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The Voting Rights Paradox: Ideology and Incompleteness of American Democratic Practice

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THE VOTING RIGHTS PARADOX: IDEOLOGY AND INCOMPLETENESS OF AMERICAN DEMOCRATIC PRACTICE

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This Essay describes the "voting rights paradox"—the fact that despite America's professed commitment to universal enfranchisement, voting rights legislation throughout U.S. history has arisen in some states to serve antidemocratic, exclusionary ends. This Essay argues that this contradiction comes into focus when the right to vote is understood as having as an ideological driving force based on worthiness for admission to the franchise. This ideology of worthiness persists because the right to vote is dependent on political decisions left to the political branches and the majority's willingness to allow propaganda to influence the scope of the franchise.

Ultimately, this Essay argues that the voting rights paradox is effectively the "invisible hand" influencing the American law of democracy. The only way out of the paradox is to reorient voting rights towards a communitarian conception that fosters an authentic understanding of a universalist right to vote. This must be expressed by (and coupled with) fundamental, structural transformations in the mechanisms for allowing citizens to exercise their voting rights.

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TABLE OF CONTENTS

I. INTRODUCTION

A central paradox has plagued and continues to plague the American right to vote: the American republic has always conditioned participation in the democratic process on an antidemocratic ideology of worthiness needed to exercise the rights of citizenship. This reality has shaped debates around the right to vote in the past and in the present and has made it more difficult for the law to embrace the rhetoric of a universal right to vote—that is, a right for all citizens to participate freely and fairly.

This is the defining dilemma of voting rights in American history. Indeed, the histories surrounding voting rights admit to the progress that was required to gain a more expansive right to vote for all American citizens, yet at the same time recognize that these rights are inherently and constantly contested.[1] The continued contest around voting rights is ultimately attributable to this paradox.

This paradox—and the underlying constitutional flaws that allow it to exist—is the subject of this Essay. My claim is that, despite the significant strides towards a universal right to vote, this paradox—created by the interrelationship of deferential and malleable notions of the right to vote, coupled with the ability to condition the franchise on tests intended to allow targeted, exclusionary discrimination—exists and continues to define voting rights battles today. Limits on the franchise will persist until an authentically universalist view of the right to vote prevails in American election law. Wholesale structural change is the only way to break out of this paradox.

Our understanding of the possibilities for expansive voting rights must necessarily be read through this voting rights paradox. This inherently political force—the ability to condition the franchise on the ideological measure I am calling "worthiness"—shapes every conversation about the nature of voting rights. Throughout American history, efforts at creating a genuine, universalist right to

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[1] *See generally* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES (2000) (exploring the history of voting rights in the United States and the factors causing their expansion and contraction); William Jefferson Clinton, *The Voting Rights Umbrella*, 33 YALE L. & POL'Y REV. 383 (2015) (noting that while suffrage has expanded throughout the country's history, it is presently becoming harder for people to vote due to restrictive state voting requirements).

vote have been consistently stymied by this worthiness measure. Indeed, an individual's ability to vote has consistently been determined by whether they meet some ideologically driven criteria, whether it be white supremacy, patriarchy, class dominance, nativism, or some other hierarchy. The particular ideologies (and their respective public acceptability) have evolved over time, and, importantly, the rise of these ideologies often intersects with times when the franchise has expanded in response to modern norms of equality and universal participation. The evolution of exclusionary rhetoric has obscured voter suppression rationales and thus has insulated exclusionary actions from significant scrutiny.[2]

This problem has manifested throughout American history. The structures of the original U.S. Constitution and state constitutions codified the relationship between worthiness and the conditional right to vote; these constitutions either explicitly or implicitly denied the right to vote based on identity well into the twentieth century.[3] The paradox affects the framing of the constitutional amendments and statutory law that sought to expand the franchise, which were not given complete effect, and in some ways, were never given complete effect.[4] And it persists in the creation and interpretation of the laws at all levels through the lens of partisan epistemology—the idea that different political parties have different ecospheres of knowledge and opinions based on that knowledge[5] and "outcome determinative" election law design.[6] This era of partisan epistemology, and the fundamental divide it creates regarding the validity of voter fraud claims, structures our current era of vote suppression. The premise of all forms of voter

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[2] *See* Atiba R. Ellis, *The Meme of Voter Fraud*, 63 CATH. U. L. REV. 879, 911 (2014) (describing the antidemocratic effects of meme-driven policy, including distortion that degrades the mechanisms of voting and confidence in the electoral system).

