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Benjamin Edelstein

Mark L. Thomsen

Atiba R. Ellis
*Case Western Reserve University School of Law*

**ARTICLE**

# UNEQUAL ACCESS: THE PERPETUAL STRUGGLE FOR VOTING RIGHTS AND THE CASE OF WISCONSIN

*Benjamin Edelstein*[*]*, Mark L. Thomsen*[**] *& Atiba R. Ellis*[***]

*In this Article, we examine the transformation of Wisconsin from a state celebrated for its progressive voting laws to a focal point for stringent voting restrictions. This shift mirrors a recurring pattern in American history where progress in voting rights is often countered by strategies aimed at preserving existing power structures. We trace this pattern through American history, highlighting the role of white supremacy and structural racism in continuously reshaping the boundaries of electoral inclusion and exclusion. Wisconsin's situation is a stark example of how contemporary legal and political tactics to limit access to the ballot box continue a long history of disenfranchisement. Our analysis highlights the need for a race-conscious approach to understanding and addressing the current crisis in American democracy, and the need for a civil rights model that confronts the underlying issues of racism and exclusion.*



[*] Associate, Hawks Quindel, S.C.
[**] Partner, Gingras Thomsen & Wachs, LLP; Member, Wisconsin Elections Commission. The views of this Article do not represent the views of the Commission or the State of Wisconsin.
[***] Professor of Law, Case Western Reserve University School of Law (and former Professor of Law, Marquette University Law School). Professor Ellis wishes to acknowledge the CWRU School of Law for providing material support of this research. The authors wish to thank the participants from the State Democracy Research Initiative Academic Roundtable for their helpful comments on an earlier draft.

*"No republic is safe that tolerates a privileged class, or denies to any of its citizens equal rights and equal means to maintain them."*
*-Frederick Douglass*

## INTRODUCTION

The right to vote is a fundamental aspect of the American experiment.[1] In a poll conducted by the Pew Research Center, ninety-one percent of respondents considered the right to vote essential to their sense of freedom.[2] Despite the perception, however, the federal Constitution does not explicitly enumerate the right to vote. Indeed, when the Constitutional Convention met in the summer of 1787, the delegates avoided the issue of who should comprise the electorate entirely.[3] Instead, the Constitution allowed the individual states to decide who should, and should not, be allowed to vote.[4] As a result, the question of who should comprise the electorate has been the subject of considerable and ongoing debate.[5]

The Founders envisioned a system in which only white men of means could participate in the political process.[6] And from the founding to the modern period, voting rights gradually expanded.[7] Yet, this expansion has been met with resistance.[8] This tension

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[1] *See* McCutcheon v. FEC, 572 U.S. 185, 191 (2014) (plurality opinion) ("There is no right more basic in our democracy than the right to participate in electing our political leaders.").

[2] *Public Supports Aim of Making It 'Easy' for All Citizens to Vote: Only One-in-Five Back Mandatory Voting*, PEW RES. CTR. (June 28, 2017), https://www.pewresearch.org/politics/2017/06/28/public-supports-aim-of-making-it-easy-for-all-citizens-to-vote [https://perma.cc/Q2ZJ-8RPW].

[3] ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 20 (Revised ed. 2009).

[4] Article I, Section 2 of the Constitution provides that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States." U.S. CONST. art. I, § 2. However, "[t]his is the only textual reference to 'the People' in the body of the original Constitution and the only express, original textual right of the People to direct, unmediated political participation in choosing officials of the national government." Richard H. Pildes, *The Constitution and Political Competition*, 30 NOVA L. REV. 253, 267 (2006). The Constitution also left the process of elections to the individual states. *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 the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.").

[5] *See* Erin A. Penrod, *Disenfranchisement 2.0: Recent Voter ID Laws and the Implications Thereof*, 14 U. ST. THOMAS L.J. 207, 209–15 (2018).

[6] KEYSSAR, *supra* note 3, at 9.

[7] *See* Atiba R. Ellis, *The Cost of the Vote: Poll Taxes, Voter Identification Laws, and the Price of Democracy*, 86 DENV. U. L. REV. 1023, 1037–50 (2009).

[8] KEYSSAR, *supra* note 3, at xxi.

between a more inclusive franchise and a more restrictive one has been characterized as "battling the Hydra"[9] or "playing a game of whack-a-mole"[10] to eliminate discriminatory and exclusionary procedures. As a discriminatory procedure is eliminated, a new means of disenfranchisement emerges to take its place.[11] As the voting rights historian Alexander Keyssar explains, "[h]istory rarely moves in simple, straight lines, and the history of suffrage is no exception."[12] Yet it is fair to say that certain themes emerge around this exclusionary tension, including, as Professor Ellis put it, the fact that "[w]hite supremacy continues to transform and reinvent itself so it can continue to exist in connection to political domination."[13]

During the first two years of the COVID-19 pandemic, Republican and Democratic election officials across the country expanded voting options, providing unprecedented access to the ballot through early voting, vote-by-mail, ballot drop boxes, and other mechanisms.[14] However, after Joe Biden narrowly defeated Donald Trump in 2020, many states rushed to enact legislation on the false premise that widespread voter fraud is plaguing American elections.[15] Unsurprisingly, these voting restrictions will likely disproportionately impact minorities, the poor, and other marginalized groups.[16] An analysis by the Brennan Center found that legislators from majority-white districts in the most racially

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[9] Shelby Cnty. v. Holder, 570 U.S. 529, 560 (2013) (Ginsburg, J., dissenting).

[10] Brnovich v. Democratic Nat'l Comm., 594 U.S. 647, 697 (2021) (Kagan, J., dissenting).

[11] *See Shelby Cnty.*, 570 U.S. at 560 (Ginsburg, J., dissenting); *see also* DONATHAN L. BROWN & MICHAEL L. CLEMONS, VOTING RIGHTS UNDER FIRE: THE CONTINUING STRUGGLE FOR PEOPLE OF COLOR 3 (Brian D. Behnken ed., 2015) (noting the similarities between the Jim Crow era and today and observing that "in each of these eras, broad-based, counter-democratic programs were launched seeking a reversal of the progress made in extending the franchise to those who had been excluded.").

[12] KEYSSAR, *supra* note 3, at 53.

[13] Atiba R. Ellis, *Normalizing Domination*, 20 CUNY L. REV. 493, 503 (2017).

[14] *See* Matt Vasilogambros & Lindsey Van Ness, *States Expanded Voting Access for the Pandemic. The Changes Might Stick.*, PEW CHARITABLE TR. (Nov. 6, 2020, 12:00 AM), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/11/06/states-expanded-voting-access-for-the-pandemic-the-changes-might-stick [https://perma.cc/W7QB-SZPD]; Zach Montellaro, *The Pandemic Changed How We Vote. These States are Making the Changes Permanent*., POLITICO (June 22, 2021, 4:30 AM), https://www.politico.com/news/2021/06/22/pandemic-voting-changes-495411 [https://perma.cc/G7QX-FAGF].

[15] Jake Horton, *US Midterms: How Will New Voting Laws Affect the Election?*, BBC NEWS (Nov. 3, 2022), https://www.bbc.com/news/60309566 [https://perma.cc/6ZY4-LYLB].

[16] *See, e.g.*, Meg Cunningham, *'The New Jim Crow': Republicans and Democrats at Odds Over Voting Rights*, ABC NEWS (Apr. 20, 2021, 3:56 PM), https://abcnews.go.com/Politics/jim-crow-republicans-democrats-odds-voting-rights/story?id=77188460 [https://perma.cc/BA2F-8NQ8].

diverse states were the most likely to introduce restrictive voting bills.[17] In addition, legislators sponsoring these bills are more likely to represent districts with higher racial resentment.[18]

Nowhere is the current contraction of voting rights more evident than in Wisconsin, which has become ground zero for the recent effort to restrict the vote.[19] Once known for its long progressive tradition and expansive voting laws,[20] Wisconsin is now a conservative testing ground for anti-democratic policies.[21] After the Republican Party secured control of all three branches of Wisconsin's state government in 2010, Governor Scott Walker and the legislature enacted a series of voting restrictions, including one of the strictest voter identification laws in the country.[22] In addition, Governor Walker and the legislature disbanded the state's highly respected nonpartisan Government Accountability Board.[23] These efforts served as a template for Republicans in other states, and in 2024, Wisconsin is again a front line of the GOP's attack on free and fair elections.[24]

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The effort to restrict access to the ballot box in Wisconsin and across the country is not surprising to those familiar with the history of voting rights in America. Time and time again, panicked lawmakers have erected barriers to the voting booth following a

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[17] *See* Kevin Morris, *Patterns in the Introduction and Passage of Restrictive Voting Bills are Best Explained by Race*, BRENNAN CTR. FOR JUST. (Aug. 3, 2022), https://www.brennancenter.org/our-work/research-reports/patterns-introduction-and-passage-restrictive-voting-bills-are-best [https://perma.cc/QAU2-SNUV].

[18] *See id*.

[19] *See* Ari Berman, *How Wisconsin Became the GOP's Laboratory for Dismantling Democracy*, MOTHER JONES (Oct. 25, 2022), https://www.motherjones.com/politics/2022/10/wisconsin-2022-midterms-gerrymandering-redistricting-evers-michels [https://perma.cc/YP7H-BL82].

[20] For example, in the 1970s, Wisconsin pioneered election day registration. Ari Berman, *Rigged: How Voter Suppression Threw Wisconsin to Trump*, MOTHER JONES (Nov./Dec. 2017), https://www.motherjones.com/politics/2017/10/voter-suppression-wisconsin-election-2016 [https://perma.cc/R274-DVSN].

[21] *See* Berman, *supra* note 19*; see generally* DAN KAUFMAN, THE FALL OF WISCONSIN: THE CONSERVATIVE CONQUEST OF A PROGRESSIVE BASTION AND THE FUTURE OF AMERICAN POLITICS (2018).

[22] Shawn Johnson, *Voter ID Bill Seems Likely to Pass*, WIS. PUB. RADIO (Jan. 27, 2011), https://www.wpr.org/politics/voter-id-bill-seems-likely-pass [https://perma.cc/UVM4-XCNZ] ("If this bill passes, it would be the most restrictive in the United States." (quoting political scientist David Canon at a public hearing on the bill)).

[23] *See infra* notes 420–26 and accompanying text.

[24] *See* Ari Berman, *Wisconsin Republicans Are Taking Desperate Steps to Subvert Fair Elections in 2024*, MOTHER JONES (Sept. 24, 2023), https://www.motherjones.com/politics/2023/09/wisconsin-republicans-gerrymandering-impeachment-janet-protasiewicz-meagan-wolfe [https://perma.cc/8A5H-9B4M].

perceived increase in minority voting power. As we argue in this Article, this pattern reflects how white supremacy has always mediated the meaning of equality within American society.

Since the founding, the democratic promise of fundamental equality has struggled to form and emerge due to structures excluding those deemed unworthy of citizenship. To quote Justice Thurgood Marshall: "[t]he government [the Framers] devised was defective from the start, requiring several amendments, a civil war, and momentous transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, that we hold as fundamental today."[25] We have made significant progress toward fulfilling America's democratic potential. However, as the anti-democratic initiatives in Wisconsin show, the American notion of equality remains inconclusive.

When it comes to race and the right to vote, discriminatory animus has evolved from the caste-style exclusion of white supremacy to Jim Crow subjugation and domination to a post-Civil Rights era patchwork of precarious rights. The structural tools for this continually evolving phenomenon remain, including legal and extra-legal suppression by intimidation; racially targeted and race-manipulating gerrymandering; and the use of legal mechanisms and judicial interpretation to limit laws and policies designed to promote democratic inclusion. Moreover, these enduring forms of structural racial discrimination interplay with the present iterations of ideologies designed to justify and obscure racial subordination—namely, colorblindness and its interrelated modern companion, post-racialism. This interplay of structural racism and ideological heuristics combine to form a legal and political climate of exclusion at the expense of efforts to maintain a functioning democracy.

This Article seeks to study this interplay in Wisconsin to understand how these forces interact. In this sense, the Article aims to articulate a race-conscious account and, by reference, reinforce the need to utilize a civil rights model to understand and challenge the modern political crisis in America generally and in Wisconsin specifically. This undercurrent is a ubiquitous thread between the history described here and the existence of quasi-authoritarian democracy in Wisconsin. This fact distinguishes this account from others' analyses, where the focus may be solely on either partisanship or on authoritarian trends. Indeed, it is our view that partisanship accounts and authoritarianism divorced from their ideological and historical context understate the structural concerns at play in appreciating the dynamics of voter suppression and ultimately (and perhaps unwittingly) aid in reinforcing structural racism. This account is offered as a corrective to this trend.

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

This Article begins in Part I with the democratic promise of the United States at its founding, which was immediately undercut by a constitution that protected slavery and used enslaved people as political capital. Then, in Part II, this Article explores the pattern of voter suppression that emerged following the Civil War, the passage of the Reconstruction Amendments and the brief interracial democracy that emerged during Reconstruction. Part III details the federal response that ultimately fulfilled the promise of a reconstructed American democracy yet demonstrates the patterns of voter suppression that nonetheless persisted. In Part IV, this Article uses Wisconsin to show how lawmakers have replicated those patterns of voter suppression through exploiting the modern legal landscape to enact voting restrictions in response to massive turnout efforts in 2008 and 2012. Finally, this Article will briefly conclude.

## I. THE DEMOCRATIC PROMISE AT THE FOUNDING

The notion that all citizens will be allowed to participate in the political process is a central tenet of American democracy.[26] However, at the founding, the "We the People" represented in our union only included white men with means and access to power.[27] The Founders, all white men of property themselves, overwhelmingly favored a system that excluded those who were not property holders from the political process.[28] Furthermore,

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[26] *See* Ellis, *supra* note 7, at 1029.

[27] *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1726 (1993).

[28] At the Constitutional Convention, James Madison remarked: "Viewing the subject in its merits alone, the freeholders of the Country would be the safest depositories of Republican liberty." 1 JOHN R. VILE, THE CONSTITUTIONAL CONVENTION OF 1787: A COMPREHENSIVE ENCYCLOPEDIA OF AMERICA'S FOUNDING 768 (2005). Weeks before he would sign the Declaration of Independence, John Adams was adamant that those without property should not have voting rights: "Such is the Frailty of the human Heart, that very few Men, who have no Property, have any Judgement of their own. They talk and vote as they are directed by Some Man of Property, who has attached their Minds to his Interest." Letter from John Adams to James Sullivan (May 26, 1776), *in* THE DECLARATION OF INDEPENDENCE IN HISTORICAL CONTEXT: AMERICAN STATE PAPERS, PETITIONS, PROCLAMATIONS, AND LETTERS OF THE DELEGATES TO THE FIRST NATIONAL CONGRESSES 458 (Barry Alan Shain ed., 2014). Alexander Hamilton, who is today adored, was perhaps the most adamant that only educated men of means should choose the nation's leaders. In 1775, Hamilton dedicated an entire pamphlet to advocate restricting the vote to those who owned property. *See* ALEXANDER HAMILTON, THE FARMER REFUTED (1775), https://founders.archives.gov/documents/Hamilton/01-01-02-0057 [https://perma.cc/AA38-Q4AR]. In a speech at the Constitutional Convention, Hamilton observed: "All communities divide themselves into the few and the many. The first are the rich and well born, the other the mass of the people. The voice of the people has been said to be the voice of God; and however generally

"[a]lthough the Framers were able to comprehend the ideals of justice, equality, and freedom, the America that existed when they drafted the Constitution was a nation already deep in the mire of oppression based on skin color."[29] Indeed, the word "equality" appeared nowhere in the original text of the Constitution. As Justice Thurgood Marshall observed:

> For a sense of the evolving nature of the Constitution we need look no further than the first three words of the document's preamble: 'We the People.' When the Founding Fathers used this phrase in 1787, they did not have in mind the majority of America's citizens. 'We the People' included, in the words of the Framers, 'the whole Number of free Persons.' On a matter so basic as the right to vote, for example, Negro slaves were excluded, although they were counted for representational purposes at three fifths each. Women did not gain the right to vote for over a hundred and thirty years.[30]

Although the Founders sought to create a government that preserved the rigid hierarchical structure of the times, they also "understood that the states would decline to ratify a Constitution that empowered an aristocracy of wealth."[31] To that end, the Philadelphia delegates created a "republic," which, as James Madison explained, is a government which derives its powers from the people, and is administered by those holding their offices for a limited period."[32] To be sure, "the [F]ounders may have loved the common people, but not well enough to entrust them with control

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this maxim has been quoted and believed, it is not true in fact. The people are turbulent and changing; they seldom judge or determine right. Give therefore to the first class a distinct, permanent share in the government. They will check the unsteadiness of the second." THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911), https://oll.libertyfund.org/title/farrand-the-records-of-the-federal-convention-of-1787-vol-1 [https://perma.cc/3PUJ-XJ58].

[29] Juan Williams, *The Survival of Racism Under the Constitution*, 34 WM. & MARY L. REV. 7, 11 (1992).

[30] Marshall, *supra* note 25.

[31] ALLAN J. LICHTMAN, THE EMBATTLED VOTE IN AMERICA: FROM THE FOUNDING TO THE PRESENT 11 (2018).

[32] THE FEDERALIST NO. 39 (James Madison).

over government."[33] Unchecked direct democracy, the Founders believed, would only lead to chaos.[34]

When it came to who should have voting rights, "[it] was difficult to form any uniform rule of qualifications for all the States."[35] The individual states had been enforcing their own voting laws for more than a decade.[36] Imposing a national suffrage requirement was likely to spark opposition in one state or another and compromise the ratification of the new constitution.[37] Therefore, the Framers opted to leave voting rights up to the individual states.[38]

While the voting laws varied from state to state, nearly all of them "were shaped by colonial precedents and traditional English patterns of thought."[39] The requirement that only adult males who owned property be eligible to vote was the cornerstone of both colonial and British suffrage laws.[40] Apart from property qualifications, however, there were no firm principles that guided voting rights.[41] Certain states prohibited specific religions—Jews or Catholics—from voting, and every state denied enslaved people and Indigenous people the right to vote.[42]

> While the Framers were uninterested in fulfilling the democratic promise of fundamental equality in the Declaration of Independence, they were keen on drafting a constitution that preserved and protected

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[33] LICHTMAN, *supra* note 31, at 12.

[34] *See, e.g.*, Letter from Benjamin Rush to John Adams (July 21, 1789), *in* 1 LETTERS OF BENJAMIN RUSH 523 (Lyman H. Butterfield ed., 1951); THE FEDERALIST NO. 10 (James Madison) ("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."); Letter from John Adams to John Taylor (Dec. 17, 1814), https://founders.archives.gov/documents/Adams/99-02-02-6371 [https://perma.cc/4TJ6-PCCS] ("Remember Democracy never lasts long. It soon wastes exhausts and murders itself.").

[35] LICHTMAN, *supra* note 31, at 15.

[36] KEYSSAR, *supra* note 3, at 4.

[37] *Id*. at 19.

[38] *Id*. at 20.

[39] *Id*. at 4.

[40] *Id*. The rationale behind this scheme was that "[t]he interests of the propertyless . . . could be represented effectively by wise, fair-minded, wealthy white men." *Id*. at 8.

[41] *Id*. at 5.

[42] LAWRENCE GOLDSTONE, STOLEN JUSTICE: THE STRUGGLE FOR AFRICAN AMERICAN VOTING RIGHTS 20 (2020).

> slavery.[43] Indeed, the original constitution: (1) protected the "property" of slaveowners, (2) prohibited the federal intervention to end the slave trade, (3) permitted Congress to mobilize the militia to squash insurrections by enslaved people, and (4) forced states that outlawed slavery to return enslaved people who had fled seeking asylum.[44] Enslaved and Indigenous people were excluded from American democracy and treated as political capital. Under the three-fifths compromise, "those men . . . only count[ed] for purposes of apportionment and only as a fraction of their actual capacity.[45]

The Founders' desire to protect slavery and maintain the dominance of white men contributed significantly to their opposition to expanding the franchise. If voting is considered a right, they argued, it will be very difficult to justify denying anyone the right to vote.[46] John Adams summed up this concern in a 1776 letter:

> Depend upon it, Sir, it is dangerous to open so fruitful a source of controversy and altercation as would be opened by attempting to alter the qualifications of voters; there will be no end of it. New claims will arise; women will demand the vote; lads from twelve to twenty-one will think their rights not enough attended to; and every man who has not a farthing, will demand an equal voice with any other, in all acts of state. It tends to confound and destroy all distinctions,

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[43] Nikole Hannah-Jones, *Our Democracy's Founding Ideals Were False When They Were Written. Black Americans Have Fought to Make Them True*., N.Y. TIMES MAGAZINE, Aug. 14, 2019, at 7, https://www.nytimes.com/interactive/2019/08/14/magazine/black-history-american-democracy.html [https://perma.cc/7KKW-SS94].
[44] *Id*.
[45] Gilda Daniels, *Democracy's Destiny*, 106 CALIF. L. REV. 1067, 1076 (2021).
[46] KEYSSAR, *supra* note 3, at 12–13.

> and prostrate all ranks to one common level.[47]

During the first half of the nineteenth century, some uniformity in voting laws began to emerge across the nation. The movement to eliminate property-holding, taxpaying, and religious requirements significantly expanded the voting rights of many white men.[48] However, states also restricted suffrage for other groups. In the first years of independence, a few states permitted free Black men to vote.[49] However, following the abolition of property requirements, states became increasingly hostile toward Black voting.[50] States that previously allowed free Black men to vote began instituting racially specific voting requirements.[51] Additionally, every state that joined the union after 1819 barred Black people from voting.[52]

## II. STATE POWER AND THE PATTERN OF VOTER SUPPRESSION

Things changed after the Civil War. The Reconstruction Amendments "offered a vehicle through which former slaves would be included in the Union."[53] The Thirteenth Amendment, abolishing slavery, was a precondition for readmission of ex-Confederate states into the Union."[54] The Fourteenth Amendment granted citizenship to all people "born or naturalized in the United States" and prohibited states from passing laws that "abridge the privileges or immunities of the citizens of the United States" or deny them "equal protection of the laws."[55] The Fifteenth Amendment ordered that "the right of citizens . . . to vote shall not be denied or abridged by the United States or by any State on account of race, color, or

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[47] *Id*. at 1 (quoting Letter from John Adams to James Sullivan (May 26, 1776)), https://founders.archives.gov/documents/Adams/06-04-02-0091#:~:text=The%20Same%20Reasoning%2C%20which%20will,as%20those%20Men%20who%20are [https://perma.cc/EV7S-CPJM].

[48] KEYSSAR, *supra* note 3, at 50–52; *see also* GOLDSTONE, *supra* note 42, at 20 (noting that "[b]y 1856, both religious and property-holding requirements had been eliminated in every state in the Union, although six states continued to require that voters also be taxpayers").

[49] KEYSSAR, *supra* note 3, at 54–55.

[50] *Id*. at 55.

[51] *Id*.

[52] *Id*.

[53] Atiba R. Ellis, *Reviving the Dream: Equality and the Democratic Promise in the Post-Civil Rights Era*, 2014 MICH. ST. L. REV. 789, 820 (2014).

[54] *Id*. at 819. The one-sentence command of the Thirteenth Amendment reads: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1.

[55] U.S. CONST. amend. XIV, § 1.

previous condition of servitude."[56] "The Fourteenth and Fifteenth Amendments by design grant the federal government the express power to curtail racial discrimination in voting by 'appropriate legislation' *at the expense of state sovereignty*."[57]

During Reconstruction, "blacks enjoyed extensive political power."[58] In former confederate states, newly freed African American men were elected to state legislatures. Approximately 700,000 African Americans voted in the 1868 presidential election where Ulysses Grant won the office.[59] By 1880, "African Americans were an absolute majority in Louisiana, Mississippi, and South Carolina; and were over 40% of the population in Alabama, Florida, Georgia, and Virginia."[60] During this time, "biracial democratic government . . . was functioning effectively in many parts of the South, and men only recently released from bondage were exercising genuine political power."[61]

But the post-Civil War expansion of the franchise was short-lived. The federal government asserted its power over state control of the voting process by passing the Fourteenth and Fifteenth Amendments.[62] However, this assertion of power was limited in scope.[63] The Fourteenth and Fifteenth Amendments "merely prohibited express racial discrimination commands and did not guarantee the right to vote to all citizens."[64] States were, therefore, free to erect socioeconomic and other barriers to the full and free exercise of the right to vote.[65]

After the removal of federal troops from the South in 1877, states exhibited "direct and positive disregard of the 15th

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[56] U.S. CONST. amend. XV, § 1.

[57] Atiba R. Ellis, *The Voting Rights Paradox: Ideology and Incompleteness of American Democratic Practice*, 55 GA. L. REV. 1553, 1561 (2021) (emphasis in original) (quoting Shelby Cnty., Ala. v. Holder, 570 U.S. 529, 563 (2013) (Ginsburg, J., dissenting)).

[58] ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 587 (1988).

[59] ALLEN C. GUELZO, REDEEMING THE GREAT EMANCIPATOR 37–41 (2016).

[60] Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R-C.L. L. REV. 65, 66 (2008).

[61] ERIC FONER, FOREVER FREE: THE STORY OF EMANCIPATION AND RECONSTRUCTION 129 (2006).

[62] Ellis, *supra* note 7, at 1039.

[63] *Id*. Indeed, the assertion of federal authority over elections via constitutional amendment and accompanying statutory interventions nonetheless faced hostility from the Supreme Court. *See* Franita Tolson, *The Spectrum of Congressional Authority over Elections*, 99 B.U. L. REV. 317, 357–67 (2019) (surveying the Reconstruction legislation that sought to protect voting rights and the litigation before the Court that limited its scope).

[64] *Id*. at 1040; *see* JOHN M. MATTHEWS, LEGISLATIVE AND JUDICIAL HISTORY OF THE FIFTEENTH AMENDMENT 36 (1909) (noting that the right to vote was not guaranteed by the text of the Fifteenth Amendment).

[65] Ellis, *supra* note 7, at 1040.

Amendment."[66] White supremacists made "skillful use of electoral machinery and outright fraud to prevent the negro vote from being counted."[67] They stole, suppressed, and exchanged ballot boxes, removed polls to unknown places, doctored returns, created false certifications, repeated and excised names from the registry book, and conducted illegal arrests right before election day.[68] In addition, vigilante groups like the Ku Klux Klan carried out violent campaigns against Black people who attempted to vote or hold office.[69] By 1880, white supremacists had successfully taken back every state in the old Confederacy.[70]

The U.S. Supreme Court "was demonstrably potent in protecting white supremacy in the late nineteenth century."[71] In 1872, the Court undermined the scope of the Fourteenth Amendment by holding that it only protected rights guaranteed by the federal government, not the broad set of rights guaranteed by the states under the Bill of Rights.[72] The Court further weakened the reach of the Fourteenth Amendment in the *Civil Rights Cases*, when it held that Congress lacked the authority to prohibit racial discrimination by private individuals and organizations.[73] Finally, in *Plessy v. Ferguson*, the Court upheld the exclusion of African Americans from public life.[74]

The Court's narrow interpretation of the Fourteenth Amendment also guided its decisions specifically involving race.[75] The Court interpreted the Reconstruction Amendments in the voting rights context narrowly based on strict formalistic principles.[76]

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[66] Guinn v. United States, 238 U.S. 347, 365 (1915).
[67] Albert Bushnell Hart, *The Realities of Negro Suffrage,* 2 PROC. AM. POL. SCI. ASS'N 149, 159 (1905).
[68] *Id*.
[69] KEYSSAR, *supra* note 3, at 84.
[70] Chin & Wagner, *supra* note 60, at 83.
[71] J. MORGAN KOUSSER, COLORBLIND INJUSTICE 49 (1999); *see also* Grier Stephenson, Jr., *The Supreme Court, The Franchise, and the Fifteenth Amendment: The First Sixty Years*, 57 UMKC L. REV. 47, 47 (1988) (arguing that the Supreme Court largely neglected the Fifteenth Amendment).
[72] Slaughter-House Cases, 83 U.S. 36, 121 (1872).
[73] 109 U.S. 3 (1883).
[74] 163 U.S. 537 (1896).
[75] *See* United States v. Cruikshank, 92 U.S. 542, 554–55 (1875) (dismissing charges against white supremacist vigilantes for the massacre of African Americans on the basis that the Fourteenth Amendment does not "add any thing to the rights which one citizen has under the Constitution against another").
[76] *Id.* at 555. The Supreme Court's acceptance of state voting restrictions was not limited to restrictions on African Americans' right to vote. For example, in *Minor v. Happersett*, 88 U.S. 162 (1874), the Court upheld Missouri state constitution provisions that allowed only men the right to vote. *Id.* at 178. The Court held that "the Constitution of the United States does not confer the right of suffrage upon any one, and that the constitutions and laws of the several States which commit that important trust to men alone are not necessarily void." *Id*.

