

Election Law and Election Subversion

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ABSTRACT. Scholars of American election law used to take the rule of law as a given. The legal system, while highly imperfect, appeared sturdy, steady, and functional. Recent election cycles – culminating in dramatic attempts at election subversion – have revealed this assumption beginning to break down. Without the rule of law as a dependable constant, the study of election law quickly expands. Legal experts now are simultaneously occupied with: first, the substance of election laws; second, the design of election institutions; and third, the threat of participants unlawfully undermining elections from within. This Essay identifies and contextualizes the rule-of-law pivot that is reflected in this rapidly expanding body of scholarship, including by exploring the definition of election subversion and its relationship to the rule of law. It then examines three basic prescriptive tacks that legal experts have taken in response to the threat of election subversion. These approaches can be understood as constraint-based, incentive-based, and corrective. So framed, each approach presents fundamental advantages and disadvantages for those seeking to ensure that the rule of law continues to govern elections. No single approach, in other words, provides clear and straightforward direction. This Essay concludes by offering a path forward: one that, by necessity, is multifaceted, interdisciplinary, and messy. This complexity reflects the depth of the underlying conundrum, which asks election-law scholars to consider how, if possible, to harness the rule of law to ensure the rule of law.

INTRODUCTION

Election law relies on the rule of law – but so does election subversion. This uncomfortable overlap poses challenges for legal experts seeking to promote free and fair elections. On a superficial level, subversive actors invoke legal principles as they seek to exploit the processes and legitimization that the rule of law provides. Superficially, then, legal experts are able to provide clarity and insight; their legal analysis fits well into this space. Yet subversive actors also seek, simultaneously, to exploit *breakdowns* in the rule of law. Subversive actors seek to use these breakdowns to install their preferred candidates into elected office even when the law, properly executed, would require otherwise. It is this latter quality of election subversion that often disorients legal experts. The unease is

appropriate; breakdowns in the rule of law are, by definition, extralegal. Yet the incongruity provides no respite for legal scholars, particularly at a time when election subversion in the United States requires urgent attention and sustained analysis. In the field of election law, experts have had to make a rule-of-law pivot.

Election subversion can be understood, at least in a narrow sense, as the exploitation of a breakdown in the rule of law to install a candidate into elected office.¹ In recent years, a potent collection of forces – including political extremism, fragmentation, and disinformation – have combined in the United States to produce conditions conducive to election subversion.² The danger became self-evident in January 2021, when violence at the U.S. Capitol struck at the heart of American democracy and brought the threat of election subversion into widespread public consciousness.³ Following this attack, democratic processes across the country continue to suffer strain.⁴ Officials in positions of great power have failed to condemn,⁵ and to the contrary have embraced,⁶ attempts at subverting the 2020 elections. These efforts include aggressively promoting disinformation

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1. For further discussion of the definition of election subversion, see *infra* Section I.B. See also Lisa Marshall Manheim, *Electoral Sandbagging*, 13 U.C. IRVINE L. REV. (forthcoming 2023) (manuscript at 42-43) (on file with author) (advancing a similar definition).
 2. See generally Richard H. Pildes, *Political Fragmentation in Democracies of the West* (NYU School of Law, Public Law Research Paper No. 21-50, 2021), <https://ssrn.com/abstract=3935012> [<https://perma.cc/B53D-WM9H>] (fragmentation); RICHARD L. HASEN, *CHEAP SPEECH: HOW DISINFORMATION POISONS OUR POLITICS AND HOW TO CURE IT* (2022) (disinformation); Edward B. Foley, *Requiring Majority Winners for Congressional Elections: Harnessing Federalism to Combat Extremism*, 26 LEWIS & CLARK L. REV. 365 (2022) (extremism).
 3. See Samuel Issacharoff, *Weaponizing the Electoral System*, 74 STAN. L. REV. ONLINE 28, 30 (2022); see also 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, 270-76 (2022) (describing then-President Trump’s attempt “at subverting the outcome of the presidential election,” which contributed to “the first successful attack on the Capitol since the . . . War of 1812”); Aaron Zitner, *Jan. 6 Polling: Americans Are Paying Attention*, WALL ST. J. (July 21, 2022), <https://www.wsj.com/livecoverage/jan-6-hearing-today-trump/card/jan-6-polling-americans-are-paying-attention-nSU1sNmMHEjPc2EU1sbh> [<https://perma.cc/5Y8W-RJ63>] (“Nearly six in 10 Americans . . . say they are paying a lot of attention or some attention to the [January 6] hearings.”).
 4. See generally Manheim, *supra* note 1 (analyzing recent efforts to undermine the administration, integrity, and legitimacy of elections).
 5. See, e.g., Jonathan Weisman & Reid J. Epstein, *G.O.P. Declares Jan. 6 Attack ‘Legitimate Political Discourse’*, N.Y. TIMES (Feb. 4, 2022), <https://www.nytimes.com/2022/02/04/us/politics/republicans-jan-6-cheney-censure.html> [<https://perma.cc/WE4Q-7CH2>].
 6. *Id.*; see, e.g., Richard L. Hasen, *Opinion, Republicans Aren’t Done Messing With Elections*, N.Y. TIMES (Apr. 23, 2021), <https://www.nytimes.com/2021/04/23/opinion/republicans-voting-elections.html> [<https://perma.cc/HT7E-DSBM>]; Amy Gardner & Isaac Arnsdorf, *More Than 100 GOP Primary Winners Back Trump’s False Fraud Claims*, WASH. POST (June 14, 2022, 6:00 AM EDT), <https://www.washingtonpost.com/politics/2022/06/14/more-than-100-gop-primary-winners-back-trumps-false-fraud-claims> [<https://perma.cc/J437-5E6K>].

with respect to the integrity of elections,⁷ as well as campaigning on promises to condemn or even unwind elections that, by all reliable accounts, were legitimately conducted.⁸ Various state legislatures, for their part, have moved election responsibilities from nonpartisan actors to overtly partisan ones and criminalized election administration in ways that undermine officials acting in good faith.⁹ A growing number of these officials have resigned due to exhaustion, exasperation, and fear of violence.¹⁰ Understandably, concerns over these overlapping developments have begun to dominate scholarly discourse.

Scholarly discourse, as a result, has expanded. Without the rule of law as a dependable constant, the study of election law quickly becomes three-dimensional. Experts find themselves simultaneously occupied with concerns along several dimensions: first, with the substance of election laws; second, with the design of election institutions; and third, with the threat of elections being unlawfully undermined from within.¹¹ Most legal experts are fluent in the first dimension (substantive law) and at least proficient in the second (design of institutions). It is this third dimension—conceptualizing election law without the guaranteed existence of the rule of law—that poses particular difficulty for any scholar.

This Essay identifies three prescriptive tacks that legal experts, forced to grapple with this challenging set of predicaments, have taken recently in response to the threat of election subversion. First, scholars have explored how

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7. See, e.g., Matt Vasilogambros, *Disinformation May Be the New Normal, Election Officials Fear*, PEW CHARITABLE TRS. (Sept. 21, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/09/21/disinformation-may-be-the-new-normal-election-officials-fear> [https://perma.cc/D2DF-AB76]; Bob Christie, *Across the Country, Republican Primaries Feature Candidates Who Deny Outcome of 2020 Election*, PBS (Aug. 1, 2022, 3:34 PM EDT), <https://www.pbs.org/newshour/politics/across-the-country-republican-primaries-feature-candidates-who-deny-outcome-of-2020-election> [https://perma.cc/Z9JQ-LGF9].
 8. See, e.g., Reid J. Epstein, *In Wisconsin, G.O.P. Voters Demand the Impossible: Decertifying 2020*, N.Y. TIMES (Aug. 8, 2022), <https://www.nytimes.com/2022/08/08/us/politics/wisconsin-gop-2020-election.html> [https://perma.cc/8VRQ-3EJ8]; Daniel Dale, *More than Half of GOP Governor Nominees Have Questioned or Denied the Legitimacy of the 2020 Election*, CNN (Aug. 17, 2022, 1:38 PM ET), <https://www.cnn.com/2022/08/11/politics/fact-check-republican-governor-nominees-2020-election/index.html> [https://perma.cc/Q4R6-CPNC].
 9. See Jessica Bulman-Pozen & Miriam Seifter, *Countering the New Election Subversion: The Democracy Principle and the Role of State Courts*, 2022 WIS. L. REV. (forthcoming) (manuscript at 14-21), <https://ssrn.com/abstract=4177005> [https://perma.cc/SB9U-WFAA].
 10. See Fredreka Schouten, *Personal Threats, Election Lies and Punishing New Laws Rattle Election Officials, Raising Fears of a Mass Exodus*, CNN (July 21, 2022, 7:02 AM EDT), <https://www.cnn.com/2021/07/21/politics/election-officials-exodus/index.html> [https://perma.cc/NVT7-9ZFQ].
 11. This pattern both reflects election law's "institutional turn" and signals its limitations. See *infra* notes 15-20 and accompanying text.

prophylactic legal reforms might constrain election participants and, accordingly, minimize opportunities for subversive conduct. Second, scholars have sought to use law to alter the incentives facing actors tempted to engage in subversion. Finally, scholars have examined how legal institutions might fare in correcting attempts to subvert elections after the fact. Each of these three scholarly approaches – constraint-based, incentive-based, and corrective – presents promise and pitfalls for those seeking to ensure that elections remain grounded in the rule of law.¹²

In discussing these efforts, this Essay does not attempt to provide a comprehensive account of the burgeoning body of scholarship addressing election subversion.¹³ Instead, it seeks to identify, and to describe broadly, a sharp and recent

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12. Each approach also has a flip side: the possibility that those *resistant* to free and fair elections could use similar tactics to subversive ends. Stated otherwise, someone hoping to promote election subversion might seek to do so through some combination of removing constraints, altering incentives, and undermining corrective institutions. On this front, allegations of ill intent abound. See, e.g., Ed Pilkington, *Ousted Republican Reflects on Trump, Democracy and America: 'The Place Has Lost Its Mind,'* GUARDIAN (Aug. 21, 2022, 2:00 AM EDT), <https://www.theguardian.com/us-news/2022/aug/20/rusty-bowers-interview-trump-arizona-republicans> [<https://perma.cc/XK6F-NV2V>] (describing criticism of an attempt by Arizona lawmakers, through introduction of an “election integrity” bill, to strip away legal constraints on overriding the popular vote); Miles Park & Austin Jenkins, *Some Republicans in Washington State Cast a Wary Eye on an Election Security Device*, NPR (Aug. 28, 2022, 5:00 AM ET), <https://www.npr.org/2022/08/28/1119692541/washington-state-albert-sensor-cybersecurity-election-security> [<https://perma.cc/2RX2-FXY5>] (describing criticism of Washington State officials who removed cybersecurity devices that, according to national experts, made it more difficult to hack election records); Editorial, *Legislative Leaders' Troubling Use of an Unproven Legal Theory to Ignore Redistricting Deadline*, CLEVELAND.COM (Aug. 28, 2022, 5:59 AM), <https://www.cleveland.com/opinion/2022/08/legislative-leaders-troubling-use-of-an-unproven-legal-theory-to-ignore-redistricting-deadline-editorial.html> [<https://perma.cc/QJ7S-V896>] (criticizing lawmakers for undermining the authority of a corrective institution, the Ohio Supreme Court, by adopting a strategy of delay in response to redistricting orders, presumably in part in the hope that upcoming elections will produce a composition of Ohio justices more accepting of their recalcitrance).
 13. Among the challenges of providing a comprehensive account are the size of this growing collection and the rapidity with which scholars are producing new work. One recent attempt to categorize this dynamic body of scholarship comes from Lee Drutman, whose work offers “a tripartite classification of the proposed reform solutions to the current crisis of democratic careening.” Lee Drutman, *Moderation, Realignment, or Transformation? Evaluating Three Approaches to America's Crisis of Democracy*, 669 ANNALS AM. ACAD. POL. & SOC. SCI. 158, 159 (2022) (identifying a *moderation* approach, which “emphasizes the need to elect more ‘moderates’”; a *realignment* approach, which “anticipates and hopes to accelerate a coming and semipermanent period of Democratic Party dominance”; and a *transformation* approach, which “argues for a large-scale restructuring of the U.S. political system”). Though motivated by rule-of-law concerns, including with respect to elections, Drutman’s work engages more with politics-based solutions than with law-based solutions. It does not, accordingly, explore the inherently complicated implications of pursuing law-based solutions to the threat of breakdowns in the rule of law. To the extent that Drutman alludes to specific proposals requiring

adjustment in the field of election law – what it calls the rule-of-law pivot. The works propelling this pivot can be recognized by two dominant features: first, an acknowledgement of the threat that participants may be capable of successfully subverting an election in the United States; and, second, an insistence that the stakes are high, perhaps even existential, given the possibility that election law may effectively collapse if elections can be subverted.¹⁴ (A third commitment – taken for granted by virtually every expert in the election-law community – is that elections should, indeed, be governed by law.) Together, these commitments motivate scholars to turn toward the prescriptive. An examination of this pivot therefore reveals election-law scholars consumed not only with the longstanding question of how to “harness politics to fix politics,”¹⁵ but also with a new and daunting challenge: how, if possible, to harness the rule of law to ensure the rule of law.

Part I of this Essay reviews the recent path of election-law scholarship. In so doing, it both reveals and contextualizes the dramatic transition reflected by the rule-of-law pivot. Part I concludes by addressing the meaning of “election subversion,” ultimately endorsing a narrow definition of the term. Part II surveys legal scholarship that explores how to counteract this growing phenomenon. This Part explains how recent prescriptive work reflects three broad approaches to the problem of election subversion, and it analyzes how each approach benefits from potential advantages but also suffers from fundamental weaknesses. Part III offers explanations for why and how the field of election law must expand to meet this complicated set of challenges.

legal enactment, these proposals tend to fall into the “incentive-based approach” identified and examined in this Essay. *See id.* at 160 (alluding to reforms associated with nonpartisan primaries and modified campaign finance restrictions (citing Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804 (2014)); *infra* Section II.B).

