

## Vote Dissociation

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**ABSTRACT.** The most recent presidential election highlighted deep-seated problems in American democracy that existing voting rights law cannot fix. This Essay employs the term “vote dissociation” to refer to a species of voting rights injury that is qualitatively different from both vote denial and vote dilution. A growing body of social science research documents the severance of the vote from its central function of ensuring that all members of our political community are accorded equal concern by elected officials. At the core of vote dissociation is the manner in which concentrated wealth translates into political power, with the concomitant effects of disconnecting less affluent voters from policymaking and exacerbating political polarization. Combating vote dissociation requires that we understand the diminished political influence of less affluent voters as an injury to the constitutional right to vote.

The United States is engaged in an extended and acrimonious debate over the right to vote. Of central concern are the rules regulating how we vote, which are hotly contested along partisan and racial lines. On one side are Republicans seeking to implement a now-familiar litany of voting restrictions – including not only strict voter ID laws, but also limitations on voter registration, early voting, and the counting of provisional ballots. On the other side are Democrats and civil rights groups challenging such restrictions on the ground that they would unjustifiably suppress participation by many eligible voters, particularly racial minorities who usually vote for Democrats.<sup>1</sup> The battles outside the courtroom mirror those within it. A recent example is President Trump’s creation of the now-defunct Advisory Commission on Electoral Integrity,<sup>2</sup> led and staffed by

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1. See *infra* Part II.

2. *Presidential Advisory Commission on Election Integrity*, WHITE HOUSE (July 13, 2017, 10:15 AM), <http://www.whitehouse.gov/blog/2017/07/13/presidential-advisory-commission-election-integrity> [<http://perma.cc/6DZS-7C98>]; Michael Tackett & Michael Wines, *Trump Disbands Commission on Voter Fraud*, N.Y. TIMES (Jan. 3, 2018), <http://www.nytimes>

some of the most polarizing figures in the world of election administration.<sup>3</sup> There is no escaping the racial and partisan divisions that pervade contemporary struggles over access to the ballot.

Contemporaneous with these battles over vote denial is a resurgence of constitutional redistricting litigation, challenging plans that are alleged to dilute the votes of racial or political minorities. The increasingly sophisticated technological tools available to mapmakers enhance the dominant party's ability to entrench itself in power while diluting the votes of rival party supporters.<sup>4</sup> These disputes often involve the confluence of race and party.<sup>5</sup> Republican-controlled legislatures in Alabama, North Carolina, and other states have used the Voting Rights Act as an excuse to pack black voters into a few districts, making the remaining districts both whiter and redder.<sup>6</sup> In response, the Supreme Court has issued three significant racial gerrymandering decisions in the past two years, reviving a doctrine that had long been dormant in service of preventing the dilution of racial minority and Democratic votes.<sup>7</sup> In addition, the Court is now considering partisan gerrymandering cases out of Wisconsin and Maryland,<sup>8</sup> which could finally bring some resolution to an issue on which the Justices have been at loggerheads for decades. As with the lawsuits over vote denial, this type of claim has a distinctly partisan complexion.

The current round of litigation over vote denial and vote dilution<sup>9</sup> is essential to protect the fundamental right to vote, as the other contributions to this Collection reflect. But the most recent presidential election highlighted deep-seated

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.com/2018/01/03/us/politics/trump-voter-fraud-commission.html [http://perma.cc/E89X-8SMY].

3. Richard L. Hasen, *Trump's Voter Fraud Endgame*, SLATE (June 30, 2017, 12:59 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2017/06/donald\\_trump\\_s\\_voter\\_fraud\\_commission\\_is\\_itself\\_an\\_enormous\\_fraud.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2017/06/donald_trump_s_voter_fraud_commission_is_itself_an_enormous_fraud.html) [http://perma.cc/CCF5-43HN].
4. Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 838 (2015).
5. Richard L. Hasen, *Race or Party, Race as Party, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization in Redistricting and Voting Rights Cases*, 59 WM. & MARY L. REV. (forthcoming 2018).
6. *Id.*
7. *See infra* Part II.
8. *Gill v. Whitford*, 218 F.Supp.3d 837 (W.D. Wis. 2016), *consideration of jurisdiction postponed pending hearing on merits*, 137 S.Ct. 2268 (2017); *Benisek v. Lamone*, 266 F. Supp. 3d 799 (D. Md. 2017), *consideration of jurisdiction postponed pending hearing on merits*, 138 S. Ct. 543 (2017).
9. Here and throughout the Essay, I use the term "vote denial" to refer to practices that prevent some people from voting or having their votes counted, and "vote dilution" to refer to practices that reduce the effectiveness of a group's voting strength by diminishing its representation in elected office. *See* Richard L. Engstrom, *Racial Discrimination in the Electoral Process: The Voting Rights Act and the Vote Dilution Issue*, in PARTY POLITICS IN THE SOUTH 197, 197 (Robert P. Steed, Laurence W. Moreland & Tod A. Baker eds., 1980).

problems in American democracy that these cases cannot address, as they are issues of governance rather than participation or representation. The support for anti-system candidates like Trump is symptomatic of an increasing sense among many citizens that the real levers of power lie not in the hands of voters but rather with wealthy political insiders. Dealing with this problem requires that we recognize a new type of voting rights claim, one that is distinct from both vote denial and vote dilution.

This Essay employs the term *vote dissociation* to refer to the distinctive injury at the heart of the democratic deterioration evident in contemporary politics and documented in a growing body of social science research.<sup>10</sup> By vote dissociation, I refer to the severance of the vote from its central function of ensuring that all members of our political community are accorded equal concern by policymakers.<sup>11</sup> Vote dissociation distorts governance by diminishing the political voice of some people while enhancing that of others. At its core is the manner in which concentrated wealth translates into political power, with the concomitant effect of disconnecting less affluent voters from the policymaking process. The disillusionment with government that so many Americans now experience is a symptom of vote dissociation. Reconnecting the vote with political influence requires that we understand the effects of concentrated wealth on voting rights and consider how to ameliorate these effects.

