

“How Dare You Vote!” The Enactment of Racist and Undemocratic Voting Laws to Preserve White Supremacy, Maintain the Status Quo, and Prevent the Rise of the Black Vote – Saying the Quiet Parts Out Loud

Patricia A. Broussard
Florida A & M University College of Law

Joi Cardwell
Florida A & M University College of Law

Follow this and additional works at: <https://repository.law.miami.edu/umrsjlr>



Part of the [Law and Race Commons](#), and the [Law and Society Commons](#)

Recommended Citation

Patricia A. Broussard et al., *“How Dare You Vote!” The Enactment of Racist and Undemocratic Voting Laws to Preserve White Supremacy, Maintain the Status Quo, and Prevent the Rise of the Black Vote – Saying the Quiet Parts Out Loud*, 14 U. MIA Race & Soc. Just. L. Rev. 1 ()
Available at: <https://repository.law.miami.edu/umrsjlr/vol14/iss1/3>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Race & Social Justice Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact mperez@law.miami.edu, library@law.miami.edu .

“How Dare You Vote!” The Enactment of Racist and Undemocratic Voting Laws to Preserve White Supremacy, Maintain the Status Quo, and Prevent the Rise of the Black Vote – Saying the Quiet Parts Out Loud

Patricia A. Broussard* and Joi Cardwell†

Historically the United States has proudly described itself as a “melting pot,” declaring, “Give me your tired, your poor, your huddled masses yearning to breathe free.”¹ However, if the truth is told, the United States of America has never been a melting pot. In a melting pot, the ingredients each contribute something to the pot that equalizes them into becoming a well-seasoned, indistinguishable meal. No one ingredient dominates the mixture, and each adds something that makes the pot richer. This country is more like a gumbo, a dish whose ingredients stand out, where some purportedly add more value to the mix than others. The term “purportedly” is intentional because the cook determines which ingredients are more deserving of being added to the gumbo and which should dominate the flavor, style, and end result. Yes, the United States of America is a gumbo, White supremacy has been

* Professor Patricia A. Broussard teaches Constitutional law and First Amendment at the Florida A & M University College of Law. She is dedicated to speaking truth as it has manifested itself for centuries. She attempts to be a part of the solution and to contribute to the discourse on issues impacting the U.S. Professor Broussard acknowledges and lauds her Research Assistant and Co-author Joi Cardwell who is brilliant, dedicated, and on the path to a wonderful career.

† Joi Cardwell is a 3L Student at Florida A & M University College of Law. She is committed to illuminating glaring disparities that exist in United States culture and politics and aims to pursue a career in economic justice and civil rights for all. She thanks Professor Broussard for her exceptional leadership, mentorship, and confidence in her skills to be included in this paper.

¹ Emma Lazarus, Statute of Liberty Inscription, New York, N.Y., 1883.

the cook for far too long and the maintenance of power has been the main ingredient. America needs some new cooks in the kitchen.

The right to vote has always been an unkept promise as America's vision of equality has been distorted since its very inception. Many Americans believe the First Amendment is the most important right. The authors of this Article, however; believe that the right to vote is the foundational right because voting allows citizens to engage in the political process. Without participation in the political process, all other fundamental rights are diminished. While voting is touted as the cornerstone of American democracy, it is a promise repeatedly broken. We acknowledge that every person who is a minority in America, suffers from racism; however, but our focus here is on Black America.

I. INTRODUCTION 4

II. THE ILLUSIVE PROMISE OF DEMOCRACY 5

 A. *The Land of the Free and the Home of the Brave (for some)*. 5

 B. *Voting – “Illusory” From the Start* 6

 C. *Freedom Carried the Yoke of Disenfranchisement While Continuing a Culture of Oppression*..... 7

III. AMERICA HAD A BABY AND NAMED IT JIM CROW 10

 A. *Jim Crow 1.0*..... 10

 B. *The Hope and Disappointment of Brown v. Board of Education*..... 13

 C. *America Wearies of its Black Problem* 14

IV. JIM CROW 2.0- SEGREGATION AND VOTING
 DISENFRANCHISEMENT AS THE TIP OF THE ICEBERG. 15

 A. *The Obama Effect and Voting Rights*..... 16

 B. *The Voting Rights Act and Shelby County v. Holder* 18

 C. *The Impact of the Browning of America on Voting Rights* 20

 D. *The Impact of the 2020 Presidential Election*..... 22

 E. *The Ongoing Call and Response of White Supremacy* 24

V. CONCLUDING THOUGHTS 27

 A. *Disenfranchisement Redux – Who Are the Losers?* 27

 B. *The Losses to the Image of the U.S. Are Piling Up: The International Implications of Voter Suppression* 29

I. INTRODUCTION

“A Man Without A Vote Is A Man Without Protection.”²

Voter suppression is not a new phenomenon, scholars have written about various methods used to control the outcomes of elections since the first documented elections in the colonies.³ The continuum of suppression has not been broken but rather reinforced by voter ID laws, the closing of local voting polls, and the insipid decisions in cases, most recently *Shelby County v. Holder*,⁴ which gutted the Voting Rights Act of 1965⁵. What has changed since *Shelby County* is the out-loud, in-your-face, unrestrained approach to voter suppression. Now, the masks are off and there is no attempt to hide the motives of the opposition which believes that only they should control elections. Suppressionists are screaming, “How dare you vote!”

Professor Terry Smith, in *Whitelash: Unmasking White Grievance at the Ballot Box*⁶, brilliantly summarizes the current anti-voting frenzy by defining the word “Whitelash” as “based on the erroneous, racist view that racial inequality is a natural order, and that Whites should control the pace at which it is dismantled.”⁷

Professor Smith further asserts that the “phenomenon is anchored in fear and resentment of cultural change, change that will eventually render the White majority a racial minority.”⁸ In other words, the changing demography has stoked the fear of a power shift. Using Professor Smith’s analysis, this article will briefly outline the history of enslavement and the modern context of disenfranchisement.⁹ Further, this article will

² Former President Lyndon B. Johnson, President’s Special Speech to Congress (Mar. 15, 1965) (available at LBJ Presidential Library).

³ See Teach Democracy, *Who Voted in Early America* (n.d.), <https://www.crf-usa.org/bill-of-rights-in-action/bria-8-1-b-who-voted-in-early-america>; Steven Mintz, *Winning the Vote: A History of Voting Rights*, Gilder Lehrman Inst. Am. Hist. (n.d.), <https://www.gilderlehrman.org/history-resources/essays/winning-vote-history-voting-rights>.

⁴ See *Shelby County v. Holder*, 570 U.S. 529 (2013).

⁵ Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437.

⁶ Terry Smith, *Whitelash: Unmasking White Grievance at the Ballot Box* (Cambridge University Press, 1st ed. 2020). Pg. 3.

⁷ *Id.*

⁸ *Id.* at 8.

⁹ Vann R. Newkirk, *Voter Suppression is Warping Democracy*, THE ATLANTIC (July 17, 2018), <https://www.theatlantic.com/politics/archive/2018/07/poll-prri-voter-suppression/565355/> (last visited Aug. 21, 2023).

A new survey from *The Atlantic* and the Public Religion Research Institute shows that Black and Hispanic citizens are more likely than Whites to face barriers at the polls—and to fear the future erosion of their basic political rights . . .

emancipation, the colorization of America, the rise of the Black electorate, and the “Whitelash” that has followed in the form of nationwide “Jim Crowesque” legislation. Stacy Abrams said it best, “What is so notable about this moment, and so disconcerting, is that they are not hiding. There is no attempt to pretend that the intention is not to restrict votes. The language is different.”¹⁰ And lastly, this article will offer a few antidotes to the poison which has infused the nation and put our very democracy in peril.

II. THE ILLUSIVE PROMISE OF DEMOCRACY

A. *The Land of the Free and the Home of the Brave (for some).*

Voting is the most important tool in a representative democracy because it signifies the transfer of power from the populace to elected officials who are then charged with regulating, “with the consent of the governed.”¹¹ As previously concluded:

The right to vote is clearly the currency of democracy, yet the United States, imposing a punitive paradigm has shortchanged many groups since the country’s inception. However, the disenfranchisement of the right to

The new data support perhaps the worst-case scenario offered by opponents of restrictive voting laws. Nine percent of Black respondents and 9 percent of Hispanic respondents indicated that, in the last election, they (or someone in their household) were told that they lacked the proper identification to vote. Just 3 percent of Whites said the same. Ten percent of Black respondents and 11 percent of Hispanic respondents reported that they were incorrectly told that they weren’t listed on voter rolls, as opposed to 5 percent of White respondents. In all, across just about every issue identified as a common barrier to voting, Black and Hispanic respondents were twice as likely, or more, to have experienced those barriers as White respondents.

¹⁰ Stacy Abrams, *They Are Doing What the Insurrectionist Sought*. Interview, THE GUARDIAN, (March 24, 2021), <https://www.theguardian.com/us-news/2021/mar/24/stacey-abrams-republicans-voter-suppression-interview> (last visited Aug. 21, 2023).