14. *See, e.g.,* Hasen, *supra* note 3, at 301 (“I fear that only concerted, peaceful collective action against an attempt to subvert election results stands between American democracy and nascent authoritarianism.”). Included in this collection is commentary that is somewhat more agnostic as to just how dire this threat is, at least in the near term, but that still acknowledges others’ concerns and meaningfully engages with the possibility that subversion poses a clear and present danger to American democracy. *See, e.g.,* We the People, *Constitutional Issues in Voting Rights Today*, NAT’L CONST. CTR., at 09:55 (May 20, 2021), <https://constitutioncenter.org/news-debate/podcasts/constitutional-issues-in-voting-rights-today> [https://perma.cc/357L-75DP] (comments of Derek Muller).
15. 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, 86 (Guy-Uriel E. Charles, Heather K. Gerken & Michael S. Kang eds., 2011).

I. ELECTION LAW AND THE GROWING THREAT OF ELECTION SUBVERSION

Election law already absorbed a major conceptual shift over a decade ago, in conjunction with what Heather K. Gerken and Michael S. Kang, among others, described as an “institutional turn” in the field.¹⁶ In earlier years, academic work had prioritized the examination of substantive election laws, particularly rights-based doctrines emanating from the U.S. Supreme Court.¹⁷ Newer scholarship, by contrast, tended to look beyond the courts and instead home in on election law’s many nonjudicial institutions and processes.¹⁸ Few commentators, of course, agreed on the specifics, and the ensuing debates produced an extensive literature on whether and how legal structures can channel political self-interest to improve election systems.¹⁹ Typically underlying these disparate discussions was the assumption that law in the United States has continuing force and, accordingly, that legally constrained institutions could not serve as a fountainhead for subversion.²⁰ Scholars tended to assume, in other words, a sturdy hold by the rule of law. It has taken a striking rise in efforts to subvert elections, as manifested in recent cycles, to begin to break down this assumption. This Part describes this transition before examining how a narrow definition of election subversion might help to further facilitate the scholarly discourse that has emerged.

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16. *Id.* at 87; see, e.g., Daniel P. Tokaji, *The Future of Election Reform: From Rules to Institutions*, 28 *YALE L. & POL’Y REV.* 125, 128 (2009).
 17. See Heather K. Gerken, *Keynote Address: What Election Law Has to Say to Constitutional Law*, 44 *IND. L. REV.* 7, 7 (2010).
 18. *Id.* at 7-8; David Schleicher, *Overview: Mapping Election Law’s Interior*, in *RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS: RECURRING PUZZLES IN AMERICAN DEMOCRACY*, *supra* note 15, at 75, 75-77.
 19. See generally Gerken & Kang, *supra* note 15 (compiling and discussing illustrative commentary).
 20. See, e.g., HEATHER K. GERKEN, *THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT* 3-6 (2009) (expressing concern over the possibility of strains on the electoral system, not due to deliberate subversion but rather due to problems akin to those affecting Florida in 2000, and proposing a nonbinding rating system to encourage the adoption of good-governance reforms); Michael S. Kang, *De-Rigging Elections: Direct Democracy and the Future of Redistricting Reform*, 84 *WASH. U. L. REV.* 667, 667-70 (2006) (using the term “rigging” to refer to gerrymandering, rather than subversion, and proposing a requirement of direct democratic approval of statewide redistricting plans as a structural fix).

A. *Running into the Rule of Law*

In the midst of its institutional turn, the election-law community tended to assume a highly imperfect, but nevertheless functional, legal system.²¹ The discourse therefore could proceed in a relatively straightforward manner, even as scholars sought to integrate the implications of deeply complicated phenomena into already sophisticated discussions of institutional design.²² During this time, the relevant period for reform felt expansive: while, for some, “a decade seemed enough time for major reform,” others looked ahead a quarter-century or longer.²³

Of course, some scholars expressed prescient unease over the trajectory of American election law. Bruce E. Cain, for example, warned of the risks of destabilization associated with election law’s populist impulses.²⁴ Yet even this work tended to disavow any fundamental concern over the rule of law itself: to Cain, the country’s “commitment to democracy per se” appeared “solid,” and “[e]xcept for the paranoid fringes on both ends of the ideological spectrum,” there was

21. See, e.g., *supra* note 20.

22. These phenomena include those associated with implementation challenges, enforcement prioritization, politicization, entrenchment, and more. See, e.g., Nicholas Stephanopoulos, *Reforming Redistricting: Why Popular Initiatives to Establish Redistricting Commissions Succeed or Fail*, 23 J.L. & POL. 331, 331-32 (2007) (implementation challenges); Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 IND. L. REV. 113, 113-15 (2010) (enforcement prioritization); Pamela S. Karlan, *Lessons Learned: Voting Rights and the Bush Administration*, 4 DUKE J. CONST. L. & PUB. POL’Y 17, 19 (2009) (politicization); Jennifer Nou, *Sub-Regulating Elections*, 2013 SUP. CT. REV. 135, 135 (same); Lisa Marshall Manheim, *Presidential Control of Elections*, 74 VAND. L. REV. 385, 399-400 & nn.54-56 (2021) (enforcement and politicization); Michael S. Kang, *Sore Loser Laws and Democratic Contestation*, 99 GEO. L.J. 1013, 1071 (2011) (entrenchment).

23. Edward 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 15, at 209, 209.

24. BRUCE E. CAIN, *DEMOCRACY MORE OR LESS: AMERICA’S POLITICAL REFORM QUANDARY* 13 (2015); see also Samuel Issacharoff, *Judicial Review in Troubled Times: Stabilizing Democracy in a Second-Best World*, 98 N.C. L. REV. 1, 5 (2019) (discussing the threat of systematic failure in democracies, including in the United States, and the extent to which judiciaries can play a stabilizing role); Nathaniel Persily, *The 2016 U.S. Election: Can Democracy Survive the Internet?*, 28 J. DEMOCRACY 63, 71 (2017) (examining “the challenges that the Internet poses for American democracy, and perhaps democracy in general”); cf. Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 SUP. CT. REV. 1, 42-54 (exploring, in the wake of *Shelby County v. Holder*, 570 U.S. 529 (2013), the extent to which public law can accommodate institutional realism and still be consistent with the rule of law); *id.* at 36-42 (exploring similar themes with respect to state legislatures and election law).

“little fear about the United States lapsing into autocracy.”²⁵ Other scholars examined the possibility of a more dramatic crisis threatening the democratic system, but not in the normal course. Instead, these scholars explored what might happen if a “perfect storm” of electoral outcomes were to force the United States into an election conundrum without a clear legal solution, a scenario foreshadowed by the disputed 2000 presidential election.²⁶ Even in this context, however, scholars focused primarily on problems associated with a lack of clear legal standards, not on the erosion of the rule of law itself. And, of course, consistent with a “broad consensus” that American government was in “decline,” a multitude of scholars identified and examined the many deep dysfunctions plaguing

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25. CAIN, *supra* note 24, at 4-5. For a sense of how dramatically the tone has changed in recent years, compare Cain’s language with, for example, Joseph R. Biden, Jr., President of the United States, Inaugural Address (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/01/20/inaugural-address-by-president-joseph-r-biden-jr> [<https://perma.cc/KG3E-6QU9>], which notes the fragility of democracy and characterizes challenges facing the country as an “attack on democracy and on truth”; Philip Bump, *The Newly Important American Political Axis: Democracy vs. Autocracy*, WASH. POST (Mar. 18, 2022, 12:54 PM), <https://www.washingtonpost.com/politics/2022/03/18/newly-important-american-political-axis-democracy-vs-autocracy> [<https://perma.cc/AW76-MHM5>], which states that “[f]rom the start of his presidency . . . President Biden has framed the central tension of the moment as pitting democracy against autocracy”; Robert Costa, *In Private Speech, Romney Warns of “Extraordinary Challenge” to Preserve American Democracy*, CBS NEWS (Mar. 15, 2022, 12:50 AM), <https://www.cbsnews.com/news/mitt-romney-american-democracy-extraordinary-challenge> [<https://perma.cc/PP9W-3JB5>], which states that “Senator Mitt Romney . . . offered . . . a stark message on the fragility of American democracy”; and *Michael Luttig’s Opening Statement at Jan. 6 Select Committee Hearing*, POLITICO (June 16, 2022, 04:55 PM), <https://www.politico.com/news/2022/06/16/j-michael-luttig-opening-statement-jan-6-hearing-00040255> [<https://perma.cc/A4MK-KQ9J>], which states that “our democracy today is on a knife’s edge.”
26. Linda Feldmann, *Maybe Election Day Won’t Be a Fiasco After All*, CHRISTIAN SCI. MONITOR (Sept. 27, 2006), <https://www.csmonitor.com/2006/0927/p01s01-usp0.html> [<https://perma.cc/US9M-2AA2>]; see, e.g., Edward B. Foley, *The Founders’ Bush v. Gore: The 1792 Election Dispute and its Continuing Relevance*, 44 IND. L. REV. 23, 23-24 (2010).

American politics, often offering developments in election law both as a symptom and a cause.²⁷ Still, even there, the rule of law seemed a safe assumption.²⁸

Since that time, this assumption largely has flipped. Pressures manifesting in recent years have fueled this change, with the 2016 and 2018 elections sparking a fuse and the 2020 elections serving as a powerful accelerant. Now, instead of assuming that the rule of law will hold and that the timeline for reform efforts might appropriately span many election cycles, election-law scholars tend to assume that the rule of law is under great and immediate strain.²⁹ The result is a growing body of works, urgently drafted, attempting to diagnose the comorbid conditions threatening elections in the United States and often offering prescriptions.³⁰

Unifying this newer collection of work is a relative consensus, at least at a high level, that a serious problem exists.³¹ However, this consensus does not extend cleanly to proposed solutions. This disconnect between problems and solutions makes sense; it is always difficult to agree on solutions to intractable problems. Moreover, for this particular set of challenges—actors exploiting

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27. Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804, 808 (2014); see also Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 COLUM. L. REV. 1689, 1692 (2015) (discussing dysfunction in the legislative branch and the nature, extent, and causes of congressional polarization); Jack M. Balkin, *The Last Days of Disco: Why the American Political System Is Dysfunctional*, 94 B.U. L. REV. 1159, 1160 (2014) (“Today, our political system once again seems remarkably dysfunctional.”); Yasmin Dawood, *Democratic Dysfunction and Constitutional Design*, 94 B.U. L. REV. 913, 915 (2014) (“[T]he interaction of various factors—constitutional, political, institutional, and civic—produce dysfunction in governance.”); THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT’S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM*, at xiii-xiv (2012) (describing sources of government dysfunction).
28. Pildes, *supra* note 27, at 808 (“I do not want to suggest that American government is in some state of extreme crisis; American democracy has faced far more dramatic challenges before, and as democratic observers from de Tocqueville to today have recognized, democracy is rarely ‘as bad as it looks’ at any particular moment.” (citations omitted)).
29. See, e.g., Miriam Seifter, *Saving Democracy, State by State?*, 111 CALIF. L. REV. (forthcoming 2023) (manuscript at 5) (on file with author) (“[A] failure to safeguard our democracy in 2022 and 2024 could spell the end of fair and competitive elections.”); Issacharoff, *supra* note 3, at 35 (examining the fragility of elections in the United States and insisting that “[t]he ability of election administrators to hold the line in 2020 should not breed complacency”); Hasen, *supra* note 3, at 265 (“The United States faces a serious risk that the 2024 presidential election, and other future U.S. elections, will not be conducted fairly and that the candidates taking office will not reflect the free choices made by eligible voters under previously announced election rules.”).
30. See *infra* Part II.
31. But see *supra* note 14 and accompanying text (acknowledging a diversity of opinions on the margin).

breakdowns in the rule of law to subvert elections—the prescriptive challenges are even more fundamental. Given that subversive tactics both rely on and reject legal mandates, election subversion inescapably implicates difficult questions above and beyond questions of law.³²

As a result, legal experts continue to have important insights regarding this set of problems. But formal legal analysis necessarily fails to resolve some of the most pressing dilemmas that these problems pose. These concerns reflect more than just abstract theory, as headlines continue to provide inspiration for challenging hypotheticals. Imagine, for example, a state legislature simply refusing to act in response to a court’s direct order. This defiance presents a legal problem, but it offers no clear legal solution.³³ Or imagine an election participant illegally introducing an error into the election process and then later citing that same error as a ground for overturning the results.³⁴ Again, the law struggles to respond.³⁵ These hypotheticals can go on: imagine that a high-ranking official, claiming to apply an election rule faithfully, in fact applies it in a legally outlandish and self-serving manner and then refuses to retract the decision.³⁶ If legal

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32. See *supra* note 1 and accompanying text; *infra* Section I.B; see also Dahlia Lithwick, *The Right to Vote Isn’t a Legal Question. It’s a Power Question.*, SLATE (Nov. 2, 2020, 6:43 PM), <https://slate.com/news-and-politics/2020/11/right-to-vote-legal-power.html> [https://perma.cc/X7WS-A893] (“The most existential questions facing us at the end of this election season cannot be answered by lawyers.”).
33. An illustrative set of disputes—involving redistricting—has been unfolding in Ohio. See Andy Chow, *GOP Leaders Dispute Timeline for New Congressional Map as Groups Say Lawmakers Missed Deadline*, STATEHOUSE NEWS BUREAU (Aug. 18, 2022, 3:30 PM EDT), <https://www.stateneews.org/government-politics/2022-08-18/gop-leaders-dispute-timeline-for-new-congressional-map-as-groups-say-lawmakers-missed-deadline> [https://perma.cc/ZR8C-A9F5] (describing the Ohio state legislature’s continuing refusal to comply with a court order requiring it to redraw electoral-district lines); Michael Wines, *Maps in Four States Were Ruled Illegal Gerrymanders. They’re Being Used Anyway.*, N.Y. TIMES (Aug. 8, 2022), <https://www.nytimes.com/2022/08/08/us/elections/gerrymandering-maps-elections-republicans.html> [https://perma.cc/YMF4-5GRX] (quoting Ned Foley, an election-law professor, calling Ohio’s “especially egregious flouting of the rule of law” an “outright defiance of democracy” and “a warning sign for the rest of the nation”); see also *Ohio House Minority Leader in County Provides Legislative Update*, WILMINGTON NEWS J. (Aug. 26, 2022), <https://www.wnewsj.com/news/213643/ohio-house-minority-leader-in-county-provides-legislative-update> [https://perma.cc/248B-EXC6] (quoting Ohio House Minority Leader Allison Russo, who “called the commission’s failure to produce fair districts ‘lawlessness,’ and attributed the present stall in the redistricting process to Republicans’ hope that the November Ohio Supreme Court elections will produce justices who will approve state and congressional maps that do not remedy gerrymandering”).
34. Manheim, *supra* note 1, at 1-2.
35. *Id.* at 3.
36. Cf. Jamie Gangel & Jeremy Herb, *Memo Shows Trump Lawyer’s Six-Step Plan for Pence to Overturn the Election*, CNN (Sept. 21, 2021), <https://www.cnn.com/2021/09/20/politics/trump-pence-election-memo/index.html> [https://perma.cc/9N7S-SJBY] (explaining how John

solutions exist for these scenarios, they are not easy ones. The central insight here can be reduced to a simple observation: the law has its limits. Even the most eloquent articulation of legal principles is unlikely to convince actors who, for whatever reason, feel little loyalty to the rule of law in the first place. To be effective, prescriptive reforms must somehow fortify the law and at the same time transcend its breakdown. This insight—that the threat of election subversion generates a need for creative, outside-the-box solutions—has helped to fuel election law’s recent pivot.