Part I provides background on the right to vote, contextualizing Part II's discussion of contemporary vote denial and vote dilution litigation. Part III turns to what these cases miss. It summarizes the social science literature documenting the serious maladies in American democracy, most notably the close connection between concentrated wealth and political influence. Part IV introduces the concept of vote dissociation as a means of recognizing these systemic problems of democratic governance as voting rights issues.

### I. THREE DIMENSIONS OF THE RIGHT TO VOTE

To understand the current generation of voting rights litigation – both why it matters and what it misses – it is important to recall the reasons that the right to vote is a fundamental right. Since the nineteenth century, the Supreme Court has deemed voting “a fundamental political right, because [it is] preservative of all rights.”<sup>12</sup> In other words, voting is the mechanism through which all of our

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10. See *infra* Part III.

11. See Ronald Dworkin, *What Is Equality? Part 4: Political Equality*, 22 U.S.F.L. REV. 1, 3-4 (1987) (articulating a vision of democracy that “treat[s] all members of the community with equal concern”).

12. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

other interests are protected. If some people's voting rights are denied or diminished, then none of their other rights are safe. Ironically, at the moment these words were written, African-Americans throughout the states of the former Confederacy were being disenfranchised en masse through a range of now infamous devices – including literacy tests, threats, and sometimes brutal violence. The exclusion of southern blacks would persist until enactment of the Voting Rights Act of 1965 (VRA). Even after the VRA, many would still face barriers to equal participation, representation, and influence.<sup>13</sup>

As much as we glorify the right to vote, we often underappreciate its complexity. A framework introduced by Pamela Karlan more than two decades ago illuminates the multidimensional character of the vote that is helpful to understanding contemporary disputes.<sup>14</sup>

Karlan explained that there are three distinct aspects of the right to vote. The first is *participation*, being able to cast a ballot and have it counted.<sup>15</sup> This is the interest we most commonly associate with the right to vote. In its early years, Voting Rights Act enforcement focused on removing barriers to participation faced by southern blacks.<sup>16</sup> Section 4 of the VRA outlawed literacy tests, while Section 5 required covered jurisdictions – primarily states and localities in the South – to obtain preclearance for changes to voting laws.

The Supreme Court also played an important role in removing first-generation barriers to participation. The most notable example is the Court's decision in *Harper v. Virginia Board of Elections*,<sup>17</sup> which struck down a poll tax under the Equal Protection Clause of the Fourteenth Amendment. Interestingly, this decision rested not on the racially discriminatory character of the poll tax, but rather on its exclusion of less affluent voters. A person's wealth, the Court explained, should have no bearing on his or her ability to participate in the electoral process.<sup>18</sup>

The second conception of the right to vote is *representation*: the ability to join our votes with like-minded others to elect our preferred candidates.<sup>19</sup> One may

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13. Daniel P. Tokaji, *Representation and Raceblindness: The Story of Shaw v. Reno*, in RACE LAW STORIES 497, 499-511 (Rachel F. Moran & Devon W. Carbado eds., 2008).

14. Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 SUP. CT. REV. 245, 248-51.

15. *Id.* at 248.

16. Pamela S. Karlan, *The Rights To Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1710 (1993).

17. 383 U.S. 663 (1966).

18. *Id.* at 668.

19. Karlan, *supra* note 14, at 249. Professor Karlan refers to this interest as "aggregation," but I prefer the term "representation" because it conveys the idea of being able to join with other voters to elect preferred representatives.

be able to cast a vote and thus participate in elections, yet still not be fully or equally represented in legislative bodies or other elected offices. Voting would be little more than symbolic if citizens were unable to combine their individual preferences to elect their preferred candidates.<sup>20</sup> The “one person, one vote” line of cases focused on this interest, putting an end to practices that diluted some people’s votes while magnifying others. In *Reynolds v. Sims*,<sup>21</sup> the Court held that the malapportionment of state legislative districts violates the right to vote, effectively requiring that districts be redrawn every decade to ensure equal population.

Subsequent litigation focused on practices used to dilute the votes of racial minorities, like at-large elections and multimember legislative districts.<sup>22</sup> The 1982 amendments to the VRA were a potent weapon in this struggle, particularly after the Supreme Court’s landmark decision in *Thornburg v. Gingles*,<sup>23</sup> which established a legal framework for minority vote dilution claims.<sup>24</sup> In the 1990s, however, a more conservative Supreme Court limited the potency of the VRA through the line of racial gerrymandering cases beginning with *Shaw v. Reno*.<sup>25</sup> Under these cases, a legislative district is subject to strict scrutiny under the Equal Protection Clause if race was the “predominant factor” in its creation.<sup>26</sup> The effect of this doctrine was to limit the compelled creation of majority-minority districts, though it did not limit minority representation as drastically as some had feared.<sup>27</sup>

The third dimension of the right to vote is *governance*, which entails actually having an influence on decisions made by government. One may enjoy equal rights of participation and even representation, yet still not have meaningful influence on the decisions made by government. As Karlan explained, “the voter’s horizon extends beyond the moment of representative selection to various opportunities for collective decisionmaking by assembled legislators . . . .”<sup>28</sup> If government fails to give equal consideration to some members of the community, their right to vote remains incompletely realized. An example is *Presley v. Etowah*

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20. Karlan, *supra* note 16, at 1712-13.

21. 377 U.S. 533 (1964).