¹¹ THE DECLARATION OF INDEPENDENCE PARA. 2 (U.S. 1776).

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.

vote has been the longest-lasting and the most invidious against Blacks and other minorities.¹²

Voter suppression has become the vehicle to ensure that power remains with the elected and not the electorate. Therefore, the maintenance of White elected officials' power has been their goal and White supremacy is the playbook that has continued to be the tool to accomplish the goal. Throughout American history, fear, intimidation, discrimination, and the law have been used to prop up a faux democracy from the viewpoint of the disenfranchised.

B. Voting – “Illusory” From the Start

It is a fact that the right to vote has been “illusory” since the first ships landed on the shore of what was to become the United States of America. A cursory look at history will demonstrate the hierarchy of voting.¹³ Voter suppression started early in the history of what emerged as the United States of America. The founders, who escaped the grasp of a dictatorship in the form of a monarchy, did not in truth support equality for all. At the founding, only White, male Freeholders (landowners) over the age of 21 could vote.¹⁴ At that time, male freeholders only represented 10 to 20 percent of the population, demonstrating the broken promises of democracy since the early days of the republic.¹⁵

Then, as is now, power was always the endgame. Professor Cheryl T. Page points out the irony of some of the practices of early America:

The irony is not lost on the fact that these men were declaring freedom from British rule and control as they sought to rule and control others. In the words penned by these freedom seekers, they deliberately excluded from these rights the nation's African and African American residents. These same drafters of the Declaration of Independence classified Black people as less than human

¹² Patricia A. Broussard, *Eviscerating the Voting Rights Act and Moral Authority: Freedom to Discriminate Comes with a Price*, 7 *TOURO RACE, GENDER, AND ETHNICITY L. REV.* 2, 11-22 (2015).

¹³ Broussard, *supra* note 15, at 15.

¹⁴ See Teach Democracy, *supra* note 5

¹⁵ *Id.* (“Becoming a freeholder was not difficult for a man in colonial America since land was plentiful and cheap. Thus, up to 75 percent of the adult males in most colonies qualified as voters. But this voting group fell far short of a majority of the people then living in the English colonies. After eliminating everyone under the age of 21, all slaves and women, most Jews, and Catholics, plus those men too poor to be freeholders, the colonial electorate consisted of perhaps only 10 percent to 20 percent of the total population.”)

and, thus, undeserving of basic human rights and dignities.¹⁶

For Black Americans, the right to vote has been a constant and ongoing struggle. It did not end with Black people getting the right to vote, it continued with enforcing that right, maintaining the right, and also ensuring that once they voted, their votes would not be discounted by some pretext of insufficiency by those in power. The maintenance of democracy has been lacking.

C. Freedom Carried the Yoke of Disenfranchisement While Continuing a Culture of Oppression

Freedom (frē'dem) has two very distinct meanings for Black Americans and White Supremacists: (1) The condition of not being in prison or captivity; (2) The condition of being free of restraints, especially the ability to act without control or interference by another or by circumstance.¹⁷

Events after liberation in the aftermath of the civil war provided White America with a blueprint for structural voter suppression.¹⁸

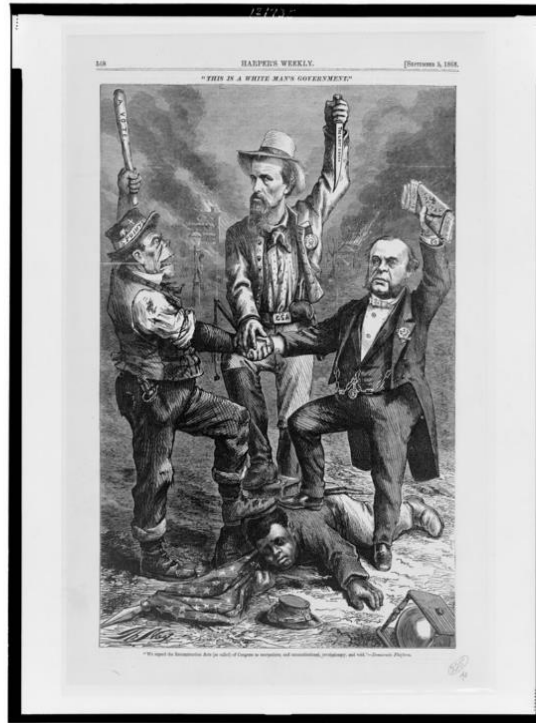
[The] era of post-Civil War Reconstruction is of vital importance because it is during this time that Whites in the South understood the full import of the right to vote and how politically dangerous the Blacks vote could be. White Southerners quickly learned that Blacks would vote in a bloc, and that they would support each other, even when they disagreed. White Southerners were well aware of the fact that voting power in the hands of Blacks meant that White politicians would have to be responsive to an element of society which they despised.¹⁹

¹⁶ Cheryl T. Page, *Stop the Steal: The History of Voter Suppression in America, and Who Is Really Stealing Votes?*, ST. THOMAS INTERCULTURAL HUMAN RIGHTS L. REV. (forthcoming Spring 2023).

¹⁷ *Freedom*, AMERICAN HERITAGE DICTIONARY (5th ed. 2011).

¹⁸ Seth Alcorn, Ph.D., *White Supremacy and the Pursuit of Power*, 48 THE JOURNAL OF PSYCHOHISTORY 285 (2021) (“Structural Racism is a system in which public laws and policies and procedures, institutional practices (rules and regulations and law enforcement), cultural representations (language and symbols), and other social norms work in various, often reinforcing, ways to perpetuate racial group inequity. Governmental structures at all levels of society are omnipresent(systemic) however the word structure speaks more directly to a less personal approach (only following the rules) for controlling and suppressing People of Color.”)

¹⁹ Broussard, *supra* note 14, at 17. See also Eric Foner, *Reconstruction*, BRITANNICA, <https://www.britannica.com/vent/Reconstruction-United-States-history> (last updated



A caption under an 1868 cartoon published in Harpers Weekly declared:” THIS IS A WHITE MAN’S GOVERNMENT” . . . We regard

Aug. 8, 2023) (It is estimated that about 15,00 Black men held elected office between 1865 and 1877); *Radical Reconstruction*, COURSE HERO, <https://courses.lumenlearning.com/ushistory2os/chapter/radical-reconstruction-1867-1872/> (last visited Aug. 21, 2023).

After the Civil War, in 1867, Congress passed the Military Reconstruction Act which gave Black men in ten former Confederate states the right to vote. This Act supported and allowed for the passage of the 15th Amendment. With the Fifteenth Amendment, they sought to correct this major weakness by finally extending to Black men the right to vote. The amendment directed that “[t]he 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.” Unfortunately, the new amendment had weaknesses of its own. As part of a compromise to ensure the passage of the amendment with the broadest possible support, drafters of the amendment specifically excluded language that addressed literacy tests and poll taxes, the most common ways Blacks were traditionally disenfranchised in both the North and the South. Indeed, Radical Republican leader Charles Sumner of Massachusetts, himself an ardent supporter of legal equality without exception to race[.];

the Reconstruction Acts (so-called) of Congress as usurpations, unconstitutional, revolutionary, and void. —Democratic Platform.”²⁰

As it turns out, not even the trifecta of the Military Reconstruction Act,²¹ Emancipation,²² or the Civil War Amendments,²³ was enough to stop the U.S. Supreme Court from enshrining the separate but equal doctrine, where the effects of systemic racism developed and flourished. *Plessy v. Ferguson*²⁴ was the Court’s, and by proxy, the nation’s nod to an intent to discriminate, which amplified the country’s hierarchical social construction.²⁵

The entrenchment of the idea that any interference with the dominance of White males’ sovereignty was political and unlawful became the impetus for the segregationist dogma of Tenth Amendment state’s rights, as well as the belief that “federal interference” was “foreign interference.”²⁶ White supremacists learned very well the lessons of inclusive suffrage and utilized their political clout to enact voting laws to stifle Indigenous People (1876), Chinese immigrants (1882), and citizens

²⁰ “*This is a White Man’s Government*”, THE LIBRARY OF CONGRESS, <https://www.loc.gov/item/98513794/> (last visited Nov. 5, 2023).

²⁵ THE MILITARY RECONSTRUCTION ACT 14 § 428-430, C.153, 15 § 2-5, C.6, 15 § 14-16, C.30, (1867); THE MIL. RECONSTRUCTION ACT 15 § 41, C.25 (1868).

The Reconstruction Act of 1867 outlined the terms for readmission to representation of rebel states. The bill divided the former Confederate states, except for Tennessee, into five military districts. Each state was required to write a new constitution, which needed to be approved by a majority of voters—including African Americans—in that state. In addition, each state was required to ratify the Thirteenth and Fourteenth Amendments to the Constitution. After meeting these criteria related to protecting the rights of African Americans and their property, the former Confederate states could gain full recognition and federal representation in Congress. The act became law on March 2, 1867, after Congress overrode a presidential veto. Admission to representation of the former Confederate states began the next year, with Arkansas.