B. Defining Election Subversion

Before examining scholarship illustrating this rule-of-law pivot, it is useful to further examine what, exactly, constitutes election subversion. Given the frequency with which this term is used, it is surprising just how rarely it is defined. Yet it is helpful to have a working definition.³⁷

This Essay proposes a narrow definition for election subversion: the exploitation of a breakdown in the rule of law to install a candidate into elected office.³⁸ This conduct might alternatively be referred to as *brazen election subversion* to distinguish it from related efforts that are, at times, referred to as “election subversion” but do not necessarily rely on a breakdown in the rule of law.³⁹ Defined in this narrow way, election subversion might occur, for example, if an election official were to intentionally mispresent vote tallies in order to claim that the loser had won.⁴⁰ Another example might be if participants were to submit

Eastman, among others, tried to persuade Vice President Mike Pence to exercise his power in a subversive way before Congress to overturn the 2020 presidential election results); *see also* Memorandum from John Eastman to Mike Pence, U.S. Vice President, on January 6 Scenarios, <http://cdn.cnn.com/cnn/2021/images/09/21/privileged.and.confidential.--jan.3.memo.on.jan.6.scenario.pdf> [<https://perma.cc/Z8FX-WFSM>] (outlining the subversive theory supporting efforts to resist an unfavorable result for the Trump administration in the 2020 presidential election).

37. *See infra* note 46 and accompanying text (examining how a working definition of election subversion can help to narrow, and thereby to advance, prescriptive discussions).

38. *See supra* note 1 and accompanying text.

39. For further discussion of these distinctions, *see infra* notes 48–58 and accompanying text.

40. *See* Michael D. Shear & Stephanie Saul, *Trump, in Taped Call, Pressured Georgia Official to ‘Find’ Votes to Overturn Election*, N.Y. TIMES (May 26, 2021), <https://www.nytimes.com/2021/01/03/us/politics/trump-raffensperger-call-georgia.html> [<https://perma.cc/3KN4-AY2H>] (describing pressure to implement such a scheme); *see also* EDWARD B. FOLEY, *BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES 206–215* (2016) (describing allegations that Lyndon B. Johnson’s victory in 1948—in a runoff that was part of a primary to be the Democratic Party’s candidate for U.S. senator—was procured by fraudulent misrepresentation of the votes cast); *id.* at 119–22 (describing allegations that the

documentation they know to be false to official entities in an effort to upend the election-certification process.⁴¹ Yet another might be if a state legislature were to purport, mere days prior to Congress's count of Electoral College ballots, to appoint electors contrary to the popular vote.⁴²

What unites these disparate schemes is their reliance on a twisted version of legality: an invocation or application of legal principles that is not only erroneous, but clearly erroneous. The subversive actors in the preceding examples are not basing their conduct on a legal theory that is controversial but still, at core, plausible – on an unexpected choice of interpretative method, for example, or a novel application of legal principles. They are not simply engaged in “constitutional hardball.”⁴³ Instead, under any construction of the rules of elections that is plausibly consistent with the legal method, their actions are unlawful.⁴⁴ The law quite clearly prohibits officials from intentionally misrepresenting vote tallies. Of course participants may not lawfully submit knowingly falsified

election result in Florida in 1876 – in the presidential contest between Rutherford B. Hayes and Samuel J. Tilden – was “manufactured by a deliberate manipulation of the count”).

41. See Alan Feuer & Katie Benner, *The Fake Electors Scheme, Explained*, N.Y. TIMES (Aug. 3, 2022), <https://www.nytimes.com/2022/07/27/us/politics/fake-electors-explained-trump-jan-6.html> [<https://perma.cc/U94Y-64K6>] (describing participants attempting to implement such a scheme); see also FOLEY, *supra* note 40, at 229-30 (describing the forgery and submission of hundreds of fake votes in an attempt to swing the 1948 election for U.S. Senator in Kentucky); Mireya Navarro, *Fraud Ruling Invalidates Miami Mayoral Election*, N.Y. TIMES (Mar. 5, 1998), <https://www.nytimes.com/1998/03/05/us/fraud-ruling-invalidates-miami-mayoral-election.html> [<https://perma.cc/QPY3-LTYP>] (describing fraud in the casting of absentee ballots in a mayoral election, including by using the names of voters who had died and by doctoring ballots to shift votes from one candidate to another).
42. See MAJORITY STAFF OF S. COMM. ON THE JUDICIARY, 117TH CONG., *SUBVERTING JUSTICE: HOW THE FORMER PRESIDENT AND HIS ALLIES PRESSURED DOJ TO OVERTURN THE 2020 ELECTION 21-22* (2021) (describing a proposal to implement such a scheme); Kyle Cheney, ‘Provide Some Cover’: *New Eastman Emails Shed Light on His Push to Overturn Biden’s Win*, POLITICO (May 11, 2022, 12:28 AM EDT), <https://politico.com/news/2022/05/10/eastman-emails-pennsylvania-legislators-biden-00031668> [<https://perma.cc/296M-TTVE>].
43. See Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523-553 (2004) (defining constitutional hardball as “political claims and practices . . . that are without much question within the bounds of existing constitutional doctrine and practice but that are nonetheless in some tension with existing pre-constitutional understandings”); see also Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 921-23 (2018) (“A political maneuver can amount to constitutional hardball when it *violates or strains constitutional conventions for partisan ends.*”).
44. To quote a federal judge considering high-level plans to overturn the 2020 presidential election results, “[t]he illegality of the plan was obvious.” *Eastman v. Thompson*, No. 22-CV-00099, 2022 WL 894256, at *22 (C.D. Cal. Mar. 28, 2022); see also *id.* (distinguishing between a “good faith interpretation of the Constitution,” on the one hand, and flagrant disregard of the law, on the other); *id.* (“Disagreeing with the law [as widely understood] entitled President Trump to seek a remedy in court, not to disrupt a constitutionally-mandated process.”).

documentation in official proceedings. And under no viable legal theory may legislatures appoint alternate slates of electors well after the Electoral College has met.⁴⁵ On these points, reasonable minds do not disagree. For any of these subversive efforts to achieve their desired ends, therefore, the rule of law necessarily must break down. And yet, even as these actors attempt to exploit this breakdown, they are purporting to rely on the legal rules and structures of elections to justify the advancement of a candidate who otherwise would have no legal basis to declare victory. In this sense, these actors are attempting to exploit (and even go so far as to induce) a breakdown in the rule of law in order to install a candidate into elected office. They are, in short, attempting to subvert an election.

This definition of election subversion—or, alternatively, what might be termed brazen election subversion—is intentionally narrow.⁴⁶ It limits the term’s scope to conduct that is exceedingly difficult to defend normatively. Indeed, election subversion, so defined, has few, if any, defenders among those committed to the rule of law. As a result, this definition allows more focused conversations over how to respond to the very serious concerns that this form of election manipulation raises. Broader definitions, by contrast, necessarily implicate a wide range of debates, including many that still divide those working in good faith in the election-law community.⁴⁷ Those more expansive debates are essential. But

45. See generally Justin Levitt, *Failed Elections and the Legislative Selection of Electors*, 96 N.Y.U. L. REV. 1052, 1053 & n.3 (2021) (discussing “half-baked” efforts to challenge the 2020 presidential election results); see also William Baude, *The Real Enemies of Democracy*, 109 CALIF. L. REV. 2407, 2417–18 (2021) (referring to the relevant legal restrictions as “hardwired provisions [that] are the foundation for democracy”).

46. This definition may be narrower than those suggested, for example, in recent works by Richard L. Hasen as well as Jessica Bulman-Pozen and Miriam Seifter. See Hasen, *supra* note 3, at 265 (suggesting that subversion occurs when elections are not “conducted fairly” and “the candidates taking office [do] not reflect the free choices made by eligible voters under previously announced election rules”); Bulman-Pozen & Seifter, *supra* note 9 (manuscript at 1) (describing the “new election subversion” as conduct that “threaten[s] the franchise and electoral integrity as well as nonpartisan, expert election administration”); cf. Jerry H. Goldfeder, *Excessive Judicialization, Extralegal Interventions, and Violent Insurrection: A Snapshot of Our 59th Presidential Election*, 90 FORDHAM L. REV. 335, 338 (2021) (defining “voter subversion” as the “[enactment of] laws to allow partisan actors to have the legal authority to ignore or overturn unfavorable results”). To the extent that variations among these descriptions reflect differing views on the definition of election subversion, the differences are largely grounded in semantics rather than substantive disagreement. Each of these works recognizes and engages deeply with the overlapping concerns surrounding elections and the rule of law. See *infra* notes 47–58 and accompanying text (discussing these works further).

47. See Richard H. Pildes & Elizabeth S. Anderson, *Slingshot Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2124 (1990) (“[It is not appropriate to imagine that ‘democracy’ involves] a collective will already in existence, lying in wait for democratic institutions to discover. Before institutions are formed . . . no such collective will exists.”). Compare *id.*, with *A Democracy Crisis in the Making: How State Legislatures Are Politicizing, Criminalizing, and Interfering with Election Administration*, STATES

so is targeted discussion regarding how best to respond to the most normatively indefensible forms of election manipulation.

Of course, even the narrowest of definitions permits debate over its application. To that end, it is easy to identify controversial developments that only arguably reflect a breakdown in the rule of law. In the context of recounts, for example, reasonable minds can disagree as to what constitutes a plausible construction of the relevant legal principles. Reasonable minds, therefore, also can disagree as to what separates an understanding of recount law that is merely controversial (and perhaps, as a result, divisive, unpersuasive, and otherwise problematic, but not the basis for election subversion) from an understanding that cannot plausibly be squared with the legal method.⁴⁸ Another prominent example involves the independent state legislature (ISL) theory – a theory under which a state legislature’s power to regulate federal elections derives directly from the U.S. Constitution in a manner that may displace other state authorities.⁴⁹ Some scholars have defended this theory, at least in selected manifestations, and others have identified it as a potential mechanism for election subversion.⁵⁰ Importantly, even within these debates, the most prominent objections arise from fears not that the ISL theory will be developed and applied in a legally coherent manner, but instead that partisan actors will purport to rely on the theory in ways that are, ultimately, inconsistent with the rule of law.⁵¹ Yet another set of difficult distinctions involves legal decisions premised on erroneous facts.

UNITED DEMOCRACY CTR. ET AL. 8 (Apr. 22, 2021), <https://statesuniteddemocracy.org/wp-content/uploads/2021/06/FINAL-Democracy-Crisis-Report-April-21-1.pdf> [<https://perma.cc/6CEA-NAET>] (defining an election crisis as the phenomenon whereby the purported “outcome of the presidential election could have been decided contrary to the will of the voters,” without providing a clear definition of what, exactly, constitutes the “will of the voters”).

48. To this end, consider the controversies surrounding the 2000 presidential election proceedings in Florida. *See, e.g.*, *Bush v. Gore*, 531 U.S. 98 (2000) (providing endless fodder for debate over whether the U.S. Supreme Court’s decision was correct, incorrect, or clearly incorrect); *Gore v. Harris*, 772 So. 2d 1243, 1262 (Fla. 2000) (providing the same regarding the decision issued by the Florida Supreme Court). My own view is that none of the judicial decisions emanating from the Bush-Gore contest was so inconsistent with the legal method as to implicate a breakdown in the rule of law and therefore that none rose to the level of subversion. My gratitude extends to Michael Morley for a helpful exchange on this topic.
49. *See* Michael T. Morley, *The Independent State Legislature Doctrine*, 90 *FORDHAM L. REV.* 501, 502-03 (2021).
50. *Compare* Morley, *supra* note 49, at 558 (endorsing a cautious reading of the independent state legislature (ISL) theory), *with* Hasen, *supra* note 3, at 287-290 (exploring the possibility of a state legislature citing a more extreme manifestation of the ISL theory in an attempt to reject electoral results).
51. *See* Hasen, *supra* note 3, at 287-290 (describing concerns that a troubling scenario premised on the ISL theory could unfold in part due to a breakdown in “fidelity to judicial independence”); *see also* Morley, *supra* note 50, at 545-46 (describing a similar scenario, if it were to come to pass, as “unjustifiable and disastrous”).

If an official or other participant relies on contested facts to reach an election-related decision, that decision does not necessarily rely on a breakdown in the rule of law. However, it is conceivable that an actor might base a decision on a factual predicate so outlandish and unfounded as to render the decision, in a sense, inconsistent with the legal method. While this line – dividing a contested factual predicate from a subversive factual predicate – is particularly challenging to draw, the law does provide some guidance, at least at the extremes.⁵² In short, reasonable minds can disagree as to what, exactly, constitutes election subversion, even under a narrow definition. Nevertheless, with respect to the most audacious forms of subversion, such as those identified above,⁵³ there tends to be near-unanimous agreement among experts assessing their legality in good faith. While the subversive actor might be claiming to respect the rule of law, in truth that person is attempting to exploit its breakdown.

