



Case Western Reserve Law Review

Volume 70 | Issue 1

Article 11

2019

Deracialization and Democracy

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Steven A. Ramirez and Neil G. Williams, *Deracialization and Democracy*, 70 Case W. Res. L. Rev. 81 (2019)
Available at: <https://scholarlycommons.law.case.edu/caselrev/vol70/iss1/11>

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DERACIALIZATION AND DEMOCRACY

Steven A. Ramirez[†] & *Neil G. Williams*^{††}

ABSTRACT

The United States suffers the continued costs of maintaining a racial hierarchy. Enhanced diversity and growing realization of the economic costs of that hierarchy could lead to democratic pressure for reform. Yet, in the U.S., elites on the radical right seek to entrench themselves in power through the constriction of voting power and the strategic use of the racial hierarchy as a political tool. This Article traces the anti-democratic efforts of the radical right to limit the political power of the nation's enhanced diversity, and to utilize archaic governance measures to entrench themselves politically, regardless of the costs of allowing the racial hierarchy to continue to fester. Anti-democratic efforts to limit voting power to assure non-democratic governance and outcomes recently scored significant success as recounted in this Article. The anti-democratic contrivances to limit the power of enhanced diversity requires comparable countermeasures to vindicate the core value of expanded democracy that find its roots in our history and in the Constitution's trajectory towards ever greater democratic governance. This Article surveys countermeasures that could lead to the preservation and even expansion of democratic governance. It concludes that only through a renewed pursuit of expansive voting rights can we restore our democracy and move the nation away from its racist past.

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INTRODUCTION

Some notable scholars maintain that the United States' racial hierarchy will endure permanently.¹ Others maintain that appropriate legal frameworks can diminish the influence of racial hierarchies, at least to the extent that human capital is broadly developed² and the rule of law³ operates free of racial discrimination.⁴ Attitudes may operate beyond the law, at least over the short and medium term, but law can operate free of discrimination, and if all human capital develops to its maximum potential, then perhaps law sets the stage for continual

1. *E.g.*, DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL* 92 (1992); *see also id.* at ix (“[R]acism is an integral, permanent, and indestructible component of this society.”); Derrick Bell, *Law as a Religion*, 69 CASE W. RES. L. REV. 265, 265 (2018) (“[W]e know from history and experience that law will never deliver justice and that law in America will never deliver racial justice; yet, we are called upon to believe somehow justice is just around the corner.”).
2. WORLD BANK GROUP, *THE HUMAN CAPITAL PROJECT* 32 (2018) (scoring the U.S.’s next generation of workers at 76% of potential in terms of human capital development and Singapore’s at 88%, notwithstanding high ethnic diversity), *available at* <https://openknowledge.worldbank.org/bitstream/handle/10986/30498/33252.pdf?sequence=5&isAllowed=y> [<https://perma.cc/2SAK-3EHJ>].
3. The U.S. rates poorly today on the rule of law insofar as racial discrimination is concerned. *See* WORLD JUSTICE PROJECT, *RULE OF LAW INDEX 2017–2018*, at 153 (2018) (ranking the U.S. a modest 19 out of 113 nations in adherence to the rule of law and scoring the U.S. especially weak on absence of discrimination in its criminal and civil justice systems), *available at* https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition_0.pdf [<https://perma.cc/G2E5-PCSN>]. Other nations beset by a history of racial divisions, such as Singapore, score much higher than the U.S. on absence of discrimination under law. *Id.* at 134.
4. Continued racial (or irrational) discrimination against a substantial part of any given population will result in a compromised rule of law, as well as impaired human development, which will negatively impact society as a whole through constricted macroeconomic performance and stunted human development. *See* Steven A. Ramirez & Neil G. Williams, *On the Permanence of Racial Injustice and the Possibility of Deracialization*, 69 CASE W. RES. L. REV. 299, 322–24 (2018). The internationally renowned consultancy firm of McKinsey & Company found that U.S. GDP in 2008 was \$525 billion lower than it would be if there were no education gap between whites and minorities. Byron G. Auguste et al., *The Economic Cost of the US Education Gap*, MCKINSEY & COMPANY: SOCIAL SECTOR (June 2009), <http://www.mckinsey.com/industries/social-sector/our-insights/the-economic-cost-of-the-us-education-gap> [<https://perma.cc/J967-RBSC>]. *See also* Steven A. Ramirez, *What We Teach About When We Teach About Race: The Problem of Law and Pseudo-Economics*, 54 J. LEG. EDUC. 365, 375 (2004) (estimating that the macroeconomic costs of race to approach \$1 trillion per year).

progress in terms of eliminating racial privileges and hierarchies.⁵ This more sanguine view of the possibility of deracialization, however, assumes that demographic and economic pressures find expression through a rationalized system of democratic decision-making that reflects the needs and desires of the entire population.⁶ But in the U.S. today, democracy and majority rule prove elusive.⁷

In terms of economics, the U.S. faces an enormous challenge that promises to steadily worsen: the corrosive influence of a socially constructed racial hierarchy that leaves millions of young Americans stranded at the margins of our economy and deprives our economy of a rationalized human-capital-formation function.⁸ Our legal and educational system propagates and entrenches this irrational economic reality, and the legal academy plays a central role in this deeply

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5. Ramirez & Williams, *supra* note 4, at 338 (“[T]he staggering economic costs of the Court’s reactionary position on our racial hierarchy, combined with demographic realities, suggest the Court’s approach is both economically and politically unsustainable.”); *see also id.* at 307–24 (detailing the operation and the costs of the U.S.’s racial hierarchy).
 6. Most Americans rate our democracy “weak,” and over two-thirds find it “weakening.” GEORGE W. BUSH INSTITUTE ET AL., THE DEMOCRACY PROJECT 4-5 (2018) [hereinafter Democracy Project], available at https://www.democracyprojectreport.org/sites/default/files/2018-06/FINAL_POLL_REPORT_Democracy_Project_2018_v5.pdf [<https://perma.cc/ST4V-NSP9>]. The *Economist Intelligence Unit* ranks democratic governance across the world in terms of the degree to which the will of the people governs and it finds that the U.S. system rates as a “flawed democracy” that has substantially declined since 2006. THE ECONOMIST INTELLIGENCE UNIT, DEMOCRACY INDEX 2018: ME TOO? POLITICAL PARTICIPATION, PROTEST AND DEMOCRACY 10, 41 (2018) [hereinafter EIU Democracy Index].
 7. *American Democracy’s Built-in Bias towards Rural Republicans*, ECONOMIST, (July 12, 2018), <https://www.economist.com/leaders/2018/07/12/american-democracys-built-in-bias-towards-rural-republicans> [<https://perma.cc/VE4R-XG9E>] (“America . . . is plagued by the only democratic vice more troubling than the tyranny of the majority: tyranny of the minority.”); Timothy Egan, *Our Fake Democracy*, N.Y. TIMES (June 23, 2017), <https://www.nytimes.com/2017/06/23/opinion/our-fake-democracy.html> [<https://perma.cc/6ESE-T8L3>] (“For the United States, the biggest institutional lie of the moment is that we have a government of the people, responding to majority will.”).
 8. Human ingenuity drives all innovation, which in turn drives sustainable macroeconomic growth. *See* STEVEN A. RAMIREZ, LAWLESS CAPITALISM 137 (2013). As such, the nation that maximizes the capacity of its human resources will invariably out-innovate and out-grow nations that allow human resources to wallow in economically oppressive conditions. *See id.* at 20. In the U.S. today, about 40% of African-American children and 35% of Latino children suffer from poverty-driven opportunity losses. *See id.* at 135.

suboptimal economic outcome⁹ by failing to teach both the role of the Supreme Court's emphasis on using the Equal Protection Clause to protect only those at the top of economic and social hierarchies and the importance of the core value of democracy.¹⁰ Our entire society bears the cost of this economic challenge in the form of trillions of dollars in foregone macroeconomic growth.¹¹ In addition, our entire society suffers

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9. For example, recent criminal allegations of fraud in connection with college admissions, whereby wealthy whites bought their way into high status universities, spotlighted again all the legal ways the Supreme Court allows affirmative action programs that largely benefit wealthy whites. See Clare Lombardo, *How Admissions Really Work: If The College Admissions Scandal Shocked You, Read This*, NPR, (Mar. 23, 2019, 9:15 AM), <https://www.npr.org/2019/03/23/705183942/how-admissions-really-work-if-the-college-admissions-scandal-shocked-you-read-th> [<https://perma.cc/B8WM-ZPES>] (“There are lots of ways that wealthy families get a boost in the college admissions process. Most are quite legal.”); *How to De-Corrupt College Admissions*, CHRISTIAN SCI. MONITOR, (Mar. 19, 2019), <https://www.csmonitor.com/Commentary/the-monitors-view/2019/0313/How-to-de-corrupt-college-admissions> [<https://perma.cc/8GRN-2PG9>] (“[T]he FBI announced 50 indictments related to fraud and bribery in the admissions process of several elite universities. More indictments are expected.”); *Poison Ivy*, ECONOMIST, (Sept. 21, 2006), <https://www.economist.com/united-states/2006/09/21/poison-ivy> [<https://perma.cc/RBK3-87H3>] (“No less than 60% of the places in elite universities are given to candidates who have some sort of extra ‘hook’, from rich or alumni parents to ‘sporting prowess.’ The number of whites who benefit from this affirmative action is far greater than the number of blacks.”).
 10. ERWIN CHEMERINSKY, *THE CASE AGAINST THE SUPREME COURT* 293–94 (2014) (concluding that, institutionally, the Court operates to protect the interests of dominant political and economic elites, rather than protecting minorities, individual rights, or long-term values); see also *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010) (expanding the power of corporations’ electioneering abilities and thereby empowering the CEOs of such corporations); *Conn. Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 90 (1938) (Black, J., dissenting) (“Yet, of the cases in this Court in which the Fourteenth Amendment was applied during the first fifty years after its adoption, less than one-half of one per cent. invoked it in protection of [African Americans], and more than fifty per cent. asked that its benefits be extended to corporations.”). One commentator called the Supreme Court “one of the most powerful and most malign institutions in American history.” IAN MILLHISER, *INJUSTICES*, at x (2016). The injustices perpetrated by the Court that Millhisser highlights include the use of the Fourteenth Amendment to protect the powerful instead of the most vulnerable, empowering billionaires to “corrupt American democracy,” and neutering voting-rights protections for minorities. *Id.* at xii–xiii. Essentially, Millhisser argues that the Supreme Court embraces “extra-constitutional limits on the government’s ability to protect the most vulnerable Americans, while simultaneously refusing to enforce rights that are explicitly enshrined in the Constitution’s text.” *Id.* at xiii.
 11. Impaired macroeconomic growth means we all sell goods and services into a smaller market with less demand. Ramirez, *supra* note 8, at 28–29. The

the effects of stunted human-capital development and innovation.¹² Law frames and promotes this outcome on a systemic basis, with the Supreme Court non-democratically paving the way towards macro-economic backwardness.¹³

In terms of demographics, we believe that new demographic and economic realities will create opportunities for the kinds of initiatives needed to diminish the perpetuation of our racial hierarchy—specifically, the broadest possible embrace of cultural diversity under the law and the broadest human development. Demographically, people of color will constitute a majority of the U.S. population by 2045.¹⁴ “New census population projections confirm the importance of racial minorities as the primary demographic engine of the nation’s future growth, countering an aging, slow-growing and soon to be declining white population.”¹⁵ Specifically, in 2045 the nation is projected to be 49.7% white, 24.6% Hispanic, 13.1% African American, 7.9% Asian American, and 3.8% multiracial populations.¹⁶ This will create important economic and social changes across society.

United Nations publishes the Inequality-adjusted Human Development Index (“IHDI”) that tests the degree to which law and institutions serve a given society in terms of life expectancy, education, and standard of living. UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT INDICATORS AND INDICES: 2018 STATISTICAL UPDATE 1–13 (2018), available at <http://hdr.undp.org/en/content/human-development-indices-indicators-2018-statistical-update> [<https://perma.cc/XD9Z-CZWK>]. The U.S. ranks modestly on this measure of well-being at thirteenth, *id.* at 22; Singapore ranks ninth while maintaining a much higher per-capita income (more than 50%) advantage over the U.S. *Id.* at 30.

12. Impaired human-capital formation leads to lower innovation, lower consumption, and, thus, less growth. See Ramirez, *supra* note 8, at 22–23.
13. Steven A. Ramirez, *Foreword: Diversity in the Legal Academy After Fisher II*, 51 U.C. DAVIS L. REV. 979, 985 & n.36 (2018) (citing George Mace, *The Antidemocratic Nature of Judicial Review*, 60 CALIF. L. REV. 1140, 1149 (1972) (“Since to resist a majority the judiciary must be independent of that majority, the character of judicial review is properly antidemocratic.”)).
14. William H. Frey, *The US Will Become ‘Minority White’ in 2045, Census Projects*, BROOKINGS: THE AVENUE (Mar. 14, 2018), <https://www.brookings.edu/blog/the-avenue/2018/03/14/the-us-will-become-minority-white-in-2045-census-projects/> [<https://perma.cc/2L62-S2ZG>].
15. *Id.*
16. *Id.* Current projections illustrate a contrast between the youth minority population and the aging white population:

Minorities will be the source of all of the growth in the nation’s youth and working age population, most of the growth in its voters, and much of the growth in its consumers and tax base as far into the future as we can see. Hence, the more rapidly growing,

While this will create political pressure for racial reform, America's representative democracy faces severe distortions as a result of the arcane and archaic legal frameworks associated with the preservation of slavery and the enduring reality of racism in America.¹⁷ Thus, for example, with respect to the Electoral College, Professor Juan Perea reviewed the pro-slavery structure of the Constitution¹⁸ and quotes James Madison for the proposition that the founders needed to address the problem of maintaining slavery in light of superior popular voting power in the North.¹⁹ The solution was the Electoral College, which, along with the infamous "three-fifths of all other persons" rule, ensured that the South could maintain slavery for decades.²⁰ Most recently, this meant that Hillary Clinton lost the 2016 election despite the fact that she garnered over three million votes more than Donald Trump in the final certified election results.²¹ The U.S. Senate operates as a racial

largely white senior population will be increasingly dependent on their contributions to the economy and to government programs such as Medicare and Social Security. This suggests the necessity for continued investments in the nation's diverse youth and young adults as the population continues to age.

Id.

17. This Article envisions a democratic republic cabined within traditional constitutional limitations, but free of the distortions of our racial history and faithful to the Amendments expanding voting rights. *See, e.g.*, Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 565 (1998) ("Indications from the time surrounding the drafting and ratification of the Constitution suggest that . . . the view of accountability that the founding community held . . . is a view of accountability as a notion of blame."); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1521 (1990) ("If the Constitution's Framers were keen on majority rule, they certainly had a bizarre manner of demonstrating their affection."). Consequently, this Article seeks constrained democracy with limited majority rule and universal suffrage.
18. *E.g.*, Juan F. Perea, *Echoes of Slavery II: How Slavery's Legacy Distorts Democracy*, 51 U.C. DAVIS L. REV. 1081, 1083 (2018) [hereinafter Perea, *Echoes*] ("One of the proslavery features of the Constitution is the electoral college, enacted as a way to protect the interests of slave owners."); *see also* Juan F. Perea, *Race and Constitutional Law Casebooks: Recognizing the Proslavery Constitution*, 110 MICH. L. REV. 1123, 1148 (2012) [hereinafter Perea, *Proslavery*] ("If we ignore the evidence of a proslavery Constitution, we are not likely to inquire into the important present ramifications of the proslavery Constitution.").
19. Perea, *Echoes*, *supra* note 18, at 1088 (illustrating that Madison was aware that the "right of suffrage was much more diffusive in the Northern than the Southern States").
20. *See id.* at 1083–88.
21. *See* Gregory Krieg, *It's Official: Clinton Swamps Trump in Popular Vote*, CNN (Dec. 22, 2016, 5:34 AM), <https://www.cnn.com/2016/12/21/politics/donald-trump-hillary-clinton-popular-vote-final-count/index.html> [<https://>

gerrymander that today preserves white, male power.²² Certainly, the law channels and defines the impact of political pressure.²³ This Article will show that the law today defines the U.S. political system in a fundamentally non-democratic, pro-oligarchy way that too often negates and neutralizes pressure for racial justice.²⁴

The Founding Fathers originally intended to impose an oligarchy upon our nation with very limited democratic influence.²⁵ Aside from

perma.cc/HM93-W3PA].

22. See Terry Smith, *Reinventing Black Politics: Senate Districts, Minority Vote Dilution and the Preservation of the Second Reconstruction*, 25 HASTINGS CONST. L.Q. 277, 354 (1998). The constitutional debates regarding the Senate were intimately bound to the issue of slavery. See JILL LEPORE, *THESE TRUTHS: A HISTORY OF THE UNITED STATES* 122–25 (2018).
23. Keith E. Whittington et al., *The Study of Law and Politics*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 3 (Keith E. Whittington et al. eds., 2008) (“[L]aw is not only the product of politics but also constitutive of politics.”).
24. The threat of oligarchic rule and its costs first emerged with respect to the Great Financial Crisis of 2008:

The Great Recession has awakened us to something new in the nation’s social and economic development. Inequality has been rising for decades, but recent shocks have laid bare what this means for our social structure: a shrinking middle class and an increasingly entrenched wealthy elite. Americans remain profoundly attached to an idea of America as a middle-class nation, with very few of us on the economic margins, abundant opportunities to raise oneself or one’s offspring into the middle classes, and everyone enjoying a fair shot at wealth and success. In fact we are becoming the opposite. The number of Americans facing real poverty is growing; opportunities for middle-class livelihoods are shrinking; and economic clout is becoming concentrated at the top to a degree that recalls the last Gilded Age. As structures of opportunity have grown increasingly narrow and brittle, and class differences have widened, the nation is becoming what reformers throughout the nineteenth and early-twentieth century meant when they talked about a society with a “moneyed aristocracy” or a “ruling class”—an oligarchy, not a republic.

Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669, 672 (2014) (citation omitted).

25. “By 1787 and the adoption of the U.S. Constitution, there were still no federal laws regarding who could vote. The decision fell to states with many maintaining the standard that favored white men of property, wealth, and education. By George Washington’s election in 1789, only 6 percent of the population was permitted to vote.” Tom Huskerson, *A Brief History of Voter Registration in the United States*, IVN: ARCHIVES (Dec, 13 2013), <https://ivn.us/2013/12/13/independent-voter-network-ivn/> [<https://perma.cc/4RKE-DMQR>]. Of course, under the original Constitution only the House of Representatives faced direct elections at all; the

the distortions implicit in the U.S. Senate, the Electoral College, and the inflation of Southern voting power through the three-fifths rule, the Founders operated in full view of state laws that extended franchise rights primarily to white, Protestant, male land owners—or about six percent of the population.²⁶ The original intent of the Founders sought, at best, to impose a highly constrained democratic republic with extremely limited suffrage, and, at worst, to constitute a government with only a bare semblance of democracy.²⁷ Americans hold democracy as a core value, but the legally constructed political system in place today is archaic and yields a perverse form of minority, not majority, rule.²⁸

Electoral College selected the President, and state legislatures selected Senators. U.S. CONST. art. I, § 3; *id.* art. II, § 1. Arguably, the original Constitution enshrined a “slavocracy” alongside an oligarchy. See LEPORE, *supra* note 22, at 125 (“The most remarkable consequence of this remarkable arrangement was to grant slave states far greater representation in Congress than free states.”). Certain delegates bolted the convention or spoke passionately against this outcome while others noted with shame the intent of the Constitution’s basic structure. See *id.* at 126–127 (noting that Martin Luther, Gouverneur Morris and John Dickinson all voiced their opposition to slavery’s preservation in the Constitution).