²² See Abraham Lincoln, *Preliminary Emancipation Proclamation*, THE LIBRARY OF CONGRESS (January 1, 1863), <https://www.loc.gov/resource/lprbscsm.scs0950/>.

²³ See U.S. CONST. amend. XIII, XIV, XV, collectively referred to as the Civil War amendments.

²⁴ *Plessy v. Ferguson*, 163 U.S. 537 (1896), was a landmark U.S. Supreme Court decision in which the Court ruled that racial segregation laws did not violate the U.S. Constitution as long as the facilities for each race were equal in quality, a doctrine commonly known as “separate but equal.”

²⁵ Brandi Blesset, *Disenfranchisement: Historical Underpinnings and Contemporary Manifestations*, 39 PUB. ADMIN. Q. 3, 15 (2015).

²⁶ See Timothy Lovelace Jr., *Xenophobic Conspiracy Theories, and the Long Roots of January Sixth*, 85 L. AND CONTEMP. PROBS. 19, 22 (2022).

of U.S. territories from voting (particularly in U.S. Presidential elections 2002).²⁷ The notion that the phenomenon of voter suppression was strictly Southern is a fallacy.²⁸ “Every new state that joined the Union after 1819 explicitly denied Blacks the right to vote.”²⁹ Between 1863 and 1870, “fifteen northern states and territories” were among those who rejected Black American suffrage.³⁰

III. AMERICA HAD A BABY AND NAMED IT JIM CROW

A. *Jim Crow 1.0*

The fear that gripped White Americans in the south after Reconstruction must have been palpable. They saw over 2,000 Black Americans hold office against all odds in southern states throughout reconstruction.³¹ Observing this feat, and supported by the federal government ending its intervention to protect black citizens rights in southern states,³² White Americans then decided to institute one of the most brutal regimes of state violence the world has ever seen.

The collective name of “Jim Crow” has been attached to the period from around 1877 to the mid-1960’s.³³ The discriminatory effects and ideologies of Jim Crow, however, have persisted into the modern day. Included under the Jim Crow umbrella was the creation of organized policing as a means to monitor Black bodies; the creation and rise of hate groups intent upon controlling Black bodies through fear, intimidation, raping, bombing, and lynching; laws that regulated Black bodies and created barriers to voting; along with a Supreme Court that was willing to support Jim Crow through inaction and malfeasance.³⁴

Governor James Vardaman of Mississippi in 1890, called for racially partisan politics when he stated: “there was no other purpose than to

²⁷ Rosemary Ferreira, *The History of Voting in the United States*, THE ELM (Oct. 28, 2020), <https://elm.umaryland.edu/voices-and-opinions/Voices--Opinions-Content/The-History-of-Voting-in-the-United-States.php>. (last accessed Aug.21, 2023).

²⁸ Steven Mintz, *supra* note 5.

²⁹ *Id.*

³⁰ *Id.*

³¹ Olivia B. Waxman, The Legacy of the Reconstruction Era’s Black Political Leaders, TIME (Feb. 7, 2022), <https://time.com/6145193/black-politicians-reconstruction/>.

³² Eric Foner, *Rooted in Reconstruction: The First Wave of Black Congressmen*, THE NATION (Nov. 3, 2008), <https://www.thenation.com/article/archive/rooted-reconstruction-first-wave-black-congressmen/>

³³ David Pilgrim, *What was Jim Crow*, FERRIS STATE UNIV. (Sept., 2012), <https://jimcrowmuseum.ferris.edu/what.htm>

³⁴ *See id.*

eliminate the nigger from politics”.³⁵ To thwart the objective of the Fifteenth Amendment, White Democrats gained control over Southern states’ legislatures and passed new constitutions and constitutional amendments, along with laws that made voter registration and voting difficult if not impossible for Blacks and poor Whites.³⁶

The corporeal embodiment of Jim Crow concurrent to the political machinations within the states, courts, and Congress was organized, sanctioned, overt, and violent.³⁷ The emergence of insurgent groups such as the Tennessee-based Ku Klux Klan formed in 1865 formed a platform for intimidation, assaults, and murders, which often went unchecked by the law and was instrumental in chilling voting by Republicans and Blacks.³⁸ South Carolina Senator Benjamin Tillman succinctly summed up the issue and justification.

I want to ask the Senator this proposition in arithmetic: In my State, there were 135,000 Negro voters, or Negroes of voting age, and some 90,000 or 95,000 White voters. General Canby set up a carpetbag government there and turned our State over to this majority. Now, I want to ask you, with a free vote and a fair count, how are you going to beat 135,000 to 95,000? How are you going to do it? You had set us an impossible task.³⁹

To further the goal of white supremacy Alabama utilized crimes of “moral turpitude” to expand disenfranchisement to misdemeanors and even acts not otherwise punishable by law.⁴⁰ The vagueness of the phrase served multiple purposes: to intimidate, to punish, and to purge.⁴¹

³⁵ Andrew Gumbel, *America’s Shameful History of Voter Suppression*, THE GUARDIAN (Sept. 13, 2017), <https://www.theguardian.com/us-news/2017/sep/13/america-history-voter-suppression-donald-trump-election-fraud>.

³⁶ RICHARD M. VALLELLY, *THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT* 134-139 (2nd ed. 2009).

³⁷ *See id.*

³⁸ *See Id. See also* Ku Klux Klan, SOUTHERN POVERTY L. CTR., <https://www.legalbluebook.com/bluebook/v21/tables/t6-case-names-and-institutional-authors-in-citations> (last visited Dec. 3, 2023)

³⁹ *See* Benjamin R. Tillman, *Speech in the Senate on the Disenfranchisement of African Americans* (March 23, 1900), TEACHING AMERICAN HISTORY <https://teachin.gamericanhistory.org/document/speech-in-the-senate-2/>.

⁴⁰ Brent Staples, *The Racist Origins of Felon Disenfranchisement*, N.Y. TIMES (Nov. 19, 2014), <https://www.nytimes.com/2014/11/19/opinion/the-racist-origins-of-felon-disenfranchisement.html>.

⁴¹ *Id.*

Other effective but no less arbitrary methods of voter suppression included an educational “understanding” clause which required an impossible literacy test that also included applicant registration to be in the applicant’s handwriting, and written in the presence of the registrar in Virginia, while “the good character/grandfather” clause was used in Oklahoma.⁴² These practices led to the brazen reduction of Black voters.⁴³

The Supreme Court, repeatedly failed in upholding the Constitutional mandates of universal suffrage for male citizens of voting age until well into the Twentieth Century.⁴⁴ In *Giles v. Harris* the Court ignored the plaintiff’s plea to address the constitutional issue in the case of disenfranchisement of Black people based on state law provisions such as a severer test.⁴⁵ The holding sidestepped the issue by stating: (1) the Court could not offer relief to the plaintiff because of the political question, and (2) the plaintiff cannot both claim the law invalid, and yet still be registered as a party qualified under the void bill.⁴⁶ The blatant disregard for the unconstitutionality of the law itself set a tone-deaf precedent for many years to come.

Felon disenfranchisement became yet another method of oppression following the enactment of the Fifteenth Amendment.⁴⁷ Beyond the intentional denial of civic rights, the practice of protecting voting from all citizens has served to exacerbate the inequality of citizenship and undermines the very essence of representative government.⁴⁸

The second civil rights movement following a White loss in *Smith v. Allwright*, where the Supreme Court ruled that a Texas state legislature’s allowance of the Democratic Party to exclusively allow white Americans to vote in primary elections violated the fourteenth and fifteenth amendment, led to a movement to register Black voters across the country.

⁴² Valelly, *supra* note 40.

⁴³ Ann Ravel, *A New Kind of Voter Suppression in Modern Elections*, 49 U. MEM. L. REV. 1019, 1020 (2019).

⁴⁴ Caroline Sullivan, *Ten Voting Rights Cases that Shaped History*, DEMOCRACY DOCKET (Mar. 22, 2022), <https://www.democracydocket.com/analysis/ten-voting-rights-cases-that-shaped-history/>.

⁴⁵ *Giles v. Harris*, 189 U.S. 475, 482 (1903).

⁴⁶ *Id.*

⁴⁷ Brent Staples, *The Racist Origins of Felon Disenfranchisement*, N.Y. TIMES (Nov. 19, 2014), <https://www.nytimes.com/2014/11/19/opinion/the-racist-origins-of-felon-disenfranchisement.html>.

⁴⁸ Denise Lieberman, *Barriers to the Ballot Box: New Restrictions Underscore the Need for Voting Laws Enforcement*, HUMAN RIGHTS (Jan. 1, 2012), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2012_vol_39_/winter_2012_-_vote/barriers_to_the_ballotboxnewrestrictionsunderscoretheneedforvoti/.

