

Democracy’s Destiny

Gilda Daniels*

I swear to the Lord, I still can’t see, why Democracy means, everybody but me.

Langston Hughes

From its beginning, America has had a paradoxical democracy, where “all men are created equal” while simultaneously denying the right to vote to anyone who was not White, male, or owned property. The pandemic exposed the fault lines of our democratic form of government. Those imposing barriers to the ballot are facing off against the advocates of access. It is not a new battle. In America, we seek ways to limit who can participate instead of expanding opportunities. We have dedicated our resources to dancing around the edges of democracy—by advocating for vote by mail or automatic voter registration, for example—while allowing states to develop blockades to the ballot that are confusing and quite effective.

Without a doubt, America is at a crossroads. The shenanigans that this country has used to prevent access to the ballot box, such as the poll tax, grandfather clause, restrictive voter ID laws, voter purges, and felon disenfranchisement, are antidemocratic and harmful to our system. COVID-19 exposed the fault lines. We must repair them. A free, fair, inclusive, nondiscriminatory right to vote is essential to a healthy democracy. We are in the position to craft a true democratic system of government. Will this country live up to its democratic destiny or continue to deny our journey to a more perfect union?

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INTRODUCTION

As the country battles the novel coronavirus, it has fixed its view on those things that are essential, such as food, health, and shelter. The virus has forced us to make decisions that improve our health and safety. Likewise, the safety and health of America’s democratic system are in poor condition. As much as this is a public health moment, it is also a democratic moment that highlights the need to establish baseline guideposts to ensure free, fair, and nondiscriminatory elections. COVID-19 is the latest disruption to an already unhealthy system. It can, however, change the way we run elections, hopefully, for the better.

Just as the 2000 presidential election exposed problems hiding in plain sight, COVID-19 serves as a warning sign that we are indeed in a crisis. Unlike the virus, the turmoil in our election system is of our own making. We established a system that provides different requirements to cast ballots that vary from state to state and county to county, from voter ID laws to voting machines. In order to have a healthy democracy, we must center the right to vote and ensure eligible persons can cast ballots without fear and discrimination. Our democracy does not exist without the ability to vote.

The COVID-19 pandemic has enabled jurisdictions to reform the way that we conduct elections.¹ Many states and counties have adopted and expanded

1. ALISON LEAL PARKER & LEWIS MUDGE, HUM. RIGHTS WATCH, WHAT DEMOCRACY LOOKS LIKE: PROTECTING VOTING RIGHTS IN THE US DURING THE COVID-19 PANDEMIC (2020), <https://www.hrw.org/report/2020/09/22/what-democracy-looks/protecting-voting-rights-us-during-covid-19-pandemic> [<https://perma.cc/UZ3R-D5SR>].

voting mechanisms, such as vote by mail and early voting.² Indeed, the Centers for Disease Control and Prevention has suggested that jurisdictions should increase modes of casting ballots that would minimize in-person exposure.³ Some states, like Virginia, have gone much further and proclaimed election day a state holiday.⁴ However, others dispute whether these measures are necessary to address the virus or to advance democracy. Indeed, President Trump has objected to statewide vote by mail, claiming that it “doesn’t work out well for Republicans.”⁵ Putting aside this statement’s truthfulness, vote by mail provides an opportunity for Americans to participate in the electoral process without having to decide between casting a ballot and catching a virus.

Just as we must take precautions to ensure that the COVID-19 does not spread and kill millions of persons who live within our borders, we must take precautions to ensure that our right to vote does not succumb to the infection of voter suppression. This moment gives us a chance to reimagine our right to vote and how we provide opportunities for eligible persons to participate in that right. If we want to have a true democratic system, we must commit to the hard work of democracy. Without a doubt, the vote is central to the existence of a democratic form of government. Yet, the ways that we have hindered, thwarted, and denied that right challenge our ability to function as a true democracy. In the midst of the pandemic, the country writ large opted to expand democracy in ways consistent with democratic principles of allowing the people to participate in the election process. While the expansion occurred as a response to the coronavirus, the need for expansion existed prior to the COVID-19 pandemic. Hopefully, these expansive measures can inoculate us from the dangers of voter suppression.

From its beginning, America has had a paradoxical democracy, which declared that “all men are created equal” while simultaneously denying the right to vote to those who were not male, White, or property owners.⁶ America has moved closer to a democracy since the civil rights movement and passage of the Voting Rights Act of 1965 (VRA), yet the many impediments that have erupted in the last decade evidence a regression in the power and right to vote.⁷ We have

2. Niall Stanage, *The Memo: Campaigns Gird for Rush of Early Voting*, HILL (Aug. 6, 2020), <https://thehill.com/homenews/administration/510778-the-memo-campaigns-gird-for-rush-of-early-voting> [<https://perma.cc/EPT6-PY9W>].

3. See *Polling Locations and Voters*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 4, 2021) <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> [<https://perma.cc/HUR7-HJXS>].

4. H.R. 108, 161st Gen. Assemb., Reg. Sess. (Va. 2020).

5. Darlene Ricker, *Block the Vote: Activists Are Fighting New Voter Suppression Tactics in Court*, 106 A.B.A. J. 52, 55 (2020).

6. ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* 22–23 (2d ed. 2003); see also CHILTON WILLIAMSON, *AMERICAN SUFFRAGE: FROM PROPERTY TO DEMOCRACY 1760–1860* 19 (1960) (describing that free, White, over the age of twenty-one, native-born Protestant males who were the owners of real property were the early participants in the franchise).

7. Robert Mickey, Steven Levitsky & Lucan Ahmad Way, *Is America Still Safe for Democracy? Why the United States Is in Danger of Backsliding*, FOREIGN AFFS., May/June 2017, at 20 (“Paradoxically, the polarizing dynamics that now threaten democracy are rooted in the United States’

seen many warnings regarding how easily a country can “slide” into authoritarianism. In questioning whether America continues to be safe for democracy, some suggest that “[i]f democratic backsliding were to occur in the United States, it would not take the form of a coup d’état; there would be no declaration of martial law or imposition of single-party rule. Rather, the experience of most contemporary autocracies suggests that it would take place through a series of little-noticed, incremental steps, most of which are legal and many of which appear innocuous. Taken together, however, they would tilt the playing field in favor of the ruling party.”⁸

How committed are we as a country to maintaining a democratic form of government? Do recent events suggest that other forms of governing are possible in these “united” states of America? We appear to lack unity on many fronts, but if we maintain a democracy—whether that was the initial form of government that the Founding Fathers envisioned or not—should not serve as a subject of debate. The majority of Americans reject authoritarianism.⁹ In the Democracy Fund Voter Study Group study, “fewer than 10 percent of Americans consistently express support for authoritarian alternatives to democracy”¹⁰ But “one-third (33 percent) of Americans have at some point . . . said that they think having ‘a strong leader who doesn’t have to bother with Congress or elections’ would be a good system of government.”¹¹ While Americans don’t want an authoritarian form of government, about a third of those surveyed have considered authoritarian ideals as options.¹² This is a severe problem for the security of our democratic system. The pandemic and political polarization have severely stressed our democracy.

Further, the same study found that 13 percent of those surveyed supported American military leaders suspending elections, closing down the legislature, and temporarily controlling government to address extreme corruption.¹³ Accordingly, it appears that Americans agree on the abstract principles of democracy, yet troubling disparities exist between those in different political parties. As the study suggests, “[w]hat distinguishes stable liberal democracies from their more endangered peers is not just the quality and integrity of their democratic institutions but the depth of their people’s commitment to them. Democracies are stable when citizens with diverse—and even intensely

belated democratization. It was only in the early 1970s—once the civil rights movement and the federal government managed to stamp out authoritarianism in southern states—that the country truly became democratic. Yet this process also helped divide Congress, realigning voters along racial lines and pushing the Republican Party further to the right.”).

8. *Id.* at 20–21.

9. LEE DRUTMAN, JOE GOLDMAN & LARRY DIAMOND, DEMOCRACY FUND VOTER STUDY GRP., DEMOCRACY MAYBE: ATTITUDES ON AUTHORITARIANISM IN AMERICA 4 (2020), <https://www.voterstudygroup.org/publication/democracy-maybe> [<https://perma.cc/9ZX5-3R6V>].

10. *Id.* at 6.

11. *Id.*

12. *Id.*

13. *Id.* at 12.

opposing—views nevertheless accept the legitimacy of their political rivals, commit to peaceful and legal means of contesting for power, and support the rules and restraints of their constitutional system.”¹⁴ As a result, the 2020 presidential election is a disturbing backdrop for democracy.

In the aftermath of the election, President Trump filed more than fifty lawsuits in eight states, made unfounded and false statements regarding voter fraud, coerced state legislators, and persuaded a majority of Republicans that the President-Elect was not legitimately elected.¹⁵ In a true democracy, the results of an election are honored, acknowledged, and follow democratic norms. The 2020 election was abnormal for several reasons, among them the number of votes cast,¹⁶ the number of lawsuits filed, and the dispersions cast on the outcome.¹⁷ These actions evidence “an anti-democratic virus that has spread in mainstream Republicanism, among mainstream Republican elected officials, . . . [a]nd that loss of faith in the machinery of democracy is a much bigger problem than any individual lawsuit.”¹⁸ Further, the damage to democracy is concerning.¹⁹ While the lawsuits and false statements were meant to destroy the system,²⁰ it is

14. *Id.* at 6.

15. Amy Gardner, Josh Dawsey & Rachael Bade, *Trump Asks Pennsylvania House Speaker for Help Overturning Election Results, Personally Intervening in a Third State*, WASH. POST (Dec. 8, 2020), https://www.washingtonpost.com/politics/trump-pennsylvania-speaker-call/2020/12/07/d65fe8c4-38bf-11eb-98c4-25dc9f4987e8_story.html [<https://perma.cc/4A5U-7DRN>]; Kyle Cheney, *Trump Calls on GOP State Legislatures to Overturn Election Results*, POLITICO (Nov. 21, 2020), <https://www.politico.com/news/2020/11/21/trump-state-legislatures-overturn-election-results-439031> [<https://perma.cc/AX5N-HZ9H>]; Alan Feuer, *The Long, Strange Road Trump Took to Challenge the Election Results*, N.Y. TIMES (Dec. 11, 2020), <https://www.nytimes.com/live/2020/12/11/us/joe-biden-trump/the-long-strange-road-trump-took-to-challenge-the-election-results> [<https://perma.cc/F7UY-9WAH>]; Alison Durkee, *Trump and the GOP Have Now Lost More than 50 Post-Election Lawsuits*, FORBES (Dec. 8, 2020), <https://www.forbes.com/sites/alisondurkee/2020/12/08/trump-and-the-gop-have-now-lost-50-post-election-lawsuits/> [<https://perma.cc/FDC8-TKTZ>].

16. See Domenico Montanaro, *President-Elect Joe Biden Hits 80 Million Votes in Year of Record Turnout*, NPR (Nov. 25, 2020), <https://www.npr.org/2020/11/25/937248659/president-elect-biden-hits-80-million-votes-in-year-of-record-turnout> [<https://perma.cc/B5X3-LUA8>].

17. See, e.g., Joseph Ax, *Coronavirus Fuels Historic Legal Battle over Voting as 2020 Election Looms*, REUTERS (Sept. 24, 2020), <https://www.reuters.com/article/us-usa-election-litigation/coronavirus-fuels-historic-legal-battle-over-voting-as-2020-u-s-election-looms-idUSKCN26F1WR> [<https://perma.cc/N2RQ-DC8R>] (noting the several legal challenges the Trump campaign brought and the preemptive assertions that “voting by mail will yield a ‘rigged’ result”).

18. Spencer Bokot-Lindell, *Where Does American Democracy Go from Here*, N.Y. TIMES (Dec. 15, 2020), <https://www.nytimes.com/2020/12/15/opinion/trump-biden-coup.html> [<https://perma.cc/7VUU-MV9P>] (quoting Dale Ho, director of the Voting Rights Project at the ACLU).

19. *Id.* (“If enough people believe that a government is not elected legitimately, that’s a huge problem for democracy.” (quoting Keith A. Darden, a political science professor at American University in Washington, D.C.)).

20. See, e.g., Courtney Vinopal, *What the Trump Campaign’s Legal Fights Could Mean for the Election and Overall Public Trust*, PBS NEWSHOUR (Nov. 10, 2020), <https://www.pbs.org/newshour/politics/what-the-trump-campaigns-legal-fights-could-mean-for-this-election-and-overall-public-trust> [<https://perma.cc/TGQ8-QAE5>] (“Voting rights advocates worry that doubt surrounding the election results could undermine trust in the electoral system going forward.”).

important to note that, thus far, the system prevailed. Moreover, these aggressive actions remind us that this country continues to evolve democratically.

President Barack Obama offered his thoughts on democracy at Congressman John Lewis's funeral.²¹ He stated:

Now, this country is a constant work in progress. We were born with instructions: to form a more perfect union. Explicit in those words is the idea that we are imperfect; that what gives each new generation purpose is to take up the unfinished work of the last and carry it further than anyone might have thought possible

[John Lewis] knew that every single one of us has a God-given power. And that the fate of this democracy depends on how we use it; that democracy isn't automatic, it has to be nurtured, it has to be tended to, we have to work at it, it's hard If we want our children to grow up in a democracy—not just with elections, but a true democracy, a representative democracy, a big-hearted, tolerant, vibrant, inclusive America of perpetual self-creation—then we are going to have to be more like John. We don't have to do all the things he had to do because he did them for us. But we have got to do something.²²

Congressman John Lewis understood that work was necessary to establish and maintain a democratic form of government. He labored and put himself in harm's way in order to establish a more perfect union and fight for the right to vote.²³ Sadly, while he dedicated his life to justice and representing his constituents in Atlanta, Georgia, he did not live to see the true democracy that he envisioned and toiled to create.²⁴ Yet, he showed us the path and, at his death, proclaimed that "Democracy is not a state. It's an act."²⁵ The act of maintaining and establishing a truly democratic system that allows all people to participate is attainable.

Our country has historically bestowed the right to vote to those deemed worthy and excluded those who did not meet the criteria concerning race, gender, and property ownership. The idea that only certain people should enjoy the full rights of citizenship continues to perpetuate and cripple the system. This

21. Civil rights hero and Congressman John Robert Lewis died on July 17, 2020. His memoir, *JOHN LEWIS WITH MICHAEL D'ORSO, WALKING WITH THE WIND: A MEMOIR OF THE MOVEMENT* (1998), chronicles his life and advocacy. *See also* Brandon Tensley & Veronica Stracqualursi, *Breaking Down the Significance of John Lewis' Funeral Service*, CNN (July 31, 2020), <https://www.cnn.com/2020/07/31/politics/john-lewis-atlanta-funeral-service/index.html> [<https://perma.cc/M4YP-V43U>] (noting that in President Obama "went beyond pure remembrance" of Congressman Lewis to warn of attacks against democracy and widespread disenfranchisement).