26. Grace Panetta & Olivia Reaney, *The Evolution of American Voting Rights in 242 Years Shows How Far We’ve Come—and How Far We Still Have to Go*, BUS. INSIDER (Feb. 15, 2019, 9:25 AM), <https://www.businessinsider.com/when-women-got-the-right-to-vote-american-voting-rights-timeline-2018-10> [<https://perma.cc/HUD2-D7QY>]. Many delegates thought the states granted an “excess of democracy.” LEPORE, *supra* note 22, at 121.
27. At the beginning of the Republic, voting generally did not even include the right to a secret ballot, which invited intimidation and even violence. Jill Lepore, *Rock, Paper, Scissors: How We Used to Vote*, NEW YORKER (Oct. 6, 2008), <https://www.newyorker.com/magazine/2008/10/13/rock-paper-scissors> [<https://perma.cc/5BAF-J3HF>].
28. Joseph E. Stiglitz, *Can American Democracy Come Back?*, BOSTON GLOBE (Nov. 7, 2018, 10:49 PM), <https://www.bostonglobe.com/opinion/2018/11/06/can-american-democracy-come-back/vzXt3DUbCeuWitpirTWCOJ/story.html> [<https://perma.cc/9WB6-C7JH>] (“The minority is dominating the majority A majority of Americans want gun control, an increase in the minimum wage, guaranteed access to health insurance, and better regulation of the banks that brought on the 2008 crisis. Yet all of these goals seem unattainable.”). Stiglitz, a Nobel Prize-winning economist, also places democracy, race, and economics in a context similar to this Article:
[T]he Republican Party’s reliance on voter suppression, gerrymandering, and similar efforts at electoral manipulation have also contributed to ensuring that the will of the majority is thwarted. The party’s approach is perhaps understandable: After all, shifting demographics have put the Republicans at an electoral disadvantage. A majority of Americans will soon be nonwhite, and a 21st-century world and economy cannot be reconciled with a male-dominated society. And the urban areas where the majority of Americans live, whether in the North or the South, have learned

This Article addresses the question of whether democracy in the U.S. will express the rising demographic and economic pressure for change or whether law can distort democratic processes and neutralize the rising political pressure for dismantling America's festering racial hierarchy.²⁹ Part II traces recent race-based attacks on U.S. democracy designed to shift power to small bands of entrenched elites. Part II strives to assess the viability of such attacks to foil future economic and demographic pressure for reform. Part III highlights the Supreme Court's role in the effort to restore the eighteenth-century oligarchy the Founders envisioned. Part IV summarizes historic and political developments that suggest that in the U.S., democracy remains a powerful core value that will ultimately triumph over attacks on democracy from the far right. Part V assesses the lawfulness of putative legal changes that aim to save our representative democracy and end minority rule. The search for solutions for the vindication of this core democratic value, notwithstanding the archaic law framing democracy in America and the far-right's race-based attacks on democracy, teaches that the U.S. should use all means necessary under the law to restore democracy so it can restore the rule of law.

This Article concludes that law can secure an enhanced democracy and thwart efforts to return America to an oligarchy. Instead, law will shed the archaic and race-based remnants in the Constitution that

the value of diversity. Voters in these areas of growth and dynamism have also seen the role that government can and must play to bring about shared prosperity. They have abandoned the shibboleths of the past, sometimes almost overnight. In a democratic society, therefore, the only way a minority—whether it's large corporations trying to exploit workers and consumers, banks trying to exploit borrowers, or those mired in the past trying to recreate a bygone world—can retain their economic and political dominance is by undermining democracy itself.

Id.

29. Closely related to the racial hierarchy plaguing the U.S. is the emergence of white-identity politics, in which white voters vote in ways both closely aligned to notions of white interests and hostile to the perceived interests of minorities:

One of the primary lessons of our current moment is that race continues to inform our political and social relations in complex and often poignant ways. In the current state of election law doctrines, that complexity is lost. A presumption of good faith is afforded to political actors, even when unjustified based on past and present behavior. Politics and race relations are segregated in judicial doctrines, despite their increased coalescence. These racial blind spots are an accomplice to the perpetuation of white identity politics.

Joshua S. Sellers, *Election Law and White Identity Politics*, 87 FORDHAM L. REV. 1515, 1562, 1576 (2019).

govern democracy in the U.S. today. These remnants of white supremacy negate and impair much of the voting rights expansion that marks our constitutional history since the end of the Civil War. The ongoing attack on American democracy strikes us as fundamentally counter-cultural and thus politically unsustainable. Eventually law will recondition our democracy and politics, rendering racial reform inevitable. To be clear, we do not contest the notion that a limited democracy is necessary to avert a tyranny of the majority. Rather, we contest the tyranny-of-minority rule that seeks to entrench privilege and raw economic and political power beyond the reach of democratic governance. As we will show in the next part of this Article, race, democracy, and the emergent U.S. oligarchy tightly intertwine.

I. RACE AND THE ATTACK ON U.S. DEMOCRACY

Professor Nancy MacLean recently documented what she terms the “radical right’s” efforts to diminish democratic power and influence in our government, paving the way for the restoration of an oligarchy to legally protect the interests of the very wealthy.³⁰ A small number of billionaires and millionaires lead this effort, and they enjoy powerful “intellectual” support from the many scholars they patronize.³¹ Race plays a central role in this effort even if the propagators of an oligarchy today hold little interest in restoring the racial oppression of yesteryear.³² Today, they intend to emasculate the federal government’s ability to fund social spending and investment so that taxes and spending remain permanently low regardless of the impact on economic growth or the public’s desire.³³ Incidentally, they would denude the

30. NANCY MACLEAN, *DEMOCRACY IN CHAINS*, at xxxi (2017) (“Pushed by relatively small numbers of radical-right billionaires and millionaires who have become profoundly hostile to America’s modern system of government, an apparatus decades in the making, funded by those same billionaires and millionaires, has been working to undermine the normal governance of our democracy.”).

31. *See id.* at xxxii.

32. *See id.* at 233–34.

33. Professor MacLean summarizes the dream of the radical right:

the uncontested sway of the wealthiest citizens; the use of right to work laws and other ploys to keep working people powerless; the ability to fire dissenting public employees at will, targeting educators in particular; the use of voting-rights restrictions to keep those unlikely to agree with the elite from the polls; the deployment of states’ rights to deter the federal government from promoting equal treatment; the hostility to public education; the regressive tax system; the opposition to Social Security and Medicare; and the parsimonious response to public needs of all kinds.

federal government's ability to ever breakdown our festering racial hierarchy.³⁴

MacLean situates the intellectual roots of this anti-democratic movement in John C. Calhoun's efforts to maintain a slave-holding oligarchy in the U.S.³⁵ Calhoun epitomized the white supremacy underlying slavery's perpetuation at the nation's founding.³⁶ "Not surprisingly, then, but with devastating consequences all around, attacks on federal power pitched to nonelites have almost always tapped white racial anxiety, whether overtly or with coded language."³⁷ The use of

Id. at 233.

34. For example, in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), the Court seemingly recast the Commerce Clause in a narrow fashion that could threaten innumerable federal programs and actions. See MACLEAN, *supra* note 30, at 229–30. The radical right's view of the Constitution would validate strict limits on the government's ability to regulate business in accord with *Lochner v. New York*, 198 U.S. 45 (1905). See MACLEAN, *supra* note 30, at 227–28. The radical right also prefers that the Equal Protection Clause operate to protect the "already privileged rather than the embattled citizens whose rights the [Fourteenth Amendment] was designed to protect." *Id.* at 228. Congress promulgated the Civil Rights Act of 1964, for example, under the Commerce Clause. *E.g.*, *Katzenbach v. McClung*, 379 U.S. 294, 295 (1964) (upholding, unanimously, Title II of the Act under the Commerce Clause).
35. MACLEAN, *supra* note 30, at 2–3.
36. James W. Loewen, *10 Questions for Yale's President*, CHRON. HIGHER EDUC. (May 25, 2016) <https://www.chronicle.com/article/10-Questions-for-Yale-s/236593> [<https://perma.cc/T2R3-Z387>]. Yale University ultimately renamed its Calhoun College after finding that Calhoun's legacy principally revolved around racism and bigotry. See Office of the President, *Decision on the Name of Calhoun College*, YALE U. (Feb. 11, 2017), <https://president.yale.edu/decision-name-calhoun-college> [<https://perma.cc/V8AK-BMQF>]; Letter from The Presidential Advisory Group on Renaming Calhoun College to Peter Salovey, President, Yale U. (Jan. 13, 2017), available at https://president.yale.edu/sites/default/files/files/Presidential%20Advisory%20Group%20-%20Calhoun%2001_13_17.pdf [<https://perma.cc/V34C-Y94R>]. At the time of the renaming decision, Yale President Peter Salovey stated: "John C. Calhoun's legacy as a white supremacist and a national leader who passionately promoted slavery as a 'positive good' fundamentally conflicts with Yale's mission and values." *Yale Changes Calhoun College's Name to Honor Grace Murray Hopper*, YALENEWS (Feb. 11, 2017), <https://news.yale.edu/2017/02/11/yale-change-calhoun-college-s-name-honor-grace-murray-hopper-0> [<https://perma.cc/9HAX-W5GE>].
37. MACLEAN, *supra* note 30, at 11. Calhoun openly acknowledged that the South used race to obscure class divisions:

With us the two great divisions of society are not the rich and poor, but white and black; and all the former, the poor as well as the rich, belong to the upper class, and are respected and treated as equals, if honest and industrious; and hence have a position

race instrumentally worked in America as a means of dividing the lower classes, disenfranchising black as well as white voters, and supporting policies to protect wealth more than social well-being.³⁸ Along the way, the Southern oligarchs used their influence to “ennoble” Southern racism and strategically demean African Americans.³⁹ Economic backwardness followed in the wake of these efforts to destroy human capabilities under the guise of race.⁴⁰

Today’s oligarchs operate in much the same way, even if they target the nation as a whole rather than just the South as in decades past. They spend billions of dollars to socially construct knowledge⁴¹ in favor of their political agenda and to influence academic areas ranging from economics⁴² to law.⁴³ “Now, as then, the leaders seek Calhoun-style

and pride of character of which neither poverty nor misfortune can deprive them.

John C. Calhoun, Speech on the Oregon Bill (June 27, 1848), in THE U.S. CONSTITUTION: A READER 419, 420 (Hillsdale C. Pol. Faculty eds., 2012), available at <http://cdn.constitutionreader.com/files/pdf/constitution/ch76.pdf> [<https://perma.cc/Y7N4-ZK3K>].

38. MACLEAN, *supra* note 30, at 23.

39. *Id.* at 33.

40. For example, in response to *Brown v. Board of Education*, 347 U.S. 483 (1954), Virginia closed its schools. MACLEAN, *supra* note 30, at 23. Professor MacLean highlights that this decision hardly followed any democratic voice; instead, a tight oligarchy controlled Virginia, such that the rural state senators voting for school shutdowns represented fewer Virginians than those urban-area senators who favored complying with *Brown*. MACLEAN, *supra* note 30, at 23. It was only with the passage of the Voting Rights Act of 1965 that the control of this oligarchy broke and a “cornucopia of economic growth” followed, particularly in Northern Virginia. *Id.* at 92–93.

41. Ultimately elites will distort knowledge to instrumentally serve their goals. See MACLEAN, *supra* note 30, at 33.”

42. In economics, economist James Buchanan worked closely with large corporations and other mega-donors to form quasi-academic institutions for the purpose of funding scholars with pro-free market and anti-spending inclinations to influence policy-makers and inculcate students in free-market dogma. MACLEAN, *supra* note 30, at 119–22. Some of these institutions operated with only the thinnest veil of academic legitimacy. *Id.* at 198. Indeed, even Buchanan himself protested (to no avail) the fact that his namesake James Buchanan Center had no academic standing at all. *Id.* at 203.

43. In law, the political efforts to impose laissez-faire policies hit their zenith in the law and economics movement. See George L. Priest, *Michael Trebilcock and the Past and Future of Law and Economics*, 60 U. TORONTO L.J. 155, 156 (2010) (describing the origins of law and economics as a “pro-market, anti-government political philosophy”). Key leaders in this movement included Henry Manne at George Mason University, who benefitted mightily from corporate patronage and radical-

liberty for the few—the liberty to concentrate vast wealth, so as to dent elementary fairness and freedom to the many.”⁴⁴ Further, because they know that Americans generally do not favor the re-imposition of an oligarchy, they deploy stealth and subterfuge (including the strategic use of racial divisions) to subvert our democracy.⁴⁵ Race is particularly potent in suppressing the vote—both white and minority.⁴⁶ MacLean shares much in common with other scholars who study both the radical right and the role of race in fueling its descent to minority rule.⁴⁷

For example, Professor Ian Haney-López demonstrates the use of “dog-whistle politics” to entrench the interests of political and economic elites, and the use of race in America to disempower both working-class whites and communities of color.⁴⁸ He argues in his book, *Dog Whistle Politics*, that “politicians backed by concentrated wealth manipulate racial appeals to win elections and also to win support for regressive policies that help corporations and the super-rich, and in the process wrecking the middle class.”⁴⁹ Among the many startling realities he highlights: no Democratic candidate for the White House won a

right billionaires such as Charles Koch. MACLEAN, *supra* note 30, at 122, 126. Manne awarded economist James Buchanan a law-and-economics award even as Buchanan openly pursued the goal of imposing an anti-democratic oligarchy in the name of his crusade for “economic liberty.” *Id.* at 152. Another law-and-economics luminary urged restricting voting rights to “property owners, educated classes, [and] employed persons.” *Id.* (quoting George Stigler, *Why Have the Socialists Been Winning?*, Presidential Address to the Mont Pelerin Society (1978)). Ultimately, Manne operated a “law and economics” institute to inculcate more than forty percent of the federal judiciary in the so-called benefits of laissez-faire economics. *Id.* at 195.

44. MACLEAN, *supra* note 30, at 234.

45. *Id.* at 151–53, 234.

46. *Id.* at 231.

47. See JANE MAYER, *DARK MONEY* 3–46, 167–76, 182–85 (2016) (highlighting the use of a “fully integrated network” of academic programs, think tanks, and advocacy groups bent on imposing libertarian policies and funded by a tight network of billionaires uninterested in racist policies but willing to use race to buttress their cause); Ramirez, *supra* note 8, at 152–56 (tying racial politics and the Southern Strategy to the financial deregulation and exploitation that drove the Great Financial Crisis); Sellers, *supra* note 29, at 1525, 1529, 1531–32 (“[W]hite identity politics is a pervasive political feature, habitually exploited by the Republican Party.”).

48. IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS*, at ix (2014) (“In the last 50 years, dog whistle politics has driven broad swaths of white voters to adopt a self-defeating hostility to government, and in the process has remade the very nature of race and racism. American politics today—and the crisis of the middle class—cannot be understood without recognizing racism’s evolution and the power of pernicious demagoguery.”).

49. *Id.* at xii.

majority of white votes since the election of 1964, or stated differently, since the effectiveness of the Civil Rights Act of 1964.⁵⁰ Even in the election of 1964, five southern states swung to the GOP and since then have formed the reliable base upon which the GOP thrives.⁵¹ Richard Nixon successfully ascended to the presidency in 1968 thanks in part to the “Southern Strategy” he deployed to attract disenchanted working-class whites across the nation who fundamentally opposed racial integration and equality.⁵² Today, white voters constitute about ninety percent of the GOP’s base; and whites constitute ninety-eight percent of elected GOP officials.⁵³ As such, Professor Haney López concludes that these phenomena have “transmogrified] the GOP into the ‘white man’s party.’”⁵⁴

To be fair, both parties have at varying times, and to varying degrees, engaged in similar “race-baiting.”⁵⁵ Yet, the history of race in America and the current social realities favor the radical right because of racial stereotypes regarding such things as crime and welfare.⁵⁶ Thus, Haney López shows that empirically racial-coding works on issues of crime and welfare spending, but only to the extent that such coding

50. *See id.* at 211, app. at 233.

51. Michael Oreskes, *Civil Rights Act Leaves Deep Mark On the American Political Landscape*, N.Y. TIMES (July 2, 1989), <https://www.nytimes.com/1989/07/02/us/civil-rights-act-leaves-deep-mark-on-the-american-political-landscape.html> [<https://perma.cc/XS8V-5VXJ>]. *See also* HANEY LÓPEZ, *supra* note 48, at 212 (recounting Lyndon Johnson’s lament that “I think we just delivered the South to the Republican party for a long time to come”).

52. HANEY LÓPEZ, *supra* note 48, at 25–27. Two GOP chairmen, Michael Steele and Ken Mehlman, admitted that the party used the so-called Southern Strategy’s racial hostility and coded language to attract working-class voters. Ramirez, *supra* note 8, at 152. President Nixon, as well as at least two of his senior aides, also essentially admitted to using racial anxiety and racial divisions as a political tool. HANEY LÓPEZ, *supra* note 48, at 24–27.

53. HANEY LÓPEZ, *supra* note 48, at 212. Professor Haney López notes that these percentages date from before the so-called Tea Party backlash to the Obama presidency. *Id.* at 147–59.

54. *Id.* at 212.

55. BILL CLINTON, MY LIFE 395 (2005) (admitting that he proposed a “new Democratic Party” in response to the claims of so-called Reagan Democrats that the government was taking their money and giving it to blacks); *see also* HANEY LÓPEZ, *supra* note 48, at 22–34 (describing Richard Nixon’s use of race-baiting in the 1968 election and the strategies employed by Democrats and Republicans in the South).

56. Thus, for example, Nixon famously emphasized “law and order.” HANEY LÓPEZ, *supra* note 48, at 23–24. Ronald Reagan’s campaign rhetoric included terminology that culled up race, such as “welfare queen” or “strapping young bucks” buying steaks with food stamps. *Id.* at 4.

does not vault the issue into the forefront of voters' minds.⁵⁷ In experiments testing the effectiveness of “dog whistles” that appeal to subconscious racial stereotypes, researchers found that “whites temper their response to dog whistle pandering once they understand a political appeal as racial.”⁵⁸ Haney López traces the evolution of dog-whistle politics through to the present, concluding that despite protestations that it was a fundamentally non-racist movement, “the Tea Party was almost wholly a creature of rightwing dog whistle politics.”⁵⁹

After the election of 2016, Ian Haney López and Robert Reich applied the lessons of *Dog Whistle Politics* to Donald Trump:

Trump's election reflects the triumph of dog-whistle politics—the use of (barely) coded racial appeals to mobilize white voters who have become anxious about their social position and economic standing. Nothing better illustrates this strategy's potency than the demographics of Trump's support. Exit polls show non-Hispanic whites contributed 86 percent of Trump's votes, while a further 3.4 percent came from Hispanic whites. African Americans constituted only 2 percent of Trump's votes.⁶⁰

Trump's campaign focused on exaggerated dangers posed by Mexican immigrants and Muslims, and his solution accordingly focused on banning further entry of such groups into the U.S.⁶¹ Haney López and Reich suggest that “Democrats develop a narrative about how political opportunists have used race and gender to divide us, to demonize government in the eyes of many working-class whites, and to prevent us from joining together in a broad-based coalition to fight widening inequalities of income, wealth, and political power.”⁶²

The suppression of voting rights plays a central role in the subversion of democracy.⁶³ The radical right does not hesitate to fund efforts to intimidate voters, harkening back to similar efforts during the

57. *Id.* at 176–81.