22. Karlan, *supra* note 16, at 1713-14.

23. 478 U.S. 30 (1986).

24. See generally Daniel P. Tokaji, *Realizing the Right To Vote: The Story of Thornburg v. Gingles*, in *ELECTION LAW STORIES* 127 (Joshua A. Douglas & Eugene D. Mazo eds., 2016) (describing the background and history of *Gingles*).

25. 509 U.S. 630 (1993).

26. *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

27. Tokaji, *supra* note 13, at 530-39.

28. Karlan, *supra* note 16, at 1717.

*County Commission*,<sup>29</sup> in which holdover white commissioners allegedly stripped an Alabama county's first elected black commissioner of his office's traditional powers.<sup>30</sup> The Supreme Court deemed such claims beyond the purview of the VRA, drawing a line between voting and governance.<sup>31</sup> The practical effect was to take governance claims off the table, at least insofar as the VRA is concerned.

## II. THE NEW VOTE DENIAL—AND THE NEW VOTE DILUTION

Though governance claims were stillborn, we have witnessed an explosion of participation- and representation-based claims in this century. Since the tumultuous 2000 election and the decision in *Bush v. Gore*,<sup>32</sup> burdens on participation have been frequent subjects of litigation.<sup>33</sup> Many of these cases involved laws adopted by Republican-controlled legislatures, ostensibly to prevent fraud, over the opposition of Democrats and civil rights advocates who claimed they would suppress the vote. In previous work, I have called these contemporary restrictions on participation the “new vote denial.”<sup>34</sup>

Perhaps the most conspicuous examples are strict voter ID laws. The Supreme Court rejected a facial constitutional challenge to one such law in *Crawford v. Marion County Election Board*,<sup>35</sup> with most of the Justices employing a balancing test.<sup>36</sup> This standard left the door open to constitutional challenges to other restrictions on participation, such as limits on early voting, voter registration, and the counting of provisional ballots. If plaintiffs can show a more substantial burden on voters than existed in *Crawford*, they have a reasonable argument that

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29. 502 U.S. 491 (1992).

30. Karlan, *supra* note 16, at 1723-24.

31. See 502 U.S. at 509 (“But § 5 is unambiguous with respect to the question whether it covers changes other than changes in rules governing voting: It does not.”); see also Karlan, *supra* note 14, at 252 (“[T]he Court . . . drew an explicit line between ‘voting’ and ‘governance’ . . .”).

32. 531 U.S. 98 (2000).

33. Richard L. Hasen, *Election Law's Path in the Roberts Court's First Decade: A Sharp Right Turn but with Speed Bumps and Surprising Twists*, 68 STAN. L. REV. 1597, 1630 (2016).

34. See Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 692 (2006).

35. 553 U.S. 181 (2008).

36. *Id.* at 189-91; *id.* at 223-24 (Souter, J., dissenting); *id.* at 237-41 (Breyer, J., dissenting).

the challenged practice is unconstitutional. Not surprisingly, some voting restrictions have been upheld under this balancing standard,<sup>37</sup> while others have been enjoined.<sup>38</sup>

The VRA has also been used to block some burdens on minority participation. Before *Shelby County v. Holder*, Section 5 of the VRA was occasionally used to deny preclearance to laws limiting participation.<sup>39</sup> In the years since *Shelby County*, litigants have increasingly relied on Section 2 of the VRA to challenge participation restrictions alleged to have a discriminatory impact on minority voters.<sup>40</sup> They have enjoyed some success, most notably in blocking Texas's voter ID law<sup>41</sup> and North Carolina's omnibus voting law, which included not only voter ID but also restrictions on early voting, same-day registration, and the counting of provisional ballots.<sup>42</sup> The Fourth Circuit found that North Carolina's law "target[ed] African Americans with almost surgical precision,"<sup>43</sup> a sad reminder that race-based restrictions on voting are not just a relic of the past.

Contemporaneous with these vote denial claims is a new round of redistricting litigation challenging the increasingly sophisticated means through which the dominant political faction can entrench itself in power by diluting votes supporting its rival. Because of their success in the 2010 state legislature elections, Republicans held the redistricting pen in a large number of states in the redistricting cycle that followed. They used their control of redistricting to great effect, gerrymandering both U.S. House of Representatives and state legislative districts.<sup>44</sup> With the assistance of the Republican State Legislative Committee's Redistricting Majority Project (REDMAP), Republican-controlled legislatures locked in GOP majorities for the current decade – and perhaps through the next decade as well, if they continue to hold state legislative majorities (and therefore

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37. *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014) (rejecting a constitutional challenge to a Wisconsin voter ID law).

38. *Obama for Am. v. Husted*, 697 F.3d 423 (6th Cir. 2012) (affirming an injunction against an Ohio law that restricted early voting by some voters).

39. Daniel P. Tokaji, *Responding to Shelby County: A Grand Election Bargain*, 8 HARV. L. & POL'Y REV. 71, 77-83 (2013).

40. See Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439, 455-64 (2015).

41. *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016)(en banc).

42. *N.C. Conf. NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2017).

43. *Id.* at 214.