22. *Read the Full Transcript of Obama's Eulogy for John Lewis*, N.Y. TIMES (July 30, 2020), <https://www.nytimes.com/2020/07/30/us/obama-eulogy-john-lewis-full-transcript.html> [<https://perma.cc/F9LV-JWUH>].

23. *See generally* LEWIS WITH D'ORSO, *supra* note 21.

24. John Lewis, Opinion, *Together, You Can Redeem the Soul of Our Nation*, N.Y. TIMES (July 30, 2020), <https://www.nytimes.com/2020/07/30/opinion/john-lewis-civil-rights-america.html> [<https://perma.cc/JQ9W-5FAF>].

25. *Id.*

mentality is prevalent and fuels false claims of voter fraud and restrictive voter laws. For instance, a longstanding ideology believes that Black votes should not count unless they are cast for a particular party. One writer described the Republican Party's perspective as "Black votes are considered illegitimate even if they are legally cast. Those votes could be legitimate if more of them were cast for Republicans, the party of true Americans, but as long as they are cast for Democrats, they can be dismissed as the result of Democratic brainwashing. Demanding that Black votes be tossed out is not antidemocratic, because they should not have counted in the first place."²⁶ This belief system leads further from a true democracy where all voters are treated equally.

However, the work of crafting a system where all persons are created equal and have an equal opportunity to participate is within reach. Will America prepare a table for all people to participate or continue to have an exclusive guest list? America has an opportunity to fulfill its democratic destiny: to provide equal, nondiscriminatory opportunities for voters to cast ballots and have those votes counted equally.

How can we achieve a more perfect union? How can we center the right to vote and the ability to access that right freely, fairly, and without discrimination? Does America have a true democracy or interest in achieving that outcome? As a country, we have been hesitant to allow people to exhibit their power. Plainly, the restrictions on power are directly related to the power of the vote and the ease in which the people are given the ability to execute it. In America, we seek ways to limit who can participate instead of expanding opportunities. We have allocated resources to makeshift fixes, like vote by mail and automatic voter registration, while allowing states to create complicated and lasting barriers to the ballot.²⁷ The COVID-19 pandemic demands that we address deficiencies in multiple areas, including health care access, racial justice, and education. Likewise, it has uncovered the failings in our democratic system, inter alia, long voting lines, aging machines, and antiquated and discriminatory processes. The problems existed before the pandemic, and so, too, did the solutions.

This Article will explore the nature of our contradictory democracy and propose measures that can lead to reform. In order to maintain our democracy, we must center the right to vote and remove the impediments that prevent the exercise of the franchise. Part I defines our democratic form of government. It will provide an overview of the developing democracy from the Founding Fathers to the twenty-first century, paying particular attention to antidemocratic and suppressive measures. Part II will assess voter suppression mechanisms that thwart the democratic process and the racist origins and contemporaneous

26. Adam Serwer, *If You Didn't Vote for Trump, Your Vote Is Fraudulent*, ATLANTIC (Dec. 10, 2020), <https://www.theatlantic.com/ideas/archive/2020/12/voter-fraud/617354/> [https://perma.cc/SEW8-SY42].

27. See, e.g., GILDA R. DANIELS, UNCOUNTED: THE CRISIS OF VOTER SUPPRESSION IN AMERICA (2020).

negative effects of the Electoral College. Finally, Part III offers solutions that can help lead us toward a more perfect union.

I.

DEFINING DEMOCRACY

Surprisingly, the word democracy is not mentioned in the U.S. Constitution or the Declaration of Independence. In *The Federalist No. 10*, Founding Father James Madison apparently feared democratic rule when he expressed that “instability, injustice, and confusion . . . have in truth been the mortal diseases under which popular governments have every where [*sic*] perished.”²⁸ He surmised, “[W]e may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior.”²⁹ Relatedly, now-beloved Founding Father Alexander Hamilton wanted only the wealthy and educated men to control the country, believing that power would corrupt the working class.³⁰ While the Founders preferred a “republic,” the ability to choose representatives makes the United States a representative democracy. The Founders’ inclination or preference for a republic reflects the belief that only well-educated, knowledgeable persons are worthy of exercising the franchise.

28. THE FEDERALIST NO. 10, at 56–57, 61 (James Madison) (Jacob E. Cooke ed., Wesleyan Univ. Press 1961). In *The Federalist No. 10*, Madison defined “pure Democracy” as one in which the people rule directly:

From this view of the subject, it may be concluded, that a pure Democracy, by which I mean, a Society, consisting of a small number of citizens, who assemble and administer the Government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert results from the form of Government itself; and there is nothing to check the inducements to sacrifice the weaker party, or an obnoxious individual. Hence it is, that such Democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property; and have in general been as short in their lives, as they have been violent in their deaths.

Id.

29. THE FEDERALIST NO. 39, at 251 (James Madison) (Jacob E. Cooke ed., Wesleyan Univ. Press 1961).

30. THOMAS G. WEST, VINDICATING THE FOUNDERS: RACE, SEX, CLASS, AND JUSTICE IN THE ORIGINS OF AMERICA 80 (1997) (“If it were probable that every man would give his vote freely, and without influence of any kind, then, upon the true theory and genuine principles of liberty, every member of the community, however poor, should have a vote. . . . But since that can hardly be expected, in persons of indigent fortunes, or such as are under the immediate dominion of others, all popular states have been obliged to establish certain qualifications, whereby, some who are suspected to have no will of their own, are excluded from voting; in order to set other individuals, whose wills may be supposed independent, more thoroughly upon a level with each other.” (quoting passage from Alexander Hamilton’s *The Farmer Refuted*)).

A. Democracy and “We the People”

Although the Founders did not equate a republic with democracy, it was arguably the intent of the Framers, despite the fact that the Constitution does not have the word democracy in the preamble.³¹ According to scholar Erwin Chemerinsky, “the Preamble begins by proclaiming that the Constitution is created by ‘we the people.’ . . . This phrase makes it clear that the United States is to be a democracy, not a monarchy or theocracy or a totalitarian government, the dominant forms of government throughout the world in 1787 and before.”³²

It is clear that “we the people” meant other forms of governance were not tolerated in the new land. Yet, the people whom the Founders envisioned as utilizing the newly established power in the Constitution reflected only White men with means and access to power. Accordingly, while the founding documents did not include the word “democracy,” “we the people” equates with the Greek meaning of the term where the people have the power.³³

If in a democracy, the power to cast a ballot serves as the primary means in which a democracy can exist, then “we the people” has evolved from its muted tones to a symphony of possibilities. For more than a century, “we the people” only included Whites and excluded Indigenous and people of color.³⁴ As Justice Thurgood Marshall observed, “[t]he government [that the Founders] devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional

31. *Compare* *Evenwel v. Abbott*, 136 S. Ct. 1120, 1139 (2016) (citing GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 222–26 (1998)) (“For most constitution-makers in 1776, republicanism was not equated with democracy.”), with AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 276–81 (2005) (arguing that the provision prohibited monarchies and aristocracies but not direct democracy). *See also* THE FEDERALIST NO. 10, at 62 (James Madison) (Jacob E. Cooke ed., Wesleyan Univ. Press 1961) (distinguishing a “democracy” and a “republic”); THE FEDERALIST NO. 14, at 83–84 (James Madison) (Jacob E. Cooke ed., Wesleyan Univ. Press 1961) (doing the same).

32. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 1 (6th ed., 2019) (“The Preamble does much more than tell us that the document is to be called the ‘Constitution’ and that it is meant to establish a government. The Preamble describes the core values that the Constitution seeks to achieve: democratic government, effective governance, justice, and liberty.”).

33. The Greek derivative of the word democracy is “demos” the people and “kratia” power or authority.

34. *See, e.g., Elk v. Wilkins*, 112 U.S. 94, 109 (1884) (ruling that Indians were “not . . . citizen[s] of the United States under the Fourteenth Amendment.”); *Ozawa v. United States*, 260 U.S. 178, 198 (1922) (upholding laws that prohibited Asians from voting or owning land); *Smith v. Allwright*, 321 U.S. 649 (1944) (banning all-white primaries); *Lynch v. Alabama*, No. 08-S-450-NE, 2011 WL 13186739, at *47–48 (N.D. Ala. 2011), *aff’d in part, vacated in part, remanded sub nom. I.L. v. Alabama*, 739 F.3d 1273 (11th Cir. 2014) (“‘Jim Crow laws’ were state laws and local ordinances enacted from the end of Reconstruction through the first six decades of the twentieth century for the purpose of mandating *de jure* racial segregation of all public transportation conveyances, restaurants, restrooms, water fountains, schools, hotels, libraries, and virtually every other form of public accommodations and facilities.”); *see also Jim Crow Laws*, SMITHSONIAN NAT’L MUSEUM OF AM. HIST. SEPARATE IS NOT EQUAL: BROWN V. BOARD OF EDUC., <https://americanhistory.si.edu/brown/history/1-segregated/jim-crow.html> [<https://perma.cc/VV22-Y SRL>].

government, and its respect for individual freedoms and the human rights, that we hold as fundamental today.”³⁵

The hypocrisy that “all men” received the benefits of citizenship served as an unrealized proclamation for Indigenous people and those who were enslaved. The three-fifths compromise ensured that those men would only count for purposes of apportionment and only as a fraction of their actual capacity.³⁶ The Founders were explicit in their intentions to create a caste system that assured second-class citizenship to people of color.³⁷ As former gubernatorial candidate Stacey Abrams observed:

At the country’s inception, the Founding Fathers decided who would be deemed worthy of citizenship. . . . Not surprisingly, only [W]hite men were granted such esteemed status From the mundane decision of taxation to the sale of human chattel, the Constitution envisioned the narrowest class of power brokers, and constraints on citizenship are the most effective means to filter out the interlopers.³⁸

The lines were drawn. The demarcations were clear. Only certain people should share in the American experiment. The Founders had decided that only those who looked like them and were of the same economic status had the ability to participate. This idea that only certain persons should have the right to vote continues to permeate American society.³⁹

B. Democracy’s Evolution

The country has evolved into a democracy, but that democracy does not necessarily serve all the people. President Abraham Lincoln proclaimed that democracy is “government of the people, by the people, for the people.”⁴⁰ This statement embodies the ideal that the people govern and that we have a representative form of government. But it is a persistent perception that the

35. Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987).

36. See, e.g., DANIELS, *supra* note 27, at 146–48.

37. See, e.g., Three-Fifths Compromise, U.S. CONST. art. I, § 2 (repealed 1868) (“Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.”).

38. STACEY ABRAMS, *OUR TIME IS NOW: POWER, PURPOSE AND THE FIGHT FOR A FAIR AMERICA* 29 (2020).

39. Jason Brennan, *The Right to Vote Should Be Restricted to Those with Knowledge*, AEON (Sept. 29, 2016), <https://aeon.co/ideas/the-right-to-vote-should-be-restricted-to-those-with-knowledge> [<https://perma.cc/5P5G-BBDF>] (The author suggests an epistocracy instead of a democracy: “Epistocracies retain the *same* institutions as representative democracies, including imposing liberal constitutional limits on power, bills of rights, checks and balances, elected representatives and judicial review. But while democracies give every citizen an equal right to vote, epistocracies apportion political power, by law, according to *knowledge* or *competence*.”).

40. Abraham Lincoln, U.S. President, Address at Gettysburg, Pennsylvania (Nov. 19, 1865), in SPEECHES AND WRITINGS 1859-1865, at 536 (Roy P. Basler ed., 1989).

government does not reflect the will of the people. Elected officials are referred to as out-of-touch elites that have little knowledge of the common person's struggles. Indeed, "[m]any now believe, correctly or not, that the government of the United States is a government of the elite, by the elite, and for the elite."⁴¹

As President Obama and the late Congressman John Lewis admonished, maintaining the promise of democracy takes work.⁴² Jack Balkin called this work, evidenced through the combination of beliefs, practices, and institutions, a constitutional regime.⁴³ He argued that "[s]uccessive constitutional regimes both build on and reject parts of previous regimes, so that they form a crazy quilt of practices and constructions from different eras. Our current regime cobbles together the New Deal, the national security state, and the civil rights revolution, as well as aspects of the Reagan-era transformations that came with the rise of conservative political movements in the late twentieth century."⁴⁴ It is this patchwork of principles that has garnered the cozy quilt of democracy. The many experiences and values that this country has embodied have evolved into a democratic form of government that stretches and constricts—but does not break. To be sure, America did not begin to realize its democratic possibilities until almost a century after its founding.

1. Nineteenth Century Democracy

It was not until 1868 and the passage of the Fourteenth Amendment⁴⁵ that equality and its guarantees were included in the Constitution. These guarantees were included in the Civil War Amendments: the Thirteenth ended slavery,⁴⁶ the

41. Barry Sullivan, *Democratic Conditions*, 51 LOY. U. CHI. L.J. 555, 582 (2019) ("But a major source of popular discontent with government today is the perception that government is too far removed from the people, that it is too unresponsive to the will of the people, and that the constitutional safeguards properly designed to prevent hasty or ill-conceived governmental action have, in practice, led to legislative paralysis, the aggrandizement of the executive, and a governmental system that is attentive and responsive mainly to the interests and desires of the rich and powerful. In other words, the same mechanisms that may be effective in protecting against hasty decisions or ill-conceived policies may also serve to distance the people from the government—and the government from the people.").

42. See *supra* note 22.

43. Jack M. Balkin, *The Roots of the Living Constitution*, 92 B.U. L. REV. 1129, 1135 (2012) ("At any point in time, Americans live within what political scientists call a constitutional regime. A constitutional regime combines a range of beliefs about constitutional meaning together with a set of accepted, customs, practices, and institutions. Thus, a constitutional regime includes (1) basic principles and assumptions about constitutional rights, duties, and powers and the proper role of government and (2) the institutions and practices that grow up around these principles and assumptions.").

44. *Id.* at 1136.