58. *Id.* at 179.

59. *Id.* at 158.

60. Ian Haney López & Robert Reich, *The Way Forward for Democrats Is to Address Both Class and Race*, THE NATION (Dec. 12, 2016), <https://www.thenation.com/article/the-way-forward-for-democrats-is-to-address-both-class-and-race/> [https://perma.cc/W4XQ-2RVE].

61. *Id.*

62. *Id.*; see also Sellers, *supra* note 29, at 1529–32 (showing how Donald Trump mobilized political support around white-identity politics and an aggressively racist agenda).

63. HANEY LÓPEZ, *supra* note 48, at 159.

Jim Crow era.⁶⁴ These efforts, typically aimed at minority communities, operate under the guise of voter-fraud myths.⁶⁵ According to Haney López: “Despite intensive, highly motivated efforts to find voter fraud, the data suggests that voter impersonation happens with roughly the same frequency that persons are struck and killed by lightning [sic].”⁶⁶ In fact, President Trump’s commission to find voter fraud quietly failed in its mission.⁶⁷ Nevertheless, the right argues in favor of disenfranchising poor people, in favor of restrictive voter identification laws, and in favor of felony-disenfranchisement laws.⁶⁸ All of this activity enjoys billionaires’ support, particularly through the Koch-funded American Legislative Exchange Council (“ALEC”).⁶⁹ In moments of candor, their objective of restoring an oligarchy in America becomes clear, as the founder of ALEC once stated: “I don’t want everybody to vote. . . . As a matter of fact, our leverage in the elections quite candidly goes up as the voting populace goes down.”⁷⁰

These voter-suppression efforts effectively changed the political landscape. After the 2010 mid-term elections, ALEC successfully introduced more than 180 bills to restrict voting rights across the nation.⁷¹ For example, according to a University of Wisconsin study, in Wisconsin, which Donald Trump won by about 22,000 votes statewide,⁷² a new voter-ID law deterred or prevented about 25,000 predom-

64. *Id.*

65. *Id.*

66. *Id.* (citing BRENNAN CTR. FOR JUSTICE, THE TRUTH ABOUT “VOTER FRAUD” (2006), available at https://www.brennancenter.org/sites/default/files/legacy/d/download_file_38347.pdf [<https://perma.cc/XET3-GJKU>] (“Raising the unsubstantiated specter of mass voter fraud suits a particular policy agenda. . . . Fraud by individual voters is both irrational and extremely rare.”) (emphasis omitted)).

67. Marina Villeneuve, *Report: Trump Commission Did Not Find Widespread Voter Fraud*, ASSOCIATED PRESS (Aug. 3, 2018), <https://www.apnews.com/f5f6a73b2af546ee97816bb35e82c18d> [<https://perma.cc/W247-AW5u>].

68. HANEY LÓPEZ, *supra* note 48, at 160–61.

69. Ari Natter, *Koch-Funded Group Prods Trump’s EPA to Say Climate Change Not a Risk*, BLOOMBERG (Nov. 15, 2017), <https://www.bloomberg.com/news/articles/2017-11-15/coal-funded-alec-prods-trump-to-say-climate-change-not-a-risk> [<https://perma.cc/V6SH-TKVM>].

70. HANEY LÓPEZ, *supra* note 48, at 161. For a video of the statement, see *People for the American Way, Paul Weyrich—“I Don’t Want Everybody to Vote” (Goo Goo)*, YOUTUBE (Jun. 8, 2007), https://www.youtube.com/watch?v=8GBAsFwPglw_ [<https://perma.cc/JD5G-5R5B>].

71. MacLean, *supra* note 30, at 231.

72. WISCONSIN ELECTION COMM’N, CANVASS RESULTS FOR 2016 GENERAL ELECTION 1 (2016), available at [https://elections.wi.gov/sites/elections.wi.gov/files/Statewide%20Results%20All%20Offices%20%28post-Presidential%](https://elections.wi.gov/sites/elections.wi.gov/files/Statewide%20Results%20All%20Offices%20%28post-Presidential%20)

inantly lower-income citizens from casting their ballots in Milwaukee and Dane Counties *alone*.⁷³ The study also found that “8.3% of white registrants were deterred, compared to 27.5% of African Americans.”⁷⁴ No study can certainly determine how these voters would vote if not deterred or prevented from doing so, but a functioning democracy requires leaders committed to securing the vote, not to preventing citizens from voting.⁷⁵ The leaders advocating for restrictive voting laws seek to thwart democracy, and to use race instrumentally to do so, with full knowledge that minority voters will be disproportionately disenfranchised.⁷⁶

In terms of actual policy impact, the Trump Administration’s tax cut, tilted heavily towards the rich and adding to the nation’s debt burden while delivering modest benefits to most Americans, proves the

20recount%29.pdf [<https://perma.cc/K7SM-BNN9>].

73. Press Release, Election Research Ctr. at the Univ. of Wis., *Voter ID Study Shows Turnout Effects in 2016 Wisconsin Presidential Election* (Sept. 25, 2017) [hereinafter *Wisconsin Voter ID Study*] (available at <https://elections.wiscweb.wisc.edu/wp-content/uploads/sites/483/2018/02/Voter-ID-Study-Release.pdf> [<https://perma.cc/FZ8Q-G9KC>]). “Roughly 80% of registrants who were deterred from voting by the ID law, and 77% of those prevented from voting, cast ballots in the 2012 election.” *Id.* Of course, “[t]he burdens of voter ID fell disproportionately on low-income and minority populations. Among low-income registrants (household income under \$25,000), 21.1% were deterred, compared to 7.2% for those over \$25,000. Among high-income registrants (over \$100,000 household income), 2.7% were deterred.” *Id.* While these numbers dramatize the kind of oligarchy the radical right works to achieve, it is impossible to know with certainty if the ID law changed the outcome of the election. *See* Eugene Kiely, *FactChecking Clinton’s Voter Suppression Claims*, FACTCHECK.ORG (Mar. 17, 2019), <https://www.factcheck.org/2019/03/factchecking-clinton-voter-suppression-claims/> [<https://perma.cc/2PWV-423M>] (explaining that the Wisconsin report could not accurately assess the link between the drop in voter turnout and the new ID laws).
74. Wisconsin Voter ID Study, *supra* note 73.
75. Indeed, one factor in the Economist Intelligence Unit’s index of democracy is voter turnout. EIU DEMOCRACY INDEX, *supra* note 6, at 7.
76. Dan Hopkins, *What We Know About Voter ID Laws*, FIVETHIRTYEIGHT (Aug. 21, 2018, 7:07 AM), <https://fivethirtyeight.com/features/what-we-know-about-voter-id-laws/> [<https://perma.cc/M8NP-J4L5>] (citing Seth C. McKee, *Politics is Local: State Legislator Voting on Restrictive Voter Identification Legislation*, RES. & POL., July–Sept. 2015, at 1, 6 (“Republicans are much more supportive of restrictive voter ID legislation It is also worth noting that, in alignment with the coalitional bases of support for the major parties, among Republican legislators, a higher black district population *increases* legislators’ support for voter ID, whereas among Democratic lawmakers, a higher black district population *reduces* legislators’ likelihood of voting in favor of restrictive voter ID legislation.”) (citations omitted)).

point that dog-whistle politics aim at helping the wealthy become wealthier rather than specifically intending to harm minorities.⁷⁷ Those in the top-twenty percent of the income distribution scored eight times the tax benefits from those cuts than those in the bottom-twenty percent.⁷⁸ These gains add to a forty-year run of elite gains (and stagnation for most Americans) in after-tax income driven primarily by relentless tax cuts for the very wealthy.⁷⁹

The Trump Administration also waged an unprecedented and unprincipled war on regulation. Specifically, it mandated that government agencies promulgate no new regulations without repealing two regulations.⁸⁰ Deregulation creates further opportunities for elite enrichment, ranging from the fraudulent peddling of subprime mortgage debt to profiteering from underpriced carbon.⁸¹ Concentrated wealth naturally leads to elites subverting the law and regulations through job offers, campaign contributions, electioneering expenditures, and a wide range of patronage benefits.⁸² Concentrated wealth similarly opens wide opportunities for the social construction of knowledge to further facilitate profiteering through an intellectually polluted body politic and an ultimately corrupted law.⁸³ All of this allows elites to exploit the system for windfall payoffs while imposing trillions of dollars in costs upon the global economy.⁸⁴

The Great Financial Crisis of 2008 provides a textbook example. The crisis originated in the political power of financial elites to free themselves from regulations and laws dating back to the New Deal.⁸⁵

77. See Ben Steverman et al., *A Year After the Middle Class Tax Cut, the Rich Are Winning*, BLOOMBERG (Dec. 18, 2018), <https://www.bloomberg.com/graphics/2018-tax-plan-consequences/> [<https://perma.cc/TX5K-GZEJ>] (analyzing the effects of President Trump's tax cuts).

78. *Id.*

79. Since 1980, after-tax income for about half of all Americans has stagnated at about \$16,000 per annum (adjusted for inflation), while income for those in the top-one percent of the income distribution soared from \$420,000 to \$1.3 million. Thomas Piketty et al., *Distributional National Accounts: Methods and Estimates for the United States*, 133 Q.J. ECON. 553, 557 (2018). The highest growth rate lies at the very top (0.0001 percentile) of the population. *Id.* at 579. This concentration of wealth in very few hands explains the subversion of law and regulation that drove all aspects of the financial crisis. Ramirez, *supra* note 8, at 1–5, 36–37.

80. Exec. Order No. 13,771, 82 Fed. Reg. 9,339 (Jan. 30, 2017).

81. Ramirez, *supra* note 8, at 8–9.

82. *Id.* at 3–5.

83. *Id.*

84. *Id.* at 1–10.

85. *Id.* at 1–16.

The crisis contributed to the greatest upward transfer of wealth in modern American history.⁸⁶ Financial elites took out-sized compensation payments while the American and global economies paid the tab.⁸⁷ Indeed, a recent assessment put the cost at \$70,000 per U.S. resident.⁸⁸ Despite the loot garnered, no senior manager at any major bank faced any real legal accountability under the rigged financial regulatory and corporate governance systems.⁸⁹ Global warming promises even more costs upon the general population for the gross enrichment of carbon-selling elites.⁹⁰

Thus, the radical right's efforts to reinstall an oligarchy through the suppression of democracy and dog-whistle politics have achieved great success. The relentless tax cuts and drive for deregulation over the past forty years witnessed a remarkable after-tax income explosion at the very tip-top (top .001%) of the income distribution at the expense of over ninety-nine percent of all Americans.⁹¹ Only legal and regulatory restructuring currently suffices to explain this aberrational increase in

86. For example:

During the crisis, African-Americans experienced a 53% decline and Hispanic a 66% decline compared to a 16% decline for white households. There was [also] a significant racial difference in wealth recovery after the Crisis . . . from 2010 to 2013, the median wealth of white households increased from \$138,600 to \$141,900, or by 2.4%. By contrast, the median wealth of black households fell 33.7%, from \$16,600 in 2010 to \$11,000 in 2013. Among Hispanics, median wealth decreased by 14.3%, from \$16,000 to \$13,700.

Emma Coleman Jordan, *The Hidden Structures of Inequality: The Federal Reserve and a Cascade of Failures*, 2 U. PA. J.L. & PUB. AFF. 107, 112 (2017). Furthermore, across racial groups, the top ten percent enjoyed relative wealth gains while the rest of Americans lost. *Id.* at 134.

87. Patrice Ollivaud & David Turner, *The Effect of the Global Financial Crisis on OECD Potential Output*, 2014 OECD J.: ECON. STUD. 41, 48–49 (2015) (showing output gap in U.S. at 3.3%; Italy, 6.0%; and Greece, 12.9%).
88. Regis Barnichon et al., *The Financial Crisis at 10: Will We Ever Recover?*, FRBSF ECON. LETTER (Aug. 13, 2018), <https://www.frbsf.org/economic-research/files/el2018-19.pdf> [<https://perma.cc/8DXD-HSGP>] (finding that “the U.S. economy remains significantly smaller than it should be based on its pre-crisis growth trend” and that “[t]he size of those losses suggests that the level of output is unlikely to revert to its pre-crisis trend level. This represents a lifetime present-value income loss of about \$70,000 for every American.”).
89. MARY K. RAMIREZ & STEVEN A. RAMIREZ, *THE CASE FOR THE CORPORATE DEATH PENALTY* xi–xiv (2017).
90. Steven A. Ramirez, *The Law and Macroeconomics of Climate Change and Inequality* (forthcoming 2020).
91. Piketty et al., *supra* note 79, at 578.

inequality; in other words, inequality reflects the legal re-engineering of income distribution in favor of the wealthy and powerful.⁹² These facts profoundly altered political outcomes. Law re-channeled power in favor of the very wealthy and entrenched their economic and political privileges.

The next part of this Article demonstrates the Supreme Court's recent role in concretizing the high income inequality arising from forty years of legal change favoring the very wealthy.

II. THE SUPREME COURT'S NEW OLIGARCHY

Another major flaw in American democracy is political and racial gerrymandering, as the Supreme Court itself acknowledges.⁹³ On March 29, 2019, the Supreme Court heard oral arguments in two cases that raised issues relating to political and racial gerrymandering.⁹⁴ Some commentators suggested that the Court should consider political realities and the “vastness of white identity politics”⁹⁵ in determining Equal Protection violations, as it did in the unanimous decision of *White v. Regester*.⁹⁶ Instead, the Court held that partisan gerryman-

92. *Id.* at 604–05.

93. *The Supreme Court Does Not Like Gerrymandering*, ECONOMIST (Mar. 28, 2019), <https://www.economist.com/united-states/2019/03/30/the-supreme-court-does-not-like-gerrymandering> [https://perma.cc/R4AG-CPT5].

94. Amy Howe, *Argument Analysis: Justices Divided and Hard to Read on Partisan Gerrymandering*, SCOTUSBLOG (Mar. 26, 2019, 3:45 PM), <https://www.scotusblog.com/2019/03/argument-analysis-justices-divided-and-hard-to-read-on-partisan-gerrymandering/> [https://perma.cc/A8MM-ZNRB].

95. Sellers, *supra* note 29, at 1532–60.

96. 412 U.S. 755 (1973). The Court, invalidating multimember districts used to dilute minority voting power, wrote:

[W]e have entertained claims that multimember districts are being used invidiously to cancel out or minimize the voting strength of racial groups. To sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.

Id. at 765–66 (citations omitted). The Court has since overruled this approach. *See City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980) (plurality opinion) (“Our decisions . . . have made clear that action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose.”).

dering presents political questions beyond judicial review, essentially giving a green light to any racial gerrymandering parading as merely political gerrymandering.⁹⁷

Haney López suggests that the GOP more aggressively carves out Congressional districts favorable to GOP rule than do Democrats.⁹⁸ The facts support his position: “The AP scrutinized the outcomes of all 435 U.S. House races . . . using a new statistical method of calculating partisan advantage designed to detect potential political gerrymandering.”⁹⁹ It found that “among the two dozen most populated states that determine the vast majority of Congress, there were nearly three times as many with Republican-tilted U.S. House districts.”¹⁰⁰ This permitted the GOP to enjoy a ten percent advantage in total House seats with only a one percent popular-vote advantage.¹⁰¹ In 2018, gerrymandering protected many GOP seats from shifting to the Democrats.¹⁰² On this front, some leaders now advocate for non-partisan redistricting.¹⁰³

The Supreme Court figures prominently in any account of the installation of a new American oligarchy.¹⁰⁴ Professor MacLean notes

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97. *See* *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019); Jon Greenbaum & Kristen Clarke, *Gerrymandering Symposium: The Racial Implications of Yesterday’s Partisan Gerrymandering Decision*, SCOTUSBLOG (June 28, 2019, 2:01 PM), <https://www.scotusblog.com/2019/06/gerrymandering-symposium-the-racial-implications-of-todays-partisan-gerrymandering-decision/> [<https://perma.cc/Z5HX-N86M>].
98. HANEY LÓPEZ, *supra* note 48, at 161 (“The Republicans won control of the House by a 234 to 201 margin, yet the Democrats cumulatively received 1.4 million more votes.”).
99. David A. Lieb, *AP Analysis Shows How Gerrymandering Benefited GOP in 2016*, ASSOCIATED PRESS (June 25, 2017), <https://www.apnews.com/e3c5cc51faba4b7fb67d8a3f996bdaca> [<https://perma.cc/8Y2M-GB7S>].
100. *Id.*
101. *Id.*
102. Brett Neely & Sean McMinn, *Voters Rejected Gerrymandering in 2018, but Some Lawmakers Try to Hold Power*, NPR (Dec. 28, 2018, 5:00 AM), <https://www.npr.org/2018/12/28/675763553/voters-rejected-gerrymandering-in-2018-but-some-lawmakers-try-to-hold-power> [<https://perma.cc/3CWL-5V3E>].
103. *Id.*; *see also* *The Supreme Court Does Not Like Gerrymandering*, *supra* note 93 (“Justice Neil Gorsuch picked up on this in response to the claim that the Supreme Court ‘must act because nobody else can’. About 20 states, he noted, have ‘dealt with this problem through citizen initiatives’ handing over map-drawing to bipartisan or independent commissions, and a ‘bunch more’ will be on the ballot in 2020. Justice Kavanaugh agreed that ‘a fair amount of activity’ in the states may free the Supreme Court from the ‘big lift’ of policing partisan gerrymandering.”).
104. According to *Washington Post* columnist E.J. Dionne, Jr.:

that during the nineteenth century the Court aimed to preserve the privileges of the powerful, and today the radical right openly seeks to control the Supreme Court for its project to wrest control of the government from the democratically empowered masses.¹⁰⁵ Like Professor MacLean, Professor Haney López also zeros in on the Supreme Court as the key institution for the subversion of democracy.¹⁰⁶ The Court's power and its lack of democratic accountability led the radical right to seize control of it by all means necessary.

The Senate recently politicized the Court through historic overreach. It simply defied President Obama's constitutional power to nominate Supreme Court justices when it refused to vote on the Supreme Court nomination of Merrick Garland.¹⁰⁷ The installations of

On cases involving the right of Americans to vote and the ability of a very small number of very rich people to exercise unlimited influence on the political process, Chief Justice John G. Roberts Jr. and his four allies always side with the wealthy, the powerful and the forces that would advance the political party that put them on the court.

