, and, potentially, judges when resolving voting-related and election-administration cases.¹³

Electoral adequacy also accounts for political reality regarding the likelihood for reform. In 2020, Democratic Party control of the White House and Congress understandably shifted attention to the prospect of federal voting-rights legislation. With that legislation moribund, though, and the near certainty that the Democratic Party will soon lose control of the House of Representatives,

administration of the election abides by genuine (and not pretextual) requirements of accuracy, efficacy, transparency, and trustworthiness”). Electoral adequacy is focused on improving the quality and responsiveness of election administration and ensuring voting access. As such, it defers any discussion of vote aggregation, including the recurrent distortions caused by partisan and racial gerrymandering. Those concerns are also at the heart of our democratic dysfunction and should not be neglected, and other scholars have proposed quantitative benchmarks as a means of establishing what is adequate in the gerrymandering context. See, e.g., Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 885-91 (2015) (proposing and defending a numerical threshold to distinguish acceptable from unacceptable partisan gerrymanders).

10. Joshua S. Sellers & Justin Weinstein-Tull, *Constructing the Right to Vote*, 96 N.Y.U. L. REV. 1127, 1159-68 (2021).
11. DENNIS F. THOMPSON, JUST ELECTIONS: CREATING A FAIR ELECTORAL PROCESS IN THE UNITED STATES, at viii (2002). The benefits of institutional political theory in election-law scholarship were similarly observed in Yasmin Dawood, *Second-Best Deliberative Democracy and Election Law*, 12 ELECTION L.J. 401, 402 (2013).
12. Toby S. James has likewise outlined the benefits of combining institutional theory and empirical analysis. See TOBY S. JAMES, COMPARATIVE ELECTORAL MANAGEMENT 33-58 (2020) (exploring theoretical and empirical measures of electoral management). His work is not, however, directly focused on the United States.
13. See, e.g., Sellers & Weinstein-Tull, *supra* note 10, at 1171-77 (discussing how electoral adequacy might be incorporated into voting-rights doctrines, specifically through the use of consent decrees).

continued focus on Congress as a site of broad-based reform is illogical.¹⁴ At the same time, prodemocracy reformers confront potent antidemocratic forces in a plurality of states.¹⁵ While there may be democratic promise in underexamined state constitutional provisions,¹⁶ at present, in many jurisdictions, significant reliance on state constitutions to achieve *comprehensive* election reform would be misplaced.¹⁷ Thus, reform efforts that reflexively seek only to enlarge or expand

-
14. The merits of federal voting-rights legislation were disputed among experts even when such legislation was still viable. Compare Guy-Uriel Charles & Lawrence Lessig, *The Democrats Are Walking Right into a Trap on Voting Rights*, SLATE (May 24, 2021, 2:19 PM), <https://slate.com/news-and-politics/2021/05/democrats-joe-manchin-voting-rights-trap.html> [<https://perma.cc/P8DQ-L624>] (“H.R. 1 is the only opportunity for this Congress to secure to all Americans an equal freedom to vote while minimizing the risks of partisan gerrymandering and the continued and overwhelming influence of big money in politics.”), with Edward B. Foley, Opinion, *Democrats Have a Chance to Expand Voter Access. But They’re Focusing on the Wrong Bill*, WASH. POST (Mar. 29, 2021, 1:59 PM), <https://www.washingtonpost.com/opinions/2021/03/29/democrats-have-chance-expand-voter-access-theyre-focusing-wrong-bill> [<https://perma.cc/H2PP-UKBC>] (“The unwieldy menu of mandates known as H.R. 1 is not the electoral reform legislation that Congress should enact. Among other problems, the bill represents an intrusive and unnecessary federal overreach into state management of elections.”).
 15. See James A. Gardner, *Illiberalism and Authoritarianism in the American States*, 70 AM. U. L. REV. 829, 897–908 (2021) (discussing the manipulation of electoral rules and processes in Republican-controlled states). See generally JACOB M. GRUMBACH, LABORATORIES AGAINST DEMOCRACY: HOW NATIONAL PARTIES TRANSFORMED STATE POLITICS (2022) (describing the effort of national partisan groups to erode state democratic institutions).
 16. See, e.g., Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 861 (2021) (“State constitutions furnish powerful resources for addressing antidemocratic behavior. These constitutions ‘will not save’ us either. But they do provide a stronger foundation for protecting democracy than their federal counterpart.”); Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 120 (2014) (“There is a simple reason to analyze state constitutions’ explicit safeguards of voting rights faithfully and independently from federal jurisprudence: the right to vote is the most fundamental and important right that we have. It therefore deserves the strongest protection possible.”).
 17. For one, many state supreme courts are themselves the product of partisan politics. See, e.g., Daniel Nichanian, *Your State-by-State Guide to the 2022 Supreme Court Elections*, BOLTS (May 11, 2022), <https://boltsmag.org/your-state-by-state-guide-to-the-2022-supreme-court-elections> [<https://perma.cc/YK5B-FUMN>]; Andrew DeMillo & Gary D. Robertson, *Primaries Spotlight Coming Battles over State Supreme Courts*, AP NEWS (May 14, 2022), <https://apnews.com/article/abortion-2022-midterm-elections-us-supreme-court-raleigh-9233470c6557fff307a24cd97db3453c> [<https://perma.cc/2JFX-WAQ9>]. These partisan dynamics, in turn, inform state constitutional interpretations. See Neal Devins, *State Constitutionalism in the Age of Party Polarization*, 71 RUTGERS U. L. REV. 1129, 1159 (2019) (“Th[e] nationalizing of state judicial politics often cuts against expansive state court interpretations of state constitutions.”); Michael S. Kang & Joanna M. Shepherd, *The Long Shadow of Bush v. Gore: Judicial Partisanship in Election Cases*, 68 STAN. L. REV. 1411, 1444 (2016) (“Our results support suspicions that partisanship affects judicial decisionmaking in

democratic opportunities, absent other considerations, should be reassessed. Reform advocates, often faced with inevitable resource limitations, should instead prioritize initiatives that attenuate zero-sum partisan and ideological divisions.

Rather than pursuing election reform with a maximalist orientation, then, there may be theoretical, policy, and political benefits to an alternate approach structured around adequacy. By way of example, consider Ned Foley's assertion, while critiquing H.R. 1, the For the People Act, that providing both two weeks of early voting *and* no-excuse vote-by-mail is redundant.¹⁸ In one sense, this assertion seems unnecessarily conciliatory, contrary to the democratic goal of increased political participation. Yet, in fact, the veracity of Foley's assertion depends on several factors, which we can only determine through: some degree of democratic theorizing in "the midrange of political deliberation, between the abstract concepts of philosophers and the concrete proposals of politicians;"¹⁹ empirical research on early voting and no-excuse vote-by-mail;²⁰ and consideration of what is both administratively and politically feasible. Some of these factors might appear to be secondary to the simple importance of securing the vote, but they are in fact inseparable from that aspiration. Furthermore, these factors will point in different directions from jurisdiction to jurisdiction; given the decentralization of our elections, the tradeoffs between them are necessarily idiosyncratic. The purpose of this type of analysis, then, is to encourage holistic thinking about election law—theory, policy, politics—in defense of our proposed interventions.

election cases."). Second, some state legislatures have moved to limit state courts' power to regulate elections. See Patrick Berry, *In Assaults on Democracy, State Lawmakers Target Courts*, BRENNAN CTR. FOR JUST. (Dec. 14, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/assaults-democracy-state-lawmakers-target-courts> [<https://perma.cc/UEX8-AXHG>]. Finally, the litigation track record under state constitutions is mixed. See, e.g., Dale E. Ho, *Election Day Registration and the Limits of Litigation*, 129 YALE L.J.F. 185, 199–201 (2019). Electoral adequacy seeks evidence-based, bipartisan solutions intended to mitigate these impediments.