44. For journalistic accounts of Republican redistricting tactics in the most recent cycle, see DAVID DALEY, *RATF\*\*KED: THE TRUE STORY BEHIND THE SECRET PLAN TO STEAL AMERICA'S DEMOCRACY* (2016); Tim Dickinson, *How Republicans Rig the Game*, ROLLING STONE (Nov. 11, 2013), <http://www.rollingstone.com/politics/news/how-republicans-rig-the-game-20131111> [<http://perma.cc/KW84-WSGA>].

the redistricting pen) after the 2020 elections. The basic strategy was familiar: pack Democrats into a small number of districts while cracking them in the remaining districts to create safe Republican majorities. In Ohio, for example—a quintessentially purple state—Republican mapmakers managed to draw a plan that has allowed Republicans to control twelve of the state’s sixteen congressional districts.<sup>45</sup>

In some states, Republican legislatures used the Voting Rights Act as a justification for packing African Americans—who as a group are reliably Democratic voters—into a few districts, thus making the overall map more favorable to Republicans.<sup>46</sup> Three recent Supreme Court cases rely on the *Shaw* racial gerrymandering doctrine to limit this abuse of the VRA.<sup>47</sup> The most significant of these decisions is *Cooper v. Harris*, which struck down two Republican-drawn, majority-black congressional districts in North Carolina. These cases have made it more difficult for Republicans to use the VRA as an excuse to engage in partisan gerrymandering.<sup>48</sup>

Meanwhile, partisan gerrymandering is facing a renewed frontal attack, with the Court set to rule on the constitutionality of a Wisconsin state legislative plan that strongly favors Republicans in *Gill v. Whitford*.<sup>49</sup> This too is a species of vote dilution, although based on party affiliation rather than race. The central idea is that partisan gerrymandering discriminates against those who support the non-dominant party, effectively diminishing the strength of their votes. Like contemporary litigation over participation, the new vote dilution litigation has a distinctively partisan character, with Democrats urging judicial intervention and Republicans resisting it.

To sum up: we are in the midst of a resurgence of litigation over the first two dimensions of the right to vote: participation and representation. The new vote denial cases challenge burdens on the former, while the new vote dilution cases challenge abridgement of the latter. Important as these claims are, they miss

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45. See DALEY, *supra* note 44, at 89-90; Jim Slagle, *Ohio Redistricting Transparency Report: The Elephant in the Room*, OHIO CAMPAIGN FOR ACCOUNTABLE REDISTRICTING 4-21 (Dec. 12, 2011), <http://www.lwvohio.org/assets/attachments/file/The%20Elephant%20in%20the%20Room%20-%20Transparency%20Report.pdf> [<http://perma.cc/S3Z2-FRNY>].

46. See Justin Levitt, *Quick and Dirty: The New Misreading of the Voting Rights Act*, 43 FLA. ST. U. L. REV. 573, 591-606 (2016).

47. *Cooper v. Harris*, 137 S. Ct. 1455 (2017); *Bethune-Hill v. Va. St. Bd. of Elections*, 137 S. Ct. 788 (2017); *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015).

48. Daniel Tokaji, *Restricting Race-Conscious Redistricting*, REG. REV. (July 31, 2017), <http://www.theregreview.org/2017/07/31/tokaji-restricting-race-conscious-redistricting> [<http://perma.cc/9QU7-8MEF>].

49. In a forthcoming Article, I argue that extreme partisan gerrymanders violate the First Amendment right of association. Daniel P. Tokaji, *Gerrymandering and Association*, 59 WM. & MARY L. REV. (forthcoming 2018).

something essential: governance. As it turns out, this neglected dimension of the right to vote is where the most grievous concerns lie.

### III. DEMOCRATIC DETERIORATION

I have thus far avoided confronting the elephant in the room. But we cannot meaningfully discuss voting, governance, or democracy without talking about the 2016 election.

Trump won the presidential election despite his lack of experience in government and lopsidedly upside-down public approval ratings.<sup>50</sup> He was one of three antisystem candidates to enjoy unexpected success in the major parties' primary contests. Trump's closest competitor for the Republican nomination was Ted Cruz, an extreme conservative who the party establishment looked on with comparable if not even greater disdain.<sup>51</sup> His opponent, Hillary Clinton, was favored by her party's establishment, yet her public approval ratings were only slightly better than those of her Republican rival going into the general election.<sup>52</sup> Her main competitor for the Democratic nomination, Bernie Sanders, was a self-described Democratic Socialist who performed much more strongly than expected and extended the contest beyond almost everyone's expectations.<sup>53</sup>

The 2016 election points to serious underlying problems of governance. There is no denying the antipathy toward the federal government that has fueled the rise of antisystem candidates. Public trust in government remains historically low, reflecting a palpable dissatisfaction with our political system that crosses ideological lines – though it tends to be stronger among those who associate with the party out of the White House.<sup>54</sup> Congressional approval ratings have been in

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50. *Donald Trump Favorable Rating*, HUFFPOST POLLSTER (Nov. 6, 2016), <http://elections.huffingtonpost.com/pollster/donald-trump-favorable-rating> [<http://perma.cc/NZ4H-VDJE>] (noting an unfavorable rating of 57.4%, favorable 39.2%).

51. Matt Flegenheimer, *Ted Cruz Courts an Old Adversary: The G.O.P. Establishment*, N.Y. TIMES (Mar. 14, 2016), <http://www.nytimes.com/2016/03/15/us/politics/ted-cruz-republican-party.html> [<http://perma.cc/8WMN-YD24>].

52. *Hillary Clinton Favorable Rating*, HUFFPOST POLLSTER (Nov. 6, 2016), <http://elections.huffingtonpost.com/pollster/hillary-clinton-favorable-rating> [<http://perma.cc/2CQX-RGLQ>] (noting an unfavorable rating of 54.9%, favorable 41.9%).

53. Nicole Gaudiano, *Bernie Sanders Defied Expectations with Long-Shot Presidential Campaign*, USA TODAY (July 11, 2016), <http://www.usatoday.com/story/news/politics/elections/2016/07/11/bernie-sanders-defied-expectations-presidential-campaign/85694576> [<http://perma.cc/DN47-TDFU>].