E.J. Dionne Jr., *Supreme Oligarchy*, WASH. POST (Apr. 6, 2014), https://www.washingtonpost.com/opinions/ej-dionne-jr-supreme-oligarchy/2014/04/06/823f15ea-bc2e-11e3-9a05-c739f29ccb08_story.html?utm_term=.77883049456a [perma.cc/P3HN-3L9J]; see also CHEMERINSKY, *supra* note 10 (concluding that, institutionally, the Court operates to protect the interests of dominant political and economic elites rather than individual rights or long-term values).

105. MACLEAN, *supra* note 30, at 227–30 (detailing efforts to use the Supreme Court to permanently disable the federal and state governments to enact progressive legislation similar to pre-Depression notions of government power) (citing *Lochner v. New York*, 198 U.S. 45 (1905) (striking down state labor regulation based upon Fourteenth Amendment)); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) (narrowing the scope of the Commerce Clause)).

106. See HANEY LÓPEZ, *supra* note 48, at 144, 161.

107. Ron Elving, *What Happened With Merrick Garland In 2016 And Why It Matters Now*, NPR (June 29, 2018, 5:00 AM), <https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now> [https://perma.cc/2LUE-ZHW2]. According to one scholar:

[The] door has now been opened to . . . politically motivated Senate moratoriums on Supreme Court nominations. The encroachment and impairment that it entails cast[s] grave doubt on its constitutionality, and it currently finds no safe harbor in historical practice. Whether the imposition of such a moratorium will continue to present a grave constitutional question, however, depends on what tradition develops now that the door has been opened. The potential evils of further expansion are already audible just over the horizon. Calling out the probable constitutional invalidity of the McConnell moratorium, clearly repudiating it, and preventing a repetition and expansion are imperative if the

Justice Kavanaugh as well as Justice Gorsuch produced a historic first: justices nominated by a president who lacked majority-vote approval¹⁰⁸ and confirmed by a Senate that lacked majority-vote approval.¹⁰⁹ This could operate as arguably the greatest triumph of minority rule in U.S. history.¹¹⁰ It is certainly the crowning achievement of a long-standing campaign by the radical right to cement long-term control of the Court by all means necessary.¹¹¹

Recent case law shows that the oligarchs' efforts have paid off. *Citizens United v. Federal Election Commission*¹¹² illustrates well the

practice is not to gain a constitutional safe harbor in a newly established tradition.

J. Stephen Clark, *Senators Can't Be Choosers: Moratoriums on Supreme Court Nominations and the Separation of Powers*, 106 KY. L.J. 337, 408 (2018).

108. Gregory Krieg, *It's Official: Clinton Swamps Trump in Popular Vote*, CNN (Dec. 22, 2016, 5:34 AM), <https://www.cnn.com/2016/12/21/politics/donald-trump-hillary-clinton-popular-vote-final-count/index.html> [<https://perma.cc/3FWM-DASB>].

109. See Rick Noack, *How to Explain to Someone Living Abroad that Democrats Can Have over 10 Million more Senate Votes and Still Lose*, WASH. POST (Nov. 7, 2018), https://www.washingtonpost.com/world/2018/11/07/how-explain-someone-living-abroad-that-democrats-can-have-over-million-more-senate-votes-still-lose/?utm_term=.14a4add505c3 [<https://perma.cc/SM77-QNQ5>] (describing how Democratic candidates in both 2016 and 2018 received millions more votes than Republican candidates, yet the GOP controls the Senate and, thus, the Supreme Court nomination process); see also Aaron Blake, *Democrats Won the Senate Popular Vote! Which is Both True and Terribly Misleading*, WASH. POST (Nov. 29, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/11/29/the-most-bogus-stat-of-the-2016-election-how-democrats-won-the-senate-popular-vote/?utm_term=.f1905bb3a2ce [<https://perma.cc/UE5L-CZ6V>].

110. See Michael Tomasky, *The Supreme Court's Legitimacy Crisis*, N.Y. TIMES, (Oct. 5, 2018), <https://www.nytimes.com/2018/10/05/opinion/supreme-courts-legitimacy-crisis.html> [<https://perma.cc/QHN4-2E8X>] (“[I]n an age of 5-4 partisan decisions, we’re on the verge of having a five-member majority who figure to radically rewrite our nation’s laws. And four of them will have been narrowly approved by senators representing minority will.”).

111. See Brandon Bartels, *It Took Conservatives 50 Years to Get a Reliable Majority on the Supreme Court. Here Are 3 Reasons Why.*, WASH. POST (June 29, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/06/29/it-took-conservatives-50-years-to-get-a-reliable-majority-on-the-supreme-court-here-are-3-reasons-why/?utm_term=.56227cff95c9 [<https://perma.cc/XT6D-TTP7>] (explaining the Republicans’ emphasis on appointing “strict constructionist” jurists and the Senate’s elimination of the filibuster for judicial appointments).

112. 558 U.S. 310 (2010).

central importance of the Supreme Court to reigning in democracy by all means necessary.¹¹³ In *Citizens United*, the Court ruled that corporations enjoy the same free-speech rights as individuals, and therefore, governmental restrictions on a corporation's political speech must survive strict scrutiny, the most demanding level of judicial review of governmental actions.¹¹⁴ More specifically, the Court held that corporations are entitled to First Amendment free-speech protections and, as a result, corporate money spent on political electioneering independent of a campaign cannot be limited by campaign-finance restrictions.¹¹⁵ Emblematic of the judicial activism driving this outcome, the Court overruled two of its own precedents on this point, and it also limited bi-partisan legislation.¹¹⁶ The billionaires and CEOs seeking more concentrated wealth and power won an important political gift as a direct result of this legal stretch: the unlimited use of corporate (shareholder) wealth, rather than their own cash, to engage in electioneering.¹¹⁷ Lower courts extended the logic of *Citizens United* to invalidate all limitations on independent electioneering expenditures.¹¹⁸

The Court doubled down on further empowering the wealthy in *McCutcheon v. Federal Election Commission*.¹¹⁹ There, in a 5–4 decision, the conservative majority ruled that limits on aggregate federal

113. *See id.* at 365–66 (overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) and *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003)).

114. *Id.* at 340–43.

115. *Id.* at 372 (holding unconstitutional the restriction of corporate independent electioneering expenditures under 2 U.S.C. § 441b (2012)).

116. *Id.* at 365–66. The unconstitutional statutory section was part of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.

117. Previously, corporate funds could not be used for electioneering purposes, forcing CEOs and corporate leaders to finance politicking for their chosen candidates from their own capital (typically through Political Action Committees (“PACs”)). *See generally* Bret Shaw, Note, *It's the End of the World as We Know It (and I Feel Fine): How Comparative Campaign Finance Suggests that Citizens United May Not Be the End of the World . . . and that the United States Should Consider Other Policy Alternatives*, 31 ARIZ. J. INT'L & COMP. L. 159, 161–64 (2014) (describing the evolution of regulating corporate political activity). Moreover, “[t]here is no enforceable mandate that the CEO consider shareholder interests when deploying for political ends the extraordinary capital available to the public firm.” andré douglas pond cummings et al., *Toward a Critical Corporate Law Pedagogy and Scholarship*, 92 WASH. U. L. REV. 397, 418 (2014).

118. *See SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 694–95 (D.C. Cir. 2010).

119. 572 U.S. 185 (2014).

campaign contributions ran afoul of the First Amendment.¹²⁰ Chief Justice John Roberts stated: “The Government may no more restrict how many candidates or causes a donor may support than it may tell a newspaper how many candidates it may endorse.”¹²¹ The dissent argued that “[t]aken together with [*Citizens United*], today’s decision eviscerates our Nation’s campaign finance laws, leaving a remnant incapable of dealing with the grave problems of democratic legitimacy that those laws were intended to resolve.”¹²² The Court seems determined to prevent any democratic pressure for election reform from achieving success based upon an expansive, even contrived, reading of the First Amendment.¹²³ Jeffrey Toobin suggests that more election deregulation by judicial fiat is likely: “the language of Chief Justice John Roberts’s opinion suggests that the Court remains committed to . . . the deregulation of American political campaigns.”¹²⁴

This deregulation of money in politics represents a massive shift in power and influence, which carries with it significant racial implications because wealth is distributed in accordance with our racial hierarchy, as is corporate power.¹²⁵ “Put simply, the Supreme Court transferred power from the diverse body politic as a whole to a small handful of non-diverse corporate elites.”¹²⁶ For example, only three African Americans hold CEO positions in Fortune 500 firms today.¹²⁷ Only eleven Latinos hold CEO positions.¹²⁸ Women total five percent of all

120. *Id.* at 193. There, the Court effectively overruled *Buckley v. Valeo*, 424 U.S. 1 (1976), insofar as aggregate contribution limits are concerned. *Id.* at 232–33 (Breyer, J., dissenting).

121. *Id.* at 204 (majority opinion).

122. *Id.* at 233 (Breyer, J., dissenting) (citation omitted).

123. *See id.* (suggesting that the majority “misconstrue[d]” the constitutional interests implicated).

124. Jeffrey Toobin, *The John Roberts Project*, NEW YORKER (Apr. 2, 2014), <https://www.newyorker.com/news/daily-comment/the-john-roberts-project> [<https://perma.cc/TF6F-YXKG>].

125. *See* Spencer Overton, *But Some Are More Equal: Race, Exclusion, and Campaign Finance*, 80 TEX. L. REV. 987, 989 (2002) (arguing that allowing money into politics “effectively enshrine[s] the existing distribution of property as a baseline for political advantage”).

126. cummings et al., *supra* note 117, at 421.

127. Ellen McGirt, *raceAhead: Only Three Black CEOs in the Fortune 500*, FORTUNE (Mar. 1, 2018), <http://fortune.com/2018/03/01/raceahead-three-black-ceos/> [<https://perma.cc/5847-M2PP>].

128. Robert Reiss, *Latino CEOs Share Insights On Business Success*, FORBES (Feb. 27, 2018, 2:50 PM), <https://www.forbes.com/sites/robertreiss/2018/02/27/latino-ceos-share-insights-on-business-success/#7dc871b52264> [<https://perma.cc/N65X-LNSC>].

Fortune 500 CEOs.¹²⁹ “[T]he apex of corporate leadership remains a bastion of white male supremacy.”¹³⁰ In terms of wealth, only seven members of the “Forbes 400 Richest Americans” are African American or Latino, and none made the top one hundred.¹³¹ It begs credulity that the conservative Court majority in *Citizens United* failed to apprehend this distribution of power and wealth when it radically shifted power to CEOs and other billionaires by overturning the Bipartisan Campaign Reform Act as well as its own precedents.¹³²

While the Roberts Court zealously guards the rights of those with money to freely influence elections, it displays hostility to individuals seeking the right to vote. For example, in *Husted v. A. Philip Randolph Institute*,¹³³ the Court upheld Ohio’s purge of its voter rolls despite Congressional legislation aimed at stopping the very practice Ohio used.¹³⁴ The *Harvard Law Review* argued that the case transcended the statute at issue:

Voter suppression is as American as apple pie. Between the 2012 and 2016 elections, for example, fourteen states enacted laws making it harder for citizens to vote. These laws affect minority voters with particular intensity. Last Term, in *Husted v. A. Philip Randolph Institute*, the Court upheld an Ohio law that could ultimately allow the state to remove from its voter rolls close to one million registered voters. While cast as a dry exercise in statutory interpretation, *Husted* is best understood through the lens of the nation’s history of race-based voter suppression.¹³⁵

129. *These Are the Women CEOs Leading Fortune 500 Companies*, FORTUNE (June 7, 2017), <http://fortune.com/2017/06/07/fortune-500-women-ceos/> [<https://perma.cc/N2BN-JQJF>].

130. cummings et al., *supra* note 117, at 411. If the Court intended to entrench white male power, it would be impossible to do so more efficaciously than to give white CEOs unlimited power to spend shareholder wealth on their own interests without regard to shareholders’ voices. *Id.* at 421.

131. CHUCK COLLINS & JOSH HOXIE, INST. FOR POLICY STUDIES, BILLIONAIRE BONANZA 5 (2017), available at <https://ips-dc.org/wp-content/uploads/2017/11/BILLIONAIRE-BONANZA-2017-FinalV.pdf> [<https://perma.cc/5QQU-2PUT>].

132. See cummings et al., *supra* note 117, at 417–23, for a comprehensive critique of *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) on these grounds.

133. 138 S. Ct. 1833 (2018).

134. *Id.* at 1850 (Breyer, J., dissenting).

135. *National Voter Registration Act—Statutory Interpretation—Election Law—Husted v. A. Philip Randolph Institute*, 132 HARV. L. REV. 437, 437 (2018) (footnotes omitted).

The *Review* also suggested that the Court should not ignore the long history of minority disenfranchisement when weighing statutory meaning:

To ignore the context in which these laws arise—the context of this nation’s history—is to betray the legacies of so many who have fought and died for the franchise. Even if one assumes Ohio’s law was a good-faith effort to ensure the accuracy of voter rolls, the Court’s decision offers a roadmap for states whose motives are more suspect. To date, at least a dozen states—all of them controlled by Republicans—have indicated that they intend to adopt a similar plan to purge voter rolls. These purge laws will work in concert with other racially inequitable voter-suppression tactics like restrictions on early voting, stringent registration requirements, and felon disenfranchisement—many of which are common in states controlled by Republicans. Though undoubtedly less blatant than Jim Crow laws, these tactics may be similarly effective given the winner-take-all nature of American elections.¹³⁶

Justice Sotomayor, in dissent, urged minority communities to act against the Roberts Court’s efforts for disenfranchisement, stating: “Communities that are disproportionately affected by unnecessarily harsh registration laws should not tolerate efforts to marginalize their influence in the political process, nor should allies who recognize blatant unfairness stand idly by.”¹³⁷

Blatant unfairness also describes other Roberts Court efforts to favor money over democracy. This far-right majority on the Court also applied new legal doctrine¹³⁸ to overturn a key part of the Voting Rights

136. *Id.* at 445–46 (footnotes omitted). Other commentators echo this assessment. *See, e.g.*, Joshua Douglas, *Supreme Court Takes a Giant Step Backward on Voter Rights*, CNN (June 11, 2018, 6:50 PM), <https://www.cnn.com/2018/06/11/opinions/supreme-court-makes-it-harder-to-vote/index.html> [<https://perma.cc/3KP4-DLKK>] (“The Court once served as a bastion of voting rights protection, striking down state practices that infringed upon that fundamental right. . . . Today’s decision, however, follows a more troubling trend in failing to protect fully the most important right in our democracy.”).

137. *A. Philip Randolph Inst.*, 138 S. Ct. at 1865 (Sotomayor, J., dissenting).

138. *See* Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2133 n.103 (2015) (“The legal commentariat generally viewed the doctrine as an invention.”); Eric Posner, *Supreme Court on the Voting Rights Act: Chief Justice John Roberts Struck Down Part of the Law for the Lamest of Reasons*, SLATE (June 25, 2013, 1:44 PM), <https://slate.com/news-and-politics/2013/06/supreme-court-on-the-voting-rights-act-chief-justice-john-roberts-struck-down-part-of-the-law-for-the-lamest-of-reasons.html> [<https://>

Act of 1965 (“VRA”),¹³⁹ despite the fact that the Court previously upheld the very same provision.¹⁴⁰ In *Shelby County v. Holder*,¹⁴¹ the Court invalidated section 4(b) of the VRA, which required certain states to obtain preclearance on changes to voting requirements.¹⁴² The Court found that “the conditions that originally justified [§ 5] no longer characterize voting in the covered jurisdictions.”¹⁴³ Dissenting, Justice Ginsburg argued that “the Constitution vests broad power in Congress to protect the right to vote, and in particular to combat racial discrimination in voting. This Court has repeatedly reaffirmed Congress’ prerogative to use any rational means in exercise of its power in this area.”¹⁴⁴ In sum, “[t]he Court’s conservative majority believes that the First Amendment gives wealthy donors and powerful corporations the carte blanche right to buy an election but that the Fifteenth Amendment does not give Americans the right to vote free of racial discrimination.”¹⁴⁵ The cases above moved the U.S. in the

perma.cc/S8AR-4YHE]; Richard A. Posner, *The Voting Rights Act Ruling is About the Conservative Imagination*, SLATE (June 26, 2013, 12:16 AM), <https://slate.com/news-and-politics/2013/06/the-supreme-court-and-the-voting-rights-act-striking-down-the-law-is-all-about-conservatives-imagination.html> [<https://perma.cc/KVQ2-BLT4>]. Some commentators suggest the proper precedent for “equal sovereignty” rests in the Confederate States of America. See, e.g., Peggy Cooper Davis et al., *The Persistence of the Confederate Narrative*, 84 TENN. L. REV. 301, 356 (2017) (“Justice Roberts, speaking for the Court, embellished the Confederate narrative, elevating the status of States to both horizontal and vertical sovereignty . . .”).

139. Pub. L. No. 89-110, 79 Stat. 437 (1965) (relevant portions codified at 52 U.S.C. § 10303 (2012)).
140. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); see also *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009) (declining to hold unconstitutional VRA pre-clearance provisions after reauthorization of the Act in 2006).
141. 570 U.S. 529 (2013).
142. *Id.* at 557; see also *id.* at 551 (“In 1965, the States could be divided into two groups: those with a recent history of voting tests and low voter registration and turnout, and those without those characteristics. . . . Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were.”).
143. *Id.* at 535.
144. *Id.* at 570 (Ginsburg, J., dissenting); see also Franita Tolson, *The Spectrum of Congressional Authority over Elections*, 99 B.U. L. REV. 317, 392 (2019) (“The VRA is a permissible exercise of federal power, justifiable pursuant to the Fourteenth and Fifteenth Amendments and the Elections Clause.”).
145. Ari Berman, *The Supreme Court’s Ideology: More Money, Less Voting*, THE NATION (Apr. 2, 2014), <https://www.thenation.com/article/supreme-courts-ideology-more-money-less-voting/> [<https://perma.cc/D8E4-U62Y>].

direction of a new oligarchy. The lessons the Supreme Court teaches through those cases are that precedent matters little and that the very concept of constitutionality is politically pliable.

All of these attacks on democracy have taken a toll on our democracy and moved us toward an oligarchy. In fact, political scientists concluded in 2014 that “if policymaking is dominated by powerful business organizations and a small number of affluent Americans,” as their analyses showed, “then America’s claims to being a democratic society are seriously threatened.”¹⁴⁶ The political scientists assembled a unique database of 1,779 federal-policy cases between 1981 and 2002 which provided data regarding surveyed citizens’ income as well as a host of other factors, such as clear policy outcomes.¹⁴⁷ They found that after controlling for all other factors, economic elites (defined as those at the ninetieth percentile or above) and business-related special interest groups predominated in influencing policy outcomes.¹⁴⁸ Mass-interest groups held some sway, but only half as much as business-oriented groups, leading the authors to find: “These business groups are far more numerous and active; they spend much more money; and they tend to get their way.”¹⁴⁹ The study finds that the U.S. political system operates as a textbook example of an oligarchy: “When the preferences of economic elites and the stands of organized interest groups are controlled for, the preferences of the average American appear to have only a minuscule, near-zero, statistically non-significant impact upon public policy.”¹⁵⁰ Many other scholars agree.¹⁵¹

146. Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSPS. ON POLS. 564, 577 (2014).