### *A. The Blueprint for Legalized Voter Intimidation*

Although using violence and fraud to suppress Black voting rights was largely successful, the widespread reliance on illegal methods was problematic for white Democrats.[77] As one Mississippi judge in 1890 observed:

> [I]t is no secret that there has not been a full vote and a fair count in Mississippi since 1875—that we have been preserving the ascendency of the white people by revolutionary methods. In plain words, we have been stuffing the ballot-boxes, committing perjury, and here and there in the state carrying the elections by fraud and violence until the whole machinery for elections was about to rot down.[78]

While white supremacists did not oppose using terror and fraud, there was a growing realization that illegal disenfranchisement would be dangerous if Americans began to demand honest elections.[79] Thus, between 1890 and 1908, Southern states passed statutes or adopted facially neutral constitutional provisions to deny the right of suffrage from as many Black people as possible without excluding white people."[80] Even though these practices' intent was discriminatory, the Supreme Court regularly upheld them as in compliance with the Reconstruction amendments and therefore within a state's authority to regulate the franchise.[81]

Mississippi would be the first state to employ this approach in the summer of 1890 when delegates gathered to draft a new state

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[77] *See* Ratliff v. Beale, 20 So. 865, 867 (Miss. 1896) ("The habitual disregard of one law not only brings it finally into contempt, but tends to weaken respect for all other laws.").

[78] William Alexander Mabry, *Disenfranchisement of the Negro in Mississippi*, 4 J. S. HIST. 318, 319 (1938) (quoting *Clarion-Ledger*, Sept. 11, 1890).

[79] GOLDSTONE, *supra* note 42, at 94.

[80] Julien C. Monnet*, The Latest Phase of Negro Disfranchisement*, 26 HARV. L. REV. 42, 42 (1912).

[81] Ellis, *supra* note 53, at 830; *see also* DERRICK A. BELL, JR., RACE, RACISM, AND AMERICAN LAW 349 (6th ed. 2008) ("Historians for some years have engaged in vigorous debate as to whether the flood of black disfranchisement pro-visions placed in state statutes and constitutions during the decades after 1890 serve as a fait accompli for work already accomplished by violence and intimidation, or whether affirmative legal steps were necessary to supplement the courts' silent acquiescence in stripping from blacks rights granted in the Fourteenth and Fifteenth Amendments.").

constitution.[82] The drafters of the new document did not hide their intent. The convention's president, Solomon S. Calhoon, stated: "[l]et us tell the truth if it bursts to the bottom of the Universe. We came here to exclude the negro. Nothing short of this will answer."[83] To that end, the 1890 Constitution included provisions that increased the residency requirement, instituted a poll tax, and added a literacy test that required potential voters to read and interpret a section of the state constitution.[84]

Henry Williams opposed this so-called "Mississippi Plan" on the basis that the Mississippi 1890 Constitution excluded African Americans from jury service (since the Mississippi Constitution required jurors to be qualified voters).[85] Williams appealed his conviction, arguing that the suffrage provisions of the 1890 Constitution were adopted for a discriminatory purpose and that they granted unchecked discretion to registrars.[86] Nonetheless, in *Williams v. Mississippi*, the Court unanimously held that "[t]he Constitution of Mississippi and its statutes . . . do not on their face discriminate between the races, and it has not been shown that their actual administration was evil, only that evil was possible under them."[87] The Court reasoned that "[t]hey reach weak and vicious white men as well as weak and vicious Black men, and whatever is sinister in their intention, if anything, can be prevented by both races by the exertion of that duty which voluntarily pays taxes and refrains from crime."[88] Moreover, the Court ignored the racial disparate impact of, for example, administering relatively simple literacy tests to white citizens but significantly more complicated tests to African Americans, by reasoning that Williams had to—and failed to—prove that such choices were made with an impermissible intention.[89]

According to historian Michael Perman, "the *Williams* decision removed any lingering uncertainty that the methods of disenfranchisement employed by the southern states might be declared unconstitutional."[90] Other states followed Mississippi's

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[82] KEYSSAR, *supra* note 3, at 89.
[83] MICHAEL PERMAN, STRUGGLE FOR MASTERY: DISENFRANCHISEMENT IN THE SOUTH 1888–1908 70 (2001); *see also* GOLDSTONE, *supra* note 42, at 94–95 (quoting James K. Vardman ("There is no use to equivocate or lie about the matter. Mississippi's constitutional convention of 1890 was held for no other purpose than to eliminate the n— from politics . . . let the world know it just as it is.")).
[84] Williams v. Mississippi, 170 U.S. 213, 220–23 (1898).
[85] *Id.* at 214.
[86] *Id.*
[87] *Id*. at 225.
[88] *Id*. at 222.
[89] *Id.* at 225.
[90] PERMAN, *supra* note 83, at 121.

example and convened constitutional conventions of their own, where they instituted statutes to disenfranchise Black people.[91]

*Williams v. Mississippi* "set the tone for future Supreme Court cases dealing with voting rights."[92] Underlying the tenor of this decision is ultimately a deference to state authority regarding voting regulations as well as a formalistic approach to assessing claims of discriminatory exclusion. Thus, the extensive and intimidating qualifications for registration created in the Mississippi Plan served as nearly insurmountable barriers for the African American franchise. The message of *Williams* was clear.

Moreover, the 1903 decision *Giles v. Harris* made clear that the Court would decline to undertake even the most basic protections of minority voting rights.[93] Plaintiffs in *Giles* attacked the 1901 Alabama Constitution, the clear intent of which was to disenfranchise African Americans.[94] The 1901 Constitution provided for permanent enfranchisement for all Alabama men twenty-one years or older who were registered before December 20, 1902 and were veterans (or descendants of veterans) of the Civil War or other major American wars of the late nineteenth century.[95] The Constitution also required payment of a poll tax and the compliance with a "good character" requirement for an Alabama voter to be registered.[96] The determination of who met these "good character" requirements was left to state officials.[97]

On March 13, 1902, Jackson W. Giles, an African American from Montgomery, Alabama, went to the courthouse to register to vote.[98] Giles was employed, literate, and had paid the poll tax.[99] "He was the type of African American whom the disenfranchisers claimed no animus toward during the constitutional convention, but he was also the type of man they most feared."[100] Thus, the registrars refused to register Mr. Giles. Giles sued the state of Alabama on his own behalf and the behalf of 5,000 similarly situated African American men alleging that the suffrage provisions violated the

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[91] *See generally id.*; GOLDSTONE, *supra* note 42.
[92] Stuart Chinn, *Race, the Supreme Court, and the Judicial-Institutional Interest in Stability*, 1 J.L. 95, 150 (2011).
[93] 189 U.S. 475, 488 (1903).
[94] Alabama Democrats were not subtle in their intent. One Alabama Democrat explained: "We cannot afford to live with our feet upon fraud. We will not do it. We have disenfranchised the African in the past by doubtful methods, but in the future, we will disenfranchise them by law." Frank S. White, speech, 25 April 1900, Democratic State Executive Committee Minutes, 3:5, ADAH.
[95] ALA. CONST. of 1901, art. 8, § 180.
[96] *Id.* §§ 178, 180.
[97] *Giles*, 189 U.S. at 478.
[98] GOLDSTONE, *supra* note 42, at 109.
[99] *Id*.
[100] R. VOLNEY RISER, DEFYING DISENFRANCHISEMENT, BLACK VOTING RIGHTS ACTIVISM IN THE JIM CROW SOUTH, 1890–1908 150 (2010).

Fourteenth and Fifteenth Amendments.[101] Indeed, the plaintiffs sought to demonstrate through statistics, media clippings, and affidavits that an ostensibly neutral law was being used to discriminate against Black voters.[102]

By a 6-3 vote, the Court rejected the Alabama's voter suppression scheme.[103] Writing for the majority, Justice Oliver Wendell Holmes determined that the case was inappropriate for an equitable remedy for two reasons. First, Justice Holmes claimed that since the plaintiffs insisted that Alabama's registration scheme was unconstitutional and void, they were suing "to be registered as a party qualified under the void instrument."[104] Therefore, if the Court were to side with the plaintiffs, it would become "a party to the unlawful scheme by accepting it and adding another voter to its fraudulent lists."[105]

Second, Justice Holmes claimed that, in the end, the right to vote was a political question that required a political solution.[106] He observed that since "the great mass of the white population intends to keep the blacks from voting . . . something more than ordering the plaintiff's name to be inscribed upon the lists of 1902 will be needed."[107] According to Justice Holmes, "relief from [that] great political wrong, if done, as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political department of the government of the United States."[108]

In decision after decision, the Supreme Court failed to protect the rights of Black Americans by refusing to address the post-reconstruction hostility to universal franchise.[109] This is true despite the notable exception of the Court's 1915 decision in *Guinn v. United States* which struck down Oklahoma's grandfather clause since it expressly exempted whites from the impact of the disenfranchisement regulations.[110] The larger arc of the Court's Jim Crow-era decisions is that it solidified a restrictive understanding of federalism and an expansive reading of state sovereignty regarding election administration. This played the pivotal role in reducing federal enforcement of voting rights, the end of Reconstruction, and

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[101] *Giles*, 189 U.S. at 482.
[102] RISER, *supra* note 100, at 163.
[103] *Giles*, 189 U.S. at 486–88.
[104] *Id.* at 486.
[105] *Id*.
[106] *Id.* at 488.
[107] *Id*.
[108] *Id.*
[109] GOLDSTONE, *supra* note 42, at 117.
[110] 238 U.S. 347, 365 (1915).

the further marginalization of African Americans in American political life.[111]

## III. MODERN TRANSFORMATIONS AND THE VOTING RIGHTS DIALECTIC

With the Supreme Court's deference to the Mississippi Plan approach to disenfranchisement, open political violence coupled with a structure of election administration designed to dissuade, intimidate, and ultimately bar African American voters became, for a time, the norm of American political life. Indeed, central to the claim of this Article is the idea that this methodology of voter suppression remains integral to the practice of American elections, despite the evolution of the law toward a more inclusive electorate. It is this tension that defines how American democracy is practiced today, and shapes the experience in states like Wisconsin which have shown an inclination toward exclusionary practices around elections. This part will examine this enduring tension and how it arguably contributes to what some have called a separate-but-equal right to vote across the United States.

### *A. The Voting Rights Act Revolution*

The antecedents of this tension include the intervention of a Supreme Court that was markedly supportive of voting rights as well as the inclusive transformation created by the Voting Rights Act of 1965. By the late 1950s, the Court had reversed its antipathy toward Black voting rights demonstrated in *Giles*. Indeed, in decisions like *Gomillion v. Lightfoot*, which struck down the State of Alabama's attempt to racially gerrymander Tuskegee, Alabama by redrawing the city's borders,[112] to decisions like *Reynolds v. Simms*, which announced the principle of "one person, one vote,"[113] and *Harper v. Virginia State Board of Elections*, which held that poll taxes in state elections violated the Fourteenth Amendment's equal protection clause,[114] the Warren Court established important predicates for the voting rights revolution.

Though the use of a more robust equal protection doctrine provided some protection against vote denial, the true reversal of Jim Crow political apartheid came with the passage of the Voting

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[111] *See* Anderson Bellegarde Francois, *To Make Freedom Happen:* Shelby County v. Holder, *The Supreme Court, and the Creation Myth of American Voting Rights*, 34 N. ILL. U. L. REV. 529, 548 (2014).
[112] 364 U.S. 339 (1960).
[113] 377 U.S. 533 (1964).
[114] 383 U.S. 663 (1966).

Rights Act of 1965 ("VRA").[115] The VRA is widely considered the "most successful piece of civil rights legislation ever enacted."[116] A robust empirical literature credits the Voting Rights Act with increasing the rate of African American voter turnout[117] and the election of nonwhite officials.[118]

This transformative effect on American democracy was not assured. Indeed, it was the product of long civil rights advocacy which started with the creation of the National Association for the Advancement of Colored People in 1909 to advocacy that formed the mid-century Civil Rights Movement that placed pressure on the federal government to defend voting rights.[119]

On August 6, 1965, in response to this pressure, President Lyndon B. Johnson signed the VRA into law.[120] The two main provisions of the VRA are Section 2 and Section 5. Section 2 of the VRA, which effectively codifies the Fifteenth Amendment, prohibits states from adopting laws or procedures that disqualify voters based on race.[121] Section 2 is primarily a litigation tool used

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[115] Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 52 U.S.C. §§ 10101, 10301–10702).

[116] *Extension of the Voting Rights Act of 1965: Hearing Before the Senate Subcomm. on Constitutional Rights of the Comm. on the Judiciary*, 94th Cong. 121 (1975) (statement of Nicholas deB. Katzenback, former Attorney General, United States); *see also* BROWN AND CLEMONS, *supra* note 11, at 14; Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1395 (1983); Chandler Davidson, *The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities*, *in* QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS 36 (Chandler Davidson & Bernard Gofman eds., 1994); James Thomas Tucker, *The Politics of Persuasion: Passage of the Voting Rights Act Reauthorization Act of 2006*, 33 J. LEGIS. 205, 205 (2007).

[117] *See* John E. Filer, Lawrence W. Kenny & Rebecca B. Morton, *Voting Laws, Educational Policies, and Minority Turnout*, 34 J.L. & ECON. 371, 381–86 (1991).

[118] *See* Pei-te Lien et al., *The Voting Rights Act and the Election of Nonwhite Officials*, 40 PS: POL. SCI. & POL. 489, 490–92 (2007).

[119] *See* Wayne A. Santoro, *The Civil Rights Movement and the Right to Vote: Black Protest, Segregationist Violence and the Audience*, 86 SOCIO. F. 1391 (2008); *see generally*, Michael J. Klarman, Brown*, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994) (discussing the evolution of civil rights).

[120] Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 52 U.S.C. §§ 10101, 10301–10702). For an overview of the events leading up to the Voting Rights Act and its amendments, see Chandler Davidson, *The Voting Rights Act: A Brief History*, in CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT 7–34 (Bernard Grofman & Chandler Davidson eds., 1992). For a retrospective of the Voting Rights Act and a discussion of its limitations, see Karyn L. Bass, *Are We Really Over the Hill Yet? The Voting Rights Act at Forty Years: Actual and Constructive Disenfranchisement in the Wake of the Election 2000, and* Bush v. Gore, 54 DEPAUL L. REV. 111, 141–56 (2004).

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

after legislation is passed or implemented. Section 5 requires states with an established history of voter discrimination and a continuing gap in participation between the majority and minority racial groups to seek federal approval before changing voting laws or procedures.[122]

After the passage of the VRA, certain states and cities attempted to dilute the minority vote using multi-member districts and at-large voting schemes.[123] Vote dilution is the process by which "election laws or practices, either singly or in concert, combine with systemic bloc voting among an identifiable majority group to diminish or cancel the voting strength of at least one minority group."[124] In *City of Mobile v. Bolden*, the U.S. Supreme Court held that multi-member legislative districts were not per se unconstitutional but "that such legislative apportionments could violate the Fourteenth Amendment if their purpose were invidiously to minimize or cancel out the voting potential of racial or ethnic minorities."[125]

Moreover, the *Mobile* decision required that for Fifteenth Amendment claims, plaintiffs had to meet the near impossible threshold of demonstrating that a discriminatory voting law was passed with a deliberate intent to discriminate on the basis of race.[126] In response, Congress enacted the 1982 amendments to the VRA. The Reagan administration and John Roberts, then the president's point person on voting rights, strongly opposed the revision.[127] Under the 1982 amendments, plaintiffs challenging discriminatory voting laws under Section 2 would not have to show that the jurisdiction acted with an intent to discriminate against minority voters. Instead, plaintiffs could challenge voting laws under Section 2 "if the evidence established that, in the context of the 'totality of the circumstance of the local electoral process,' the standard, practice, or procedure being challenged had the result of denying a racial or language minority an equal opportunity to participate in the political process."[128]

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[122] *Id.* § 5 (52 U.S.C. § 10304).

[123] In a multi-member electoral district, two or more legislators are elected to represent that district. *See* John F. Banzhaf III, *Multi-Member Electoral Districts—Do They Violate the "One Man, One Vote" Principle*, 75 YALE L.J. 1309, 1309 (1966).

[124] Davidson, *supra* note 116, at 22.

[125] 446 U.S. 55, 66 (1980) ("Despite repeated constitutional attacks upon multimember legislative districts, the Court has consistently held that they are not unconstitutional *per se*.").

[126] *Id*. at 74.

[127] *See* Richard. L. Hasen, *Roberts' Iffy Support for Voting Rights*, L.A. TIMES (Aug. 3, 2005, 12:00 AM), https://www.latimes.com/archives/la-xpm-2005-aug-03-oe-hasen3-story.html [https://perma.cc/JAL5-FYDR].

[128] *Section 2 Of The Voting Rights Act*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/section-2-voting-rights-

When the Court interpreted the amended Section 2 in *Thornburg v. Gingles*, it narrowed the grounds for federal intervention to remedy vote dilution.[129] The Court determined that Section 2 required plaintiffs to satisfy a three-part test to prove vote dilution, followed by the "totality of the circumstances" test.[130] First, plaintiffs would have to prove the existence of three "preconditions" showing that the challenged law had the effect of denying or abridging the right to vote on account of race: (1) the minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district, (2) the group must be "politically cohesive," and (3) a white voting bloc must "usually . . . defeat the minority's preferred candidate."[131] Then the Court would conduct the totality of the circumstances analysis, which would consider the "Senate Factors."[132]

In this sense, federal intervention into the structure of voting—not seen since Reconstruction—created an ability for plaintiffs through Section 2 and the United States through Section 5 to ensure that disenfranchising provisions created by states would be struck down or moderated. This achievement, however, was tempered by the Court's interventions to limit the ultimate scope of the VRA. Moreover, as we will explore next, the larger effects of disenfranchisement could not be remedied by the Voting Rights Act alone.[133]

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act?msclkid=4290932bc41611ec987abb1c80c32244 (last updated Apr. 5, 2023) [https://perma.cc/E8HA-HYQK]. In Thornburg v. Gingles, 478 U.S. 30, 50–51 (1986), the Court set forth three "preconditions" for Section 2 vote dilution claims: (1) the minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the group must be "politically cohesive;" and (3) a white voting bloc must "usually . . . defeat the minority's preferred candidate." The decision narrowed the grounds for federal intervention to remedy vote dilution.

[129] 478 U.S. 30 (1986).

[130] *Id*. at 43.

[131] *Id*. at 50–51.

[132] *Id*. at 44–46. These factors include: "(1) the history of official voting-related discrimination in the State or political subdivision; (2) the extent to which voting in the elections of the state or political subdivision is racially polarized; (3) the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against [a] minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; (4) the exclusion of members of [a] minority group from candidate slating processes; (5) the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinders their ability to participate effectively in the political process; (6) the use of overt or subtle racial appeals in political campaigns; and (7) the extent to which members of [a] minority group have been elected to public office in the jurisdiction." S. Rep. No. 97-417, 28–29 (1982).

[133] Shaw v. Reno, 509 U.S. 630, 640 (1993).

### *B. Modern Disenfranchisement: "Jim Crow in New Clothes"*[134]

Despite the mechanisms of inclusiveness enabled by the Voting Rights Act, a number of states nonetheless engage in de facto voter suppression via seemingly race-neutral policies that produce racially disproportionate outcomes after implementation.[135] This new disenfranchisement is more subtle than the "outright racist actions of violence and intimidation used throughout the 20th century."[136] However, these mechanisms serve the same purpose by creating structural obstacles that have an outsized disparate impact on minority citizens:

> While the diminished use of violence is a tremendous step in the right direction, the colorblind nature of disenfranchisement is just as dangerous, and frightening based on its outward appearance that all laws are equally applied to all groups. In this regard, the colorblind nature for which these policies have emerged does not acknowledge the long-standing disparities that exist with regard to minorities being able to access the ballot and certainly does not recognize the role of state legislatures in their attempts to circumvent suffrage rights for racial and ethnic minorities.[137]

Following the contested 2000 presidential election and the U.S. Supreme Court's decision in *Bush v. Gore*,[138] the mechanics of election administration became a topic of national concern.[139] The Florida recount highlighted widespread problems with election

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[134] Senator Reverend Raphael Warnock, Maiden Speech on Voting Rights at the 117th Congress (Mar. 17, 2021).

[135] Paru Shah & Robert S. Smith, *Legacies of Segregation and Disenfranchisement: The Road from* Plessy *to* Frank *and Voter ID Laws in the United States*, 7 RUSSELL SAGE FOUND. J. SOC. SCI. 134, 138 (2021).

[136] Brandi Blessett, *Disenfranchisement: Historical Underpinnings and Contemporary Manifestations*, 39 PUB. ADMIN. Q. 3, 36 (2015).

[137] *Id*.

[138] 531 U.S. 98 (2000).

[139] Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 693–94 (2006).

administration which affected every state.[140] In response, state legislatures placed electoral reform at the top of their agendas.[141] Many legislative efforts at reform, such as updating vote-counting technology, directly addressed the systemic issues brought to light during the 2000 presidential election.[142] However, state lawmakers also began passing voting restrictions that disproportionally affect minorities and low-income communities. After the 2000 election, "[m]any politicians came to a fateful realization. 'In a very close election, the rules of the game matter.'"[143]

Efforts to pass strict voting laws intensified after the 2008 election of Barack Obama.[144] Young voters and people of color voted in record numbers in 2008.[145] During the 2008 election cycle, over thirty percent of white voters said they were "troubled" by the prospect of an Obama presidency.[146] A report by the NAACP found that "the states with the highest voter turnout among people of color in the 2008 elections and the highest population growth among voters of color are the states pushing the most restrictive voting laws in the past year."[147]

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[140] NAT'L COMM'N ON FED. ELECTION REFORM, *To Assure Pride and Confidence in the Electoral Process* 1 (2000), https://verifiedvoting.org/wp-content/uploads/2020/09/NCFER_2001.pdf [https://perma.cc/65LZ-UBD6] (discussing the longstanding problems with election administration).

[141] *Id*.

[142] Daniel J. Palazzolo, *Election Reform After the 2000 Election*, *in* ELECTION REFORM: POLITICS AND POLICY 1, 6 (Daniel J. Palazzolo & James W. Ceaser eds., 2005).

[143] Oliver Roeder, *Tighter Restrictions Are Losing In The Battle Over Voter ID Laws*, FIVETHIRTYEIGHT (Aug. 3, 2016), (quoting Professor Richard L. Hasen), https://fivethirtyeight.com/features/tighter-restrictions-are-losing-in-the-battle-over-voter-id-laws [https://perma.cc/L693-KBPC].

[144] *Id.* ("The effort to try to restrict the electorate really intensifies after Barack Obama's election, because I think lots of Republicans were really scared." (quoting Ari Berman, author of GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA (2016))); *see also* Ari Berman, *Eric Cantor's Defeat Is Bad News for the Voting Rights Act*, NATION (June 11, 2014), https://www.thenation.com/article/archive/eric-cantors-defeat-bad-news-voting-rights-act [https://perma.cc/W2A5-UPTL] (observing that since the 2008 election "the Republican Party is considerably more conservative than it was just eight years ago and significant elements of the party are actively committed to making it harder for people to vote").

[145] Roeder, *supra* note 143.

[146] David P. Redlawsk, Caroline J. Tolbert & William Franko, *Voters, Emotions, and Race in 2008: Obama as the First Black President*, 63 POL. RSCH. Q. 875, 877–880.

[147] NAACP LEGAL DEF. & EDUC. FUND, INC. & NAACP, DEFENDING DEMOCRACY: CONFRONTING MODERN BARRIERS TO VOTING RIGHTS IN AMERICA 3 (2011), https://www.naacpldf.org/wp-content/uploads/Defending-Democracy-12-16-11.pdf [https://perma.cc/437L-KLGX].

Indeed, compositional changes in the demographic makeup of key states have favored the Democratic Party.[148] The partisan motivations behind voter suppression efforts are well known. The correlation between voter participation and partisan victory suggests that "Democrats seem to do better when voter turnout is high, and worse when turnout is lower."[149] At a gathering of evangelical conservatives in 1980, Paul Weyrich, a conservative activist and the co-founder of the Heritage Foundation, spoke candidly about the threat posed by the expansion of the franchise:

> How many of our Christians have what I call the 'goo goo' syndrome? Good government. They want everybody to vote. I don't want everybody to vote. Elections are not won by a majority of people. They never have been from the beginning of our country, and they are not now. As a matter of fact, our leverage in the elections quite candidly goes up as the voting populace goes down.[150]

Today, lawmakers are not much better at hiding their intent regarding voting laws. In Wisconsin, a former GOP staffer testified that Republican senators were "giddy" and "politically frothing at the mouth" about Act 23's voter ID requirement.[151] On the national level, when Congress held hearings on the For the People Act, Hans von Spakovsky, a senior legal fellow at the Heritage Foundation, testified that the bill was "clearly unconstitutional" and that its

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[148] *See* THOMAS M. HOLBROOK, ALTERED STATES: CHANGING POPULATIONS, CHANGING PARTIES, AND THE TRANSFORMATION OF THE POLITICAL LANDSCAPE (Oxford Univ. Press 2016). Professor Holbrook examined presidential election returns from 1972 to 2012 to document trends in party support. *Id*. at 4. His analysis shows that the dominant patterns over time are (1) more competitive states shifting toward the Democratic Party, (2) a few Republican-leaning states becoming more Republican, and (3) some Republican-leaning states becoming competitive. *Id*. at 13–30. Notably, "[a]cross all twenty-two states whose competitive status changed, only six states, representing 59 electoral votes, moved in the Republican direction, while sixteen states, representing 209 electoral votes, moved in the Democratic direction." *Id*. at 17–18.

[149] Samuel Issacharoff, *Ballot Bedlam*, 64 DUKE L.J. 1363, 1366 (2015).

[150] People For the American Way, *Paul Weyrich–"I Don't Want Everybody To Vote" (Goo Goo)*, YOUTUBE (June 8, 2007), https://www.youtube.com/watch?v=8GBAsFwPglw [https://perma.cc/Y64J-2RY2].

