

Democracy Reform Symposium*

K. Sabeel Rahman**

Thanks so much, Jeff, for that introduction and for your remarkable work. We're so appreciative of all your leadership and all your work as well. And thank you too to the leaders of the symposium, Kacey, Sam, Julianne, the Cal Law Review team, the Berkeley team, and all of you for joining this conversation. It's a challenging and urgent time to have these conversations, particularly thinking of those of you who are tuning in from California and seeing, I'm calling in from New York myself. And we're all seeing the images of playing out in real time, on social media, on the TV. And I really appreciate Jeff's opening frame. Because I think this, a lot of times when we talk about democracy and democracy reform, it can take a sort of a theoretical quality, right? Like how do we improve participation or increase civic virtue that, the smooth functioning of the system. But of course, we're at a moment where this question about democracy is not theoretical and it's not nice to have, right. It's deeply urgent and is closely, intimately connected with the real life and death struggles of so many Americans, so many people around the world, right. We're entering into this conversation in the middle of a pandemic, that's already claimed 190,000 lives. Predominantly in Black and Brown communities. We're seeing the continued, epidemic of anti-Black violence, both state sponsored and paramilitary violence on Black communities, the climate catastrophe and, not just in California with hurricanes in the Gulf and all around the country, is underscored so sharply today. And, amidst all of this, the most powerful tool that we have to solve these collective problems, to create the kind of conditions that promote the flourishing of our communities, is democratic tools to force government to respond to those needs, right. Jeff mentioned responsiveness as a key feature of democracy, but of course we're at a moment where, all the tools that we have on hand are being attacked in real time, dismantled in real time. And, you know, it's not clear that they were operating in the ways that they needed to operate even before the current administration. So as an opening for the symposium, for the conversations that you will all be having over these next several days, I really want to set the larger

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context about, the historical context, but also the conceptual context of sort of what is the landscape and universe of democratizing fights that we are taking on right now, and that we need to take on in the years to come, because it's not just about November, it's not just about one election. It's really about the project for the next five, 10, 15, 20 years. And I think Jeff is exactly right to also remind us of the legacy of transformational democratic change, democratize and change. And I think that's the level of ambition that we need to have. So, to kind of give the punchline first at the outset to be a little bit provocative I mean, I think I would love for us to think about this conversation, not in terms of how do we advance democracy reform to improve an already functioning democracy, but actually if we were to change our view and think about what does it look like to be fighting for democracy reform in a polity that has arguably ceased to function, or maybe never functioned as a democracy really. And that's a different stance. And I think it opens up a bunch of different fights that we need to fight, but also a bunch of different opportunities for transformative and not just incremental change. And that's what I want to talk about here. So, what I'm going to spend the next few minutes on is first give a few remarks about the historical arc of what I think brought us here. Then say a little bit about the diagnosis of what are the big, what are those big long term structural fights that any democracy reform agenda needs to take on, which includes of course the right to vote, but much more than that as Jeff alluded in his comments. And then third is I want to talk concretely about some of the immediate policy fights and ways forward, that there's just so much happening right now. It's a moment of great peril, but also a tremendous powerful organizing and creativity and really bold ideas that are moving through the landscape. And I do want to talk about that as well. So, to start with the history a little bit, as Jeff mentioned, I'm also a constitutional law professor, so I can't resist, those of you who are in law school will forgive this way of starting, but I do want to start with a case. And it's not the case that we usually start our constitutional law classes with, right? You usually would start with *Marbury* or *McCulloch* depending on your professor. But I want to start with the case of *U.S v Cruikshank* which is a case from 1876. And what it's really about is the Colfax massacre. And so, this is at the high-water mark of Reconstruction, the immediate aftermath of the Civil War. And it's a time where we'd passed the 13th, 14th, and 15th amendments. And you're actually seeing a tremendous upsurge of Black electoral power, in terms of Black elected officials at all levels of government, grassroots organizing of Black voters. And you have a local election in Colfax, Louisiana in the 1872 election where Republicans, and the party is still very much the party of Lincoln and made up of mostly black free persons in the district and the County, win the local election, but then there's a standoff because the opposition organized a paramilitary force and threatened the certification of the election. There's a standoff. And then it ultimately results in a massacre of, the count ranges anywhere from 150 to 300, Black free persons who are defending that, who had holed up in the courthouse, to certify the elections, and were attacked by a group of white paramilitaries led by William