54. *Public Trust in Government Remains Near Historic Lows as Partisan Attitudes Shift*, PEW RES. CTR. (May 3, 2017), <http://www.people-press.org/2017/05/03/public-trust-in-government-remains-near-historic-lows-as-partisan-attitudes-shift> [<http://perma.cc/7GDA-D937>].

the doldrums for years, now hovering around or even below twenty percent.<sup>55</sup> While public dissatisfaction with Congress as a whole goes back years, a striking recent change is that more individuals have an unfavorable view of even *their own* representative.<sup>56</sup>

An increasing number of citizens has become skeptical of democracy itself. In one study, a record-high twenty-four percent of young Americans said they thought that democracy was a “bad” or “very bad” way of running the country.<sup>57</sup> The proportion of Americans who think it is essential to live in a democracy has decreased, especially among millennials.<sup>58</sup> A similar pattern is evident outside the United States (in Australia and Great Britain, for example), but the shifts have been especially dramatic here<sup>59</sup> – and are especially troubling, given our historical role as a leader among democratic countries.

These trends have caused some scholars to express concern that we may be witnessing the gradual demise or “deconsolidation” of American democracy.<sup>60</sup> The concern is not so much that our democratic system is at imminent risk of collapse, but rather that we are at risk of what Aziz Huq and Tom Ginsburg call “constitutional retrogression.”<sup>61</sup> They define this as the erosion of three essential components of constitutional democracy: free and fair elections, expressive and associational rights, and the rule of law.<sup>62</sup> Just one year into the Trump Presidency, we see worrying signs on all of these fronts.<sup>63</sup>

This should cause us to worry about the long-term viability of our constitutional system. Tracing the roots of democratic deterioration is too complex a task

55. *Congress and the Public*, GALLUP, <http://www.gallup.com/poll/1600/congress-public.aspx> [<http://perma.cc/CT2Z-HMCJ>].

56. Peyton M. Craighill & Scott Clement, *A Majority of People Don't Like Their Own Member of Congress. For the First Time Ever*, WASH. POST: THE FIX (Aug. 5, 2014), <http://www.washingtonpost.com/news/the-fix/wp/2014/08/05/a-majority-of-people-dont-like-their-own-congressman-for-the-first-time-ever> [<http://perma.cc/5CZS-59RG>].

57. Roberto Stefan Foa & Yascha Mounk, *The Signs of Deconsolidation*, 28 J. DEMOCRACY 5, 5 (2017).

58. *Id.* at 5-6.

59. *Id.* at 6-7.

60. *Id.* at 12.

61. Aziz Huq & Tom Ginsburg, *How To Lose a Constitutional Democracy*, 65 UCLA L. REV. (forthcoming 2018) (manuscript at 6), [http://papers.ssrn.com/abstract\\_id=2901776](http://papers.ssrn.com/abstract_id=2901776) [<http://perma.cc/TZ8F-T5AZ>].

62. *Id.*

63. See Daniel P. Tokaji, *Arresting the Deterioration of Democracy*, TAKE CARE (Mar. 31, 2017), <http://takecareblog.com/blog/arresting-the-deterioration-of-democracy> [<http://perma.cc/P46A-NQ5J>].

to be comprehensively addressed in this Essay, but a partial explanation may be found in two related developments of the last four decades.

The first is the increase in partisan polarization and attendant political dysfunction.<sup>64</sup> Republicans have moved to the right, while Democrats have moved to the left.<sup>65</sup> This phenomenon is most pronounced among elected officials, but it is also observable among the citizenry – at least those who vote regularly.<sup>66</sup> As polarization among both elected officials and the electorate has intensified, incentives to compromise have waned, and governance has become more difficult.<sup>67</sup>

The other development is the substantial increase in economic inequality over roughly the same time frame. Incomes at the top have increased, while those further down the economic ladder have stagnated or even declined in real terms.<sup>68</sup> Wealth disparities have increased in an even more exaggerated fashion.

There is good reason to believe that these two developments are linked – that party polarization and economic inequality are not just causally related, but mutually reinforcing.<sup>69</sup> The mechanisms through which partisan polarization and

64. For a sampling of the vast literature on the topic of political polarization, see ALAN I. ABRAMOWITZ, *THE DISAPPEARING CENTER: ENGAGED CITIZENS, POLARIZATION, AND AMERICAN DEMOCRACY* (2010); Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 276-81 (2011); *Political Polarization in the American Public*, PEW RES. CTR. 18-31 (2014), <http://assets.pewresearch.org/wp-content/uploads/sites/5/2014/06/6-12-2014-Political-Polarization-Release.pdf> [<http://perma.cc/8Z6J-LUR9>].
65. There is strong evidence that polarization is asymmetrical, with Republicans moving further to the right than Democrats have moved to the left. MATT GROSSMAN & DAVID A. HOPKINS, *ASYMMETRIC POLITICS: IDEOLOGICAL REPUBLICANS AND GROUP INTEREST DEMOCRATS* 11 (2016).
66. ABRAMOWITZ, *supra* note 64, at 54-57; see also *Sharp Partisan Divisions in Views of National Institutions*, PEW RES. CTR. (July 10, 2017), <http://www.people-press.org/2017/07/10/sharp-partisan-divisions-in-views-of-national-institutions> [<http://perma.cc/LVZ4-L48U>] (surveying public attitudes toward national institutions such as universities, labor unions, and financial institutions).
67. See generally 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* (2012).
68. Chad Stone et al., *A Guide to Statistics on Historical Trends in Income Inequality*, CTR. ON BUDGET & POL'Y PRIORITIES (Nov. 7, 2016), [http://www.cbpp.org/sites/default/files/atoms/files/11-28-11pov\\_1.pdf](http://www.cbpp.org/sites/default/files/atoms/files/11-28-11pov_1.pdf) [<http://perma.cc/DXY8-FXXB>]. For a comprehensive treatment of the subject, see THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (2014).
69. See NOLAN MCCARTY ET AL., *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* 1-3, 92 (2006); John V. Duca & Jason L. Saving, *Income Inequality and Political Polarization: Time Series Evidence over Nine Decades*, 62 REV. INCOME & WEALTH 445 (2016); James C. Garand, *Income Inequality, Party Polarization, and Roll-Call Voting in the U.S. Senate*, 72 J. POL. 1109 (2010).