[151] Laurel White, *Voter ID Changes Got GOP Lawmakers 'Giddy' And 'Frothing At The Mouth,' Ex-Aide Says*, WIS. PUB. RADIO (May 16, 2016), https://www.wpr.org/justice/voter-id-changes-got-gop-lawmakers-giddy-and-frothing-mouth-ex-aide-says [https://perma.cc/R2Z9-22NT].

provisions "come at the expense of federalism."[152] However, at a private gathering of GOP donors, von Spakovsky "was considerably more candid about his reason for opposing the bill: [i]t would be bad for Republicans."[153]

The tools of white racial rule have had racist effects without declaring their intent.[154] This section will discuss some of the modern forms of disenfranchisement. Though ostensibly race-neutral, modern voting restrictions "are effective holdovers from the Jim Crow era in their capacity to circumscribe political access, particularly for Black and Latino voters."[155] These policies, just like poll taxes, grandfather clauses, and literacy tests, utilize race-neutral language to perpetuate white supremacy.[156]

### 1. Remnants of Jim Crow Practices Pervasive Today

#### *a. Gerrymandering*

Gerrymandering, or the practice of redrawing political districts to disadvantage a minority group to the political advantage of the majority, continues to stymie minority voting strength. While drawing district lines to gain partisan political advantage dates back to before the founding, "the practice is now a common technique for securing political power that exceeds one's numerical voting strength."[157] The U.S. Supreme Court eschewed one of the two forms of illegal gerrymandering, racial gerrymandering, in *Shaw v.*

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[152] *For the People Act of 2019: Hearing on H.R. 1 Before the Judiciary Committee*, 116th Cong. 11 (2021) (testimony of Hans A. von Spakovsky, Senior Legal Fellow, Center for Legal and Judicial Studies, The Heritage Foundation).

[153] Lee Fang & Nick Surgery, *Conservative Expert Privately Warned GOP Donors that a Voting Rights Bill Would Help Democrats*, INTERCEPT (Feb. 27, 2019, 12:55 PM), https://theintercept.com/2019/02/27/hr1-bill-voting-rights-republicans [https://perma.cc/33W4-ZHLJ].

[154] George Lipsitz, *The Sounds of Silence: How Race Neutrality Preserves White Supremacy*, *in* SEEING RACE AGAIN: COUNTERING COLORBLINDNESS ACROSS THE DISCIPLINES, 26 (Kimberlé Williams Crenshaw et al. eds., 2019).

[155] Shah and Smith, *supra* note 135, at 135; Ellis, *supra* note 7, at 1025 (arguing that photo identification laws represent the continued use of economic forces as a way to block people of lower economic status from participation in the electorate).

[156] *See* EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA 30 (5th ed. 2018) (discussing the similarities between modern voter ID laws and Jim Crow-era voter suppression tactics); Barbara Harris Combs, *Black (and Brown) Bodies Out of Place: Towards a Theoretical Understanding of Systematic Voter Suppression in the United States*, 75 CRITICAL SOCIO. 535, 544 (2016) (discussing the use of "seemingly race-neutral language, which is laden with race-based attitudes").

[157] Girardeau A. Spann, *Gerrymandering Justiciability*, 108 GEO. L.J. 981, 984 (2020) (citing Rucho v. Common Cause, 588 U.S. 684, 697 (2019)).

*Reno*.[158] Yet, in *Rucho v. Common Cause*, the Court held that the other form of gerrymandering, partisan gerrymandering, was a nonjusticiable political question for the federal courts.[159]

Partisan gerrymandering disproportionately impacts the voting strength of minorities.[160] Given the high correlation between race and political affiliation, race often plays a significant role behind the scenes in partisan gerrymanders. In fact, race and political affiliation are so intertwined that plaintiffs often assert both partisan and gerrymandering challenges against the same voting districts.[161] In states with large minority populations, partisan gerrymandering has effectively become a legal way of drawing racially gerrymandered districts.[162] And *Rucho* leaves the policing of partisan gerrymandering—and its racial impacts—to state courts.

### *b. Felon Disenfranchisement*

The history of felon disenfranchisement in the United States is rife with racism and discrimination.[163] Several Southern states enacted these laws expressly to exclude African Americans from the franchise during the post-Reconstruction years.[164] These states specifically targeted crimes that African Americans were thought to commit more often than whites.[165] For example, the author of Alabama's constitutional disenfranchisement provision "estimated the crime of wife-beating alone would disqualify sixty percent of the Negroes."[166]

In 1974, the Supreme Court held that "the exclusion of felons from the vote has an affirmative sanction in [Section] 2 of the Fourteenth Amendment."[167] Today, forty-eight states restrict the

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[158] 509 U.S. 630 (1993).
[159] 588 U.S. 684, 718 (2019).
[160] *See* Olga Pierce & Kate Rabinowitz, *'Partisan' Gerrymandering Is Still About Race*, PROPUBLICA (Oct. 9, 2017, 6:48 PM), https://www.propublica.org/article/partisan-gerrymandering-is-still-about-race [https://perma.cc/WPG9-ADVP].
[161] *See, e.g.*, League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 409–10 (2006).
[162] *See* Richard L. Hasen, *The Supreme Court's Pro-Partisanship Turn*, 109 GEO. L.J. ONLINE 50, 70–73 (2020).
[163] Daniels, *supra* note 45, at 1091.
[164] Pippa Holloway, *"A Chicken-Stealer Shall Lose His Vote": Disenfranchisement for Larceny in the South, 1874–1890*, 75 J.S. HIST. 931, 935 (2009).
[165] *Id*.
[166] Andrew L Shapiro, *Challenging Criminal Disenfranchisement under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537, 541 (1993) (quoting JIMMIE F. GROSS, ALABAMA POLITICS AND THE NEGRO, 1874–1901, 204 (1969) (internal quotation marks omitted)).
[167] Richardson v. Ramirez, 418 U.S. 24, 54 (1974).

voting rights of individuals with felony convictions to some degree, although the stringency of felon disenfranchisement laws has moderated.[168] As of 2022, felon disenfranchisement laws exclude an estimated 4.4 million citizens from the franchise.[169] African Americans are almost four times as likely to lose their voting rights than the rest of the adult population.[170]

As with other voting laws, felony disenfranchisement has become a partisan issue.[171] While Democratic states generally have fewer restrictions, Republican states remain "bastions of disenfranchisement."[172] For example, Florida has long had one of the harshest disenfranchisement policies in the country.[173] In 2016, Florida was responsible for more than one-quarter of the nation's disenfranchised citizens.[174] However, in November 2018, Florida voters passed Amendment 4, which restored the voting rights of over 1.4 million people who have completed their sentences.[175] Amendment 4 was one of the most significant expansions of the franchise since the VRA.[176] The following year, the Florida state legislature passed Senate Bill 7066, which interpreted the language of Amendment 4 as requiring those who have completed their sentences to fully pay fines, fees, and restitution.[177] This limits the overall benefit of this liberalization measure, leaving over 900,000 people disenfranchised.[178]

In *Jones v. Governor of Florida*, the Eleventh Circuit upheld the policy against claims it violated the Fourteenth and Twenty-Fourth Amendments.[179] The Supreme Court then declined to

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[168] CHRISTOPHER UGGEN ET AL., SENT'G PROJECT, LOCKED OUT 2022: ESTIMATES OF PEOPLE DENIED VOTING RIGHTS DUE TO A FELONY CONVICTION 2 (2022), https://www.sentencingproject.org/app/uploads/2024/03/Locked-Out-2022-Estimates-of-People-Denied-Voting.pdf [https://perma.cc/5G6S-9DCQ].

[169] *Id.*

[170] NICOLE D. PORTER & JEAN CHUNG, SENT'G PROJECT, VOTING RIGHTS IN THE ERA OF MASS INCARCERATION: A PRIMER 2 (2021), https://www.sentencingproject.org/policy-brief/voting-rights-in-the-era-of-mass-incarceration-a-primer [https://perma.cc/9T8J-EBN4].

[171] *See* Michael Morse, *The Future of Felon Disenfranchisement Reform: Evidence from the Campaign to Restore Voting Rights in Florida*, 109 CALIF. L. REV. 1143, 1145 (2021).

[172] *Id.*

[173] Historically, the only way for people with felony convictions to regain their voting rights was through executive clemency. FLA. CONST. art. IV, § 8(a) ("[T]he governor may . . . with the approval of two members of the cabinet, grant full or conditional pardons, restore civil rights, commute punishment, and remit fines and forfeitures for offenses.").

[174] Morse, *supra* note 171, at 1145.

[175] *Id.* at 1183 n. 188.

[176] Daniels, *supra* note 45, at 1092.

[177] Fla. S. 7066, 2019 Leg., Reg. Sess. (Fla. 2019) (codified at Fla. Stat. § 98.0751(2)).

[178] UGGEN ET AL., *supra* note 168, at 11.

[179] 975 F.3d 1016, 1025 (11th Cir. 2020).

intervene. In her dissent, Justice Sotomayor argued that "[t]his Court's inaction continues a trend of condoning disenfranchisement."[180] As Professor Gilda Daniels commented, "[a]fter legislative and judicial action to counter an impressive expansion of democracy, the State of Florida continues to exhibit anti-democratic practices that prevent the exercise of the right to vote."[181] In both Florida and other states the old methods of voter suppression, like gerrymandering and felon disenfranchisement, are accompanied by new innovations.

2. The Twenty-First Century Innovation in Voter Suppression[182]

*a. Voter ID*

While states have required various forms of identification to vote since at least the 1950s, laws requiring a photo ID from voters are a recent phenomenon.[183] In an effort to restore the nation's confidence in the electoral system, the Commission on Federal Election Reform made a bipartisan recommendation for voter ID at the polls.[184]

Since 2010, thirty-six states have enacted laws requesting or requiring voters to show identification at the polls.[185] While these laws do not formally exclude anyone from casting a ballot, the added burdens associated with obtaining an ID may disenfranchise otherwise eligible voters.[186] The overwhelming majority of these states have Republican-controlled state legislatures whose members stand to benefit from voting restrictions that disproportionally affect minorities and the poor, who statistically skew more Democratic.[187]

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[180] Raysor v. DeSantis, 140 S. Ct. 2600, 2603 (2020) (Sotomayor, J., dissenting).
[181] Daniels, *supra* note 45, at 1093.
[182] *See generally* Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379 (2014).
[183] *See* ERIC A. FISCHER, R. SAM GARRETT & L. PAIGE WHITAKER, CONG. RSCH. SERV., R42806, STATE VOTER IDENTIFICATION REQUIREMENTS: ANALYSIS, LEGAL ISSUES, AND POLICY CONSIDERATIONS 1 (2016); Eugene D. Mazo, *Finding Common Ground on Voter ID Laws*, 49 U. MEM. L. REV. 1233, 1238 (2019).
[184] COMM'N ON FED. ELECTION REFORM, *Building Confidence in U.S. Elections*: COMM. ON FED. ELECTION REFORM 18–21 (2005), https://www.eac.gov/sites/default/files/eac_assets/1/6/Exhibit%20M.PDF [https://perma.cc/9U4U-P7UV].
[185] *Voter Identification Requirements | Voter ID Laws*, NAT'L CONF. STATE LEGISLATURES (Oct. 7, 2021), https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx [https://perma.cc/FT2G-YSSS].
[186] *See* Ellis, *supra* note 7, at 1025–26; Alan E. Garfield, *How Conservative Justices Are Undermining Our Democracy (or What's at Stake in Choosing Justice Scalia's Successor?*), 92 IND. L.J. 60, 65–68 (2016).
[187] *See* Garfield, *supra* note 186, at 65–66; NAT'L CONF. STATE LEGISLATURES, *supra* note 185.

Republican lawmakers insist that any effect voter ID laws have on minorities is merely incidental.[188] However, it is easy to glean the true intent of voter ID laws from Republican lawmakers' remarks in the media.[189]

Research on the impact of voter ID laws suggests that they disproportionately affect minority and low-income populations.[190] For example, twenty-five percent of Black voters lack acceptable photo ID, greater than the national average of eighteen percent.[191] The disparate impact of these laws raises real concerns for critics who believe that they are unnecessary and ultimately detrimental to democracy.[192] Former U.S. Attorney General Eric Holder equated

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[188] Richard L. Hasen, *Race or Party?: How Courts Should Think About Republican Efforts to Make it Harder to Vote in North Carolina and Elsewhere*, 127 HARV. L. REV. F. 58, 69 (2014).

[189] *See, e.g.*, Jose Delreal, '*Daily Show*' *Prompts Resignation*, POLITICO (Oct. 24, 2013, 6:13 PM), https://www.politico.com/story/2013/10/nc-gop-official-resigns-after-interview-098822 [https://perma.cc/5KM3-VMA2] ("If [North Carolina's voter ID law] hurts a bunch of college kids that are too lazy to get up off their bohonkas and go get a photo ID, then so be it. If it hurts a bunch of whites, so be it. . . . If it hurts a bunch of lazy blacks that want the government to give them everything, then so be it." (quoting North Carolina Precinct Chair Don Yelton)); Aaron Blake, *Everything You Need to Know About the Pennsylvania Voter ID Fight*, WASH. POST (Oct. 2, 2012), https://www.washingtonpost.com/news/the-fix/wp/2012/10/02/the-pennsylvania-voter-id-fight-explained [https://perma.cc/V8CV-CMGN] ("Voter ID . . . is going to allow Governor Romney to win the state of Pennsylvania: done." (quoting Pennsylvania House Majority Leader Mike Turzai)); Todd Richmond, *Wisconsin AG Suggests Voter ID Helped Trump Win the State*, ASSOCIATED PRESS (Apr. 13, 2018, 4:38 PM), https://apnews.com/article/87fabc13bf724009ae68972dce79d189 [https://perma.cc/8C6V-G9ML] ("How many of your listeners really honestly are sure that Senator [Ron] Johnson was going to win re-election or President Trump was going to win Wisconsin if we didn't have voter ID to keep Wisconsin's elections clean and honest and have integrity?" (quoting Wisconsin Attorney General Brad Schimel)).

[190] John Kuk, Zoltan Hajnal & Nazita Lajevardi, *A Disproportionate Burden: Strict Voter Identification Laws and Minority Turnout*, POL., GROUPS, & IDENTITIES 1, 2–7 (2020); Zoltan Hajnal, John Kuk & Nazita Lajevardi, *We All Agree: Strict Voter ID Laws Disproportionately Burden Minorities*, 80 J. POL. 1052, 1053–58; Zoltan Hajnal, Nazita Lajevardi & Lindsay Nielson, *Voter Identification Laws and the Suppression of Minority Votes*, 79 J. POL. 383, 368–76 (2017); Bertrall L. Ross II & Douglas M. Spencer, *Passive Voter Suppression: Campaign Mobilization and the Effective Disenfranchisement of the Poor*, 114 NW. U. L. REV. 633, 643–47 (2019); Samuel Issacharoff, *Ballot Bedlam*, 64 DUKE L.J. 1363, 1379–80 (2015).

[191] Brady Horine, *What's So Bad About Voter ID Laws?*, LEAGUE OF WOMEN VOTERS: BLOG, https://www.lwv.org/blog/whats-so-bad-about-voter-id-laws [https://perma.cc/F5RH-SKQM] (May 23, 2023).

[192] *See* Vanessa Cárdenas, *Voter ID Laws Target the Most Vulnerable: Policies Making It Harder to Vote Disrupt Democracy*, CTR. FOR AM. PROGRESS (Feb. 15, 2012), https://www.americanprogress.org/article/voter-id-laws-target-the-most-vulnerable [https://perma.cc/ER4B-AZAY].

voter ID laws to poll taxes in a speech to the NAACP.[193] Indeed, voter ID laws are consistent with the United States' long history of political devices intended to safeguard power for white men and keep it at a distance from minorities, the poor, and other marginalized groups.[194]

### *b. Voter Purges*

Many states routinely remove voters from their rolls with cause.[195] Correctly done, "list maintenance" serves an important administrative function.[196] Removing duplicate names or voters who have moved, died, or become otherwise ineligible promotes election integrity and efficiency.[197] However, list maintenance can disenfranchise eligible voters if they "purge" incorrectly identified names.[198] In recent years, there has been a significant increase in the number of states engaging in voter purging.[199] Notably, the conservative Wisconsin Institute for Law & Liberty unsuccessfully brought a lawsuit in 2019 seeking to compel the Wisconsin Elections Commission ("WEC") to purge the voting rolls of nearly 230,000 Wisconsin voters.[200]

Voter purges tend to impact low-income and minority voters disproportionally.[201] For example, an examination of Ohio's voter

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[193] Amy Bingham, *Eric Holder Dubs Texas Vote ID Law a 'Poll Tax,'* ABC NEWS (July 10, 2012), https://abcnews.go.com/blogs/politics/2012/07/eric-holder-dubs-texas-voter-id-law-a-poll-taxes [https://perma.cc/XE29-MVA4].

[194] *See* Lynn Adelman, *A New Stage in the Struggle for Voting Rights*, 43 U. ARK. LITTLE ROCK L. REV. 477, 477–84 (2021).

[195] Lisa M. Manheim & Elizabeth G. Porter, *The Elephant in the Room: Intentional Voter Suppression*, 2018 SUP. CT. REV. 213, 213–14 (2018).

[196] Catalina Feder & Michael G. Miller, *Voter Purges After* Shelby, 48 AM. POL. RSCH., 687, 688 (2020).

[197] *Id.*

[198] *Id*.; *see also* Adelman *supra* note 194, at 487 (noting that "[t]he effect of [vote purging] is that a large number of eligible and registered voters are needlessly and routinely purged from the voting rolls").

[199] *See generally* JONATHAN BRATER, ET AL., BRENNAN CTR. FOR JUST., PURGES: A GROWING THREAT TO THE RIGHT TO VOTE (2018), https://www.brennancenter.org/our-work/research-reports/purges-growing-threat-right-vote?msclkid=fca54afcc63111ec8d5e88634e56087a [https://perma.cc/AF2S-6RW2]. Many high-profile voter purges occurred in previously covered jurisdictions following the Supreme Court's decision in *Shelby County v. Holder*. *Id*.

[200] *See* State *ex. rel.* Zignego v. Wis. Elections Comm'n, 396 Wis. 2d 391 (Wis. 2021).

[201] *See* U.S. COMM'N ON C.R., AN ASSESSMENT OF MINORITY VOTING RIGHTS ACCESS IN THE UNITED STATES 282 (2018), https://www.usccr.gov/files/pubs/2018/Minority_Voting_Access_2018.pdf [https://perma.cc/4JM3-J4SX]; Lydia Hardy, Comment, *Voter Suppression Post-*

purge policies found that "neighborhoods that have a high proportion of poor, African-American residents are hit the hardest."[202] Similarly, in Georgia, the ACLU found that nearly 200,000 voters were removed from the rolls based on incorrect claims that they had relocated.[203] The majority of these incorrect removals were in the majority-Black Atlanta Metro area.[204]

### *c. The Voter Fraud Myth*

Despite the effects of these voting restrictions, lawmakers insist that they are not meant to disenfranchise. Instead, they argue these policies are essential to prevent voter fraud and restore confidence in American elections.[205] However, the link between the specter of voter fraud and opposition to broadening the franchise goes back to the founding. Voting rights historian Michael Waldman explains that "[t]he focus on fraud has deep roots in founding-era worries that the poor would sell their votes and in the Gilded Age fears expressed by Protestants about immigrant voters."[206] And while voter fraud was a legitimate problem in the 19th and early 20th centuries, it has become exceedingly rare due to stronger voter protections.[207]

Today, proponents of election integrity initiatives and their supporters argue that initiatives like voter identification laws, proof of citizenship laws, and voter purges are necessary to prevent the

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Shelby: *Impacts and Issues of Voter Purge and Voter ID Laws*, 71 MERCER L. REV. 857, 866–72 (2020).

[202] Andy Sullivan & Grant Smith, *Use it or Lose it: Occasional Ohio Voters May be Shut Out in November*, REUTERS (June 2, 2016, 11:17 AM), https://www.reuters.com/article/us-usa-votingrights-ohio-insight-idUSKCN0YO19D?msclkid=3d4616adc63411ecba329d51fbb099ee [https://perma.cc/YE69-NT7D].

[203] Greg Palast, *Georgia Voter Roll Purge Errors*, AM. CIV. LIBERTIES UNION OF GA. 11 (Sept. 1, 2020), https://www.gregpalast.com/wp-content/uploads/Palast-Fund-ACLU_Georgia-Voter-Purge-Errors-Download.pdf [https://perma.cc/6M6R-KZQ7].

[204] *Id.* at 19.

[205] KEYSSAR, *supra* note 3, at 283.

[206] MICHAEL WALDMAN, THE FIGHT TO VOTE 184 (2016). We observe in passing that similar baseless fears about election subversion by immigrant and/or non-citizen voters have become a recurring theme in recent election integrity debates. Jude Joffe-Block & Miles Parks, *How Republicans Mainstreamed the Baseless Idea of Noncitizen Voting in 2024*, NPR (Oct. 18, 2024 (5:00 AM), https://www.npr.org/2024/10/16/nx-s1-5147790/noncitizen-voting-claims-trump [https://perma.cc/7YCK-ZGJS].

[207] *Id.* at 74–76; Erin Blakemore, *Voter Fraud Used to be Rampant. Now it's an Anomaly*, NAT'L GEOGRAPHIC (Nov. 11, 2020), https://www.nationalgeographic.com/history/article/voter-fraud-used-to-be-rampant-now-an-anomaly [https://perma.cc/6FVG-9857].

American elections from being contaminated by illegal voters.[208] In *Stealing Elections: How Voter Fraud Threatens Our Democracy*, the conservative columnist John Fund claims that, "[e]lection fraud, whether it's phony voter registrations, illegal absentee ballots, shady recounts or old-fashioned ballot-box stuffing, can be found in every part of the United States."[209] Fund relies on spurious or overstated allegations of voter fraud to support his argument. For example, in 2004, Christine Gregoire was elected Governor of the state of Washington.[210] Fund references a news report that 129 felons cast illegal votes and argues that "[s]ince the Democratic candidate, Christine Gregoire, won by (coincidentally) 129 votes in the final recount, it appears that she owes her election in part to the felon vote."[211]

Fund's accusations, like many voter fraud claims, do not hold up under close examination. In reality, voter fraud is extremely rare, and does not happen enough to even come close to "rigging" an election.[212] Lorraine Minnite employed a mixed-methods approach to evaluate the current prevalence of voter fraud in the United States today.[213] Using a wide range of evidence, Minnite determined that voter fraud—defined as "the intentional, deceitful corruption of the electoral process by vote"[214]—is extremely rare in

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[208] *See, e.g.,* LORRAINE C. MINNITE, THE MYTH OF VOTER FRAUD 5–6 (2010) (discussing the voter fraud argument); Fabrice Lehoucq, *Electoral Fraud: Causes, Types, and Consequences*, 6 ANN. REV. POL. SCI. 233, 251 (2003) ("[T]he colorful history of vote fabrication probably exaggerates its role in determining election outcomes."); David Schultz, *Less Than Fundamental: The Myth of Voter Fraud and the Coming of the Second Great Disenfranchisement*, 34 WM. MITCHELL L. REV. 483, 492–93 (discussing recent efforts to use voter fraud as a basis to restrict voting rights).

[209] JOHN FUND, STEALING ELECTIONS: HOW VOTER FRAUD THREATENS OUR DEMOCRACY 7 (2004).

[210] *See* Ralph Thomas, *Gregoire Declared Governor-Elect, but Rossi Wants New Vote*, SEATTLE TIMES (Dec. 30, 2004), https://archive.seattletimes.com/archive/?date=20041230&slug=rossi30m [https://perma.cc/L6PQ-UVRS].

[211] FUND, *supra* note 209, at 32.

[212] *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUST. (Jan. 31, 2017), https://www.brennancenter.org/our-work/research-reports/debunking-voter-fraud-myth [https://perma.cc/2QJB-Z2AJ].

[213] *See, e.g.*, MINNITE, *supra* note 208. Minnette's approach utilized qualitative, quantitative, and archival research. Minnette compiled data from an array of sources including, but not limited to: (1) academic literature on voter fraud, (2) news sources, (3) legal databases and cases, (4) public records, (5) Freedom of Information Act Requests, and (6) interviews with prosecutors, defense lawyers, election officials, voters, academics, people working on voter registration drives, and others.

[214] *Id.* at 36.

contemporary U.S. elections.[215] Further studies have consistently shown that instances of voter fraud are almost nonexistent.[216]

Despite that lack of evidence, the myth of voter fraud "continues to be repeated, believed, and used to form a basis for voting rights policy."[217] Professor Ellis calls this conspiratorial cycle the "meme of voter fraud," arguing that it operates as a heuristic for understanding the legitimacy of certain voters.[218] "The meme of voter fraud . . . is geared to promote an ideology of exclusion from the political process of those deemed unworthy."[219] Professor Ellis has also argued that the 2020 election, and its aftermath, demonstrated how "the meme distorts the legitimacy of the democratic process itself."[220]

In the months leading up to the 2020 presidential election, vote-by-mail emerged as the leading policy solution to ensure that voters could safely cast their ballots during the coronavirus pandemic.[221] Across the country, Republican and Democratic election officials expanded absentee and mail-in voting.[222]

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[215] *See id.* at 6, 129.

[216] *See* Sharad Goel et al., *One Person, One Vote: Estimating the Prevalence of Double Voting in U.S. Presidential Elections*, 114 AM. POL. SCI. REV. 456, 467 (2020) ("We estimate that at most only 1 in 4,000 votes cast in 2012 were double votes, with measurement error in turnout records possibly explaining a significant portion, if not all, of this."); LORRAINE C. MINNITE, THE POLITICS OF VOTER FRAUD 3 (2018), http://www.projectvote.org/wp-content/uploads/2007/03/Politics_of_Voter_Fraud_Final.pdf [https://perma.cc/KU6R-PKCY] (finding that reports of voter fraud over two years could generally be traced to "unsubstantiated or false claims by the loser of a close race, mischief and administrative or voter error").

[217] Atiba R. Ellis, *Voter Fraud as an Epistemic Crisis for the Right to Vote*, 71 MERCER L. REV. 757, 760 (2020).

[218] Atiba R. Ellis, *The Meme of Voter Fraud*, 63 CATH. U. L. REV. 879, 915 (2014).

[219] *Id.* at 893.

[220] Atiba R. Ellis, *"This Lawsuit Smacks of Racism": Disinformation, Racial Coding, and the 2020 Election*, 82 LA. L. REV. 453, 457–58 (2022).

[221] *Considerations for Election Polling Locations and Voters: Interim Guidance to Prevent Spread of Coronavirus Disease 2019 (COVID-19)*, CTR. FOR DISEASE CONTROL AND PREVENTION (June 22, 2020), https://stacks.cdc.gov/view/cdc/89652 [https://perma.cc/9LZE-CUBJ]; MATT BARRETO ET AL., UCLA LATINO POL'Y & POL. INITIATIVE, PROTECTING DEMOCRACY: IMPLEMENTING EQUAL AND SAFE ACCESS TO THE BALLOT BOX DURING A GLOBAL PANDEMIC 3 (2020), https://latino.ucla.edu/wp-content/uploads/2021/08/VRP-VBM-res.pdf [https://perma.cc/EJ4A-GN7V]; Editorial Board, Opinion, *Voting by Mail is Crucial for Democracy,* N.Y. TIMES Aug. 1, 2020, at SR8 https://www.nytimes.com/2020/08/01/opinion/sunday/mail-voting-covid-2020-election.html [https://perma.cc/6YP9-SHZ8]; Lily Hay Newman, *Vote by Mail Isn't Perfect. But It's Essential in a Pandemic*, WIRED (Apr. 9, 2020, 6:30 PM), https://www.wired.com/story/vote-by-mail-absentee-coronvirus-covid-19-pandemic [https://perma.cc/3DVZ-PRA3].