18. Foley, *supra* note 14 ("The bill would require states to adopt both in-person early voting and 'no excuse' vote-by-mail. But both approaches are not necessary to assure that voters have an adequate opportunity to cast a ballot. Either would suffice.").
19. THOMPSON, *supra* note 11, at 13.
20. See, e.g., Barry C. Burden, David T. Canon, Kenneth R. Mayer & Donald P. Moynihan, *Election Laws, Mobilization, and Turnout: The Unanticipated Consequences of Election Reform*, 58 AM. J. POL. SCI. 95, 108 (2014) ("The only consistent way to increase turnout is to permit Election Day registration. Early voting reduces turnout by robbing Election Day of its stimulating effects."); KATHLEEN HALE & MITCHELL BROWN, *HOW WE VOTE: INNOVATION IN AMERICAN ELECTIONS* 107–08 (2020) (summarizing research on voting by mail); see also BRUCE E. CAIN, *DEMOCRACY MORE OR LESS: AMERICA'S POLITICAL REFORM QUANDARY* 185–88 (2014) (considering the pros and cons of voting by mail).

One final preliminary note: the word adequacy connotes minimalism; it suggests the surrender of grand principle and perhaps a poverty of imagination. It might be read to betray a concessionary outlook that underestimates the democratic challenges at hand, or a dispositional commitment to what Martin Luther King, Jr. called “the tranquilizing drug of gradualism.”²¹ Such a reading would misapprehend the research program outlined below. While realism and pragmatism are, in my estimation, necessary aspects of any reform effort, electoral adequacy is not rooted in resignation.²² Rather, it entails context-specific, granular inquiries intended to facilitate the construction of robust, well-functioning election systems. Finding success, as is true in any complex institution, requires both commitment and vision. But as an initial step, we need to understand the landscape. Electoral adequacy is, in short, fully compatible with creative thinking.²³

In fact, creative thinking is imperative. If democracy is, as John Dewey described it, a “mode of associated living,”²⁴ our associations are under severe strain. Trust in electoral institutions is waning.²⁵ Voting inequality persists.²⁶ Election administrators are under threat.²⁷ Racial divisions, and especially “white identity-based political calculations,”²⁸ continue to befoul our politics in

-
21. Martin Luther King, Jr., Address at the Lincoln Memorial (“I Have a Dream” Speech) (Aug. 28, 1963), <https://www.npr.org/2010/01/18/122701268/i-have-a-dream-speech-in-its-entirety> [https://perma.cc/9FLK-AGLE].
 22. In addition, electoral adequacy should not be conflated with minimalist theories of democracy. See, e.g., Adam Przeworski, *Minimalist Conception of Democracy: A Defense*, in DEMOCRACY’S VALUE 23, 23 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999).
 23. See Sellers & Weinstein-Tull, *supra* note 10, at 1177 (“Creating a robust right to vote requires thinking about our elections systems in more experiential ways.”).
 24. JOHN DEWEY, DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION 101 (1916).
 25. See Richard H. Pildes, *Election Law in an Age of Distrust*, 74 STAN. L. REV. ONLINE 100, 102 (2022) (“No institutional safe harbors exist any longer that generate widespread confidence that votes will be fairly tallied, free of partisan manipulation.”).
 26. See Michael Barber & John B. Holbein, *400 Million Voting Records Show Profound Racial and Geographic Disparities in Voter Turnout in the United States*, 17 PLoS ONE art. no e0268134, at 6 (2022) (“[V]oter turnout is highly segregated by race, politics, and age in the United States; minorities, young people, and democrats are much more likely to live in turnout deserts.”).
 27. See Richard L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, 135 HARV. L. REV. F. 265, 265-66 (2022) (“Threats of violence and intimidation have led to unprecedented attrition among election administrators, and some exiting officials are being replaced by those who may not have allegiance to the integrity of the election system.”).
 28. Joshua S. Sellers, *Election Law and White Identity Politics*, 87 FORDHAM L. REV. 1515, 1519 (2019).

myriad ways.²⁹ Fortifying American democracy in the face of these and related crosscurrents requires identifying and prioritizing what is most prudent in the current environment. So, while no research program can remedy blatant race-based or partisan electoral discrimination—both troublingly common—that does not relieve aspiring reformers of the task of striving for creative, yet achievable, solutions.

This Essay proceeds as follows. Part I defines electoral adequacy and situates it within a collection of complementary reform projects. After describing these projects, it explains why electoral adequacy is timely. Part II provides two examples of how electoral adequacy can aid in reform efforts. Part III concludes with a brief comment on electoral adequacy and rights.

I. ELECTORAL ADEQUACY AND ITS PRECURSORS

A. Defining Electoral Adequacy

Electoral adequacy obligates states to provide a minimal set of entitlements to all voters. As a touchstone for reform, it relies on an analytical framework uniting theory, policy, and politics. The policy dimension of the framework encompasses three subsidiary components—adequate funding, competent management, and democratic structures³⁰—and is the core of the framework. These three policy components arise from an understanding that the right to vote is both unacceptably fragile³¹ and impersonal.³² Accordingly, improvement along the policy dimension would remedy many of the most salient election-

29. See Aziz Z. Huq, *The Counter-Democratic Difficulty*, 117 NW. U. L. REV. (forthcoming 2023) (manuscript at 21), <https://ssrn.com/abstract=4109443> [<https://perma.cc/8Q8P-4DZT>] (“While increasingly aligned with the Republican party, this new politically potent ‘white’ identity is a separate and distinct sociocultural phenomenon from partisanship—one that poses a structural threat to contemporary democracy.”); Nicholas Confessore & Karen Yourish, *A Fringe Conspiracy Theory, Fostered Online, Is Refashioned by the G.O.P.*, N.Y. TIMES (May 15, 2022), <https://www.nytimes.com/2022/05/15/us/replacement-theory-shooting-tucker-carlson.html> [<https://perma.cc/QF84-FXT9>].

30. Sellers & Weinstein-Tull, *supra* note 10, at 1132.

31. *Id.* at 1131 (“The right to vote is fragile because its foundation is unsteady. Because most election-related litigation and federal legislation arises in reaction to state and local attempts to restrict the franchise, the core regulatory and financial attributes of our elections systems are rarely assessed. As a consequence, election administration is often haphazard, lacking in standards, and underfunded.”).

32. *Id.* at 1132 (“The right to vote is impersonal in that, with a few exceptions, it is agnostic about individual voters’ circumstances. That is, voters are treated similarly regardless of the relative ease or difficulty they might experience in registering to vote and casting a ballot.” (footnote omitted)).

administration challenges. It is also the part of the framework for which collaboration between scholars, election administrators, and community stakeholders is most likely. So, while theorizing about both electoral institutions and political strategizing is essential, the policy dimension is the central node of the framework.