⁴⁹ The efforts in the South particularly, increased Black registered voters from “less than 3 percent in 1940 to 29 percent in 1960 to over 40 percent in 1964.”⁵⁰

The significance of the NAACP and their unceasing contributions toward the civil rights movement from its founding in 1909 cannot be understated.⁵¹ From the pivotal case of *Brown v. Board of Education* (1954), to the passage of the Civil Rights Act of 1964, and Voting Rights Act of 1965, highlights both the power of federalism and multi-cultural alliances in advancing equality for black people in America.

B. The Hope and Disappointment of Brown v. Board of Education

The import of the NAACP’s victory in *Brown* within the context of racial relations spurred two separate and polarizing reactions: unbridled joy and hope for Black Americans, compared to vitriol, and retrenchment for White, and particularly Southern Americans.⁵² Included in the new segregationist schemes which formed after *Brown*, was the mission to influence and reshape public opinion on civil rights and liberties. Included methods were the advancement of xenophobic (i.e., communist) and sexual deviance conspiracy theories, the presentation of Northern media outlets as liberally biased, subversive, and purveyors of “dictatorial” agendas, as well as the promulgation of the idea of preventing election fraud.⁵³ Further narratives included White Southerners as a “minority group” being scapegoated like the “Nazi regime used Jewish people.”⁵⁴

Brown vs. Board of Education held segregation in schools as unlawful and spurred a political movement in the South that ensured momentum in maintaining White dominance in the electorate.⁵⁵ State sovereignty commissions were formed, utilizing tactics that would become the framework for future election dog whistles: foreign influence, communist agitators illegally registering Black voters, and subsequent voter purges under the guise of “voter protection” and election integrity.⁵⁶ Civil Rights reforms, particularly the Voting Rights Act of 1965, which forbid states from enacting discriminatory laws that restricted people from voting due to poll taxes, appeared to nullify overt racist policies⁵⁷ and led to greater

⁴⁹ *Smith v. Allwright*, 321 U.S. 649, 666 (1944). See also August Meier and Elliott Rudwick. *The Rise of Segregation in the Federal Bureaucracy, 1900–1930*, 28 *PHYLON* 178 (1967).

⁵⁰ *Id.*

⁵¹ *Our History*, NAACP, <https://naacp.org/about/our-history> (last visited Apr. 5, 2023).

⁵² Lovelace, *supra* note 30, at 25.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483, 495, (1954).

⁵⁶ *Id.*

⁵⁷ Ferreira, *supra* note 38.

political representation within the Black American community culminating with the election of Barack Obama in 2008.

C. *America Wearies of its Black Problem*

Recent times have revealed that many in America have grown weary of conversations about the American stain of slavery, equality, justice, and equity.⁵⁸ In fact, many state legislatures have gone so far as to pass laws that criminalize teaching “Critical Race Theory.”⁵⁹ This is a subject of which many lack substantive knowledge including American legislators such as Frank Hargrove who believes that black Americans should “get over” slavery in opposing a bill in his state on formally apologizing to descendants of slaves.⁶⁰

Many White Americans believe that the passage of time has removed the stain of slavery and have tired of hearing about it. Even basketball legend Charles Barkley has stated how he believes that people bring up slavery too much; to address this, Alabama State Representative Hank Sanders wrote an open letter to Barkley.⁶¹ Sanders explained in detail the brutality of the slave trade and how once African people made it to the Americas, they were “broken like wild animals.”⁶² Representative Sanders went on to explain how the legacy of slavery is still here in the form of

⁵⁸ Janel George, *A Lesson On Critical Race Theory*, A.B.A. (Jan. 12, 2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory/.

CRT is not a diversity and inclusion “training” but a practice of interrogating the role of race and racism in society that emerged in the legal academy and spread to other fields of scholarship. Crenshaw—who coined the term “CRT”—notes that CRT is not a noun, but a verb. It cannot be confined to a static and narrow definition but is considered to be an evolving and malleable practice. It critiques how the social construction of race and institutionalized racism perpetuate a racial caste system that relegates People of Color to the bottom tiers. CRT also recognizes that race intersects with other identities, including sexuality, gender identity, and others. CRT recognizes that racism is not a bygone relic of the past. Instead, it acknowledges that the legacy of slavery, segregation, and the imposition of second-class citizenship on Black Americans and other People of Color continue to permeate the social fabric of this nation.

⁵⁹ *Id.*

⁶⁰ Chris Kromm, *Slavery: “Get over it”*, FACING SOUTH (Jan. 17, 2007), <https://www.facingsouth.org/2007/01/slavery-get-over-it.html>.

⁶¹ Hank Sanders, *Dear Charles Barkley: 8 reasons why slavery was bad*, PHILA. TRIB. (Jan. 9, 2015), https://www.phillytrib.com/commentary/dear-charles-barkley-8-reasons-why-slavery-was-bad/article_fe4fa43b-b56b-5a6f-8018-0f9ab4b11b16.html.

⁶² *Id.*

violence against black people including in the deaths of Trayvon Martin and Eric Garner, among many others.⁶³

Slavery was not just a stain on America, as a stain can be washed away. Slavery is a wound so deep, so septic that it prevented the body from functioning properly. It is undisputed that slavery in America was grounded in White supremacy.⁶⁴ It is this White supremacy that underlies the notions of who should have the right to vote today.⁶⁵

IV. JIM CROW 2.0- SEGREGATION AND VOTING DISENFRANCHISEMENT AS THE TIP OF THE ICEBERG.

Many southern states have enacted laws that ban felons from the ballot box, and an estimated six million voters were excluded from voting in 2016, with a disproportionate number of them being Black men.⁶⁶ This type of suppression is inconsistent with the ideals of our country and while not as overt as historic voter suppression, has the same impact on black voters.⁶⁷

Shifts in demography, the 2020 federal election, and the “Big Lie” have seen a return in voter suppression that rivals post-Reconstruction tactics. Jim Crow’s new name is “Election Integrity.”⁶⁸ This faux crisis of

⁶³ *Id.*

⁶⁴ *White supremacy*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/white%20supremacy> (last visited Oct. 6, 2023).

“1: the belief that the white race is inherently superior to other races and that white people should have control over people of other races . . .

2: the social, economic, and political systems that collectively enable white people to maintain power over people of other races.”

⁶⁵ *Id.*

⁶⁶ Ravel, *supra* note 57, at 1020.

⁶⁷ *Id.* at 1022

⁶⁸ *Block the Vote: How Politicians are trying to Block Voters from the Ballot Box*, ACLU (Aug. 17, 2021), <https://www.aclu.org/news/civil-liberties/block-the-vote-voter-suppression-in-2020>.

Who’s Affected by Voter Suppression?

The short answer is *all of us*. Our democracy is debased when the vote is not accessible for all. But the fact is that some groups are disproportionately affected by voter suppression tactics, including People of Color, young people, the elderly, and people with disabilities. The proof is in the numbers.

- Across the country, 1 in 16 Black Americans cannot vote due to disenfranchisement laws.
- Counties with larger minority populations have fewer polling sites and poll workers per voter.
- In 2018, Latinx and Black Americans were twice as likely as Whites to be unable to get off work while polls were open.

voting integrity is more damaging than it appears at first glance because it not only deprives Black Americans of their constitutional right to vote, but it also threatens the very Democracy itself.⁶⁹

A. *The Obama Effect and Voting Rights*

In November 2008, the United States of America elected its first Black American president in the history of the nation, Barack Hussein Obama. This election seemed to signal to the world that the nation had finally lived up to the image and values it purported to ascribe to for decades. While some have seen Barack Obama's presidency as the country overcoming its racist past, others believe that racism is so embedded in society that "it will take more than the election of a Black president to move the country beyond its long traditions of racism and discrimination."⁷⁰

Barack Obama campaign volunteer Kaylon Johnson, after pulling into a Shreveport, Louisiana gas station in his Obama T-shirt, was jumped by three white men and called racial slurs.⁷¹ Johnson received "a broken nose and a fractured eye socket that required surgery".⁷² Other instances of racial hatred stemming from Obama's election include a "**life-sized likeness** of Obama was found hanging from a noose in a tree at the University of Kentucky" and a predominantly Black church being torched in Springfield, Massachusetts mere hours after Obama's election.⁷³

"From the very beginning, Obama's ascendance produced a huge backlash that was undeniably racist in nature, tied to what he has described euphemistically as his "unique demographic."⁷⁴ Black Americans were acutely aware of the animus and disrespect that had been leveled at Barack

-
- 25 percent of voting-age Black Americans do not have a government-issued photo ID.
 - Geographic isolation is a major barrier to Native American voters due to the inaccessibility of nearby polling locations in many reservations. In South Dakota, 32 percent of Native voters cite travel distance as a factor in deciding whether to vote.
 - More than one-sixth (18 percent) of voters with disabilities reported difficulties voting in person in 2020.

⁶⁹ *Id.*

⁷⁰ Terence Samuel, *The Racist Backlash Obama has Found During His Presidency*, WASH. POST (Apr. 22, 2016), <https://www.washingtonpost.com/graphics/national/obama-legacy/racial-backlash-against-the-president.html>.