[222] *See Absentee and Mail Voting Policies in Effect for the 2020 Election*, NAT'L CONF. STATE LEGISLATURES (Nov. 3, 2020), https://www.ncsl.org/research/elections-and-campaigns/absentee-and-mail-

However, some Republicans, including then-President Trump, claimed that the expansion would lead to voter fraud.[223] Disagreement over pandemic-inspired election changes led to over 600 cases and appeals in forty-six states, D.C., and Puerto Rico.[224] Given the increase in absentee and mail-in voting, delays in election reporting were expected.[225] In addition, election experts predicted that Trump would have an early advantage in the November election from in-person votes, but that his lead would shrink as mail-in ballots were counted.[226] In May 2020, Louis DeJoy, a loyal Trump supporter, was appointed Postmaster General.[227] Just three months later, President Trump frankly acknowledged that he was undermining the United States Postal Service to make it harder to process mail-in ballots.[228]

As predicted, on election night 2020, Trump held a commanding lead. But despite a substantial number of mail-in

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voting-policies-in-effect-for-the-2020-election.aspx [https://perma.cc/A493-XPLM].

[223] *See* Jim Rutenberg & Nick Corsaniti, *Behind Trump's Yearslong Effort to Turn Losing Into Winning*, N.Y. TIMES (Nov. 23, 2020), https://www.nytimes.com/2020/11/15/us/politics/trump-voter-fraud-claims.html [https://perma.cc/9TKE-256W]; Lisette Voytko-Best, *Trump Using Landmark* Bush v. Gore *Supreme Court Case to Attack Mail-In Voting*, FORBES (Aug. 24, 2020, 12:41 PM), https://www.forbes.com/sites/lisettevoytko/2020/08/24/trump-using-landmark-bush-v-gore-supreme-court-case-to-attack-mail-in-voting/?sh=506a86c431ab#17b88d7b31ab [https://perma.cc/9EKL-W2UX].

[224] *COVID-Related Election Litigation Tracker*, STANFORD-MIT HEALTHY ELECTIONS PROJECT, https://healthyelections-case-tracker.stanford.edu/results [https://perma.cc/69SB-R857] (last visited Oct. 23, 2024).

[225] *See, e.g.*, UCI LAW AD HOC COMMITTEE FOR 2020 ELECTION FAIRNESS AND LEGITIMACY, FAIR ELECTIONS DURING A CRISIS: URGENT RECOMMENDATIONS IN LAW, MEDIA, POLITICS, AND TECH TO ADVANCE THE LEGITIMACY OF, AND THE PUBLIC'S CONFIDENCE IN, THE NOVEMBER 2020 U.S. ELECTIONS 5 (Apr. 2020), https://www.law.uci.edu/news/press-releases/2020/2020ElectionReport.pdf [https://perma.cc/3A79-JWFE].

[226] *See* Rutenberg & Corsaniti, *supra* note 223; Chris Kahn & Jason Lange, *Explainer: Red Mirage, Blue Mirage—Beware of Early U.S. Election Wins*, REUTERS (Oct. 22, 2020, 8:27 PM), https://www.reuters.com/article/us-usa-election-mirage-explainer/explainer-red-mirage-blue-mirage-beware-of-early-u-s-election-wins-idUSKBN2771CL [https://perma.cc/DXK6-T8N9].

[227] *See* Press Release, U.S. Postal Serv., Board of Governors Announces Selection of Louis DeJoy to Serve as Nation's 75th Postmaster General, (May 6, 2020), https://about.usps.com/newsroom/national-releases/2020/0506-bog-announces-selection-of-louis-dejoy-to-serve-as-nations-75th-postmaster-general.htm [https://perma.cc/NTU3-2Y4H]; Donald K. Sherman & Sylvia Albert, *Trump's New Postmaster General Could Corrupt a Key Institution Ahead of Election Day*, NBC NEWS (July 19, 2020, 7:38 AM), https://www.nbcnews.com/think/opinion/trump-s-2020-usps-appointment-could-corrupt-key-institution-ahead-ncna1234125 [https://perma.cc/9WE5-7FRS].

[228] Deb Riechmann & Anthony Izaguirre, *Trump Admits He's Blocking Postal Cash to Stop Mail-In Votes*, ASSOCIATED PRESS (Aug. 13, 2020, 9:49 AM), https://apnews.com/article/virus-outbreak-election-2020-ap-top-news-elections-politics-14a2ceda724623604cc8d8e5ab9890ed [https://perma.cc/4V8W-YZZQ].

ballots to be counted, the president declared victory and falsely asserted that any gains Biden made from mail-in votes would be due to election fraud.[229] In the days that followed, Trump's lead narrowed, and his legal team launched an aggressive attack on the legitimacy of the 2020 election results.[230] However, Trump's efforts failed, and ultimately, Joe Biden was declared the winner of the 2020 election.[231]

On November 12, 2020, federal election officials released a statement asserting that the November election "was the most secure in American history."[232] However, Trump refused to concede and continued claiming that the election was "stolen."[233] At one point, the president urged Georgia election officials to "find" him more votes.[234] While some of the president's allies began to accept that Biden won the election, a sizable faction of the country bought into the president's rhetoric.[235] Then, on January 6, 2021, hundreds of Trump supporters stormed the U.S. Capital in an attempt to stop the lawful certification of Biden's victory.[236] Subsequent investigations

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[229] Colby Itkowitz et al., *Trump Falsely Asserts Election Fraud, Claims Victory*, WASH. POST. (Nov. 4, 2020, 5:58 AM), https://www.washingtonpost.com/elections/2020/11/03/trump-biden-election-live-updates [https://perma.cc/3GKR-ZPMM].

[230] *See* Doug Bock Clark et al., *Building the "Big Lie:: Inside the Creation of Trump's Stolen Election Myth*, SALON (Apr. 26, 2022, 1:30 PM), https://www.salon.com/2022/04/26/building-the-big-lie-inside-the-creation-of-stolen-myth_partner [https://perma.cc/5SVF-VQE5].

[231] *See* Scott Detrow & Asma Khalid, *Biden Wins Presidency, According to AP, Edging Trump in Turbulent Race*, NPR (Nov. 7, 2020, 1:24 PM), https://www.npr.org/2020/11/07/928803493/biden-wins-presidency-according-to-ap-edging-trump-in-turbulent-race [https://perma.cc/ZF2M-Q5EY].

[232] Press Release, Cybersecurity & Infrastructure Agency, Joint Statement from Elections Infrastructure Government Coordinating Council & the Election Infrastructure Sector Coordinating Executive Committees (Nov. 12, 2020), https://www.cisa.gov/news/2020/11/12/joint-statement-elections-infrastructure-government-coordinating-council-election [https://perma.cc/2PLA-QMNJ].

[233] Glenn C. Altschuler, *Trump's Election Lies Must be refuted Every Time He Repeats Them*, THE HILL (Jul. 28, 2024, 9:00 AM), https://thehill.com/opinion/campaign/4796147-trump-election-fraud-claims [https://perma.cc/8G93-GNFE].

[234] *See* Quinn Scanlan, *Trump Demands Georgia Secretary of State 'Find' Enough Votes to Hand Him Win*, ABC NEWS (Jan. 3, 2021, 8:52 PM), https://abcnews.go.com/Politics/trump-demands-georgia-secretary-state-find-votes-hand/story?id=75027350 [https://perma.cc/FDQ6-PXPR].

[235] *See* Jonathan Easley, *Majority of Republicans Say 2020 Election was Invalid: Poll*, THE HILL (Feb. 25, 2021, 12:08 PM), https://thehill.com/homenews/campaign/540508-majority-of-republicans-say-2020-election-was-invalid-poll [https://perma.cc/YZQ2-E9GG] ("About half of all Republicans said they believe their votes were counted, while 42 percent said the system is corrupt and that their vote 'probably doesn't get counted anyway.'").

[236] *See* Christopher Wray, *Examining the January 6 Attack on the U.S. Capitol*, FBI (June 15, 2021), https://www.fbi.gov/news/testimony/examining-the-

into the 2020 election have confirmed that it was not stolen.[237] However, the former president and his supporters continue to insist that widespread voter fraud led to a stolen election.[238]

### *C. Colorblindness, Post-Racialism, and the Supreme Court*

Despite the disenfranchising effects of the new voter suppression tools, the Supreme Court has continued its historical pattern of reluctance to intervene on behalf of voters. Congress acknowledged the continued existence of voting discrimination when it reauthorized the Voting Rights Act in 2006.[239] Congress stated that the "vestiges of discrimination in voting continue to exist as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process."[240] However, the Supreme Court has increasingly used colorblind and post-racial rationales to justify upholding restrictive voting laws.

#### 1. Colorblindness and Post-Racialism

In his *Plessy v. Ferguson* dissent, Justice Harlan famously wrote: "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law."[241] Harlan's "colorblind Constitution" was co-opted by conservative justices in the years that followed.[242] However, in quoting Harlan's dissent, conservatives often leave out the passage leading up to his declaration that the Constitution is color-blind, which states:

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january-6-attack-on-the-us-capitol-wray-061521 [https://perma.cc/3KDA-CXCP].

[237] *See* Christina A. Cassidy, *Far Too Little Vote Fraud to Tip Election to Trump, AP Finds*, ASSOCIATED PRESS (Dec. 14, 2021, 5:56 PM), https://apnews.com/article/voter-fraud-election-2020-joe-biden-donald-trump-7fcb6f134e528fee8237c7601db3328f [https://perma.cc/X42L-HLWH].

[238] Sarah Longwell, *Trump Supporters Explain Why they Believe the Big Lie*, THE ATLANTIC (Apr. 18, 2022), https://www.theatlantic.com/ideas/archive/2022/04/trump-voters-big-lie-stolen-election/629572 [https://perma.cc/U8NE-NYBE].

[239] Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006).

[240] *Id.* § 2(b)(2).

[241] 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

[242] *See* Jamin B. Raskin, *From Colorblind White Supremacy to American Multiculturalism*, 19 HARV. J.L. & PUB. POL'Y 743, 743–44 (1996) (observing that "Chief Justice William Rehnquist and Justice Antonin Scalia . . . gleefully cite Justice Harlan on this point").

> The white race deems itself to be the dominant superior race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty.[243]

Harlan saw colorblindness as a means ensure the continuation of white supremacy.[244] Nevertheless, a "utopian vision of a future society in which race no longer correlates with privilege or disadvantage, and so carries no meanings tied to established hierarchies, is powerfully compelling."[245] To that end, Thurgood Marshall used the ideal of colorblindness to attack Jim Crow-era segregation while serving as counsel for the NAACP Legal Defense and Educational Fund.[246] In a 1947 brief to the Supreme Court, Marshall argued that "classifications and distinctions based on race or color have no moral or legal validity in our society. They are contrary to our constitution and laws."[247]

However, Marshall also "recognized that while colorblindness posed a radical demand as a right to be immediately free from all Jim Crow oppressions, colorblindness as a remedy promised tepid change, for it required only an end to explicitly segregationist laws, not actual remediation of the harms wrought by racial oppression."[248] Unfortunately, Marshall was correct: the concept of colorblindness developed into a weapon used to subvert racial equality and perpetuate white supremacy.[249] In addition,

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[243] *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

[244] Raskin, *supra* note 242, at 744; *But see* Molly P. Matter, *The* Shaw *Claim: The Rise and Fall of Colorblind Jurisprudence*, 18 SEATTLE J. SOC. JUST. 25, 39 (2020) (arguing that "[Harlan] used the term 'colorblind' to demand color-conscious justices to the inhumane vestiges of slavery"). Harlan's white supremacist rhetoric is on display throughout the opinion, where he disparages not only African Americans, but other minority groups such as Asian immigrants. *See* Ciara Torres-Spelliscy, *The Political Branding of Us and Them: The Branding of Asian Immigrants in the Democratic and Republican Party Platforms and Supreme Court Opinions 1876–1924*, 96 N.Y.U. L. Rev. 1215, 1248

[245] Ian F. Haney Lopéz, *Is the "Post" in Post-Racial the "Blind" in Colorblind?*, 32 CARDOZO L. REV. 807, 809 (2011).

[246] *Id*.

[247] *Id*. (citing Brief for Petitioner at 27, Sipuel v. Bd. of Regents of the Univ. of Okla., 332 U.S. 631 (1948) (no. 369), 1947 WL 44231, at *27).

[248] *Id*. at 810.

[249] *See id.* at 809–11.

colorblindness has also become a tool that "soothes anxiety about the stubborn endurance of the structures of white dominance."[250]

While race relations have improved, systemic racial inequalities endure in American society.[251] However, more and more Americans believe that racial thinking and racial solutions are no longer needed because racism is no longer an issue in the United States.[252] This "post-racial" ideology "claims that America has moved beyond race and that there is thus no need to discuss race as a salient issue."[253] For individuals adhering to the post-racial ideology, conversations about race are irrelevant, and those who discuss race are harmful to society.[254]

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[250] Kimberlé Williams Crenshaw, *Race to the Bottom: How the Post-Racial Revolution Became a Whitewash*, THE BAFFLER (June 2017), https://thebaffler.com/salvos/race-to-bottom-crenshaw?msclkid=e6997a1cc75411ecafd779d0ce508886 [https://perma.cc/S2JD-JUUA].

[251] *See* ELIZABETH ARIAS, BETZAIDA TEJADA-VERA & FARIDA AHMAD, NAT'L CTR. FOR HEALTH STAT., NVSS VITAL STAT. RAPID RELEASE; REP. NO. 010, RAPID PROVISIONAL LIFE EXPECTANCY ESTIMATES FOR JANUARY THROUGH JUNE 2020, at 3 (Feb. 2021) (finding that during the first half of 2020, the gap in life expectancy at birth between Black and white Americans was six years—an increase of forty-six percent from 2019 and the largest gap since 1998); *see also* Valerie Wilson & William M. Rodgers II, *Black-White Wage Gaps Expand with Rising Wage Inequality*, ECON. POL'Y INST. 1–10 (Sept. 19, 2016), https://www.epi.org/publication/black-white-wage-gaps-expand-with-rising-wage-inequality/ [https://perma.cc/7FVF-FEEK] (finding that the wage gap between Black and white Americans is at its largest since 1979); Elizabeth Hinton, LeShae Henderson & Cindy Reed, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA INST. JUST. 2 (May 2018), https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf [https://perma.cc/SF8S-LDWY] (noting that "Black men comprise about 13 percent of the U.S. male population, but nearly 35 percent of all men who are under state or federal jurisdiction with a sentence of more than one year"); Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENT'G PROJECT 4 (2021), https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/ [https://perma.cc/RVC7-SWW3] ("The latest available data regarding people sentenced to state prison reveal that Black Americans are imprisoned at a rate that is roughly five times the rate of white Americans.").

[252] Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1594–97, 1601 (2009).

[253] Ellis, *supra* note 53, at 837.

[254] *See id.*; Cho, *supra* note 252, at 1595, 1601–02.

### 2. The Supreme Court's Colorblind and Post-Racial Voting Rights Jurisprudence: Chipping Away at the VRA and Race-Conscious Remedies

Initially, the Court sanctioned the VRA's power as a means of enforcing of the Fifteenth Amendment.[255] However, skepticism about federal interference in states' authority over elections was present from the start. For example, in *South Carolina v. Katzenbach*, the Court sustained the constitutionality of the VRA's preclearance provision.[256] However, in his partial dissent, Justice Black positioned opposition to Section 5 of the VRA within federalism and Anti-Federalist concerns about central government control:

> Though, as I have said, I agree with most of the Court's conclusions, I dissent from its holding that every part of [Section] 5 of the Act is constitutional. Section 4(a), to which [Section] 5 is linked, suspends for five years all literacy tests and similar devices in those States coming within the formula of [Section] 4(b). Section 5 goes on to provide that a State covered by [Section] 4(b) can in no way amend its constitution or laws relating to voting without first trying to persuade the Attorney General of the United States or the Federal District Court for the District of Columbia that the new proposed laws do not have the purpose and will not have the effect of denying the right to vote to citizens on account of their race or color. I think this section is unconstitutional on at least two grounds.[257]

Justice Black laid the groundwork for the Court to treat the VRA with increasing hostility. In *Shaw v. Reno*, the Court remanded a district court decision allowing a redistricting plan in North Carolina that created two majority-Black districts.[258] Justice

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[255] *See generally* South Carolina v. Katzenbach, 383 U.S. 301 (1966); Katzenbach v. Morgan, 384 U.S. 641 (1966); Allen v. Va. State Bd. of Elections, 393 U.S. 544 (1969).

[256] 383 U.S. 301 (1966).

[257] South Carolina v. Katzenbach, 383 U.S. 301, 356 (1966) (Black, J., concurring in part and dissenting in part). According to Justice Black, there must be a compelling reason for the preferences of the federal government to override local preferences. *Id.* at 358.

[258] Shaw v. Reno, 509 U.S. 630, 657 (1993) ("Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer

Sandra Day O'Connor called the districts "political apartheid."[259] In *Miller v. Johnson*, the Court held that evidence of race being the "predominant, overriding factor" in organizing district lines is sufficient to trigger strict scrutiny of a redistricting plan, even if the state is complying with the VRA or the Justice Department.[260] The majority opinion, authored by Justice Kennedy, seized upon Justice Black's concerns:

> We are especially reluctant to conclude that [Section] 5 justifies [the Justice Department's] policy given the serious constitutional questions it raises. . . . But our belief in *Katzenbach* that the federalism costs exacted by [Section] 5 preclearance could be justified by those extraordinary circumstances does not mean that they can be justified in the circumstances of this case. And the Justice Department's implicit command that States engage in presumptively unconstitutional race-based districting brings the Voting Rights Act, once upheld as a proper exercise of Congress' authority under [Section] 2 of the Fifteenth Amendment . . . into tension with the Fourteenth Amendment.[261]

By 1997, in *Reno v. Bossier Parish School Board* (*Bossier Parish I)*, the "federalism costs" alluded to in *Miller* were now "serious federalism costs."[262] Three years later, in *Bossier Parish II*, the Court held that "[Section] 5 does not prohibit preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose.[263] The Court reasoned that a contrary reading of Section 5 would "exacerbate the 'substantial' federalism costs that the preclearance procedure already exacts."[264]

The Roberts Court has continued incorporating colorblindness and post-racialism into its voting rights jurisprudence. Indeed, "rewriting the rules of our democracy to make it harder to vote is one of the central legacies of the Roberts

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matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which this Nation continues to aspire.").

[259] *Id*. at 647.

[260] Miller v. Johnson, 515 U.S. 900, 920 (1995).

[261] *Id.* at 926–27.

[262] Reno v. Bossier Parish Sch. Bd. (*Bossier Parish I*), 520 U.S. 471, 480 (1997) (holding that preclearance from the Attorney General or District Court under Section 5 of the Voting Rights Act may not be denied solely because the covered jurisdictions new voting standard, practice, or procedure results in a denial of the right to vote on account of race in violation of Section 2).

[263] Reno v. Bossier Parish Sch. Bd. (*Bossier Parish II)*, 528 U.S. 320, 341 (2000).

[264] *Id*. at 336 (quoting Lopez v. Monterey Cnty., 525 U.S. 266, 282 (1999)).

Court."[265] In particular, the Court's decisions in *Crawford v. Marion County Election Board*,[266] *Shelby County v. Holder*,[267] and *Brnovich v. Democratic National Committee*[268] have significantly undermined the fight against voter suppression by taking away the primary tools used to fight voting restrictions.[269]

### *a. Crawford v. Marion County Election Board*

In *Crawford v. Marion County Election Board*,[270] the Supreme Court effectively gave states seeking to enact strict voter ID laws the greenlight. In *Crawford*, the Court considered a facial challenge to Indiana's voter ID law.[271] The plaintiffs argued that Indiana's law was invalid under the Fourteenth Amendment because it unduly burdened the right to vote.[272] The district court upheld the law, explaining that the plaintiffs had not introduced evidence showing that any Indiana resident would be unable to vote, or have their right to vote unduly burdened, by the law.[273] In a plurality decision, the Court affirmed the district court's decision upholding the law.[274]

Justice Stevens wrote the lead opinion, which Chief Justice Roberts and Justice Kennedy joined. His opinion narrowly focused on the record before him. He applied the balancing test laid out in *Anderson v. Celebrezze*[275] and *Burdick v. Takushi*.[276] Under this test, a court must "weigh the asserted injury to the right to vote against

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[265] David Gans, *Selective Originalism and Selective Textualism: How the Roberts Court Decimated the Voting Rights Act,* SCOTUSBLOG (July 7, 2021), https://www.scotusblog.com/2021/07/selective-originalism-and-selective-textualism-how-the-roberts-court-decimated-the-voting-rights-act [https://perma.cc/N2EH-8KTP].

[266] 553 U.S. 181 (2008).

[267] 570 U.S. 529 (2013).

[268] 594 U.S. 647 (2021).

[269] *See* Richard L. Hasen, Opinion, *The Supreme Court is Putting Democracy at Risk*, N.Y. TIMES (July 1, 2021), https://www.nytimes.com/2021/07/01/opinion/supreme-court-rulings-arizona-california.html?msclkid=abe3aaabce7b11ec8272e1b1495e901f [https://perma.cc/F7GD-WRVC]; Ian Millhiser, *How America Lost Its Commitment to the Right to Vote*, VOX (July 21, 2021, 8:00 AM), https://www.vox.com/22575435/voting-rights-supreme-court-john-roberts-shelby-county-constitution-brnovich-elena-kagan [https://perma.cc/VZ8N-T3Q9].

[270] 553 U.S. 181 (2008).

[271] *Id.* at 188.

[272] *Id.* at 187.

[273] *Id.* (quoting Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 783 (S.D. Ind. 2006)).

[274] *Id.* at 188.

[275] 460 U.S. 780, 789 (1983).

[276] 504 U.S. 428, 434 (1992).

the precise interests put forward by the State as justifications for the burden imposed."[277] Justice Stevens noted that "[h]owever slight that burden may appear . . . it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation" on voting.[278]

Justice Stevens addressed the "precise" interests put forth by the Indiana legislature, which were "deterring and detecting voter fraud" and "safeguarding voter confidence."[279] Although he acknowledged that the record contained no evidence of in-person voter impersonation ever occurring in Indiana, he determined that the state clearly had a legitimate and important interest in only counting votes cast by eligible voters.[280] Justice Stevens then concluded that the burdens that result from gathering documents required for registration "do[] not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting" for most people.[281] Thus, the plurality opinion ultimately found that the state of Indiana's "interest in deterring voter fraud outweighed the plaintiffs' speculative vote denial claims."[282] Justice Scalia, joined by Justices Thomas and Alito, concurred in the judgment but rejected the premise that a law could be unconstitutional because it might impose a particular burden upon some voters.[283] In Justice Scalia's view, "[i]t is for state legislatures to weigh the costs and benefits of possible changes to their election codes, and their judgment must prevail unless it imposes a severe and unjustified overall burden upon the right to vote, or is intended to disadvantage a particular class."[284]

In dissent, Justice David Souter wrote that the law's practical effect is to impose nontrivial burdens on tens of thousands of poor, elderly, and disabled voters.[285] Furthermore, Souter said the legislature's insistence on the law's immediate implementation demonstrated its lack of interest in easing this burden.[286]

The *Crawford* Court failed to account for the systemic racism that has been part of America's electoral process since its founding. This worldview is a key feature of contemporary racism in the United States.[287] "The [w]hite commonsense view on racial matters is that racists are few and far between, that discrimination

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[277] *Crawford*, 533 U.S. at 190 (citation and internal quotations omitted).
[278] *Id.* at 191 (citation and internal quotations omitted).
[279] *Id*. at 190–91.
[280] *Id.* at 196.
[281] *Id.* at 198.
[282] Ellis, *supra* note 218, at 899.
[283] *Crawford*, 533 U.S. at 204 (Scalia, J., concurring in the judgment).
[284] *Id.* at 208 (Scalia, J., concurring in the judgment).
[285] *Id.* at 209 (Souter, J., dissenting).
[286] *Id.* at 236 (Souter, J., dissenting).
[287] BONILLA-SILVA, *supra* note 156, at 57–58.

has all but disappeared since the 1960s, and that most whites are color-blind."[288] For example, in his concurring opinion, Justice Scalia argued that "[w]eighing the burden of a nondiscriminatory voting law upon each voter and concomitantly requiring exceptions for vulnerable voters would essentially turn back decades of equal protection jurisprudence."[289] The rationalization of racial inequality in the name of equal opportunity is a component of colorblindness.[290] The *Crawford* decision ultimately safeguards white privilege "by supporting equal opportunity for everyone without a concern for the savage inequalities between whites and blacks."[291]

### *b. Shelby County v. Holder*

In *Shelby County v. Holder*, the Supreme Court held that it was unconstitutional to use criteria under Section 4(b) of the Voting Rights Act as the basis for subjecting jurisdictions to preclearance.[292] Section 4(b) sets the formula for determining which jurisdictions would be subject to the Section 5 preclearance requirement.[293] Under Section 5, Congress required these states to preclear any changes to their voting laws with the Attorney General or a court of three judges in the U.S. District Court for the District of Columbia.[294] The Court held that Section 4's coverage formula was outdated and violated the covered states' rights to "equal sovereignty."[295]

The majority opinion, authored by Chief Justice Roberts, begins by immediately suggesting that discrimination is no longer a primary factor affecting minorities' lives: "[t]oday, the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were."[296] To Roberts, the divergent histories of the North and the South are no longer relevant.[297] As evidence of racial progress, Chief Justice Roberts points out that Selma, Alabama and Philadelphia, Mississippi—two cities with disturbing histories of racial oppression—had elected African-

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[288] *See id.* at 17.
[289] *Crawford*, 553 U.S. at 207 (Scalia, J., concurring in the judgment).
[290] BONILLA-SILVA, *supra* note 156, at 58.
[291] *Id.* at 59.
[292] 570 U.S. 529, 535–53 (2013).
[293] *Id.* at 537.
[294] *Id.*
[295] *Id.* at 544.
[296] *Id.* at 551.
[297] *Id.*

American mayors.[298] Thus, the Chief Justice concludes, "[n]early fifty years later, things have changed dramatically."[299]

In her dissent, Justice Ginsberg criticized the majority's declaration that it is 'mission accomplished' when it comes to voting rights in America. While Justice Ginsberg acknowledged that "conditions in the South have impressively improved since passage of the Voting Rights Act," she warned that "eliminating preclearance would risk loss of the gains that had been made."[300] According to Justice Ginsburg, "[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."[301]

Today, "most whites insist that minorities (especially blacks) are the ones responsible for whatever 'race problem' we have in this country."[302] Justice Scalia remarked that the Voting Rights Act represented a "perpetuation of racial entitlement" during *Shelby County*'s oral arguments.[303] According to Professor Barbara Harris Combs, "[l]anguage about racial entitlement ignores a nearly 100-year denial of the franchise and suggests that the protections afforded by the Act are a handout instead of a Constitutional promise."[304] In response to Justice Scalia's statement, the late congressman John Lewis said, "[i]t appeared to me that several members of the Court didn't have a sense of the history, what brought us to this point, and not just the legislative history and how it came about."[305]

The *Shelby County* decision opened the floodgates for states to enact voting laws that disproportionately disenfranchise minority

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[298] *Id*. at 549.
[299] *Id*. at 547.
[300] *Id*. at 575–76 (Ginsburg, J., dissenting).
[301] *Id*. at 590 (Ginsburg, J., dissenting).
[302] BONILLA-SILVA, *supra* note 156, at 1.
[303] Transcript of Oral Argument at 47, Shelby Cnty. v. Holder, 570 U.S. 529 (2013). In a 1979 article, Scalia wrote: "My father came to this country when he was a teenager. Not only had he never profited from the sweat of any black man's brow, I don't think he had ever seen a black man." Antonin Scalia, *The Disease as Cure: "In Order to Get Beyond Racism, We Must First Take Account of Race"*, 47 WASH. U. L.Q. 147, 152 (1979). Virginia Hench observes that "Justice Scalia works from this image of the 'innocent' white to the idea that discrimination, if it exists, is intentional wrongdoing by specific wrongdoers, and that 'innocent' beneficiaries of unfair systems owe nothing to the victims." Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 CASE W. RSRV. L. REV. 727, 756 n.137 (1998).
[304] Combs, *supra* note 156, at 543–44.
[305] Ari Berman, *John Lewis's Long Fight for Voting Rights*, THE NATION (June 5, 2013), https://www.thenation.com/article/politics/john-lewiss-long-fight-voting-rights [https://perma.cc/3VXD-Q9P7].

voters.[306] States previously covered by the preclearance requirement were particularly aggressive in changing their voting rules.[307] Immediately after the Court's decision was released, Texas announced that it would implement a strict voter identification law. Similarly, the North Carolina legislature enacted a voting law that the Fourth Circuit found targeted African Americans "with almost surgical precision."[308]

### *c. Brnovich v. Democratic National Committee*

In *Brnovich v. Democratic National Committee*, the Supreme Court interpreted Section 2 of the VRA in the vote denial context.[309] Unfortunately, the Court used an ahistorical and atextual interpretation of Section 2 to affirm two Arizona voting restrictions.[310] The decision reopens the door to a country where states can use tenuous and unsupported concerns about voter fraud to justify erecting barriers to the disenfranchisement and suppression of minority votes.