147. *Id.* at 568. Gilens and Page excluded issues not committed to democratic negotiation, such as Supreme Court decisions or those requiring a Constitutional Amendment. *See id.*

148. *Id.* at 572, 574–75.

149. *Id.* at 574–75 (“The influence coefficients for both mass-based and business-oriented interest groups are positive . . . but the coefficient for business groups is nearly twice as large as that for the mass groups.”).

150. *Id.* at 575. An oligarchy is a government by the few, or a small group of people. *Oligarchy*, LEXICO, <https://lexico.com/en/definition/oligarchy> [<https://perma.cc/NJQ9-HMFD>] (last visited Mar. 27, 2019).

151. *E.g.*, LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* 6 (2d ed. 2016) (“[T]he opinions of . . . ordinary citizens in the bottom one-third of the income distribution have *no* discernible impact on the behavior of their elected representatives.”); Martin Gilens, *Inequality and Democratic Responsiveness*, 69 PUB. OPINION Q. 778, 794 (2005) (“[I]nfluence over actual policy outcomes appears to be reserved almost exclusively for those at the top of the income distribution.”); *id.* at 778 (“[R]epresentational biases of this

The issues of current import to these new ruling oligarchs do not include any efforts to breakdown the American racial hierarchy. On the contrary, they seem most interested in limiting government spending, lowering taxes, deregulating business, and restricting the influence of democracy.¹⁵² Their pursuit of this agenda is intimately tied to the preservation of the racial hierarchy that continues to fester in our society.¹⁵³ Their reactionary agenda relies upon the perpetuation of that hierarchy both as a mechanism of drawing political strength from the animus it engenders and as a mechanism of excluding disinvited voices from our democracy.¹⁵⁴ While they themselves may not act with racial animus, they need to engender such animus in the body politic for their stealth plan to impose an oligarchy to succeed.¹⁵⁵

As shown above, moreover, the movement does not abide by norms or precedent, only naked power (including the power of dog-whistle politics and mass voter disenfranchisement) to impose its will.¹⁵⁶ They pursue their oligarchy through stealth and only minimally respect

magnitude call into question the very democratic character of our society.”).

152. *See supra* note 33 and accompanying text.

153. *See* HANEY LÓPEZ, *supra* note 48, at 221 (“[A]meliorating racial inequality is a precondition to ending racial politics. So long as society remains riven by racial divisions, racial demagoguery will remain a threat to the middle class.”) (emphasis omitted). Without the support of dog-whistle politics, the radical right in the U.S. would fail. *See id.*

154. As Professor Haney López highlights, three out of ten African-American males will suffer disenfranchisement at some point in their lives. *Id.* at 160.

155. Professor MacLean describes the true motive of the libertarian cause:

The libertarian cause . . . was never really about freedom It was about the promotion of crippling division among the people so as to end any interference with what those who held vast power over others believed should be their prerogatives. Its leaders had no scruples about enlisting white supremacy to achieve capital supremacy.

MACLEAN, *supra* note 30, at 234.

156. Professor Haney López describes the practical effects of voter ID laws:

In the wake of Obama’s 2008 election, the GOP became even more aggressive in seeking to disenfranchise minorities and the poor through various mechanisms, including restrictive voter ID laws. In 2011, 38 states introduced legislation likely to impede voting by these groups. This extraordinary number reflected a concerted effort on the part of some Republican officials—and their billionaire backers—to drive down voting by Democratic constituencies.

HANEY LÓPEZ, *supra* note 48, at 160.

precedent or the rule of law.¹⁵⁷ They spurn democratic negotiation in favor of minority rule.¹⁵⁸ They pursue their agenda by all means necessary, including fabricating new-fangled legal doctrines and reversing legal precedents.¹⁵⁹ The nature of their attack on democracy knows little restraint.¹⁶⁰

157. See MACLEAN, *supra* note 30, at 234 (“[T]oday, knowing that the majority does not share their goals and would stop them if they understood the endgame, the team of paid operatives seeks to win by stealth.”).

158. The radical right is closing in on holding a veto-proof supermajority even though the majority of voters do not support it. See *id.* at 231–32 (describing the effect of gerrymandering on American voting).

159. For example, in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), the Roberts Court struck down the Bi-Partisan Campaign Finance Reform Act of 2002, and overturned two of its own precedents: “Today Justice Kennedy wrote for a court majority of the five conservative justices. He effectively wiped out a key provision of Congress’[s] 2002 campaign finance reform. He also did indeed strike down *Austin* and parts of *McConnell*.” Richard Hasen, *Money Grubbers*, SLATE (Jan. 21, 2010), <https://slate.com/news-and-politics/2010/01/the-supreme-court-kills-campaign-finance-reform-in-citizens-united.html> [<https://perma.cc/2AA7-2NB6>].

160. For example, in *Shelby County v. Holder*, 570 U.S. 529 (2013), the Roberts Court struck down legislation that passed the Senate by a vote of 98–0 and passed the House by an overwhelming vote. *Id.* at 565 (Ginsburg, J., dissenting). Nevertheless, according to conservative former jurist Richard Posner:

The majority opinion in *Shelby* acknowledges that racial discrimination in voting continues, but notes that the situation has improved since 1965 and that the procedures in the current Voting Rights Act do not make a clean fit with the current forms and pattern of discrimination. Ordinarily however a federal statute is not invalidated on the ground that it’s dated. . . . And the criticisms of the statute in the majority opinion are rather tepid. That’s why the court’s invocation of “equal sovereignty” is an indispensable prop of the decision. But, as I said, there is no doctrine of equal sovereignty. The opinion rests on air.

Richard A. Posner, *The Voting Rights Act Ruling is About the Conservative Imagination*, SLATE (June 26, 2013), <https://slate.com/news-and-politics/2013/06/the-supreme-court-and-the-voting-rights-act-striking-down-the-law-is-all-about-conservatives-imagination.html> [<https://perma.cc/KVQ2-BLT4>]. “Roberts is able to cite only the weakest support for this principle—a handful of very old cases that address entirely different matters.” Eric Posner, *Supreme Court on the Voting Rights Act: Chief Justice John Roberts Struck Down Part of the Law for the Lamest of Reasons*, SLATE (June 25, 2013), <https://slate.com/news-and-politics/2013/06/supreme-court-on-the-voting-rights-act-chief-justice-john-roberts-struck-down-part-of-the-law-for-the-lamest-of-reasons.html> [<https://perma.cc/S8AR-4YHE>].

As such, the movement to impose an oligarchy lights the way for the means to unwind their handiwork; democracy will be saved only by pursuing all paths available under law to restore democracy and to reverse engineer our democracy from where the oligarchs leave it today. That means limiting deference to traditional norms and respect of precedent, as the conservative majority on the Court clearly does, until the transcendent value of democracy is vindicated and majority rule is restored.¹⁶¹ The rule of law requires that the law secure fundamental rights, including the right to vote. Democracy and the rule of law enjoy close and mutually essential links;¹⁶² thus, defending a vibrant democracy defends the rule of law.

161. See *supra* notes 138–140 and accompanying text. Thus, for example, a fair assessment of the precedential value of the “equal sovereignty” doctrine used to invalidate the VRA would focus on the fact that the doctrine finds a firmer textual foundation in the Articles of Confederation rather than the U.S. Constitution. Unlike the Constitution, in the Articles of Confederation the states retained sovereignty. The word “sovereignty” does not appear in the U.S. Constitution. Compare ARTICLES OF CONFEDERATION OF 1781, art. II (“Each State retains its Sovereignty, freedom and independence”), with U.S. CONST. See also LEPORE, *supra* note 22, at 122, 290 (explaining that the Constitution did not reflect a confederacy of states but instead invested the people as sovereign directly).

162. In a commencement address, United States Senator Kay Bailey Hutchison described the role of democracy:

Our efforts to foster democracy, even in areas where it has never been known, is a noble effort. But it’s based on self interest. Until we interrupt the cycle of radicalism and repression among the tyrannies of the world, we will never be safe. In today’s world, our security depends upon the freedom of others. Democracy starts with voting and majority rule. But it is successful only when it has, at its foundation, a society that provides minority rights, dispenses equal justice, tolerates a free media, and operates under the rule of law. This concept harnesses individual rights as well as majority rule to the democratic process. We have grown up in the United States in a society of laws, not of men. We tend to take that concept for granted. But in most emerging democracies, the rule of law is an alien idea, almost incomprehensible. It is critical, as we promote free elections, that we also promote the rule of law throughout the world.

Senator Kay Bailey Hutchison, Commencement Address at the SMU Dedman School of Law (May 14, 2005), in *Foreword: Democracy and the Rule of Law*, 58 SMU L. REV. 495, 495 (2005). In fact, every nation ranked at the top of the World Justice Project Rule of Law Rating (strongest adherence to the rule of law) is also rated as a “Full Democracy” by the EIU Democracy Index. Compare World Justice Project, *supra* note 3, at 20, with EIU Democracy Index, *supra* note 6, at 11, 14, and 24.

Traditionally the U.S. has pursued that right with vigor, as the next part will show. Part IV seeks to prove that democratic rule plays a central, even paramount, role in our modern constitutional republic, and that minority rule simply cannot be allowed to play the predominant role it plays today. As such, we posit that extraordinary efforts to restore democracy are now justified. Part IV demonstrates that advocating for a democracy over an oligarchy is the apotheosis of our long history of struggling for democratic rule.

III. DEMOCRACY STRIKES BACK

Consider first the long-term course of the concept *democracy* in the life of our own democracy. As shown above, it defies reality to argue that at its incipiency the U.S. functioned as a democratic republic instead of an oligarchy.¹⁶³ While the definition of an oligarchy turns on the term *few*, and no magic number clearly demarcates an oligarchy from a representative democracy, certainly a system that extends voting rights to only six percent of the populace and enslaves a significant percentage of its population cannot qualify as a democratic republic or a representative democracy.¹⁶⁴ Then additional problems emerge, as discussed above, in the form of inflating the voting power of the slaveholders, the Electoral College, and the Senate.¹⁶⁵ None of these contrivances to save slavery into the indefinite future can hide the essential fact that the original intent of the Founders was the imposition of an oligarchy, pure and simple.¹⁶⁶ Nevertheless, since 1789 the

163. See *supra* notes 25–27 and accompanying text.

164. See *supra* notes 25–27 and accompanying text (discussing how the Founders established the early United States as an oligarchy rather than as a democratic republic).

165. See Huskerson, *supra* note 25 (describing the evolution of U.S. voting laws).

166. Historically, many considered the South “an aggressive slavocracy,” which effectively dominated the federal government until it failed to maintain sufficient unity of purpose and cohesion to overcome the economic and military superiority of the Union forces during the Civil War. See Chauncy S. Boucher, In re *That Aggressive Slavocracy*, 8 MISS. VALLEY HIST. REV. 13, 13–15, 79 (1921). This slavocracy pulled the nation into the annexation of Texas as a slave state in 1845. See JOEL SIBLEY, STORM OVER TEXAS 91, 175–81 (2005). In 1860, after the election of Abraham Lincoln, then-President James Buchanan advised the North to amend the Constitution to protect slavery in all U.S. territories, submit to the fugitive slave law, “stop criticizing slavery,” and make Cuba a slave state. JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM 251 (1988). In the late-1850s, slave interests sought to violently expand their power throughout Central and South America. LEPORE, *supra* note 22, at 281. Ultimately, the slavocracy’s overreach incited both Northern resistance and its own destruction in the Civil War. SIBLEY, *supra*. Indeed, some termed the South a “rabid slavocracy” in the aftermath of Lincoln’s

constitutional trajectory of our nation traces a path to a representative democracy and constantly affirms a move toward an ever-increasing democratic form of governance.¹⁶⁷

Indeed, the status of African Americans as citizens or slaves defined the Civil War. The pro-slavery Constitution installed in 1789 faced complete destruction (at least in theory) in 1865 after the South desperately decided to attack the federal government in a violent¹⁶⁸ and futile attempt to retain indefinitely the ownership of slaves.¹⁶⁹ After

election but prior to the rebels firing on Fort Sumter. MCPHERSON, *supra*, at 251. Ever-increasing concentrations of power prove insatiable and therefore tend toward self-destruction.

167. See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE* 295 (rev. ed. 2009) (“The proportion of the adult population enfranchised is far greater than it was at the nation’s founding or at the end of the nineteenth century.”). The ratification of the Nineteenth Amendment in 1920 effectively doubled the electorate. *Id.* at 175. In 1971, the Twenty-sixth Amendment lowered the voting age to eighteen. *Id.* at 228. The Fourteenth Amendment introduced the right to vote into the Constitution and effectively guaranteed suffrage for all males by sanctioning states who denied them suffrage. *Id.* at 71–74, 82–83. The Fifteenth Amendment enfranchised former slaves. *Id.* at 74–83. This ultimately led to the Voting Rights Act of 1965, which empowered over one million African-American voters in the South. *Id.* at 211–13.

168. After the election of 1860, South Carolina began its insurrection. On December 20 of that year, its legislature declared that “the Union now subsisting between South Carolina and other states, under the name of the United States of America, is hereby dissolved.’ After the declaration, South Carolina set about seizing forts, arsenals, and other strategic locations within the state.” *States Meet to Form Confederacy*, HISTORY, <https://www.history.com/this-day-in-history/states-meet-to-form-confederacy> (last updated July 27, 2019) [<https://perma.cc/MTL2-J5Y5>]. “On April 12, 1861, thirty-four hours of bombardment began the Civil War. It was the beginning of four years of terrific fighting, North versus South.” *Where the American Civil War Began*, NAT’L PARK SERV. <https://www.nps.gov/fosu/index.htm> [<https://perma.cc/L86V-TW8Q>] (last updated Sept. 27, 2019). See also MCPHERSON, *supra* note 166, at 234–35, 271–74 (explaining South Carolina’s leading role in fomenting secession and its reasons for striking preemptively on Fort Sumter).

169. The secession statement of South Carolina clarifies the role of slavery and the profoundly anti-democratic nature of the rebel cause:

A geographical line has been drawn across the Union, and all the States north of that line have united in the election of a man to the high office of President of the United States, whose opinions and purposes are hostile to slavery. He is to be entrusted with the administration of the common Government, because he has declared that that “Government cannot endure permanently half slave, half free,” and that the public mind must rest in the belief that slavery is in the course of ultimate extinction. This sectional combination for the submersion of the Constitution, has been aided in some of the States by elevating to citizenship, persons

firing on Fort Sumter, the South failed to produce enough soldiers and sufficient war materiel to successfully fight the industrial North.¹⁷⁰ Atlanta burned, General Sherman marched to the sea, and General Grant accepted General Lee's surrender at Appomattox Courthouse.¹⁷¹ Arguably the South lost the war after Lee's unsuccessful attacks upon the Union Army at Gettysburg.¹⁷² In any event, about 750,000 Amer-

who, by the supreme law of the land, are incapable of becoming citizens; and their votes have been used to inaugurate a new policy, hostile to the South, and destructive of its beliefs and safety.

CONFEDERATE STATES OF AMERICA—DECLARATION OF THE IMMEDIATE CAUSES WHICH INDUCE AND JUSTIFY THE SECESSION OF SOUTH CAROLINA FROM THE FEDERAL UNION paras. 22–23 (Dec. 24, 1860), *available at* http://avalon.law.yale.edu/19th_century/csa_scarsec.asp [<https://perma.cc/R6CL-RJVG>]. Interestingly, in order to justify its secession, South Carolina invoked “the equal rights of the States.” *See id.*; *see also* MCPHERSON, *supra* note 166, at 258 (noting that the Constitution of the Confederate States expressly protected states' sovereignty and required states to protect slavery). The Confederate Constitution expressly forbade the Confederate Congress from restricting slavery and restricted states' abilities to interfere with slavery. CONF. CONST. OF MAR. 1861, art. I, §9, *available at* http://avalon.law.yale.edu/19th_century/csa_csa.asp [<https://perma.cc/R6CL-RJVG>]; *id.* art. IV, §§ 2, 3.

170. MCPHERSON, *supra* note 166, at 854–59 (“The North had a potential manpower superiority of more than three to one (counting only white men) and Union armed forces had an actual superiority of two to one during most of the war. In economic resources and logistical capacity the northern advantage was even greater.”)
171. *See generally id.* at 752–56, 807–26, 848–50 (describing the Union and Confederate descent on Atlanta, Sherman's motive for his march to the sea, and Grant's invitation to Lee to surrender). The burning of Atlanta and the March to the Sea imposed a new level of cruelty upon civilians. In Atlanta, General Sherman ordered the citizens evacuated and the Union Army burned the vast majority of buildings. *See* Phil Leigh, *Who Burned Atlanta?*, N.Y. TIMES (Nov. 13, 2014), <https://opinionator.blogs.nytimes.com/2014/11/13/who-burned-atlanta/> [<https://perma.cc/KU4F-BSEH>]. During the March to the Sea, Sherman's troops pursued a “total-war philosophy,” destroying anything of any military value and consuming civilian food supplies with the intent of “making Georgia howl” and undermining the South's will to continue the war. MCPHERSON, *supra* note 166, at 808–11.
172. “The Battle of Gettysburg was a turning point in the Civil War, the Union victory that ended General Robert E. Lee's second and most ambitious invasion of the North. Often referred to as the ‘High Water Mark of the Rebellion’, Gettysburg was the Civil War's bloodiest battle and was also the inspiration for President Abraham Lincoln's immortal ‘Gettysburg Address’.” *A New Birth of Freedom*, NAT'L PARK SERV., <https://www.nps.gov/gett/index.htm> [<https://perma.cc/92HV-XUS5>]

ican deaths ultimately changed the nature of federalism: the South did not retain sufficient “equal sovereignty” to secede against the wishes of the federal government and the North imposed the abolition of slavery.¹⁷³ These facts are removed from mechanisms like judicial review or repeal and retain constitutional significance today.¹⁷⁴

Importantly, in the wake of the North’s triumph, the U.S. Constitution evolved in a fundamentally democratic manner.¹⁷⁵ The Fifteenth Amendment provides:

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.¹⁷⁶

After the Civil War, former slaves could vote,¹⁷⁷ at least for a time.¹⁷⁸ This certainly does not reflect the operation of any “equal

(last updated Oct. 2, 2019). *See also* LEPORE, *supra* note 22, at 294 (describing the thousands of photographs taken of post-battle carnage).

173. New research indicates the Civil War resulted in more casualties than previously estimated:

For 110 years, the numbers stood as gospel: 618,222 men died in the Civil War, 360,222 from the North and 258,000 from the South—by far the greatest toll of any war in American history. But new research shows that the numbers were far too low. By combing through newly digitized census data from the 19th century, J. David Hacker, a demographic historian from Binghamton University in New York, has recalculated the death toll and increased it by more than 20 percent—to 750,000.

Guy Gugliotta, *New Estimate Raises Civil War Death Toll*, N.Y. TIMES (Apr. 2, 2012), <https://www.nytimes.com/2012/04/03/science/civil-war-toll-up-by-20-percent-in-new-estimate.html> [<https://perma.cc/K7FD-JWJK>].

174. *See* LEPORE, *supra* note 22, at 293 (“The Civil War . . . was vast and long, four brutal, wretched years of misery on a scale never before seen.”).