On a more general level, this narrower definition excludes a wide swath of conduct that, while problematic, does not display the same erratic relationship with the rule of law as does election subversion. An openly illegal and forceful takeover of government, for example, is obviously of great concern. So is any other democratic breakdown that outright rejects the structure and legitimation that law provides. Still, these developments do not, under the narrow definition provided here, constitute election subversion; they do not constitute conduct wherein a candidate has been improperly installed in *elected* office. This exclusion is appropriate. An unabashedly unlawful declaration of power, while exceedingly dire, poses a different set of quandaries for legal experts than does election subversion.

On the flip side, this narrower definition also excludes conduct, however troubling, that remains fastidiously consistent with the rule of law. To be clear, adherence to the rule of law cannot, in and of itself, ensure a free and fair election. A long line of scholars, among others, have long exposed the fallacies of this

52. See, e.g., 18 U.S.C. § 1001 (2018) (criminalizing false statements and concealments made in the context of federal government proceedings); *id.* § 1621 (criminalizing perjury). Similar statutes exist in various states' legal codes. See, e.g., GA. CODE ANN. § 16-10-20 (2022) (criminalizing false statements and concealments made in the context of state government proceedings). See also FED. R. CIV. P. 11 (setting a minimum standard for factual assertions made in federal civil litigation); Renee Knake Jefferson, *Lawyer Lies and Political Speech*, 131 YALE L.J.F. 114, 132 (2021) (examining the lawyer's duty of candor as applied in the context of election-related falsehoods). In the context of defining election subversion, the question is not whether an actor could or should be sanctioned pursuant to any of these constraints; instead, these constraints provide confirmation that baseless factual statements are, in some contexts, inconsistent with the rule of law.

53. See *supra* notes 40-42 and accompanying text.

view.⁵⁴ Still, to the extent that most of the many imperfections in elections do not exploit a “breakdown in the rule of law,” they do not constitute election subversion, at least under the narrow definition proposed here. Again, the exclusion is appropriate, particularly if a central goal is to concentrate the scholarly discussion. Without reliance on a breakdown in the rule of law, these decisions and developments may be corrosive to free and fair elections, but they do not pose the same set of multidimensional quandaries for legal experts as does election subversion.

As a final acknowledgement, this distinction does begin to disintegrate at an extreme. To that end, budding autocrats have relied on the rule of law, at least nominally, to advance illiberal ends. The result can induce, in legal experts, a head-spinning dynamic similar to that induced by election subversion. Kim Lane Scheppelle calls this phenomenon “autocratic legalism.”⁵⁵ Identifying this convergence is among the central insights advanced by Jessica Bulman-Pozen and Miriam Seifter, who have deftly applied their work on state governments to what they refer to as the “new election subversion.”⁵⁶ Bulman-Pozen and Seifter define

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54. Among the innumerable offerings, see, for example, Samuel Issacharoff & Richard H. Pildes, *Majoritarianism and Minoritarianism in the Law of Democracy* 1-7 (Oct. 10, 2022) (unpublished manuscript), <https://ssrn.com/abstract=4240006> [<https://perma.cc/8A6R-SGWT>]; Pamela S. Karlan, *The New Countermajoritarian Difficulty*, 109 CALIF. L. REV. 2323, 2355 (2021); and Lisa Marshall Manheim & Elizabeth G. Porter, *The Elephant in the Room: Intentional Voter Suppression*, 2018 SUP. CT. REV. 213, 214-15; cf. KENNETH ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1951) (introducing what came to be termed Arrow’s impossibility theorem). See generally DANIEL HAYS LOWENSTEIN, RICHARD HASEN, DANIEL TOKAJI & NICOLAS STEPHANOPOULOS, *ELECTION LAW: CASES AND MATERIALS* 3 (7th ed. 2022) (discussing two basic concepts – that certain rights should be guaranteed to all people and that each person should have an equal opportunity to participate in making public policy – and explaining that “[i]n this book, our primary concern will be with how the laws governing elections and politics further (or hinder) the attainment of these democratic goals”). For a discussion of the conceptual challenges posed by lawful reforms enacted toward illiberal ends, see *infra* notes 55, 146 and accompanying text (discussing Kim Lane Scheppelle’s work on “autocratic legalism” and its applicability to elections).
55. See Kim Lane Scheppelle, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 548 (2018) (defining autocratic legalism as the phenomenon of “electoral mandates plus constitutional and legal change [being] used in the service of an illiberal agenda”).
56. Bulman-Pozen & Seifter, *supra* note 9 (manuscript at 2, 3, 32) (exploring the possibility “that future elections will be compromised not by violence but by state officials quietly changing the law,” terming this conduct the “new election subversion,” and arguing that “state courts have ample resources to engage with – and to counter – the new election subversion”); see also Miriam Seifter, *State Institutions and Democratic Opportunity*, 72 DUKE L.J. 275, 280 (2022) (exploring the extent to which “state institutions offer crucial democratic opportunity that federal institutions thwart: the opportunity for popular majorities to rule on equal terms” (emphasis omitted)); 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.” (emphasis omitted)).

this term broadly to refer to actions, including legally sanctioned actions, that “threaten the franchise and electoral integrity as well as nonpartisan, expert election administration.”⁵⁷ Illustrative examples include state legislatures passing statutes to arrogate to themselves power over elections, officials executing sham audits, and lawmakers criminalizing previously lawful manifestations of election administration.⁵⁸

This Essay’s narrower definition of election subversion does not recognize these highly problematic developments as constituting election subversion (or, to use the alternative phrase, it does not recognize these developments as constituting brazen election subversion). These actions do not depend, at least in their current manifestations, on a breakdown in the rule of law. This narrower definition does, however, readily recognize that these developments are likely to *enable* election subversion, both by increasing opportunities for subversion and by increasing the likelihood that subversive attempts will be successful.

This narrower definition responds in a similar way to the phenomenon of “election denialism,” which might be understood as an insistence on denying the lawfully determined outcome of an election.⁵⁹ Without more, election denialism does not constitute election subversion. However, the two phenomena are closely related. People seeking to subvert elections often engage in election denialism in an attempt to hide or justify their subversive efforts.⁶⁰ More broadly, widespread election denialism almost certainly makes it more likely that future attempts to subvert an election will be successful. Still, without an accompanying effort to exploit a breakdown on the rule of law to install a candidate into elected office, election denialism remains a dangerous phenomenon with ominous implications, rather than a concrete manifestation of election subversion.⁶¹

Semantics aside, scholars who study these related phenomena well recognize, in the words of Bulman-Pozen and Seifter, the possibility of election-related threats coming “from within the legal system, not outside of it,” as subversive actors attempt to “coopt the vocabulary and instruments of law,” rather than dismiss the rules out of hand.⁶² They also understand that the law necessarily

57. Bulman-Pozen & Seifter, *supra* note 9 (manuscript at 1).

58. Bulman-Pozen & Seifter, *supra* note 9 (manuscript at 14-21).

59. See Edward Foley, *Three Reforms to Protect Democracy from Election Denialism*, VOLOKH CONSPIRACY (Aug. 29, 2022, 11:25 AM), <https://reason.com/volokh/2022/08/29/three-reforms-to-protect-democracy-from-election-denialism> [<https://perma.cc/CG92-TFRN>] (discussing this phenomenon, its definition, and implications for election subversion).

60. See *supra* notes 38-40 (identifying subversive attempts, fueled by election denialism, emerging from the 2020 elections). See also *supra* note 52 and accompanying text (discussing the strain on the rule of law represented by baseless factual assertions).

61. See *infra* note 89 and accompanying text (discussing the study of disinformation in elections).

62. Bulman-Pozen & Seifter, *supra* note 9 (manuscript at 31).

struggles in response to this sort of threat to the electoral system “[p]recisely *because* of its ostensibly legal, even legalistic, character.”⁶³ It is this erratic and dysfunctional relationship with the rule of law that is central to the phenomenon of election subversion and, accordingly, what has helped to motivate the recent shift in scholarly focus.

II. THREE LAW-BASED APPROACHES FOR BOLSTERING THE RULE OF LAW IN ELECTIONS

The deep challenges, both practical and conceptual, posed by election subversion reveal many questions in need of answers. In response, the election-law community has pivoted to produce a rapidly expanding body of work exploring those dilemmas. An examination of this work reveals legal scholars primarily advancing three law-based approaches to the problem of election subversion. This Essay will refer to these approaches as the constraint-based approach, the incentive-based approach, and the corrective approach.

The first approach explores how prophylactic reform of election rules might constrain participants in ways that minimize opportunities for subversion. The second examines how altering incentives – including by applying principles of social choice, incorporating models of voter behavior, and otherwise relying on nonlegal theorization – might discourage subversion. The third explores how institutions might, after the fact, negate or otherwise correct the effects of attempts at subversion. These categories are not hermetic; at times, they overlap. And the list is not exhaustive. Some alternative approaches – for example, those involving improved civics education or collective peaceful protest⁶⁴ – look beyond law. Still, in recent years, much of the prescriptive work advanced by legal experts in response to concerns over election subversion fits into one or more of these three broad categories. For those seeking to bolster the rule of law, each has significant advantages and disadvantages in counteracting the threat of election subversion.

A. *The Constraint-Based Approach to Election Subversion*

Legal experts tend to be well acquainted with the first approach: proposing legal reforms and preemptive legal analysis in attempts to foreclose an anticipated problem. In the context of elections, this approach explores changes in the

63. *Id.* at 3 (emphasis added).

64. See, e.g., Hasen, *supra* note 3, at 301.

law, as well as clarifications of preexisting rules, to determine what might best constrain actors tempted to engage in subversion.⁶⁵

Much of the recent debate surrounding reforms to the Electoral Count Act of 1887⁶⁶ illustrates this approach. This antiquated statute sets forth procedures for counting electoral votes in a presidential election and, accordingly, governed the congressional proceedings that took place on January 6, 2021 to formalize Joe Biden's electoral victory.⁶⁷ Partly due to the events on January 6,⁶⁸ scholars have grown increasingly concerned about the potential for election subversion to be facilitated by ambiguous language in the Act, including language that allows members of Congress to submit "objections" to the reading of the certification of a state's electoral votes.⁶⁹ Among other possibilities, partisan actors might try to exploit the abstruseness of this language to achieve subversive ends.⁷⁰ In response, the most prominent proposals involve prophylactic attempts to foreclose some of the opportunity for abuse by, among other things, removing the relevant statutory ambiguity.⁷¹ Related work focuses less on the virtues of formally amending the Electoral Count Act and more on how the preexisting statutory language can be interpreted to accomplish similar ends.⁷²

As noted, the basic prescriptive approach reflected in this work is familiar to lawyers: anticipate the problem (here, attempts at subverting an election via Congress's counting of the electoral vote) and prophylactically offer legal constraints meant to foreclose the opportunity for actors to induce the problem. Unsurprisingly, then, this constraint-based approach appears frequently in scholarship on election subversion. With respect to the possibility of state and local

65. As noted above, the troubling flip side of this approach reflects the possibility of subversive actors trying to alter constraints in order to *increase* the opportunities for subversion. See *supra* note 12.

66. 3 U.S.C. § 15 (2018).

67. See generally Derek T. Muller, *Electoral Votes Regularly Given*, 55 GA. L. REV. 1529 (2021) (discussing Congress's power to object under the Electoral Count Act).

68. See *supra* note 3 and accompanying text.

69. 3 U.S.C. § 15 (2018).

70. Matthew Seligman, *Disputed Presidential Elections and the Collapse of Constitutional Norms* 58-63 (Jan. 30, 2022) (unpublished manuscript), <https://ssrn.com/abstract=3283457> [<https://perma.cc/L337-BK23>]; Baude, *supra* note 45, at 2419.

71. See, e.g., Seligman, *supra* note 70, at 63-65; Edward B. Foley, Michael W. McConnell, Richard H. Pildes & Bradley Smith, Opinion, *How Congress Can Fix the Electoral Count Act*, WASH. POST (Jan. 4, 2022, 3:22 PM EST), <https://www.washingtonpost.com/opinions/2022/01/04/congress-fix-electoral-count-act> [<https://perma.cc/5GRU-KXEJ>]; Bob Bauer & Jack Goldsmith, *Correcting Misconceptions About the Electoral Count Reform Act*, LAWFARE (July 24, 2022, 4:09 PM), <https://www.lawfareblog.com/correcting-misconceptions-about-electoral-count-reform-act> [<https://perma.cc/E82A-QACE>].

72. See, e.g., Muller, *supra* note 67; Levitt, *supra* note 45, at 1071-83.

officials adopting abusive tactics when certifying vote totals, for example, Richard L. Hasen has proposed that states “change laws to eliminate any discretion in the certification process.”⁷³ With respect to the potentially subversive implications of the nascent ISL theory,⁷⁴ Michael T. Morley has advocated construing surrounding laws and doctrines to foreclose the possibility of a legislature purporting to “appoint its own preferred electors as a partisan maneuver without regard to the popular vote,” among other prescriptions.⁷⁵ Members of Congress, for their part, have proposed bills seeking to implement some of these proposals.⁷⁶

Of course, proposing a legal amendment or construction is far easier than actually convincing a legislature or other body to adopt it. To that end, this approach has significant implementation challenges. But there is an even more fundamental problem with a constraint-based approach in the context of election subversion: ultimately, in response to threats to the rule of law, it assumes the rule of law will hold. It assumes, more specifically, that actors will follow the law as clarified or amended. Yet actors tempted to engage in election subversion are, by deduction, tempted to subvert legal mandates even while claiming to respect the law. An election official might, for example, cite legal-sounding reasons as the basis for refusing to certify a vote total even if the relevant law, as carefully amended, does not possibly provide them with this discretion under any reasonable construction.⁷⁷ Or a state legislature might insist on its own subversive and implausible understanding of an unsettled legal theory, notwithstanding even

73. Hasen, *supra* note 3, at 297.

74. See, e.g., *id.* at 287; Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731 (2001).

75. Michael T. Morley, *The Independent State Legislature Doctrine*, 90 FORDHAM L. REV. 501, 549 (2021).

76. See, e.g., Electoral Count Reform and Presidential Transition Improvement Act of 2022, S. 4573, 117th Cong. (2022) (reforming the procedures through which the Electoral College votes are counted); Freedom to Vote Act, S. 2747, 117th Cong. (2022) (criminalizing intimidation of election workers and other subversive activities). Efforts at constraining election participants also have occurred, in pockets, at the state level. See, e.g., Nick Reynolds, *Wyoming Looks to Limit Secretary of State Power after 2020 Election Denial*, NEWSWEEK (Aug. 25, 2022, 6:44 PM EDT), <https://www.newsweek.com/chuck-gray-wyoming-limit-secretary-state-election-role-1737141> [<https://perma.cc/9PT8-A7YX>] (“Wyoming lawmakers are looking to strip the secretary of state’s duties to oversee the state’s elections after a candidate who denies the result of the 2020 presidential election won the Republican primary to lead the office.”).