45. U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); see also CHEMERINSKY, *supra* note 32, at 3.

46. U.S. CONST. amend. XIII.

Fourteenth⁴⁷ provided equal protection under the law, and the Fifteenth⁴⁸ prohibited discrimination in voting. These amendments paved the way for the extensions of “we the people” to include formerly enslaved persons. Additionally, prior to the Fourteenth Amendment, the Constitution did not explicitly define citizen, which allowed the states to define the term and deny the right to vote to those that did not fit into their criteria. Moreover, prior to the passage of the Fifteenth Amendment, the Constitution lacked language that mentioned the right to vote.

Accordingly, the “we” in “we the people” did not include people of color. In *Elk v. Wilkins*, the United States Supreme Court found that Native American peoples were “not . . . citizen[s] of the United States under the Fourteenth Amendment.”⁴⁹ Latinx Americans have dealt with violence and laws that prevented the right to vote similar to those exercised over African American and Indigenous people.⁵⁰ Likewise, Asian American, Native Hawaiian, and Pacific Islanders (AANHPI) were denied the ability to vote for most of the country’s existence, as Asian immigrants were barred from becoming citizens via federal policy until 1943 and subject to racial criteria for naturalization until 1952. In fact, many legislative efforts prevented Asian immigrants from even entering the country and becoming citizens.⁵¹ Asian immigrants were also prohibited from voting and owning land, as they were legally identified as aliens “ineligible for citizenship.”⁵²

47. U.S. CONST. amend. XIV.

48. U.S. CONST. amend. XV.

49. 112 U.S. 94, 109 (1884).

50. See GILDA DANIELS, TYSON KING-MEADOWS & LOREN HENDERSON, RACIAL EQUITY ANCHORS COLLABORATIVE, WE VOTE, WE COUNT: THE NEED FOR CONGRESSIONAL ACTION TO SECURE THE RIGHT TO VOTE FOR ALL CITIZENS (2019), https://www.demos.org/sites/default/files/2019-11/Demos_Kellogg_Report_DD_Final_Web.pdf [<https://perma.cc/2XXZ-3N54>] (citing Nina Perales, Luis Figueroa & Criselda G. Rivas, *Voting Rights in Texas: 1982–2006*, 17 S. CAL. REV. L. & SOC. JUST. 713, 713 (2008)) (“Around the same period, following the Mexican-American War in 1848, the U.S. had annexed over half of Mexico—what is now the states of Arizona, Colorado, California, New Mexico, Nevada, Utah, and portions of Kansas, Oklahoma, and Wyoming, plus Texas, annexed in 1845. Mexicans who resided in those territories and stayed were allowed to choose U.S. citizenship. Nonetheless, remaining meant they faced violence, and laws and practices similar to those experienced by African American and Native Peoples . . .”).

51. See, e.g., Naturalization Act of 1790, ch. 3, 1 Stat. 103, 103 (providing one of the first laws to limit naturalization to aliens who were “free white persons” and thus, in effect, excluding African Americans, and later, Asian Americans), *repealed by* Immigration and Nationality of 1952, Pub. L. No. 82-414, 66 Stat. 163; Act of Oct. 1, 1888, ch. 1064 § 2, 25 Stat. 504 (rendering approximately 20,000 Chinese re-entry certificates null and void); Immigration Act of 1924, ch. 190 § 27, 43 Stat. 153 (repealed 1952) (denying entry to virtually all Asians); 1934 Philippine Independence Act, ch. 84 § 8(a)(1), 48 Stat. 456 (amended 1946) (imposing annual quota of fifty Filipino immigrants).

52. DANIELS ET AL., *supra* note 50, at 13 (citing Perales, Figueroa & Rivas, *supra* note 50); see Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58, 58–61 (repealed 1943) (prohibiting immigration of Chinese laborers); Immigration Act of 1917, ch. 29, 39 Stat. 874, 874–98; Immigration Act of 1924, ch. 190, 43 Stat. 153 (repealed 1952) (banning immigration from almost all countries in the Asia-Pacific region); Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 415 (2005).

These practices within the states extended the Founding Fathers' intent to allow only people with means—White, male, property owners—the ability to vote.⁵³ James Madison identified that granting the right to vote to all citizens, including the minority and non-landowners, could be detrimental to the interest of the White-majority and property owners' votes. Madison contends: “The right of suffrage is a fundamental article in the Republican constitutions. The regulation of it is, at the same time, a task of peculiar delicacy. Allow the right [to vote] exclusively to property [owners], and the rights of a person may be oppressed . . . [but] extend [the right] equally to all, and the rights of property [owners] . . . may be overruled by a majority without property.”⁵⁴

This “fundamental article in the Republican constitution”⁵⁵ would not become available to other citizens until almost one hundred years after the founding of the country. Nevertheless, the passage of the Civil War Amendments allowed Black men to experience the power and an abbreviated relationship with the right to vote. During Reconstruction, which followed the passage of the Civil War Amendments, Black men participated as full citizens and enjoyed electoral success. Black men were able to elect persons to local, state, and federal offices.⁵⁶ For example, in South Carolina, “where in 1870 [B]lack leaders, as the result of a concerted campaign for greater power, received half the eight executive offices, elected three Congressmen, and placed Jonathan J. Wright on the state supreme court, the only [B]lack in any state to hold this position during Reconstruction.”⁵⁷ These gains were short-lived.

This display of Black voter power was met with violence and economic terror. The Ku Klux Klan, the Knights of the White Camellia, Red Shirts, and other like-minded organizations sought to dismantle the pursuit of the ideal that all men were created equal.⁵⁸ Historian Eric Foner noted, “It is a measure of how far change had progressed that the reaction against Reconstruction proved so extreme.”⁵⁹ In addition to violence, the reaction included a resurgence of White segregationist laws that would eliminate Black people from elected office and political participation. South Carolina Senator “Pitchfork” Ben Tillman divulged

53. See Sullivan, *supra* note 41, at 582–83 (citing DAHL, *supra* note 6); WILLIAMSON, *supra* note 6, at 19 (noting that confining the vote in colonial elections to those who were “free, [W]hite, twenty-one, native-born Protestant males who were the owners of property, especially real property, appeared to be the best guarantee of the stability of the commonwealth”).

54. James Madison, Note to His Speech on the Right of Suffrage (Aug. 7, 1787), in 3 A CENTURY OF LAWMAKING FOR A NEW NATION: U.S. CONGRESSIONAL DOCUMENTS AND DEBATES, 1774–1875 450, 450 (Max Farrand ed., Yale Univ. Press 1911).

55. *Id.*

56. See, e.g., ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 354–55 (Harper & Row 1988) (noting that approximately 650 Black people were elected from 1860–1877, an incredible achievement a few years after the end of slavery).

57. See ERIC FONER, A SHORT HISTORY OF RECONSTRUCTION, 1863–1877, at 151 (Perennial Libr. 1990).

58. See Sheryll D. Cashin, *Democracy, Race, and Multiculturalism in the Twenty-First Century: Will the Voting Rights Act Ever Be Obsolete?*, 22 WASH. U. J.L. & POL'Y 71, 83–84 (2006).

59. FONER, *supra* note 57, at 425.

the Southern Strategy, “We organized the Democratic Party with one plank, and only one plank, namely, that ‘this is a [W]hite man’s country and [W]hite men must govern it.’”⁶⁰ Southern legislators passed laws—such as poll taxes, grandfather clauses, literacy tests, and felon disenfranchisement—that had as their explicit intent to remove the “Negro” from the voter rolls. In Louisiana, in 1896, 135,000 Black men were registered, but due to the State’s implementation of various disenfranchising devices, this number was reduced to less than 1,000 men by 1907.⁶¹ White segregationists maintained this level of disenfranchisement in Black and Brown communities throughout the South and Southwest for much of the twentieth century. Indeed, despite the passage of the Nineteenth Amendment in 1920 that prohibited discrimination based on gender, Black and Brown women in the South and Southwest did not realize the right to vote until the passage of the Voting Rights Act of 1965.⁶²

What then of this idea of democracy? “We the people” served as the embodiment of a larger desire to be inclusive, but widespread and disenfranchising laws have effectively excluded millions of eligible people of color from voting for almost two centuries. If the Founders wanted the people to have a voice in the process, Americans were silenced by White supremacist devices, such as the poll tax, literacy test, and grandfather clause.

2. *Twentieth Century Democracy*

It would take almost one hundred years, from the passage of the Fifteenth Amendment to the hard-fought passage of civil rights laws like the Voting Rights Act of 1965, to address the inequities in our democracy. Justice Thurgood Marshall noticed that our perfect union was rather imperfect, observing that “the government [that the Founders] devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, that we hold as fundamental today.”⁶³

The many “conniving methods”⁶⁴ that segregationists and White supremacists employed at the turn of and throughout the twentieth century effectively blocked the vote and kept people of color from participating in the political process. Following the civil rights movement, Congress sought to

60. JOHN HOPE FRANKLIN & ALFRED A. MOSS JR., *FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS* 285 (8th ed. 2000).

61. *Major v. Treen*, 574 F. Supp. 325, 340 (E.D. La. 1983) (noting that, while Black suffrage increased from 1867 to 1898, the imposition of a grandfather clause and educational and property qualifications for registration reduced Black voter registration).

62. *See, e.g.*, MARTHA S. JONES, *VANGUARD: HOW BLACK WOMEN BROKE BARRIERS, WON THE VOTE, AND INSISTED ON EQUALITY FOR ALL* (Basic Books 2020).

63. Marshall, *supra* note 35, at 2.

64. Martin Luther King Jr., Address at the Prayer Pilgrimage for Freedom: Give Us the Ballot (May 17, 1957), <http://okra.stanford.edu/en/permalink/document570517-000> [<https://perma.cc/9WBC-LWC5>] (“[A]ll types of conniving methods are still being used to prevent Negroes from becoming registered voters.”).

address the defective nature of our democracy with the passage of the Voting Rights Act of 1965. America has moved closer to a democracy since the civil rights movement and passage of the Voting Rights Act of 1965, an attempt to put the “we” back into the “we the people.” Communities that had been terrorized for attempting to exercise the right to vote desperately needed the protections that the VRA provided—the Fifteenth and Nineteenth Amendments were not enough. To give true meaning to democracy and dismantle barriers to the ballot box, Congress had to use its power under the Fourteenth and Fifteenth Amendments to enact the extraordinary measures included in the Voting Rights Act.

a. The Voting Rights Act of 1965

The Voting Rights Act of 1965⁶⁵ and its later iterations allowed people of color to register and vote in jurisdictions where they had previously been forbidden from exercising that right.⁶⁶ Although the Civil Rights Act of 1957 created the U.S. Commission on Civil Rights,⁶⁷ a Civil Rights Section with an Assistant Attorney General, and the ability to bring discrimination cases in federal courts, the Attorney General of the United States found that the Civil Rights Act and the constitutional amendments were still not enough to prevent the widespread discrimination in the South. Attorney General Katzenbach had requested authority to abandon “case-by-case litigation against voting discrimination.”⁶⁸ In *South Carolina v. Katzenbach*, the Court found that “[v]oting suits are unusually onerous to prepare, sometimes requiring as many as 6,000 man-hours spent combing through registration records in preparation for trial. Litigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials and others involved in the proceedings.”⁶⁹ Election officials often ignored or subverted the existing civil rights laws, thus, highlighting the need for federal intervention.⁷⁰

65. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

66. See, e.g., BRIAN K. LANDSBERG, *FREE AT LAST TO VOTE: THE ALABAMA ORIGINS OF THE 1965 VOTING RIGHTS ACT* 187 (2007) (“[T]he eight years from 1957 to 1965 seemed interminable. The failures of enforcement were maddening. Two presidential elections had come and gone in which hundreds of thousands of [B]lack citizens had been barred from voting. The 1957, 1960, and 1967 Acts could have led to a break from the pattern of racial discrimination in registration, but the state and local politics of the day combined with the natural preference for the status quo to produce resistance to compliance.”).

67. Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (codified as amended at 42 U.S.C. §§ 1975–1975d).

68. See *South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966).

69. *Id.* at 314.

70. See *id.* at 315 (“The litigation in Dallas County took more than 4 years to open the door to the exercise of constitutional rights conferred almost a century ago. The problem on a national scale is that the difficulties experienced in suits in Dallas County have been encountered over and over again under existing voting laws. Four years is too long. The burden is too heavy—the wrong to our citizens

Accordingly, the 1965 Act provided federal registrars and observers who added a sense of protection to communities that had lived in terror for casting a ballot.⁷¹ Rosie Head tried to register to vote in Mississippi in 1964 among police dogs, threats, and other intimidation. The chancellor clerk told her, “‘I’ve known your people for years and years, and I know you know better. What are you doing out here anyway?’ And so, I told him what I wanted. And he said, ‘You go home and do like your mama and your grandmama did. You don’t need to come out here. This ain’t for [B]lack folk.’”⁷² Ms. Head was given a test, and the clerk did not allow her to register. She could not register and vote until after the passage of the Voting Rights Act of 1965.⁷³

Events throughout the South beckoned Congress to act. None was louder than the terror attack on peaceful marchers on March 7, 1965, led by John Lewis and Hosea Williams in Selma, Alabama, which is referred to as Bloody Sunday.⁷⁴ A week after Bloody Sunday, President Lyndon Baines Johnson remarked,

“[A]bout this there can and should be no argument. Every American citizen must have an equal right to vote. There is no reason which can excuse the denial of that right. There is no duty which weighs more heavily on us than the duty we have to ensure that right. Yet the harsh fact is that in many places these country men and women are kept from voting simply because they are Negroes. . . . For the fact is that the only way to pass these barriers is to show a [W]hite skin.”⁷⁵

It was apparent that the disenfranchising methods that persisted from the constitutional conventions of the early twentieth century and continued throughout the South and Southwest needed congressional action to prevent their unrelenting threat to democracy.⁷⁶ The need for the VRA was clear.

This monumental piece of legislation included two primary provisions: Section 2 and Section 5. Section 2 of the Act provides a nationwide prohibition

is too serious—the damage to our national conscience is too great not to adopt more effective measures than exist today.”).

71. 52 U.S.C. §§ 10301–10314, 10501–10508, and 10701–10702. The Voting Rights Act of 1965 provided federal registrars and observers who registered Black and Brown voters in the South, who had been excluded from participating in the electoral process.

72. Ms. Head’s and other firsthand accounts are archived in the Library of Congress. *Civil Rights History Project*, LIBR. OF CONG., <https://www.loc.gov/collections/civil-rights-history-project/articles-and-essays/voting-rights/> [<https://perma.cc/9YU6-2KVV>].