175. The states ratified the Fifteenth amendment in 1870. *15th Amendment to the U.S. Constitution: Voting Rights (1870)*, NAT’L ARCHIVES, <https://www.ourdocuments.gov/doc.php?flash=false&doc=44> [<https://perma.cc/YGC4-A9ZG>] (last visited Apr. 2, 2019).

176. U.S. CONST. amend. XV.

177. The Supreme Court enforced the Fifteenth Amendment to prohibit “grandfather tests” for voting rights. *Guinn v. United States*, 238 U.S. 347 (1915).

178. After the election of 1876, the Republicans withdrew their support from Reconstruction efforts and the Democrats used violence and terrorism to restore white supremacy. DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* § 2.8 (2008). *See also* RICHARD WHITE, *THE REPUBLIC FOR WHICH*

sovereignty” and instead only occurred as a result of a protracted violent struggle in which the South could not match the industrial North.¹⁷⁹ Today, it defies history to circumscribe federal power and democratically negotiated outcomes to restore antebellum¹⁸⁰ notions of sovereignty and the slavocracy that spawned such notions.¹⁸¹

The next major expansion of voting rights occurred in the aftermath of World War I. World War I itself drew the U.S. in to “make the world safe for democracy.”¹⁸² In fact, President Wilson refused to even negotiate with Germany so long as the Hohenzollern monarchy remained;¹⁸³ he would only deal with democratic representatives of

IT STANDS 332 (2017) (stating that after the hotly disputed election of 1876, a compromise meant that “Hayes would not enforce the civil rights laws in the South; he would not deploy federal troops”). “Political equality had been possible, in the South, only at the barrel of a gun. As soon as federal troops withdrew . . . [t]he Klan terrorized the countryside, burning homes and hunting, torturing, and killing people.” LEPORE, *supra* note 22, at 330.

179. MCPHERSON, *supra* note 166, at 854–59.

180. In 1845, the Court held:

First, [t]he shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively. Secondly, [t]he new states have the same rights, sovereignty, and jurisdiction over this subject as the original states. Thirdly, [t]he right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy in this case.

Pollard v. Hagan, 44 U.S. 212, 230 (1845).

181. See Boucher, *supra* note 166.

182. President Wilson stated our war aims to Congress:

The world must be made safe for democracy. Its peace must be planted upon the tested foundations of political liberty. We have no selfish ends to serve. We desire no conquest, no dominion. We seek no indemnities for ourselves, no material compensation for the sacrifices we shall freely make. We are but one of the champions of the rights of mankind. We shall be satisfied when those rights have been made as secure as the faith and the freedom of nations can make them.

President Woodrow Wilson, Joint Address to Congress Leading to a Declaration of War Against Germany (Apr. 2, 1917), *available at Woodrow Wilson's War Message*, DIGITAL HISTORY, http://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=3&psid=1406 [https://perma.cc/Y394-9GYE] (last visited Apr. 3, 2019).

183. A.C. Umbreit, *The Peace Notes: The Armistice: The Surrender*, 3 MARQ. L. REV. 3, 5 (1918). At the conclusion of the war, much optimism surrounded the opportunity to democratize the world:

Germany.¹⁸⁴ This effectively ended the German monarchy and put Germany on its (torturous) path towards the democratic governance it enjoys today.¹⁸⁵ World War I therefore illustrates the core cultural value of democracy in America, evinced by America's increased dedication to the cause by sending as much as 250,000 fresh U.S. troops to France per month in 1918.¹⁸⁶ Ultimately, U.S. military might ended the most durable monarchies in Europe, as the Hapsburgs and Hohenzollern dynasties followed the Romanovs to extinction.¹⁸⁷

Back home, World War I profoundly remade America. "The long fight to secure voting rights for women . . . reached its climax during the war and largely because of it."¹⁸⁸ Wilson decided in January 1918—at the same time he urged self-determination and democracy abroad¹⁸⁹—that he would change his previous opposition and support a constitutional amendment to give women the right to vote.¹⁹⁰ Wilson claimed that this would support the war effort; indeed, that it was "just and necessary."¹⁹¹ On June 28, 1919, the warring powers signed the

[T]he task of teaching all these nations, large and small, the ways of democracy, rests upon us alone, and if we should fail, then democracy again will become a dream. While the war against autocratic militarism is over, the contest to make democracy safe and workable has but just begun.

Id. at 14. While monarchies vanished from the scene insofar as the great powers were concerned, the horrors of militarism reemerged a scant twenty years later with the onset of World War II.

184. THOMAS A. BAILEY, *WOODROW WILSON AND THE LOST PEACE* 36 (1944) (noting President Wilson's refusal to deal with "the military masters of the monarchical autocrats" and instead demanding unconditional surrender if Kaiser Wilhelm remained in power).
185. *Id.* at 36–39. Wilson pursued democracy abroad for white Europeans, but he pursued segregation at home and did nothing to resist Jim Crow laws. See Jim Lehr, *The Racist Legacy of Woodrow Wilson*, ATLANTIC (Nov. 27, 2015), <https://www.theatlantic.com/politics/archive/2015/11/wilson-legacy-racism/417549/> [<https://perma.cc/7E6Q-EQ9L>].
186. G.J. MEYER, *A WORLD UNDONE: THE STORY OF THE GREAT WAR* 677 (2006).
187. G.J. MEYER, *THE WORLD REMADE: AMERICA IN WORLD WAR I* 470, 571 (2016).
188. *Id.* at 337.
189. *Id.* at 375 (recounting Wilson's Fourteen Points speech to Congress to justify the conscription and transit of three million U.S. troops to Europe).
190. *Id.* at 339, 343.
191. *Id.* at 343. World War I highlighted the contributions and sacrifices women made to the war effort; and women's voting rights raised the possibility that full civic participation of women could avert the horrors of war. As President Wilson stated to the Senate in support of a constitutional amendment securing the vote for women: "I regard the

Versailles Treaty ending both World War I and the plague of the monarchies.¹⁹² On June 4, 1919, Congress passed the Nineteenth Amendment, which was ratified the following year.¹⁹³ It provides: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex. Congress shall have power to enforce this article by appropriate legislation.”¹⁹⁴ Once again, America paid in blood for expanded democracy.¹⁹⁵ Axiomatically, the Nineteenth Amendment doubled voting rights in America.¹⁹⁶

The next great leap in voting rights occurred as a result of the Voting Rights Act of 1965.¹⁹⁷ “The veterans of World War II and the Korean War became the foot soldiers of the civil rights movement in the 1950s and 1960s.”¹⁹⁸ These foot soldiers marched in Selma, Alabama for the right to vote, leading directly to passage of the VRA in August 1965.¹⁹⁹ Fighting for freedom in Europe and Asia led directly to the

concurrence of the Senate in the constitutional amendment proposing the extension of the suffrage to women as vitally essential to the successful prosecution of the great war of humanity in which we are engaged.” President Woodrow Wilson, Equal Suffrage, Address of the President of the United States to the Senate (Sept. 30, 1918), *available at* <https://www.senate.gov/artandhistory/history/common/image/WilsonSpeech1918.htm> [<https://perma.cc/XY4X-GQ3H>].

192. BAILEY, *supra* note 184, at 302.

193. *19th Amendment to the U.S. Constitution: Women’s Right to Vote (1920)*, NAT’L ARCHIVES, <https://www.ourdocuments.gov/doc.php?flash=false&doc=63> [<https://perma.cc/9TDJ-HZWC>] (last visited Apr. 3, 2019).

194. U.S. CONST. amend. XIX.

195. See Carol R. Byerly, *War Losses (USA)*, INT’L ENCYCLOPEDIA OF WORLD WAR I, https://encyclopedia.1914-1918-online.net/article/war_losses_usa [<https://perma.cc/CLF5-E53M>] (last updated Jan. 8, 2017) (“American losses in World War I were modest compared to those of other belligerents, with 116,516 deaths and approximately 320,000 sick and wounded of the 4.7 million men who served.”).

196. LEPORE, *supra* note 22, at 402.

197. Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended in scattered sections of 52 U.S.C.). The Act addressed the widespread failure of the Fifteenth Amendment to successfully secure the voting rights of African Americans and other minorities. BELL, *supra* note 178, §§ 6.1–6.7.

198. Maria Höhn, *African-American GIs of WWII: Fighting for Democracy Abroad and at Home*, THE CONVERSATION (Feb. 9, 2017, 11:06 PM), <http://theconversation.com/african-american-gis-of-wwii-fighting-for-democracy-abroad-and-at-home-71780> [<https://perma.cc/UB9P-QT9L>].

199. LEPORE, *supra* note 22, at 620–23. The televised violence of Alabama State Troopers “cracking the skulls” of non-violent protesters on the Pettus Bridge moved President Lyndon Johnson and the nation to action. *Id.* at 622.

fight for civil rights at home. Over one million African Americans served in World War II to protect the civil rights that they themselves were not yet able to enjoy.²⁰⁰ Many more also fought in Korea during the Cold War.²⁰¹ Service in the war effort emboldened African American resistance to continued white supremacy at home.²⁰² In the meantime, the racist ideology of Nazi Germany fell into grave disrepute and the Cold War created an imperative for the U.S. to stand for freedom not just for whites but for people of all colors worldwide.²⁰³

The VRA operated as the “most successful”²⁰⁴ civil-rights act in history for forty-seven years before Chief Justice Roberts articulated a new-fangled theory of “equal sovereignty.”²⁰⁵ As astute commentators recognize:

The impact of the 1965 Act was immediate and dramatic. By 1968, more than one million new Black voters were registered, a figure that included more than 50 percent of the Black voting-age population in every southern state. The most dramatic immediate change occurred in Alabama, where the percentage of Black Americans registered to vote rose from 11 percent in 1956 to 51.2 percent in 1966.

Over the longer term, the Act delivered impressive (though not perfect) results as the number of registered Black voters continued to climb and the historic gaps between Black and White registration rates narrowed. In addition, there was significant growth in the number of Black elected officials. Most

200. Höhn, *supra* note 198.

201. *Id.*

202. JAMES T. PATTERSON, GRAND EXPECTATIONS 19–31 (1997) (“World War II seemed like a turning point in the nation’s quest for greater ethnic acculturation and racial equality.”).

203. KEYSSAR, *supra* note 167, at 195–204 (tracing the impact of World War II and the Cold War on minorities’ voting rights); Derrick Bell, Brown v. Board of Education and the Interest-Convergence Dilemma, 93 HARV. L. REV. 518, 524–25 (1980) (stating that “the decision helped to provide immediate credibility to America’s struggle with Communist countries to win the hearts and minds of emerging third world peoples” and that “*Brown* offered much needed reassurance to American blacks that the precepts of equality and freedom so heralded during World War II might yet be given meaning at home”).

204. “The Voting Rights Act of 1965 is the most successful civil rights law in the history of the United States.” Jason Mazzone & Stephen Rushin, *From Selma to Ferguson: The Voting Rights Act as a Blueprint for Police Reform*, 105 CALIF. L. REV. 263, 294 & n.196 (2017). In Mississippi, African-American registration soared from ten percent to almost sixty percent in four years from 1964 to 1968. KEYSSAR, *supra* note 167, at 212.

205. *See* *Shelby Cty. v. Holder*, 570 U.S. 529, 544 (2013).

notably, by the time the Supreme Court heard *Shelby County v. Holder*, “African-American voter turnout ha[d] come to exceed White voter turnout in five of the six States originally covered by Section 5, with a gap in the sixth State of less than one half of one percent.”²⁰⁶

Scholars link the gains in African-Americans’ civil rights (including voting rights) in the mid-1960s to their willingness to enlist in the Vietnam War.²⁰⁷ Clearly, the VRA formed the cornerstone of a long-term effort to grant basic civil rights to African Americans, and the minority rule imposed to overturn it lacks any semblance of legitimacy beyond raw political power buttressed by yesteryear’s slavocracy.²⁰⁸

Like the expansion of voting rights generally, the next great expansion of voting power occurred in the wake of a bloody conflict—the Vietnam War.²⁰⁹ The Twenty-sixth Amendment provides:

SECTION. 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

SECTION. 2. The Congress shall have power to enforce this article by appropriate legislation.²¹⁰

The Twenty-sixth Amendment was ratified by the states on July 1, 1971,²¹¹ as the country found itself embroiled in a conflict that necessitated transporting hundreds of thousands of young men to the jungles of Southeast Asia.²¹² As Dwight Eisenhower put it, the basic

206. Mazzone & Rushin, *supra* note 204, at 294 (alteration in original) (citations omitted).

207. See PATTERSON, *supra* note 202, at 617; see also DANIEL S. LUCKS, SELMA TO SAIGON: THE CIVIL RIGHTS MOVEMENT AND THE VIETNAM WAR 133–40 (2014) (linking disproportionate African-American enlistment to civil-rights gains and the fact that military service fueled further advancement).

208. See sources cited *supra* notes 138, 160, 161, and 180.

209. KEYSSAR, *supra* note 167, at 226–28 (discussing the critical influence of Vietnam, as well as the Cold War and World War II, on both the enactment of the Twenty-sixth Amendment and in fueling a vast increase in voting rights in the 1960s and 1970s).

210. U.S. CONST. amend. XXVI.

211. See *Historical Highlights: The 26th Amendment*, U.S. HOUSE OF REPRESENTATIVES: HISTORY, ART & ARCHIVES, <https://history.house.gov/HistoricalHighlight/Detail/37022> [<https://perma.cc/5EMB-PSJC>] (last visited Nov. 20, 2019).

212. By 1971, hundreds of thousands of U.S. troops had served in Vietnam. *Vietnam War Allied Troop Levels 1960–73*, AM. WAR LIBR. (Dec. 6, 2008), <https://www.americanwarlibrary.com/vietnam/vwat1.htm> [<https://perma.cc/742Z-QKYF>].

argument in favor of expanded voting rights for youths came down to this: “If a man is old enough to fight he is old enough to vote.”²¹³ Once again, expanded voting rights occurred due to a war.

Amending the U.S. Constitution requires overwhelming political consensus.²¹⁴ The Constitution has only been amended to expand voting rights and democracy and, repeatedly, to empower Congress to protect voting rights from denial or abridgement.²¹⁵ This expansion of voting power is closely associated with the sacrifices of war—including sacrifices paid in blood.²¹⁶ At the constitutional level, this expansion of democracy is a one-way street.²¹⁷ Thus, the value of securing democracy cannot be overstated; it is a core American value vindicated generation after generation.²¹⁸ This value should fuel hope and aggressive action to

213. Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 *CIN. L. REV.* 1345, 1358–59 (2003). The plain meaning of the Amendment prohibits all age discrimination denying or abridging voting rights, a point we return to in the next part of the Article. See Eric S. Fish, *The Twenty-Sixth Amendment Enforcement Power*, 121 *YALE L. J.* 1168, 1174–77 (2012).

214. U.S. CONST. art. V.

215. See sources cited *supra* notes 176, 194, and 210.

216. As President Lyndon Johnson stated to a joint session of Congress in 1965:

This was the first nation in the history of the world to be founded with a purpose. The great phrases of that purpose still sound in every American heart, North and South: “All men are created equal,” “government by consent of the governed,” “give me liberty or give me death.” Well, those are not just clever words, or those are not just empty theories. In their name Americans have fought and died for two centuries, and tonight around the world they stand there as guardians of our liberty, risking their lives.

President Lyndon B. Johnson, Address to a Joint Session of Congress on Voting Legislation (Mar. 15, 1965), available at *American Rhetoric: Top 100 Speeches*, AM. RHETORIC <https://www.americanrhetoric.com/speeches/lbjweshallovercome.htm> [<https://perma.cc/XD2D-LBWZ>] (last updated May 22, 2018). “[T]he most prominent peaks in the history of the franchise in the United States were the Revolutionary War, the Civil War, World Wars I and II, and the first decades of the cold war. Each of these conflicts contributed significantly to the broadening of the right to vote.” KEYSSAR, *supra* note 167, at 296.

217. No constitutional amendment has ever circumscribed voting or citizens’ democratic voice. See *generally* U.S. CONST.

218. KEYSSAR, *supra* note 167, at xix (“According to our national self-image—an image etched in popular culture and buttressed by scholarly inquiry—the United States has been the pioneer of republican and then democratic reforms for two hundred years, the standard bearer of democratic values on the stage of world history.”).

defeat the stealth efforts to reimpose an American oligarchy by all means necessary under the law.

Recently, hope has emerged from Florida. On November 6, 2018, the citizens of Florida voted to pass the Voting Restoration Amendment (“Amendment 4”), a measure that held favor with sixty-five percent of voters.²¹⁹ Amendment 4, as it stands, restores voting rights to over 1.4 million convicted felons—the largest voter expansion since the Twenty-sixth Amendment.²²⁰ The terms of Amendment 4 restore voting rights to convicted felons who have “completed their prison term, parole and probation, except those with murder or felony sexual-assault convictions.”²²¹ While some backtracking may occur, the fact remains that a powerful majority of a large, diverse, and critical swing state voted to expand democracy.²²²

Felony enfranchisement could well create the next great expansion in voter eligibility. The vote in Florida mirrors nationwide support for halting felony disenfranchisement.²²³ Felony disenfranchisement disproportionately affects African Americans, as intended in the post-Civil War South where many such laws find their roots.²²⁴ Currently,

219. Jessica Weiss, *When Will Amendment 4 Be Implemented?*, WRLN (Dec. 14, 2018), <https://www.wlrn.org/post/when-will-amendment-4-be-implemented> [<https://perma.cc/JM6Y-9GDD>].

220. Jon Kamp & Arian Campo-Flores, *Florida to Gain 1.4 Million Voters if Felon Measure Passes*, WALL ST. J. (Oct. 30, 2018, 5:42 AM), <https://www.wsj.com/articles/florida-to-gain-1-4-million-voters-if-felon-measure-passes-1540891801> [<https://perma.cc/26Z3-4CD3>].

221. *Id.*

222. Lawrence Mower, *Paying Restitution Fully Is a Huge Complication for the Intent of Amendment 4*, MIAMI HERALD (Apr. 4, 2019, 10:00 AM), <https://www.miamiherald.com/news/politics-government/state-politics/article228821704.html> [<https://perma.cc/2ALT-Z2WH>] (“Republican lawmakers and some key supporters of Amendment 4 believe sentences include restitution. Others disagree.”). The GOP will continue its war on democracy by all means necessary with respect to all expansions of voting rights, particularly voting rights for people of color, which plays a key role in justifying legal counterattacks. See David Leonhardt, *G.O.P. vs. Voting Rights (Yes, Again)*, N.Y. TIMES (Apr. 9, 2019), <https://www.nytimes.com/2019/04/09/opinion/florida-felons-vote-amendment-4.html> [<https://perma.cc/Z3LU-RB2W>].

223. Sam Levine & Ariel Edwards-Levy, *Most Americans Favor Restoring Felons’ Voting Rights, But Disagree On How*, HUFFINGTON POST (Mar. 21, 2018, 6:56 PM), https://www.huffpost.com/entry/felons-voting-rights-poll_n_5ab2c153e4b008c9e5f3c88a [<https://perma.cc/2ALT-Z2WH>].