Cruikshank among others. And so, then a court case ensues, Congress after the 14th Amendment had passed a series of civil rights and enforcement acts, to help local prosecutors go after these paramilitary groups. You can imagine the whole scene, there's witness intimidation, the DA is having trouble making the case, makes the case, secures a conviction, the Supreme Court then intervenes and throws the case out in 1876. And if you read the case, read the opinion, it's kind of all over the place, but what's really going on here, of course, is a judicial intervention to sanction the off the books paramilitary violence, which was deployed to nullify the results of the election in Colfax County. And I want to start there because it captures this moment, captures a lot of what I think we're really up against in this moment in 2020, right. The first thing/lesson of this moment to me is that the battle for American democracy that we're in, the fight against a slide into authoritarianism or autocracy. It's not just about the current moment. There are modern day threats that Jeff alluded to which I'll talk about in a minute, but we have our own sort of home-grown American tradition as it were of autocracy that we've been fighting against for a long time. And the Colfax case and the Colfax massacre, Cruikshank case, are really, highlights that this is a long running historical problem, and it's not just about the vote, but it's about who gets to vote and who counts, right. It's specifically about this idea of can American democracy be a multiracial democracy in which Black and Brown communities have full equal standing at, and dignity, as members of the polity. That's really the question, right. Because what we find is, in the years that followed is that democracy. Sometimes we think that there's support for the idea of American democracy, but it turns out it's, we're fine with democracy when it's for some folks, but not for everybody. So, the Colfax case highlights the centrality of race, the centrality of the, of our own American tradition of autocracy, which is Jim Crow and white supremacy. And it also highlights that what we're up against is a complex interplay between law, between, civil society actors, grassroots actors, it's about sort of power on the ground as well as power in the courts. And it's about legislative as well as constitutional change. And so, if you fast forward then 100 years. But a big part of why it takes until 1964 to get the voting, the Civil Rights Act, in 1965 to get the Voting Rights Act, is because of cases, moments like Cruikshank, right, these episodes where the eight, the late 19th century court and late 19th century politics, really slams the door shut on the emancipatory and democratizing vision of the reconstruction amendments of the 13th, 14th, and 15th amendments. And that sort of creates this long period of Jim Crow, which then gets challenged by the civil rights movement in the 1950s and 1960s, culminating in, among other things, civil rights act and the voting rights act. If we can think of that moment as kind of a Second Reconstruction, a sequel to that moment of the 13th, 14th, and 15th Amendments. But that moment also then provokes its own backlash, similar in some, in a lot of ways to what we saw in the Cruikshank case, right? So, this, if you think about what happens after 1964, the parties realigned, you have the rise of the Nixonian conservative movement which really starts to fuse a coalition

assembled among big business anti, constituency is resistant to desegregation, social conservatives. They share a common critique of big government, but also there's this undercurrent about race, and a racialized understanding of democracy and of the economy. And so, the lesson here then is that the, this, the backlash against Democracy that we saw in a case like *Cruikshank*, it's still very much there, but it operates through other channels. You see, different debates about social policy, for example, about the welfare state or different ideas about who the polity should serve. But it hadn't yet at that point, gotten to the point of a direct attack on voting rights and the electoral system. So now that gets us to the present. And I think there's a lot of ways in which even before we got to the Trump Administration, that we can understand some of the challenges and tensions of American democracy as being a sequel or in this cause, a part three of this story, of the kind of battling back and forth between are we going to be an inclusive, multiracial democracy or not. And so, when you think about cases like the *Shelby County* case, like *Citizens United*, these cases that, you know, under somewhat plausible, depending on your read, legal theories, really, start to undermine and erode the efficacy and responsiveness of our electoral system, right, by undercutting the voting rights act, by creating more room for corporate money and to skew our elections. And so, there's, there are these pieces that are getting put in place even before they sort of like brazen and open attacks that you see now on the legitimacy of vote by mail say, or of the postal service. So, all of that, I mean, that's a very potted, short history, if we can talk about more in the Q&A but, for me, the take, there are a couple of implications of this. One, of the story, one is that the fight for democracy is fundamentally, centrally, also a fight about racial equity, right? Who is a democracy for, who gets to be a part of the democracy, that's you can't talk about those democracy without talking about those. The second implication is that the law of features on both sides of this story, right. The law, the legal profession, the courts, legislation features both on the side of those sort of fighting for and envisioning a broader democracy. And on the side of, those creating those systems that actually contain and undermine and erode our democratic institutions, and as lawyers, I think that's something that we have to recognize and reckon with. And then the third story is that the fight for democracy isn't just in the courts, and it's not even just in the legislatures, it's this interplay between grassroots organizing, movement building, protest in the streets, and policy change. So, what then is a landscape going forward for democracy reform coming out of this crisis moment in 2020, that we are in? So, I mentioned earlier that I think the scale of our ambition in this moment really has to be at the level of the first or second reconstructions, right? The level of the 14th Amendment or of the Civil Rights and Voting Rights Act, and for leaders, civil rights leaders in this moment, like Reverend Barber among others. This really is a moment of, we can think of as a Third Reconstruction or a possible Third Reconstructions but a moment of possibility of creating an inclusive multi-racial democracy. So, I think there are really four big longterm fights that that project of creating a multiracial democracy out of