The Court in *Brnovich* considered two election-related policies in Arizona: (1) the out-of-precinct ("OOP") policy; and (2) H.B. 2023, which prohibited third-party ballot collection.[311] The Democratic National Committee ("DNC") and other plaintiffs filed suit, alleging that Arizona's policy to reject ballots cast in the wrong precinct violated the First and Fourteenth Amendments[312] and had a disparate impact on minority voters in violation of Section 2 of the VRA.[313] In addition, the DNC alleged that H.B. 2023 "was 'enacted with discriminatory intent' and thus violated both [Section] 2 of the VRA and the Fifteenth Amendment."[314]

After a ten-day bench trial, the district court rejected all the DNC's claims.[315] In a divided panel, the Ninth Circuit affirmed,[316] but an en banc majority reversed, holding that the OOP policy and

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[306] *See* U.S. COMM'N ON C.R, *supra* note 201, at 82 (noting in 2018 that at least 23 states enacted "newly restrictive statewide voter laws since the Shelby County decision").
[307] *See* Wendy Weiser & Max Feldman, *The State of Voting 2018*, BRENNAN CTR. FOR JUST. 18–19 (June 5, 2018), https://www.brennancenter.org/our-work/research-reports/state-voting-2018 [https://perma.cc/E3QU-TQWN].
[308] N.C. State Conf. of NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016).
[309] Brnovich v. Democratic Nat'l Comm., 594 U.S. 647, 653 (2021).
[310] *See generally id.*
[311] *Id.* at 660–65.
[312] *See* Democratic Nat'l Comm. v. Reagan, 329 F. Supp. 3d 824, 832 (D. Ariz. 2018).
[313] *Brnovich*, 594 U.S. at 663.
[314] *Id.* at 2325.
[315] *Reagan*, 329 F. Supp. 3d at 832.
[316] Democratic Nat'l Comm. v. Reagan, 904 F.3d 686, 697 (9th Cir. 2018).

H.B. 2023 violated the VRA.[317] Regarding the OOP policy, the majority opinion, authored by Judge Fletcher, determined that the district court erred in its conclusion that discarded OOP ballots burdened a de minimis number of voters.[318] In addition, the majority concluded that the OOP policy violated Section 2 of the VRA because it had a disparate impact on minority voters.[319] Lastly, the majority held that H.B. 2023 was passed with discriminatory intent.[320]

In a 6-3 decision, the Supreme Court reversed, holding that "the en banc court misunderstood and misapplied [Section] 2."[321] Instead of announcing a clear test for vote denial claims under Section 2, the Court established five ad-hoc "guideposts" to inform future cases.[322] They are: (1) "the size of the burden imposed by a challenged voting rule," (2) "the degree to which a voting rule departs from what was standard practice when [Section] 2 was amended," (3) the size of the disparities resulting from the impact of the rule on a minority group, (4) the alternate opportunities provided by a state's voting system, and (5) "the strength of the state interests served by [the] . . . rule."[323] The Court determined that the Arizona laws did not violate the VRA under these guideposts.[324]

In the majority opinion, Justice Alito refers to the "strong and entirely legitimate state interest" in preventing voter fraud.[325] As the Ninth Circuit observed, "[t]here is no evidence of any fraud in the long history of third-party ballot collection in Arizona."[326] According to Justice Alito, Section 2 plaintiffs need to show the challenged voting law imposes something more than the usual burdens of voting compared to the voting landscape in 1982 when voter registration was onerous, and absentee and early voting was

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[317] Democratic Nat'l Comm. v. Hobbs, 948 F.3d 989, 998–99 (9th Cir. 2020). The en banc majority did not address the First and Fourteenth Amendment claims.
[318] *Id.* at 1014–16.
[319] *Id*. at 1032–33, 1037.
[320] *Id*. at 1042.
[321] *Brnovich*, 594 U.S. at 655.
[322] *Id*. at 666.
[323] *Id*. at 669.
[324] *Id*. at 2677–82.
[325] *Id*. at 672.
[326] Democratic Nat'l Comm. v. Hobbs, 948 F.3d 989, 1007 (9th Cir. 2020). Justice Alito also downplays the impact that the Arizona laws have on voters of color. For example, the Navajo Nation noted in its amicus curiae brief: "Arizona's ballot collection law criminalizes ways in which Navajos historically participated in early voting by mail. Due to the remoteness of the Nation and lack of transportation, it is not uncommon for Navajos to ask their neighbors or clan members to deliver their mail." Brief for the Navajo Nation as Amicus Curiae Supporting Respondents at 3, Brnovich v. Democratic Nat'l Comm., 594 U.S. 647 (2021) (Nos. 19-1257 & 19-1258).

extremely rare.[327] On the other hand, the state does not have to come forward with any evidence that its laws are necessary. Instead, the state simply needs to assert an interest in preventing voter fraud.

By prioritizing state interests over racial equality, *Brnovich* conflicts with both the language and the intent of Section 2. Justice Alito ignored that Section 2's language centers on disparate "results."[328] In fact, Congress deliberately emphasized "results" in the 1982 amendments in response to *City of Mobile v. Bolden*.[329] Therefore, Congress has already established that "voters of color get the benefit of the doubt," not the state.[330]

3. *Moore* and *Allen*: A Win for Voting Rights? Not So Fast.

In the final weeks of the October 2022 term, the Court took a surprising turn—issuing two ostensibly pro-democracy decisions. In *Moore v. Harper*,[331] the Court preserved state constitutional limitations on state legislatures' abilities to enact laws regulating federal elections, and in *Allen v. Milligan*,[332] it reaffirmed the constitutionality of Section 2. The two decisions, authored by Chief Justice Roberts, were hailed as victories for voting rights and democracy.[333]

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[327] *See* Nate Cohen, *How Convenient Should Voting Be? Court Ruling Leaves No Clear Answer*, N.Y. TIMES (July 12, 2021), https://www.nytimes.com/2021/07/06/us/politics/voting-rights-law-supreme-court.html?msclkid=414bcdc8ce8811ec8a9dc7a9ed2f2171 [https://perma.cc/SV27-NYSZ].

[328] 52 U.S.C. § 10301(a).

[329] *Brnovich*, 594 U.S. at 701–02 (Kagan, J., dissenting).

[330] Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *The Court's Voting-Rights Decision Was Worse Than People Think*, THE ATLANTIC (July 8, 2021), https://www.theatlantic.com/ideas/archive/2021/07/brnovich-vra-scotus-decision-arizona-voting-right/619330 [https://perma.cc/9C5G-M8FV].

[331] 600 U.S. 1, 22 (2023).

[332] 599 U.S. 1, 25 (2023).

[333] *See Civil Rights Coalition Praises Supreme Court's Decision to Protect Freedom to Vote, Renews Call for Congressional Action to Restore the Voting Rights Act*, LEADERSHIP CONF. ON CIV. AND HUM. RTS.. (June 8, 2023), https://civilrights.org/2023/06/08/civil-rights-coalition-praises-supreme-courts-decision-to-protect-freedom-to-vote-renews-call-for-congressional-action-to-restore-the-voting-rights-act [https://perma.cc/A9M6-ZLLB]; *Historic Win: U.S. Supreme Court Rules Alabama's Congressional Map Violates the Voting Rights Act by Diluting Black Political Power,* ACLU OF AL. (June 8, 2023, 11:00 AM), https://www.aclu.org/press-releases/u-s-supreme-court-rules-alabamas-congressional-map-violates-the-voting-rights-act-by-diluting-black-political-power [https://perma.cc/P2G7-XHAA]; Josh Gerstein & Zach Montellaro, *Voting Rights Act Dodges Bullet at Supreme Court*, POLITICO (June 8, 2023 12:21 PM), https://www.politico.com/news/2023/06/08/voting-rights-act-dodges-bullet-at-supreme-court-00101004 [https://perma.cc/BVW6-W5XS]; Dahlia Lithwick, *The Supreme Court's Latest Decision Is a Big Fat Rebuke to Donald Trump's Jan. 6 Claims*, SLATE (June 27, 2023, 6:05 PM), https://slate.com/news-and-

The *Allen* and *Moore* decisions were welcome departures from the Roberts Court's persistent and deliberate efforts to erode voting rights and undermine democracy. However, voting rights are far from secure, and the Court's colorblind racial ideology remains firmly intact.

*a.* Moore v. Harper

In 2021, the North Carolina legislature enacted an extreme partisan gerrymander. The maps were drawn so that in an evenly divided popular vote, Republicans would secure ten seats with only four seats going to Democrats.[334] This distribution made the map an extreme anomaly, favoring Republicans over Democrats in a way that surpasses 99.9999 percent of all conceivable map configurations.[335] A group of voters challenged the maps in state court.[336]

In February 2022, the North Carolina Supreme Court sided with the voters, concluding that the map constituted "egregious and intentional partisan gerrymanders designed to enhance Republican performance, and thereby give a greater voice to those voters than to any others."[337] In addition, the court rejected the maximalist interpretation of the Independent State Legislature Theory ("ISLT") advanced by the legislature which posits that the Elections Clause grants exclusive authority to draw congressional maps to the state legislature.[338] The court criticized the theory, calling it "repugnant to the sovereignty of states . . . and the independence of state courts."[339] The legislature appealed to the Supreme Court.[340]

While the appeal was pending, the ideological balance of the North Carolina Supreme Court shifted significantly to the right. In April 2023, the court, with its new composition, took the highly unusual action of swiftly overturning its previous stance. It declared that it did not have the authority to adjudicate cases concerning gerrymandered maps, thereby overturning its earlier decision that had invalidated the maps drawn by Republicans.

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politics/2023/06/state-legislature-theory-donald-trump-rejected.html [https://perma.cc/8TTK-9C22].

[334] Eliza Sweren-Becker & Ethan Herenstein, Moore v. Harper*, Explained*, BRENNAN CTR. FOR JUST. (June 27, 2023), https://www.brennancenter.org/our-work/research-reports/moore-v-harper-explained [https://perma.cc/BST6-6GWE].

[335] *Id.*

[336] Harper v. Hall, 868 S.E.2d 499 (2022).

[337] *Id*. at 510.

[338] *Id*. at 551.

[339] *Id.*

[340] *Id*.

In *Moore v. Harper*, the Supreme Court affirmed the North Carolina Supreme Court's original ISLT judgment,[341] holding that the Elections Clause does not exempt congressional maps from the "ordinary exercise of state judicial review."[342] According to the Court, although the Elections Clause empowers state legislatures to regulate congressional elections, any laws enacted under this authority must adhere to the state constitutional restrictions that apply to all legislative actions within the state.[343]

Although the Court rejected the maximalist ISLT claim that state legislatures are entirely immune to state constitutional constraints when setting rules for congressional elections, it also stated that state courts "do not have free rein" to "transgress the ordinary bounds of judicial review."[344] However, the Court did not announce a specific standard of review to determine when state courts go too far, saying the issues were "complex and context specific."[345]

While *Moore* is a positive outcome for voters, it also introduces a concerning expansion of federal court involvement in federal elections. *Moore* expands the authority of federal courts when it comes to settling election disputes.[346] This standard allows for federal courts to determine when they exceed their authority, giving federal courts the final say over state election law. David Daley's observation underscores the potential hazards of this expanded authority:

> A court that has already proven, time and again, its willingness to put the thumb on the scale for its own side in cases at the heart of American democracy may decide those future cases on a case-by-case basis, with no clear standard at all, based on how the individual justices feel about that state supreme court's interpretation, and perhaps the consequence of that

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[341] 600 U.S. 1, 36–37 (2023).
[342] *Id*. at 22.
[343] *Id*. at 25–29.
[344] *Id*. at 34, 36.
[345] *Id*. at 36.
[346] *See* Richard L. Hasen, *There's a Time Bomb in Progressives' Big Supreme Court Voting Case Win*, SLATE (June 27, 2023, 12:44 PM), https://slate.com/news-and-politics/2023/06/supreme-court-voting-moore-v-harper-time-bomb.html [https://perma.cc/EB44-K3ZG].

> ruling. It's an uncomfortable position to begin a presidential election.[347]

The implications of *Moore* are especially troubling, given the Roberts Court's sustained efforts to eliminate remedies for race-based voter suppression. Indeed, the decision positions the Supreme Court to have even greater influence on future elections. To quote Professor Hasen: "[i]t's going to be ugly, and sooner rather than later it could lead to another Supreme Court intervention in a presidential election."[348]

*b.* Allen v. Milligan

In 2021, Alabama adopted a congressional map where only one in seven districts were majority Black, despite Black people constituting twenty seven percent of the state's population.[349] Four plaintiff groups filed suit in the Northern District of Alabama, alleging that the map violated Section 2 of the VRA by diluting the Black vote and was a racial gerrymander in violation of the Fourteenth Amendment.[350]

A three-judge panel ruled in favor of the plaintiffs, issuing a preliminary injunction preventing Alabama from using the disputed maps in any congressional elections.[351] The court held that the plaintiffs were substantially likely to succeed in their Section 2 claim.[352] The panel applied *Gingles*, finding that Alabama could feasibly establish another majority-Black district, Black voters in Alabama are politically cohesive, and that voting in the state is racially polarized.[353] Thus, under the totality of circumstances, the map was likely illegal.[354] The panel did not consider the plaintiffs' racial gerrymander claims because the preliminary injunction under Section 2 disposed of the case.[355]

Alabama sought emergency relief in the Supreme Court. In a 5-4 decision, the Supreme Court stayed the injunction and agreed to hear the case on the merits.[356] The Court did not provide an

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[347] David Daley, *The Supreme Court Denied a Wild Election Theory. But Don't Relax Yet*, THE GUARDIAN (June 28, 2023, 6:00 AM), https://www.theguardian.com/commentisfree/2023/jun/28/supreme-court-fringe-election-theory-dont-relax [https://perma.cc/BJ66-9KF5].
[348] Hasen, *supra* note 346.
[349] Singleton v. Merrill, 582 F. Supp. 3d 924, 935, 1025 (N.D. Ala. 2002).
[350] *Id*. at 935.
[351] *Id*.
[352] *Id*. at 936
[353] *Id*. at 1016.
[354] *Id*. at 1018.
[355] *Id*. at 1035.
[356] Merrill v. Milligan, 142 S. Ct. 879, 879 (2022).

explanation for the stay, but in his concurrence, Justice Kavanaugh invoked the *Purcell* principle, writing: "[t]he stay order follows this Court's election-law precedents, which establish (i) that federal district courts ordinarily should not enjoin state election laws in the period close to an election, and (ii) that federal appellate courts should stay injunctions when, as here, lower federal courts contravene that principle."[357] As a result, the map that the district court held was likely illegal remained in place for Alabama's 2022 elections.[358]

In June 2023, the Supreme Court affirmed the district court's decision, holding the congressional map likely violated Section 2.[359] Writing for the majority, Chief Justice Roberts reaffirmed *Gingles* and rejected Alabama's call to "remake our Section 2 jurisprudence anew."[360] According to Chief Justice Roberts and the majority, the district court had "faithfully applied" *Thornburg v. Gingles* in finding that Alabama's redistricting plan violated Section 2.[361] The Court saw no reason to change the district court's "careful factual findings" or change its conclusions of law.[362]

To be sure, the Court's decision in *Allen* is favorable for voting rights. However, the decision is not a sign that the Court is taking a pro-democracy turn. If anything, it "spotlights how thin the tools for fighting discriminatory line drawing have become."[363] Indeed, the Court has already significantly narrowed the scope of Section 2. As Chief Justice Roberts noted in the majority opinion, "[Section] 2 litigation in recent years has rarely been successful."[364] In declining to extend Section 2, the Court did not strengthen voting rights protections but merely maintained the status quo.[365] As

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[357] *Id*. at 879 (Kavanaugh, J., concurring).
[358] *See* Hansi Lo Wang, *Illegal Voting Maps Were Used in Some States in 2022. This Legal Idea Allowed Them*, NPR (July 19, 2023, 5:00 AM), https://www.npr.org/2023/07/19/1186746963/alabama-redistricting-map-gerrymandering-purcell-principle#:~:text=In%20February%202022%2C%20the%20high,of%20the%20Voting%20Rights%20Act [https://perma.cc/7R7S-4ZB9].
[359] Allen v. Milligan, 599 U.S. 1, 23 (2023).
[360] *Id*.
[361] *Id*.
[362] *Id*.
[363] Michael Li, *A Rare Win for Voting Rights at the Supreme Court*, BRENNAN CTR. FOR JUST. (June 9, 2023), https://www.brennancenter.org/our-work/analysis-opinion/rare-win-voting-rights-supreme-court [https://perma.cc/T4GP-HNM9].
[364] *Allen*, 599 U.S. at 29.
[365] *See* Richard L. Hasen, *Opinion: John Roberts Throws a Curveball*, N.Y. TIMES (June 8, 2023), https://www.nytimes.com/2023/06/08/opinion/milligan-roberts-court-voting-right-act.html [https://perma.cc/9GZM-N6TA].

Professor Guy-Uriel Charles quipped, "it is remarkable that a conventional legal analysis can elicit surprise, even delight."[366]

But despite upholding Section 2, there is still reason to be concerned about its future. And while the majority opinion affirmed the *Gingles* standards, Justice Kavanaugh's concurrence suggests that questions surrounding the standards for enforcing Section 2 remain unresolved.[367] Referencing Justice Thomas's dissent, Justice Kavanaugh noted that "even if Congress in 1982 could constitutionally authorize race-based redistricting under § 2 for some period of time, the authority to conduct race-based redistricting cannot extend indefinitely into the future."[368] However, because Alabama did not raise that issue, Justice Kavanaugh wrote that he would not consider it at that time.[369] For his part, Chief Justice Roberts observed that

> [t]he concern that §2 may impermissibly elevate race in the allocation of political power within the States is, of course, not new. Our opinion today does not diminish or disregard these concerns. It simply holds that a faithful application of our precedents and a fair reading of the record before us do not bear them out.[370]

### 4. *Students for Fair Admissions v. Harvard College* and Twenty-First Century Colorblindness

Similarly troubling for the broader scope of constitutional law generally, and for the structure of the right to vote in particular, is the decision in *Students for Fair Admissions v. President and Fellows of Harvard College* ("*SFFA*")[371] In this case, the Supreme Court determined that under the Fourteenth Amendment's Equal Protection Clause, the race-conscious admissions practices at Harvard University and the University of North Carolina at Chapel Hill ("UNC") were unconstitutional.[372] The Court reasoned under a

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[366] Guy-Uriel Charles, *The Remarkable Conventionality of Allen v. Milligan*, ELECTION L. BLOG (June 8, 2023, 12:52 PM), https://electionlawblog.org/?p=136710 [https://perma.cc/2QES-5DA2].
[367] *Allen*, 599 U.S. at 44–45 (Kavanaugh, J., concurring).
[368] *Id*. at 45.
[369] *Id*.
[370] *Id.* at 41–42.
[371] 600 U.S. 181 (2023).
[372] *Id.* at 182.

strict scrutiny standard that Harvard and UNC's practices were not sufficiently focused to create measurable objectives for the judicial supervision of such programs, had no discernible end point, and deployed racial stereotypes in a negative manner.[373] The Court thus held that admissions practices had to be race-blind and only consider students' aptitudes, skills, and individual experiences in making admissions decisions.[374] Both Chief Justice Roberts's *SFFA* majority and Justice Clarence Thomas's concurrence effectively emphasize colorblindness as a constitutional value.[375] The essence of this expression is the importance of forbidding the government from making any race-conscious, negative assessments that penalize people based on impermissible stereotypes.

This expansive view of colorblindness parallels—indeed, it supersedes—that articulated in the *Shaw v. Reno* line of cases, where the Court deemed unconstitutional a focus on race in the redistricting process that serves to predominate other factors in the process.[376] In essence, *Shaw* held that race cannot be the predominant factor in making redistricting decisions.[377] Combined with the Voting Rights Act, which implements the Fifteenth Amendment's command to forbid redistricting decisions that directly abridge or deny the right to participate to minorities, the contemporary interpretation of the role of race in redistricting is to allow it as an explicit concern so long as it is not discriminatory nor overly predominant.[378]

Yet, the view of colorblindness set forward in *SFFA* may shift this balance in the name of colorblindness as the ultimate constitutional value in the context of the law of democracy.[379] The policy concern expressed in *SFFA* was to make suspect all governmental uses of race in *any* admissions process.[380] Some argue that this would logically extend to any governmental action, and that argument may, in the foreseeable future, include the process of redistricting.[381]

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[373] *Id.* at 213–14

[374] *Id.* at 230–31.

[375] *Id.* at 229–30, 236–37; *see also* Jonathan Feingold, *Justice Roberts Chose Colorblindness Over the Constitution: Opinion*, NEWSWEEK (June 29, 2023, 7:07 PM), https://www.newsweek.com/justice-roberts-just-chose-colorblindness-over-constitution-opinion-1809984 [https://perma.cc/GF9D-97S9].

[376] 509 U.S. 630, 646 (1993).

[377] *Id.*at 648; *see also* Miller v. Johnson, 515 U.S. 900, 916 (1995).

[378] *See* David T. Canon, *Race and Redistricting*, 25 ANN. REV. OF POL. SCI. 509, 520 (2022).

[379] David Hinojosa & Genevieve Bonadies Torres, *The Absurd Reach of a "Colorblind" Constitution*, 72 AM. U. L. REV. 1775, 1819 (2023).

[380] *Id.* at 1801.

[381] Indeed, as we discuss, the Wisconsin Supreme Court relied on precisely this view in its reasoning in *Johnson v. Wis. Elections Comm'n III* in ultimately choosing a race-neutral map and eschewing a plausible view of race in the

Indeed, it is plausible that this iteration of the Roberts Court, a generation removed from the *Shaw* decision, may reinterpret the *Shaw* standard considering what was said in *SFFA*, and ultimately forbid any use of race by a governmental actor under the Fourteenth Amendment (or the Fifteenth Amendment, since *City of Mobile v. Bolden*).[382] This would be consistent with Justice Thomas's longstanding views about the unconstitutionality of the Voting Rights Act and Justice Kavanaugh's concurrence in *Allen v. Milligan*, which, echoing the language of *SFFA*, argues that the unsettled scope of Section 2 holds open the continued viability of the Voting Rights Act.[383] Commentators have interpreted it as an invitation for a suit by which the Court may strike down Section 2's applicability to redistricting once and for all.[384]

Such an expansive interpretation to implement a race-blindness version of colorblindness may serve to call into question both *Shaw* and Section 2 of the Voting Rights Act, which is, as we observed earlier regarding *Allen v. Milligan*, a "thin" race-conscious protection of the right to participate for racial minorities.[385] "Thin" may well become extinct in the foreseeable future.[386]

## IV: WISCONSIN: THE EPICENTER OF MODERN VOTER SUPPRESSION

For years, Wisconsin was considered an exemplary good government state.[387] In the early twentieth century, Governor Robert La Follette was a national leader of the progressive movements.[388] Under Governor La Follette, the state pioneered many innovative measures to curb corruption, limit political parties' influence, and enhance participatory democracy.[389] Wisconsin was among the first states to extend voting rights to African Americans and women, and

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political process; *see* Johnson v. Wis. Elections Comm'n, 399 Wis.2d 623, 642 (Wis. 2021), *overruled in part by* Clarke v. Wis. Elections Comm'n, 410 Wis. 2d 1 (2023).

[382] 446 U.S. 55, 60–61 (1980).

[383] Allen v. Milligan, 599 U.S. 1, 45–91 (2023); *see also id.* at 42–45.

[384] Josh Gerstein & Zach Montellaro, *supra* note 33; *see also* Erwin Chemerinsky, *Opinion: The Outlandish Ruling that Could Eviscerate What's Left of the Landmark Voting Rights Act*, L.A. TIMES (Nov. 29, 2023, 3:30 AM) https://www.latimes.com/opinion/story/2023-11-29/voting-rights-act-section-2-8th-circuit-court-of-appeals-clarence-thomas [https://perma.cc/H5BX-WZFY].

[385] *See* discussion *supra* Part III.C.3.b.

[386] We note that this shift will have wide-ranging ramifications for voting rights law and Professor Ellis will likely further address these ramifications in future research.

[387] *See* Lynn Adelman, *How Big Money Ruined Public Life in Wisconsin*, 66 CLEV. ST. L. REV. 1, 1 (2018).

[388] JAMES K. CONANT, WISCONSIN POLITICS AND GOVERNMENT: AMERICA'S LABORATORY OF DEMOCRACY xvii (2006).

[389] Adelman, *supra* note 387, at 1–6.

its election administration system served as a "model" for the country. For these reasons, the state was often called a "laboratory of democracy."[390]

Unfortunately, those days are long gone. Increased partisanship, special interest money, and a string of ethical scandals destroyed Wisconsin's reputation as a model good government state.[391] To be sure, in recent years, Wisconsin has been at the forefront of a growing anti-democratic trend among certain American states.[392]

Wisconsin's democratic backslide can be traced back to the 2010 midterm elections.[393] For the first time in forty years, Republicans controlled all three branches of government in the state.[394] The state quickly became a laboratory for conservative ideas. New legislation focused on curtailing unions,[395] lowering taxes, creating more stringent welfare rules, and expanding the state's school voucher program.[396] Republicans also redrew the state's legislative maps to secure a majority, enacted some of the most restrictive voting laws in the country, and dissolved the

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[390] CONANT, *supra* note 388, at xv–xxii.

[391] *See* Adelman, *supra* note 387.

[392] *See generally* James A. Gardner, *Illiberalism and Authoritarianism in the American States*, 70 AM. U. L. REV. 829 (2021); Jacob M Grumbach, *Laboratories of Democratic Backsliding* (Working Paper 2022), https://csap.yale.edu/sites/default/files/files/grumbach-apppw-4-20-22.pdf [https://perma.cc/5XH6-KWAZ].