224. *Id.*; see also Angela Behrens et al., *Ballot Manipulation and the “Menace of Negro Domination”: Racial Threat and Felon Disenfranchisement in the United States, 1850-2002*, 109 AM. J. SOC. 559, 598 (2003) (finding that after the Civil War “felon disenfranchisement laws offered one method for states to avert ‘the menace of negro domination.’”).

about 6.1 million felons cannot vote due to felony disenfranchisement laws across the U.S.²²⁵ This defies the general trend of American history, shown above, toward greater franchise rights.²²⁶ In fact, in 1788, less than two percent of the population voted for president.²²⁷ Today, about forty or forty-five percent of the population votes for president.²²⁸ The percentage of Americans voting for president has increased by a factor of twenty since the incipency of our republic.²²⁹

That is the central point here. The constitutional trajectory of democratic governance moves only in the direction of greater majority rule, despite its admittedly oligarchic beginning.²³⁰ The core value of ever-increasing democracy arises very often either from a contract with those asked to make the ultimate sacrifice in wartime or from the consecration of war.²³¹ Indeed, the U.S. traditionally operated as an

225. Karin Kamp, *Voting By the Numbers: Americans and Election Day*, MOYERS & COMPANY (Nov. 8, 2016), <https://billmoyers.com/story/numbers-americans-election-day-voting/> [<https://perma.cc/T3FU-UBJK>]. According to one observer, the major spikes in voting rights arose from the earliest decades of the republic:

As different segments of the American population gained the right to vote throughout our history, the percentage of voters as compared to population increased. The first surge came in 1828, when non-property-owning white men gained the right to vote. Then we see another surge, when women got the right to vote in 1920.

Id.

226. *See supra* Part IV.

227. Kamp, *supra* note 225.

228. *Id.*

229. *Id.*

230. *See generally* KEYSSAR, *supra* note 167 at 295–98 (tracing the expansion of voting rights throughout U.S. history).

231. As Professor Karlan explains:

[T]he history of voting rights in America has been an admirable one. Far from being “almost bloodless, almost completely peaceful, and astonishingly easy,” the struggle for voting rights has in fact been none of those things. The most significant developments—from the enactment of the Reconstruction, Nineteenth, and Twenty-Sixth Amendments to the abandonment of wealth qualifications—were either directly or indirectly the product of wars. Sometimes, war has emboldened previously excluded groups to demand their right to full citizenship; sometimes, war has brought home to the rest of the nation the injustice of asking people to fight on behalf of a government that excludes them. As much as our military engagements have focused on making the rest of world safe for democracy, they have often been as valuable in helping to achieve democracy at home.

international force for democracy as a means of stabilizing the global political order and securing peace.²³² Moreover, democratic rule forms an essential element of the rule of law²³³ and should certainly warrant protection as a fundamental right under American law.²³⁴ Consequently, based upon these realities, we advocate that the law restructure our electoral processes to maximize democratic influence by all means necessary.²³⁵ The next section expands on the meaning of that term for purposes of our democracy in the current era.

IV. REFORMING DEMOCRACY

Congress holds the power to regulate and restructure our democracy. For example, Article I, section 4 of the Constitution provides: “Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature

Karlan, *supra* note 213, at 1371 (footnotes omitted).

232. LARRY DIAMOND, *ILL WINDS: SAVING DEMOCRACY FROM RUSSIAN RAGE, CHINESE AMBITION, AND AMERICAN COMPLACENCY* 41–43 (2019). Unfortunately, the “steady decline in the quality of American democracy” contributed to a decline of democratic freedom worldwide after 2006, in favor of a more autocratic vision of governance proffered by China and Russia, “which are avidly undermining democratic and liberal values around the world.” Larry Diamond, *The Global Crisis of Democracy*, WALL ST. J. (May 18, 2019, 2:26 PM), <https://www.wsj.com/articles/the-global-crisis-of-democracy-11558105463> [<https://perma.cc/C47K-PL7D>].

233. *See* sources cited *supra* note 162.

234. Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J. L. & PUB. POL’Y 143, 176–86 (2008). Douglas summarizes as follows:

Most Americans believe that they have a voice in their democracy because they can exercise that right. Every four years, advocacy groups urge citizens to vote in that year’s presidential election. We fight wars overseas in part to help people in foreign countries achieve the freedom that comes with the ability to cast a ballot. In short, the right to vote is part of our ethos for what it means to be an American. The problem, however, is that our legal system has not always given an individual’s right to vote the same venerated status as it has given many other important rights. Although the right to vote is considered a “fundamental” right, courts often treat the right to vote as less than fundamental by employing a low level of scrutiny to election law challenges.

Id. at 145 (footnotes omitted).

235. Americans will generally support all such efforts. About fifty-five percent believe our democracy is “weak” and sixty-eight percent think it is “weakening.” Democracy Project, *supra* note 6, at 4–5. Moreover, sixty percent of Americans rate democracy as “absolutely important” and an additional seventeen percent rate it as “very important.” *Id.* at 3.

thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”²³⁶ In *Arizona v. Inter Tribal Council of Arizona, Inc.*,²³⁷ the Court read congressional authority under the Elections Clause broadly, explaining that:

Because the power the Elections Clause confers is none other than the power to pre-empt, the reasonable assumption is that the statutory text accurately communicates the scope of Congress’s pre-emptive intent. Moreover, the federalism concerns underlying the presumption in the Supremacy Clause context are somewhat weaker here. Unlike the States’ “historic police powers,” the States’ role in regulating congressional elections—while weighty and worthy of respect—has always existed subject to the express qualification that it “terminates according to federal law.” In sum, there is no compelling reason not to read Elections Clause legislation simply to mean what it says.²³⁸

The passage of the Seventeenth Amendment, which provided for the direct, popular election of Senators instead of their selection by state legislatures, rendered moot the one limitation on Congress’s power under the Elections Clause; that is, when it comes to elections for both houses of Congress, Congress has broad power to regulate those elections.²³⁹

Congress enjoys additional power under multiple other constitutional provisions relating to elections.²⁴⁰ Most importantly, the Fourteenth, Fifteenth, Nineteenth and Twenty-sixth Amendments each empowers Congress to enforce the expanded franchise rights those Amendments provide and to protect such voting rights from being “denied or abridged.”²⁴¹ Because of the overlapping and multiple grants of authority to Congress to secure federal elections, scholars posit that “federal power is at its highest ebb when Congress seeks to regulate federal elections.”²⁴² Further, “federalism is not a barrier to aggressive

236. U.S. CONST. art. I, § 4, cl. 1.

237. 570 U.S. 1 (2013).

238. *Id.* at 14–15 (citations omitted) (first quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); then quoting *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 347 (2001)).

239. *Id.* at 16–17; *see also* U.S. CONST. amend. XVII (changing the place of Senate selections away from State legislatures).

240. *See, e.g.*, U.S. CONST. art. I, §§ 2, 4–5; *id.* art. II, § 1; *id.* art. IV, § 4; *id.* amends. XXII, XIV, XV, XVII, XIX, XXIII, XXIV, XXVI.

241. *Id.* amend. XIV, § 5; *id.* amend. XV, § 2; *id.* amend. XIX; *id.* amend. XXVI, § 2.

242. Tolson, *supra* note 144, at 322. Professor Tolson continues:

federal action under the Elections Clause seeking to protect the fundamental right to vote” because these Amendments commit the federal government to guard the expanded democracy that the Amendments envision.²⁴³

Congress should use this power to immediately reverse felony disenfranchisement nationwide. Scholars find the laws closely associated with the maintenance of racial hierarchy:

The expansion of citizenship to racial minorities, and the subsequent extension of suffrage to all citizens, threatened to undermine the political power of the white majority. By restricting the voting rights of a disproportionately nonwhite population, felon disenfranchisement laws offered one method for states to avert “the menace of negro domination.” The sharp increase in African-American imprisonment goes hand-in-hand with changes in voting laws. In many Southern states, the percentage of nonwhite prison inmates nearly doubled between 1850 and 1870. Whereas 2% of the Alabama prison population was nonwhite in 1850, 74% was nonwhite in 1870, though the total nonwhite population increased by only 3%. Felon disenfranchisement provisions offered a tangible response to the threat of new African-American voters that would help preserve existing racial hierarchies.²⁴⁴

Reversing felony-disenfranchisement laws would not violate any new legal doctrines like “equal sovereignty” because the laws would not be limited to the South.²⁴⁵ Indeed, it is challenging to find non-

From this perspective, the sin of *Shelby County* is not only the neutering of a significant provision of one of the most successful civil rights statutes in history, but also that it leaves a legacy of constitutional interpretation ignorant of the full spectrum of congressional authority in this area. The Court focused on the substantial federalism costs of the VRA, ignoring that the Act arguably could have been sustained based on some combination of the Elections Clause and the Fourteenth and Fifteenth Amendments.

Id. at 323 (citing H.R. REP. NO. 89-439, at 6 (1965) (“The bill, as amended, is designed primarily to enforce the 15th amendment to the Constitution of the United States and is also designed to enforce the 14th amendment and article I, section 4.”)).

243. *Id.* at 321–22.

244. Behrens et al., *supra* note 224, at 598 (citations omitted).

245. *Id.* (“As in the South, new Western states struggled to sustain control ‘under conditions of full democratization’ and a changing industrial and agricultural economy. Racial and ethnic divisions thus led to similar attempts to limit suffrage of the non-white population”) (citations omitted).

discriminatory reasons for these laws.²⁴⁶ The fact that these laws mimic the operation of the “three-fifths a man” rule compounds the laws’ odiousness because ineligible prisoners inflate the voting power of rural districts where prisons are typically found while denying those prisoners the right to vote.²⁴⁷ Repeal of all felony disenfranchisement rests clearly within the powers of Congress to protect voting rights and democracy.

Another means of expanding democracy to meet the threat of an oligarchy entails granting statehood to Puerto Rico and the District of Columbia. The Constitution grants this power to Congress.²⁴⁸ It is impossible to defend the non-voting status of the U.S. citizens currently residing in Puerto Rico.²⁴⁹ This summarizes the bizarre status of our co-citizens in Puerto Rico:

Though Puerto Rico nationals are U.S. citizens and they send a non-voting resident commissioner to the U.S. House of Representatives, they are prohibited from voting in presidential elections.

246. *Id.* (“Our results suggest that one of the reasons that felon disenfranchisement laws persist may be their compatibility with modern racial ideologies. The laws are race neutral on their face, though their origins are tainted by strategies of racial containment.”); *see also* *Hunter v. Underwood*, 471 U.S. 222 (1981) (holding that Alabama’s constitutional provision disenfranchising felons violated the Fourteenth Amendment).

247. As one practitioner notes:

In forty-four states, prisoners are treated as residents of their prison cell for the purposes of creating electoral districts, although they themselves cannot vote, and are likely to return to their home community after serving their term of incarceration. Those sent to prison are disproportionately people of color and disproportionately come from urban areas. Prisons, however, are increasingly located in more rural areas, among disproportionately white, more conservative populations.

Julie A. Ebenstein, *The Geography of Mass Incarceration: Prison Gerrymandering and the Dilution of Prisoners’ Political Representation*, 45 *FORDHAM URB. L.J.* 323, 371 (2018) (footnotes omitted).

248. U.S. CONST. art. IV, § 3 (“New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.”).

249. Colonial rule of U.S. citizens can only be termed “a historic injustice,” starkly inconsistent with the nation’s history of expanding democracy. *See* Camilo Montoua-Galvez & David Begnaud, *Lawmakers Introduce Puerto Rico Statehood Bill: “It’s Time to End 120 Years of Colonialism,”* CBS NEWS (Mar. 28, 2019, 11:27 AM), <https://www.cbsnews.com/news/statehood-for-puerto-rico-lawmakers-to-introduce-bill-granting-puerto-rico-statehood-bypassing-any-referendum/> [<https://perma.cc/7BAU-TTA4>].

However, Puerto Rican nationals can cast ballots in the Democratic and Republican nominating contests for the White House.²⁵⁰

The current policy of colonial rule in Puerto Rico leaves 3.2 million Americans disenfranchised.²⁵¹ With respect to the District of Columbia, the *Washington Post* states, bluntly:

Another bill . . . has been introduced . . . that would make D.C. the nation's 51st state It is wrong that the more than 700,000 people who live in the District, paying taxes and fulfilling all the other obligations of citizenship (including going to war), are denied a voice in Congress. It is time for them to be heard.²⁵²

In all, four million U.S. citizens simply do not count in American democracy because they happen to live in Washington, D.C., or Puerto Rico.²⁵³

Reforming the Senate itself presents more difficulty.²⁵⁴ After all, Article V specifies that “no State, without its Consent, shall be deprived of its equal Suffrage in the Senate” through any constitutional amendment.²⁵⁵ The current system deprives both states and individuals of any notion of “equal suffrage” in the Senate: “today a voter in the state with the lowest population—Wyoming, with 573,000 people—has

250. Amanda Becker, *Puerto Rico Governor says 2020 Democrats Must Support Statehood*, REUTERS (Feb. 22, 2019, 2:14 PM), <https://www.reuters.com/article/us-usa-election-puertorico/puerto-rico-governor-says-2020-democrats-must-support-statehood-idUSKCN1QB2A4> [<https://perma.cc/9WYN-WS3F>].

251. See Montoua-Galvez & Begnaud, *supra* note 249; see also José A. Cabranes, *Puerto Rico: Colonialism as Constitutional Doctrine*, 100 HARV. L. REV. 450, 461 (1986) (reviewing JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* (1985) (“Puerto Rico is still not a part of the ‘United States’ for all constitutional purposes; the island and its people are still subject to the laws and regulations adopted by the political branches of the national government before which they appear only as supplicants”)).

252. *The House Finally Voted to Support D.C. Statehood. It's a Needed Step.*, WASH. POST (Mar. 12, 2019, 7:11 PM), https://www.washingtonpost.com/opinions/the-house-finally-voted-to-support-dc-statehood-its-a-needed-step/2019/03/12/fl171771c-4434-11e9-8aab-95b8d80a1e4f_story.html?utm_term=.d46d72b134b7 [<https://perma.cc/7DFF-SPPD>].

253. In both Puerto Rico and the District of Columbia, strong citizen majorities favor statehood. See Mehdi Hasan, *Eight Simple Steps to Fix American Democracy*, NEWSTATESMANAMERICA (Nov. 1, 2019), <https://www.newstatesman.com/world/north-america/2018/11/eight-simple-steps-fix-american-democracy> [<https://perma.cc/46SF-Z3QM>].

254. If the Senate can become more democratically constituted then the electoral college will follow. See U.S. CONST. art. II, § 1.

255. U.S. CONST. art. V.

approximately 70 times the influence in the Senate as a voter in the largest state, California, where the population is 39.5 million.”²⁵⁶ This plainly abridges and dilutes the votes of women and minorities in highly populated states.²⁵⁷ The political scientist David Birdsell calculates that by 2040, seventy percent of U.S. citizens will reside in fifteen states with thirty Senators; on the other hand, thirty percent of the population will reside in thirty-five states with seventy Senators.²⁵⁸

Professor Eric Orts argues that Congress holds the power to alter the current convention of limiting states to two senators.²⁵⁹ He finds this power in the Fourteenth, Fifteenth, Nineteenth, Twenty-fourth and Twenty-sixth Amendments, which he argues give Congress broad power to protect voting rights from being “denied or abridged.”²⁶⁰ The Constitution requires only that the Senate “be composed”²⁶¹ of two senators per state; if the Senate also consisted of an overlay of proportional representation based upon population, as Orts suggests, the Constitution as a whole would be harmonized in a pro-democracy direction.²⁶² We argue, in short, that the Senate “be composed” of two Senators per state, and be further composed of additional Senators based upon state population to vindicate every State’s right to equal suffrage in the senate.

256. Stephen Mihm, *Why Power in the Senate Is Increasingly Imbalanced*, BLOOMBERG (Feb. 8, 2019, 8:30 AM), <https://www.bloomberg.com/opinion/articles/2019-02-08/senate-power-imbalance-tilts-toward-least-populous-states> [<https://perma.cc/GB88-GBWA>].

257. See Philip Bump, *By 2040, Two-thirds of Americans Will Be Represented by 30 Percent of the Senate*, WASH. POST (Nov. 28, 2017, 12:23 PM), https://www.washingtonpost.com/news/politics/wp/2017/11/28/by-2040-two-thirds-of-americans-will-be-represented-by-30-percent-of-the-senate/?utm_term=.81010530283f [<https://perma.cc/BD48-V3PR>] (“Population projections from the University of Virginia’s Weldon Cooper Center for Public Service offer a slightly lower distribution: By 2040, the 15 most populous states will be home to 67 percent of the U.S. population and represented by 30 percent of the Senate.”).

258. *Id.*

259. Eric W. Orts, *The Path to Give California 12 Senators, and Vermont Just One*, ATLANTIC (Jan. 2, 2019), <https://www.theatlantic.com/ideas/archive/2019/01/heres-how-fix-senate/579172/> [<https://perma.cc/A2MG-TZQC>].

260. *Id.*

261. U.S. CONST. art. I, § 3.

262. Much turns on the meaning of the word *composed*. See, e.g., *Compose*, WEBSTER’S NEW UNIVERSAL UNABRIDGED DICTIONARY 419 (1996) (defining “compose” primarily to mean “to make or form by combining things or parts.”); *Compose*, RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 302 (unabridged ed. 1973) (“to make or form by combining things, parts or elements”).