With respect to the first policy component, adequate funding, we know very little. We do know that election administration is chronically underfunded, despite widespread acknowledgment of the need for more resources.³³ Such resources are essential not only for conventional purposes—such as training and paying poll workers, printing and mailing ballots, and updating voter-registration databases—but also for responding to heightened security needs.³⁴ Therefore, to achieve electoral adequacy, scholars and policy makers must identify existing election expenditures and, more significantly, uncover how resource limitations impact the voting experience.³⁵

The second policy component of electoral adequacy, competent management, involves “the organizations, networks, resources, micro anthropological working practices and instruments involved in implementing elections.”³⁶ This admittedly expansive sphere implicates a host of public and private actors, often with relationships that are difficult to evaluate systematically.³⁷ The task is made even more difficult given the central role of local governments in managing elections.³⁸ Fortunately, political science and public administration provide models

-
33. See Sellers & Michalski, *supra* note 9, at 1082; Mary Jo McGowan, JoEllen V. Pope, Martha E. Kropf & Zachary Mohr, *Guns or Butter . . . or Elections? Understanding Intertemporal and Distributive Dimensions of Policy Choice Through the Examination of Budgetary Tradeoffs at the Local Level*, PUB. BUDGETING & FIN. 3, 17 (2021) (“[E]lections administration may be chronically underfunded, with the possible exception of general election years that just happen to coincide with good economic conditions.”).
34. See Nathaniel Persily & Charles Stewart III, *A 12-Step Rehabilitation Program for American Election Administration*, LAWFARE (Jan. 27, 2021, 8:01 AM), <https://www.lawfareblog.com/12-step-rehabilitation-program-american-election-administration> [https://perma.cc/57UM-TGME] (“Even in the best of times, election administrators operate under fiscal stress that can, in a crisis, quickly become a threat to election security.”).
35. See Martha Kropf & JoEllen V. Pope, *Election Costs: A Study of North Carolina*, in THE FUTURE OF ELECTION ADMINISTRATION 185, 186-87 (Mitchell Brown, Kathleen Hale & Bridgett A. King eds., 2020) (describing the benefits of collecting cost data).
36. JAMES, *supra* note 12, at 5 (emphasis omitted).
37. See HALE & BROWN, *supra* note 20, at 45 (referring to “the contemporary public management environment, which is dominated by networked arrangements of organizations within and across the public and private sectors and supported by growing professionalism”).
38. See Richard Briffault, *Election Law Localism and Democracy*, 100 N.C. L. REV. 1421, 1423 (2022) (“As the actions of local election officials in the 2020 election—and the backlash to those actions in many states in 2021—illustrate, local election offices play an essential role in making democracy work.”).

for engaging these complex networks. For instance, one such “model of network innovation”³⁹ outlines various stages of election-administration professionalism and discusses how different election-administration innovations spread across jurisdictions.⁴⁰ Other models evaluate the “multifaceted approach to building capacity in local election administration.”⁴¹ These and similar models might aid efforts to improve election administration and establish baselines for competent management.

Democratic structures, the third policy component of electoral adequacy, are “internal governance structures that clarify the roles of state and local officials in administering elections”⁴² and include the “[r]epresentation of disempowered communities within the election administration sphere.”⁴³ Thus, poll workers, law-enforcement officials, election observers, communication specialists, election auditors, elected officials, and countless others involved with administering elections should reflect the communities they serve. In addition, citizens, non-profits, and community groups should have options for providing feedback to election administrators.⁴⁴ In these ways, democratic structures promote accountability and function as a safeguard against election-administration manipulation.

Note that the focus of each of the three policy components is on institutions, not individuals. While individualist, rights-oriented perspectives are a common feature of election-law scholarship, such perspectives reveal little about the complexity of election systems and processes.⁴⁵ Note also that these components fall

39. See HALE & BROWN, *supra* note 20, at 45.

40. See *id.* at 55-64.

41. Kathleen Hale & Christa Daryl Slaton, *Building Capacity in Election Administration: Local Responses to Complexity and Interdependence*, 68 PUB. ADMIN. REV. 839, 847 (2008).

42. Sellers & Weinstein-Tull, *supra* note 10, at 1167.

43. *Id.*

44. For a thoughtful discussion of how to democratize administrative processes, see Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. 1, 75-79 (2022). See also *Our Common Purpose: Reinventing American Democracy for the 21st Century*, AM. ACAD. OF ARTS & SCI. 41-47 (2020), https://www.amacad.org/sites/default/files/publication/downloads/2020-Democratic-Citizenship_Our-Common-Purpose.pdf [<https://perma.cc/YL8P-FHYB>] (recommending strategies to make public meetings, such as town halls and congressional hearings, more participatory).

45. See THOMPSON, *supra* note 11, at 62 (“Methodologically, even while recognizing that individuals are the fundamental moral subjects in democratic theory, we should assess equal respect, and locate any justifications for unequal treatment, in the context of institutions.”); Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804, 807 (2014) (“[R]ights-oriented approaches typically pay less attention to the structural or systemic consequences—the effects on the organization of political power—of concretely institutionalizing these abstract ideals in specific settings.”).

within a midrange of generality; finding success in these policy dimensions would mitigate many specific election-administration disputes.⁴⁶ In other words, adequate funding, competent management, and democratic structures would go a long way towards producing administrative outcomes that are just.⁴⁷ Of course, until such success is realized, specific election-administration disputes will remain. In the meanwhile, then, efforts should be made to define the line between adequacy and inadequacy in the context of each specific dispute. In sum, this Essay proposes retail electoral adequacy based on systematized research in the short term (e.g., how long is too long to wait in line at a polling place?),⁴⁸ with the goal of wholesale electoral adequacy in the long term.

B. Electoral Adequacy's Precursors

A research program built around electoral adequacy draws inspiration from several earlier scholarly projects. While electoral adequacy's express focus on adequate funding, competent management, and democratic structures is unique, the notion that theory, policy (through quantitative research), and politics should inform our pursuits is indebted to prior prominent accounts.

The closest analogue is found in what Heather K. Gerken and Michael S. Kang, writing in 2011, labeled the "institutional turn" in election-law scholarship.⁴⁹ This line of scholarship, which emerged around 2009 and to which Gerken was a central contributor,⁵⁰ endorsed "[shifting] our attention away from the courts toward a new set of private and public institutions, away from big reform proposals toward the more modest institutional tweaks that will

46. It would also confer considerable legitimacy on elections. See, e.g., James A. Gardner, *Democratic Legitimacy Under Conditions of Severely Depressed Voter Turnout*, U. CHI. L. REV. ONLINE (June 26, 2020), <https://lawreviewblog.uchicago.edu/2020/06/26/pandemic-gardner> [<https://perma.cc/FKQ4-YGUC>] ("The *substantive* electoral legitimacy of an election thus requires that it employ methods and procedures reasonably calculated to permit the accurate identification of those individuals [whom the people wish to appoint]. The *procedural* electoral legitimacy of an election, in contrast, requires only that it be conducted faithfully pursuant to authoritatively established procedures, whatever they may be.").

47. Adequate funding, competent management, and democratic structures would also mitigate theoretical and political disagreements.

48. See *infra* Section II.A.

49. Heather K. Gerken & Michael S. Kang, *The Institutional Turn in Election Law Scholarship*, in RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS: RECURRING PUZZLES IN AMERICAN DEMOCRACY 86, 87 (Guy-Uriel Charles, Heather K. Gerken & Michael S. Kang eds., 2011).