73. *Id.*

74. See LEWIS WITH D’ORSO, *supra* note 21, at 330–45. On March 7, 1965, civil rights marchers led by John Lewis and Hosea Williams attempted to march from Selma to Montgomery, Alabama. Police officers met them after crossing the bridge with horses, tear gas, and billy clubs. The beatings and violence were captured on national television. Bloody Sunday is attributed with moving Congress and President Lyndon Baines Johnson to introduce and pass the Voting Rights Act of 1965.

75. Lyndon B. Johnson, U.S. President, Special Message to the Congress: The American Promise (Mar. 15, 1965), <http://www.lbjlibrary.org/lyndon-baines-johnson/speeches-films/president-johnsons-special-message-to-the-congress-the-american-promise> [<https://perma.cc/8ZK9-YHSM>].

76. See, e.g., DANIELS, *supra* note 27, at 20–23 (providing firsthand accounts of these disenfranchising methods during the 1950s and 1960s).

against discrimination in voting.⁷⁷ It is primarily a litigation tool and reactive, meaning that the action begins after the passage of legislation or implementation. Section 5 of the VRA, originally a temporary provision requiring periodic Congressional reauthorization, required “covered jurisdictions” to submit all voting changes to either the U.S. Attorney General or the District of Columbia District Court.⁷⁸ In any given year, the Department of Justice would receive thousands of submissions that included tens of thousands of changes, and that number would increase substantially during a redistricting period.⁷⁹

During the 1982 reauthorization, Congress added Section 203, which requires certain jurisdictions designated through the U.S. Census to provide all election materials in the covered language in addition to English. This section is referred to as the language assistance provision.⁸⁰ President Ronald Reagan signed the reauthorization of the VRA in 1982 and remarked on its necessity,

To so many of our people—our Americans of Mexican descent, our [B]lack Americans—this measure is as important symbolically as it is practically. It says to every individual, “Your vote is equal; your vote is meaningful; your vote is your constitutional right . . . the right to vote is the crown jewel of American liberties, and we will not see its luster diminished.”⁸¹

Indeed, the dismal voter registration rates pre-1965 served as evidence that the land of the free and home of the brave had fallen far short of its democratic ideals. In short order, the VRA began to dismantle the vestiges of voter suppression. Voter registration rates increased among voters of color, as did the number of elected officials of color.⁸² The VRA, particularly Section 5, forced the country to live up to its democratic principles.

b. Politicizing Advancements

Interestingly, some scholars attribute the expansion of the right to vote, stemming from the Voting Rights Act of 1965, as a type of watershed moment towards increasing polarization and the deterioration of democracy.⁸³ The

77. Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437 (52 U.S.C. § 10301(a)).

78. *Id.* at § 5 (52 U.S.C. § 10304).

79. *About Section 5 of the Voting Rights Act*, DEP’T OF JUST. (Sept. 11, 2020), <https://www.justice.gov/crt/about-section-5-voting-rights-act> [<https://perma.cc/N7BQ-J2VJ>] (“Over the last decade, the Attorney General received between 4,500 and 5,500 Section 5 submissions, and reviewed between 14,000 and 20,000 voting changes, per year.”).

80. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified as amended 52 U.S.C. §§ 10303(f)(4) and 10503).

81. Ronald Reagan, U.S. President, Remarks on Signing the Voting Rights Act Amendments of 1982 (June 29, 1982), <https://www.presidency.ucsb.edu/documents/remarks-signing-the-voting-rights-act-amendments-1982> [<https://perma.cc/DNL3-8Y74>].

82. See DANIELS, *supra* note 28, at 124, 127 tbls.5.1, 5.2.

83. See Mickey et al., *supra* note 7, at 24 (“Still, the United States has been a bona fide multiracial democracy for almost half a century. Yet just as the United States fulfilled its democratic promise, the foundations of the system began to weaken. Ironically, the very process of democratization in the South generated the intense polarization that now threatens American democracy.”).

passage of the Civil Rights Act of 1964⁸⁴ and the Voting Rights Act of 1965 appeared to realign the country politically on racial lines.⁸⁵ From Reconstruction to the 1960s, most people of color identified themselves as Republicans.⁸⁶ The party of Lincoln had maintained its standing amongst many people of color. It was not until the Franklin Delano Roosevelt era that Black people ventured into the Democratic party, which had previously maintained its status as the protectors of White supremacist ideologies and policies.⁸⁷ Indeed, “[s]outhern [B]lack entered the electorate as Democrats, and southern [W]hites became increasingly Republican. Many [W]hite southerners voted Republican for class reasons: the region’s incomes were rising, thus enhancing the appeal of the GOP’s economic policies. But many chose the Republicans for their conservative stances on racial issues and their appeals to ‘law and order.’”⁸⁸ Yet, with the signing of the civil rights-oriented legislation in the 1960s, President Lyndon Baines Johnson prophesied that he had effectively signed the South over to the Republican party.⁸⁹ As President Johnson predicted, the South became reliably Republican and politically conservative.

The Republican party has also been at the forefront of voter suppression. In 1981, the Democratic National Committee (DNC) sued the Republican National Committee (RNC) claiming that the RNC and the New Jersey Republican State Committee engaged in voter intimidation and voter caging that violated the VRA and other statutes.⁹⁰ The RNC sought to remove voters of color from the voter rolls and provided armed patrols and other “ballot security” measures that the court found actionable.⁹¹ The RNC and DNC entered into a consent decree that

84. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. § 2000a et seq.).

85. Becky Little, *How the ‘Party of Lincoln’ Won Over the Once Democratic South*, HISTORY (Aug. 18, 2017), <https://www.history.com/news/how-the-party-of-lincoln-won-over-the-once-democratic-south> [https://perma.cc/W37W-HH4S].

86. See David Greenberg, *The Party of Lincoln . . . But Not of Hayes, Harrison, Hoover, Eisenhower, Nixon, Reagan, or Bush*, SLATE (Aug. 10, 2000), <https://slate.com/news-and-politics/2000/08/the-party-of-lincoln.html> [https://perma.cc/DK33-V7H8] (“Entering the 1960 election the Democrats, behind such leaders as Hubert Humphrey of Minnesota and Herbert Lehman of New York, had become the unquestioned party of civil rights.”); *Party Realignment and the New Deal*, HIST., ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Essays/Keeping-the-Faith/Party-Realignment--New-Deal/> [https://perma.cc/8B5G-57YF].

87. See Greenberg, *supra* note 86.

88. Mickey et al., *supra* note 7, at 24.

89. Little, *supra* note 85.

90. Democratic Nat’l Comm. v. Republican Nat’l Comm., No. 81-03876, 2016 WL 6584915, at *1–2 (D.N.J. Nov. 5, 2016).

91. *Id.* at *3 (“In 1987, it came to light that in the previous year’s election in Louisiana, a voter challenge list was compiled by sending letters to African-American voters and recording the names of individuals for whom the letters were undeliverable. . . . Discovery uncovered the fact that the RNC’s Midwest Political Director had remarked that the voter challenge list could ‘keep the black vote down considerably.’” (citing Democratic Nat’l Comm. v. Republican Nat’l Comm., 671 F.Supp.2d 575, 580 (D.N.J. 2009), *aff’d*, 673 F.3d 192 (3d Cir. 2009))).

lasted from 1982 to 2016. The focus on voters of color and voter intimidation are staples in the voter suppression playbook.

3. *Twenty-first Century Democracy*

While great gains were achieved under the VRA, the challenges to its authority, particularly that of Section 5, persisted.⁹² These challenges caused a near-fatal blow with the Supreme Court's decision in *Shelby County v. Holder*.⁹³ Prior to *Shelby County*, under Section 5 of the Voting Rights Act, certain jurisdictions had to seek preclearance or approval of any voting change before implementation. The mechanism that determined which jurisdictions had to make submissions was Section 4 of the VRA. It contained the "triggering mechanism" for determining covered jurisdictions. In *Shelby County*, the U.S. Supreme Court decided that the triggering mechanism in Section 4 was outdated and, as such, unconstitutional. Without a mechanism to determine which jurisdictions were covered, Section 5 ceased to exist. Accordingly, covered jurisdictions no longer had to seek federal approval of voting changes. Consequently, no preemptive federal supervision exists. Since *Shelby County* and the elimination of preemptive federal protections under the Voting Rights Act, approximately half of the states have instituted suppressive measures impacting the right to vote.⁹⁴ This resurgence is similar to the regression in the post-Reconstruction era, where forces were determined to "redeem" the country from the newly enfranchised voters and return it to a more restrictive voting regime.

II.

DISTRUSTING DEMOCRACY

The many impediments that have erupted in the last decade evidence a regression in the power and right to vote.⁹⁵ The modern-day disenfranchising

92. *South Carolina v. Katzenbach*, 383 U.S. 301, 329 (1966) (challenging the constitutionality of Section 5 and finding that the coverage formula "evolved to describe these areas [and] was relevant to the problem of voting discrimination" (emphasis added)); *Nw. Austin Mun. Util. No. One v. Holder*, 557 U.S. 193 (2009) (challenging the constitutionality of Section 5, where the Supreme Court upheld the provision and expanded the bailout provision); *Shelby County v. Holder*, 570 U.S. 529 (2013) (finding Section 4 of the Act unconstitutional).

93. 570 U.S. 529 (2013).

94. Theodore R. Johnson & Max Feldman, *The New Voter Suppression*, BRENNAN CTR. FOR JUST. (Jan. 16, 2020), <https://www.brennancenter.org/our-work/research-reports/new-voter-suppression> [<https://perma.cc/L6C3-9SLP>] ("Over the past decade, half the states in the nation have placed new, direct burdens on people's right to vote, abetted by a 2013 Supreme Court decision that struck down a key provision of the Voting Rights Act. And the racial cause and effect of these seemingly race-neutral laws are hard to escape.")

95. See Mickey et al., *supra* note 7, at 20 ("Paradoxically, the polarizing dynamics that now threaten democracy are rooted in the United States' belated democratization. It was only in the early 1970s—once the civil rights movement and the federal government managed to stamp out authoritarianism in southern states—that the country truly became democratic. Yet this process also

mechanisms warrant questions regarding the state of our democracy. Efforts to diminish the right to vote, particularly of people of color, harken back to a darker time in our history. The myth that these laws are race neutral and apply universally to all voters has been repeatedly debunked.⁹⁶ Yet, these unsubstantiated and blatantly inaccurate statements remain. For example, the myth that everyone has the restrictive IDs that are required under seemingly neutral laws is met with the cold hard facts: in Georgia, the exact match law disenfranchised nearly fifty thousand mostly Black and Brown voters.⁹⁷ The idea that only certain people should have the right to vote, namely White men with means, should serve as a remnant of our past, not our present, and hopefully not the future. Nonetheless, the ways in which we disenfranchise voters of color challenge our commitment to democracy and, particularly, the right to vote. Likewise, we have seen many warnings regarding how easily a country can “slide” into authoritarianism.⁹⁸ Innocuous, seemingly neutral steps appear, *inter alia*, in the restrictive voter ID laws, voter purges, felon disenfranchisement, voter deception, and intimidation. In our representative democracy, we have prevented people from accessing the ballot for such nefarious reasons as not possessing required documentation,⁹⁹ not being able to pay for underlying documents,¹⁰⁰ not voting in two federal elections,¹⁰¹ or previous felony conviction.¹⁰² Additionally, campaign fundraising principles stress democratic

helped divide Congress, realigning voters along racial lines and pushing the Republican Party further to the right.”).

96. See LANDSBERG, *supra* note 66, at 18–19 (“The geology of American history contains a deep seam of state resistance to federal law. Although the Supreme Court had said that the Constitution forbids sophisticated as well as simple means of discrimination, Alabama and other Deep South states continually hid behind laws that were neutral on their face but that were discriminatorily enforced to actively resist the extension of the vote to [B]lack.”); see also Johnson & Feldman, *supra* note 94 (delineating the latest “barriers to the ballot box”); *Voter Suppression, Then and Now*, MARKETPLACE (Sept. 18, 2020), <https://www.marketplace.org/2020/09/18/voter-suppression-then-and-now/> [<https://perma.cc/5NX8-Y3SJ>].

97. See *Fair Fight Action, Inc. v. Raffensperger*, 413 F. Supp. 3d 1251, 1273 (N.D. Ga. 2019); see also Shannon Van Sant, *Judge Rules Against Georgia Election Law, Calling It a ‘Severe Burden’ for Voters*, NPR (Nov. 3, 2018), <https://www.npr.org/2018/11/03/663937578/judge-rules-against-georgia-election-law-calling-it-a-severe-burden-for-voters> [<https://perma.cc/SC64-JK56>].

98. Mickey et al., *supra* note 7, at 20–21 (“If democratic backsliding were to occur in the United States, it would not take the form of a coup d’état; there would be no declaration of martial law or imposition of single-party rule. Rather, the experience of most contemporary autocracies suggests that it would take place through a series of little-noticed, incremental steps, most of which are legal and many of which appear innocuous. Taken together, however, they would tilt the playing field in favor of the ruling party.”).

99. See, for example, proof of citizenship cases: *League of Women Voters of U.S. v. Newby*, 838 F.3d 1 (D.C. Cir. 2016); *Ga. Coalition for People’s Agenda, Inc. v. Kemp*, 347 F. Supp. 3d 1251 (N.D. Ga. 2018); *Kobach v. U.S. Election Assistance Comm’n.*, 772 F.3d 1183 (10th Cir. 2014).

100. See, for example, voter ID cases: *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016); *League of Women Voters of Ind., Inc. v. Rokita*, 929 N.E.2d 758 (Ind. 2010); *Greater Birmingham Ministries v. Sec’y of State for Ala.*, 966 F.3d 1202 (11th Cir. 2020).

101. *Ohio A. Phillip Randolph Inst. v. Husted*, 350 F. Supp. 3d 662 (S.D. Ohio 2018).

102. *Jones v. DeSantis*, 462 F. Supp. 3d 1196 (N.D. Fla. 2020), *rev’d and vacated sub nom. Jones v. Governor of Fla.*, 975 F.3d 1016 (11th Cir. 2020) (en banc).

equality but, as enumerated in this Section, state actors' voter suppression tactics have undermined the one person, one vote principle necessary for a true democracy.¹⁰³

A. *Voter Suppression as Antidemocratic*

The dictionary defines antidemocratic as “opposed to the principles or practices of democracy.”¹⁰⁴ As discussed throughout this Article, at the center of democracy is the right to vote. Yet, efforts to deny the right to vote, particularly to people of color, have continued for centuries.¹⁰⁵ Voter suppression is not new. Nor are the efforts to prevent eligible persons from exercising the fundamental right to vote. Moreover, the connection between voter suppression and violence is, unfortunately, more contemporaneous than historical.¹⁰⁶ The Department of Justice's Public Integrity Section is responsible for prosecuting election crimes such as voter fraud and campaign finance violations. It also has some oversight of voter suppression activity.¹⁰⁷ Disenfranchising measures exist throughout our country and impact the right to vote. While grandfather clauses and literacy tests may serve as relics of the past, modern-day tactics, such as voter ID laws, voter purges, and felon disenfranchisement, remain as measures that are antithetical to democratic principles.