77. Cf. Craig Mauger, *Michigan Supreme Court Again Tells State Board to Certify Unlock Michigan*, DETROIT NEWS (July 9, 2021, 9:06 PM ET), <https://www.detroitnews.com/story/news/politics/2021/07/09/michigan-supreme-court-unlock-michigan-order-state-canvassars-certify-petitions-repeal-1945-law/7920744002> [<https://perma.cc/74DB-C8UT>] (describing a Board of State Canvassers’s refusal to fulfill a clear legal duty to certify petition signatures).

the most persuasive of scholarly arguments foreclosing such a construction.⁷⁸ In either of these scenarios, the legal constraint was in place, but it failed to prevent the attempt at subversion. Some additional mechanism—an after-the-fact response—is needed. Otherwise, the subversive attempt ultimately may succeed.⁷⁹

It is true that, within this body of work, some scholars attempt to respond to this fundamental limitation of the constraint-based approach by exploring the extent to which power—including the power to engage in subversive attempts—can be shifted from one election participant to another. Ideally, the participant benefiting from this shift is more likely to be trustworthy. A proposed reform might, for example, clarify that an incumbent vice president has only a ministerial role in the process of counting the electoral votes governing their own reelection efforts.⁸⁰ When the constraint-based approach effectively incorporates this sort of analysis, it more plausibly justifies its reliance on the rule of law. Even without a shift in power, moreover, the constraint-based approach is able, at least on the margin, to make subversive attempts less plausibly consistent with law

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78. See, e.g., Andy Craig, *The Limits of Independent State Legislature Theory*, CATO INST. (July 6, 2022, 3:29 PM), <https://www.cato.org/blog/limits-independent-state-legislature-theory> [<https://perma.cc/4VFU-LRXJ>] (describing “confusion” over the independent state legislature (ISL) theory due, in part, to the reality that “the real ISL theory, endorsed and advocated by serious legal scholars and founded in a credible (if still debatable) interpretation of the Constitution, is being conflated with arguments made by Trump and his acolytes in the 2020 election,” and explaining that while these latter claims “invoked the theory in name, . . . the interpretation claimed by people such as John Eastman and some Republican lawmakers (and rightly rejected by others) is frivolous and unsupported even on ISL’s own terms”); Richard H. Pildes, Response to Committee on House Administration Re: July 28, 2022 Hearing Majority Questions for the Record [8] (Aug. 12, 2022), <https://electionlawblog.org/wp-content/uploads/RP-responses-on-ISLT-to-House-Committee-on-Administration.pdf> [<https://perma.cc/4J3A-XRWK>] (“There has been loose talk that the doctrine would give state legislatures ‘plenary powers’ over the presidential election, from which it supposedly follows that they could ‘reclaim’ their power to appoint electors after the election has been held. That is legally incorrect—no matter what version of the [independent state legislature theory] the Court might recognize, if it recognizes any such doctrine at all.”); see also Vikram David Amar & Akhil Reed Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 SUP. CT. REV. 1, 51 (criticizing all manifestations of the ISL theory and acknowledging authors’ “hope that what scholars say might matter”).
79. Cf. Hasen, *supra* note 3, at 294 (“Legal change alone is not enough because rules for conducting fair elections are not binding without a deeper commitment to the rule of law.”).
80. See, e.g., Electoral Count Reform and Presidential Transition Improvement Act of 2022, S. 4573, 117th Cong. § 109 (2022). Tellingly, much of the controversy over reforms of the Electoral Count Act involve arguments not only over what power should be shifted, but to whom. See, e.g., Marc Elias, *Reforms to the Electoral Count Act Miss the Mark*, DEMOCRACY DOCKET (July 22, 2022), <https://www.democracymatters.com/news/reforms-to-the-electoral-count-act-miss-the-mark> [<https://perma.cc/Z6HC-5N8J>].

and therefore, presumably, harder to execute.⁸¹ In addition, scholars may at times propose these reforms not necessarily as a strategy to resist election subversion, as this Essay has narrowly defined it, but rather as a strategy to counteract the emergence of related phenomena such as autocratic legalism.⁸²

Still, in response to efforts to exploit breakdowns in the rule of law, the limitations of the constraint-based approach are fundamental: at their core, these efforts seek to counteract election subversion by assuming that the prophylactic constraints will not themselves be subverted. In this sense, the constraint-based approach, by virtue of its basic structure, will struggle to counteract many of the most brazen attempts at subversion.

B. The Incentive-Based Approach to Election Subversion

A second broad approach to election subversion relies on incentive-based legal reforms. Like the constraint-based approach, this approach seeks to use law to prevent attempts at subversion. However, it does not seek directly to deprive actors of the opportunity to subvert. Instead, it seeks to use the law to raise the costs of engaging in subversion and to lower the costs of upholding the rule of law. It is in this sense that this approach seeks to affect the incentives facing those who might be tempted to adopt subversive tactics, as well as those inclined to resist them.⁸³

So defined, this category is very broad, with manifestations of the incentive-based approach taking on a wide variety of forms. Throughout, the defining feature of these prescriptions is their indirect relationship to the problem of election subversion. One illustrative example again comes from Hasen, whose lead proposal in an essay exploring how to minimize the risk of election subversion is strikingly concrete: “All jurisdictions should run elections that produce paper ballots.”⁸⁴ This proposal would not impose a direct legal constraint on any potentially subversive actor. Instead, on Hasen’s reasoning, by ensuring a verifiable and tangible record for elections, it would increase the difficulty (i.e., cost) of subverting an election and, by extension, decrease the difficulty of maintaining

81. Cf. Baude, *supra* note 45, at 2408 (“The real enemies [of democracy] are those who resist the peaceful transfer of power, those who subvert the hardwired law of succession in office. The shield against those enemies may be more formalism, not less.”).

82. See *supra* Section I.B (advancing a narrow definition for election subversion and discussing its overlap with autocratic legalism).

83. As noted above, this approach also has more ominous implications, as subversive actors may try to use an incentive-based approach for perverse purposes—that is, to lower the costs of engaging in subversion and increase the costs of upholding the rule of law. See *supra* note 12.

84. Hasen, *supra* note 3, at 294.

the rule of law.⁸⁵ He bases this conclusion on the reasonable empirical assertion that “[p]aper ballots not only assure that counts can be verified but also help to bolster public confidence.”⁸⁶ That empirical assumption is what links his proposal to the problem of election subversion.⁸⁷

Hasen is far from alone in exploring the extent to which bolstering public confidence in the legitimacy of elections can renew the electorate’s commitment to the rule of law and, by extension, make subversion schemes more difficult to implement.⁸⁸ Others’ works take a similar tact and, accordingly, necessarily rely on empirical understandings of what, in fact, bolster public confidence and how public confidence, in fact, deters or otherwise counteracts subversive attempts. In related works, legal scholars have attempted to take on the sprawling problem of misinformation, including its effects on elections.⁸⁹ In this context, scholars often explore or posit an empirical connection between misinformation and the threat of election subversion. Among other potential linkages, when public discourse is awash in misinformation, the costs of attempting to subvert an election may go down—and, at least as importantly, the costs of resisting election subversion may go up. Another set of prescriptions explores how to reduce the cost of adhering to the rule of law in elections by providing more protection—legal

85. *Id.* at 294-97.

86. *Id.* at 295.

87. Other empirical assumptions may not be as reasonable as this one. As discussed below, a significant disadvantage of the incentive-based approach is its heavy reliance on these sorts of assumptions. *See infra* notes 102-108 and accompanying text (describing the limitations of the incentive-based approach).

88. Some scholars have made this connection explicit. In response to the threat of election subversion, these scholars advocate for improved transparency and related reforms to bolster voter confidence. *See, e.g.*, Hasen, *supra* note 3, at 294-97; Richard H. Pildes, *Election Law in an Age of Distrust*, 74 STAN. L. REV. ONLINE 100, 112 (2022). Other important work, such as scholarship by Rebecca Green, does not focus as explicitly on subversion per se but instead on voter confidence, though the potential implications for the rule of law are similar. *See generally* Rebecca Green, *Election Surveillance*, 57 WAKE FOREST L. REV. 289 (2022) (examining the overlapping phenomena of election transparency and surveillance).

89. *See, e.g.*, HASEN, *supra* note 2; Andrew M. Guess & Benjamin A. Lyons, *Misinformation, Disinformation, and Online Propaganda*, in SOCIAL MEDIA AND DEMOCRACY: THE STATE OF THE FIELD AND PROSPECTS FOR REFORM 10 (Nathaniel Persily & Joshua A. Tucker, eds., 2020); Chloe Wittenberg & Adam J. Berinsky, *Misinformation and Its Correction*, in SOCIAL MEDIA AND DEMOCRACY: THE STATE OF THE FIELD AND PROSPECTS FOR REFORM, *supra*, at 163; Jacqueline Alemany, *Democrats Ramp Up Investigation into Impact of Disinformation on Elections*, WASH. POST (Apr. 21, 2022, 6:30 AM EDT), <https://www.washingtonpost.com/politics/2022/04/21/oversight-trump-disinformation> [<https://perma.cc/S87V-BXWU>]; Cecilia Kang, *Help Wanted: State Misinformation Sheriff*, N.Y. TIMES (May 31, 2022), <https://www.nytimes.com/2022/05/31/technology/misinformation-sheriff-election-midterms.html> [<https://perma.cc/EC98-KGSH>].

and physical – to election officials and workers.⁹⁰ Still more works signal another area for examination: how reforms to campaign-finance law, as well as other regulatory regimes affecting the strength of political parties, might help to adjust the rewards upwards for candidates ready to uphold the rule of law, and downwards for candidates taking the opposite approach.⁹¹

In recent years, some of the most dramatic illustrations of the incentive-based approach seek to raise the cost of subversion in a potentially more fundamental way: by reforming the rules governing who is entitled to serve in positions of power in the first place. Election-law scholars have long explored how altering these rules – through, for example, reforms requiring the appointment of nonpartisan election administrators – might affect how elections are run.⁹² The newer scholarship goes a step further. It seeks, in effect, to apply social-choice theory in an effort to increase the odds that candidates winning elections will be committed to the rule of law.⁹³ In election law, this line of inquiry implicates the rules for identifying an election’s winner from the votes cast – whether by a simple “first-past-the-post” model (typical in American jurisdictions); a “proportional representation” model (rare in American jurisdictions); or some alternative option.⁹⁴

Edward B. Foley, among others, has contributed a great deal to this body of work exploring electoral systems and the rule of law.⁹⁵ In recent years, Foley has

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90. See, e.g., Hasen, *supra* note 3, at 298-99; Bob Bauer & Benjamin L. Ginsberg, Opinion, *Election Officials Need Our Legal Help Against Repressive Laws and Personal Threats*, WASH. POST (Sept. 7, 2021, 6:04 PM), <https://www.washingtonpost.com/opinions/2021/09/07/bauer-ginsberg-election-official-legal-defense-network> [<https://perma.cc/8T5A-SYD7>].
91. See, e.g., Richard H. Pildes, *Small-Donor-Based Campaign-Finance Reform and Political Polarization*, 129 YALE L.J.F. 149, 166-67 (2019); Mike Norton & Richard H. Pildes, *How Outside Money Makes Governing More Difficult*, 19 ELECTION L.J. 486, 500-01 (2020).
92. See, e.g., Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808, 1841-43 (2012).
93. Social-choice theory can be thought of as the “logical study of the properties of collective decision-making processes.” Pildes & Anderson, *supra* note 47, at 2124. It therefore examines what is, in a sense, “the most basic question of democratic politics and welfare economics: How should the preferences of many individuals be amalgamated into a single social choice?” David Luban, *Social Choice Theory as Jurisprudence*, 69 S. CAL. L. REV. 521, 521 (1996).
94. See, e.g., SAMUEL ISSACHAROFF, PAMELA S. KARLAN, RICHARD H. PILDES, NATHANIEL PERSILY & FRANITA TOLSON, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 1148 (6th ed. 2022) (“A survey on which this Note draws suggests there are at least 2,500 works dealing with electoral structures and their consequences.”); see also *id.* at 1148-57 (describing basic distinctions between these electoral systems).
95. See, e.g., Edward B. Foley, *The Constitution and Condorcet: Democracy Protection Through Electoral Reform*, 70 DRAKE L. REV. (forthcoming) [hereinafter Foley, *The Constitution and Condorcet*], <https://ssrn.com/abstract=4127560> [<https://perma.cc/556E-VXUS>]; Foley, *supra* note 2, at 401-03; Edward B. Foley, *Tournament Elections with Round-Robin Primaries: A Sports*

published a collection of works he characterizes as a “neo-Madisonian project.”⁹⁶ This work intends to identify and promote rules that best ensure a particular electoral outcome: that each winning candidate “is most preferred by a majority of voters and, simultaneously, is unlikely once in office to subvert the electoral system itself,” two qualities that Foley considers essential in a democratic system.⁹⁷ Importantly, Foley’s analysis assumes, based on available empirical data, no inherent conflict between these two qualities. To the contrary, he assumes that the candidate most preferred by a majority of voters will, as a general rule, be unlikely to engage in subversive tactics. Underlying Foley’s analysis, in other words, is the empirical assumption that most voters prefer elected officials who will uphold the rule of law. This assumption is critical for sustaining Foley’s argument; without it, improved electoral systems might very well help to ensure the majority’s will is effectuated, but there is no necessary correlation between that majoritarian result and the bolstering of the rule of law going forward.⁹⁸