50. See HEATHER K. GERKEN, *THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT* (2009).

make bigger and better reform possible in the long run.”⁵¹ Indeed, some of the ideas in this Essay (e.g., the systematic collection of quantitative data and attention to the competency and professionalization of election administrators) are reprised suggestions from the institutional turn.⁵²

In highlighting election administration as a distinct topic of study, this line of scholarship distinguished election rules (the traditional focus) from the institutional features of electoral administrative bodies.⁵³ It pressed for institutional novelties to improve local election performance.⁵⁴ And it sought “avenue[s] for second-best deliberative opportunities.”⁵⁵ Like electoral adequacy, these proposals were characterized by both their pragmatism and skepticism about the feasibility of large-scale reform. For example, Ned Foley, another key contributor to the genre,⁵⁶ expressly advocated for “optimality” (as opposed to “perfection”) as a lodestar for election-law reform.⁵⁷ In a representative article, he made

51. Gerken & Kang, *supra* note 49, at 98.

52. See GERKEN, *supra* note 50, at 43 (“It is remarkable that we spend so much time arguing about which direction election reform should take when we don’t even have the data we need to map where we are now.”); *id.* at 86 (“But the long-term health of any system depends on administrators policing themselves based on shared professional norms. Indeed, professional norms may ultimately be more important to a well-run system than pressures from the outside.”). For discussions of the limits of Gerken’s “Democracy Index,” see Richard L. Hasen, *Election Administration Reform and the New Institutionalism*, 98 CALIF. L. REV. 1075, 1088-89 (2010), which states, “There is a certain irony to Gerken’s book: in arguing for more data to spur election administration reform, Gerken must rely primarily on anecdotes, not hard data, to show that increased information about election administration practices and the accompanying rankings would spur election reform”; and Michael S. Kang, *To Here from Theory in Election Law*, 87 TEX. L. REV. 787, 795 (2009), which states, “The ingenuity of the Democracy Index, and Gerken’s persuasive skill in advocating the concept, make it easy to miss the basic fact that Gerken does not articulate with real specificity what data she would include in the Democracy Index.”

53. See, e.g., Daniel P. Tokaji, *The Future of Election Reform: From Rules to Institutions*, 28 YALE L. & POL’Y REV. 125, 127 (2009) (“In the next phase of election reform, the focus should shift from rules to institutions – and, correspondingly, from the dueling values of access and integrity toward the twin problems of decentralization and partisanship.”).

54. See, e.g., Christopher S. Elmendorf, *Representation Reinforcement Through Advisory Commissions: The Case of Election Law*, 80 N.Y.U. L. REV. 1366, 1371 (2005) (advocating for “permanent advisory commission[s]”).

55. Dawood, *supra* note 11, at 417.

56. In 2011, Foley authored a book chapter that, much like this Essay, attempted to chart a course for the election-law field. Many of his observations still resonate. Edward B. Foley, *Democracy in the United States, 2020 and Beyond: How Can Scholarly Research Shape a Vision and Help Realize It?*, in RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS: RECURRING PUZZLES IN AMERICAN DEMOCRACY, *supra* note 49, at 209.

57. Edward B. Foley, *The Legitimacy of Imperfect Elections: Optimality, Not Perfection, Should Be the Goal of Election Administration*, in MAKING EVERY VOTE COUNT: FEDERAL ELECTION LEGISLATION IN THE STATES 97, 109 (Andrew Rachlin ed., 2006).

the case for quantifying an “electoral error rate”⁵⁸ that “would be a powerful measure of how well, or poorly, a state’s voting system performed its basic function of accurately aggregating the electoral preferences of the eligible citizens endeavoring to participate in democratic decisions.”⁵⁹ Foley’s express engagement with theory,⁶⁰ policy,⁶¹ and politics⁶² anticipated the scholarly frame this Essay suggests.⁶³

In its specific approach to theory, electoral adequacy is in service to Bruce Cain’s groundbreaking and deeply realist book, *Democracy More or Less*.⁶⁴ Cain premised the argument for his “coherent blended design”⁶⁵ not on an idealized or uniform set of reforms, but on pragmatism and urgency. In his words, “[T]he goal of a more coherent blending of different reforms is more feasible than consistency. It allows reformers to pick and choose their fights more carefully.”⁶⁶ “Rather than fix what is not seriously broken but might seem inconsistent with populist principles,”⁶⁷ Cain concluded, “it is better to focus on features that violate basic democratic goals and good governance.”⁶⁸ In other words, with respect to election administration, it is better to prioritize electoral adequacy.

But beyond offering a scholarly paradigm shift, election-law institutionalism spotlighted the need for more functional election-related data.⁶⁹ This realization

58. Edward B. Foley, *The Analysis and Mitigation of Electoral Errors: Theory, Practice, Policy*, 18 STAN. L. & POL’Y REV. 350, 353 (2007).

59. *Id.*

60. See *id.* at 356 (“[T]he disenfranchisement of an eligible citizen who attempts to vote violates that citizen’s basic right to participate in democratic government.”).

61. See *id.* at 358 (proposing “a threshold Electoral Error Rate of one hundred per million votes counted” as an “attainable goal worth striving for”); see also Foley, *supra* note 56, at 212 (encouraging the development of “state-of-the-art” voting infrastructure” through “collaboration among computer scientists, other systems engineers, and political scientists, lawyers, and other policy-oriented professionals”).

62. See Foley, *supra* note 58, at 376-79 (proposing bipartisan special elections courts).

63. Rick Pildes’s influential 2014 article, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, is another important precursor of electoral adequacy. The article critiques a romanticized view of American exceptionalism, chronicles a broad range of history and social-science literature, and defends specific policy proposals. See generally Pildes, *supra* note 45.

64. CAIN, *supra* note 20.

65. *Id.* at 6.

66. *Id.* at 215.

67. *Id.*

68. *Id.*

69. See, e.g., Stephen Ansolabehere & Nathaniel Persily, *Measuring Election System Performance*, 13 N.Y.U. J. LEGIS. & PUB. POL’Y 445, 447 (2010) (“[W]hile the country has seen substantial

engendered valuable compilations that pushed the research agenda forward.⁷⁰ At the same time, though, new issues emerged that occupied much of the election-law field's bandwidth. For example, the Supreme Court's decision in *Citizens United v. Federal Election Commission*⁷¹ and its progeny⁷² initiated a deluge of scholarship on the nature of corruption and the shifting campaign-finance landscape.⁷³ The Court's momentous *Shelby County v. Holder*⁷⁴ decision likewise centered attention on both the plethora of voting laws enacted in its wake⁷⁵ and potential legislative and doctrinal responses.⁷⁶ And the Court's unexpected resuscitation of racial-gerrymandering doctrine in *Alabama Legislative Black Caucus v. Alabama*⁷⁷ sparked a rash of commentary on the implications for Democrats and minority voters.⁷⁸

So, while it would be plainly inaccurate to say that the institutional turn had run its course by 2020,⁷⁹ it is probably fair to say it was deprioritized. And of course, the nefariousness of President Trump, Rudy Giuliani, John Eastman, and a significant portion of the Republican Party⁸⁰ has, as of late, compelled lawyers,

recent improvement in election administration, there still exists a need for higher quality data in order to further assess the election system.”).

70. See, e.g., Barry C. Burden & Charles Stewart III, *Introduction to the Measure of American Elections*, in *THE MEASURE OF AMERICAN ELECTIONS* 1, 9 (Barry C. Burden & Charles Stewart III eds., 2014) (“This volume begins the process of assessing how elections are conducted in America by identifying a manageable set of candidate indicators, subjecting them to scrutiny, and examining them for what they tell us about elections in America.”).
71. 558 U.S. 310 (2010).
72. E.g., *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010).
73. See Joshua S. Sellers, *Contributions, Bribes, and the Convergence of Political and Criminal Corruption*, 45 *FLA. ST. U. L. REV.* 657, 668 (2018) (providing examples).
74. 570 U.S. 529 (2013).
75. See, e.g., Joshua S. Sellers, *Shelby County as a Sanction for States' Rights in Elections*, 34 *ST. LOUIS UNIV. PUB. L. REV.* 367, 380-83 (2015).
76. See, e.g., Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 *HARV. L. REV.* 95 (2013).
77. 575 U.S. 254 (2015).
78. See, e.g., Richard L. Hasen, *Racial Gerrymandering's Questionable Revival*, 67 *ALA. L. REV.* 365 (2015).
79. For recent examples of election-law institutionalism, see, for example, Christian R. Grose & Abby K. Wood, *Randomized Experiments by Government Institutions and American Political Development*, 185 *PUB. CHOICE* 401 (2020); and Cheryl Boudreau, Christopher S. Elmendorf & Scott A. MacKenzie, *Roadmaps to Representation: An Experimental Study of How Voter Education Tools Affect Citizen Decision Making*, 41 *POL. BEHAV.* 1001 (2019).
80. See Luke Broadwater, *Lawyer Says He Dealt Directly with Trump over Jan. 6 Plans*, *N.Y. TIMES* (May 20, 2022), <https://www.nytimes.com/2022/05/20/us/politics/john-eastman-trump-jan-6.html> [https://perma.cc/U6KY-AU5K]; Jenny Gross & Luke Broadwater, *Here Are the Republicans Who Objected to Certifying the Election Results*, *N.Y. TIMES* (Jan. 8, 2021),

judges, and scholars to engage with previously obscure topics, including the so-called “independent state legislature theory”⁸¹ and the Electoral Count Act.⁸² What, then, recommends a research program built around electoral adequacy at this moment in time?