[3] *See* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 95–105 (2014) (describing how the federal and state constitutions allocate the franchise).

[4] *See* Charles S. Bullock III, Ronald Keith Gaddie & Justin Wert, *Electoral College Reform and Voting Rights*, 1 FAULKNER L. REV. 89, 123–24 (2009) (comparing "*first order* constitutional limitations to voting procedures" with "*second order* statutory and doctrinal regulations, created by Congress and the federal judiciary").

[5] I describe this divide and recent research relevant thereto in Atiba R. Ellis, *Voter Fraud as an Epistemic Crisis for the Right to Vote*, 71 MERCER L. REV. 757, 758 (2020) (describing, as part of the epistemic divide in America, the phenomenon of divisions around knowledge based upon political affiliation).

[6] David Schultz, *The Case for a Democratic Theory of American Election Law*, 164 U. PA. L. REV. ONLINE 259, 259–60 (2016).

suppression is the commitment to ideologically driven standards of worthiness for admission to the franchise and the majority's willingness to allow propaganda to influence decisions concerning who is worthy to participate in the franchise.

This Essay will discuss the paradox of "worthiness" as a standard for democracy and expose it as a fundamental problem for American democracy. The Essay will discuss how this phenomenon has evolved and continues to perpetuate voter suppression by reflecting upon the less-than-complete progress of voting rights during the twentieth and twenty-first centuries. In doing so, it will elucidate the problems of antidemocratic constitutional design, the predominance of so-called "identity politics" in shaping voting rights, and the sway that ideology (notably, "partisan epistemology") has on our modern debates.

In Part II, this Essay uses the seminal case of *Shelby County v. Holder*[7] to focus on the political theme at the heart of this thesis—i.e., the fact that the American democratic structure allows voting rights to be treated as a political question. Then, in Part III, this Essay provides an account of how "worthiness" as an ideological commitment delegates to political actors (who are motivated by the desire to condition the franchise on meeting a measure of worthiness) the power to determine who holds the franchise in democracy. Part IV further explores this paradox by reflecting on the history of racial voter suppression in the United States. Then, Part V argues that because the paradox is an intrinsic part of American democracy, a reconsideration of the first premise of our democracy to insulate from this paradox is necessary to achieve a truly universal right to vote. Part VI concludes.

II. A POLITICAL QUESTION: *SHELBY COUNTY V. HOLDER* AND THE DILEMMA OF VOTING RIGHTS

The debate over voting rights is intrinsically linked to the power that the body politic has to define itself. Thus, questions of the legitimacy of an individual's participation in elections are intrinsically tied to the political legitimacy of the decisions made by the body politic to determine who gets to participate in the

[7] 570 U.S. 529 (2013).

franchise.[8] This, in itself, is the paradox of American democracy.[9] Of course, the consequence of this paradox is that the conversation over who is—and who is not—a legitimate participant in the franchise is left to the majority itself. And those questions, in the American structure, are then delegated to the representatives of the people, as well as to the courts.[10] Thus, an expression of the voting rights paradox is the dilemma created when the majoritarian and counter-majoritarian forces of American government conflict over the scope of voting rights based on their competing normative and political commitments.

This dilemma was made explicit in a recent case shaping the scope of modern American voting rights, *Shelby County v. Holder*.[11] This decision reveals aspects of the voting rights paradox: a commitment to conditioning the franchise based upon arguably ideological measures; the effect of deference to state law, rather

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[8] *See* Schultz, *supra* note 6, at 261 (arguing that "democratic theory of election law" is needed to "guide[] important questions such as who gets to participate, who runs for office, or how votes are counted").