1. *Voter ID Laws*

Many states have adopted restrictive voter ID laws that allow only a few government-issued forms of identification in order for a voter to cast a ballot.¹⁰⁸ These restrictions impact people of color, students, and elderly persons to pursue

103. See, for example, the principle of “one person, one vote”: “The conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.” *Gray v. Sanders*, 372 U.S. 368, 381 (1963); *Reynolds v. Sims*, 377 U.S. 533, 558 (1964).

104. See *Antidemocratic*, *DICTIONARY.COM*, <https://www.dictionary.com/browse/antidemocratic> [<https://perma.cc/U5KA-2GW7>].

105. See *supra* Part I.

106. See Jennifer Rubin, Opinion, *Republicans Created an Antidemocratic Mob*, *WASH. POST* (Nov. 23, 2020), <https://www.washingtonpost.com/opinions/2020/11/23/republicans-created-an-anti-democratic-mob/> [<https://perma.cc/GW85-CUY8>].

107. The Public Integrity Section defines voter suppression activity as follows: “Voter suppression schemes are designed to ensure the election of a favored candidate by blocking or impeding voters believed to oppose that candidate from getting to the polls to cast their ballots. Examples include providing false information to the public—or a particular segment of the public—regarding the qualifications to vote, the consequences of voting in connection with citizenship status, the dates or qualifications for absentee voting, the date of an election, the hours for voting, or the correct voting precinct.” *DEP’T OF JUST., FEDERAL PROSECUTION OF ELECTION OFFENSES 56* (Richard C. Pilger, ed., 8th ed. 2017), <https://www.justice.gov/criminal/file/1029066/download> [<https://perma.cc/BP67-7WGK>].

108. See *Voter Identification Requirements/Voter ID laws*, *NAT’L CONF. OF STATE LEGISLATURES* (Aug. 25, 2020), <https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx> [<https://perma.cc/3LKB-6TU7>] (noting that thirty-six states require voters to show identification).

their right to vote.¹⁰⁹ In Texas, approximately six hundred thousand people of color lacked the strict ID that the State planned to mandate in order for a voter to cast a ballot. In fact, the acceptable forms of government ID included handgun licenses, but not student IDs. “More than 80 percent of handgun licenses issued to Texans in 2018 went to [W]hite Texans, while more than half of the students in the University of Texas system are racial or ethnic minorities.”¹¹⁰ Similarly, in North Dakota, election officials required a street address on its voter ID.¹¹¹ Indigenous people who lived on reservations had P.O. boxes, but not street addresses, which the State found unacceptable and noncompliant.¹¹²

In *Crawford v. Marion*,¹¹³ Justice Ruth Bader Ginsburg wondered why voting is a difficult experience, stating, “Why—why, if you really wanted people to vote, wouldn’t you do it that way?”¹¹⁴ The answer is that restrictive voter ID laws fulfill the antidemocratic purpose of eliminating eligible voters from participating in the political process.¹¹⁵ Just as with poll taxes in the previous century, Voter ID requirements have proven effective in barring voters of color and others from the ballot.¹¹⁶

2. Voter Purges

The method of removing ineligible voters from registered voter lists is called a voter purge. Under the Elections Clause of the Constitution, states have the authority to determine voter eligibility. Although state governments have passed legislation that causes specific individuals—such as those declared mentally incompetent—to be designated as ineligible voters, voter purges can also cause the removal or invalidation of eligible and legal voters from voter registration lists.¹¹⁷

109. DANIELS, *supra* note 27; Laura Williamson & Brenda Wright, *Right to Vote: The Case for Expanding the Right in the U.S. Constitution*, DEMOS (Aug. 26, 2020), <https://www.demos.org/sites/default/files/2020-08/Right%20to%20Vote%20-%20The%20Case%20for%20Expanding%20the%20Right%20to%20Vote%20in%20the%20Constitution.pdf> [https://perma.cc/XR3Y-NKD4]; Issie Lapowsky, *A Dead-Simple Algorithm Reveals the True Toll of Voter ID Laws*, WIRED: SECURITY (Jan. 4, 2018), <https://www.wired.com/story/voter-id-law-algorithm/> [https://perma.cc/2PAW-D2PP].

110. Johnson & Feldman, *supra* note 94.

111. Camila Domonoske, *Many Native IDs Won't be Accepted at North Dakota Polling Places*, NPR, (Oct. 13, 2018) <https://www.npr.org/2018/10/13/657125819/many-native-ids-wont-be-accepted-at-north-dakota-polling-places> [https://perma.cc/DH73-JC87].

112. *Id.*

113. 553 U.S. 181 (2008).

114. Transcript of Oral Argument at 53, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008) (Nos. 07-21, 07-25).

115. *Oppose Voter ID Legislation - Fact Sheet*, ACLU (Feb. 17, 2021), <https://www.aclu.org/other/oppose-voter-id-legislation-fact-sheet> [https://perma.cc/A3Y9-4HXS].

116. In Gilda R. Daniels, *A Vote Delayed Is a Vote Denied: A Proactive Approach to Eliminating Election Administration Legislation That Disenfranchises Unwanted Voters*, 47 U. LOUISVILLE L. REV. 57 (2008), I categorized these voters as “unwanted.”

117. See, e.g., DANIELS, *supra* note 27, at 122.

In *Husted v. A. Philip Randolph Institute*,¹¹⁸ the Supreme Court held that the National Voter Registration Act (NVRA) allowed jurisdictions to remove persons from the voter rolls who neglected to vote in two federal elections.¹¹⁹ The essential purpose of the NVRA was to “increase the number of eligible citizens who register to vote in elections for Federal office” and to increase voter participation in federal elections.¹²⁰ Voter purges, done accurately, can assist election officials in maintaining accurate voter rolls. Generally, election officials remove persons who have been declared mentally incompetent, deceased persons, or persons who were convicted of committing a disenfranchising felony.¹²¹ The work of ensuring that purges are accurately conducted, by only removing persons who actually moved or died, is cumbersome work. Election officials have taken shortcuts with lists that have less than a one hundred percent match and wrongfully removed persons who had not moved, died, or committed a felony.¹²² While the NVRA considers only a few rationales proper for purging voters, its purpose of increasing registration and participation is consistent with its requirement not to use not voting as a means to purge.

Indeed, the NVRA included a prohibition from removing people for not voting.¹²³ In *Husted*, Justice Sotomayor noted that the majority “entirely ignores the history of voter suppression against which the NVRA was enacted and upholds a program that appears to further the very disenfranchisement of minority and low-income voters that Congress set out to eradicate.”¹²⁴ Nonetheless, the Court ruled that Ohio could indeed remove eligible persons from the voter rolls for not voting in consecutive federal elections.¹²⁵ Under Ohio law, the removal for non-voting is predicated on the return, or lack thereof, of a postcard sent to the voter. Despite evidence that the return rate of the postcard did not correlate with the recipient moving, Ohio removes eligible persons for essentially not returning a postcard.¹²⁶

The Brennan Center analyzed the Election Administration and Voting Surveys (EAVS) to determine the impact of voter roll purges between the 2016

118. 138 S. Ct. 1833 (2018).

119. *Id.* at 1846.

120. 52 U.S.C. § 20501.

121. *Voter List Accuracy*, NAT'L CONF. OF STATE LEGISLATURES (Mar. 20, 2020), <https://www.ncsl.org/research/elections-and-campaigns/voter-list-accuracy.aspx> [<https://perma.cc/J93A-F8JS>].

122. See, e.g., Gilda R. Daniels, *Husted v. A. Philip Randolph Institute – To Vote, or Not to Vote: That is the Question*, AM. CONST. SOC'Y: SUP. CT. REV., 2017–2018, at 49.

123. 52 U.S.C.A. § 20507(b)(2) (“Any State program . . . shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person’s failure to vote . . .”).

124. *Husted*, 138 S. Ct. at 1865.

125. *Id.* at 1842–43.

126. See *id.*

and 2018 federal elections.¹²⁷ Seventeen million voters were purged between 2016 and 2018.¹²⁸ States likely purged 1.1 million more voters than they would have been able to prior to *Shelby County*.¹²⁹ Astonishingly, “16 million voters were purged between the federal elections of 2014 and 2016, and . . . this was almost 4 million more names purged from the rolls than between 2006 and 2008.”¹³⁰ Since *Shelby County*, jurisdictions have significantly increased voter purges. Essentially, without the Section 5 preclearance requirement, formerly covered jurisdictions have engaged in more purges.¹³¹

The removal of voters for not voting has consequences. Purged Ohio voter Larry Harmon commented, “I earned the right to vote. . . . Whether I use it or not is up to my personal discretion. They don’t take away my right to buy a gun if I don’t buy a gun.”¹³² The ease with which election officials will remove qualified persons from the right to vote demonstrates the need for more protections for the right to vote. The antidemocratic nature of the voter purge for not voting cannot be overstated.

3. *Felon Disenfranchisement*

Another antidemocratic mechanism is felon disenfranchisement. The United States leads the world in felon disenfranchisement.¹³³ An American Civil Liberties Union (ACLU) report compared the felon disenfranchisement laws in the United States with the world’s democracies (notably Europe).¹³⁴ The key

127. Kevin Morris, *Voter Purge Rates Remain High, Analysis Finds*, BRENNAN CTR. FOR JUST. (Aug. 21, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/voter-purge-rates-remain-high-analysis-finds> [<https://perma.cc/UK4A-8CDK>].

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. Nina Totenberg, *Supreme Court Upholds Controversial Ohio Voter-Purge Law*, NPR (June 11, 2018), <https://www.npr.org/2018/06/11/618870982/supreme-court-upholdscontroversial-ohio-voter-purge-law> [<https://perma.cc/9JS4-QKUM>].

133. See, e.g., *Democracy Imprisoned: The Prevalence and Impact of Felony Disenfranchisement Laws in the United States*, SENT’G PROJECT (Sept. 30, 2013), <https://www.sentencingproject.org/publications/democracy-imprisoned-a-review-of-the-prevalence-and-impact-of-felony-disenfranchisement-laws-in-the-united-states/> [<https://perma.cc/54SJ-KDAY>] (“Not only does the sheer number of individuals the United States imprisons set it apart from most nations, the United States has further distinguished itself from other countries through the widespread practice of depriving individuals with felony convictions of the right to vote.”). See generally LALEH ISPAHANI, ACLU, OUT OF STEP WITH THE WORLD: AN ANALYSIS OF FELONY DISENFRANCHISEMENT IN THE U.S. AND OTHER DEMOCRACIES 4 (2006), https://www.aclu.org/sites/default/files/pdfs/votingrights/outofstep_20060525.pdf [<https://perma.cc/9KBA-MC6B>] (“European nations differ in their criminal disenfranchisement policies. But it is important not to lose the forest for the trees. There are disagreements and debates within European nations over disenfranchisement – but the debate is over *which prisoners* should be barred from voting. In almost all cases, the debate stops at the prison walls. Seen in this context, the U.S. is an outlier: In other democracies, many inmates vote, and it is extremely rare for anyone who is not in prison to lose the right to vote.”).

134. ISPAHANI, *supra* note 133, at 4.

takeaways from the study include: (1) almost half of European countries allow all incarcerated people to vote; (2) where disenfranchisement does exist in other countries, it is narrower than in the United States; (3) international treaties support the abolition of blanket disenfranchisement such as that employed by the U.S.; and (4) where prisoners can vote, they do so at their correctional facility with no threat to security.¹³⁵

Moreover, while we proclaim to serve as a beacon of light for democracy, we are antidemocratic toward persons previously convicted of felonies. The history of felon disenfranchisement is fraught with racism and discrimination.¹³⁶ Indeed, the passage of felon disenfranchisement laws at the turn of the twentieth century had the explicit intent of removing new voters from the franchise. Segregationists sought to remove newly enfranchised African Americans through enumerating crimes that Black men were thought to commit more often than Whites.¹³⁷

The erasure of democracy is vividly illustrated by the process surrounding the passage and implementation of Amendment 4 to the Florida Constitution.¹³⁸ Prior to the passage of Amendment 4, Florida's Constitution disenfranchised people with felony convictions for life; the only path to rights restoration was executive clemency.¹³⁹ With over 1.4 million disenfranchised by this provision, Florida residents decided to take the issue into their own hands using a citizen-initiated constitutional amendment.¹⁴⁰ Starting in 2014, grassroots organizations, such as the Florida Rights Restoration Coalition (FRRRC), organized and campaigned to obtain over eight hundred thousand signatures in support of

135. *Id.*

136. *See, e.g.,* DANIELS, *supra* note 27; Andrew L. Shapiro, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537, 540 (1993) (“[B]etween 1890 and 1910, many Southern states tailored their criminal disenfranchisement laws, along with other preexisting voting qualifications, to increase the effect of these laws on black citizens.”); Erin Kelley, *Racism & Felony Disenfranchisement: An Intertwined History*, BRENNAN CTR. FOR JUST.: TWENTY YEARS (Aug. 2018), https://www.brennancenter.org/sites/default/files/2019-08/Report_Disfranchisement_History.pdf [<https://perma.cc/4KH4-9AVS>]; Jean Chung, *Felony Disenfranchisement: A Primer*, SENT’G PROJECT (June 27, 2019), <https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/> [<https://perma.cc/8MJK-JMDQ>].

137. *See, e.g.,* DANIELS, *supra* note 27, at 148–54.

138. The language of Amendment 4 states: “No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability. Except as provided in subsection (b) of this section, any disqualification from voting arising from a felony conviction shall terminate *and voting rights shall be restored upon completion of all terms of sentence including parole or probation.*” FLA. CONST. art. VI, § 4 (emphasis added).

139. *See* FLA. CONST. art. IV, § 8(a).