2020, really has to tackle. The first is, we need to make sure that our political system is, doesn't screen away or isn't insulated from the kind of social and economic inequities that communities are struggling with that we're, that is sort of the bread and butter of politics, right? It, democracy doesn't mean very much if, the substance of election are if elections, aren't talking about issues like economic justice, racial justice, access to basic needs of healthcare, housing, you know, the safety net. Right, that democracy is closely bound up in sort of the bread and butter of what communities need to thrive. The second project or challenge is how do we rebuild or build a new, the electoral system itself, right? Our biggest weapon, or one of our biggest weapons for holding government accountable, making government responsive. And so, this is the fight around voting rights, around a free and fair election process, you know, we had the ACLU released a study the other day, going, looking back at the 2018 midterms and the gubernatorial election in Georgia, which those of you who followed that election, then secretary of state Brian Kemp was running for governor against Stacey Abrams, the Democrat, the democratic candidate. And there were a lot of allegations about really, really problematic irregularities in that election. But as secretary of state, did Brian Kemp, undermine, for example, the number of voting machines that were present in black and Brown districts of the state. And the ACLU recent report released the other day found that of the 300,000 voters who were purged from the roles in Georgia, in advance of the 2018 election, 60% of them, over 60% of them were purged, were wrongly purged from the list right. There was from a bogus reason. They were still voters. They hadn't changed their address. They were still very much, should have been eligible to vote in an election where the margin was 55,000 votes, that 200,000 wrongly purged voters. That is four times the margin of victory, right? That is, in a country where that's what's actually happening, we can't really call that a free and fair election. And we can't call that a democracy. And that's just one example, right? We're seeing that same story play out in so many States across the country even right now, as we come, less than two months away from the November election. So, there's a whole second, this whole second fight around the electoral system, election administration, voting rights, voter suppression. There's a third set of battles which really has to do with the kind of larger ecosystem or terrain on which electoral contests are fought out. So as Jeff alluded to in his opening comments, it's really hard to have a free and fair election when, our media ecosystem, for example, is rife with disinformation, misinformation, fake news. When we have a few monopoly actors who own and control and therefore can shape both online and offline flows of information and media, that's a structural problem for having a real democratic election. Another structural problem is the balance of economic power. So a world in which we have an unregulated campaign finance system, a world in which we have concentrated corporate power and systematic attacks on community and labor organizing, is a world in which we have a really deep disparities of political power as a result. In one study, we, political scientists found that in right to work States, States that have some union busting legislation,

democratic vote share for the democratic party drops from bias anywhere from eight to 10 percentage points, but it also results in a dramatic decline in elected officials who come from blue collar background, which in turn drives a decline in economic policies that serve working class constituencies. And so, on one level, when we think of labor policy, that's not usually considered as part of the suite of democracy reforms, but understood in this way, right? Union busting attacks on organized labor and attempts to concentrate corporate power are very much about undercutting, structurally undercutting, the political voice of working folks, which has direct impact on the responsiveness, or lack thereof, of the political of the political system. So, there's this whole third set of problems, which we can call sort of structural problems that are related to, but upstream, from the voting, system of voting. And then there's a fourth set of problems which I think of as a sort of election proofing, election proving the policy outcome. So, let's say we have a free and fair election. Let's say that everything goes smoothly in November or in future Novembers. But if government isn't able to then actually pass the kind of policies that respond to people's needs, then how effective is that election really? Or how democratic is our country really? And so here, I'm thinking of, for example, fights to dismantle, the modern administrative state, there's the, for those of you who followed this debate, there's a question about whether courts today are engaging in a kind of neo-Lochnerism, sort of invoking the attacks on social and economic regulations by the Lochner era courts of the 1920s. These are again, not normally thought of as democracy reform questions, but I think they're very much tied to this idea of, you know, if democracy is about a responsive government, even if you get the election part, right, if government can then actually respond, then how meaningful is that election, in the end? So those are four big picture challenges ahead of us. In these last couple of minutes before we open up for questions and discussion, I want to talk a little bit more concretely about the road ahead and the way forward. And I do think that despite all the challenge we are in a really exciting and historic and rare opportunity to rebuild or build anew our democratic institutions. So, there are a couple of buckets that I would put that the current set of fights around. The first bucket is really the sprint to November, right? We are less than two months away from this critical election. As Jeff mentioned in his opening remarks, the Trump administration has been singular in its open and brazen attacks on checks and balances, on the rule of law, and on the electoral system itself. And so, any project of democracy reform or rebuilding has to involve accountability against those attacks on our democratic institutions in November. So that has to do with turnout, has to do with access to the ballot, safe and inclusive vote by mail. These are projects that certainly our team at Demos along with others have been working on in States like Florida or New Mexico, Missouri, trying to get inclusive and equitable vote by mail policies in place so that, all voters, but especially Black and Brown voters can access the ballot, in the middle of a pandemic that is threatening the ability of the election to go smoothly. So, there's a sprint to November around access to the ballot,