[9] This presumes that the ultimate goal of American democracy is to be, in a word, democratic. Our conception of democracy is based on the equality of all citizens. *See, e.g.*, Atiba R. Ellis, *Reviving the Dream: Equality and the Democratic Promise in the Post-Civil Rights Era*, 2014 MICH. ST. L. REV. 789, 790–91 [hereinafter Ellis, *Reviving the Dream*] (noting that equality is "axiomatic" to conceptions of democracy). To be clear, my view on this contention is that this should be the goal of American democracy. Accordingly, ideas that justify exclusion must be closely interrogated. *See* Atiba R. Ellis, *Tiered Personhood and the Excluded Voter*, 90 CHI.-KENT L. REV. 463, 490 (2015) [hereinafter Ellis, *Tiered Personhood*] ("In short, we modern Americans proceed from the assumption that democracy and exclusivity [of the franchise] not only can co-exist, but that they must co-exist in order to preserve the political community. We must uproot this assumption."). As this Essay will show, our rhetoric around democracy in the modern age has been about the equality of citizens and equal access to the franchise. But our history shows that this has never been the case. Particularly, prior to the passage of the Voting Rights Act of 1965 (VRA), America had never provided a full right to vote for all eligible citizens. Even after the passage of the VRA, some people occasionally argue that not all citizens should be entitled to voting rights or that the conditions on voting rights should be based on some form of determination of worth or utility. To take one example that is more philosophical than enmeshed in the history of America's politics of identity, see, e.g., Jason Brennan, *The Right to Vote Should Be Restricted to Those With Knowledge*, AEON (Sept. 29, 2016), https://aeon.co/ideas/the-right-to-vote-should-be-restricted-to-those-with-knowledge.

[10] *See* Schultz, *supra* note 6, at 261 (noting the courts' general role in shaping American democracy).

[11] 570 U.S. 529 (2013).

than to a national standard; and the exclusionary effects of doing so.[12]

In *Shelby County*, Chief Justice John Roberts, writing for a five-justice majority, struck down as unconstitutional Section 4(b) of the Voting Rights Act of 1965.[13] Section 4(b) provided the formula for determining which states had a history of racial discrimination in voting and lagging metrics concerning the participation of minority voters sufficient to require that the jurisdiction's voting laws be subject to federal government oversight.[14] Section 5 of the VRA, in contrast, is the supervision provision.[15] This Section of the VRA required states which fit the criteria under Section 4(b) to have all of their election laws "precleared" (that is, approved by the federal government before they are enforced within that state).[16] The standard for receiving preclearance was whether the election provision was "retrogressive" regarding minority voting rights—i.e., whether the provision made racial minorities worse off in exercising the right to vote.[17] This effectively meant that states subject to preclearance had to cooperate with the federal government to ensure that minority voting rights were protected.[18] And because of the preclearance provision, the retrogressive effect of the laws would not harm the targeted voters until any dispute about their legality was settled by the Department of Justice or a federal court.[19] In this way, the preclearance requirements ultimately prevented discrimination and forestalled backsliding in regard to minority voting rights.[20]

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[12] *See, e.g.*, *id.* at 543 ("States retain broad autonomy in structuring their governments and pursuing legislative objectives.").

[13] *See id.* at 557 ("Congress could have updated the coverage formula . . . but did not do so. Its failure to act leaves us today with no choice but to declare §4(b) unconstitutional.").

[14] *See id.* at 537–39 (describing the VRA's coverage formula).

[15] *See id.* at 535 (stating that states covered by Section 4's formula are "required . . . to obtain federal permission before enacting any law related to voting").

[16] *Id.* at 544.

[17] *See id.* at 537–38 (describing the preclearance standard under Section 5).

[18] *See id.* at 537 ("Section 5 provided that no change in voting procedures could take effect until it was approved by federal authorities in Washington, D.C.—either the Attorney General or a court of three judges.").

[19] *See id.* at 544 ("States must beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact . . . on their own . . . .").