economic inequality interact are incompletely understood, but some empirical research helps explain the connection. A growing body of scholarship demonstrates that well-financed interest groups exercise outsized influence on public policy.<sup>70</sup> Legislators are much more responsive to the preferences of the affluent than they are to the preferences of those at the bottom of the economic ladder.<sup>71</sup> As one study sums up the research, “the rich have been able to use their resources to influence electoral, legislative, and regulatory processes through campaign contributions, lobbying, and revolving door employment of politicians and bureaucrats.”<sup>72</sup> The increase in economic inequality is a political phenomenon, in the sense that it arises from the enhanced ability of the affluent to achieve their policy objectives.<sup>73</sup> There is considerable evidence that members of Congress, in particular, tend to be more receptive to the policy preferences of their wealthy constituents than to those of their constituents with lesser means.<sup>74</sup>

While the connection between wealth and political power is well-documented, discerning its relationship to the current political milieu requires some degree of speculation. One might imagine that party lines track class divisions — with more affluent voters gravitating toward the Republican Party and less affluent ones toward the Democratic Party — but that explanation has become increasingly untenable in light of the most recent presidential election. Trump did well in places where the economy was weaker and jobs were most at risk.<sup>75</sup> His performance among less educated white voters was especially strong.<sup>76</sup> This does

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70. See LARRY BARTELS, *UNEQUAL DEMOCRACY* 3 (2008); MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* 81 (2012); KAY LEHMAN SCHOLZMAN ET AL., *THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY* (2012); Martin Gilens & Benjamin Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 *PERSP. POL.* 564 (2014).

71. GILENS, *supra* note 70, at 81; Elizabeth Rigby & Gerald C. Wright, *Whose Statehouse Democracy?: Policy Responsiveness to Poor Versus Rich Constituents in Poor Versus Rich States*, in *WHO GETS REPRESENTED?* 189 (Peter K. Enns & Christopher Wlezien eds., 2011); Bertrall L. Ross & Su Li, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 *CALIF. L. REV.* 323, 356–76 (2016); Nicholas Stephanopoulos, *Political Powerlessness*, 90 *N.Y.U. L. REV.* 1527, 1577–79 (2015).

72. Adam Bonica et al., *Why Hasn't Democracy Slowed Rising Inequality?*, 27 *J. ECON. PERSP.* 103, 105 (2013).

73. BARTELS, *supra* note 70, at 3.

74. Bonica, et al., *supra* note 72, at 118 (summarizing evidence).

75. Jed Kolko, *Trump Was Stronger Where the Economy Was Weaker*, *FIVETHIRTYEIGHT* (Nov. 10, 2016, 8:43 AM), <http://fivethirtyeight.com/features/trump-was-stronger-where-the-economy-is-weaker> [<http://perma.cc/ND8R-TRAJ>].

76. Nate Silver, *Education, Not Income, Predicted Who Would Vote for Trump*, *FIVETHIRTYEIGHT* (Nov. 22, 2016, 2:53 PM), <http://fivethirtyeight.com/features/education-not-income-predicted-who-would-vote-for-trump> [<http://perma.cc/LG9B-6ZUV>]; Alec Tyson & Shiva Maniam, *Behind Trump's Victory: Divisions by Race, Gender, Education*, *PEW RES. CTR.*

not necessarily mean that President Trump will pursue policies that inure to the economic benefit of these voters, but it does show that the relationship between socioeconomic class and party is more complicated than some might suppose.<sup>77</sup>

Still, a growing body of evidence suggests that economic inequality and political polarization are mutually reinforcing.<sup>78</sup> One possible explanation is that the inability of our political system to address runaway inequality exacerbates frustration among voters, in turn fueling the rise of anti-system candidates.<sup>79</sup> The views of such candidates are likely to lie outside the political mainstream. There is at least some empirical support for the proposition that advancing economic inequality leads to greater polarization among voters.<sup>80</sup> To the extent this translates into more polarized legislators, this is likely to exacerbate political dysfunction. That in turn makes it even more difficult to redress persistent economic disparities. The ultimate result is a perverse feedback loop: economic inequality feeds political polarization, in turn making the problem of economic inequality even more intractable.<sup>81</sup>

If this analysis is right, it suggests that the 2016 election—while unprecedented—was not a one-off. Its apparent anomalies are instead reflections of and reactions to deeply rooted maladies afflicting the U.S. political system, which will continue to fester, grow, and debilitate if left untreated. Let me again stress that some connecting of the dots is necessary to understand how the most recent presidential election relates to the megatrends of escalating partisan polarization

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(Nov. 9, 2016), <http://www.pewresearch.org/fact-tank/2016/11/09/behind-trumps-victory-divisions-by-race-gender-education> [<http://perma.cc/A53U-VYPJ>].

