

## THE LAW OF FREEDOM

The Supreme Court has been at the center of great upheavals in American democracy over the last seventy years. From the end of Jim Crow to the rise of wealth-dominated national campaigns, the Court has battled over if democracy is an egalitarian collaboration to serve the good of all citizens, or a competitive struggle by private interests. In *The Law of Freedom*, Jacob Eisler questions why the Court has the moral authority to shape democracy at all. Analyzing leading cases through the lens of philosophy and social science, Eisler demonstrates how the soul of election law is a battle between two philosophical understandings of democratic freedom and popular self-rule. This remarkable book reveals that the Court's battle over democracy has shaped how Americans rule themselves, marking election law as the most dramatic judicial intervention in constitutional history.

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# The Law of Freedom

THE SUPREME COURT AND DEMOCRACY

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*For Darel, John, and George*

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*In memory and to the honor of David C. Eisler, 1956–2023*

Opposition is true Friendship.

–WB

Man errs as long as he strives.

–JWvG

All is not lost; the unconquerable Will...

–JM

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## Preface

This book addresses a puzzle about liberal democracy and rule of law: If democracy's legitimating value is the autonomy of the people, how can an impartial court transform the terms of that autonomy?

To address that puzzle, this book does two things. First, it frames and answers the question in philosophical terms. The dignity of democratic autonomy and the justice of rule of law neutrality are both essential for legitimate liberal democracy where the people rule but individual rights are respected. But in the context of electoral process, it creates a *counterpopular dilemma*: if courts dictate terms of elections, they intrude upon the extent of democratic autonomy. The best answer cannot solve this dilemma. It can only ameliorate it. The best approach is for courts to engage in ongoing contestation over the nature of freedom, directed toward what electoral procedures will best serve popular self-rule.

Second, this book evaluates the American election law doctrine in light of this dilemma, and this answer. It shows how the Supreme Court's transformation of democratic process has consisted of a long-running, fiercely contested debate over the ideal of popular autonomy. Moreover, this debate has settled into two opposed sides: a conservative view that advances a libertarian understanding of just elections and a progressive view that advances an egalitarian understanding. Conservative libertarians see elections as a means for converting private power and position into political representation. They wish to maintain elections as a zone of private power and reject both state action and judicial interpretation that intrudes upon private power. Progressive egalitarians see elections as an expression of the mutual aspects of a democracy that aspires toward civic equality. They wish to use the bench to advance a vision of democracy as a shared space of rule by equals.

This struggle over the meaning of freedom on the Supreme Court has shaped American democracy, and American life. The struggle reflects partisan allegiances, but it shows that deeper than the partisan divide is a philosophical dispute over the meaning of liberty. The Supreme Court's battle shows a shared commitment to the ideal of liberty, as well as how deeply the different justices

understand liberty, and how much these divergent understandings mean for American democracy.

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This book should be of interest to lawyers, social scientists, and anyone who wishes to deepen their understanding of how the Supreme Court has shaped American politics. The argument as a whole may be of the most interest to scholars of the Constitution, of elections, and of American democracy, but the individual chapters are meant to be accessible for any reader with an interest in a particular topic.

This book makes a unified argument, but it is also meant as an introduction to both the theory and doctrine of elections. It sets forth background that provides an overview that is both accessible and penetrating on questions of democracy, judicial review, and constitutionalism, as well as the four main areas of American election law doctrine: one person, one vote; campaign finance; parties in elections; and race in elections. Readers should feel comfortable dipping into single chapters – particularly those on substantive areas of election law – as they find useful.

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The book is divided into two main parts. The first three chapters lay out the problem and answer of judicial review of elections: outlining the counterpopular dilemma of judicial review of democratic process (Chapter 1); discussing the inadequacy of existing scholarly accounts to reconcile judicial review with constituent democratic autonomy (Chapter 2); and explaining why a normative dispute over freedom on the bench is the best way through the dilemma (Chapter 3).

The next four chapters address the Supreme Court doctrine on elections through this lens: one person, one vote (Chapter 4), campaign finance (Chapter 5), parties in elections (Chapter 6), and race in elections (Chapter 7). Each describes how the given area of law is best framed as contestation over popular self-determination and the status of each in the egalitarian–libertarian debate. The Conclusion synthesizes the doctrinal dispute and its redemptive potential in election law and more broadly while noting the threats to this potential from partisan overdetermination and the increasing use of summary procedures.

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This book is meant to answer a question and show a remarkable pattern, but also inspire and show paths for new understandings of democracy, the courts, and just liberal constitutionalism. I hope you find it useful.



## Acknowledgments

*The Law of Freedom* was written during my time at Jesus College, University of Cambridge and Southampton Law School, University of Southampton. I am grateful to these institutions for their support, as well as to the Centre for Research in the Arts, Humanities, and Social Sciences at the University of Cambridge where early steps for developing this book were taken.

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