[20] *See id.* at 565–66 (Ginsburg, J., dissenting) ("The VRA has directly caused significant progress in eliminating first-generation barriers to ballot access, leading to a marked increase in minority voter registration and turnout and the number of minority elected officials.").

In striking down the Section 4(b) coverage formula, Chief Justice Roberts effectively nullified this entire scheme.[21] Thus, no state can be supervised under Section 5, no matter the racial disparities created by their modern practices.[22] Chief Justice Roberts reasoned that the South had changed sufficiently regarding race and elections by pointing towards increased rates of voter participation and the number of minority officials elected in Alabama and other states.[23] As I have argued elsewhere, this selective determination of the facts amounted to offering a misleading post-racial vision of improvement in the South that misrepresented the scope of the problem of race and elections.[24] Yet, as Chief Justice Roberts rationalized, Congress had not changed the coverage formula in response to that evolution.[25] Thus, by maintaining a decades-old coverage formula, the law offended "equal sovereignty" between the states since some states subject to Section 5 preclearance had their authority to administer their election laws suspended while other states did not.[26] Because of this mismatch between the post-racial America that Chief Justice Roberts saw and the race-centered mechanism that denied states equal sovereignty, the Court nullified the VRA's coverage formula, rendering Section 5 inoperative.[27]

Justice Ginsburg in dissent showed how Roberts's post-racial vision of America ignores the ongoing crisis of voter suppression.[28] Ginsburg argued that Roberts's depiction of race is based on a false

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[21] *Id.* at 556–57 (majority opinion).

[22] *See id.* at 550 ("The provisions of § 5 apply only to those jurisdictions singled out by § 4.").

[23] *See id.* at 547–49 (describing the improvements made in the South).

[24] *See e.g.*, Atiba R. Ellis, *Shelby Co. v. Holder: The Crippling of the Voting Rights Act*, ACS: EXPERT FORUM (June 27, 2013), https://www.acslaw.org/expertforum/shelby-co-v-holder-the-crippling-of-the-voting-rights-act/ (arguing that the *Shelby* majority offered an "incomplete picture of racial triumph [that] ignores the political realities of modern voter suppression tactics and their racial impact"); Atiba R. Ellis, *Mission Accomplished? Post-Racialism and Shelby County*, ACS: EXPERT FORUM (Feb. 25, 2013), https://www.acslaw.org/expertforum/mission-accomplished-post-racialism-and-shelby-county/ (noting that the premise of Roberts's opinion is that Section 5 "has triumphed over the problem of race" such that voter suppression "no longer exists").

[25] *See Shelby Cnty.*, 570 U.S. at 554 ("Congress did not use the record it compiled to shape a coverage formula grounded in current conditions. It instead reenacted a formula based on 40-year-old facts having no logical relation to the present day.").

[26] *Id.* at 544.

[27] *Id.* at 556–57.

[28] *See id.* at 563 (Ginsburg, J., dissenting) (arguing that the VRA "has not eliminated all vestiges of discrimination against the exercise of the franchise by minority citizens").

premise—merely because some measures of minority participation have improved does not disprove the existence of rampant voter suppression or the fact that minority political participation is severely endangered.[29] Moreover, Ginsburg made clear that Congress acts within its core constitutional role when using its power under the Reconstruction Amendments to address racial voter suppression.[30] Indeed, she criticized Roberts's concept of the "equal sovereignty" of the states, as rooted in an expansive notion of state-focused equal dignity, as nonsensical.[31] The Fourteenth and Fifteenth Amendments by design grant the federal government express power to curtail racial discrimination in voting by "appropriate legislation" *at the expense of state sovereignty*.[32]

Justice Ginsburg emphasized that the ultimate end of these constitutional amendments and the VRA is to protect the dignity of the voter in not being hampered from participating in elections.[33] To illustrate this, she recited in great detail the record of racial voter suppression amassed by Congress as a basis for reauthorizing Section 5 in 2006.[34] She described specific instances of voter suppression against voters of color in granular detail and the efforts spurred by Section 5 to limit these abuses.[35] She echoed the bipartisan consensus in Congress around the salience of this problem and the solution that it chose to continue.[36]

The differing opinions of Roberts and Ginsburg have been written about at length, and they clearly illustrate the terms of the battle over voting rights. But Justice Ginsburg's dissent contains an important premise that points to the inherent voting rights

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[29] *See id.* at 578–79 (noting that "racially polarized voting" in the covered jurisdictions "increases the vulnerability of racial minorities to discriminatory changes in voting law").