Congress should also exercise its power to render the Supreme Court more responsive to democratic realities and to check abusive uses of judicial review.²⁶³ Few would dispute that judicial review protects individual rights when the Court exercises judicial review on behalf of minorities to prevent a tyranny of the majority.²⁶⁴ But exercising judicial review for the reinstallation of an oligarchy composed of the already powerful lacks all legitimacy.²⁶⁵ Protecting monied interests and suspect socio-economic hierarchies, as the Court does today with unblinking consistency,²⁶⁶ profoundly distorts our democracy.²⁶⁷ The fact that only nine justices sit on the Court hailing from just two so-called “elite” law schools also makes the Court non-reflective of the

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263. While judicial independence plays a crucial role in a well-ordered scheme of democracy, the judiciary can overstep its bounds, and throughout our history the government’s more political branches generally adhered to extra-constitutional conventions to secure judicial independence or, alternatively, to check perceived judicial excesses. *See* Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 544–45 (2018).
264. *See* Fishkin & Forbath, *supra* note 24, at 673 (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (“The idea of equal protection of the laws is central to our modern understanding of the Constitution. Today we generally think of equal protection as a constitutional provision aimed against laws that injure groups defined by race and sex and other ‘discrete and insular minorities.’”).
265. *See* Aaron Tang, *Rethinking Political Power in Judicial Review*, 106 CAL. L. REV. 1755, 1767–68 (2018); *id.* at 1825 (arguing “that legislative enactments burdening politically powerful groups hold a special kind of democratic and institutional pedigree that courts should take into account”).
266. The Roberts Court holds a long record of empowering the powerful to the point of nearly re-imposing an oligarchy through judicial fiat. *See* *Janus v. Am. Fed’n of State, Cty. and Mun. Emps.*, 138 S. Ct. 2448, 2486 (2018) (holding that labor unions may not collect fees to support political activities); *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185, 226 (2014) (lifting aggregate limits on campaign contributions); *Shelby Cty. v. Holder*, 570 U.S. 529, 556–57 (2013) (holding pre-clearance provisions of Voting Rights Act unconstitutional); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 372 (2010) (allowing unlimited corporate electioneering); *see also* Jedediah Purdy, *The Roberts Court Protects the Powerful for a New Gilded Age*, N.Y. TIMES (June 28, 2018), <https://www.nytimes.com/2018/06/28/opinion/sunday/supreme-court-kennedy-roberts.html> [<https://perma.cc/X49G-3B44>] (“When it comes to economic inequality, today’s Supreme Court is not only failing to help but is also aggressively making itself part of the problem in a time when inequality and insecurity are damaging the country and endangering our democracy.”).
267. *See* Fishkin & Forbath, *supra* note 24, at 696 (advocating for strict scrutiny against laws fostering an oligarchy and a strong presumption of constitutionality for laws breaking-down oligarchy).

nation and insensitive to the nation's intellectual diversity.²⁶⁸ This kind of concentrated hyper-elitism finds fertile ground for the re-imposition of an oligarchy under the guise of a "meritocracy." Over the years, the Court has ranged in size from five justices to ten.²⁶⁹ In the early decades of the Republic, the number of justices increased as the nation expanded.²⁷⁰ It has remained fixed at nine since 1869.²⁷¹ Meanwhile, our population increased ten-fold.²⁷² Congress can and should insist on a larger, more diverse Court. Expanding the Court makes sense as a means of assuring that the vast diversity of the nation is adequately

268. Margaret Talev, *Does Supreme Court's Harvard-Yale Dominance Bother Obama?*, McCLATCHY (Apr. 12, 2010, 5:27 PM), <https://www.mcclatchydc.com/news/politics-government/article24579943.html> [<https://perma.cc/UB9N-2KWE>] (noting that George Washington University Professor Jonathan Turley calls Harvard and Yale's dominance on the Court "perfectly absurd" and "remarkably inbred"); see also Jason Iuliano & Avery Stewart, *The New Diversity Crisis in the Federal Judiciary*, 84 TENN. L. REV. 247, 299 ("Drawing upon the Federal Judicial Center Biographical Database, we found that the educational diversity of federal judges is at an all-time low. Over the past century, a smaller and smaller number of law schools have claimed a larger and larger share of judgeships and clerkships.").

269. PETER G. FISH, *Justices, Number of*, THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 550, 550 (Kermit L. Hall ed., 2d ed. 2005).

270. *Id.*

271. The Judiciary Act of 1869 established the current nine-member Supreme Court. Judiciary Act of 1869, ch. 22, 16 Stat. 44. Prior to that Act, Congress regularly tinkered with the size of the Court. See Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73, 73 (establishing that the Court "consist of a chief justice and five associate justices"); Seventh Circuit Act of 1807, ch. 16, § 5, 2 Stat. 420, 421 (increasing the number from six to seven); Tenth Circuit Act of 1863, ch. 100, § 1, 12 Stat. 794, 794 (setting the size of the Court at one Chief Justice and nine Associate Justices). In 1866, Congress decreased the number of justices. Judicial Circuits Act of 1866, ch. 210, § 1, 14 Stat. 209, 209 ("[N]o vacancy in the office of associate justice of the [S]upreme [C]ourt shall be filled by appointment until the number of associate justices shall be reduced to six.").

272. See *History: POP Culture: 1870*, U.S. CENSUS BUREAU, https://www.census.gov/history/www/through_the_decades/fast_facts/1870_fast_facts.html [<https://perma.cc/RF79-N85Y>] (last revised Oct. 21, 2019) (noting that the 1870 U.S. Census reported 38,558,371 U.S. residents); see also *Census Bureau Projects U.S. and World Populations on New Year's Day*, U.S. CENSUS BUREAU (Feb. 1, 2019), <https://www.census.gov/newsroom/press-releases/2019/new-years-population.html> [<https://perma.cc/ZPR4-T4KS>] ("As our nation prepares to ring in the new year, the U.S. Census Bureau projects the U.S. population will be 328,231,337 on Jan. 1, 2019.").

represented on the Court.²⁷³ Such an expansion need not raise the specter of a power-grab, like that which the GOP pulled off to achieve minority rule.²⁷⁴

Perhaps the most ambitious of the current proposals to help reverse engineer the damage being done to our democracy is the “For the People Act of 2019”²⁷⁵ (also known as “HR 1”) which recently passed the House of Representatives.²⁷⁶ Sponsored by Representative Sarbanes of Maryland, the Act’s goal is “to expand American’s access to the ballot box, reduce the influence of big money in politics, and [to] strengthen ethics rules for public servants and for other purposes.”²⁷⁷ The legislation passed the House in a party-line vote.²⁷⁸ Senate Majority Leader Mitch McConnell stated that he would not even allow the GOP-controlled Senate to vote on the measure.²⁷⁹ The bill includes many bold innovations such as federally funded campaign contributions that give

273. See Frey, *supra* note 16 (“Minorities will be the source of all of the growth in the nation’s youth and working age population, most of the growth in its voters, and much of the growth in its consumers and tax base as far into the future as we can see.”).

274. On this point, President Franklin Roosevelt’s plan to expand the Court is tainted to some degree:

Every history of America in the twentieth century recounts the familiar chronicle—that in February of 1937, FDR, in response to a series of decisions striking down New Deal laws, asked Congress for authority to add as many as six Justices to the Supreme Court, only to be outwitted by the Court itself when Chief Justice Charles Evans Hughes demonstrated that Roosevelt’s claim that the Court was not abreast of its docket was spurious; when the conservative Justice Willis Van Devanter retired, thereby giving the President an opportunity to alter the composition of the bench; and when, above all, the Court, in a series of dramatic decisions in the spring of 1937, abandoned its restricted conception of the scope of the powers of both state and national governments. In short, it is said, Roosevelt’s Court-packing plan went down to defeat because, in the catchphrase that swept Washington that spring, “a switch in time saved nine.”

William E. Leuchtenburg, *FDR’s Court-Packing Plan: A Second Life, A Second Death*, 1985 DUKE L.J. 673, 673 (1985).

275. H.R. 1, 116th Cong. (2019).

276. *Id.*

277. *Id.*

278. Mike DeBonis & John Wagner, *House Democrats Pass H.R. 1, Their Answer to Draining the Swamp*, WASH. POST (Mar. 8, 2019), https://www.washingtonpost.com/powerpost/house-democrats-prepare-to-pass-hr-1-their-answer-to-draining-the-swamp/2019/03/08/740f6b48-415b-11e9-9361-301ffb5bd5e6_story.html?utm_term=.7b3b1257d27a [https://perma.cc/SJA9-JS9B].

279. *Id.*

a candidate six dollars for every one dollar they raise from small donors.²⁸⁰ On the other hand, it takes a more tepid approach toward expanding voting power relative to the proposals above.²⁸¹

There are, in fact, many proposals for reforming and restricting our democracy through law in ways that enhance the political system's ability to translate political pressure into law.²⁸² Senator Elizabeth Warren favors abolishing the Electoral College.²⁸³ Others favor proportional representation in the Electoral College.²⁸⁴ Another outstanding proposal would institute an end-run around the Electoral College without formally amending the Constitution by having states that represent a majority of electoral votes (currently 270) enter into a compact to cast all their electoral votes to the winner of the national popular vote.²⁸⁵ Many commentators also offer various methods to deal with the anti-democratic nature of the U.S. Senate.²⁸⁶

This Article does not address fully the constitutionality of any of the above proposals for expanding democracy. Instead, it introduces a compelling constitutional value—democracy and its expansion—as a core cultural and historical value worthy of great weight.²⁸⁷ It further argues that given our history of expanding democracy, the tendency to expand should weigh much more heavily than efforts to impose oligarchic rule in judicial decisions.²⁸⁸ The above proposals would be

280. *Id.*

281. *Id.*

282. *Id.*

283. Astead W. Herndon, *Elizabeth Warren Calls for Ending Electoral College*, N.Y. TIMES (Mar. 18, 2019), <https://www.nytimes.com/2019/03/18/us/politics/elizabeth-warren-town-hall-electoral-college.html> [<https://perma.cc/TD8X-HDMC>].

284. Nicholas Riccardi, *2020 Democrats' New Litmus Test: Abolish Electoral College*, U.S. NEWS (Mar. 20, 2019), <https://www.usnews.com/news/politics/articles/2019-03-20/2020-democrats-new-litmus-test-abolish-electoral-college> [<https://perma.cc/8NJE-UGZP>].

285. *National Popular Vote*, NAT'L CONF. ON STATE LEGISLATURES (May 31, 2019), <http://www.ncsl.org/research/elections-and-campaigns/national-popular-vote.aspx> [<https://perma.cc/AY3W-4U3K>].

286. See Orts, *supra* note 259 (“Today the voting power of a citizen in Wyoming, the smallest state in terms of population, is about 67 times that of a citizen in the largest state of California, and the disparities among the states are only increasing. The situation is untenable.”); *id.* (noting that scholars have suggested breaking up larger states, reforming the Senate's composition, or abolishing the Senate altogether).

287. *Supra* Part III.

288. Michele E. Gilman, *A Court for the One Percent: How the Supreme Court Contributes to Economic Inequality*, 2014 UTAH L. REV. 389, 434 (“As this [article] explains, the Supreme Court has directed political outcomes, dismantled congressional attempts to rein in corporate political spending,

consistent with that value, and they are appropriate means of repairing our democracy and protecting our nation from the threat of an oligarchy.²⁸⁹ In other words, the constitutionality of efforts to expand democracy should also consider the legitimacy and transparency of the radical-right's cause to re-impose oligarchy.²⁹⁰ Constitutional decision-making does not occur by accident.²⁹¹ The handiwork of the Roberts Court cannot find shelter behind any traditional mode of adjudication.²⁹² The transparent repair and expansion of our democracy in response to threat of an oligarchy would be furthered by the above proposals.

In considering the validity of measures intended to restore democracy, the intimate relationship between our racial history and democracy must also weigh heavily.²⁹³ At its birth, our nation succumbed to continuing the nation's racist stain—slavery—rather than risk democracy.²⁹⁴ Even after the bloody conflict of the Civil War and the promise of the post-Civil War Amendments, white supremacists

and undermined the electoral process for low-income voters. In each of these areas, the 1% flourishes, while the 99% becomes increasingly disenfranchised.”).

289. *Supra* Part II.

290. *E.g.*, Gene Nichol, *Citizens United and the Roberts Court's War on Democracy*, 27 GA. ST. U. L. REV. 1007, 1016 (2011) (“What increasingly emerges from the Roberts Court's campaign finance decisions, like a mountain appearing through the receding mists, is a foundational conclusion that the United States Constitution, ultimately, secures a power for people of wealth to use their disproportionate economic resources to get their way in our politics.”).

291. *See id.* at 1009 (“[S]ave us from these . . . judges who ‘just call balls and strikes.’ Plenty has been said about this grotesque hypocrisy. . . . My favorite fusillade . . . is Senator Arlen Specter's claim in his farewell address that Chief Justice ‘Roberts promised to just call the balls and strikes and then moved the bases.’”).

292. *See id.* at 1017 (“[The Roberts Court's] decisions say, at bottom, that there is something about our Constitution that means we are flatly powerless to deal with the scourge of purchased politics. This cannot be so. It is dangerous and demeaning to the world's strongest democracy to suggest that it is.”).

293. Thus, for example, the constitutional convention eschewed democracy in favor of maintaining slavery. *See* Perea, *Echoes*, *supra* note 18, at 1087 (“Why does the world's leading democracy rely on an electoral institution that overrides the results of democracy? The answer to this question can be found in the proslavery provisions of the Constitution.”).

294. *Id.* at 1087 (“As described earlier, the ‘three-fifths of all other persons’ phrase in the apportionment clause was intended to give additional representation in Congress to the slave states. The electoral college also was created to protect the political interests of slave owners in presidential elections.”).

and oligarchists needed racial animus to fuel their ascendancy and economic domination in the South.²⁹⁵ Today's oligarchs continue to use race to fuel their political ambitions to consolidate more power in fewer hands.²⁹⁶ Racial politics will bedevil our nation until we reckon with our racial hierarchy.²⁹⁷ Expanded democracy operates as a condition precedent for breaking down our nation's festering racial hierarchy.²⁹⁸ Resisting the continuation of racial politics also operates as a condition precedent to expanded democracy.²⁹⁹ Consequently, the stakes of democracy and deracialization together form a compelling state interest.

Regardless of the perceived conventions or norms at stake, those in favor of a democracy over an oligarchy must not impede the vitality of their cause by adhering to notions of precedent and constitutionality that the radical right clearly rejects in their pursuit of a restored oligarchy.³⁰⁰ Justice Roberts and the other conservatives redefined the nearly absolute political pliability of the term *constitutionality* in cases like *Citizens United* and *Shelby County*.³⁰¹ They also defined the importance of precedent in common-law rulemaking at the Supreme Court level.³⁰² Judicial activism in pursuit of oligarchy knows few bounds in the Roberts Court era.³⁰³ Politicizing the role of the Senate in voiding presidential appointment power also redefined the limits of legislative power for partisan purposes.³⁰⁴

295. See MACLEAN, *supra* note 30, at 21–25 (detailing Virginia's oligarchy at work under Harry Byrd).

296. *Id.* at 234.

297. HANEY LÓPEZ, *supra* note 48, at 211.

298. *Id.* at 219–20.

299. *Id.* at 218–19.

300. *Supra* note 119.

301. *Supra* notes 95, 96, 105, 123.

302. *Supra* notes 97, 101.

303. *E.g.*, STEPHEN E. GOTTLIEB, UNFIT FOR DEMOCRACY: THE ROBERTS COURT AND THE BREAKDOWN OF AMERICAN POLITICS 203 (2016) (finding that Roberts Court protects “entrenched political power” and does not respect “rights to vote”); Robert Reich, *The Most Brazen Invitation to Oligarchy in Supreme Court History*, BERKELEY BLOG (Apr. 2, 2014), <https://blogs.berkeley.edu/2014/04/02/robert-reich-the-most-brazen-invitation-to-oligarchy-in-supreme-court-history/> [<https://perma.cc/LP7C-LE29>] (“Overturning 40 years of national policy and 38 years of judicial precedent, the Court’s decision allows federal officeholders to solicit and individual donors to pour as much as \$3.6 million directly into federal campaigns every election cycle—buying unparalleled personal influence in Washington . . .”).

304. Ron Elving, *What Happened with Merrick Garland in 2016 and Why It Matters Now*, NPR (June 29, 2018, 5:00 AM), <https://www.npr.org/2018/>

On the other hand, our cause is democracy. The vindication of that core value in opposition to stealthy efforts for a restored oligarchy drives the analysis herein.³⁰⁵ Properly valuing an expanding democracy in accordance with U.S. history and cultural traditions opens far more opportunities for legally restoring democracy.³⁰⁶ The transparent pursuit of democratic expansion under the law should operate to justify even heretofore off-limits legal innovations and to tip constitutional analysis more favorably toward traditional notions of democracy and against the restoration of an oligarchy.³⁰⁷ The threat of an oligarchy, the core value of democracy, and the possibility of deracialization combine to form a compelling interest of the highest gravity.

CONCLUSION

This Article argues for a representative democracy, cabined in accordance with traditional republican and constitutional limitations, but free of the archaic protections of slavery and fully reflective of the historic bargains of expanded voting rights throughout our history. It seeks to light the way for those wishing to challenge the radical right's efforts to transform our democracy into an oligarchy and to use race to illegitimately entrench themselves at the apex of our political and economic system contrary to any notion of democracy. Aggressively pursuing democratic-enhancing legislative action will prove the most efficacious method of short-circuiting the right's success because of the strength and history behind the core value of democracy in America. The great majority of American voters remain committed to democracy and voting rights; they understand the hard-fought gains in democracy illustrated throughout our history. This value finds support in deep historic and cultural roots. Most recently, the value of democracy triumphed in Florida with the success of Amendment 4. It proved the bipartisan appeal of democracy in the voting booth.

06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now [https://perma.cc/CAX3-2AJS] (“Senate Majority Leader Mitch McConnell declared any appointment by the sitting president to be null and void.”).

305. See MACLEAN, *supra* note 30, at 151–53, 234; MAYER, *supra* note 47, at 376.

306. According to Professor MacLean, the pursuit of an oligarchy relies upon both stealth and intimidation. MACLEAN, *supra* note 30, at 232–33 (detailing Koch-funded operatives' secretive surveillance and intimidation efforts).

307. As such, the proposals above operate within the current constitutional framework rather than advocating for any amendments, as others suggest. *E.g.*, Devan Cole, *Democratic Senator Introduces Constitutional Amendment to Abolish Electoral College*, CNN (Apr. 2, 2019), https://www.cnn.com/2019/04/02/politics/senate-democrats-electoral-college-constitutional-amendment/index.html [https://perma.cc/TJW9-J8VD].

Viewed from this perspective, the effort to remedy the manifest deficiencies in our democracy—an effort reflected in HR 1—may well prove politically expedient as well as morally sound. Indeed, our assessment suggests that the opposition to power consolidation should relentlessly pursue enhanced democratic voting power wherever possible. The opposition to the radical right should expose its anti-democratic agenda at every opportunity. It should also seek to highlight the fundamentally anti-democratic nature of our political system manifested in our institutions. The basis of the Electoral College and the U.S. Senate in the South's insatiable need to preserve slavery must become a widely understood point of attack.

This core value of democracy means that novel and innovative methods of perfecting our democracy warrant exploration, vetting, and pursuit. Nationwide felony re-enfranchisement is an obvious choice for cementing the Amendment 4 victory and expanding democracy in an under-privileged population. This issue successfully passed in Florida. The Electoral College and the U.S. Senate operate in bizarrely irrational and antidemocratic ways, and pro-democracy efforts should challenge these pro-slavery methods of placating the South. Law must recondition the political system in accordance with contemporary realities; it should cease indulging the slave-holder's needs of yesteryear.

With respect to the Supreme Court, the law governing its composition is hopelessly tainted by the U.S. Senate and the Electoral College, which both operate to determine the Court's membership. History clearly shows, however, that nine justices no longer suffices for a country of over 300 million, and no constitutional provision requires that membership perpetually stagnate at nine. The number of Supreme Court justices has varied over time, and it is past time to again vary the number of justices to reflect the nation they represent. Nine cannot parade as a magic number any longer.

With respect to the U.S. Senate, it holds key veto power over the composition of the Supreme Court and over legislation. Yet it operates in defiance of the one-citizen-one-vote principle. If we take seriously the blood spilt for greater voting rights, then the Senate must change. This Article articulates an argument for legislation to expand the composition of the Senate by adding Senators to states with large populations based upon the core value of democracy. Alternatively, the Senate could expand through the admission of new states.

Our conclusion suggests that if a wide-ranging and ceaseless attack is launched against the now manifest anti-democratic forces dominating our government, then democratic pressure for racial reform will succeed. This conclusion garners support from the demographic and economic realities that surely will challenge the continuation of our racial hierarchy. So long as the radical right fails to reimpose the oligarchy that marred our nation's birth, then racial progress should inexorably follow the manifest contemporary economic and demographic realities of our nation. That racial hierarchy, in fact, forms the source of the

political power of the radical right. That summarizes the intimate relationship between democracy and deracialization.