77. See Brian J. Dettrey & James E. Campbell, *Has Growing Income Inequality Polarized the American Electorate? Class, Party, and Ideological Polarization*, 94 SOC. SCI. Q. 1062 (2013) (finding that the parties have not become more polarized along class lines).
78. See, e.g., John Voorheis et al., *Unequal Incomes, Ideology and Gridlock: How Rising Inequality Increases Political Polarization*, PRINCETON U. (Aug. 31, 2015), <http://www.princeton.edu/csdp/events/McCarty10012015/McCarty-10012015.pdf> [<http://perma.cc/TD9R-GRQX>].
79. For such an argument, see Robert Shiller, *Why Did US Voters Back Trump? Economic Powerlessness*, GUARDIAN (Nov. 22, 2016, 3:24 PM), <http://www.theguardian.com/business/2016/nov/22/why-did-americans-support-trump-economic-powerlessness> [<http://perma.cc/4LEA-D26N>]. See also Chris Kahn, *U.S. Voters Want Leader to End Advantage of Rich and Powerful*, REUTERS (Nov. 8, 2016, 4:19 PM), <http://www.reuters.com/article/us-usa-election-poll-mood/u-s-voters-want-leader-to-end-advantage-of-rich-and-powerful-reuters-ipsos-poll-idUSKBN1332NC> [<http://perma.cc/F639-JWD7>] (describing a poll showing that 75% of voters agreed that “America needs a strong leader to take the country back from the rich and powerful”).
80. James C. Garand, *Income Inequality, Party Polarization, and Roll-Call Voting in the U.S. Senate*, 72 J. POL. 1109 (2010).
81. Bonica, et al., *supra* note 72, at 121 (concluding that “the kinds of government policies that could have ameliorated the sharp rise in inequality have been immobilized by a combination of greater polarization” and other factors).

and economic inequality. One need not accept the causal connection I have suggested to believe that these developments – and the accompanying public disaffection with our political system – should cause us to worry about the long-term health of American democracy. What remains to be explained is the relationship between these big-picture problems and the vote. I turn to this in the next Part.

#### IV. RECOGNIZING VOTE DISSOCIATION

To explain the relationship between democratic deterioration and the right to vote, I return to Karlan's tripartite framework. Recall that participation and aggregation have been subjects of active litigation for decades. Voting rights doctrine in these areas has adapted to meet the challenges of the day. Back in the 1960s, the Supreme Court finally embraced the idea that voting was a fundamental right in the "one person, one vote" and poll tax cases.<sup>82</sup> In the ensuing decades, Congress and the Court expanded protections against minority vote dilution under the Voting Rights Act.<sup>83</sup> The post-2000 election administration cases have addressed laws and practices that unduly burden the vote, thereby excluding some people – including racial minorities – from participation. The most recent development is the revival of the *Shaw* doctrine to limit gerrymanders drawn under the guise of VRA compliance, which may be augmented by recognition of a new legal standard for partisan gerrymandering in *Gill v. Whitford*.<sup>84</sup>

While participation and representation claims are mainstays of voting rights litigation, governance remains uncharted territory. It is the neglected dimension of the right to vote. The evidence reviewed in Part III, however, suggests a pressing need to recognize governance as a province of the right to vote. Specifically, we should recognize *vote dissociation* as a new and distinct type of voting rights injury. I use this term to refer to the severance of voting from its central purpose of ensuring that the government accords equal consideration to all members of the political community.<sup>85</sup>

Particularly germane to the concept of vote dissociation is a recognition of the influence that concentrated wealth has on policymaking. There is strong evidence that economic status largely determines the strength of one's political voice.<sup>86</sup> This is not an entirely novel idea. There is a robust body of scholarship

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82. See *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966); *Reynolds v. Sims*, 377 U.S. 533 (1964).

83. See *supra* Part I.

84. See *supra* Part II.

85. Cf. *Bush v. Gore*, 531 U.S. 98, 104 (2000) (“[O]ne source of [the right to vote’s] fundamental nature lies in the equal weight accorded to each vote and the equal dignity to each voter.”).

86. See *supra* Part III.

on the subject of campaign finance, much of it critical of Supreme Court jurisprudence that elevates free speech above other democratic values.<sup>87</sup> A litany of commentators has argued that the Supreme Court has undervalued the competing interest in preventing wealthy individuals and corporate entities from dominating public policy. This interest is sometimes characterized in anticorruption terms,<sup>88</sup> sometimes in egalitarian or antiplutocracy terms.<sup>89</sup> My goal here is not to engage with this debate. It is instead to consider the relationship between these questions and the right to vote.

Election law traditionally puts voting rights and money-in-politics issues in separate silos. The voting rights implications of election administration and redistricting are commonly discussed. Campaign finance and lobbying regulation, on the other hand, are not conventionally seen as implicating the right to vote. But if we understand governance as a component of the right to vote, then their relevance becomes evident. As the social science literature reviewed in Part III documents,<sup>90</sup> a close connection exists between political money and policymaking. Legislators are more responsive to the interests of their affluent constituents,<sup>91</sup> especially those who constitute what Spencer Overton has called “the donor class.”<sup>92</sup> To the extent that political giving and spending severs the relationship between voting and policymaking, it damages democratic governance. It is this disconnection between vote and voice<sup>93</sup> that the concept of vote dissociation is meant to capture.

How might recognition of vote dissociation as a distinct kind of voting rights injury be actualized? To answer this question, we should return to the decision that first recognized that economic barriers were anathema to the right to vote. Recall that in *Harper v. Virginia Board of Elections*, the Court struck down the poll tax on equal protection grounds, explaining that “[w]ealth, like race, creed, or color, is not germane to one’s ability to participate intelligently in the electoral

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87. For a summary of and references to the academic literature, see Renata E.B. Strause & Daniel P. Tokaji, *Between Access and Influence: Building a Record for the Next Court*, 9 DUKE J. CONST. L. & PUB. POL’Y 179, 188–95 (2014).

88. See, e.g., LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* (2012).

89. See, e.g., RICHARD L. HASEN, *PLUTOCRATS UNITED: CAMPAIGN MONEY AND THE SUPREME COURT* (2016).

90. See *supra* notes 70–74 & accompanying text.

91. Bonica, et al., *supra* note 72, at 118.

92. Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73 (2004).