[30] *Id.* at 567–68.

[31] *See id.* at 587–88 (noting that equal sovereignty principle, based on Court precedent, applies only to the terms on which states are admitted to the Union and that "[f]ederal statutes that treat States disparately are hardly novelties").

[32] *Id.* at 559–60 (quoting U.S. CONST. amends. XIV, XV).

[33] *See id.* at 567 (noting that the Fifteenth Amendment "targets precisely and only racial discrimination in voting rights").

[34] *See id.* at 573 ("The number of discriminatory changes blocked or deterred by the preclearance requirement suggests that the state of voting rights in the covered jurisdictions would have been significantly different absent this remedy.").

[35] *See id.* at 573–75 (outlining "characteristic examples of changes blocked [by preclearance] in the years leading up to the 2006 reauthorization").

[36] *See id.* at 593 ("Congress reauthorized the VRA, including the coverage provision, with overwhelming bipartisan support.").

paradox. On the most basic level, Justice Ginsburg warned that the most democratically legitimate intervention against racial voter suppression must be political.[37] In essence, voter suppression is a political problem that must be addressed by political solutions.

Indeed, Ginsburg's dissent quotes Justice Oliver Wendell Holmes's decision in *Giles v. Harris*, where, over a century ago, the Court upheld Alabama's notorious racial voter suppression scheme.[38] Holmes observed that the problem of white voters denying African Americans the right to vote was ultimately a political problem that requires a political solution.[39] To quote Ginsburg:

> As Justice Holmes explained: If "the great mass of the white population intends to keep the blacks from voting," "relief from [that] great political wrong, if done, as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political department of the government of the United States."[40]

Of course, the irony of Justice Ginsburg quoting Justice Holmes's dicta in *Giles* is that Holmes made this argument while dismissing a claim that the Alabama electoral system was discriminating against African Americans.[41] In this sense, Holmes disclaimed the Court's responsibility for remedying alleged wrongs regarding racial voter suppression, to the extent he even recognized that a claim would have been salient in the first place.[42] The irony, then, is that over a century later, Holmes's words—which were meant to justify the Court's ambivalence towards racial discrimination—

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[37] *See id.* at 590 ("Given a record replete with examples of denial or abridgment of a paramount federal right, the Court should have left the matter . . . in Congress' bailiwick.").

[38] *Id.* at 561 (citing Giles v. Harris, 189 U.S. 475 (1903)).

[39] *Giles*, 189 U.S. at 488.

[40] *Shelby Cnty.*, 570 U.S. at 561 (Ginsburg, J., dissenting) (alteration in original) (quoting *Giles*, 189 U.S. at 488)).

[41] *See Giles*, 189 U.S. at 488 ("Unless we are prepared to supervise the voting in that State by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form.").

[42] The *Giles* opinion is infamous for this summary dismissal of allegations of racial voter suppression at the beginning of the Jim Crow era. As a leading casebook recognized, *Giles* "signaled that[] the Fifteenth Amendment notwithstanding, the Supreme Court would not intervene" to stop racial voter suppression. SAMUEL ISSACHAROFF, PAMELA S. KARLAN, RICHARD H. PILDES & NATHANIEL PERSILY, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 47 (5th ed. 2016).

were used to criticize an opinion of the Court that is arguably ambivalent towards a new era of racial discrimination in voting.[43]

Yet, Ginsburg's recognition that Holmes was essentially correct points to a truth of our system that is at the heart of the voting rights paradox: the concern of racial political equality in the United States is a political question to be answered by the political branches.[44] And for that essential question to be left to politics leaves the meaning of democracy to the forces of inequitable majoritarianism—or, as Lani Guinier put it, to "tyranny by The Majority."[45]

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[43] *See Shelby Cnty.*, 570 U.S. at 559–60 (Ginsburg, J., dissenting) (warning that, without Section 5 preclearance, "backsliding" will occur).