140. *See* FLA. CONST. art. XI, § 3. A main requirement for getting a constitutional amendment on the ballot is to obtain signatures equal to 8 percent of the total number of votes cast in the last presidential election. *Id.*

placing the Amendment on the ballot.¹⁴¹ In November 2018, more than 64 percent of Floridians voted in support of the Amendment,¹⁴² demonstrating to America that they were in favor of returning voting rights to over 1.4 million disenfranchised people.¹⁴³ This was one of the largest expansions of voting rights in the United States since the passage of the Voting Rights Act of 1965. The message from Florida's residents was clear: we have the power to change laws that hinder our rights, and we can increase access to democracy.

Unfortunately, both the state government and federal courts rejected this assertion of power and decided democracy should not be easily accessible for everyone. Shortly after the passage of Amendment 4, the Florida legislature passed Senate Bill 7066.¹⁴⁴ The bill interpreted the language of Amendment 4 as requiring the payment of all fines, fees, and restitution before a person's sentence was complete and rights restored.¹⁴⁵ Given that many returning citizens are subject to lower income and higher unemployment,¹⁴⁶ it is extremely difficult for many of them to pay the legal financial obligations (LFOs) that stand between them and voting. For nearly 775,000 people,¹⁴⁷ the promise of voting disappeared as the Florida legislature subverted the will of voters. After several civil rights organizations filed litigation to challenge the constitutionality of SB 7066, the Florida Secretary of State and Governor vigorously defended the necessity of the law, despite its disproportionate impact on people of color and low-income residents.¹⁴⁸ After a brief win in the Northern District of Florida,¹⁴⁹

141. *Voting Restoration Amendment 14-01*, FLA. DIV. OF ELECTIONS, <https://dos.elections.myflorida.com/initiatives/initdetail.asp?account=64388&seqnum=1> [<https://perma.cc/Y4LN-BNM5>].

142. See *Jones v. DeSantis*, 462 F. Supp. 3d 1196, 1205 (N.D. Fla. 2020) (“Amendment 4, which passed with 64.55% of the vote, added a provision automatically restoring the voting rights of some—not all—felons.”), *rev'd and vacated sub nom.* *Jones v. Governor of Fla.*, 975 F.3d 1016 (11th Cir. 2020) (en banc).

143. Lesley Stahl, *The Legal and Political Fight over Amendment 4, Granting as Many as 1.4 Million Florida Felons the Right to Vote*, CBS NEWS: 60 MINUTES (Sept. 27, 2020), <https://www.cbsnews.com/news/amendment-4-florida-felony-voting-rights-60-minutes-2020-09-27/> [<https://perma.cc/M98L-3MB9>].

144. FLA. STAT. ANN. § 98.0751 (West 2019).

145. *Id.*

146. KEVIN MORRIS, BRENNAN CTR. FOR JUST., ANALYSIS: THWARTING AMENDMENT 4, at 2–3 (May 9, 2019), https://www.brennancenter.org/sites/default/files/analysis/2019_05_FloridaAmendment_FINAL-3.pdf [<https://perma.cc/DU8F-BTSA>].

147. Gary Fineout, *Florida Law Disqualifies Nearly 775K People with Felony Convictions from Voting*, POLITICO (Mar. 11, 2020), <https://www.politico.com/states/florida/story/2020/03/11/florida-law-disqualifies-nearly-775k-people-with-felony-convictions-from-voting-1266365> [<https://perma.cc/3MTR-CRFC>].

148. See, e.g., Micah Kubic, *Governor Ron DeSantis Hostility to Amendment 4 Is Even More Concerning Than It Sounds*, FLA. TODAY (Nov. 22, 2019), <https://www.floridatoday.com/story/opinion/2019/11/22/gov-ron-desantis-hostility-amendment-4-even-more-concerning-than-sounds/4271965002/> [<https://perma.cc/DUZ6-EPQV>].

149. *Jones v. DeSantis*, 462 F. Supp. 3d 1196 (N.D. Fla. 2020), *rev'd and vacated sub nom.* *Jones v. Governor of Fla.*, 975 F.3d 1016 (11th Cir. 2020) (en banc).

the Eleventh Circuit annulled that victory.¹⁵⁰ The Eleventh Circuit held that it was constitutional for Florida to condition a person's ability to vote upon the ability to pay LFOs.¹⁵¹ With this ruling, Florida state officials essentially succeeded in quelling Florida voters' intent for returning citizens to vote. However, Florida officials did not stop there. The State continues to suppress people's ability to vote as the executive branch moves to investigate donors that want to help pay people's outstanding LFOs.¹⁵² After legislative and judicial action to counter an impressive expansion of democracy, the State of Florida continues to exhibit antidemocratic practices that prevent the exercise of the right to vote.

B. Electoral College

In recent history, the presidential election of 2000 and its subsequent litigation in *Bush v. Gore*¹⁵³ revealed fault lines in our election administration process. Hanging chads,¹⁵⁴ faulty machines,¹⁵⁵ felon disenfranchisement,¹⁵⁶ and inaccurate purges¹⁵⁷ were prevalent throughout the election cycle and were cause for concern. Yet, it was the Supreme Court's opinion in *Bush v. Gore* that solidified the power, or lack thereof, of the right to vote. In *Bush v. Gore*, the Supreme Court illuminated the principle that voters do not elect the President of the United States.¹⁵⁸ Indeed, according to the U.S. Supreme Court, it is the Electoral College that is of the greatest import in presidential elections.¹⁵⁹

The roots of the Electoral College are deeply connected to antidemocratic principles that avoid the principle of one person, one vote. To be sure, the

150. *Jones v. Governor of Fla.*, 975 F.3d at 1028.

151. *Id.*

152. Dan Merica & Devon M. Sayers, *Florida Attorney General Asks for Investigation of Bloomberg's Efforts to Reinstate Felon Voting Rights*, CNN POLITICS (Sept. 23, 2020), <https://www.cnn.com/2020/09/23/politics/florida-michael-bloomberg-investigate-felon-voting-rights/index.html> [<https://perma.cc/Y6CF-QFQB>].

153. *Bush v. Gore*, 531 U.S. 98 (2000) (halting the recount of votes in Florida and granting a stay of the decision for Bush on the grounds that manual recounts violated the Equal Protection Clause because different standards were applied from ballot to ballot).

154. *Id.* at 105.

155. *Id.* at 104.

156. *See, e.g.*, *Johnson v. Bush*, 546 U.S. 1015 (2005); *Johnson v. Governor of State of Fla.*, 405 F.3d 1214 (11th Cir. 2005).

157. U.S. COMM'N ON CIV. RTS., No. 005-902-00065, VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL: ELECTION EXECUTIVE SUMMARY ch. 1 (2001), <https://www.usccr.gov/pubs/vote2000/report/ch1.htm> [<https://perma.cc/EP8Z-FZED>]

158. *Gore*, 531 U.S. at 104 ("The individual citizen has no federal constitutional right to vote for electors for the President of the United States.").

159. *Chiafalo v. Washington*, 140 S. Ct. 2316, 2328 (2020) ("Early in our history, States decided to tie electors to the presidential choices of others, whether legislatures or citizens. Except that legislatures no longer play a role, that practice has continued for more than 200 years. Among the devices States have long used to achieve their object are pledge laws, designed to impress on electors their role as agents of others. A State follows in the same tradition if, like Washington, it chooses to sanction an elector for breaching his promise.").

Founders' choice of the Electoral College, instead of a direct vote, was discussed and implemented in large part to preserve the unfair advantage of the South.¹⁶⁰ The Electoral College served as a compromise that benefitted the slaveholding South.¹⁶¹

It was undeniably a compromise. The South did not want to count enslaved persons 1:1 for tax purposes, but desired to do so for purposes of political apportionment. The North, however, disagreed, resulting in the three-fifths compromise.¹⁶² This compromise led to counting three out of five enslaved persons for apportionment and tax purposes. This, however, skewed the number of representatives and Electoral College votes that the Southern states would receive.¹⁶³ The compromise and the Electoral College yielded a massive advantage to the South.¹⁶⁴ Indeed, these two related devices allowed the South to control the presidency for almost a century.¹⁶⁵ In his book, *The Constitution Today*, Akhil Reed Amar demonstrated how the Electoral College was predicated on appeasing Southern slave states.¹⁶⁶ Scholars have also shown that the Electoral College's creation was linked to slavery and the relative numbers of free Whites in the North and South.¹⁶⁷

The Constitution states that “[t]he [p]erson having the greatest [n]umber of [v]otes shall be the President In every [c]ase, after the [c]hoice of the President, the [p]erson having the [g]reatest number of [v]otes of the [e]lectors

160. Akhil Reed Amar, *The Troubling Reason the Electoral College Exists*, TIME (Nov. 8, 2016), <https://time.com/4558510/electoral-college-history-slavery/> [<https://perma.cc/6GBM-HMTY>] (“[I]n a direct election system, the North would outnumber the South, whose many slaves (more than half a million in all) of course could not vote. But the Electoral College—a prototype of which Madison proposed in this same speech—instead let each southern state count its slaves, albeit with a two-fifths discount, in computing its share of the overall count.”).

161. See, e.g., *id.* (“If the system’s pro-slavery tilt was not overwhelmingly obvious when the Constitution was ratified, it quickly became so. For 32 of the Constitution’s first 36 years, a white slaveholding Virginian occupied the presidency.”).

162. See DANIELS, *supra* note 27, at 146–48.

163. Wilfred U. Codrington III, *The Electoral College’s Racist Origins*, BRENNAN CTR. FOR JUST. (Apr. 1, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/electoral-colleges-racist-origins> [<https://perma.cc/YD9K-HS7C>].

164. *Id.*

165. Amar, *supra* note 160 (“For 32 of the Constitution’s first 36 years, a [W]hite slaveholding Virginian occupied the presidency Southerner Thomas Jefferson, for example, won the election of 1800-01 against Northerner John Adams in a race where the slavery-skew of the electoral college was the decisive margin of victory: *without the extra electoral college votes generated by slavery, the mostly southern states that supported Jefferson would not have sufficed to give him a majority*. As pointed observers remarked at the time, Thomas Jefferson metaphorically rode into the executive mansion on the backs of slaves.”).

166. AKHIL REED AMAR, *THE CONSTITUTION TODAY: TIMELESS LESSONS FOR THE ISSUES OF OUR ERA* (2016).

167. See, e.g., Juan F. Perea, *Echoes of Slavery II: How Slavery’s Legacy Distorts Democracy*, 51 U.C. DAVIS L. REV. 1081, 1087–91 (2018) (discussing that one purpose of the Electoral College was to protect the political interests of slave owners in presidential elections); Paul Finkelman, *The Proslavery Origins of the Electoral College*, 23 CARDOZO L. REV. 1145 (2002) (noting that scholars rarely note the ties the Electoral College has to slavery).

shall be the Vice President.”¹⁶⁸ Further, the Constitution requires that “[t]he [e]lectors shall meet in their respective [s]tates, and vote by [b]allot”¹⁶⁹ In the event of a tie in the Electoral College, the House of Representatives will determine the winner,¹⁷⁰ which happened in 1824.¹⁷¹ We have had four elections, in 1876, 1888, 2000, and 2016, where the person who received the popular vote did not receive the necessary Electoral College votes.¹⁷² Indeed, the popular vote winner has lost the Electoral College in two of the last five presidential elections.¹⁷³ In 2000, George H. W. Bush beat Al Gore by as few as 537 votes in Florida, and the U.S. Supreme Court made the final decision on who would win the election.¹⁷⁴ And, in 2016, Hillary Clinton received almost three million more votes than Donald Trump.¹⁷⁵ Yet, she lost the Electoral College and the presidency.¹⁷⁶

168. U.S. CONST. art. II, § 1, cl. 3.

169. *Id.*

170. Nicholas G. Karambelas, *The Electoral College and the Race to 270*, 72 J. MO. BAR 260, 262 (2016).

171. *Tally of the 1824 Electoral College Vote*, NAT'L ARCHIVES, <https://www.archives.gov/education/lessons/electoral-tally> [<https://perma.cc/BQ3M-SZWB>]; *The 1824 Election and the "Corrupt Bargain,"* U.S. HIST., <https://www.ushistory.org/us/23d.asp> [<https://perma.cc/XL86-B2Q4>].

172. See Jonathan R. Cervas & Bernard Grofman, *Why Noncompetitive States Are So Important for Understanding the Outcomes of Competitive Elections: The Electoral College 1868–2016*, 173 PUB. CHOICE 251, 254–60 (2017).

173. In 2000 and 2016, the winner of the Electoral College did not receive a majority of the popular vote. See *Electoral College Results 2000*, NAT'L ARCHIVES (Nov. 27, 2019), <https://www.archives.gov/electoral-college/2000> [<https://perma.cc/885A-5FG8>]; *Electoral College Results 2016*, NAT'L ARCHIVES (Jan. 11, 2021), [archives.gov/electoral-college/2016](https://www.archives.gov/electoral-college/2016) [<https://perma.cc/6MMF-58KF>]; *2016 Presidential Election Results*, N.Y. TIMES (Aug. 9, 2017), <https://www.nytimes.com/elections/2016/results/president> [<https://perma.cc/V69L-MSRW>].

174. See Wilfred U. Codrington III, *So Goes the Nation: The Constitution, the Compact, and What the American West Can Tell Us About How We'll Choose the President in 2020 and Beyond*, 120 COLUM. L. REV. F. 43, 45 (2020) (“In *McPherson v. Blacker*, the Court minced no words in holding that ‘the appointment and mode of appointment of electors belong exclusively to the States under the Constitution of the United States.’ The Court reiterated this well-settled point more than a century later in its otherwise controversial *Bush v. Gore* decision. When Florida’s electoral votes—and the presidency—remained in limbo, five Justices ruled that ‘the state legislature’s power to select the manner for appointing electors is plenary; it may, if it so chooses, select the electors itself.’”).

175. *2016 Presidential Election*, 270TOWIN, https://www.270towin.com/2016_Election/ [<https://perma.cc/LM8X-TLEK>].