93. See generally SCHLOZMAN, ET AL., *supra* note 70, at xxxii (discussing the concept of political voice).

process.”<sup>94</sup> The Court’s focus in *Harper* was on the interest in participation. But if we accept the proposition that governance is also a component of the right to vote, then wealth-based inequalities of policymaking influence are as troubling as wealth-based inequalities in who may cast a ballot.

That said, it is a much more complicated matter to *remedy* vote dissociation than to get rid of participation barriers like the poll tax. One can certainly imagine vote dissociation arguments being used defensively—for example, as a rationale to defend limits on campaign contributions or expenditures. The argument would be that such restrictions are needed to reconnect one’s vote with one’s voice by limiting the ability of wealthy interests to dominate policymaking. The interest in stopping vote dissociation would certainly conflict with *Buckley v. Valeo*’s admonition that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”<sup>95</sup> There is no realistic chance that such an interest would be accepted by the current Supreme Court as a rationale for imposing limits on political spending. But it might ultimately be used to buttress the anticorruption and equality interests before some future Court less hostile toward regulation than the one that now sits.<sup>96</sup>

Though it is more difficult to imagine what an affirmative vote dissociation claim might look like, it could include arguments that existing political structures effectively deny less affluent voters the means to protect their interests through the political system. In this respect, the type of governance claim I propose differs from that which the Court rejected in cases like *Presley*, which involved practices used to weaken the political influence of African Americans.<sup>97</sup> A contemporary vote dissociation claim would focus on the mechanisms through which wealth is translated into policymaking influence, including not just bribery but also campaign finance and lobbying. If well-financed interest groups subvert the policy preferences of the majority of voters through their political spending, then the vote is severed from its core function of ensuring equal concern for all people regardless of their wealth. Understanding this as an injury to the right to vote should cause us to view the vehicles for this spending with a more skeptical eye. If they are legally permitted—for example, authorized by existing campaign finance or tax laws—they might give rise to a vote dissociation claim.

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94. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 668 (1966).

95. 424 U.S. 1, 48-49 (1976).

96. See Strause & Tokaji, *supra* note 87.

97. See *Presley v. Etowah Cty. Comm’n*, 502 U.S. 491 (1992).

To see why these should be understood as right-to-vote issues, we must go back to the *raison d'être* of this right: it is fundamental because it is preservative of all other rights. Judged by this rationale, there is strong evidence to suggest that it is failing to achieve its ends. While our system does an excellent job of reflecting the policy preferences of the affluent, it is much less responsive to those of more limited means. A focus on vote dissociation would attempt to reconnect voting with political influence. It might, for example, target conflicts of interest laws that enable wealthy interests to translate money into political influence. Since Trump has assumed office, there have been numerous claimed conflicts of interest on the part of the President and his associates, some of which have resulted in litigation.<sup>98</sup> Recognizing vote dissociation as a distinct form of injury would add voting rights law to the legal arsenal available to combat such practices.

This brings me to another reason for using the term “vote dissociation” with respect to governance claims. It captures the idea that there is a countervailing First Amendment interest in the money-in-politics debate that must be weighed against the traditional libertarian view: the interest in protecting the freedom of association of less-affluent citizens. As I have explained elsewhere, there exists a closer connection between the First Amendment right of expressive association and the Fourteenth Amendment right to vote than is commonly supposed.<sup>99</sup> Although *Harper* declined to decide whether voting is protected speech,<sup>100</sup> the Court has long recognized voting as a form of association protected by the First Amendment. The rationale for the right of association extends beyond the individual’s ability to aggregate his or her vote with those of like-minded others — an interest that sounds in representation.<sup>101</sup> It also encompasses the systemic concern with ensuring that *groups* are able to engage in politics on equal terms. As the Court explained in one of its early expressive association cases, the right is designed to promote the “free functioning of the electoral process.”<sup>102</sup> To the extent that our system of campaign finance and lobbying weakens the collective

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98. See, e.g., *Trump’s Conflicts of Interests*, SUNLIGHT FOUND., <http://sunlightfoundation.com/tracking-trumps-conflicts-of-interest> [<http://perma.cc/6ZYL-5V4H>]; Heather Caygle, *Democrats To Sue Trump over Conflicts of Interest*, POLITICO (June 7, 2017, 5:00 PM), <http://www.politico.com/story/2017/06/07/democrats-donald-trump-sue-conflict-of-interest-239262> [<http://perma.cc/4CYG-KKRM>].

99. Daniel P. Tokaji, *Voting Is Association*, 43 FLA. ST. U. L. REV. 763 (2016).

100. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966) (“We do not stop to canvass the relation between voting and political expression.”).

101. See Tokaji, *supra* note 49.

102. *Elrod v. Burns*, 427 U.S. 347, 356 (1976).

ability of certain groups – such as poor people – to meaningfully engage in politics, it may implicate the right of association as well as the right to vote.<sup>103</sup>

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The preceding sketch of how vote dissociation might be used to reconnect voting and political influence is necessarily preliminary and suggestive. My main goal is to demonstrate that we should recognize a distinct type of constitutional injury in practices that disconnect voting from governance. Voting rights jurisprudence has long been adapted to meet the pressing challenges confronting American democracy, from the mass disenfranchisement of African Americans and the malapportionment of legislative bodies to contemporary burdens on participation and representation evident in the current rounds of litigation. But if the right to vote fails to adapt to meet the challenge of vote dissociation, the pathologies revealed in the last election are sure to worsen, with devastating consequences for our system of democratic governance.

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<sup>103</sup>. I develop association-based arguments for challenging voting restrictions in Tokaji, *Voting Is Association*, *supra* note 99, and Tokaji, *Gerrymandering and Association*, *supra* note 49.