C. *Electoral Adequacy’s Timeliness*

There are three principal justifications for the timeliness of electoral adequacy: remaining open questions, improved data, and synergy with other reform efforts.

First, and despite earlier endeavors, so much about the performance and fairness of our election systems remains unknown.⁸³ Questions ranging from the utility of various voter-registration processes, to the relative virtues of rival voting machines, to the security of various post-election ballot-counting practices, persist. As noted above, only now are we starting to systematically evaluate how election expenditures affect election administration.⁸⁴ Simply stated, improving our election systems requires, as a first step, better understanding their current functionality, which, again, entails theoretical, policy, and political considerations.

Second, and most crucially, we now have more reliable data than ever to evaluate election performance. For example, while the biennial election-administration data provided in the Election Administration and Voting Survey has its

<https://www.nytimes.com/2021/01/07/us/politics/republicans-against-certification.html> [<https://perma.cc/S97J-26Y4>].

81. See, e.g., Carolyn Shapiro, *The Independent State Legislature Theory, Federal Courts, and State Law*, 90 U. CHI. L. REV. (forthcoming 2023), <https://ssrn.com/abstract=4047322> [<https://perma.cc/AS2H-Y44F>].
82. See, e.g., Edward B. Foley, *Reforming the Electoral Count Act*, DEMOCRACY (Summer 2022), <https://democracyjournal.org/magazine/65/reforming-the-electoral-count-act> [<https://perma.cc/6VHY-TSDS>].
83. Foley, *supra* note 56, at 217 (“No other field of inquiry would settle for the underdeveloped and internally inconsistent standards for performance evaluation that our voting process has.”).
84. See *supra* Section I.A; see also Zachary Mohr, JoEllen V. Pope, Martha E. Kropf & Mary Jo Shepherd, *Strategic Spending: Does Politics Influence Election Administration Expenditure?*, 63 AM. J. POL. SCI. 427 (2019) (examining partisan effects on election spending and calling for further research into the effect of such spending on election administration).

limitations,⁸⁵ it is far more comprehensive now than was true in the early 2000s.⁸⁶ The Election Performance Index compiled by the MIT Election Data and Science Lab similarly offers a wealth of data for scholars to mine. The U.S. Census Bureau, of course, continues to provide indispensable data through, for example, its Current Population Survey's November Voting and Registration Supplement, carried out after every national election.⁸⁷ Other organizations, such as the Center for Election Innovation & Research, conduct routine surveys on voter-registration database security.⁸⁸ In addition, data collected by private vendors like Data Trust and Catalist has enabled novel research designs.⁸⁹ Data alone will not answer democracy's fundamental questions. Yet, presently available data greatly expands our ability to comprehensively assess election performance, straightforwardly negotiate trade-offs, and convincingly defend best practices. While data limitations may have narrowed the scope of prior research, today, the abundance of election-related data should be exploited.

A third and final justification for electoral adequacy is its confluence with current reform efforts in nonprofit and broader academic communities. For example, electoral adequacy comports with the Bipartisan Policy Center's suggestion that "states must have flexibility to implement *minimum standards* in ways that meet the unique needs of their voters."⁹⁰ There are also calls for "[m]ore pragmatic and evidence-based approaches to improving elections in the short term"⁹¹ that accord with this Essay's proposals for systematized data collection. And in the long term, electoral adequacy intersects with sophisticated advances

85. See Jack Williams, *The Election Administration and Voting Survey: A Critical Tool for Researchers in Election Science*, MIT ELECTION LAB (Aug. 16, 2021), <https://medium.com/mit-election-lab/the-election-administration-and-voting-survey-4111aa0of69c> [https://perma.cc/T5SB-LHDB].

86. Burden & Stewart, *supra* note 70, at 13-14.

87. See JACOB FABINA & ZACHARY SCHERER, U.S. CENSUS BUREAU, P20-585, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2020 (2022), <https://www.census.gov/content/dam/Census/library/publications/2022/demo/p20-585.pdf> [https://perma.cc/3K46-JXF7].

88. See 2020 VRDB Security Report, CTR. FOR ELECTION INNOV. & RSCH. (2020), <https://election-innovation.org/2020-vrdb-security-report> [https://perma.cc/6RJF-H4DE].

89. See, e.g., Barber & Holbein, *supra* note 26 (using Data Trust data); Bertrall L. Ross II & Douglas M. Spencer, *Passive Voter Suppression: Campaign Mobilization and the Effective Disfranchisement of the Poor*, 114 NW. U. L. REV. 633 (2019) (using Catalist data).

90. *Prioritizing Achievable Federal Election Reform*, BIPARTISAN POL'Y CTR. 4 (Jan. 2022), <https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2022/02/Achievable-FederalElectionReformV2.pdf> [https://perma.cc/J4EY-W29A] (emphasis added).

91. Persily & Stewart, *supra* note 34.

in “election science.”⁹² As stated by leaders in that field, “[i]mproving the technology and administration of U.S. elections is a critical research priority but is not an activity that any single academic discipline can tackle alone.”⁹³ Election-law scholars can meaningfully contribute to these endeavors, and electoral adequacy offers a practical framework for doing so.

Election reform is far from easy. As Cain aptly summarized:

Figuring out the optimal trade-offs between [different approaches to political reform] is no simple matter. It is complex politically (somebody’s ox will be gored with any change), empirically (how do we know whether things are working as we hoped they would), and in terms of fundamental values (people may view the trade-offs between different democratic values in various ways).⁹⁴

Electoral adequacy provides a research program for negotiating this complexity. To demonstrate this, the next Part outlines how this program might be applied to two election-reform issues.

II. OPERATIONALIZING ELECTORAL ADEQUACY

This Part examines two election-reform issues – one extensively studied, one severely understudied – as a means of illustrating the benefits of a research program built around electoral adequacy. The first, extensively studied issue, is polling-place wait times. The second, severely understudied issue, is voting rights for the disabled.

A. Polling-Place Wait Times

Researchers have devoted significant attention to the issue of polling-place wait times.⁹⁵ The amount of time voters have to wait at polling sites is understood to affect, among other things, voter-turnout rates and levels of voter

92. See, e.g., R. Michael Alvarez, Moon Duchin, Gretchen Macht & Charles Stewart III, *Election Science: A Proposed NSF Convergence Accelerator*, CALTECH/MIT VOTING TECH ET AL. (July 21, 2021), <https://vote.caltech.edu/documents/217/Election-Science-Proposed-NSF-Convergence-Accelerator.pdf> [<https://perma.cc/7WUC-T7LH>].

93. *Id.* at 6.