176. See e.g., Alex Cohen, *The National Popular Vote, Explained*, BRENNAN CTR. FOR JUST. (Apr. 3, 2020), <https://www.brennancenter.org/our-work/research-reports/national-popular-vote-explained> [<https://perma.cc/9YEN-2DV4>] (“This ‘wrong winner’ scenario has happened three additional times in U.S. history. Back in 1824, John Quincy Adams lost the popular vote and the electoral college to Andrew Jackson. But no candidate received a majority of the Electoral College votes, so the race was decided in the House of Representatives. In the infamous ‘corrupt bargain,’ Speaker of the House Henry Clay delivered Adams the presidency in exchange for his appointment as Adams’ Secretary of State. In 1876, Democratic candidate Samuel J. Tilden won the popular vote, but 20 of the electoral votes were contested. Election Day had been tainted with violence and fraud, and in several states, both parties declared that their candidates had prevailed. In the Compromise of 1877, the disputed electoral votes were awarded to Republican candidate Rutherford B. Hayes in exchange for the removal of Northern troops from the South and the end of Reconstruction. And in 1888, incumbent President

Generally, electors are expected to vote in the same manner as “those who chose them, rather than exercising independent discretion, as the founders contemplated.”¹⁷⁷ Legitimate concerns exist over whether electors will vote pursuant to the popular vote.¹⁷⁸ The Electoral College and the polarized nature of presidential politics have siloed voting into red states and blue states. Author Jesse Wegman pointed out that only a few states, fewer than ten, decide the presidential election; he argued that “that’s just fundamentally at odds with this idea that we’re holding a national election that should be decided by all the people being treated equal by the candidates.”¹⁷⁹

These issues with the Electoral College, including its winner-takes-all structure and its troubling beginnings with its connection to slavery, disproportionately impact voters of color and further justify its elimination. The stronghold of the Republican party in the South tends to silence Black voters. Indeed, for presidential elections, the Electoral College effectively nullifies people of color’s voting strength in the South.¹⁸⁰

The Electoral College has antidemocratic and racist origins and continues to discriminate against Black voters in the South.¹⁸¹ To be clear, the Electoral College’s origins were meant to benefit Southern Whites’ ability to win election to federal offices.¹⁸² The highest concentration of Black people, as was true two centuries ago, remains in the South.

While those votes are reflected in the popular vote, they are not outcome determinative for the Electoral College. The current system has a distinct, adverse impact on Black voters, diluting their political power. Because the concentration of Black people is highest in the South, their preferred presidential candidate is virtually assured of losing their home states’ electoral votes. Despite Black voting patterns to the contrary, five of the six states whose populations are

Grover Cleveland won the popular vote against Benjamin Harrison but lost two states by less than 1 percent—and consequently, the Electoral College.”)

177. See Sullivan, *supra* note 41, at 579 n.77 (citing A.V DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 28–29 (8th ed. 1915)).

178. See Trip Gabriel, *Electoral College Members Can Defy Voters’ Wishes, Court Rules*, N.Y. TIMES (Aug. 22, 2019), <https://www.nytimes.com/2019/08/22/us/politics/electoral-college-faithless-electors.html> [<https://perma.cc/N97Z-PUWJ>] (“[A] federal appeals court on Tuesday said members of the Electoral College, who cast the actual votes for president, may choose whoever they please regardless of a state’s popular vote.”).

179. Terry Gross, *Electoral College ‘Not Carved In Stone:’ Author Advocates Rethinking How We Vote*, NPR (Mar. 18, 2020), <https://news.wbfo.org/post/electoral-college-not-carved-stone-author-advocates-rethinking-how-we-vote> [<https://perma.cc/D5YF-GYCM>] (Terry Gross interviews N.Y. Times journalist Jesse Wegman on his new book, *Let the People Pick the President*).

180. See, e.g., *id.*

181. See, e.g., Wilfred U. Codrington III, *The Electoral College’s Racist Origins*, ATLANTIC (Nov. 17, 2019), <https://www.theatlantic.com/ideas/archive/2019/11/electoral-college-racist-origins/601918/> [<https://perma.cc/M3VJ-MGAZ>].

182. See, e.g., *id.* (“The populations in the North and South were approximately equal, but roughly one-third of those living in the South were held in bondage. Because of its considerable, nonvoting slave population, that region would have less clout under a popular-vote system. The ultimate solution was an indirect method of choosing the president . . .”).

“25 percent or more [B]lack have been reliably red in recent presidential elections. Three of those states have not voted for a Democrat in more than four decades.”¹⁸³ The use of the Electoral College, instead of the popular vote, weakens the ability of Black votes to be reflected in the presidential election. Moreover, it is precisely why we must abandon the Electoral College as the means to elect the President.

Efforts to address antidemocratic devices amount to piecemeal efforts that vary from state to state and are akin to placing a Band-Aid on a wound when a transfusion is needed. While mandating same-day voter registration, expanding vote by mail, and making election day a holiday are all things that should occur to address the constriction of the right to vote, we are literally dancing around the edges of democracy. In order to develop a true democracy, we must propose measures that alleviate the disparities that exist across the country. The illness of voter suppression and the Electoral College bleed the life out of democracy. The health of our democratic form of government is on life support. Yet, we have the ability to save our country. The question is whether we have the will to do so.

III.

DESIGNING DEMOCRACY

To continue the work of democracy, we must center the right to vote. Two solutions involve adopting the national popular vote and including an explicit right to vote in the U.S. Constitution.

A. National Popular Vote

The racist origins and antidemocratic components of the Electoral College behoove us to consider eliminating it and adopting the national popular vote for presidential elections. States have adopted the National Popular Vote Interstate Compact (NPV), an agreement between the signatory states that would bypass the traditional Electoral College.¹⁸⁴ Moreover, it would avoid the constitutional amendment process. Instead, the signatory states would agree to award their electoral votes to the winner of the national popular vote.¹⁸⁵ The NPV would not

183. *Id.*

184. See *Agreement Among the States to Elect the President by National Popular Vote*, NAT'L POPULAR VOTE, <https://www.nationalpopularvote.com/written-explanation> [<https://perma.cc/2JUY-PGQD>]; see also *A National Popular Vote for President*, FAIRVOTE, https://www.fairvote.org/national_popular_vote [<https://perma.cc/8A7C-4KD5>].

185. See, e.g., Cohen, *supra* note 176 (“In the current Electoral College system, the presidency is awarded to the candidate who wins at least 270 of the 538 available electoral votes. The Constitution gives state legislatures the right to choose how presidential electors are chosen. Since the 19th century, each state (with the exceptions of Maine and Nebraska) has awarded its electoral votes to the winner of the popular vote in that state. But under the NPV system, states would commit to awarding their electoral votes to the winner of the national popular vote instead. The Compact will go into effect only when states controlling at least 270 electoral votes have joined. In the election after that threshold is reached, the NPV states would ensure that the winner of the national popular vote becomes president. While the

take effect until enough states sign on to reach 270 electoral votes. Approximately fifteen states so far have agreed that the NPV should serve as the vehicle for electing the president.¹⁸⁶

However, the NPV crusade has its detractors. Some scholars have argued that since constitutional and democratic norms are currently challenged ad nauseam, perhaps this is not the appropriate time to suggest that the constitutional method of electing the president needs amending.¹⁸⁷ It is a major undertaking to ratify a constitutional amendment. The effort is certainly important, but success is not certain. Conversely, the prospect of yet another election where the winner of the Electoral College did not win the popular vote is highly probable.

Adopting NPV would strengthen the right to vote. It would restore the power of the vote to the populace instead of the Electoral College. Additionally, the NPV or a similar initiative could assist in diminishing the polarization between red and blue states. If candidates must secure the most votes, instead of the most Electoral College votes, the appeal is to all voters instead of a few select states.

B. *Right to Vote Amendment*

As discussed in Part I, the U.S. Constitution has more amendments addressing the right to vote than any other right. While not an enumerated right, the Fourteenth,¹⁸⁸ Fifteenth,¹⁸⁹ Nineteenth,¹⁹⁰ Twenty-Fourth,¹⁹¹ and Twenty-Sixth¹⁹² Amendments contain prohibitions that affect the right to vote. The frequency with which the right is addressed and amended speaks to the need for

compact would not abolish the Electoral College, it would guarantee that the winner of the Electoral College vote and popular vote are the same.”).

186. *National Popular Vote*, NAT’L CONF. OF STATE LEGISLATURES (Jan. 27, 2020), <https://www.ncsl.org/research/elections-and-campaigns/national-popular-vote.aspx> [<https://perma.cc/2N49-LMTR>]. The 15 states that have signed on are: Maryland, New Jersey, Illinois, Hawaii, Washington, Massachusetts, Vermont, California, Rhode Island, New York, Connecticut, Colorado, New Mexico, Delaware, Oregon, and Washington, D.C. The campaign has 196 electoral votes pledged, approximately 72 percent of what is needed to move to NPV. *Id.*

187. *See, e.g.*, Walter Shapiro, *Rage Against the Electoral College*, BRENNAN CTR. FOR JUST. (Apr. 17, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/rage-against-electoral-college> [<https://perma.cc/V7Y8-69J6>] (“The current obsession with the purported injustice of the Electoral College may be a goad to reform, but it irks nonetheless. At a moment when Trump is challenging the validity of democratic institutions from the courts to a free press, why are liberals joining the chorus by suggesting that a president elected under constitutional mechanisms must be illegitimate if he lost the popular vote?”).

188. U.S. CONST. amend. XIV, § 1 (prohibiting states from denying “any person within [their] jurisdiction the equal protection of the laws”).

189. U.S. CONST. amend. XV (prohibiting discrimination based on race, color, or previous condition of servitude).

190. U.S. CONST. amend. XIX (prohibiting discrimination based on sex).

191. U.S. CONST. amend. XXIV (outlawing the poll tax).

192. U.S. CONST. amend. XXVI (prohibiting discrimination based on age of persons 18 and older).

an affirmative right to vote in the U.S. Constitution. In each iteration of the right to vote, the Constitution gives Congress the authority to enact “appropriate legislation” to enforce this most fundamental of rights.¹⁹³ The Constitution contains a number of “thou shall nots”—or what scholar Lani Guinier called “negative proscriptions.”¹⁹⁴ Guinier explained that “[t]hey are not an affirmative guarantee that we really want all citizens of the United States to participate in making the decisions that affect their lives.”¹⁹⁵ Consequently, the word “vote” as applied to the citizenry did not appear in the Constitution until the passage of the Civil War Amendments.¹⁹⁶

The Founders left the right to vote to the states, which provided that only White, property-owning men could vote.¹⁹⁷ The amendments addressing the right sought to correct for America’s transgression of slavery and racial and sexual discrimination. They sought to address the illness, not cure the disease. Without an affirmative, explicit right to vote, states have, since the passage of the Civil War Amendments, passed laws that limited the right to vote and prevented people of color from freely and fairly accessing the ballot.¹⁹⁸ States passed literacy tests, poll taxes, felon disenfranchisement, and other disenfranchising laws in spite of the prohibitions contained in the amendments to the Constitution.¹⁹⁹

The lack of a guaranteed right to vote in the federal Constitution allows states to infringe on the right to vote. The Constitution gives states the authority to determine the qualifications of electors.²⁰⁰ States developed laws with the intention of eliminating Black and Brown voters from the franchise.²⁰¹ These intentions were laid bare in 1865 when Florida Governor David Walker stated, “Of course we could never accede to the demand for negro suffrage, should it be made. . . . [W]e could not give either an honest or a conscientious assent to negro

193. *Shelby County v. Holder*, 570 U.S. 529, 567 n.2 (2013) (Ginsburg, J., dissenting) (“The Constitution uses the words ‘right to vote’ in five separate places: the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments. Each of these Amendments contains the same broad empowerment of Congress to enact ‘appropriate legislation’ to enforce the protected right. The implication is unmistakable: Under our constitutional structure, Congress holds the lead rein in making the right to vote equally real for all U.S. citizens. These Amendments are in line with the special role assigned to Congress in protecting the integrity of the democratic process in federal elections.”).

194. Martin Newhouse, *Voting Rights and Voting Wrongs: An Interview with Lani Guinier*, MASS. HUMANITIES, Spring 2006, at 1, 3.

195. *Id.*

196. Victoria Bassetti, *In Search of the Right to Vote*, HARPER’S MAG. (Oct. 2012), <https://harpers.org/archive/2012/10/in-search-of-the-right-to-vote/> [<https://perma.cc/NUB8-64M9>].

197. *See* DAHL, *supra* note 6.

198. *See* DANIELS, *supra* note 27.

199. *See, e.g.*, J. Morgan Kousser, *The Undermining of the First Reconstruction: Lessons for the Second*, in *MINORITY VOTE DILUTION* 27, 34 (Chandler Davidson ed., 1984).

200. *See* U.S. CONST. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but Congress may at any time . . . make or alter such Regulations, except as to the Place of chusing [sic] Senators.”).

201. *See supra* notes 60–62 and accompanying text.

suffrage.”²⁰² To achieve the stated outcome, states passed grandfather clauses, literacy tests, and felon disenfranchisement laws to dull the impact of the constitutional amendments.²⁰³ While Governor Walker was explicit, more than a century later, the North Carolina legislature attempted to achieve the same result by adopting draconian measures that turned back voting rights gains. In *North Carolina State Conference of NAACP v. McCrory*,²⁰⁴ the court found “[a]lthough the new provisions target African Americans with almost surgical precision, they constitute inapt remedies for the problems assertedly justifying them and, in fact, impose cures for problems that did not exist. . . . In essence, the State took away [minority voters’] opportunity because [they] were about to exercise it.”²⁰⁵ Although centuries apart, the objective remained the same. The “negative proscriptions” in the U.S. Constitution did not prevent the intentional legislative efforts to disenfranchise people of color.

Given these shortcomings, congressional action is needed. Without a doubt, the federal government has adopted legislation that strengthened the right to vote. The Voting Rights Act of 1965, the National Voter Registration Act,²⁰⁶ and the Help America Vote Act²⁰⁷ were tremendous vessels for advancing voting rights. Nonetheless, without an affirmative, explicit right to vote, states will continue to work around the edges and pass legislation that makes it harder to register and vote. This is not our Founding Fathers’ democracy, but it is becoming less democratic with every disenfranchising piece of legislation.²⁰⁸

202. David Shelby Walker, Governor of Florida, Address before the General Assembly of the State of Florida (Dec. 20, 1865).

203. See, e.g., ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 89 (Basic Books 2000) (“In short order, other states followed suit, adopting—in varying combinations—poll taxes, cumulative poll taxes, . . . literacy tests, secret ballot laws, lengthy residence requirements, elaborate registration systems, confusing multiple voting- box arrangements, and eventually, Democratic primaries restricted to [W]hite voters. Criminal exclusion laws also were altered to disenfranchise men convicted of minor offenses, such as vagrancy and bigamy.”).

204. 831 F.3d 204 (4th Cir. 2016).

205. *Id.* at 214–15 (citation omitted).