[393] *See, e.g.*, Dan Kaufman, THE FALL OF WISCONSIN (2018); Jack Kelly, *Experts Say Democracy is Backsliding in Wisconsin. How Does That Change?*, CAP TIMES (July 21, 2022), https://captimes.com/news/government/experts-say-democracy-is-backsliding-in-wisconsin-how-does-that-change/article_21cff8ce-cb31-5e86-b7f1-fe1e3979edfc.html [https://perma.cc/52DF-42F4].

[394] One Wis. Institute, Inc. v. Thomsen, 198 F. Supp. 3d 896, 902, 906, 920 (W.D. Wis. 2016), *aff'd in part*, *rev'd in part sub nom.* Luft v. Evers, 963 F.3d 665 (7th Cir. 2020).

[395] *See* Gardner, *supra* note 392, at 893–94 (noting that attacks on well-resourced actors that support the opposition is common in countries experiences authoritarian countries and arguing that "[i]n the United States, the equivalent behavior consists of a constant, systematic barrage aimed at labor unions which historically have been among the most consistent and best-resourced supporters of Democratic candidates and their policies").

[396] *See* Bill Glauber & Patrick Marley, *Scott Walker's Eight Years as Governor Ushered in Profound Change in Wisconsin*, MILWAUKEE J. SENTINEL (Jan. 4, 2019, 9:57 AM), https://www.jsonline.com/story/news/politics/2019/01/04/scott-walkers-eight-years-wisconsin-governor-were-consequential/2473616002 [https://perma.cc/FGY2-CKUE]; *see also* Robert Samuels, *Wisconsin is the GOP Model for 'Welfare Reform.' But as Work Requirements Grow, So Does One Family's Desperation*, WASH. POST (Apr. 22, 2018, 8:55 PM), https://www.washingtonpost.com/politics/you-ever-think-the-government-just-dont-want-to-help-as-requirements-for-welfare-grow-so-does-one-familys-desperation/2018/04/22/351cb27a-2315-11e8-badd-7c9f29a55815_story.html [https://perma.cc/WE6X-94Y5].

nonpartisan Government Accountability Board, replacing it with a more partisan body.[397]

Wisconsin's anti-democratic turn intensified after Democrats won elections for governor and attorney general in the 2018 midterms. A few weeks after the election, the Republican-controlled legislature passed laws stripping the governor of authority over important public programs and giving the legislature veto power over whether to join or withdraw from various types of litigation.[398] This move was unprecedented in Wisconsin. To be sure, "[t]hese actions constitute a gross breach of longstanding, universal norms of democratic contestation, which require fair alternation of power among the parties and gracious acceptance of electoral defeat."[399]

A key component of Wisconsin's anti-democratic shift has been dismantling voting rights. Since 2010, Wisconsin Republicans have implemented various voting restrictions that disenfranchise racial and ethnic minorities, the poor, and other groups that overwhelmingly vote for Democrats.[400] The state legislature also employed "a sharply partisan methodology" to manipulate the state legislative map to gain electoral advantage[401] and has attempted to seize control of the body that regulates elections.[402] When these methods failed in 2020, the Wisconsin legislature used taxpayer money to find fraudulent votes in areas with a high percentage of voters of color. Perhaps most unsettling is that the courts tasked

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[397] Andy Kroll, *Wisconsin Is Ground Zero for the MAGA Effort to Steal the Next Election*, ROLLING STONE (Feb. 6, 2022), https://www.rollingstone.com/politics/politics-features/trump-wisconsin-eastman-election-decertification-1295191 [https://perma.cc/DMK2-TRAX] ("The GAB actually did its job, and so the Legislature said, 'Let's get rid of it.'" (quoting WEC Commissioner Ann. S. Jacobs)).

[398] *See* Shawn Johnson & Laurel White, *Wisconsin Legislature Works Overnight To Approve Limiting Gov.-Elect Tony Evers' Power*, WIS. PUB. RADIO (Dec. 5, 2018), https://www.wpr.org/wisconsin-legislature-works-overnight-approve-limiting-gov-elect-tony-evers-power [https://perma.cc/8E6K-T4F6]; Sophie Quinton, *Lame-Duck Power Grabs Escalate Unsettling Trend*, PEW CHARITABLE TR. (Dec. 7, 2018), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/12/07/lame-duck-power-grabs-escalate-unsettling-trend [https://perma.cc/2DQS-62AM].

[399] Gardner, *supra* note 392, at 880.

[400] Shah & Smith, *supra* note 135, at 141.

[401] Baldus v. Members of Wis. Gov't Accountability Bd., 849 F. Supp. 2d 840, 844 (E.D. Wis. 2012).

[402] *See* Editorial, *Let Watchdog Do Its Job Without Partisanship*, MILWAUKEE J. SENTINEL (Aug. 6, 2015), [hereinafter "Editorial"], https://archive.jsonline.com/news/opinion/let-watchdog-do-its-job-without-partisanship-b99551946z1-320983601.html [https://perma.cc/U4UQ-K5JN]; Shawn Johnson, *GOP Election Bills Would Make Legislature More Powerful and Absentee Voting More Difficult*, WIS. PUB. RADIO (Feb 9, 2022), https://www.wpr.org/gop-election-bills-would-make-legislature-more-powerful-and-absentee-voting-more-difficult [https://perma.cc/MJW8-MLCQ].

with checking this behavior have largely failed to intervene.[403] Such actions are tell-tale signs of democratic erosion and creeping authoritarianism[404] and lay bare the counter-democratic underpinnings that can be activated within the framework of state discretion provided by the Constitution.

### *A. Voting Restrictions and Partisan Gerrymandering*

A key tactic from the "authoritarian playbook" is the "elimination or suppression of effective partisan political competition."[405] To do this, the ruling party often enacts voting restrictions targeting specific groups.[406] The ruling party will also manipulate electoral maps to ensure they hold their grip on power even if they fail to win a majority vote in a future election.[407] This exploitation of electoral systems reflects a counter-democratic design embedded within the American democratic framework, where the Constitution's delegation of vast powers to states in determining electoral processes allows for the manipulation of voting laws in ways that undermine the principles of fair and representative democracy. Following their success in the 2010 midterms, Wisconsin Republicans used this power to pass one of the most restrictive voting laws in the country and aggressively gerrymandered the state's voting maps.[408]

In 2011, the Wisconsin Legislature passed Act 23, which enacted various voting restrictions.[409] The centerpiece of Act 23 is

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[403] *See* Gardner, *supra* note 392, at 886–87.

[404] *See* TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 72–73 (2018); LARRY DIAMOND, ILL WINDS: SAVING DEMOCRACY FROM RUSSIAN RAGE, CHINESE AMBITION, AND AMERICAN COMPLACENCY 64–65 (2019); András Jakab, *What Can Constitutional Law Do Against the Erosion of Democracy and the Rule of Law*, 6 CONST. STUD. 5, 6–8 (2020).

[405] Gardner, *supra* note 392, at 853.

[406] *See* Gardner, *supra* note 392, at 903.

[407] *See id.* at 875 (quoting DIAMOND, supra note 404, at 65).

[408] *See* Milwaukee Branch of the NAACP v. Walker, No. 11CV5492, 2012 WL 739553 (Wis. Cir. Mar. 06, 2012) ("Wisconsin now has the benefit and the burden of the single most restrictive voter eligibility law in the United States."); Gregory Herschlag, Robert Ravier & Jonathan Mattingly, *Evaluating Partisan Gerrymandering in Wisconsin*, 1 (2017), https://arxiv.org/abs/1709.01596 [https://perma.cc/PBD5-AZHB]("We find that the Wisconsin redistricting plan is highly gerrymandered and less representative than at least 99% of all plans in our ensemble and shows more Republican bias than over 99% of the plans."); Ari Berman, *The Courts Won't End Gerrymandering. Eric Holder Has a Plan to Fix It Without Them*, MOTHER JONES (July/Aug. 2019), https://www.motherjones.com/politics/2019/07/the-courts-wont-end-gerrymandering-eric-holder-has-a-plan-to-fix-it-without-them [https://perma.cc/HZQ9-V6AZ] ("[Wisconsin] in some ways is ground zero for Gerrymandering." (quoting former Attorney General Eric Holder)).

[409] *See* Shawn Johnson, *supra* note 22.

its strict voter identification requirement. Under Act 23, an eligible Wisconsin voter cannot vote unless they produce one of nine forms of photo identification.[410] The law also contains a provisional ballot option for voters without ID.[411] Lastly, Act 23 provides an exception for those confined to their home or a care facility due to age, sickness, injury, or disability.[412] A 2019 examination of the impact of Wisconsin's voter ID law found that it deterred or prevented thousands of Milwaukee and Dane County residents from voting.[413]

Unlike other voter ID laws, Act 23's provisional ballot procedure does not include an option to sign and execute an affidavit claiming indigence or a religious objection.[414] Furthermore, except in limited circumstances, Act 23 requires ID from absentee voters.[415] In *Crawford v. Marion County Election Board*, the Supreme Court determined that Indiana's affidavit option significantly mitigated the burdens imposed by the voter ID law.[416] In addition, the Court said that the fact that Indiana's law did not require ID from absentee voters minimized the burden for elderly voters.[417]

Along with the strict voter ID requirement, Act 23 imposes several other barriers to the ballot box, including: (1) limitations on in-person absentee voting,[418] (2) a requirement that college and university "dorm lists" include citizen information, (3) increasing the durational residency requirement from ten days to twenty-eight days, and (4) prohibiting election officials from sending absentee ballots via email or fax to all but military and overseas voters.[419]

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[410] WIS. STAT. § 5.02(6M).

[411] Frank v. Walker, 17 F. Supp. 3d 837, 844 (E.D. Wis. 2014), *rev'd*, 768 F.3d 744 (7th Cir. 2014), *cert. denied*, 575 U.S. 913 (2015).

[412] *Id*.

[413] Michael G. DeCrescenzo & Kenneth R. Mayer, *Voter Identification and Nonvoting in Wisconsin—Evidence from the 2016 Election*, 18 ELECTION L.J. 342, 351–52 (2019) ("Using flat priors, we estimate a mean of 13,900 nonvoters deterred from voting (to the nearest hundred, ninety-five percent interval from 9,000 to 19,000) and a mean of 7,900 nonvoters prevented from voting (interval from 4,100 to 11,700). Estimates from informed priors reflect regularization of the affected rate and are thus slightly lower than the estimates from flat priors: 12,300 nonvoters deterred from voting (ninety-five percent interval from 8,100 to 17,000) and a mean of 7,000 nonvoters prevented from voting (interval from 3,700 to 10,500).").

[414] *Walker*, 17 F. Supp. 3d at 844.

[415] *Id*.

[416] Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 199 (2008).

[417] *Id.* at 201–02.

[418] The law limits in-person absentee voting to a single location per municipality, reduces the in-person absentee period to ten days, and prohibits clerks from providing weekend voting.

[419] Jessica Karls-Ruplinger & Katie Bender-Olson, *2011 Wisconsin Act 23 Changes to Election Laws*, WISCONSIN LEGIS. COUNCIL (Jun. 6, 2011), https://docs.legis.wisconsin.gov/document/lcactmemos/2011/REG/Act%2023.pdf [https://perma.cc/2WYH-XML4].

The combined impact of these restrictions has made Wisconsin one of the most difficult states to vote in.[420]

Wisconsin Republicans also led the redistricting process during the post-2010 cycle. They employed partisanship to manipulate the state legislative map to gain an electoral advantage.[421] As a result, in 2012, despite receiving less than fifty percent of the total vote, Republicans won sixty out of ninety-nine seats in the Wisconsin Assembly.[422] Indeed, the 2010 election "has been the gift that keeps giving for Republicans. It was just one election, but thanks to redistricting it ensured lopsided control of the Wisconsin Legislature in every election since."[423] This approach to maintaining power despite a lack of majority support underscores a critical vulnerability in our democratic design—it permits and may even facilitate the erosion of democratic norms and the entrenchment of minority rule.

As discussed below, during the post-2020 redistricting cycle, since the maps were already tilted in Wisconsin Republican's favor, they did not need to pursue an aggressive gerrymander as they did during the post-2010 cycle. So, with the help of the courts, they successfully argued to preserve the status quo.

### *B. The Wisconsin Legislature's Attempts to Seize Control of Election Administration*

Independent election administration is essential to ensure the integrity and fairness of the electoral process.[424] Just as "no man can be a judge in his own case,"[425] elected politicians should not have a role in administering their own elections. To be sure, this "would

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[420] *See* Scot Schraufnagel, Michael J. Pomante II & Quan Li, *Cost of Voting in the American States: 2022*, 21 ELECTION L.J. 220, 223 (2022).

[421] Baldus v. Members of Wis. Gov't Accountability Bd., 849 F. Supp. 2d 840, 844 (E.D. Wis. 2012).

[422] Bridgit Bowden & Shawn Johnson, *How the 2011 Political District Map Changed the Game for Wisconsin*, WIS. PUB. RADIO (Oct. 13, 2021), https://www.wpr.org/wpr-reports/mappedout/how-2011-political-district-map-changed-game-wisconsin [https://perma.cc/K9Y9-PPRL].

[423] Craig Gilbert, *A Gerrymandered Map and a New Court Decision Make the 2010 Election the Gift That Keeps Giving for GOP*, MILWAUKEE J. SENTINEL, (Dec. 10, 2021, 11:58 AM), https://www.jsonline.com/story/news/politics/analysis/2021/12/10/wisconsin-2010-gop-wave-likely-locks-republican-grip-for-10-more-years/6461070001 [https://perma.cc/4ZWW-TP5D].

[424] *See* Richard L. Hasen, *Introduction: Foxes, Henhouses, and Commissions: Assessing the Nonpartisan Model in Election Administration, Redistricting, and Campaign Finance*, 3 U.C. IRVINE L. REV. 467, 472–73 (2013).

[425] *In re* Murchison, 349 U.S. 133, 136 (1955).

certainly bias [their] judgment, and, not improbably, corrupt [their] integrity."[426]

When it came to independent election administration, Wisconsin once served as a model. In 2007, the Wisconsin legislature created the Government Accountability Board ("GAB") to oversee elections, ethics, campaign financing, and lobbying.[427] The six-person board consisted of retired judges.[428] A panel of Court of Appeals Judges was tasked with submitting a list of possible GAB members to the governor to select GAB nominees.[429] GAB nominees then had to be confirmed by a two-thirds vote of the state senate.[430] In addition, all board decisions required approval from at least four of the six GAB members.[431] The GAB's structure and its members' selection were designed to insulate board members from partisan pressures.[432]

The GAB merged the State Elections Board, which oversaw election administration and campaign finance laws, with the State Ethics Board, which enforced lobbying and ethics regulations.[433] The formation of the GAB was not because of issues with the preexisting election administration system.[434] Election administration in Wisconsin already had "a reputation for evenhandedness and professionalism in its administration of election laws."[435] The GAB was created to address concerns about how the state's campaign finance and lobbying laws were enforced.[436] The legislature and reform groups also believed that a single entity should administer the activities of the two preexisting boards.[437]

"[T]he Wisconsin Accountability Board shined as an example of what an independent ethics agency could be."[438] It was

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[426] THE FEDERALIST No. 10 (James Madison).
[427] 2007 Wisconsin Act 1; WIS. STAT. § 5.05.
[428] WIS. STAT. § 15.60.
[429] *Id.* §§ 5.052, 15.60(2), 15.07(1)(a)(2).
[430] *Id*. § 15.07(1)(a)(2).
[431] *Id*. § 5.05(1e).
[432] *See* Daniel P. Tokaji, *America's Next Top Model: The Wisconsin Government Accountability Board*, U.C. IRVINE. L. REV. 572, 577–586 (2013).
[433] *See* STEVEN F. HUEFNER, DANIEL P. TOKAJI & EDWARD B. FOLEY, FROM REGISTRATION TO RECOUNTS: THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES 115–117 (2007).
[434] *Id*. at 115.
[435] Tokaji, *supra* note 432, at 580.
[436] HUEFNER, TOKAJI & FOLEY, *supra* note 433, at 115.
[437] Tokaji, *supra* note 432, at 578.
[438] Speech by Kevin Kennedy, Former Director and General Counsel of the Wisconsin Government Accountability Board, *Accountability in Wisconsin Government: A Look Forward, If Not a Step Backward*, https://www.wisdc.org/news/commentary/5818-accountability-in-wisconsin-government-a-look-forward-if-not-a-step-backward [https://perma.cc/Q7D4-92J3].

the only nonpartisan state election board established in recent history.[439] Prominent election law scholar Daniel Tokaji studied the performance of the GAB during its first five years and noted that "[w]hile some might reasonably disagree with some of its decisions on the merits, its decision-making process has been meticulous, careful, balanced, and judicious."[440] He concluded that the GAB "serve[d] as a worthy model for other states considering alternatives to partisan election administration at the state level."[441]

The GAB had bipartisan support when it was enacted, with every Republican and all but two Democrats voting for it.[442] Unfortunately, the Wisconsin Republicans soured on the agency for its role in investigating Governor Scott Walker for alleged campaign finance violations during his 2012 recall election.[443] Wisconsin Republicans accused the GAB of being politically motivated and leaking more than 1,300 pages of secret documents to the *Guardian* newspaper.[444] In July 2015, Governor Walker called for the board to be dismantled and replaced with "something completely new that is truly accountable to the people of the state of Wisconsin."[445] However, critics were skeptical that accountability was the true goal. An editorial in the Milwaukee Journal Sentinel quipped: "They want a watchdog with no teeth."[446] This shift in sentiment highlights the ease with which states can compromise or dilute the integrity of oversight mechanisms under the guise of reform.

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[439] Kevin Johnson, Larry Garber, Edward McMahon & Alexander Vanderklipp, *Guardrails for the Guardians: Reducing Secretary of State Conflict of Interest and Building More Impartial U.S. Election Administration*, ELECTION REFORMERS NETWORK, at 6 (2020), https://electionreformers.org/wp-content/uploads/2020/09/Guardrails_Guardians.pdf [https://perma.cc/E5SJ-FQPH].

[440] Tokaji, *supra* note 407, at 607.

[441] *Id*. at 577; *see also* Editorial, *supra* note 402 ("My impression is that the GAB is one of the few nonpartisan boards running elections in the country, and it would be a shame I think for an independent, nonpartisan board—which many think of as a model for the nation—to be turned into a partisan board." (quoting Richard Hasen)).

[442] Editorial, *supra* note 402.

[443] *See* Ann-Elise Henzl, *Wisconsin GAB Heading Towards Its Final Day*, WUWM (June 29, 2016, 1:00 AM), wuwm.com/politics-government/2016-06-29/wisconsin-gab-heading-toward-its-final-day [https://perma.cc/V6AK-DV8J].

[444] *See* Mary Bottari, *Retribution and Revenge in the Wisconsin John Doe*, SHEPHERD EXPRESS (Jan. 9, 2018), https://shepherdexpress.com/news/issue-of-the-month/retribution-and-revenge-in-the-wisconsin-john-doe [https://perma.cc/5TXX-7D2L]; Scott Bauer, *AP Explains: John Doe Investigations Involving Scott Walker*, ASSOCIATED PRESS (Dec. 17, 2017, 1:10 AM), https://apnews.com/article/a647afdcc3134cb7a2f234446f16ad5f [https://perma.cc/8GLA-VYBM].

[445] Julie Bosman, *Scott Walker Proposes Shutting Wisconsin Ethics Board*, N.Y. TIMES (July 20, 2015), https://www.nytimes.com/2015/07/21/us/scott-walker-proposes-shutting-wisconsin-ethics-board.html [https://perma.cc/BZ8J-U9JX].

[446] Editorial, *supra* note 402.

In December 2015, Governor Walker signed a bill eliminating the GAB and replacing it with a more partisan model,[447] the Wisconsin Elections Commission ("WEC").[448] The WEC is made up of six members, with three members representing the Democratic Party and three representing the Republican Party.[449] The Commission is under the direction and supervision of an administrator who serves for a four-year term expiring on July 1 of the odd-numbered year.[450] The administrator serves as the State's Chief Election Official and is appointed by a majority of the Commission members and confirmed by the Senate.[451]

However, Republicans now want to dissolve and replace the WEC over COVID-19-related changes to Wisconsin's voting rules.[452] Specifically, in the Spring of 2020, the WEC waived the requirement that special voting deputies visit nursing home facilities to assist with voting before the residents cast absentee ballots.[453] Nursing homes emerged as deadly hotspots during the COVID-19 pandemic, and nationwide, they were restricting public access to their facilities.[454] So in March 2020, after soliciting public comments and considering input from health officials, the WEC unanimously voted not to send special voting deputies into nursing

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[447] *See* Speech by Kevin Kennedy, *supra* note 438 (discussing the creation of the GAB and the "demise of independent oversight in Wisconsin"); Kroll, *supra* note 397.

[448] *See* 2015 Wisconsin Act 118.

[449] WIS. STAT. § 15.61(1)(a).

[450] *Id.* § 15.61(1)(b).

[451] WIS. STAT. §§ 5.05(3g), 15.61(1)(b).

[452] *See* Reid J. Epstein, *Wisconsin Republicans Push to Take Over the State's Elections*, N.Y. TIMES (Nov. 19, 2021), https://www.nytimes.com/2021/11/19/us/politics/wisconsin-republicans-decertify-election.html [https://perma.cc/R98K-HW3T].

[453] *See* Molly Beck & Patrick Marley, *How Nursing Home Voting in Wisconsin Became a Focus of Republicans Scrutinizing the 2020 Election*, MILWAUKEE J. SENTINEL (Mar. 17, 2022, 10:43 AM), https://www.jsonline.com/story/news/politics/2022/03/17/what-you-need-know-nursing-home-voting-wisconsin-2020/7001779001 [https://perma.cc/Y7UA-DKSN].

[454] *See* Daphne Chen, Ignacio Claderon & Dana Brandt, *1 in 4 Wisconsin Nursing Homes Hit by COVID-19, Data Show. One facility Reports 57 Death*, MILWAUKEE J. SENTINEL (June 4, 2020, 6:08 PM), https://www.jsonline.com/story/news/2020/06/04/covid-19-wisconsin-nursing-homes-1-4-report-least-one-case/3146881001 [https://perma.cc/JX2J-WUEU]; *Nearly One-Third of U.S. Coronavirus Deaths Are Linked to Nursing Homes*, N.Y. TIMES (June 1, 2021), https://www.nytimes.com/interactive/2020/us/coronavirus-nursing-homes.html [https://perma.cc/45GC-AWL6]; State of Wisconsin Department of Health Services, DPH-2016, Important Guidance for Infection Prevention and Control of Coronavirus Disease 2019 (COVID-19) (REVISED) in Long-Term Care Facilities and Assisted Living Facilities (Mar. 20, 2020), *available at* https://www.dhs.wisconsin.gov/dph/memos/communicable-diseases/2020-16-bcd.pdf [https://perma.cc/AH9C-58N3].

homes.[455] This decision sparked Republicans' calls to dissolve the WEC.

But the decision was not met with any opposition or backlash at the time.[456] The WEC later extended the policy for the November election by a 5-1 vote, with Republican commissioner Bob Spindell casting the lone dissenting vote.[457] However, after Joe Biden's narrow victory, Republicans began parroting Trump and making unsubstantiated claims that fraudulent ballots were cast from nursing homes throughout the state.[458] The Racine County sheriff went so far as to refer the five who voted in favor of the policy to the local district attorney for criminal charges.[459] Republican elected officials, including Speaker of the Assembly Robin Vos, have also suggested that the five commissioners be criminally prosecuted.[460]

### *C. The November 2020 Election and its Aftermath*

In 2018, David Frum predicted that "[when] conservatives become convinced that they cannot win democratically, they will not abandon conservativism. They will reject democracy."[461] This seems to be what happened after Joe Biden won Wisconsin by about 21,000 votes in 2020.[462] Recounts, multiple state and federal lawsuits, a statutory audit, and a review by a conservative law firm have confirmed Biden's victory and found little to no evidence of

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[455] *See* Kroll, *supra* note 397; Marisa Wojcik, *The Competency of Voters in Nursing Homes*, PBS WIS. (Nov. 3, 2021), https://pbswisconsin.org/news-item/noon-wednesday-the-competency-of-voters-in-nursing-homes [https://perma.cc/GT89-YAEV]; The Associated Press, *GOP targets Wisconsin Elections System, Nonpartisan Director*, NBC NEWS (Dec. 1, 2021, 10:07 PM), https://www.nbcnews.com/politics/elections/gop-targets-wisconsin-elections-system-nonpartisan-director-n1285148 [https://perma.cc/SY6M-N6G7].

[456] *See* Epstein, *supra* note 452.

[457] *See* Beck & Marley, *supra* note 453.

[458] *See* Epstein, *supra* note 452.

[459] *Id*.

[460] *See* Dan Kaufman, *Will Wisconsin's Republicans Make Voting Meaningless, or Just Difficult?*, NEW YORKER (July 25, 2022), https://www.newyorker.com/magazine/2022/08/01/will-wisconsins-republicans-make-voting-meaningless-or-just-difficult [https://perma.cc/XK44-XTRG]; A.J. Bayatpour, *Vos Says Elections Commissioners Should "Probably" Face Criminal Charges*, WKOW (Nov. 12, 2021), https://www.wkow.com/news/vos-says-elections-commissioners-should-probably-face-criminal-charges/article_7cdd9398-4410-11ec-a1d8-93e6cab5d1a2.html [https://perma.cc/A8RD-D2QG].

[461] DAVID FRUM, TRUMPOCRACY: THE CORRUPTION OF THE AMERICAN REPUBLIC 53 (2018).

[462] *See* Steven Shepard, *Biden Wins Wisconsin*, POLITICO (Jan. 6, 2021), https://www.politico.com/news/2020/11/04/wisconsin-presidential-election-results-2020-433423 [https://perma.cc/ZFP2-7AQA].

voter fraud.[463] However, Republican lawmakers and party officials continue to claim, without evidence, that the results in Wisconsin and other battleground states were illegitimate. As a result, most Wisconsin Republicans believe that the election was stolen,[464] and election administration became a key issue in the 2022 Governor's race.[465]

Before the 2020 election, President Trump and his allies repeatedly claimed that democrats would "rig" the election.[466] Such claims were already an established part of the Trump playbook—the former President repeatedly asserted that he lost the popular vote in 2016 because of voter fraud.[467] During the 2020 election, claims of voter fraud and election malfeasance primarily targeted pandemic-inspired election changes,[468] with mail-in voting as the main target.[469] In an April 8, 2020 tweet, the former President—who

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[463] *See* Scott Baur, *Judge: Wisconsin Probe Found 'Absolutely No' Election Fraud*, ASSOCIATED PRESS (July 28, 2022, 12:12 PM), https://apnews.com/article/2022-midterm-elections-wisconsin-lawsuits-presidential-16d90c311d35d28b9b5a4024e6fb880c [https://perma.cc/ZA5A-63CC].

[464] *See* Charles Franklin, *New Marquette Law School Poll Survey of Wisconsin Voters Finds Johnson Leading Barnes in Senate Race, Evers and Michels in a Gubernatorial Toss-Up*, MARQUETTE UNIV. L. SCH. POLL (Oct. 12, 2022), https://law.marquette.edu/poll/2022/10/12/new-marquette-law-school-poll-survey-of-wisconsin-voters-finds-johnson-leading-barnes-in-senate-race-evers-and-michels-in-a-gubernatorial-toss-up [https://perma.cc/RD6V-UNJE].

[465] *See* Zac Schultz, *Wisconsin Republicans Still Fixated on 2020 Election in 2022*, PBS WIS. (Oct. 7, 2022), https://pbswisconsin.org/news-item/wisconsin-republicans-still-fixated-on-2020-election-in-2022 [https://perma.cc/CC9A-4LPW].