94. CAIN, *supra* note 20, at 40.

95. For a succinct summary of some of the causes of long wait times, see Richard H. Pildes, *The Real Reasons You Waited Hours in Line to Vote*, ATLANTIC (Nov. 20, 2012), <https://www.theatlantic.com/politics/archive/2012/11/the-real-reasons-you-waited-hours-in-line-to-vote/265446> [<https://perma.cc/4CE8-JYMD>].

satisfaction.⁹⁶ Models applying so-called “queuing theory” to polling places have existed since 1980.⁹⁷ More recently, the Presidential Commission on Election Administration identified long lines at polling places as a key area for reform.⁹⁸ The Commission set a target of having no voter wait for more than thirty minutes at any polling site.⁹⁹ With that target in mind, one team of researchers found that “the application of simple line-management techniques can produce significant benefits for voters.”¹⁰⁰ The idea of a simple fix should be tempered, however, by another study’s finding that “minorities are three times as likely to wait longer than 30 minutes and six times as likely to wait more than 60 minutes.”¹⁰¹ This finding comports with the established view that “the more voters in a precinct who are non-white, the longer the wait times.”¹⁰² What, then, can the concept of electoral adequacy contribute to this already well-studied issue?

Recall electoral adequacy’s emphasis on merging institutional theory, policy, and politics. Regarding theory, electoral adequacy would conceptualize polling places as quintessential sites of democratic inclusion and as institutions with

-
96. See, e.g., Matt A. Barreto, Mara Cohen-Marks & Nathan D. Woods, *The Prevalence of Low-Quality Precincts in Low-Income and Minority Communities*, 62 POL. RSCH. Q. 445, 453-55 (2009); Colin McIntyre, *What Queuing Theory Says About Managing Polling Places amid COVID-19*, MIT ELECTION DATA & SCI. LAB & STANFORD-MIT PROJECT ON A HEALTHY ELECTION 5 (Aug. 2020), [https://electionlab.mit.edu/sites/default/files/2020-08/What QueueingMeansPollingPlacesCOVID19.pdf](https://electionlab.mit.edu/sites/default/files/2020-08/What%20QueueingMeansPollingPlacesCOVID19.pdf) [<https://perma.cc/6RZB-U474>].
97. See Floyd H. Grant III, *Reducing Voter Waiting Time*, 10 INTERFACES 19, 20-24 (1980).
98. Jeff Zeleny, *Election Opponents Team up on Panel to Fix Voting System*, N.Y. TIMES (Feb. 14, 2013), <https://www.nytimes.com/2013/02/15/us/politics/opposing-election-lawyers-to-lead-obama-voting-panel.html> [<https://perma.cc/BSK9-6824>].
99. *The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration*, PRESIDENTIAL COMM’N ON ELECTION ADMIN. 14 (Jan. 2014), <https://law.stanford.edu/wp-content/uploads/sites/default/files/publication/466754/doc/slspublic/Amer%20Voting%20Exper-final%20draft%2001-04-14-1.pdf> [<https://perma.cc/JP2K-EZHH>].
100. John C. Fortier, Charles Stewart III, Stephen Pettigrew, Matthew Weil & Tim Harper, *Improving the Voter Experience: Reducing Polling Place Wait Times by Measuring Lines and Managing Polling Place Resources*, BIPARTISAN POL’Y CTR. 4 (Apr. 2018), <https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2019/03/Improving-The-Voter-Experience-Reducing-Polling-Place-Wait-Times-by-Measuring-Lines-and-Managing-Polling-Place-Resources.pdf> [<https://perma.cc/822K-2UBZ>].
101. Stephen Pettigrew, *The Racial Gap in Wait Times: Why Minority Precincts Are Underserved by Local Election Officials*, 132 POL. SCI. Q. 527, 527 (2017).
102. Matthew Weil, Tim Harper, Charles Stewart III & Christopher Thomas, *The 2018 Voting Experience: Polling Place Lines*, BIPARTISAN POL’Y CTR. 21 (2019), <https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2019/11/The-2018-Voting-Experience.pdf> [<https://perma.cc/A4H6-34GZ>].

expressive value to their communities.¹⁰³ It would explicate the “civic alienation”¹⁰⁴ that results when voters experience long wait times, especially due to threats or intimidation. It would explore the concept of justice and our expectation that “a baseline attribute of responsible government is the capacity to accommodate its own public’s desire to participate in its foundational constituent moment.”¹⁰⁵ Specifics aside, institutional theory should inform a determination of what constitutes an unacceptably long wait time.

The policy dimension of electoral adequacy (and its subsidiary components: electoral adequacy, competent management, and democratic structures) generates countless questions. Are lengthy wait times – which are often caused by too few voting machines and poll workers – related to inadequate funding?¹⁰⁶ How should the “time tax”¹⁰⁷ of waiting in a long line be quantified? What relationships exist between the increased volume of mail voting,¹⁰⁸ the trend in several states of polling-place closures,¹⁰⁹ and wait times? Do poll-worker trainings and certifications, or community input into preferred polling-place locations, produce shorter wait times?

Finally, efforts to reduce polling-place wait times may find bipartisan political support. Consider, for example, that eighty-eight electoral jurisdictions, representing election administrators from both political parties, chose to provide polling-place line data as part of a national study.¹¹⁰ Their participation evidences some general level of commitment to reform.

103. THOMPSON, *supra* note 11, at 22–23 (“[E]lections and electoral procedures also express the polity’s attitude toward its citizens. The electoral process can be not only individually but also institutionally expressive.”).

104. *Id.* at 19.

105. Justin Levitt, “*Fixing That*”: *Lines at the Polling Place*, 28 J.L. & POL. 465, 469–70 (2013).

106. See Charles Stewart III & Stephen Ansolabehere, *Waiting to Vote*, 14 ELECTION L.J. 47, 52 (2015) (“The fact that there is only a tiny number of empirical studies that examine correlations between the capacity of individual polling places, on the one hand, and voter experience, on the other, suggests the difficulty in knowing precisely what it would take, in terms of the expenditure of dollars for additional equipment or the redistribution of existing equipment, to mitigate the problems that do exist.”).

107. See Elora Mukherjee, *Abolishing the Time Tax on Voting*, 85 NOTRE DAME L. REV. 177, 180 (2009) (“Like the poll tax, the time tax burdens a citizen’s fundamental right to vote. It is a government policy or practice that forces one citizen to pay more in time to vote compared with her neighbor across town, across the state, across state lines, or even across the street.”).

108. See Nathaniel Persily & Charles Stewart III, *The Miracle and Tragedy of the 2020 U.S. Election*, 32 J. DEMOCRACY 159, 165 (2021).

109. See *Democracy Diverted: Polling Place Closures and the Right to Vote*, LEADERSHIP CONF. EDUC. FUND 12 (Sept. 2019), <http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf> [<https://perma.cc/4FNT-KSS4>].

110. Fortier et al., *supra* note 100, at 16.

Legal scholars could build useful research agendas around these dimensions. For example, legal scholars are well suited to evaluate the rules and regulations governing polling places,¹¹¹ voters' relative eligibility for voting by mail,¹¹² and the scope of election administrators' discretionary authority.¹¹³ In collaboration with scholars from other fields, legal academics can develop fruitful research questions and, to continue with this Section's example, gain greater insight into how these rules and regulations affect wait times.