206. Pub. L. No. 103-31, 107 Stat. 77 (1993) (codified at 52 U.S.C. § 20501). The National Voter Registration Act (NVRA), *inter alia*, included best practices and established procedures that sought to increase voter registration, provide list maintenance procedures.

207. Pub. L. No. 107-252, 116 Stat. 1666 (2002) (codified in scattered sections of 52 U.S.C. ch. 209).

208. Jill Lepore, *Rock, Paper, Scissors: How We Used to Vote*, *NEW YORKER* (Oct. 6, 2008), <https://www.newyorker.com/magazine/2008/10/13/rock-paper-scissors> [<https://perma.cc/T7M2-PVF7>] (“From an eighteenth-century point of view, how we vote now looks even stranger. Casting a ballot remains the defining act of American citizenship. But, especially since the election of 2000, with its precariously hanging chad, many people worry that voting in America is a shambles and even a sham, that the machinery of our democracy is broken, crippled by confusing, illegible, and deceptive ballots; vote-counting devices either rickety and outdated or new, gimmicky, and untested but, in any case, unreliable and by no means tamperproof; and a near total absence of national standards and federal oversight.”).

Furthermore, Democracy is neither enumerated nor defined in the Constitution.²⁰⁹ The Constitution first outlines the Bill of Rights, which includes fundamental rights such as freedom of speech, religion, press, and assembly. The Constitution recognizes other things such as the right to bear arms and privacy but does not explicitly enumerate the right to vote. Professor Morgan Marietta wrote that the right to vote was intentionally left out of the Constitution because “[t]he [F]ounders didn’t trust ordinary citizens to endorse the rights of others.”²¹⁰ The Founders “did not lay out an inherent right to vote because they feared rule by the masses would mean the destruction of – not better protection for – all the other rights the Constitution and Bill of Rights uphold. Instead, they highlighted other core rights over the vote, creating a tension that remains today.”²¹¹

Although we have more amendments that impact the right to vote than any other right in the Constitution, they are a list of “shall nots” that do not give the right to vote while simultaneously forbidding the taking of the right based on race, sex, age, etc. The passage of the Civil War Amendments, particularly the Fifteenth Amendment, gave Black men the right to vote, which changed the complexion of the electorate. In a matter of years, the Black electorate garnered newly elected people of color on the state, local, and federal levels.²¹²

The U.S. Supreme Court has adjudged the right to vote as fundamental.²¹³ Yet, it does not apply the highest level of scrutiny to cases that involve this fundamental right. Instead of applying strict scrutiny, the Supreme Court engages in a balancing test that is referred to as the *Anderson-Burdick* test.²¹⁴ This lower level of scrutiny usually allows disenfranchising mechanisms such as

209. See generally Jane S. Schacter, *Unenumerated Democracy: Lessons from the Right to Vote*, 9 U. PA. J. CONST. L. 457, 471–72 (2007) (“[T]he Constitution plays a necessary, if contested, role in constituting democracy.”).

210. Morgan Marietta, *The Right to Vote is Not in the Constitution*, CONVERSATION (Aug. 26, 2020), <https://theconversation.com/the-right-to-vote-is-not-in-the-constitution-144531> [<https://perma.cc/TLQ5-QNHX>].

211. *Id.*

212. See, e.g., Anna Brown & Sara Atske, *Blacks Have Made Gains in U.S. Political Leadership, but Gaps Remain*, PEW RSCH. CTR.: FACT TANK (Jan. 18, 2019), <https://www.pewresearch.org/fact-tank/2019/01/18/blacks-have-made-gains-in-u-s-political-leadership-but-gaps-remain/> [<https://perma.cc/KYB2-FU8M>]; see also DAVID A. BOSITIS, JOINT CTR. FOR POL. & ECON. STUD., BLACK ELECTED OFFICIALS: A STATISTICAL SUMMARY 2000, at 5 (2002).

213. *Yick v. Hopkins*, 118 U.S. 356, 370 (1886) (“[T]he political franchise of voting is . . . regarded as a fundamental political right, because preservative of all rights.”); *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964) (“[T]he right of suffrage is a fundamental matter in a free and democratic society. . . . [A]ny alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (“No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.”).

214. *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992).

restrictive voter IDs, as in *Crawford v. Marion*,²¹⁵ or purging eligible voters, as in *Husted v. APRI*.²¹⁶

Congress has authority under the Fourteenth and Fifteenth Amendments to address discrimination in voting and has utilized its powers to address election issues and expand the ability for eligible persons to vote.²¹⁷ On August 5, 2020, Senator Richard Durbin introduced a Joint Resolution that provided: (1) an affirmative right for every American citizen to vote in the jurisdiction in which they reside; (2) a requirement for any efforts to limit the right to vote to be subjected to the “strictest level” of review in court; (3) that states can no longer rely on Section 2 of the Fourteenth Amendment to prevent Americans from voting due to a criminal conviction; and (4) that Congress has the “irrefutable” authority to protect the right to vote through legislation.²¹⁸ The Joint Resolution calls for an explicit right to vote in the U.S. Constitution and reads as follows:

SECTION 1. Every citizen of the United States, who is of legal voting age, shall have the fundamental right to vote in any public election held in the jurisdiction in which the citizen resides.

SECTION 2. The fundamental right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State or political subdivision within a State unless such denial or abridgment is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.

SECTION 3. The portion of section 2 of the fourteenth article of amendment to the Constitution of the United States that consists of the phrase ‘or other crime,’ is repealed.

SECTION 4. The Congress shall have the power to enforce this article and protect against any denial or abridgement of the fundamental right to vote by legislation.²¹⁹

Senator Durbin issued a press release that admitted the difficulties of passing a constitutional amendment while also suggesting that the resolution was the best vehicle for achieving meaningful change.²²⁰ To be clear, this legislation has very little chance at passage.²²¹ Yet, it is a significant step in securing the right to vote.

215. See, e.g., *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189–90 (2008) (rejecting challenge to an Indiana law requiring photo ID for voting).

216. *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833 (2018).

217. See, e.g., 52 U.S.C. ch. 103.

218. Press Release, Dick Durbin, U.S. Senate, Durbin Introduces Joint Resolution to Enshrine Right to Vote in U.S. Constitution (Aug. 5, 2020), <https://www.durbin.senate.gov/newsroom/press-releases/durbin-introduces-joint-resolution-to-enshrine-right-to-vote-in-us-constitution> [<https://perma.cc/4NWT-V8HS>].

219. S.J. Res. 75, 116th Cong. (as referred to the S. Comm. on the Judiciary, Aug. 4, 2020), <https://www.durbin.senate.gov/imo/media/doc/BOM20380%20-%20Affirmative%20Right%20to%20Vote%20Amendment,%20final.pdf> [<https://perma.cc/8QRY-987U>].

220. Press Release, Dick Durbin, *supra* note 218.

221. *Id.*

Similarly, other U.S. senators have offered solutions to address antidemocratic practices.²²² As a senator, Vice President Kamala Harris announced the Vote Safe Act, which provides \$5 billion to expand vote by mail and early voting, requires states to permit no-excuse mail-in absentee voting, requires states to maintain an early voting period of at least twenty days, and compensates states to make voting safer.²²³ She suggested that we do the hard work of democracy because “[s]o many have marched, protested, fought and died for the fundamental right to vote, yet that right is under attack. . . . Even before the pandemic, Native American, Black, and Latinx voters, and voters with disabilities too often faced long lines, inaccessible voting locations, and outright hostility by election officials.”²²⁴ Certainly, Congress has a role to play in eliminating laws that contradict democratic principles. Efforts to enshrine the right to vote must begin in Congress. It is up to the country to embrace democracy’s destiny and adopt an explicit right to vote in the U.S. Constitution.

While proponents of an explicit right to vote believe that a constitutional amendment could prevent state actions that constrict the right to vote, other scholars retort that the right to vote is in the Constitution and a right-to-vote amendment is duplicative. As a proponent of a right-to-vote amendment, I believe the stronger argument is that this amendment would ensure that the right is treated similarly to other enumerated rights, such as the right to bear arms or freedom of speech, essentially preventing legislatures from denying or infringing on the right. A right-to-vote amendment would indeed make the right to vote fundamental.

222. For example, Senator Elizabeth Warren offered broad solutions such as: (1) removing the barriers to voter registration/preventing states from purging the voter rolls; (2) providing everyone the option to vote by mail and making in-person voting safer; (3) fully funding the U.S. Post Office; (4) requiring all states to provide a minimum of thirty days of early voting; and (5) providing states the necessary funding to implement ballot tracking and to properly staff polling locations. Press Release, Elizabeth Warren, U.S. Senate, Protecting Our Elections During the Coronavirus Pandemic (Apr. 7, 2020), <https://www.warren.senate.gov/newsroom/press-releases/senator-warren-publishes-medium-post-on-protecting-our-elections-during-coronavirus-pandemic> [<https://perma.cc/9XZC-T23K>]. In response to COVID-19, Senator Amy Klobuchar also introduced the Natural Disaster and Emergency Ballot Act in March 2020. The bill would have expanded early voting periods, allowed no-excuse absentee vote-by-mail to all states, and reimbursed states for additional election costs incurred due to the coronavirus pandemic. Press Release, Amy Klobuchar, U.S. Senate, With Unprecedented Disruptions Expected from Coronavirus, Klobuchar and Wyden Introduce Bill to Ensure Americans Are Still Able to Vote (Mar. 13, 2020), <https://www.klobuchar.senate.gov/public/index.cfm/2020/3/with-unprecedented-disruptions-expected-from-coronavirus-klobuchar-and-wyden-introduce-bill-to-ensure-americans-are-still-able-to-vote> [<https://perma.cc/7Z9J-B2SF>].

223. Press Release, Kamala Harris, U.S. Senate, Harris Announces VoteSafe Act to Protect Voters Amid COVID-19 Crisis (Apr. 16, 2020), <https://www.harris.senate.gov/news/press-releases/harris-announces-votesafe-act-to-protect-voters-amid-covid-19-crisis> [<https://perma.cc/F8Q4-VJ3M>].

224. *Id.*

CONCLUSION

Langston Hughes' words echo the thoughts of voters of color and their collective desire to enjoy the fruits of democracy, especially the right to vote. Today, we use other words to describe our country's present state, such as crisis, chaos, and catastrophe. Many have questioned whether we are on the verge of or in the middle of a constitutional crisis.²²⁵ Is American democracy at a crossroads? Can we achieve a democracy where all people can vote freely and securely?

The rules surrounding the fundamental right to vote have shifted in ways that make it more difficult for eligible persons to access the ballot.²²⁶ Moreover, these disenfranchising mechanisms threaten the fundamental right to vote and, consequently, our democratic form of government. Opposition to providing eligible citizens with the mechanisms necessary to exercise their right is antidemocratic and consistent with opinions that only certain people should vote. What we call a democracy has only operated as such for a short period of time in this nation's history. Our democratic state is layered with hypocrisy and paradox. Yet, we have an opportunity to make "we the people" a clarion call to all who inhabit these borders if we center the right to vote in our efforts to do the hard and constant work of maintaining a democracy.

The United States knows how to count ballots, but it also knows all too well how to suppress them. During the 2020 election season, the tripwires for our democracy were exposed and triggered. The ability of eligible persons to access the right to vote was fraught with land mines. The expansion and contraction of mail-in ballots, the closing of polling sites,²²⁷ the elimination of drop boxes,²²⁸ the dismantling of the U.S. Postal Service, and the threat of voter intimidation²²⁹ all played out during a global pandemic. We can do better.

While approximately two-thirds of eligible Americans cast a ballot in the 2020 election,²³⁰ the United States consistently has abysmal voter turnout. According to Pew Research, the United States voter participation rate ranks

225. Quinta Jurecic & Benjamin Wittes, *Is America on the Verge of a Constitutional Crisis?*, ATLANTIC (Mar. 17, 2018), <https://www.theatlantic.com/politics/archive/2018/03/is-america-on-the-verge-of-a-constitutional-crisis/555860/> [<https://perma.cc/CGD9-LB64>].

226. See generally DANIELS, *supra* note 27.

227. Cameron Joseph & Rob Arthur, *The US Eliminated Nearly 21,000 Election Day Polling Locations for 2020*, VICE (Oct. 22, 2020), <https://www.vice.com/en/article/pkdenn/the-us-eliminated-nearly-21000-election-day-polling-locations-for-2020> [<https://perma.cc/6RAA-RMDW>].

228. Jolie McCullough, *Texas Counties Will Be Allowed Only One Drop-Off Location for Mail-in Ballots, State Supreme Court Rules*, TEX. TRIB. (Oct. 27, 2020), <https://www.texastribune.org/2020/10/27/texas-voting-elections-mail-in-drop-off/> [<https://perma.cc/P7KM-M5L4>].

229. Shaila Dewan, *Armed Observers, Chants of '4 More Years' at Polls: Is That Legal?*, N.Y. TIMES (Oct. 30, 2020), <https://www.nytimes.com/2020/10/30/us/poll-watching-intimidation.html> [<https://perma.cc/LTZ3-NT3L>].

230. Olivia B. Waxman, *The 2020 Election Set a Record for Voter Turnout. But Why Is It Normal for So Many Americans to Sit Out Elections?*, TIME (Nov. 5, 2020), <https://time.com/5907062/record-turnout-history/> [<https://perma.cc/S7ZM-Z8FS>].

thirtieth of thirty-five advanced democracies.²³¹ The federal government can take several immediate and impactful steps to make voting easier. First, the U.S. Senate must pass the John Lewis Voting Rights Advancement Act,²³² which requires states with a proven history of voter suppression and discrimination to prove that any changes to their election laws will not disenfranchise voters. Second, Congress must adopt an explicit right to vote in the Constitution. Third, our country must eliminate felon disenfranchisement.

In a democracy, the vote and the ability of eligible persons to exercise the right to vote is central, and elections must be conducted fairly, freely, and without discrimination. Only after we achieve these goals will democracy reach its destiny, and we will have a more perfect union.

231. See Drew DeSilver, *In Past Elections, U.S. Trailed Most Developed Countries in Voter Turnout*, PEW RSCH. CTR. (Nov. 3, 2020), <https://www.pewresearch.org/fact-tank/2020/11/03/in-past-elections-u-s-trailed-most-developed-countries-in-voter-turnout/> [<https://perma.cc/Y5E2-ZSS2>].

232. John Lewis Voting Rights Advancement Act, S. 4263, 116th Cong. (as referred to the S. Comm. on the Judiciary, July 22, 2020), <https://www.congress.gov/bill/116th-congress/senate-bill/4263> [<https://perma.cc/K27K-NANM>].