[466] Michael Martina, *Democrats Preparing for 'Nightmare Scenario' in which Trump Challenges Election Results*, REUTERS (July 23, 2020, 11:22 PM), https://www.reuters.com/article/us-usa-election-contested-democrats/democrats-preparing-for-nightmare-scenario-in-which-trump-challenges-election-results-idUSKCN24O184 [https://perma.cc/6M97-Q52Q].

[467] Terrance Smith, *Trump Has Longstanding History of Calling Elections 'Rigged' If he Doesn't Like the Results*, ABC NEWS (Nov. 11, 2020, 5:24 AM), https://abcnews.go.com/Politics/trump-longstanding-history-calling-elections-rigged-doesnt-results/story?id=74126926 [https://perma.cc/W9H4-NK92].

[468] *See* Miles Parks, *Ignoring FBI And Fellow Republicans, Trump Continues Assault On Mail-In Voting*, NPR (Aug. 28, 2020, 12:46 PM), https://www.npr.org/2020/08/28/906676695/ignoring-fbi-and-fellow-republicans-trump-continues-assault-on-mail-in-voting [https://perma.cc/A5Z5-RXYA].

[469] *See* Centers for Disease Control and Prevention, C*onsiderations for Election Polling Locations and Voters: Interim Guidance to Prevent Spread of Coronavirus Disease 2019 (COVID-19)* (June 22, 2020), https://stacks.cdc.gov/view/cdc/89652 [https://perma.cc/VLS9-CUZ3]; Barreto et al., *supra* note 221; Lily Hay Newman, *Vote by Mail Isn't Perfect. But It's Essential in a Pandemic*, WIRED (Apr. 9, 2020, 6:30 PM), https://www.wired.com/story/vote-by-mail-absentee-coronvirus-covid-19-pandemic [https://perma.cc/CM5N-TEGF]; Editorial Board Opinion, *Voting by Mail is Crucial for Democracy*, N.Y. TIMES (Aug. 1, 2020),

voted by mail in the Florida primary a month before—tweeted that "Republicans should fight very hard when it comes to statewide mail-in voting" and claimed that the practice had a "[t]remendous potential for voter fraud, and for whatever reason, doesn't work out well for Republicans."[470] In addition to attacking vote-by-mail, "President Trump falsely claimed both before and after the election that massive voter fraud took place in the form of ballot dumping, the rigging of voting machines, votes being cast by dead voters, and the exclusion of poll watchers from polling places."[471]

In the aftermath of the 2020 election, President Trump and his allies filed dozens of lawsuits, with more than eighty-six judges—ranging from trial courts to the Supreme Court—rejecting his claims.[472] He made unsubstantiated and misleading statements about voter fraud, intimidated and pressured state lawmakers to overturn the election, and tried to convince the public that Joe Biden's victory was illegitimate.[473] These efforts culminated with the January 6th insurrection.[474] "One principle of democracy is free and fair elections, but an even more fundamental important premise of democracy is that those in power must abide by the results of those elections."[475] Unfortunately, while the attempt to overturn the

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https://www.nytimes.com/2020/08/01/opinion/sunday/mail-voting-covid-2020-election.html [https://perma.cc/GWW5-SF6K].

[470] Quint Forgey, *Trump: GOP Should Fight Mail-In Voting Because it 'Doesn't Work Out Well For Republicans'*, POLITICO (Apr. 8, 2020, 10:48 AM), https://www.politico.com/news/2020/04/08/trump-voting-by-mail-174695 [https://perma.cc/Q8BM-VGA5].

[471] Ellis, *supra* note 220, at 460.

[472] *See* Rosalind S. Helderman & Elise Viebeck, *'The Last Wall': How Dozens of Judges Across the Policial Spectrum Rejected Trump's Efforts to Overturn the Election*, WASH. POST (Dec. 12, 2020), https://www.washingtonpost.com/politics/judges-trump-election-lawsuits/2020/12/12/e3a57224-3a72-11eb-98c4-25dc9f4987e8_story.html [https://perma.cc/DU58-5AYZ].

[473] Meridith McGraw, *Trump's Election Fraud Claims Were False. Here are his Advisors Who Said So*, POLITICO (June 13, 2022), https://www.politico.com/news/2022/06/13/trumps-election-fraud-claims-were-false-here-are-his-advisers-who-said-so-00039346 [https://perma.cc/HV9U-EFAG]; Amy Gardner, Josh Dawsey & Rachel Bade, *Trump Asks Pennsylvania House Speaker for Help Overturning Election Results, Personally Intervening in a Third State*, WASH. POST (Dec. 8, 2020, 8:49 PM), https://www.washingtonpost.com/politics/trump-pennsylvania-speaker-call/2020/12/07/d65fe8c4-38bf-11eb-98c4-25dc9f4987e8_story.html [https://perma.cc/X3K2-56KX].

[474] *See* Christopher Wray, *Examining the January 6 Attack on the U.S. Capitol*, FBI (June 15, 2021), https://www.fbi.gov/news/testimony/examining-the-january-6-attack-on-the-us-capitol-wray-061521 [https://perma.cc/XNV3-DBU8].

[475] William Baude, *The Real Enemies of Democracy*, 109 CALIF. L. REV. 2407, 2417 (2021).

"most secure [election] in American history"[476] ultimately failed, those unhappy with the results of the 2020 election have continued to capitalize on the damage done to the public's confidence in our democratic institutions.[477]

In Wisconsin and other swing states, Trump-friendly legislators and special interest groups are trying to take control of election administration and further restrict access to the ballot box. For example, in December 2020, a small group of Wisconsin Republicans held a ceremony installing themselves as Wisconsin's electors for Donald Trump.[478] The group sent quasi-legal documents stating that they were "duly elected and qualified Electors" to the president of the U.S. Senate,[479] the National Archives, and the Wisconsin Secretary of State.[480]

At the annual Wisconsin GOP convention in June 2021, Vos appointed former Wisconsin Supreme Court Justice Michael Gableman to conduct a wide-ranging investigation of the 2020 election.[481] The announcement came a day after former President Trump released a statement saying that Vos and other Wisconsin legislatures "are working hard to cover up election corruption in Wisconsin."[482] Vos fired Gableman in August 2022, three days after narrowly surviving a primary challenge from a Trump-endorsed challenger.[483]

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[476] Press Release, Cybersecurity & Infrastructure Security Agency, Joint Statement from Elections Infrastructure Government Coordinating Council & The Election Infrastructure Sector Coordinating Executive Committees (Nov. 12, 2020), https://www.cisa.gov/news/2020/11/12/joint-statement-elections-infrastructure-government-coordinating-council-election [https://perma.cc/6QMY-5E52].

[477] Alex Woodward, *'Evolving And Deepening' Antidemocratic Threats Could Ignite Election Chaos, Officials and Experts Warn*, INDEPENDENT (Aug. 28, 2022), https://www.independent.co.uk/news/world/americas/us-politics/election-fraud-interference-conspiracy-theories-b2154643.html [https://perma.cc/NFM7-WWYC].

[478] Kaufman, *supra* note 460.

[479] The Constitution names the Vice President as President of the Senate. *Officers and Staff*, U.S. SENATE, https://www.senate.gov/about/officers-staff.htm [https://perma.cc/4E9C-F8QF] (last visited Oct. 23, 2024).

[480] *Id*.

[481] Shawn Johnson, *Following Warning By Trump, Vos Announces Former Justice Will Lead Assembly GOP Election Probe*, WIS. PUB. RADIO (June 26, 2021), https://www.wpr.org/following-warning-trump-vos-announces-former-justice-will-lead-assembly-gop-election-probe [https://perma.cc/M4VA-WSKU].

[482] *Id*.

[483] Molly Beck, *Robin Vos Fires Michael Gableman, Ending a 2020 Election Review That's Cost Taxpayers More Than $1 Million and Produced No Evidence of Fraud*, MILWAUKEE J. SENTINEL (Aug. 12, 2022), https://www.jsonline.com/story/news/politics/2022/08/12/robin-vos-fires-michael-gableman-ending-1-million-review-2020-election/10299570002 [https://perma.cc/SLZ8-7NKW].

The investigation, which failed to find evidence of fraud, cost taxpayers over $1 million.[484] Gableman presented two interim reports in which, among other things, he (1) called on lawmakers to "eliminate and dismantle" the WEC, (2) suggested that the legislature could and should decertify the 2020 election, and (3) reiterated disproven claims about turnout among nursing home residents.[485] Gableman also contended that private grants by the Center for Tech and Civic Life allocated to cities to help administer the election amid the pandemic constituted bribery.[486]

Unsurprisingly, much of Gableman's focus was on the voting procedures in Milwaukee County and Dane County, where the supermajority of people of color live.[487] Gableman's March 2022 interim report alleged that the Center for Tech and Civic Life grants "favor[ed] Black and minority voters as opposed to the rest of the residents."[488] "Why did [the funding] focus on African Americans?" Gableman posited in a presentation to Wisconsin lawmakers.[489] "Because . . . Black Americans have a strong preference for the Democratic Party."[490] As discussed above, voter fraud is the latest iteration of the ideology that the "unworthy" should be excluded from the franchise.[491]

The Trump Campaign also targeted Milwaukee and Dane Counties when it asked the Wisconsin Supreme Court to throw out 221,000 ballots in the two counties.[492] The state supreme court was the only one in the country to hold a hearing on the former President's efforts to overturn the election.[493] During oral

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[484] *Id.*

[485] *See* Shawn Johnson, *Gableman Report Calls for Decertifying 2020 Election. The Legislature's Nonpartisan Lawyers Say That's Not Possible*, WIS. PUB. RADIO (Mar. 1, 2022), https://www.wpr.org/gableman-report-calls-decertifying-2020-election-legislatures-nonpartisan-lawyers-say-thats-not [https://perma.cc/8L2V-Z625].

[486] *Id*.

[487] Ellis, *supra* note 220, at 462.

[488] *Second Interim Investigative Report on the Apparatus & Procedures of the Wisconsin Elections System*, WIS. OFFICE OF THE SPECIAL COUNSEL 33, (March 1, 2022), https://docs.google.com/viewer?url=https%3A%2F%2Flegis.wisconsin.gov%2Fassembly%2F22%2Fbrandtjen%2Fmedia%2Fdpale3yd%2Fosc-second-interim-report.pdf&embedded=true&chrome=false&dov=1 [https://perma.cc/Z5CU-UREP].

[489] Johnson, *supra* note 485.

[490] *Id*.

[491] Ellis, *supra* note 218, at 883.

[492] *See* Scott Baur, *Trump Files Lawsuit Challenging Wisconsin Election Results*, ASSOCIATED PRESS (Dec. 1, 2020), https://apnews.com/article/donald-trump-lawsuit-wisconsin-results-6b6f053d548b6be8f3e85e975661fe0d [https://perma.cc/CC4E-MGCG].

[493] Reid J. Epstein, *The Year's Biggest Election: The Battle for a State Supreme Court Seat in Wisconsin*, N.Y. TIMES (Apr. 3, 2023),

arguments, Wisconsin's Supreme Court Justice Jill Karofsky pointed out that Milwaukee and Dane counties were "targeted because of their diverse populations, because they're urban, and I presume because they vote Democratic."[494] Justice Karofsky bluntly addressed Trump's attorney Jim Troupis: "This lawsuit, Mr. Troupis, smacks of racism."[495] "You want us to overturn this election so that your king can stay in power, and that is so un-American,"[496] Justice Karofsky continued. "For you to say that anyone in Wisconsin engaged in fraud, for you to perpetuate that fallacy . . . is nothing short of shameful."[497] Ultimately, the Wisconsin Supreme Court narrowly rejected Trump's challenge by a 4-3 vote.[498]

Milwaukee again became the focus of election litigation in 2022 when the Republican Party of Wisconsin filed lawsuits targeting a privately funded get-out-the-vote effort. In a September 2022 press conference, Milwaukee Mayor Cavalier Johnson voiced his support for "Milwaukee Votes 2022," a privately funded and nonpartisan campaign to boost voter turnout through door-to-door canvassing.[499] Republicans quickly branded the initiative a partisan attempt to influence the election.[500] The Republican Party of Wisconsin sued Mayor Johnson and the elections commission, demanding all communications between city employees and the firm involved in Milwaukee Votes 2022.[501] The Party also filed a

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https://www.nytimes.com/2023/04/03/briefing/wisconsin-supreme-court.html [https://perma.cc/42ND-3TPG].

[494] Will Kenneally, *Federal Court Dismisses Trump Suit as Supreme Court Hears Oral Arguments*, PBS WIS. (Dec. 12, 2020), https://pbswisconsin.org/news-item/federal-court-dismisses-trump-suit-as-supreme-court-hears-oral-arguments [https://perma.cc/P6UE-RNRK].

[495] *Id*.

[496] *Id*.

[497] *Id*.

[498] Trump v. Biden, 394 Wis. 2d 629 (2020), *cert. denied*, 141 S. Ct. 1387 (2021).

[499] Leah Treidler, *Wisconsin Republicans Sue the City of Milwaukee, Demanding Information About Effort to Get Out the Vote*, WIS. PUB. RADIO (Sept. 29, 2022), https://www.wpr.org/wisconsin-republicans-sue-city-milwaukee-demanding-information-about-effort-get-out-vote.

[500] *Rep. Vos: Republicans demand the City of Milwaukee Cease in highly partisan voting activities*, WISPOLITICS (Sept. 13, 2022), https://www.wispolitics.com/2022/rep-vos-republicans-demand-the-city-of-milwaukee-cease-in-highly-partisan-voting-activities [https://perma.cc/594Z-4B8E] ("The City of Milwaukee's promotion and coordination of potentially illegal activities under the guise of canvasing is why Wisconsin voters have lost confidence in our elections. It is inappropriate for any municipality to support a [get-out-the-vote] campaign.").

[501] *See* Nat'l Republican Senatorial Comm. v. Office of the Mayor of Milwaukee, (No. 22-CV-6136) (Milw.Cnty. filed Oct. 12, 2022), https://wcca.wicourts.gov/caseDetail.html?caseNo=2022CV006136&countyNo=40&index=0 [https://perma.cc/3ZKB-8W7X].

lawsuit to stop the city from continuing the get-out-the-vote entirely.[502] Both cases were ultimately dismissed.[503]

During the 2022 midterms, Wisconsin Republicans were again "on the cutting edge of attacking free and fair elections."[504] Until this point, Democratic Governor Tony Evers had blocked bills from the Wisconsin Legislature that would wrest control of election administration away from the Wisconsin Elections Commission.[505] Evers's opponent, Tim Michels, had openly questioned the 2020 results and refused to say whether he would certify presidential election results as governor should a Democrat win the state in a national election.[506] Days before the election, Michels promised that "Republicans will never lose another election in Wisconsin after I'm elected governor."[507] Even if Michels didn't win, Republicans could "make Tony Evers irrelevant" by picking up just one more Senate seat and five in the Assembly to get a two-thirds supermajority.[508]

Neither of these scenarios happened, as Evers was reelected and Republicans fell short of a supermajority.[509] However, the efforts to subvert democracy did not end there, as the outcome of the 2023 Wisconsin Supreme Court election would decide the court's

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[502] *See* Elizabeth L. Burke v. The City of Milwaukee (No. 22-CV-6195) (Milw.Cnty. filed Sep. 28, 2022), https://wcca.wicourts.gov/caseDetail.html?caseNo=2022CV006195&countyNo=40&index=0 [https://perma.cc/QZ83-GE3D].

[503] *See* Alison Dirr, *Judge denies Republican Party Request to Stop 'Milwaukee Votes 2022'*, MILWAUKEE J. SENTINEL (Oct. 22, 2022, 8:48 PM), https://www.jsonline.com/story/news/politics/2022/10/22/judge-denies-republican-party-request-in-gotv-lawsuit-against-milwaukee/69582878007 [https://perma.cc/3BJA-48LL].

[504] Ari Berman, *How Democracy Nearly Died in Wisconsin*, MOTHER JONES (Jan./Feb. 2023), https://www.motherjones.com/politics/2022/12/how-democracy-nearly-died-in-wisconsin-republican-gerrymandering-evers [https://perma.cc/WU6W-YLW2].

[505] Nicholas Riccardi, *Conspiracists Seeking Key State Election Posts Falling Short*, ASSOCIATED PRESS (Nov. 9, 2022, 3:25 AM), https://apnews.com/article/2022-midterm-elections-secretaries-of-state-beae4afab87b010cce72f6e2922fe673 [https://perma.cc/6MVD-QZ72].

[506] Ryan Teague Beckwith, *Election-Denial Fight Spreads to Wisconsin With Trump Ally's Win*, BLOOMBERG (Aug. 10, 2022), https://www.bloomberg.com/news/articles/2022-08-10/election-denial-fight-spreads-to-wisconsin-with-trump-ally-s-win [https://perma.cc/VVW2-7JJA].

[507] Hann Getahun, *Trump-Backed Wisconsin GOP Candidate and 2020 Election Denier Claims Republicans Will 'Never Lose Another Election' In The State if He Gets Voted Into Office*, BUSINESS INSIDER (Nov. 1, 2022, 9:17 PM), https://www.businessinsider.com/republicans-will-never-lose-wisconsin-tim-michels-tony-evers2022-11 [https://perma.cc/PFP4-NUG8].

[508] Berman, *supra* note 504.

[509] Corrinne Hess, *Wisconsin Republicans Do Not Secure a Supermajority*, MILWAUKEE J. SENTINEL (Nov. 9, 2022, 11:26 AM), https://www.jsonline.com/story/news/politics/2022/11/09/wisconsin-gop-fails-in-bid-to-win-supermajority-in-legislature/69610622007 [https://perma.cc/HNF7-UQ3D].

ideological balance. The contest was labeled the most critical election of 2023[510] and became the most expensive judicial race in United States history.[511] The election pitted progressive Milwaukee County Circuit Court Judge Janet Protasiewicz against former Wisconsin Supreme Court Justice Daniel Kelly. Notably, following the 2020 elections, the state Republican Party and the Republican National Committee paid Kelly $120,000 to advise on "election integrity issues."[512] In a deposition before the January 6 committee, Wisconsin GOP chairman Andrew Hitt said he had "pretty extensive conversations" with Kelly about the fake electors scheme.[513] During the only debate between the candidates, Protasiewicz called Kelly "a true threat to our democracy."[514]

Ultimately, Daniel Kelly lost the election to Janet Protasiewicz, marking a significant victory for progressives and another clear rejection by voters of the attempts to undermine democracy in Wisconsin.[515] This loss, however, did not deter Wisconsin Republicans from pursuing their agenda. In an unprecedented move, they initiated a campaign to impeach Judge Protasiewicz, a strategy set in motion even before the election results were announced.[516] This maneuver was seen by many as a

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[510] *See* Sam Levine, *'Stakes are Monstrous': Wisconsin Judicial Race is 2023's Key Election*, THE GUARDIAN (Feb. 13, 2023, 6:00 AM), https://www.theguardian.com/us-news/2023/feb/13/wisconsin-supreme-court-election-gerrymandered-democracy [https://perma.cc/T6LS-NKYJ]; Michelle Goldberg, *Opinion: This Election Could Be the Beginning of the End of Scott Walker's Legacy in Wisconsin*, N.Y. TIMES (Mar. 30, 2023), https://www.nytimes.com/2023/03/30/opinion/wisconsin-supreme-court-election.html?smid=nytcore-ios-share&referringSource=articleShare [https://perma.cc/AN2S-H64F].

[511] Inci Sayki, *Wisconsin Supreme Court Race was The Most Expensive State Judicial Election in U.S. History*, OPENSECRETS (Apr. 10, 2023, 5:54 PM), https://www.opensecrets.org/news/2023/04/wisconsin-supreme-court-race-was-the-most-expensive-state-judicial-election-in-u-s-history [https://perma.cc/EP6P-EPAE].

[512] Daniel Bice, *Supreme Court Candidate Daniel Kelly was Paid $120,000 by Republicans to Work on 'Election Integrity,' Advise on Fake Electors*, MILWAUKEE J. SENTINEL (Feb. 17, 2023, 2:03 PM), https://www.jsonline.com/story/news/politics/elections/2023/02/17/wisconsin-supreme-court-candidate-dan-kelly-was-paid-120000-by-gop/69912903007 [https://perma.cc/6ABV-32F6].

[513] *Id*.

[514] Shawn Johnson, *Dan Kelly, Janet Protasiewicz Get Personal in Debate for Wisconsin's Hotly-Contested Supreme Court Seat*, WIS. PUB. RADIO (Mar. 21, 2023), https://www.wpr.org/justice/dan-kelly-janet-protasiewicz-debate-wisconsin-supreme-court-seat [https://perma.cc/Y2WQ-SWN9].

[515] *See* Zach Schultz, *2023 Wisconsin Supreme Court Race Results in a New Majority*, PBS WIS. (Apr. 7, 2023), https://pbswisconsin.org/news-item/2023-wisconsin-supreme-court-race-results-in-a-new-majority [https://perma.cc/XKQ2-LKXM].

[516] Mary Harris, *The State Where Republicans Are Breaking Their Own Rules to Stay in Power*, SLATE (Sept. 21, 2023, 3:40 PM), https://slate.com/news-and-

clear attempt to undermine the electoral process and to retain control over the state's judicial system, regardless of the voters' decision.[517] The campaign to impeach Protasiewicz underscores the lengths Wisconsin Republicans are willing to go to challenge the outcome of a fair election.

### *D. Courts Undermining Democratic Norms in Wisconsin*

Democracy in the United States is grounded upon the checks and balances provided by the federalist structure and three branches of government.[518] This balance makes democracy possible and protects against any one or two branches of government obtaining undue power of control. Fundamental to the system of checks and balances is the role of the judiciary. State constitutions and the courts that enforce them provide critical protections that restrict governmental bodies—including state legislatures—from engaging in racial exclusion and oppression.[519] To quote John Adams:

> [t]he dignity and stability of government in all its branches, the morals of the people, and every blessing of society depend so much upon an upright and skillful administration of justice, that the judicial power ought to be distinct from both the legislative and executive, and independent upon both, that so it may be a check upon both, as both should be checks upon that.[520]

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politics/2023/09/wisconsin-republicans-janet-protasiewicz-supreme-court-gerrymandering-impeachment-democracy.html [https://perma.cc/RF33-RP89].

[517] *See id.*; Jamelle Bouie, *A Breathtaking Contempt for the People of Wisconsin*, N.Y. TIMES (Sept. 8, 2023), https://www.nytimes.com/2023/09/08/opinion/wisconsin-judge-impeachment-democracy.html [https://perma.cc/92EA-625H]; John Nichols, *The Wisconsin GOP's New Attack on Democracy Is Obscene Even for Them*, THE NATION (Sept. 8, 2023), https://www.thenation.com/article/politics/wisconsin-gop-supreme-court-impeachment [https://perma.cc/VF48-FH4Y].

[518] *See* Marbury v. Madison, 5 U.S. 137 (1803); Bayard v. Singleton, 1 N.C. 5 (N.C. Super. 1787).

[519] Brief for Boston University Center for Antiracist Research and Professor Atiba R. Ellis as Amici Curiae Supporting Respondents, Moore v. Harper, 600 U.S. 1 (2023) (No. 21–1271).

[520] John Adams, Thoughts on Government (Apr. 1776), *available at* https://founders.archives.gov/documents/Adams/06-04-02-0026-0004 [https://perma.cc/3Y7T-4CTW].

Because judicial independence is essential to preserving liberty, capturing the judiciary is a common strategy employed by anti-democratic actors.[521] In Wisconsin, courts have been crucial allies for those seeking to undermine anti-democratic norms, particularly regarding elections.

### 1. The April 2020 Primaries

Take, for example, the 2020 primary elections. Wisconsin was scheduled to hold elections on April 1, 2020—just three weeks after the Trump administration declared COVID-19 a public health emergency. "In the weeks leading up the election, the extent of the risk of holding that election . . . became increasingly clear."[522] Unfortunately, the state legislature and the courts forced voters to choose between exercising the franchise and risking their lives and health.[523]

On April 3, 2020, Wisconsin Governor Tony Evers called a special session of the state legislature to vote on a plan to postpone the election and convert entirely to mail-in voting.[524] However, during the special legislative session, Republicans refused to act, gaveling in and out within seconds.[525] Finally, on April 6, Governor Evers invoked his emergency powers and issued an executive order to postpone the election.[526] At the same time, Democrats and their allies filed a lawsuit in federal district court to delay the election and extend the deadline for casting and returning absentee ballots. The district court refused to postpone the election but granted emergency

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[521] DIAMOND, *supra* note 404, at 64–65.

[522] Democratic Nat'l Comm. v. Bostelmann, 451 F. Supp. 3d 952, 957 (W.D. Wis. 2020).

[523] Sherrilyn Ifill, *Never Forget Wisconsin*, SLATE (Apr. 8, 2020, 6:46 PM), https://slate.com/news-and-politics/2020/04/never-forget-wisconsin.html [https://perma.cc/M2NF-ED82].

[524] John Whitesides, *Wisconsin Governor Asks Legislature to Delay Tuesday's Primary, Make All Voting by Mail*, REUTERS (Apr. 3, 2020), https://www.reuters.com/article/health-coronavirus-election-wisconsin/wisconsin-governor-asks-legislature-to-delay-tuesdays-primary-make-all-voting-by-mail-idUSL1N2BR1RI [https://perma.cc/6TZZ-88AD].

[525] Bill Glauber & Patrick Marley, *In Matter of Seconds, Republicans Stall Gov. Tony Evers' Move to Postpone Tuesday Election*, MILWAUKEE J. SENTINEL (Apr. 4, 2020, 3:30 PM), https://www.jsonline.com/story/news/2020/04/04/wisconsin-legislature-adjourns-special-session-monday-voting-track-tuesday-election/2948444001 [https://perma.cc/MM2T-T69W].

[526] Office of Governor Tony Evers, Exec. Order No. 74 (Apr. 6, 2020), https://evers.wi.gov/Documents/COVID19/EO074-SuspendingInPersonVotingAndSpecialSession2.pdf [https://perma.cc/D5DS-ZZBN].

relief, giving voters six additional days to return their absentee ballots.[527]

However, on the eve of the election, the Wisconsin Supreme Court invalidated the Governor's order.[528] The same day, in a per curium opinion, the United States Supreme Court reversed the district court's order requiring ballots cast after election day to be counted.[529] The Court held that "[e]xtending the date by which ballots may be cast by voters—not just received by the municipal clerks but cast by voters—for an additional six days after the scheduled election day fundamentally alters the nature of the election."[530]

Wisconsin election administrators struggled with the massive influx of absentee ballot requests.[531] Thousands of Wisconsinites who requested absentee ballots did not receive their vote before Election Day.[532] As a result, many voters were forced to "brave the polls, endangering their own and others' safety. Or they [would have] los[t] their right to vote, through no fault of their own."[533] Due to a massive shortage of poll workers and the reduction of polling places, voters stood in line for hours to vote.[534] In Milwaukee—home to sixty percent of Wisconsin's African American voters and thirty percent of the state's Hispanic voters—polling locations were reduced from 180 to just five.[535] Images of masked voters waiting in line to exercise their vote became a symbol of American failure.

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[527] Bostelmann, 451 F. Supp. 3d at 959.

[528] Natasha Korecki & Zach Montellaro, *Wisconsin Supreme Court Overturns Governor, Orders Tuesday Elections to Proceed*, POLITICO (Apr. 6, 2020, 1:51 PM), https://www.politico.com/news/2020/04/06/wisconsin-governor-orders-stop-to-in-person-voting-on-eve-of-election-168527 [https://perma.cc/LEN4-AFAR].