Analogy for Electoral Reform, 2021 WIS. L. REV. 1187, 1227-29 [hereinafter, Foley, *Tournament Elections with Round-Robin Primaries*]; Lee Drutman, *Elections, Political Parties, and Multiracial, Multiethnic Democracy: How the United States Gets It Wrong*, 96 N.Y.U. L. REV. 985, 1019-20 (2021); LEE DRUTMAN, *BREAKING THE TWO-PARTY DOOM LOOP: THE CASE FOR MULTIPARTY DEMOCRACY IN AMERICA* 239-63 (2020); Richard H. Pildes & G. Michael Parsons, *The Legality of Ranked-Choice Voting*, 109 CALIF. L. REV. 1773, 1832-33 (2021); Stephen Gardbaum & Richard H. Pildes, *Populism and Institutional Design: Methods of Selecting Candidates for Chief Executive*, 93 N.Y.U. L. REV. 647, 706-08 (2018). Reflecting both the widespread interest in these reform proposals, as well as the urgent nature of the threats they seek to counteract, many scholars also have published short pieces aimed at more general audiences. See, e.g., Edward B. Foley, Opinion, *How Our System of Primary Elections Could Destroy Democracy*, WASH. POST (May 19, 2022, 4:25 PM), <https://www.washingtonpost.com/opinions/2022/05/19/primary-elections-majority-vote> [<https://perma.cc/3R8B-MY5S>]; Richard H. Pildes, Opinion, *More Places Should Do What Alaska Did to Its Elections*, N.Y. TIMES (Feb. 15, 2022), <https://www.nytimes.com/2022/02/15/opinion/alaska-elections-ranked-choice.html> [<https://perma.cc/3XSR-CKCF>]; Richard H. Pildes, Opinion, *How to Keep Extremists Out of Power*, N.Y. TIMES (Feb. 25, 2021) [hereinafter Pildes, *How to Keep Extremists Out of Power*], <https://www.nytimes.com/2021/02/25/opinion/elections-politics-extremists.html> [<https://perma.cc/FH9P-G6ES>]; Larry Diamond, *Saving Democracy—Realistically*, 65 DEMOCRACY, Summer 2022, <https://democracyjournal.org/magazine/65/saving-democracy-realistically> [<https://perma.cc/KT35-Y7JH>].

96. Foley, *The Constitution and Condorcet*, *supra* note 95 (manuscript at 21).

97. *Id.*; see Foley, *supra* note 2, at 401-03; Foley, *Tournament Elections with Round-Robin Primaries*, *supra* note 95, at 1227-29; see also Seifter, *supra* note 56, at 298-303 (exploring similar themes in the context of state governments, including how majoritarian-enhancing election structures might serve as a bulwark against subversion); *id.* at 299 (“[S]tate officials responsive to popular voting may be less likely to subvert democracy altogether. Having majoritarian officials serving in the offices of attorney general, the governor’s office, state courts, and in some states, secretary of state, creates some barrier against unpopular antidemocratic movements—or so some recent examples suggest.”).

98. See Foley, *The Constitution and Condorcet*, *supra* note 95 (manuscript at 5) (“If a majority of voters truly wanted these populists to hold office, it would be impossible in a genuine

With this assumption in place, by contrast, Foley can use the majority's preferred candidate as a proxy for a nonsubversive candidate and, accordingly, seek to identify election methods that help to minimize the threat of election subversion.⁹⁹

Incorporating social-choice theory into election law is hardly new; to the contrary, prominent legal scholars for decades have integrated insights from this field.¹⁰⁰ What is more novel, at least for the most fastidiously nonpartisan of the field's scholars, is harnessing social-choice theory with an eye toward influencing the political agendas of those elected to office. To that end, the most recent scholarly works concern themselves not only with how the design of collective decision-making processes can effectuate the preferences of the majority, but also how it can increase the likelihood that candidates who take office will be committed to free and fair elections.¹⁰¹

In short, much of recent scholarship reflects, at least in part, an approach to the problem of election subversion that relies on incentives. It seeks to strategically alter the costs of upholding the rule of law versus engaging in subversion. This approach is appealing in part because of its great potential: in theory, an incentive-based approach can counteract the threat of subversion at its root. Unlike the constraint-based approach, this approach does not problematically assume that the rule of law ultimately will hold. To the contrary, this approach explores how to incentivize participants precisely because it assumes that the rule of law is tenuous.

Yet significant challenges nevertheless underlie an incentive-based approach to election subversion. At the outset, implementation challenges can, again, be quite onerous. At times, these challenges are mundane: for example, it always is difficult to secure funding, even for a worthy cause,¹⁰² and the highly partisan

democracy to prevent them from winning elections. . . . For now, however, the populist movement in America, while ascendant, has not reached majority status throughout the United States.”).

99. This focus on electoral systems is consistent with an incentive-based approach because it poses no direct legal restrictions on potentially subversive actors. Instead, it seeks to raise the difficulty of subverting an election—in theory, quite dramatically—by reducing the likelihood that subversive actors will be able to exploit the powers of elected office in ways that affect election administration.

100. See, e.g., Pildes & Anderson, *supra* note 47, at 2128-43.

101. See Pildes, *How to Keep Extremists Out of Power*, *supra* note 95 (“American democracy faces alarming risks from extremist forces that have rapidly gained ground in our politics. . . . Every reform proposal must be judged through this lens: Is it likely to fuel or to weaken the power of extremist politics and candidates?”).

102. See Joshua S. Sellers & Roger Michalski, *Democracy on A Shoestring*, 74 VAND. L. REV. 1079, 1082 (2021) (“Election officials are, according to Michigan director of elections Christopher Thomas, ‘at the bottom of the food chain when it comes to resources.’”).

nature of election administration complicates the process even further.¹⁰³ Other implementation challenges are extraordinary. Politicians are notoriously loath, for example, to alter election-related processes in ways that might affect their chances at reelection.¹⁰⁴ To take one of many illustrations, it is far from straightforward to convince sitting state legislators (typically elected via a first-past-the-post system) to adopt a dramatically different system (such as a ranked-choice voting system) to govern their own reelection attempts.¹⁰⁵ In addition, the aggressiveness with which the Supreme Court has construed various constitutional-law doctrines, including in its First Amendment jurisprudence, has made it all the more difficult not only to design major structural reforms, but to summon the will to implement them.¹⁰⁶

An even more fundamental challenge to this approach involves its central defining quality: an indirect relationship to the problem of election subversion. Whether this indirect approach proves to be effective – in other words, whether an incentive-based strategy will, in fact, alter the costs of subversion and, if so,

103. *Id.*; see, e.g., Miles Park, *Private Funding Saved the 2020 Election. Now, Some GOP-Led States Are Banning It*, NPR (Mar. 31, 2022, 5:00 AM), <https://www.npr.org/2022/03/31/1088252896/private-funding-saved-the-2020-election-now-some-gop-led-states-are-banning-it> [https://perma.cc/GB5A-9P98].

104. See, e.g., Stephanopoulos, *supra* note 22, at 332 (“[L]egislators are the primary beneficiaries of the redistricting status quo, and therefore have a strong incentive not to change the rules that allow them to be reelected time after time.”).

105. This dynamic helps to explain why structural electoral reforms often find more success via voter initiative than the legislature – and also why the stakes are correspondingly high with respect to the implications of the ISL theory currently before the U.S. Supreme Court. See Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1, 90 (2020) (“Under [an extreme version of the ISL theory], only a state’s institutional legislature may regulate federal elections – no other entities or processes (e.g., public initiatives or referenda) may be involved.”); see also *Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022), *cert. granted sub nom. Moore v. Harper*, 142 S. Ct. 2901 (2022) (No. 21-1271) (presenting questions that, once resolved, likely will help to clarify the Supreme Court’s understanding of the ISL theory and its implications).

106. See Franita Tolson, *Enforcing the Political Constitution*, 74 STAN. L. REV. ONLINE 88, 91 (2022) (criticizing what the author characterizes as the “mistakes” of *Shelby County v. Holder*, 570 U.S. 529 (2013), and *City of Boerne v. Flores*, 521 U.S. 507 (1997), in which the Supreme Court narrowly construed the scope of Congress’s power under the Reconstruction Amendments); Robert Yablon, *Voting, Spending, and the Right to Participate*, 111 NW. U. L. REV. 655, 663-77 (2017) (describing the Supreme Court’s First Amendment jurisprudence, which recognizes aggressive limitations on campaign finance reforms, as compared to its Fourteenth Amendment jurisprudence, which recognizes few constraints on restrictive voting measures); *supra* note 105 (discussing the ISL theory, which, in its more extreme forms, would reduce or eliminate the ability of states to regulate federal elections through public initiatives or other direct-democracy mechanisms). See generally Jamal Greene, *Rights as Trumps?*, 132 HARV. L. REV. 28 (2018) (exploring the Supreme Court’s “rights as trumps” frame of constitutional analysis and how it may further divisions in a pluralist society).

whether participants will, in fact, change their behavior based on those assumptions—implicates a wide swath of empirical questions. These questions often lack clear answers. To consider a prior illustration, Foley’s “neo-Madisonian project” assumes that electoral majorities care about, and disapprove of, election subversion. The issue of whether this assumption is true (and, even if it is true, how this collection of voter preferences might translate into electoral outcomes under various voting systems) implicates empirical questions subject to debate. Other incentive-based prescriptions—including those involving perceptions of legitimacy, the implications of campaign-finance practices, the effects of disinformation, and beyond—all rely on empirical assumptions that, in many respects, cannot be definitively resolved.¹⁰⁷

Formal legal analysis, for its part, has almost nothing to provide in response to these empirical questions. Other disciplines, including political science, have much more to say.¹⁰⁸ However, even works from those disciplines often offer little in the way of consensus, particularly once the question becomes how various observations can or should be applied in practice. In this sense, while an incentive-based approach to election subversion has great potential—by seeking to counteract attempts at subversion at their root—it struggles mightily to provide a clear path forward. Reasonable minds invariably disagree, at least on the margins and often in the very center, on empirical questions that would, if settled, provide more guidance.

In short, the incentive-based approach has great potential. The question is how much of that potential can possibly be realized. It can be profoundly challenging to implement even the most sensible of good-governance measures. And its passage is no guarantee it will work.

C. The Corrective Approach to Election Subversion

The third broad approach to the problem of election subversion involves after-the-fact remedies. Unlike the previous two approaches, this approach does not seek to prevent subversive attempts. Instead, it seeks to counteract the effects. Recent scholarship in this area tends to explore the potential for this role

107. Cf. Ned Foley, *Mitch McConnell and Alaska’s New RCV System*, ELECTION L. BLOG (Aug. 19, 2022, 12:51 PM), <https://electionlawblog.org/?p=131460> [<https://perma.cc/8MGN-74MS>] (discussing possible outcomes—including unintended ones—of altering rules to implement Alaska-style elections in Pennsylvania and Ohio and acknowledging that empirical questions remain open).

108. See generally Bruce E. Cain, *Teaching Election Law to Political Scientists*, 56 ST. LOUIS U. L.J. 725 (2012) (discussing the relevance of political-science research to questions of election law).

to be filled by preexisting institutions, rather than newly created ones. The institution that scholars most often examine is the judiciary.¹⁰⁹

Derek Muller illustrates this approach in recent commentary exploring writs of mandamus.¹¹⁰ Mandamus allows a court “to compel performance of a particular act by a lower court or a governmental officer or body,” most often “to correct a prior action or failure to act.”¹¹¹ As Muller observes, this mechanism potentially can serve as a remedy for election subversion – in particular, subversion attempted by an election administrator or other actor improperly refusing to certify election results (or, even worse, certifying the wrong results).¹¹² Describing this judicial mechanism as “simple” and “longstanding,” Muller identifies multiple occasions in recent history in which, in response to subversive recalcitrance, courts successfully relied on mandamus to direct election officials to fulfill their ministerial duties.¹¹³ In light of this precedent, and notwithstanding important caveats, Muller concludes that, as a corrective response to this brand of subversion, “mandamus works.”¹¹⁴

In my own work, I also have looked to the potential for courts to counteract attempts at subversion. A forthcoming article explores the phenomenon of “electoral sandbagging,” a practice that proceeds in multiple stages.¹¹⁵ First, an election participant perpetuates an error at an early stage of an election’s proceedings. The participant then waits to see how the election results unfold. If the results are favorable, the error slides into irrelevance. If not, the participant still

109. As noted above, the flip side of this approach reflects the opposite scenario, where subversive actors try to undermine institutions that might be able and willing to correct attempts at subversion. See *supra* note 12.

110. See Derek Muller, *Election Subversion and Writs of Mandamus*, ELECTION L. BLOG (Feb. 2, 2022, 7:08 AM) [hereinafter Muller, *Election Subversion and Writs of Mandamus*], <https://electionlawblog.org/?p=127340> [https://perma.cc/SP7S-PGNG]; Derek Muller, *Mandamus Works*, ELECTION L. BLOG (June 18, 2022, 3:40 AM) [hereinafter Muller, *Mandamus Works*], <https://electionlawblog.org/?p=130038> [https://perma.cc/2WRH-Y98F]; Derek Muller, *Is Mandamus Appropriate in the Pennsylvania Certification Dispute*, Chapman v. Berks County Board of Elections?, ELECTION L. BLOG (July 13, 2022, 7:05 AM) [hereinafter Muller, *Is Mandamus Appropriate in the Pennsylvania Certification Dispute*], <https://electionlawblog.org/?p=130639> [https://perma.cc/WGU8-HTPZ]; Derek Muller, *Injunctive Relief Granted, Mandamus Denied in Pennsylvania County Certification Dispute*, ELECTION L. BLOG (Aug. 20, 2022, 7:53 AM), <https://electionlawblog.org/?p=131475> [https://perma.cc/JB64-R5ZY].

111. *Mandamus*, BLACK’S LAW DICTIONARY (11th ed. 2019).

112. Muller, *Election Subversion and Writs of Mandamus*, *supra* note 110.

113. *Id.*

114. Muller, *Mandamus Works*, *supra* note 110. But see Muller, *Is Mandamus Appropriate in the Pennsylvania Certification Dispute*, *supra* note 110 (“[S]tand-alone mandamus is not always going to be a solution where there’s at least some uncertainty or ambiguity about legal duties.”).