⁷¹ Larry Keller, *Barack Obama: Even as Many Celebrated, The Election of America's First Black President Provoked a Furious Backlash from Some Angry Whites*, SPLC INTEL. REPORT (Feb. 26, 2009), <https://www.splcenter.org/fighting-hate/intelligence-report/2009/racist-backlash-greets-president-barack-obama>.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Samuel, *supra* note 90.

Obama since the day he announced his candidacy for President.⁷⁵ In 2015, during President Obama's second term of office, former New York City Mayor Rudy Giuliani stated, "I do not believe that the president loves America . . . He does not love you. And he does not love me." He wasn't brought up the way you were brought up and I was brought up through love of this country. February 18, 2015.⁷⁶

Pollster Cornell Belcher stated that during the 2008 campaign, he initially thought that America had hit a racial milestone and a "post-racial America", but realized that voting patterns on election day did not support this.⁷⁷ He realized that the "narrative about how America has progressed a great deal and we've broken racial barriers turned out not to be true at all."⁷⁸ During Obama's presidency, racial aversion increased greatly and created a "perfect storm for a racial antagonist to reboot the "Southern strategy" — and for Donald Trump to really ride and expand that niche and take the Republican nomination."⁷⁹

This racist rhetoric continued throughout President Obama's two terms in office, in part because Donald Trump added fuel to this backlashing by amplifying the theory that President Obama was not born in the United States, claiming, instead that he was born in Kenya.⁸⁰ In addition to the claim of Obama being a noncitizen, was the assertion that he was a Muslim.⁸¹ Although Donald Trump was not the originator of the theory of Birtherism, he amplified it and sold it to a willing White contingency.

Birtherism was a statement of values, a way to express allegiance to a particular notion of American identity, one that became the central theme of the Trump campaign itself: To Make America Great Again, to turn back the clock to an era where White political and cultural hegemony was unthreatened by Black people, by immigrants, by people of a different faith. By people like

⁷⁵ Smith, *supra* note 7, at 11.

⁷⁶ *Id.*

⁷⁷ Jenée Desmond-Harris, *A Pollster on The Racial Panic Obama's Presidency Triggered — And What Democrats Must Do Now*, VOX MEDIA (Dec. 12, 2016), <https://www.vox.com/identities/2016/12/12/13894546/obama-race-Black-White-house-cornell-belcher-racism>.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Adam Serwer, *Birtherism of A Nation*, THE ATLANTIC (May 13, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/birtherism-and-trump/610978/>.

⁸¹ Pew Research Center, *Growing Number of Americans Say Obama is a Muslim* (Aug. 18, 2010), <https://www.pewresearch.org/religion/2010/08/18/growing-number-of-americans-say-obama-is-a-muslim/>

Barack Obama. The calls to disavow birtherism missed the point: Trump's entire campaign was birtherism.

Trump won the Republican primary, and united the party, in part because his run was focused on the psychic wound of the first Black presidency. He had, after all, humiliated and humbled Obama. None of the other Republican candidates could make such a claim. None could say, as Trump could, that they had put the first Black president in his place. And so, none could offer an answer to the anguish that produced birtherism. That very same anguish helped Trump win the presidency.⁸²

B. *The Voting Rights Act and Shelby County v. Holder*

After exhaustive evidence-gathering and deliberative process, Congress reauthorized the Voting Rights Act of 1965 in 2006, including the coverage provision, with overwhelming bipartisan support.⁸³ It was the judgment of Congress that “40 years has not been a sufficient amount of time to eliminate the vestiges of discrimination following nearly 100 years of disregard for the dictates of the 15th amendment and to ensure that the right of all citizens to vote is protected as guaranteed by the Constitution.” 2006 Reauthorization §2(b)(7), 120 Stat. 577.

On June 25, 2013, in *Shelby County V. Holder*, the Supreme Court held 5-4 that there was no longer any justification for the Justice Department's system to oversee election changes in historically discriminatory states and, as such, the preclearance formula was now unconstitutional under the 10th Amendment. Subsequently, nine states no longer needed to get any new laws pre-approved: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia.⁸⁴ Of note is the fact that the only part of the law struck down in *Holder* was that which delineated what states required intervention, not the provision on how preclearance operates.⁸⁵ Congress still had the power

⁸² Serwer, *supra* note 84.

⁸³ Evan Hartung, *The Voting Rights Act Should Still Have Bipartisan Support*, LEADERSHIP CONF. ON CIVIL AND HUMAN RIGHTS (Aug. 13, 2021), <https://civilrights.org/blog/the-voting-rights-act-should-still-have-bipartisan-support/>

⁸⁴ *Shelby County v. Holder*, 570 U.S. 529 (2013).

⁸⁵ Kara Brandeisky et al., *Everything That Has Happened Since Supreme Court Ruling on Voting Rights Act*, PROPUBLICA (Nov. 4, 2014, 12:31 PM), <https://www.propublica.org/article/voting-rights-by-state-map>

to amend Section 4 which could have authorized the Justice Department to enforce Section 5 again.⁸⁶

Justice Ginsberg wrote a very powerful dissent stating that, by striking Section 4(b) of VRA, the Court discounted that the preclearance remedy was designed by Congress “both to catch discrimination before it causes harm, and to guard against return to old ways.”⁸⁷

Within hours of the decision, Texas implemented Voter ID laws.⁸⁸ Two months later, North Carolina enacted strict ID laws, eliminated same-day voter registration, and shortened early voting by several days.⁸⁹ Texas, Florida, Virginia, South Carolina, Mississippi, Alabama, and Arizona all followed suit by the time of the 2014 mid-term elections.⁹⁰

It was no mistake that it was during the second term of the presidency of Barack Obama that the Voting Rights Act was neutered by a Supreme Court, in which a majority of its members declared the country to be color blind and therefore, no longer in need of a strong voting rights act.⁹¹ There is no doubt that the Court factored President Obama’s re-election into the conclusion that the U.S. was indeed a color-blind nation and, therefore, no longer in need of a diligent and stringent safeguards protecting the right to vote.⁹² Matt Vasilogambros’ 2018 research found that in the “five years since the U.S. Supreme Court struck down key parts of the Voting Rights Act, nearly a thousand polling places have been shuttered across the country, many of them in southern Black communities.”⁹³ He also found that ten counties with large Black populations in Georgia closed polling locations, purportedly to save money.⁹⁴ Providing fewer places to vote in minority communities, as well as enacting laws that discourage voting assures a maintenance of the status quo and serves the White majority in maintaining its supremacy.

⁸⁶ Brittany C. Armour, *After Shelby County v. Holder, Can Independent Commissions Take the Place of Section 5 of the Voting Rights Act?*, 53 WASH. U. J. L. & POL’Y 269, 275 (2017).

⁸⁷ *Id.* at 276.

⁸⁸ *Id.*

⁸⁹ Brandeisky, *supra* note 99, at 108.

⁹⁰ *Id.*

⁹¹ Harry Baumgarten, *Shelby County v. Holder’s Biggest Impact and Most Harmful Impact May Be on the Nation’s Smaller Towns*, CAMPAIGN LEGAL CENTER (June 20, 2016), https://campaignlegal.org/update/shelby-county-v-holders-biggest-and-most-harmful-impact-may-be-our-nations-smallest-towns?gclid=Cj0KCQjw4NujBhC5ARIsAF4Iv6e1tYHA2w2UPhDKE5HIUPYdc-HPkHc46kD2H7qU_DSWyh5bzGoLqNYaAIJfEALw_wcB.

⁹² *See id.*

⁹³ Matt Vasilogambros, *Polling Places Remain a Target Ahead of November Elections*, STATELINE (Sept. 4, 2018, 12:00 AM), <https://stateline.org/2018/09/04/polling-places-remain-a-target-ahead-of-november-electio>

⁹⁴ *Id.*

C. *The Impact of the Browning of America on Voting Rights*

One of the biggest impacts on the political landscape, has been the meteoric change in American demographics over the last fifty years. In 1960, for example, Whites made up 85 percent of the population according to the U.S. Census.⁹⁵ While Black people were 11 percent of the population and Latinos combined with Asians made up less than 5 percent in 1960.⁹⁶ In 2022 the White population declined by more than 20 percent while Latinos became 19.1% of the US population⁹⁷ The shift in demographics has, for the first time, created a “majority-minority” in several states. By 2044, for the first time in history, Whites will no longer make up a majority of the population.⁹⁸

The implication of this demographic shift is already making for distinctive patterns of behaviors particularly shown in state legislatures where Republicans hold all the levers of power.⁹⁹ Specifically, lawmakers in less White states where Republicans hold super majorities, have introduced, and passed far more restrictive provisions.¹⁰⁰

Democrats and Republicans alike are very much aware of the growing populations of minorities and the implications of those numbers in potentially swaying election outcomes. However, “A strategy based on appealing to nonwhites and Latinos can succeed only in the places these voters reside. But when these voters are concentrated, it is challenging to create electoral majorities.”¹⁰¹

Gerrymandering has been utilized as a tool to stack legislatures with dominant parties to the detriment of proportionate representation.¹⁰² Gerrymandering is when officeholders of the party in power either spread voters from the opposing party across districts to dilute the vote, or pack the voters into a minority of districts to reduce the number of seats the

⁹⁵ CHRISTOPHER T. STOUT, *THE CASE FOR IDENTITY POLITICS: POLARIZATION, DEMOGRAPHIC CHANGE, AND RACIAL APPEAL* 179-199 (2020).