[44] This question implicates the insight of Derrick Bell and his observation that the history of discrimination against racial minorities in voting and elections is one of "democratic domination." DERRICK BELL, RACE, RACISM, AND AMERICAN LAW § 6.1, at 341 (6th ed. 2008). Indeed, this history of the white majority, which has been informed by an ideology of white supremacy and which has had the discretion to give voting rights to the racial minority and to condition the extension of those rights on the political deliberations of the representatives of that majority, appears consistent with Bell's theory of "interest convergence." *See* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 526 (1980) (arguing that "the convergence of black and white interests" in promoting racial equality was a driver of the *Brown v. Board of Education* decision). Indeed, as Bell argued, and as Mary L. Dudziak has shown, that consensus was driven not by a fundamental recognition of the need for political equality but by the need to prevent the debasement of America's status in the world as an apartheid democracy. *See id.* at 524 ("[T]he decision helped to provide immediate credibility to America's struggle with Communist countries to win the hearts and minds of emerging third world peoples."); Mary L. Dudziak, Brown *as a Cold War Case*, 91 J. AM. HIST. 32, 34 (2004) ("Cold War concerns provided a motive beyond equality itself for the federal government, including the president and the courts, to act on civil rights when it did."). In this sense, Justice Ginsburg's citation would seem to suggest that the imposition of equal rights through legislative choice represents another instance of interest convergence driven by politics rather than a commitment to authentic universalism. Moreover, it points to the voting rights paradox in that it suggests that the majority may own the democracy on whatever terms it chooses—including discriminatory ones—and one must depend on the majority itself to change its mind about its antidemocratic choices. That it did, and Ginsburg depends on this shift with regards to the VRA, is beside the point. The point is that authentic democratic practice that is tied to antidemocratic political opportunism is the background of the American experience; thus, the expansion of the franchise will continue to be contested due to this force. This should give pause to anyone who would argue that the expansion of voting rights is in some way inevitable.

[45] *See* LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 6 (1994) ("'[I]t is no fair' if a fixed, tyrannical majority excludes or alienates the minority. It is no fair if a fixed, tyrannical majority monopolizes all the power all the time. It is no fair if we engage in the periodic ritual of elections, but only the permanent

III. WORTHINESS AND THE FRANCHISE

The political dilemma, and the voting rights paradox embedded in it, are not artifacts limited to the *Shelby County* era, or even to the Jim Crow period, of which *Giles v. Harris* is exemplary.[46] The structure of the American franchise has always suffered from this voting rights paradox: the right to vote within American democracy has been, and arguably continues to be, treated as a political question which the voting majority determines. This paradox is embedded in the structure of American constitutionalism and, accordingly, may require revisiting that structure to fix it.

This Part explores this structural dilemma by demonstrating how structure, from the founding of the republic to the present day, effectively has allowed ideology to serve as the measuring device for exercising the franchise. The roots of this are based in the deference our constitutional structure accords to states to determine the right to vote, while at the same time allowing societal notions of worthiness (based upon identity-driven standards) to serve as the measure for creating the standards for voting rights.[47] And while the right to vote may have evolved to exclude barriers explicitly about identity, status, or other measures, the ideology (and the attendant exclusionary effects) persists in American electoral structures.[48]

From the American colonial project to the present day, politicians have used worthiness as a standard to structure the democratic process to exclude the voters they saw as unworthy and to include the voters they deemed worthy.[49] Politicians in the United States are afforded this opportunity because state governments largely decide election rules in the first instance, including who gets to vote, how voters may access the ballot, how votes are counted, and how

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majority gets to choose who is elected. Where we have tyranny by The Majority, we do not have genuine democracy.").

[46] *See supra* notes 38–42 and accompanying text.