115. Manheim, *Electoral Sandbagging*, *supra* note 1.

has an ace in the hole: that same error can now be used as grounds for overturning the disfavored results. So defined, electoral sandbagging has the potential to be a powerful tool in the arsenal of those seeking to subvert elections.¹¹⁶ In a somewhat analogous context, courts have developed doctrines to identify, defuse, and deter these types of maneuvers,¹¹⁷ and, in light of this precedent, I propose that courts likewise be employed, where possible, to help counteract electoral sandbagging.¹¹⁸ Other scholars have similarly proposed that the courts serve as frontline medics in the battle against election subversion.¹¹⁹ Many of these works have carefully – and appropriately – distinguished between federal courts and state courts.¹²⁰

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116. Electoral sandbagging is not necessarily subversive; candidates can follow the law diligently and still attempt to employ this maneuver. Of course, from a normative perspective, even this more benign form of electoral sandbagging is difficult to justify. *See id.* (manuscript at 50-51).
117. More specifically, this practice has a parallel in litigation, where sandbagging has been defined as “suggesting or permitting, for strategic reasons, that the trial court pursue a certain course, and later – if the outcome is unfavorable – claiming that the course followed was reversible error.” *Id.* at 2 (quoting *Freytag v. Comm’r*, 501 U.S. 868, 895 (1991) (Scalia, J., concurring in part and concurring in the judgment)).
118. *Id.* (manuscript at 53-54).
119. *See, e.g.,* Foley, *The Constitution and Condorcet*, *supra* note 95 (manuscript at 5) (“Perhaps, as an element of Madisonian checks and balances, the courts could be counted upon to insist that these populists relinquish power when the valid votes showed that they had lost.”); Bulman-Pozen & Seifter, *supra* note 9 (manuscript at 32) (“[T]he democracy principle underscores that state courts have not only the authority but also the duty to invalidate election-subverting measures.”); Bob Bauer & Jack Goldsmith, *Bauer and Goldsmith: “Clarity about the Electoral Count Reform Act and Gubernatorial Certification,”* ELECTION L. BLOG (Sept. 12, 2022, 6:30 AM), <https://electionlawblog.org/?p=131890> [<https://perma.cc/B42K-ELA9>] (discussing the role of judicial review in proposed changes to the Electoral Count Act).
120. These discussions draw on and extend decades’ worth of debate over the existence of parity between the state and federal courts. Among other distinctions, federal judges have lifetime appointments, as well as a tradition of recognizing strict jurisdictional constraints, which together may make them less nimble in response to innovative attempts at subversion. State judges, by contrast, are often elected or otherwise more responsive to the electorate, and collectively they have adopted a more heterogeneous approach to the scope of the judicial power. *See* Bulman-Pozen & Seifter, *supra* note 9 (manuscript at 32) (“Whatever the limits of federal courts when it comes to reviewing these measures, state courts have ample resources to engage with – and to counter – the new election subversion. The democracy principle in state constitutions commits states to popular sovereignty, majority rule, and political equality.”). *Compare, e.g.,* *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019) (concluding that the federal courts lack the power to adjudicate partisan gerrymandering claims), *with* N.C. State Conf. of NAACP v. Moore, 876 S.E.2d 513, 540-41 (N.C. 2022) (concluding that, in light of elections that had been held using unconstitutionally racially gerrymandered districts, the state legislature might not have been capable of exercising its full power, potentially requiring the state courts to invalidate a voter-approved election restriction). *See generally* Pildes, *supra* note 24, at 6-12 (discussing parity debates).

Despite this focus, the corrective approach need not necessarily rely on the judiciary. To this end, scholars have explored the potential for other entities to provide remedies. Some commentators have looked to Congress, for example, with its power under the Fourteenth Amendment to disqualify insurrectionist candidates from taking office.¹²¹ In one particularly provocative essay, Nicholas O. Stephanopoulos examines a more radical idea: the potential of two “non-legislative powers” to “bring about a more majoritarian democracy.”¹²² Stephanopoulos first examines the right of each chamber of Congress, under Article I, Section 5 of the Constitution, to be “the Judge of the Elections . . . of its own Members.”¹²³ Each house of Congress could, in theory, use this power to refuse to seat candidates whose victories depended on subverted or otherwise defective elections. Stephanopoulos separately looks to the President’s authority, under Article IV, to guarantee a republican form of government. “Thanks to this position,” Stephanopoulos explains, “the President could take whatever steps are necessary, in the chief executive’s judgment, to prevent states from lapsing into non-republicanism or to remedy anti-republican abuses.”¹²⁴ While Stephanopoulos’s published work on this topic primarily focuses on voter suppression, gerrymandering, and other potentially antimajoritarian measures, his logic extends to attempts at election subversion—which, he appropriately acknowledges, might also be advanced, perversely, through unscrupulous use of these very same nonlegislative powers.¹²⁵

Although Stephanopoulos proposes the creation of a new entity—a nonpartisan panel whose decisions, in his view, should be “rubberstamp[ed]”¹²⁶—the bulk of his analysis is directed at preexisting institutions: the presidency and

121. See, e.g., Daniel J. Hemel, *Disqualifying Insurrectionists and Rebels: A How-To Guide*, LAWFARE (Jan. 19, 2021), <https://www.lawfareblog.com/disqualifying-insurrectionists-and-rebels-how-guide> [<https://perma.cc/W43S-Z2DV>]; Tom Ginsburg, Aziz Z. Huq & David Landau, *The Law of Democratic Disqualification*, 111 CALIF. L. REV. (forthcoming 2023), <https://ssrn.com/abstract=3938600> [<https://perma.cc/2VDH-ZHVP>]. Even in the context of disqualification claims, the courts might also play a role. See Ronald Sullivan, *Forgotten Insurrection Clause of 14th Amendment Used to Force GOP Members of Congress to Defend Their Actions on Jan. 6*, CONVERSATION (May 9, 2022), <https://theconversation.com/forgotten-insurrection-clause-of-14th-amendment-used-to-force-gop-members-of-congress-to-defend-their-actions-on-jan-6-181905> [<https://perma.cc/4P52-ZPK6>].

122. Nicholas O. Stephanopoulos, *The New Pro-Majoritarian Powers*, 109 CALIF. L. REV. 2357, 2359 (2021) (emphasis omitted).

123. *Id.* (quoting U.S. CONST. art. I, § 5).

124. *Id.* at 2360.

125. *Id.* at 2360–61; see also *supra* note 12 (discussing the possibility of subversive actors exploiting law-based mechanisms to expand subversive opportunities and make them more likely to succeed).

126. *Id.* at 2369.

each house of Congress. Other scholars have long explored the possibility of creating new entities, including specialized election courts, that might be empowered to resolve disputes.¹²⁷ Yet their more recent scholarship tends to sidestep proposals that would require the creation of new institutions. Instead, when exploring the corrective approach to election subversion, scholars tend to focus on institutions that already exist.

This pattern may reflect one of the major advantages of the corrective approach to election subversion, at least to the extent it relies on preexisting institutions: the approach is, relatively speaking, far more straightforward to implement than other approaches. Courts, in particular, exist to address complaints. Were legislatures more unified in their commitment to the rule of law and otherwise well-functioning, this advantage might not be as profound. But when political fragmentation and hyperpolarization dominate government, particularly at the national level,¹²⁸ implementation challenges often prove fatal to otherwise worthy proposals. As a result, corrective actions by preexisting institutions might be among the only options realistically available to those committed to free and fair elections.

The corrective approach has other advantages as well. For legal experts, at least, the basic framework is familiar: law can help to remedy violations of law. The approach is therefore relatively easy to understand and implement. Perhaps even more importantly, this approach does not, in the same manner as an incentive-based approach, rely on empirical determinations without clear answers. In other words, the expectation is not that these corrective actions somehow will persuade actors to uphold election law voluntarily when they otherwise might have tried to subvert it. Instead, the expectation is that the corrective actions will, in effect, force participants in the electoral system to adhere to the rule of law.

So framed, this advantage also helps to signal the limitations of the corrective approach. Law-based remedies may purport to compel someone to act (or refrain from acting), but these remedies can be extremely difficult to enforce in the face of recalcitrance, particularly by governmental actors.¹²⁹ In this sense, the corrective approach suffers from a fundamental limitation that is similar to that affecting the constraint-based approach: in the end, it relies on the continued

127. See, e.g., Edward B. Foley, *The McCain v. Obama Simulation: A Fair Tribunal for Disputed Presidential Elections*, 13 N.Y.U. J. LEGIS. & PUB. POL'Y 471, 508-09 (2010).

128. See Michael Dimock & Richard Wike, *America Is Exceptional in Its Political Divide*, PEW CHARITABLE TRS. (Mar. 29, 2021), <https://www.pewtrusts.org/en/trust/archive/winter-2021/america-is-exceptional-in-its-political-divide> [<https://perma.cc/5C93-DHGT>]; THOMAS E. MANN & NORMAN J. ORNSTEIN, *supra* note 27, at 45-46 (2012); Pildes, *supra* note 27, at 809.

129. See *supra* note 33 (discussing recent recalcitrance in Ohio and its implications); see Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685, 687-89 (2018).

functioning of the rule of law. If a breakdown in the rule of law runs deep enough—if election officials defiantly ignore writs of mandamus, if the courts are captured by subversive judges, if the executive branch is unable or unwilling to enforce the law, if violence prevails, and so on—there is no easy or obvious backstop.

A second disadvantage of the corrective approach is its timing. Rather than preventing subversion before it occurs—and, accordingly, before the specific nature of the subversive attempt, including the partisan valence of that attempt, has become clear—the corrective approach comes later in the process. Indeed, the correction often comes after Election Day, when the votes already have been cast, and it is all the more difficult for institutions to remain impartial (and, relatedly, maintain the appearance of impartiality). In the world of election law, therefore, commentators have long recognized the advantages of correcting problems *ex ante*, rather than *ex post*.¹³⁰

A third disadvantage to the corrective approach involves the narrow opportunities that institutions have—at least under current law—to counteract attempts at election subversion. Again, the courts provide the clearest, and most important, illustration. The federal courts, in particular, have adopted a relatively strict understanding of their jurisdictional limits and the scope of their remedial powers.¹³¹ While the state courts often take a more relaxed approach to these limitations, they do not, as of yet, have a robust and well-established record of implementing creative remedies in response to attempted election subversion.¹³² Tellingly, the success of both the state and federal courts after the 2020 elections—a deft and uniform rejection of attempts at subverting the results through litigation—was primarily in a defensive posture.¹³³ Stated otherwise, to maintain the rule of law against these subversive attempts, the courts did not

130. See, e.g., Derek T. Muller, *Reducing Election Litigation*, 90 *FORDHAM L. REV.* 561, 574 (2021) (quoting Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 *STAN. L. REV.* 1, 37 (2007)); cf. *Bush v. Gore*, 531 U.S. 1046, 1047 (2000) (Scalia, J., concurring) (“Count first, and rule upon legality afterwards, is not a recipe for producing election results that have the public acceptance democratic stability requires.”).

131. See, e.g., *Texas v. Pennsylvania*, 141 S. Ct. 1230, 1230 (2020); *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019); *Grove v. Emison*, 507 U.S. 25, 34 (1993); *Nixon v. United States*, 506 U.S. 224, 234-35 (1993).

132. Still, this record is growing. See *supra* note 120 and accompanying text; see also Manheim, *supra* note 1 (manuscript at 55) (discussing the potential for equitable doctrines to be expanded).

133. See JOHN DANFORTH, BENJAMIN GINSBERG, THOMAS B. GRIFFITH, DAVID HOPPE, J. MICHAEL LUTTIG, MICHAEL W. MCCONNELL, THEODORE B. OLSON & GORDON H. SMITH, *LOST, NOT STOLEN: THE CONSERVATIVE CASE THAT TRUMP LOST AND BIDEN WON THE 2020 PRESIDENTIAL ELECTION* 3-6 (2022), <https://lostnotstolen.org> [<https://perma.cc/UA4R-8UGB>] (cataloging litigation).

need to issue novel remedies or adjudicate substantively meritorious claims brought under unusual postures. Instead, the courts simply had to acknowledge the lack of merit in meritless claims and, accordingly, refuse to award inappropriate relief.¹³⁴ Were actors to attempt to subvert elections through other means – for example, through subverting the electoral count in the joint session of Congress – it is not clear under current law what, if anything, courts could do in response.¹³⁵

A final disadvantage of the corrective approach recognizes that the relevant institutional leaders simply may not be willing to correct all forms of subversion.¹³⁶ Perhaps this unwillingness would itself be grounded in rule-of-law concerns: consider, to that end, a judge dismissing a substantively meritorious claim on jurisdictional grounds. Or consider good-faith differences in opinion regarding what exactly constitutes election subversion, and therefore what, on the substance, might possibly warrant relief in the first place. More ominously, an unwillingness to stop subversion may not be grounded in rule-of-law concerns. It is possible – albeit deeply concerning to consider – that judges and other high-ranking institutional actors might themselves be subversive actors. At a minimum, the public’s diminished confidence in the U.S. Supreme Court may suggest this perception,¹³⁷ compounding other disadvantages to a corrective approach.

It is in response to these sorts of concerns that election scholars may begin to hear an echo: a renewal of the criticisms of the courts that, years ago, inspired the field’s institutional turn. Preeminent scholars have for years persuasively argued that “courts are generally not the institutions best suited” for engaging with many of election law’s thorniest issues.¹³⁸ Recent scholarship has gone still further in questioning the extent to which courts offer any value in election law – and in particular whether the U.S. Supreme Court, with its current composition, can even possibly serve as “a vanguard of democracy protection and constitutional renewal” rather than as an enabler of democracy’s decline.¹³⁹

134. *Id.* at 57.

135. Richard H. Pildes, *Election Law in Age of Distrust*, 74 STAN. L. REV. ONLINE 100, 110 (2022).

136. See generally Pildes, *supra* note 24 (exploring the tensions between treating an institution like the judiciary as an “institutional black box” and attempting to assimilate understandings of “how these institutions actually function in, and over, time”).

137. See Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (June 23, 2022), <https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx> [https://perma.cc/Y5BB-X5Q6].