around fighting the kind of voter suppression policies that we saw in 2018, with the voter purge that I mentioned, and that are ongoing. Then there's a second set of fights, that are really about post-November, but fights about structural reforms to our political institutions, right? So, bills like the for the people act in that's sitting in the Congress, also known as HR1, sort of a massive omnibus bill that covers everything from automatic voter registration to money and politics reforms, to redistricting reforms. That's going to be a critical fight in January, assuming, if there's a change in administration, to get that bill through, then there's a bunch of other related bills, the voting rights act, kind of restoration now renamed in honor of John Lewis, to restore the VRA in response to the Shelby County case. So, a whole bunch of bills around democracy reform that will have to go through. There's a third set of fights then around these broader structural reform questions. So, how do we, for example, finally abolish the electoral college that creates this huge disparity in between the popular vote and the vote for president. And by the way, I would argue that electoral college is also a big reason why, for example, we have a presidential administration that is not particularly interested in responding to the wildfire crises in California, the electoral college has not incentivized political response to States that are not swing States. And we're seeing that problem being played out back in a dramatic and really dangerous troubling way right now. So how do we abolish the electoral college? How do we enfranchise and empower folks who do not currently have a political voice? So are restoring voting rights for the formerly incarcerated, creating statehood for places like Washington D.C, independence for territories and Puerto Rico. There's then a next set of fights, which is, which would try to get at some of those structural questions that I talked about earlier. So, expanding the ability of workers to organize, constraining the ability of money to skew political action. So, money and politics reforms, labor law reforms, reforms on corporate power like antitrust and financial regulations. This is where I would also put these questions about the media, right? Jeff alluded to the issues of fake news, disinformation, the current media ecosystem, it's in the long run we're going to have to have an answer for how do we have a democracy where the public sphere is online and where the platforms that run the online public sphere have a business model that actually profits from virality and profits from the kind of algorithms that incentivize both radicalization and the spread of misinformation. And we're going to need an answer to that if we want to get a democracy that is going to work for the 21st century. So that's a lot to put on the table. I do think that this is when we, when I mentioned earlier, the cases like Cruickshank, in those moments, it's not just about policy, it's also about power and organizing and kind of bottom-up pressure from below. And I do think this is a moment where we're seeing that in space, from the movement Black lives to the climate justice movement, there's, to the kind of worker organizing that is happening in this moment, we're at a moment of tremendous civic activism, organizing, can, real energy in the grassroots. And I think part of it, the task ahead is going to be to build on that energy, build on that power and that

momentum, and channel it into the kind of structural reforms that we're talking about here. If you look at the movement for Black lives platform, for example, there's a lot in there about fighting voter suppression and dismantling systems of anti-Black police violence. And those are really, if we take democracy at its deepest level, those are fights about creating the kind of equitable democracy that we're looking for. So, we're, in the next few days, you'll have, in this symposium, a deeper dive into these questions around how do we ensure everyone is encouraged and able to vote? How do we think about the relationship between voting rights and racial equity? How do we think about civic duty in this moment? What I hope we can do is, going into those conversations, sort of engage in them in context of this broader history and the broader structural reforms that need to happen. If we're able to do that over these next few years, I really do think we're going to have the opportunity to create the sort of, the kind of real democracy that we've always sort of aspired to have in this country, but never actually realized. So, I'm about at time, why don't I stop there? I see some questions coming in the Q&A so let me turn it back over to Kacey and we can have some discussion.