⁹⁶ *Id.* at 181.

⁹⁷ *QuickFacts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045222> (last visited Nov. 5, 2023).

⁹⁸ Stout, *supra* note 108, at 181.

⁹⁹ Kevin Morris, *Patterns in the Introduction and Passage of Restrictive Voting Bills are Best Explained by Race*, BRENNAN CENTER FOR JUSTICE (Aug. 3, 2022), <https://www.brennancenter.org/our-work/research-reports/patterns-introduction-and-passage-restrictive-voting-bills-are-best>.

¹⁰⁰ *Id.*

¹⁰¹ Stout, *supra* note 108, at 185

¹⁰² See Julila Kirschenbaum & Michael Li, *Gerrymandering Explained*, BRENNAN CTR. FOR JUSTICE (August 10, 2021), <https://www.brennancenter.org/our-work/research-reports/gerrymandering-explained>

opposing party can control.¹⁰³ The effects of this voter manipulation are a form of turnout suppression because voters in the affected districts are keenly aware that their vote generally does not matter, because they are a different party than the majority in the district.¹⁰⁴

Recently super majorities have emerged with devastating effects on the rights of the populace. Since the 2020 election, in 22 states, Republicans hold unified control over the governor's office and both houses of the legislature, giving the party wide political latitude- including in states such as Florida and Georgia.¹⁰⁵ The repercussions of such supermajorities have resulted in wide-sweeping state legislative efforts to minimize the rights of transgendered individuals, Women's rights, reproductive rights, voting rights, as well as decreased access to alternative views from marginalized populations: BIPOC, Native Americans, Immigrants, and Non-Christian believers. Most recently, the Tennessee legislature has used this power to expel Democratic representatives from the state house, over Gun Rights and "uppity Negroes"¹⁰⁶ (Republicans state the posture was defended to protect democratic processes from being desecrated).¹⁰⁷

Further implications from the supermajorities resulting from redistricting, are states passing laws that take away electoral power from the people and giving it to legislators who act on behalf of their own interests. Recently, Tennessee has shown true commitment to suppressing the will of the people, presenting legislation that would have cut the Democratic-leaning city of Nashville's Metropolitan Council from 40

¹⁰³ *Gerrymandering*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/gerrymandering> (last visited Aug. 22, 2023). "[T]he practice of dividing or arranging a territorial unit into election districts in a way that gives one political party an unfair advantage in elections."

¹⁰⁴ Ravel, *supra* note 51, at 1025.

¹⁰⁵ Joe Walsh, *Republicans Will Enter 2021 With Control Over Most States' Governments. Here's Why That Matters for Redistricting*, FORBES (Nov. 6, 2020), <https://www.forbes.com/sites/joewalsh/2020/11/06/republicans-will-enter-2021-with-control-over-most-states-governments-heres-why-that-matters-for-redistricting/?sh=1f1fe037441a>.

¹⁰⁶ Jennifer Bowers Bahney, *Expelled Tennessee Lawmaker Claims Republicans Voted Him Out for Being 'An Uppity Negro'*, MEDIAITE (Apr. 6, 2023), <https://www.mediaite.com/politics/expelled-tn-lawmaker-claims-colleagues-voted-him-out-basically-for-being-an-uppity-negro/>.

¹⁰⁷ Eliza Fawcett & Emily Cochrane, *Tennessee House Expulsions: What You Need to Know*, N.Y. TIMES (May. 20, 2023), <https://www.nytimes.com/article/tennessee-house-democrats-expulsion-shooting-gun-control.html>.

members to 20 members, undermining the council's districting map, and integrity of the election process, which had been in place since 1963.¹⁰⁸

Another example of these tactics is Georgia's new law removing the Secretary of State (an elected position) as chair of the state elections board and giving the power to the legislature to instead appoint a "nonpartisan" chair of the board.¹⁰⁹ Under the new law, if the majority of the five-member board decides a county election official has done their job poorly, they can remove and replace them with a hand-picked candidate to serve as temporary superintendent, with all powers the previous official had.¹¹⁰ In counties where there have been previous rumblings about "election integrity", those officials are now subject to this new law- without any real oversight.¹¹¹ Perhaps the smokescreen of these voters who elect such officials and the officials themselves, "may not necessarily be concerned about maintaining those democratic norms if they no longer feel that Democracy is there to serve them."¹¹²

D. *The Impact of the 2020 Presidential Election*

The first "Big Lie" was created by Adolf Hitler in *Mein Kampf*, when he accused Jews of spreading lies about how the German army performed in World War I in an effort to rewrite history and blame Jews for Germany's defeat.¹¹³ In the context of the 2020 election, there were three Big Lies: First, Biden did not win the election; second, Trump's adoption of the Big Lie "as a claim of his own persecution, which has eclipsed its use about his lies, into a form of propaganda;"¹¹⁴ and third, the protectors of electoral integrity and democracy were in fact there to dismantle it.¹¹⁵

On January 6, 2021, a mob of President Trump's supporters came to Washington D.C. in an attempt to thwart the electoral certification of Joe

¹⁰⁸ Jonathan Mattise, *Judges block Tennessee move to cut Nashville council in half*, ASSOCIATED PRESS (Apr. 10, 2023), <https://apnews.com/article/tennessee-expulsion-democracy-election-nashville-city-council-2f4b61050a34a5980e48dd63f8e20cf0>.

¹⁰⁹ Daniel Dale & Dianne Gallagher, *Fact check: What the new Georgia elections law actually does*, CNN (Mar. 31, 2021), <https://www.cnn.com/2021/03/31/politics/fact-check-georgia-voting-bill-law-elections-explained/index.html>.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Lisa García Bedolla, *On the Ballot in 2020: Will the United States (finally) embrace civil rights?*, 6 JOURNAL OF RACE, ETHNICITY, AND POLITICS 71–81, 77 (2021).

¹¹³ Zachary B. Wolf, *The 5 key elements of Trump's Big Lie and how it came to be*, CNN (May 19, 2021), <https://www.cnn.com/2021/05/19/politics/donald-trump-big-lie-explainer/index.html>.

¹¹⁴ *Id.*

¹¹⁵ Bedolla, *supra* note 135, at 77.

Biden as the new President of the United States.¹¹⁶ Encouraged by a speech given by Trump on the Ellipse a mile from the Capitol, Trump claimed election fraud, called on V.P. Pence to refuse to certify the electors, and literally told his supporters “if you don’t fight like hell, you’re not going to have a country anymore.”¹¹⁷ Within two hours of giving his speech, rioters attacked the Capitol police, entered, and ransacked the Capitol complex, destroyed property, and injured more than 100 law enforcement members.¹¹⁸ One protestor died, and the insurrection failed, with Congress voting to confirm Biden’s win at 3:24 am the following morning.¹¹⁹

To understand the insurrection of January 6, 2021, one can look back to the attempted insurrection of February 13, 1861, when militias attempted to disrupt the counting of the electoral certificates that would confirm Abraham Lincoln’s election.¹²⁰ The current attack and the former one both included deep ties to White Supremacy.¹²¹ Of note, Joe Biden’s victory came from substantial support from Blacks, Latinos, Asians, and Native Americans.¹²²

When dominant groups have found their power and status threatened, this perceived threat has been characterized as an attack on the nation, where these groups believe they must protect the authentic American way of life.¹²³ One state in particular, Georgia exemplifies the mentality and instrumentality of the “Big Lie” as a means of oppression. Georgia was the subject of substantial court action over the 2020 election including the justification for electoral worker and voter intimidation, illegal and absentee votes validity questions, and accusations of private funding to compromise the process, from poll monitoring to ballot harvesting.”¹²⁴

¹¹⁶ American Oversight, *The January 6 Attack on the U.S. Capitol* (updated Sept. 26, 2023), <https://www.americanoversight.org/investigation/the-january-6-attack-on-the-u-s-capitol>

¹¹⁷ *U.S. Capitol Riot*, HISTORY (Jan. 5, 2022), <https://www.history.com/this-day-in-history/january-6-capitol-riot>.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Kevin B. Anderson, *The January 6 Insurrection: Historical and Global Contexts*, 48 *CRITICAL SOCIOLOGY* 901 (2022).

¹²¹ *Id.* at 902.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Will Wilder & Katie Friel, *5 State Laws Based on Voter Fraud Myths that Will Hamper Future Elections*, BRENNAN CENTER FOR JUSTICE (July 7, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/5-state-laws-based-voter-fraud-myths-will-hamper-future-elections>.