[529] Republican Nat'l Comm. v. Democratic Nat'l Comm., 589 U.S. 423 (2020) (per curiam).

[530] *Id*. at 1207.

[531] *See* Joaquin Garcia, Zahavah Levine, Bea Phi, Peter Prindiville, Jeff Rodriguez, Lexi Rubow & Grace Scullion, *Wisconsin's 2020 Primary in the Wake of the Coronavirus*, HEALTHY ELECTIONS PROJECT (Aug. 10, 2020, 11:06 AM), https://www.lawfareblog.com/wisconsins-2020-primary-wake-coronavirus [https://perma.cc/QM3W-YTV5].

[532] *Id.*

[533] *Republican Nat'l Comm.*, 589 U.S. at 432.

[534] Shruti Banerjee & Dr. Megan Gall, *COVID-19 Silenced Voters of Color in Wisconsin*, THE LEADERSHIP CONF. ON CIV. & HUM. RTS. (May 14, 2020), https://civilrights.org/blog/covid-19-silenced-voters-of-color-in-wisconsin [https://perma.cc/7V53-53PG].

[535] *Id.*

Since the founding, Black Americans who insisted on exercising their right to vote have often faced violence and death.[536] In the April 2020 election in Wisconsin, voting once again became a choice of life or death for African Americans.[537] Sherrilyn Ifill, president of the NAACP Legal Defense and Educational Fund, wrote that Wisconsin's election was conducted "[w]ith full knowledge that black voters would be disproportionately imperiled or disenfranchised . . . [and was] designed to compel those voters to make an unconscionable choice between their lives and their citizenship."[538] Unfortunately, the judiciary's failure to intervene again led to the voting rights of people of color being undermined.[539]

### 2. *Luft v. Evers* Upholds Voter ID

Two federal district court decisions, *Frank v. Walker*[540] and *One Wisconsin Institute v. Thomsen*,[541] challenged more than a dozen of the changes Act 23 made to Wisconsin's election laws, including its strict voter ID law. After a three-year delay, the Seventh Circuit rejected most of the challenges to Wisconsin election law in *Luft v. Evers*.[542] The opinion, authored by Judge Frank Easterbrook, breezily dismisses the district courts' clear findings that parts of Act 23 were discriminatory.

The Seventh Circuit's decision stands out for its superficial treatment of voting rights issues. The court determined that the laws were not discriminatory despite an extensive factual record demonstrating how the restrictions disproportionately impacted minority voters.[543] According to the court, the laws were enacted because of politics, not race, and the fact that minority voters are more likely to prefer Democratic candidates is irrelevant.[544]

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[536] *See* Jocelyn Y. Stewart, *People Died So I Could Vote*, TIME (Sept. 23, 2014, 4:45 PM), https://time.com/3423102/people-died-so-i-could-vote [https://perma.cc/V263-7JBD].
[537] *See* Mary Harris, *Why the Coronavirus is Hitting Black Americans Hardest*, SLATE (Apr. 8, 2020, 4:33 PM), https://slate.com/technology/2020/04/coronavirus-covid19-black-americans-impact.html [https://perma.cc/H3RD-7FHM].
[538] Ifill, *supra* note 523.
[539] *See* Ellis, *supra* note 57, at 1563, n.44 (2021) ("[T]he history of discrimination against racial minorities in voting and elections is one of 'democratic domination.'" (quoting DERRICK BELL, RACE, RACISM, AND AMERICAN LAW § 6.1, at 341 (6th ed. 2008))).
[540] 17 F. Supp. 3d 837 (E.D. Wis. 2014).
[541] 198 F. Supp. 3d 896 (W.D. Wis. 2016).
[542] 963 F.3d 665 (7th Cir. 2020).
[543] *Id.* at 647.
[544] *Id*. at 671.

Judge Easterbrook began the decision with the assertion that "[c]hange is constant in Wisconsin's rules for holding elections."[545] Then, he proceeded to gloss over the factual findings of the district courts. Judge Easterbrook dismissed the lower courts' findings that some of the provisions in Wisconsin's voting laws were passed with racial and partisan animus.[546] Disregarding the factual record, Judge Easterbrook concluded that these provisions were simply enacted for political reasons.[547] He stated that "[i]f one party can make changes that it believes help its candidates, the other can restore the original rules or revise the new ones. The process does not include a constitutional rachet."[548] According to Judge Easterbrook, *Rucho v. Common Cause* rejected the belief that a legislature cannot consider politics when making decisions affecting voting.[549] However, *Rucho* applied to redistricting, not voting rules.[550] Furthermore, in *Rucho*, there was no finding of racial discrimination by the district court.[551]

While Easterbrook acknowledged that "race and politics are correlated: black voters are likely to prefer Democratic candidates[,]" he ignored the lower courts' extensive records demonstrating the discriminatory effects of the provisions.[552] Instead, he simply concluded that "the record does not show that the legislatures made any of the changes because Democratic voters are more likely to be black (or because black voters are more likely to support Democrats). The changes were made because of politics."[553]

### 3. *Johnson v. WEC* Upholds Partisan Gerrymander

During the post-2020 redistricting cycle, pursuing an aggressive gerrymander no longer furthered the interests of Wisconsin Republicans. Instead, they "extolled the virtues of continuity as they sought to perpetuate their advantage."[554] To that end, the GOP-controlled Wisconsin Legislature passed maps using a "least changes" approach (i.e., retain as much as possible of the previous maps while adjusting for population).[555] However, Governor Tony Evers vetoed these maps, which meant that the

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[545] *Id*. at 668.
[546] *See id*. at 670–72.
[547] *Id*. at 671.
[548] *Id*. at 670.
[549] *Id*.
[550] *See* Rucho v. Common Cause, 588 U.S. 684, 689 (2019).
[551] *See generally id.*
[552] *Luft*, 963 F.3d at 671.
[553] *Id*.
[554] Robert Yablon, *Gerrylaundering*, 97 N.Y.U. L. REV. 985, 992 n.31 (2022).
[555] Gilbert, *supra* note 423.

judiciary would decide Wisconsin's legislative and congressional districts.[556]

The Wisconsin Supreme Court ultimately chose to adopt the maps enacted by the Wisconsin Legislature in *Johnson v. Wisconsin Elections Commission*.[557] The GOP-drawn map reduced the number of majority-Black districts from six to five.[558] In a previous decision, the Wisconsin Supreme Court selected the maps proposed by Governor Evers, adding a seventh majority-Black district.[559] However, in an unprecedented move, the United States Supreme Court intervened. In a per curium opinion, the Court summarily reversed the selection of Evers's maps.[560] The Court claimed that the Wisconsin Supreme Court had failed to address "whether a race-neutral alternative that did not add a seventh majority-black district would deny black voters equal political opportunity."[561] In a dissenting opinion, Justice Sonia Sotomayor called the decision "not only extraordinary but also unnecessary," unnecessarily complicating the issue by interfering with processes that should have been allowed to play out at the state level.[562]

Justice Brian Hagedorn joined the rest of the court's conservatives in choosing the redistricting plan drawn by GOP lawmakers. Justice Hagedorn previously sided with the court's liberals to select the maps drawn by Governor Evers. However, according to Justice Hagedorn, the Wisconsin Supreme Court's options for choosing a new map were limited given the Supreme Court's directive:

> [w]e could construct one ourselves or with the assistance of an expert, but time and our institutional limitations make that unrealistic at this juncture. The remaining option is to choose one of the proposed maps we received as the baseline. Only one proposal was represented as race-neutral in its construction: the maps submitted by

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[556] *Id*.
[557] 401 Wis. 2d 198 (Wis. 2022).
[558] Amy Howe, *Justices Reverse Wisconsin Court Ruling That Increased Majority-Black Districts in State Legislature*, SCOTUSBLOG (Mar. 23, 2022, 9:34 PM), https://www.scotusblog.com/2022/03/justices-reverse-wisconsin-court-ruling-that-increased-majority-black-districts-in-state-legislature [https://perma.cc/44DB-C9SQ].
[559] Johnson v. Wis. Elections Comm'n, 400 Wis. 2d 626, 659–60 (Wis. 2022) *overruled by* Clarke v. Wis. Elections Comm'n, 410 Wis. 2d 1 (Wis. 2023).
[560] Wis. Legislature v. Wis. Election Comm'n, 595 U.S. 398, 401 (2022).
[561] *Id*. at 406.
[562] *Id*. at 410 (Sotomayor, J., dissenting).

> the Legislature. . . . Therefore, as I understand our charge, the United States Supreme Court asks us to start with a baseline race-neutral map—the Legislature's proposal constituting our only feasible option. Then we must determine whether that map contains a VRA violation. If a violation exists, a race-conscious remedy may be crafted. If no violation is established, race-conscious alterations to district lines are impermissible. As the majority explains, the record, such as it is, does not sufficiently support the conclusion that the Legislature's maps violate the VRA. Perhaps a court deciding a VRA challenge on a more complete record would reach a different result. But I cannot conclude a violation is established based on the record we have before us. That means that in light of the Supreme Court's clarified instructions, the Legislature's state senate and state assembly maps are the only legally compliant maps we received.[563]

In her concurring opinion, Justice Rebecca Grassl Bradley made it clear that the siren song of colorblindness is her preferred harmony. In Justice Bradley's assessment: "[the] redistricting cycle proceeded in a manner heavily focused on color, supposedly for remedial purposes, but accomplishing nothing but racial animosity as showcased by the dissent's race-baiting rhetoric and condescension toward people of color."[564] Governor Evers's maps, she wrote, violate[d] the "constitutional command of color-blindness" because they "insidiously sort[ed] people into districts based on the color of their skin."[565]

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[563] *Johnson*, 401 Wis. 2d at 303 (Hagedorn, J., concurring).
[564] *Id*. at 254 (Bradley, J., concurring).
[565] *Id*. at 254, 299; *see also In re* Diversity, Equity, Inclusion, and Access Training for Continuing Legal Education, No. 22-01 (Wis. 2023), https://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=679679 [https://perma.cc/VLJ7-VGFE]. Justice Bradley's reverence for Harlan-esque colorblindness was also showcased when the Wisconsin Supreme Court denied a Wisconsin State Bar petition to create a new continuing education credit

Justice Bradley's Harlan-esque "colorblind constitution" presents as nominally egalitarian but is effectively race-ignorant. Proponents of this view argue that discrimination, for the most part, no longer exists. Thus, they contend any consideration of race, regardless of intention or outcome, is inherently insidious.[566] However, as Justice Karofsky astutely points out in her dissent, by favoring neutrality of substantive equality, colorblind constitutionalism disregards the historical and ongoing realities of race:

> [t]his argument is nothing short of gaslighting, seemingly denying Milwaukee's history of purposeful racial segregation. It was unrelenting overt racial discrimination that balkanized Milwaukee into "competing racial factions" and reduced Black individuals to a "product of their race." The fault and responsibility to remedy this systemic segregation lies not with Milwaukee's residents but instead with the government and the society that perpetuated racial redlining and restrictive covenants. Those practices shaped Milwaukee and that history of discrimination cannot be undone by force of will alone.[567]

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for attorneys focusing on diversity, equity and inclusion (DEIA). In a concurring opinion to the order, Justice Bradley criticized the State Bar for "virtue signaling" and argued that the group's efforts were an attempt to create "a goose-stepping brigade of attorneys." *Id*. at 29, 30 (Bradley, J., concurring). Furthermore, Justice Bradley seized the opportunity to criticize the Black Lives Matter movement, mentioning the "cancel culture crowd," and asserting that DEIA advocates intend to foster racial divisions. *Id*. at 29.

[566] *Johnson*, 401 Wis. 2d at 313 (Karofsky, J., dissenting).

[567] *Id.* Contemporaneous evidence would suggest that it is not only Wisconsin's state representation maps that are caught in a retrograde colorblindness that distorts minority representation. Contemporaneous with the Johnson litigation, the City of Milwaukee considered adopting an aldermanic map to provide Latino residents representation commensurate with the population's significant growth over the previous decade. The proposed map was ultimately rejected; however, after the City Attorney's Office had advised that the map would be unenforceable because race was the predominant factor in creating and drawing the districts. *See* Vanessa Swales *Latino Advocates Call on the Milwaukee Common Council to Pause Redistricting, Following Concerns About the City Attorney's Counsel*, MILWAUKEE J. SENTINEL (Jan. 15, 2022, 10:00 AM), https://www.jsonline.com/story/news/2022/01/15/latino-groups-urge-common-council-halt-redistricting-decision/6527329001 [https://perma.cc/YN6G-9D5V].

Justice Karofsky also emphasized the disparity between the ideal of living in a country where race is no longer relevant and the current reality:

> [i]f this country were anywhere close to living up to the 'goal of a political system in which race no longer matters,' then maybe we could apply the promise of Equal Protection in a race-blind manner. But the overwhelming evidence shows that we have not lived up to that goal.[568]

In *Clarke v. Wisconsin Elections Commission*, the newly liberal 4-3 majority of the Wisconsin Supreme Court overturned *Johnson's* "least change approach" to redistricting, holding that the legislative maps violated the state constitution's requirement that districts must be contiguous.[569] While the decision is certainly a victory for fair representation, it also underscores the precarious nature of voting rights, as the value of one's votes can change depending on which political party holds power. An ideological shift with the 2025 election may undue this progress.

4. *Teigen v. WEC* Prohibits Use of Most Ballot Drop Boxes

In 2020, interest in absentee voting spiked as the COVID-19 pandemic overwhelmed election officials and deterred voters from polling places.[570] The Wisconsin Elections Commission issued guidance allowing local clerks to set up drop boxes where voters could deposit their ballots until the polls close.[571] The WEC specified that "clerks should ensure [drop boxes] are secure, can be monitored for security purposes, and should be regularly emptied."[572] Additionally, the WEC stipulated that "a family member or another person may also return the ballot on behalf of the voter."[573] This innovation allowed voters to cast their ballots

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[568] *Id.* at 313–14.
[569] Clarke v. Wis. Elections Comm'n, 410 Wis. 2d 1, 29–30 (2023).
[570] *See generally* Jesse Yoder et al., *How Did Absentee Voting Affect the 2020 U.S. Election*, 7 SCI. ADVANCES 1 (2021).
[571] Memo from Megan Wolfe, Administrator, Wisconsin Elections Commission, to Wisconsin Municipal Clerks, City of Milwaukee Election Commission, Wisconsin County Clerks & Milwaukee County Election Commission, *Absentee Ballot Return Options: USPS Coordination and Drop Boxes* (Mar. 31, 2020), https://www.democracydocket.com/wp-content/uploads/2022/07/WEC-March-2020-Memo-Absentee-ballot-return-options.pdf [https://perma.cc/5L5P-ATC4].
[572] *Id*. at 1.
[573] *Id*.

without worrying about becoming sick or that their mail-in ballots would arrive too late to be counted.

Once again, this guidance was met with no opposition when issued. Indeed, Justices Kavanaugh and Gorsuch cited ballot drop boxes as evidence that voting was easy in Wisconsin.[574] However, in 2021, the Wisconsin Institute for Law and Liberty filed a lawsuit alleging that drop boxes are not permitted under Wisconsin law unless they were staffed by the municipal clerk and located at the clerk's office or other designated site.[575] The Wisconsin Supreme Court ultimately agreed, holding in *Teigen v. Wisconsin Elections Commission* that the use of ballot drop boxes in most circumstances is illegal under state law.[576] The majority opinion, authored by Justice Rebecca Grassl Bradley, contains troubling language casting doubt on the legitimacy of Joe Biden's 2020 victory and disregards the statute's plain language.[577] As a consequence, many residents are left without a feasible option for casting their ballots.

Importantly, *Teigen* did not involve allegations that ballot drop boxes were used to rig the 2020 election and there was "no evidence at all in [the] record that the use of drop boxes fosters voter fraud of any kind."[578] Nevertheless, Justice Bradley uses the majority opinion to cast doubt on the legitimacy of the 2020 election's results:

> The record indicates hundreds of ballot drop boxes have been set up in past elections, prompted by the memos, and thousands of votes have been cast via this unlawful method, thereby directly harming the Wisconsin voters. The illegality of these drop boxes weakens the people's faith that the election

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[574] *See* Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 36 (2020) (Kavanaugh, J., concurring) ("Returning an absentee ballot in Wisconsin is . . . easy."); *id*. at 29 (Gorsuch, J., concurring) ("Never mind that voters may return their ballots not only by mail but also by bringing them to a county clerk's office, or various 'no touch' drop boxes staged locally, or certain polling places on election day.").

[575] Teigen v. Wis. Elections Comm'n, 403 Wis. 2d 607, 617 (Wis. 2022), *overruled in part by* Priorities USA v. Wis. Elections Comm'n, 412 Wis. 2d 594 (2024).

[576] *Id*. at 618.

[577] *Id*. at 628.

[578] *Id*. at 738 (Ann Walsh Bradley, J., dissenting); *see also* Trump v. Biden, 394 Wis. 2d 629, 658 (2020) (Hagedorn, J., concurring) ("At the end of the day, nothing in this case casts any legitimate doubt that the people of Wisconsin lawfully chose Vice President Biden and Senator Harris to be the next leaders of our great country.").

> produced an outcome reflective of their will. The Wisconsin voters, and all lawful voters, are injured when the institution charged with administering Wisconsin elections does not follow the law, leaving the results in question.[579]

Even though the electoral results have been repeatedly confirmed to be accurate,[580] Justice Bradley goes out of her way to suggest that the election was fraudulent. "If elections are conducted outside of the law," Justice Bradley argues, "the people have not conferred their consent on the government. Such elections are unlawful and their results are illegitimate."[581] This rhetoric is especially troubling when placed in the context of the "Big Lie."[582]

Predictably, former President Trump and his allies celebrated the Wisconsin Supreme Court's ruling, arguing that it proved that the election was rigged against Trump.[583] On his social media platform, Truth Social, the former President wrote:

> Other States are looking at, and studying, the amazing Wisconsin Supreme Court decision declaring Ballot Boxes ILLEGAL, and that decision includes the 2020 Presidential Election. . . . Speaker Robin Vos has a decision to make! Does Wisconsin RECLAIM the

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[579] *Id*. at 628.

[580] *See Completed Wisconsin Recount Confirms Biden's Win Over Trump*, ASSOCIATED PRESS (Nov. 30, 2020, 12:49 PM), https://apnews.com/article/election-2020-joe-biden-donald-trump-madison-wisconsin-7aef88488e4a801545a13cf4319591b0 [https://perma.cc/FUM8-DKKM]; Scott Bauer, *Wisconsin Audit Finds Elections are 'Safe and Secure'*, ASSOCIATED PRESS (Oct. 22, 2021, 7:44 PM), https://apnews.com/article/joe-biden-wisconsin-presidential-elections-state-elections-madison-9a2f172dd8074668ded26bd5b0b41fbb [https://perma.cc/Z5YP-ABEL].

[581] *Teigen*, 403 Wis. 2d at 627.

[582] Anne Tindall, *What is the Big Lie?*, PROJECT DEMOCRACY (Aug. 15, 2023), https://protectdemocracy.org/work/what-is-the-big-lie [https://perma.cc/W4PP-38YT].

[583] *See* Timothy Bella & Patrick Marley, *Trump Called 'Within the Last Week' to Overturn Wis. Election, Speaker Says*, WASH. POST (July 20, 2022, 10:27 AM), https://www.washingtonpost.com/national-security/2022/07/20/trump-election-wisconsin-vos-overturn [https://perma.cc/RS79-XUHP]; Patrick Marley, *Wisconsin Assembly Elections Panel Chair Calls for Voiding 2020 Results*, WASH. POST (July 22, 2022, 1:55 PM), https://www.washingtonpost.com/politics/2022/07/22/wisconsin-2020-results [https://perma.cc/4WRG-8VYV].

> Electors, turn over the Election to the actual winner (by a lot!), or sit back and do nothing as our Country continues to go to HELL? Brave American Patriots already have a Resolution on the Floor![584]

The majority's suggestion that the 2020 election, conducted with drop boxes pursuant to the WEC's guidance, yielded fraudulent results "fans the flames of electoral doubt that threaten our democracy."[585]

According to the majority, ballot boxes are illegal because ballots must be delivered "to the municipal clerk," "which means mailing or delivering the absentee ballot to the municipal clerk at her office or, if designated under Wis. Stat. [Section] 6.855, an alternate site."[586] Since, "an inanimate object, such as a ballot drop box, cannot be the municipal clerk,"[587] and since ballot boxes are not designated alternate ballot sites, ballots deposited in drop boxes violate Wisconsin law.[588] However, as the dissent correctly points out, the majority conflates "municipal clerk" with "office of the municipal clerk."[589] Indeed, numerous statutes explicitly mention the office of the municipal clerk but not the one at issue.[590] The law only requires delivery to the municipal clerk, and delivery to a ballot drop box satisfies this requirement because a "drop box is set up by the municipal clerk, maintained by the municipal clerk, and emptied by the municipal clerk."[591]

In *Teigen*, the Wisconsin Supreme Court "eliminated a commonsense voting tool using warped legal reasoning to satisfy the calls of a failed former president."[592] This decision will not only impact marginalized racial groups, but also the disabled community. This impact is made worse for disabled people of color. Indeed, research shows that disabilities are more prevalent, and their impact

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[584] Molly Beck, *Trump Wants Wisconsin Ballot Drop Box Ruling to Apply to Past Elections. It Doesn't Work That Way*, MILWAUKEE J. SENTINEL (July 14, 2022, 11:33 AM), https://www.jsonline.com/story/news/politics/elections/2022/07/13/trump-uses-wisconsin-court-ruling-drop-boxes-stoke-bogus-claims/10028990002 [https://perma.cc/E9LA-QL6K].

[585] *Teigen,* 403 Wis. 2d at 577 *(*Ann Walsh Bradley, J. dissenting*)*.

[586] *Id*. at 650.

[587] *Id*. at 647.

[588] *Id*. at 647–49.

[589] *Id*. at 730–31 (Ann Walsh Bradley, J., dissenting).

[590] *Id*.

[591] *Id*. at 731 (Ann Walsh Bradley, J., dissenting).

[592] Caroline Sullivan, *Debunking the Wisconsin Supreme Court's Drop Box Opinion*, DEMOCRACY DOCKET (July 21, 2022), https://www.democracydocket.com/analysis/debunking-the-wisconsin-supreme-courts-drop-box-opinion [https://perma.cc/4YUG-HRY6].

is more severe among people of color. [593] For these voters with disabilities, returning a ballot "in person" can be a practical impossibility.[594] Furthermore, Census Bureau Data shows that renter-occupied areas, which are more likely to be occupied by people of color, have fewer polling locations than home-owner-occupied areas.[595] An analysis by the Brennan Center found that African-American and Latino voters are more likely than white voters to have exceptionally long wait times at the polls.[596] This link between race and disability and lack of access to the ballot box further displays the need for drop boxes and other alternatives to election day voting.

Like with *Johnson*, the new Wisconsin Supreme Court liberal majority reversed *Teigen* in 2023 and held that under Wisconsin law, "clerks may lawfully utilize secure drop boxes in an exercise of their statutorily-conferred discretion."[597] But this change may be time-bound. Misinformation about drop boxes remains pervasive, and many communities have banned their use.[598] As a result, Wisconsin will have only a fraction of the drop boxes available in 2024 compared to the 2020 election.[599]

## CONCLUSION

The history of voting rights in America underscores the nation's enduring struggle between the ideals of democratic equality and the harsh realities of exclusionary practices. The Wisconsin experience offers a stark example of the modern reality of voter

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[593] *See* Jennifer Pokempner & Dorothy E. Robers, *Poverty, Welfare Reform, and the Meaning of Disability*, 62 OHIO ST. L.J. 425 (2001).

[594] Intervenor-Defendants Disability Rights Wisconsin, Wisconsin Faith Voices for Justice, and League of Women Voters of Wisconsin's Response to Plaintiffs' Motion for Summary Judgement at 15, Teigen v. Wis. Elections Comm'n, 2021 WL 11147297 (Wis.Cir. 2021) (No. 21-CV-958).

[595] Philip Bump, *Increasing Turnout Isn't 'Rigging' Elections. It May be Unrigging Them*, WASH. POST (July 13, 2022, 2:12 PM), https://www.washingtonpost.com/politics/2022/07/13/increasing-turnout-isnt-rigging-elections-it-may-be-unrigging-them [https://perma.cc/TV5U-LNFV].

[596] Hannah Klain et al., *Waiting to Vote: Racial Disparities in Election Day Experiences*, BRENNAN CTR. FOR JUST. 10–13 (2020); *see also* Charles Stewart & Stephen Ansolabehere, *Waiting to Vote*, 14 ELECTION L.J. 47, 52 (2015).

[597] Priorities USA v. Wis. Elections Comm'n, 412 Wis. 2d 594, 600 (2024).

[598] *See* Alice Herman, *Mayor in Wisconsin Removes Ballot Drop Box As Tensions Rise Over Voting Method*, THE GUARDIAN (Oct. 2, 2024), https://www.theguardian.com/us-news/2024/oct/02/election-wisconsin-mail-ballot-box [https://perma.cc/EA7P-R84H].

[599] Scott Bauer, *The Use of Absentee Ballot Drop Boxes in Battleground Wisconsin is Sharply Down From 2020*, ASSOCIATED PRESS (Oct. 16, 2024), https://apnews.com/article/wisconsin-absentee-ballot-drop-boxes-944598fd085e0e6089d3f518a93a874e [https://perma.cc/T9RN-6SMQ].

suppression. Once considered the "laboratory of democracy," the state is now ground zero for the contemporary anti-democratic movement.

Despite these challenges, the 2023 state supreme court election and subsequent overturning of *Johnson* and *Teigen* offer an opportunity for optimism. However, the fact that the pendulum has swung back doesn't detract from the core issue: the value of one's vote can dramatically change depending on which political party holds power. This contingent nature of the right to vote may undercut and even discourage voters from participating, and thereby limit the possibilities of political change by entrenching power in a minority.

This highlights a deep-seated flaw in our democratic system, where power self-perpetuates, and equality is contingent upon the prevailing political dynamics. Therefore, the severity of the problem depends on which 'head of the hydra' is most concerning—racial marginalization, partisan entrenchment, or other indicia of exclusion.

Furthermore, this optimism is tempered by the reality that, Wisconsin's other voting barriers remain in place and efforts to suppress the vote in the state have continued.[600] Given the Wisconsin Legislature's undemocratic inclinations, there is little reason to expect a change in direction.

This Article has worked to show that these racial and partisan dynamics are inextricably linked and that modern-day exclusionary structures, though facially neutral today, nonetheless replicate the tenor and effect of nineteenth century subordination to subvert democratic striving. Those who seek to create an authentic American democracy must grapple with this dilemma to find ways to ensure true representation for all. What was true in 1866 remains true today, in the words of Frederick Douglass: "No republic is safe that tolerates a privileged class, or denies to any of its citizens equal rights and equal means to maintain them."[601]

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[600] *See* Molly Beck & Rachel Hale, *Wisconsin Voter ID Law Still Causing Confusion, Stifles Turnout in Milwaukee, Voting Advocates Say*, MILWAUKEE J. SENTINEL (Sept. 4, 2024), https://www.jsonline.com/story/news/politics/elections/2024/09/04/wisconsin-voter-id-law-stifles-turnout-of-black-voters-in-milwaukee-madison-advocates-say/74168605007 [https://perma.cc/MH3V-QDS5].

[601] Frederick Douglass, *Reconstruction*, THE ATLANTIC, Dec. 1866, https://www.theatlantic.com/magazine/archive/1866/12/reconstruction/304561 [https://perma.cc/QS8J-QW59].