These are just preliminary thoughts about electoral adequacy's promise as applied to polling-place wait times. What should be apparent, though, is how traditional legal scholarship emphasizing rights and structure overlooks many crucially important election-performance issues that electoral adequacy would foreground.¹¹⁴

B. Voting Rights for the Disabled

Unlike polling-place wait times, voting rights for the disabled are severely understudied. What is known, though, is that voters with disabilities – cognitive, visual, physical, and more – comprise approximately one-sixth of the eligible electorate.¹¹⁵ Voters with disabilities have consistently lower voter-turnout rates.¹¹⁶ Those who do vote often encounter difficulties. For example, one survey following the 2012 elections found that “almost one-third (30.1%) of voters with disabilities reported one or more difficulties in voting, compared to about one-twelfth (8.4%) of voters without disabilities.”¹¹⁷ Furthermore, as the population

111. See, e.g., Rebecca Green, *Election Surveillance*, 57 WAKE FOREST L. REV. 289 (2022) (examining the surveillance of election processes both historically and today); Rebecca Green, *Election Observation Post-2020*, 90 FORDHAM L. REV. 467 (2021) (discussing the “shortcomings” of election-observation statutes).

112. See, e.g., Richard L. Hasen, *Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic, and How to Treat and Cure Them*, 19 ELECTION L.J. 263, 269-70 (2020).

113. See, e.g., Briffault, *supra* note 38.

114. See Sellers & Weinstein-Tull, *supra* note 10, at 1130-31 (describing how questions about rights and structure predominate within the field).

115. Thomas Hicks, *Accessible and Secure: Improving Voter Confidence by Protecting the Right to Vote*, in THE FUTURE OF ELECTION ADMINISTRATION, *supra* note 35, at 49, 50; Ihaab Syed, Michelle Bishop, Sarah Brannon, Erika Hudson & Kristen Lee, *Designing Accessible Elections: Recommendations from Disability Voting Rights Advocates*, 21 ELECTION L.J. 60, 63 (2022).

116. See Syed et al., *supra* note 115, at 64.

117. Lisa Schur, Meera Adya & Douglas Kruse, *Disability, Voter Turnout, and Voting Difficulties in the 2012 Elections*, RSCH. ALL. FOR ACCESSIBLE VOTING 6 (July 18, 2013), https://www.eac.gov/sites/default/files/eac_assets/1/1/Disability%20and%20voting%20survey%20report%20for%202012%20elections.pdf [<https://perma.cc/5DZQ-R8EP>].

grows older, more voters will have accessibility needs.¹¹⁸ As Rabia Belt observed, “An estimated thirty to thirty-five percent of all voters in the next twenty-five years will need some form of accommodation. Every person is vulnerable to falling into this category, and nearly one in five of us will before we die.”¹¹⁹ Given these looming challenges, how might the concept of electoral adequacy be applied in this context?

Theoretically, electoral adequacy might inspire new modes of thinking about the obligations that election administrators have to their communities. For example, voter-accessibility questions seem inseparable from larger theoretical questions about whether a universalist or civil-rights disability frame is preferable.¹²⁰ A host of other issues, including the need to make information pertaining to the voting process widely accessible,¹²¹ the implications of ballot design, and the need to expand voting opportunities,¹²² might be reconsidered once viewed through a disability lens.

As for policy, the relevant questions are legion and, again, underexamined. What are, and are likely to be, the relationships between election funding and voter access, particularly as the number of disabled voters increases?¹²³ Does the professionalization of election administration improve disabled voters’ perceived ease of voting?¹²⁴ Do disability advocates have meaningful options to voice their concerns to election administrators?

-
118. Doug Lewis, *Parties and Politics: The Evolution of Election Administration*, in THE FUTURE OF ELECTION ADMINISTRATION, *supra* note 35, at 31, 44 (observing that as the population ages, “more voters will have mobility issues, more will have sight or limited vision problems, more will have difficulty standing in lines waiting to vote, more will have some cognitive difficulties, and a higher percentage will have hearing difficulties”).
119. Rabia Belt, *Contemporary Voting Rights Controversies Through the Lens of Disability*, 68 STAN. L. REV. 1491, 1493 (2016) (footnote omitted).
120. See Doron Dorfman, *The Universal View of Disability and its Danger to the Civil Rights Model*, in DEFINING THE BOUNDARIES OF DISABILITY: CRITICAL PERSPECTIVES 37, 37-41 (Licia Carlson & Matthew C. Murray eds., 2021).
121. As mandated under the Americans with Disabilities Act. See Syed et al., *supra* note 116, at 68.
122. See Lisa Schur & Douglas Kruse, *Disability and Election Policies and Practices*, in THE MEASURE OF AMERICAN ELECTIONS, *supra* note 70, at 205 (“Conceptually, an election performance measure should indicate any disparity in the difficulty of voting for people with and without disabilities.”).
123. See Lewis, *supra* note 117, at 44 (“[T]he cost of serving voters will increase to cover the variety of methods of voting and equipment and personnel to serve a vastly increased segment of voters with accessibility needs.”).
124. See Lisa Schur & Douglas Kruse, *Disability and Voting Accessibility in the 2020 Elections: Final Report on Survey Results*, U.S. ELECTION ASSISTANCE COMM’N 8 (2021), https://www.eac.gov/sites/default/files/voters/Disability_and_voting_accessibility_in_the_2020_elections_final_report_on_survey_results.pdf [https://perma.cc/6SFQ-UT47] (reporting survey results of this measure).

Politically, existing research suggests that expanding and improving voting opportunities for the disabled does not advantage either major political party over the other.¹²⁵ At the same time, improving voting access for the disabled necessarily entails improving voting access for the underprivileged.¹²⁶ This would seem, then, to be a promising area for reform.

Legal scholarship on voting rights for the disabled is sparse.¹²⁷ A research agenda built around electoral adequacy would correct this shortcoming by focusing attention on how, practically, to ensure voting equality for disabled voters. As one example, there is much to explore in how the law might compel adequate funding, competent management, and democratic structures to mitigate or remedy the continued informational disparities we see among the disabled.¹²⁸

* * *

The discussion here of polling-place wait times and voting rights for the disabled is illustrative; any number of examples might have been used to highlight the promise of electoral adequacy as a research program. Ultimately, the hope is that this and related programs will facilitate the construction of homeostatic election systems that both stabilize and strengthen our democracy.

III. ELECTORAL ADEQUACY AND RIGHTS

To this point, I have assiduously avoided discussing the relationship between electoral adequacy and rights. In this Part, I briefly comment on electoral adequacy's relationship to traditional conceptions of rights.

125. See Ruth Igielnik, *A Political Profile of Disabled Americans*, PEW RSCH. CTR. (Sept. 22, 2016), <https://www.pewresearch.org/fact-tank/2016/09/22/a-political-profile-of-disabled-americans> [<https://perma.cc/QX4Y-LACM>] (“Rather than have one distinct partisan profile, Americans with disabilities look similar to those without disabilities both in terms of party affiliation and their distribution across the ideological spectrum.”).

126. See Belt, *supra* note 119, at 1496 (“When we look at the statistics, we see that people with disabilities tend to be among the most disempowered of Americans: they are more likely to be black or brown, elderly, female, unemployed, and poor.”).

127. Exceptions include Belt, *supra* note 119; and Eve L. Hill, *Accessible Voting in a Pandemic: A Review of Recent Cases*, HARV. L. REV. BLOG (Feb. 19, 2021), <https://blog.harvardlawreview.org/accessible-voting-in-a-pandemic-a-review-of-recent-cases> [<https://perma.cc/S2HE-QVX4>].

128. See Tiffany Cusaac-Smith, *Before the Ballot Box, Americans with Disabilities Have Problems Getting Voting Information*, USA TODAY (Jul. 26, 2022, 10:15 AM), <https://www.usatoday.com/story/news/nation/2022/07/26/voting-disabled-community-elections/10143455002> [<https://perma.cc/ZDY4-XC9A>].