Trump utilized emotional appeal, historical scripts, ethnic antagonism¹²⁵, and nostalgic deprivation¹²⁶, to call out and claim the forgotten Americans who were subject to the corrupt ruling class that had sold the US out to the “false song of globalism”.¹²⁷ Trump captured and mobilized these “good Americans” (White, Christian, males) by appealing to a narrative that they were now facing an assault from dangerous immigrants, foreign nations and religions, and unpatriotic elites.¹²⁸ The power Trump had now claimed and exploited, was built on the narrative of victimization and White supremacy under the guise of White protection.¹²⁹

E. *The Ongoing Call and Response of White Supremacy*

If the January 6th insurrection was a call to action, then the decision of *Brnovich v. Democratic National Committee*¹³⁰ was the judicial ratification of the “Big Lie” to justify White Supremacy on steroids when it comes to voter suppression. Here, the Court held that Arizona law H.B. 2023 enacted in 2016, “despite no evidence of any fraud in the long history of third-party ballot collection in Arizona”, which criminalized the collection and delivery of another person’s ballot was permissible.¹³¹ As such, the ruling effectively gutted section 2 of the VRA, which prohibits a state from abridging the right to vote on account of race or color, stating that H.B. 2023 was neither enacted with a discriminatory purpose nor did

¹²⁵ Larry M. Bartels, *Ethnic antagonism erodes Republicans’ commitment to democracy*, 117 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES 22752, 22752 (2020). Author defined ethnic antagonism as “concerns about the political power and claims on government resources of immigrants, African Americans and Latinos.”

¹²⁶ Justin Gest et al., *Roots of the Radical Right: Nostalgic Deprivation in the United States and Britain*, 51 COMPARATIVE POLITICAL STUDIES 1694, 1695 (2017). Defined “nostalgic deprivation” as a “perceived threat to or loss of status—a sense of social, political, or economic deprivation.”

¹²⁷ Rogers M. Smith, *White Protectionism in America*, 19 PERSPECTIVES ON POLITICS 460 (2021).

¹²⁸ *Id.* at 466.

¹²⁹ *See id.*

¹³⁰ *See Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021).

¹³¹ *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2325, 210 L. Ed. 2d 753 (2021)

Neither Arizona’s out-of-precinct policy nor H.B. 2023, the ballot-collection law, violates Section 2 of the VRA. Neither imposes burdens on voters that exceed the “usual burdens of voting,” and any racial disparity in burdens is “small in absolute terms.” The state has legitimate and important interests in ensuring even distribution of voters among polling places and preserving the integrity of election procedures. Finally, the Court accepted the district court’s finding that H.B. 2023 was not enacted with a discriminatory purpose.

it exceed any “usual burdens of voting”, even if there were some racial disparities.¹³²

Vann R. Newkirk II writing in *The Atlantic* opined, “[j]ust five years after the landmark *Shelby County v. Holder* decision, it’s become clear that the decision has handed the country an era of renewed White racial hegemony. And we’ve only just begun.”¹³³ When the Supreme Court upheld an Ohio purge law that sent forwardable notices to registered voters who had not voted in two years based upon a questionable assumption they had moved, Ohio’s Republican secretary of state celebrated the Court’s decision with a press release and call to action:

Today’s decision is a victory for election integrity, and a defeat for those who use the federal court system to make election law across the country. This decision is validation of Ohio’s efforts to clean up the voter rolls and now with the blessing of the nation’s highest court, it can serve as a model for other states to use.¹³⁴

Even when voters exercised their rights to challenge or change state laws by referendum, state legislatures outmaneuvered and overran the will of the people by enacting new laws. One glaring example was the felon restoration ballot measure of 2018 in Florida which passed with overwhelming support.¹³⁵ To counter the Republican legislature passed Senate Bill 7066, which declared that felons must pay all outstanding fines, fees, and restitutions before they are deemed to have “served their sentence”, and thus regaining their right to vote.¹³⁶ Its effect, nearly 744,000 disenfranchised felons still cannot vote.¹³⁷

Months after the January 6th insurrection, the means to end the divisive and corrosive state of American voter suppression was presented in the form of HR1, “For the People Act of 2021”. The bill was brought up for debate on March 2, 2021 and was voted upon on March 3rd. All but one present Democrat (excluding Rep. Bennie Thompson, Miss) affirmed, and all present Republicans voted against. The bill, having passed the House 220-210, the bill was received in the United States Senate where Senators

¹³² *See id.*

¹³³ Brendan William, *Forget Kanye: Minority Voter Suppression is on the March*, 62 HOWARD L. J. 399,408 (2019).

¹³⁴ *Id.* at 414.

¹³⁵ Brennan Center for Justice, *Voting Rights Restoration Efforts in Florida*, (May 31, 2019), https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-florida?can_id=e75e6deda93939aad5ce2affc2ed5363&email_subject=our-next-big-action-the-poor-peoples-campaign&link_id=5&source=email-our-next-big-action-the-poor-peoples-campaign

¹³⁶ Patricia Mazzie, *Ex-Felons in Florida Must Pay Fines Before Voting, Appeals Court Rules*, N.Y. Times (Sept 11, 2020), <https://www.nytimes.com/2020/09/11/us/florida-felon-voting-rights.html>.

¹⁴¹ *Id.*

Schumer, Merkley, and Klobuchar introduced the companion bill SR1 in the Senate, on March 17th.¹³⁸ The bill was “Dead on Arrival” and has still not been taken up in the United States Senate.¹³⁹

The bill covered ten titles: (I) Election Access, (II) Election Integrity, (III) Election Security, (IV) Campaign Finance Transparency, (V) Campaign Finance Empowerment, (VI) Campaign Finance Oversight, (VII) Ethical standards, (VIII) Ethical Reforms for the President, Vice President, and Federal Officers and Employees, (IX) Congressional Ethics Reform and (X) Presidential and Vice-Presidential Tax Transparency.¹⁴⁰

In a joint statement when introducing the bill in the U.S. House, Speaker Pelosi, along with House Administration Chair Lofgren, and Democracy Task Force Chair Sarbanes said:

Our democracy is in a state of deep disrepair. During the 2020 election, Americans had to overcome rampant voter suppression, gerrymandering, and a torrent of special interest dark money just to exercise their right to vote . . . HR 1 will protect the right to vote, ensure the integrity of our elections, hold elected officials accountable, and end the era of big, dark, special interest money in our politics.¹⁴¹

In response, Sen. Minority Leader Mitch McConnell and Minority Leader McCarthy countered with more of the usual rhetoric accusing the bill of promoting the “absurd practice of ballot harvesting, preventing states from ID checking, mandating no-excuse, mail-in balloting as a norm, and creating a speech czar among many other things.”¹⁴² The Court in *Wesberry v. Sanders* wrote, “[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”¹⁴³

¹³⁸ Annotated Guide to the For the People Act of 2021, Brennan Ctr. for Justice (January 20, 2021), <https://www.brennancenter.org/our-work/policy-solutions/annotated-guide-people-act-2021>

¹³⁹ *Id.*

¹⁴⁰ See HR 1, *For the People Act of 2021*, https://ballotpedia.org/HR1,_%22For_the_People_Act_of_2021%22 (last visited Apr. 13, 2023).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Wesberry v. Sanders*, 376 U.S. 1, 4 (1984); Brendan Williams, *Forget Kanye: Minority Voter Suppression Is on the March*, 62 HOWARD L.J. 399,422 (2019) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)).

V. CONCLUDING THOUGHTS

A. *Disenfranchisement Redux – Who Are the Losers?*

Power concedes nothing without a demand. It never did and it never will. Find out just what any people will quietly submit to, and you have found out the exact measure of injustice and wrong which will be imposed upon them, and these will continue till they are resisted with either words or blows, or with both. The limits of tyrants are prescribed by the endurance of those whom they oppress.¹⁴⁴

This statement expressed by the great Frederick Douglass supports the thesis of this paper which simply put is that White supremacy is a powerful drug that has addicted the United States and left many of its inhabitants, “spending most of their time living in a pastime paradise.” A paradise that does not value Black people and other minorities and relegates them to powerless positions in order to maintain the status quo, is no paradise at all.

If further proof is needed to substantiate the desire to revert back to the time when Black people were powerless and unable to partake in democracy, one just needs to examine the actions taken by the state of Mississippi to ratify the Fifteenth Amendment more than one hundred years after it was added to the Constitution. If Mississippi did not officially recognize the citizenship of Black Americans, it certainly did not recognize their right to vote. “The Mississippi legislature rejected the Thirteenth Amendment in 1865. It voted to ratify the amendment in 1995. The necessary paperwork was not submitted to the appropriate federal authorities for eighteen years, so the state’s ratification was not officially recorded until 2013.”¹⁴⁵ This provides just one example of numerous efforts to maintain the status quo of White power in a nation where there is an obvious growth of diversity. There are clearly machinations in play to prevent sharing power, as would be done in a true democracy.