138. Gerken & Kang, *supra* note 15, at 89.

139. Karlan, *supra* note 54, at 2354 (quoting JACK M. BALKIN, *THE CYCLES OF CONSTITUTIONAL TIME* 144 (2020)); see also Michael Kang, *The Post-Trump Rightward Lurch in Election Law*, 74 STAN. L. REV. ONLINE 55, 57, 66 (2022) (predicting that the Court will continue to reject

Much of this criticism is valid. Still, the problems on the eve of the 2022 elections are not the problems of a decade prior. A reconsideration of options – an open mind, an ongoing communal brainstorm – is appropriate. Having already pivoted on a dime, even as rapidly unfolding events altered the playing field, scholars well recognize this reality. And so, in response to profound strains on the country’s electoral systems, especially those presented by the threat of election subversion, the question returns. With no clear path forward, how should experts expend their energy?

III. ELECTION LAW AT A SPRINT

Election subversion is a messy, complicated, and variable problem that resists a clean, straightforward, or static solution. No one knows exactly what is needed to resist the threat: which proposals are most likely to be implemented, how the constantly evolving political scene will affect the dynamic going forward, or the precise answers to any number of other difficult questions. It is appropriate, therefore, for legal experts to explore a range of prescriptive options.¹⁴⁰

A review of recent work reveals several insights consistent with the rule-of-law pivot that may help to guide efforts, at least in the short term. One unifying theme is the inherent shortcomings of any law-based approach. These limitations reflect, among other complications, the messy relationship between election subversion and the rule of law. A second, and corresponding, theme is the value of expansion: expansion into other disciplines, to begin to answer questions that the law cannot; expansion beyond the American experience, to identify comparable precedents for developments that are unprecedented in the

ideological compromise in favor of a “virtually complete deregulation of minority voting rights and campaign finance,” among other “previously unimaginable outcomes”); Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 SUP. CT. REV. 111, 117 (arguing that the current Supreme Court flips the wisdom of *Carolene Products*’s famous footnote 4 “on its head” by deciding, in response to pathologies that undermine fundamental principles of majoritarianism and pluralism, to “intervene in the political process, or refrain from acting, in a pattern that *perpetuates* the pathologies” (emphasis added)); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n. 4 (1938).

140. As Hasen has aptly put this point, “[i]n thinking about how to minimize the risk of election subversion, it is best not to think of it as an on-off switch where either we cut off the chances of a stolen election or not. It is better to think of all the incremental steps we can take to put up roadblocks against electoral malfeasance.” Richard L. Hasen, *What the Critics Get Incredibly Wrong About the Collins-Manchin Election Bill*, SLATE (July 25, 2022, 9:51 AM), <https://slate.com/news-and-politics/2022/07/collins-manchin-election-bill-democrats-should-grab.html> [<https://perma.cc/V5E3-M4BE>]; see also Seifter, *supra* note 29 (manuscript at 9) (applying a concept developed in the context of climate-change policy to suggest that, in the absence of a silver bullet, there is a need to counteract democratic decline via “silver buckshot”).

United States; and expansion of the window of discourse, to include work that may be undertheorized or otherwise imperfect. None of these proposed extensions is new to the field of election law; scholars have long strived to approach their work with a broad lens.¹⁴¹ Yet in response to the threat of election subversion, the need for expansion is all the more acute. This heightened need reflects both the legally perverse nature of the problem and the exigent nature of the risk.

Illustrating the need for expansion into other disciplines is the reality that many of the most promising prescriptions for election subversion are premised on altered incentives – or, at least, that is the idea. In practice, it is not clear, and likely cannot be clear prior to implementation, whether these incentives will materialize and work. Despite this indeterminacy, disciplines beyond law provide tentative answers to many of the empirical questions underlying the design of these proposals. These disciplines include not only political science, but also data science, information science, psychology, journalism studies, sociology, economics, and beyond. Finding ways to incorporate these insights into legal scholarship – to identify, translate, and apply the work from one field to another – is far from trivial, which helps to confirm the potential and immediate value of these efforts in the context of election subversion. One recent example is a concerted effort by Nathaniel Persily and Joshua A. Tucker to bring together works across multiple disciplines exploring the connection between social media and threats to democracy.¹⁴² Another is a working paper, published by the Berkman Klein Center, exploring the causes and nature of the 2020 disinformation campaign surrounding election fraud and mail-in ballots.¹⁴³ Among the areas of need on this front are further works harnessing a sprawling, multidisciplinary collection of research – scholarship exploring the history and potential of alternate electoral

141. Richard Pildes’s work is illustrative. See Pildes, *supra* note 27, at 827 (“Unless we attend to the ways in which political power is actually mobilized, organized, exercised, and marshaled, then policy proposals based on an individualistically driven vision of politics, or on non-grounded abstract democratic ideals such as ‘participation’ or ‘equality,’ can perversely contribute to undermining our institutional capacity to govern.”); *id.* at 842 n.110 (comparing the American system of campaign finance to those in Western Europe for the purpose of understanding reform proposals); *id.* at 847 (incorporating empirical work on the effects of transparency to guide prescriptive conclusions); *id.* at 842 (“But fixing the details is less important than generating discussion about this general direction for [reform].”).

142. SOCIAL MEDIA AND DEMOCRACY: THE STATE OF THE FIELD AND PROSPECTS FOR REFORM, *supra* note 89.

143. Yochai Benkler, Casey Tilton, Bruce Etling, Hal Roberts, Justin Clark, Robert Faris, Jonas Kaiser & Carolyn Schmitt, *Mail-In Voter Fraud: Anatomy of a Disinformation Campaign*, (Berkman Klein Ctr., Working Paper No. 2020-6), <https://ssrn.com/abstract=3703701> [<https://perma.cc/7NTL-TMSC>] (explaining that the team’s findings suggest, contrary to prevailing wisdom, that a disinformation campaign affecting the 2020 election cycle was led by elites and the media, rather than social media, and proposing prescriptions that reflect this understanding).

system designs—in order to shed more light on the potential of social-choice theory to make elections more difficult to subvert.¹⁴⁴

A similar logic helps to explain the heightened relevance of comparative work. In the United States, some of the conditions triggering acute concern over election subversion are unprecedented, at least in recent times, but they often have precedents in other countries. Scholars such as Kim Lane Scheppele have long studied constitutional systems under stress, including in Hungary and Poland.¹⁴⁵ In recent years, Scheppele has applied these insights to democratic strain in the United States.¹⁴⁶ Rachel Kleinfeld has similarly applied her comparative work on violence, political conflict, and democratic failure to the domestic context.¹⁴⁷ Among other benefits, these sorts of analyses provide a language for scholars to use when encountering and examining conceptually complicated phenomena, such as autocratic legalism. It also offers theories to help understand and explain these trends. It may even help to provide a predictive glimpse into the future, given developments across nations that, at a high enough level of abstraction, appear to be following a similar pattern. The field would benefit from additional work applying these insights to the threat of election subversion in the United States.

Of course, these expansions would not be able to resolve all outstanding uncertainty or otherwise fully negate the deficiencies of any approach to the problem of election subversion. As discussed in Part II, each of the most prominent approaches has inherent limitations. The constraint-based approach responds to concerns about subversive actors by trusting that new and improved election laws somehow will resist similar subversive efforts. The incentive-based approach relies on assumptions that, once put to the test, very well may implicate the law of unintended consequences. The corrective approach is limited on

144. See *supra* notes 93-101 and accompanying text.

145. See, e.g., Miklós Bánkúti, Gábor Halmai & Kim Lane Scheppele, *From Separation of Powers to Government Without Checks: Hungary's Old and New Constitutions*, in CONSTITUTION FOR A DISUNITED NATION: ON HUNGARY'S 2011 FUNDAMENTAL LAW (Gábor Attila Tóth ed., 2012). For more recent comparative work, see, for example, ROSALIND DIXON & DAVID LANDAU, *ABUSIVE CONSTITUTIONAL BORROWING: LEGAL GLOBALIZATION AND THE SUBVERSION OF LIBERAL DEMOCRACY* (2021).

146. See Scheppele, *supra* note 55, at 548 (defining autocratic legalism as the phenomenon of “electoral mandates plus constitutional and legal change [being] used in the service of an illiberal agenda”).

147. See, e.g., Rachael Kleinfeld, *Five Strategies to Support U.S. Democracy*, CARNEGIE ENDOWMENT FOR INT'L PEACE 4-5 (September 2022), https://carnegieendowment.org/files/202209-Kleinfeld_US_Democracy_final.pdf [<https://perma.cc/VTG5-37QW>]; RACHAEL KLEINFELD, *A SAVAGE ORDER: HOW THE WORLD'S DEADLIEST COUNTRIES CAN FORGE A PATH TO SECURITY* (2018). My gratitude extends to Miriam Seifter for a helpful exchange on this topic.

multiple fronts: by the jurisdiction of the relevant institutions; by the willingness of corrective actors to defend the rule of law; by its assumption that subversive actors will tolerate a legal remedy; and more. In addition, and importantly, all these approaches pose challenges of implementation, some more serious than others. There is, in short, no silver bullet.

Yet these imperfections should not lead to hesitation. Here, it is critical that scholars continue to bear in mind the urgent pressures facing those committed to the rule of law in elections. For scholars to advance a prescription in a timely manner, important questions must remain unanswered. And without an optimal approach to the problem of election subversion, a wide range of approaches are worth considering. Scholars still should debate which prescriptions to prioritize – and so they are – but no amount of debate will produce a clear and distinct path forward. Instead, scholars must continue to muddle through.

In so doing, it is important to recognize that the judiciary has a critical role to play. Over a decade into the field's institutional turn, skepticism of the courts runs deep among many in the election-law community. Yet the judiciary serves, among its many roles, as the cornerstone for the corrective approach to election subversion. And the corrective approach has important advantages over the other approaches, particularly when it relies on preexisting institutions. It can, in some contexts, be easier to understand, tailor, and implement than incentive-based responses. In addition, remedial responses often can be easier to implement, and perhaps in some scenarios are more forceful against subversion, than constraint-based efforts. The relative ease with which the corrective approach can be implemented, especially through preexisting institutions, is particularly advantageous in light of the time pressures imposed by the growing threat of election subversion.

Moreover, for all their institutional limitations, courts do display important strengths in response to election subversion. Any member of the bench quickly becomes familiar, for example, with attempts to exploit the litigation process in unfair ways. A well-developed body of rules and doctrines, including those associated with laches, estoppel, sanctions, burdens of proof, and more, help to channel the work of the courts even when participants are not necessarily operating in good faith. As discussed above, on this front, the months after the 2020 elections proved illustrative. Litigants filed dozens of lawsuits, often as aggressive as they were spurious, attempting to unsettle the results of the presidential election. Courts across a multitude of jurisdictions handled these high-stakes lawsuits with ease.¹⁴⁸ It is true that the remedies in these cases came in the form

¹⁴⁸. See, e.g., *Donald J. Trump for President, Inc. v. Sec'y of Pa.*, 830 F. App'x 377, 381 (3d Cir. 2020) (“[C]alling an election unfair does not make it so. Charges require specific allegations and then proof. We have neither here.”); see also *DANFORTH ET AL.*, *supra* note 133, at 3 (“Of the 64 cases brought by Trump and his supporters, twenty were dismissed before a hearing on the

of dismissals, rather than affirmative relief.¹⁴⁹ In that sense, they proved to be consistent with one of the most significant limitations of the corrective approach: that, under preexisting law, only a limited number of remedies may be available to a party seeking to counteract election subversion.¹⁵⁰ Nevertheless, the nuances of election subversion do implicate, in important ways, the strengths of the courts.

In short, even if scholars remain deeply skeptical of the role that the courts play in election law, they should be prepared to turn back again to the judiciary to explore, among other things, the ways this institution can help safeguard the rule of law. In the context of election subversion, this debate has very much not yet “run its course.”¹⁵¹ Among the priorities in this area are works further exploring the potential reach and limitations of mandamus, injunctive relief, and related mechanisms that may help to bring recalcitrant election participants into compliance with the rule of law.¹⁵² Scholars must also contend with the reality that the judiciary is not uniformly committed to any single vision of democracy, much less a representation-reinforcing conception of judicial review, and that even courts may, at times, be captured by subversive actors.¹⁵³

All this work is difficult. And the time pressures associated with election cycles make it harder. However, identifying the rule-of-law pivot as a joint effort directed at a convoluted, multidimensional problem may help to productively channel energies, including in the ways suggested above. It likewise may help to reveal the very deep complexity of the central question motivating this work, which asks how to use *law* to counteract efforts to use *law* to subvert *law*. Recognizing the collective energy behind this pivot also may help to make the work feel, if nowhere near easy, at least a bit more manageable.

CONCLUSION

In recent years, election law has taken on a three-dimensional quality. Scholars still examine the substantive legal questions that motivated the field from its

merits, fourteen were voluntarily dismissed by Trump and his supporters before a hearing on the merits, and 30 cases included a hearing on the merits. Only in one Pennsylvania case involving far too few votes to overturn the results did Trump and his supporters prevail.”).

149. See JOHN DANFORTH ET AL., *supra* note 133 (describing litigation).

150. See *supra* notes 129-139 and accompanying text (discussing the limitations of the corrective approach, including its frequent turn to the courts).

151. Heather K. Gerken & Michael S. Kang, *Déjà Vu All Over Again: Courts, Corporate Law, and Election Law*, 126 HARV. L. REV. F. 86, 86 (2013).

152. See *supra* notes 110-120 and accompanying text.

153. See *supra* notes 136-137 and accompanying text. My gratitude extends to Ned Foley for a helpful exchange on this topic.

very start. And, consistent with the field's institutional turn, scholars remain committed to exploring the importance and implications of institutional design. But now scholars must also concern themselves with the intricate and ever-changing ripple effects caused by a wavering rule of law. These complexities translate into projects that easily could fill a multitude of research agendas. As a result, the field of election law is energized. It also is expanding, as it must: for legal scholars to explore unprecedented threats, fueled by efforts that simultaneously rely on and reject law, they must be prepared to expand the scope of their analysis. This collective effort already is underway. Still, for those committed to free and fair elections, underlying developments in the United States remain ominous. For this community, having pivoted, it is now time to sprint: the clock continues to count down to the next set of elections.

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