Rights are invaluable insofar as they establish a language through which interests (and grievances) can be vindicated.¹²⁹ That is, they provide the means by which claims for justice and equality are recognized by the state.¹³⁰ In these ways, they signify the country's constitutional principles and, more broadly, normative commitments to citizens. Because the right to vote is a fundamental right, we think of voting as a sacrosanct activity, one that the state is bound to promote and respect. That said, the parameters of the right to vote have been subject to constant contestation, and regulation of the right has always been fraught.¹³¹ The right to vote, as currently conceived, protects against only limited forms of injustice and some methods of exclusion. Consequently, possessing the right to vote does not secure meaningful participation in the electoral process. This observation is not meant in a public-choice theory "voting is irrational" way,¹³² or a "why voting is different" way.¹³³ It is simply to say that possessing the right to vote does not, on its own, ensure the means of exercising the right. Electoral adequacy accounts for this incongruity by providing a framework for supplementing the predominant understanding of the right to vote — one that aims to secure the right through affirmative government action.

A useful way to think about the limits of traditional rights-based approaches to electoral reform is provided by the "capabilities approach" developed by Amartya Sen and Martha C. Nussbaum.¹³⁴ That approach, initially designed to address conceptual shortcomings in measuring international-development outcomes, directs attention beyond the consideration of rights in the abstract to an

129. See RICHARD H. FALLON, *THE NATURE OF CONSTITUTIONAL RIGHTS: THE INVENTION AND LOGIC OF STRICT JUDICIAL SCRUTINY* 68 (2019) ("In constitutional law as in moral theory, rights are constructs, designed to reflect and protect interests that are equally if not more fundamental.").

130. See Owen M. Fiss, *The Supreme Court, 1978 Term — Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979) ("Adjudication is the social process by which judges give meaning to our public values.").

131. See Sellers & Weinstein-Tull, *supra* note 10, at 1133-46. See generally ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (2009) (detailing the history of the right to vote).

132. For the classic formulation of this claim, see ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 274 (1957), which states,

When voting is costly, its costs may outweigh its returns, so abstention can be rational even for citizens with party preferences. In fact, the returns from voting are usually so low that even small costs may cause many voters to abstain; hence tiny variations in cost can sharply redistribute political power.

133. See generally Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CALIF. L. REV. 1201 (1996) (identifying and analyzing how voting is different from the rest of equal-protection law).

134. See Amartya Sen, *Capability and Well-Being*, in *THE QUALITY OF LIFE* 30, 30-53 (Martha C. Nussbaum & Amartya Sen eds., 1993) (outlining and defending the capabilities approach).

assessment of individuals' actual capacity to improve their quality of life. "Capabilities," Nussbaum states, "are very closely linked to rights, but the language of capabilities gives important precision and supplementation to the language of rights."¹³⁵

Electoral adequacy similarly interrogates and seeks to facilitate individuals' abilities to fulfill their political entitlements. In highlighting the importance of adequate funding, competent management, and democratic structures, the framework "gives us a benchmark in thinking about what it is really to secure [the right to vote] to someone."¹³⁶ This benchmark can then provide clarity on how voting rights remain significantly compromised and might be strengthened.¹³⁷ In sum, by focusing attention on electoral adequacy's policy components (i.e., electoral capabilities), we will be better positioned to navigate the divide between what the right to vote, as traditionally defined, secures, and what truly inclusive election systems require.

The question remains, though, as to how these electoral capabilities can be realized. Ideally, election officials and election administrators will come to see the virtues of electoral adequacy and respond accordingly. Election administrators are, in general, as interested and invested as scholars in gathering more information about election performance and in improving election systems. In other instances, though, electoral adequacy will need to be compelled and, crucially, courts "must take a more active hand in how they require states and local governments to comply with various statutes" and constitutional provisions.¹³⁸

Regrettably, as of late, federal election-law doctrine has proven inhospitable to voting-rights and election-reform claims. Therefore, the most viable strategy for implementing electoral adequacy is likely through novel interpretations of state constitutional provisions pertaining to voting and elections. As Miriam Seifter, in describing state constitutional litigation, notes, "Unlike the federal constitution, state constitutions, through their often extensive text, expressly and repeatedly embrace popular sovereignty, majority rule, and popular

135. Martha C. Nussbaum, *Poverty and Human Functioning: Capabilities as Fundamental Entitlements*, in *POVERTY & INEQUALITY* 47, 52 (David B. Grusky & Ravi Kanbur eds., 2006) [hereinafter Nussbaum, *Poverty and Human Functioning*]; see also Martha C. Nussbaum, *Capabilities and Human Rights*, 66 *FORDHAM L. REV.* 273, 292-97 (1997) [hereinafter Nussbaum, *Capabilities and Human Rights*] (exploring the relationship between a capabilities approach and rights).

136. Nussbaum, *Capabilities and Human Rights*, *supra* note 135, at 294.

137. See Sellers & Weinstein-Tull, *supra* note 10, at 1157-77; Nussbaum, *Poverty and Human Functioning*, *supra* note 135, at 74 ("To secure a capability to a citizen it is not enough to create a sphere of noninterference: the public conception must design the material and institutional environment so that it provides the requisite affirmative support for all the relevant capabilities.").

138. Sellers & Weinstein-Tull, *supra* note 10, at 1171.

equality.”¹³⁹ These provisions, and the principles they reflect, align with the goals of electoral adequacy. That said, as noted above, state constitutions are unlikely to be interpreted to require comprehensive overhauls of election systems.¹⁴⁰ But that is not what electoral adequacy seeks. Instead, it seeks targeted reforms based on data and deliberation. Election officials, election administrators, and judges committed to democratic improvement should welcome its findings.

CONCLUSION

In many ways, election law has always been a highly interdisciplinary field. Rigorous study of American democracy essentially demands engagement with democratic theory, constitutional law, history, and the social sciences. Legal scholarship has proven to be a necessary part of the inquiry.¹⁴¹ Yet, there has never been a coordinated, sustained, and interdisciplinary research program designed to improve election systems.¹⁴² Electoral adequacy is animated by the belief that the potential benefits of such a program are considerable. It offers a timely framework for uniting theory, policy, and politics, with the ultimate and perennial goal of improving the electoral process.

Associate Professor of Law, Sandra Day O'Connor College of Law. For their generous feedback on this Essay, I want to thank Ned Foley, Rick Pildes, Doug Spencer, Nick Stephanopoulos, and Justin Weinstein-Tull. I am also grateful to the excellent Yale Law Journal editors.

¹³⁹. Miriam Seifter, *State Institutions and Democratic Opportunity*, 72 DUKE L.J. 275, 348 (2022).

¹⁴⁰. See *supra* note 17 and accompanying text.

¹⁴¹. See Pamela S. Karlan, *Answering Questions, Questioning Answers, and the Roles of Empiricism in the Law of Democracy*, 65 STAN. L. REV. 1269, 1278 (2013) (“[L]egal scholars both identify questions in the law of democracy that need empirical answers and question how those answers fit into a broader understanding of the law of democracy.”); James A. Gardner, *Stop Me Before I Quantify Again: The Role of Political Science in the Study of Election Law*, 32 LOY. L.A. L. REV. 1141, 1160 (1999) (“Law supplies the norms and thus defines the parameters of the scientific analysis; political science then investigates the manifestation of these norms in political phenomena. Each discipline’s strength matches exactly the other’s weakness, creating a useful partnership.”).

¹⁴². See Alexander Keyssar, *Overview: Election Reform*, in RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS: RECURRING PUZZLES IN AMERICAN DEMOCRACY, *supra* note 49, at 178 (“Despite a welcome increase in interdisciplinary projects, legal academics still tend to focus on court decisions; empirical political scientists gravitate toward issues that can be quantified; psychologists lean toward experiments. As a result, most scholarly work still tends to be fairly narrow, cast in disciplinary molds.”).