In 1900, James Weldon Johnson authored a poem entitled “Lift Ev’ry Voice and Sing.”¹⁴⁶ The poem was set to music and the resulting song was

¹⁴⁴ (1857) Frederick Douglass, “If there is no struggle, there is no progress”, BLACKPAST, <https://www.blackpast.org/african-american-history/1857-frederick-douglass-if-there-no-struggle-there-no-progress/> (last visited October 4, 2023).

¹⁴⁵ Stephanie Condon, *After 148 Years Mississippi Finally Ratifies The 13th Amendment Which Banned Slavery*, CBS News (Feb. 18, 2013), <https://www.cbsnews.com/news/after-148-years-mississippi-finally-ratifies-13th-amendment-which-banned-slavery/>.

¹⁴⁶ *Lift Every Voice and Sing*, NAACP, <https://naacp.org/find-resources/history-explained/lift-every-voice-and-sing> (last accessed Nov. 4, 2023).

called The Negro National Anthem (hereafter referred to as the Black National Anthem). The first stanza of the song is:

Lift ev'ry voice and sing, 'til earth and heaven ring,
 Ring with the harmonies of liberty;
 Let our rejoicing rise, high as the list'ning skies,
 Let it resound loud as the rolling sea.
 Sing a song full of faith that the dark past has taught us,
 Sing a song full of the hope that the present has brought
 us;
 Facing the rising sun of our new day begun,
 Let us march on 'til victory is won.¹⁴⁷

It is not difficult to discern what was at the heart of this song because its lyrics continue to resonate today. Black Americans are still fighting for full participation in democracy. As stated in an amicus brief from *Shelby County v. Holder*:

Liberty as defined by political liberty, meaning among other things, the ability to participate in the process of deciding who should represent one's political interest. To this end, one of the most powerful rights that the Constitution bestows upon its citizens is the right to vote. Failure to protect that right to the fullest extent possible not only disproportionately disenfranchises Black Americans and other minorities, but also diminishes the nation as a whole.¹⁴⁸

Democracy is debased when citizens of this nation are not allowed full participation in the democracy. The ACLU reports that as of 2021, over four hundred anti-voter bills have been introduced that resulted in a severely compromised democracy.¹⁴⁹ Disenfranchisement silences the voices of Blacks and other minorities and results in the lack of political representation of large swaths of the population. This fact tarnishes and corrupts a nation that touts its Constitution as the best and oldest in the world. Yet, a constitution that cannot protect its basic rights sets in motion a spiraling descent into autocracy. How long do Black people have to wait

¹⁴⁷ *Id.*

¹⁴⁸ Broussard, *supra* note 15, at 6.

¹⁷² *Block the Vote: How Politicians are Trying to Block Voters from the Ballot Box*, ACLU (Aug. 17, 2021), <https://www.aclu.org/news/civil-liberties/block-the-vote-voter-suppression-in-2020>.

until all their rights are fully recognized and they can truly, “Lift Every Voice and Sing?”¹⁵⁰

Notwithstanding the impact that disenfranchisement and voter suppression has had on the Black population, political inequality impacts all Americans. Black and brown disenfranchisement does not reside in a vacuum and the debasement of constitutional rights for some has an impact on all because it erodes democracy. David Mitchell and Austin Clemens state the following in an article entitled, *The Consequences of Political Inequality and Voter Suppression for U.S. Economic Inequality and Growth*¹⁵¹:

Economic and racial inequality together subvert our democracy by aiding and abetting political inequality and voter suppression, creating a dangerous feedback loop for the perpetuation of economic policymaking that does not fully represent U.S. communities.¹⁵²

It should be patently clear to the average White American that their fate and well-being is inextricably bound to that of Black people and all other minorities. All manner of legislation has been proposed that will erode the rights of all Americans. Silence to the disenfranchisement of Black Americans has been viewed by White supremacists as agreement and acquiescence. White America should heed the words of James Baldwin to Angela Davis, “For, if they take you in the morning, they will be coming for us that night.”¹⁵³

B. The Losses to the Image of the U.S. Are Piling Up: The International Implications of Voter Suppression

The United States purports to provide the blueprint of a true democracy to the rest of the world, but the apparent regression of democracy in the nation, especially when it comes to voting rights, has instead provided a template to the world on how to erode the rights of citizens with little or no repercussions. The backsliding of democracy has not only eroded the rights of Americans but has also led to the loss of moral authority to reprimand the rest of the world about the lack of democracy in their nations. In an article entitled, *The United States is not entitled to*

¹⁵⁰ Lift Every Voice and Sing, *supra* note 169.

¹⁵¹ David Mitchell et al., *The consequences of political inequality and voter suppression for U.S. economic inequality and growth*, WASHINGTON CENTER FOR EQUITABLE GROWTH (Feb. 3, 2021), <https://equitablegrowth.org/research-paper/the-consequences-of-political-inequality-and-voter-suppression-for-u-s-economic-inequality-and-growth/?longform=true#>.

¹⁵² *Id.*

¹⁵³ James Baldwin, Angela Davis, *An Open Letter to My Sister, Miss Angela Davis*, *The New York Review* (Jan 7, 1971), <https://www.nybooks.com/articles/1971/01/07/an-open-letter-to-my-sister-miss-angela-davis/>.

Lead the World¹⁵⁴, authors James Goldgeier and Bruce Jentleson declare The U.S. a “tarnished model,” further asserting:

The self-proclaimed greatest democracy in the world has been an erratic one since the 1990s. In the past two decades, America has elected a Black President, impeached two others, had an election decided by the Supreme Court, and gone through radical social and economic transformations. After having elected a racist TV personality as President, the country also experienced a failed coup, reversed women’s and LGBT rights, and experienced mass gun violence at unprecedented rates. Under every measure, America is no longer a paragon of effective governance.¹⁵⁵

The duo asserts that systemic racism tarnishes the country’s image abroad as a champion of democracy but adds that the U.S. can still provide leadership but being more amid than atop requires a chastened rather than restorationist approach to internationalism.¹⁵⁶ “Systemic racism tarnishes the country’s image abroad as a champion of democracy, justice, and the rule of law.”¹⁵⁷

Perhaps we are a society that is hell-bent to destroy that which was created in the name of freedom, because we have never aimed for “a more perfect union” for all citizens. Maybe many Americans do not care what other nations think of them, so the above-mentioned loss of moral authority is unimportant to them. It is possible that civil war is preferable to civil rights.

However, there are clearly some steps we need to take as a nation to retrieve our right to be a credible and impactful leader in the world. These steps will lead the U.S. down the path to creating a nation that actually lives up its ideals of liberty and equality.

First, and foremost White Americans must recognize and acknowledge that there is a serious problem with the path that the U.S. is set upon.

Secondly, the nation must realize that when the constitutional rights of Black people and other minorities are stymied and denied their rights are not far behind. One can look to the movement to raise the voting age of young folks, as a push to deny voting rights. Should we accept the argument that a young person who is deemed old enough to purchase a weapon, fight in a war, and in many states allowed to marry, is somehow too young to vote? Or should it be recognized for what it really is – the

¹⁵⁴ James Goldgeier & Bruce W. Jentleson, *The United States Is Not Entitled to Lead the World*, FOREIGN AFFAIRS (Sept. 25, 2020), <https://www.foreignaffairs.com/articles/world/2020-09-25/united-states-not-entitled-lead-world>.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁸² *Id.*

desire to control the electorate, and elections, and to also maintain White supremacy and control of the country?

Third, we must end the culture wars that have come to define this country. There are some absolutes we should all be able to agree upon such as: (i) Black Americans are Americans, (ii) Black Americans are human beings who are covered by the same constitution as other Americans, (iii) we must ascribe to “together we stand, divided we fall” because our fates are intertwined, (iv) we must allow all Americans access to the ballot box and (v) we must accept the results of all fair and honest elections. Although the Court did not further gut the Voting Rights Act in its decision in *Allen v. Milligan*,¹⁵⁸ the true damage was done in *Shelby County v. Holder*.¹⁵⁹ Congress must reissue a strong and effective Act¹⁶⁰ that protects the right to vote for all.

Fourth, in the words of Professor Page, “We must raise awareness about the tactics that have been used for centuries to keep every vote from being counted and work daily to dismantle this system which attempts to suppress and disenfranchise American citizens.”¹⁶¹

Lastly, we should fight for the right to vote as if our lives depend upon it because they do. As we can attest from the current state of affairs, democracy does not maintain itself, it must be maintained. This maintenance is difficult, exhausting, messy, and imperative because it is indeed time for some new cooks in the kitchen.

¹⁵⁸ *Allen v. Milligan*, No. 21–1086. Argued October 4, 2022—Decided June 8, 2023.

¹⁵⁹ *Shelby County v. Holder*, 579 U.S. 529 (2013).

¹⁶⁰ *Supra* note 6.

¹⁶¹ *Supra* note 23, at 215.