[47] Annette R. Appell, *Certifying Identity*, 42 CAP. U. L. REV. 361, 364, 380 (2014).

[48] *See* Kate Slater, *What Is Systemic Racism?*, TODAY (Feb. 4, 2021, 2:49 PM), https://www.today.com/tmrw/what-systemic-racism-t207878 (defining systemic racism and its effects).

[49] *See* Ben Cady & Tom Glazer, *Voters Strike Back: Litigating Against Modern Voter Intimidation*, 39 N.Y.U. REV. L. & SOC. CHANGE 173, 215–27 (2015) (listing common voter intimidation techniques).

much a vote is worth in relation to other votes.[50] These process questions determine whether a citizen can vote and what the worth of each individual vote will be. They are fundamental to the working of our democracy, yet they are subject to the ideological forces that treat potential constraints on democracy as "political" questions.

It was not until the mid-nineteenth century that the U.S. Constitution began to constrain states with regards to how they chose to admit or deny participation in the franchise.[51] While the constitutional norms of equality and antidiscrimination contained in the Reconstruction Amendments are all relatively modern inventions to ensure fair participation—and while those inventions have been, to varying degrees, enforced by the courts—states nonetheless have retained great capacity to legislate voter qualifications.[52]

To this end, politicians have deployed rhetorical and ideological constructs to shape the contours of the American political community. In other words, politicians and lawmakers have argued that certain populations are worthy or unworthy to exercise the franchise because of traits of their identity, whether they be the population's race, ethnic origin, gender, or wealth.[53] In this sense, the use of rhetoric to shape public perception—that is, to shape ideology—serves a key role in determining the nature of the franchise. This is how lawmakers have answered the political question of democratic inclusion throughout American history: by excluding those who do not meet their standard of worthiness.[54]

This ideology of worthiness serves to justify various legal structures that have shaped the contours of the franchise. In this sense, those in power determine who is worthy of membership in

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[50] *See* Douglas, *supra* note 3, at 101–05 (describing state constitutional voting protections across the country).

[51] *Landmark Legislation: Thirteenth, Fourteenth, & Fifteenth Amendments*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/generic/CivilWarAmendments.htm (last visited June 5, 2021).

[52] *See* C.R. White, Note, *Voting Rights – Ownership of Property No Longer a Valid Qualification*, 23 SW. L.J. 964, 965–67 (1969) (outlining states' capacity to "prescribe" voter qualifications despite the Reconstruction Amendments' limitations).

[53] *See* Ellis, *supra* note 2, at 894–98 (describing the history of exclusions from the franchise in the United States).

[54] *See, e.g.*, *id.* at 895 ("For example, antebellum period social order dictated that propertied white men were effective members of society, implicitly excluding many of those who did not possess those characteristics.").

the political community, and then they deploy the vicious voter myth to justify the exclusion of those deemed unworthy.[55] And, ironically, this exclusion and the antidemocratic impact of that exclusion reinforces the myth itself. The use of the ideology of worthiness in shaping the franchise has been a constant in American history.[56]

The ideology of worthiness has not only served as a cudgel of exclusion, it has also provided political cover for those seizing power within the democratic republic. Throughout the nineteenth and twentieth centuries, allegations of election disfunction due to the malfeasance of political party bosses, election workers, and other direct participants continued to exist.[57] Yet, oftentimes this malfeasance was accepted as normal, and indeed, was accepted as necessary to reinforce the worthiness standard and to maintain political power.

Within the context of Jim Crow laws, for example, poor white voters were also disenfranchised for their inability to pay poll taxes or pass literacy tests.[58] Yet such voters were only excluded until their votes were needed by the dominant political structure.[59] Accordingly, the public tolerated vote buying, poll tax payments designed to subvert the system, and outright disregard of the requirements only if the establishment was put at stake.[60] And, of

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[55] *See id.* ("Exclusion was often based on irrational characteristics specifically tied to the prevailing social order.").

[56] *See id.* at 897 ("The memeplex of exclusion . . . evolved through a formalistic approach to voting laws that had disparate impacts on racial groups and the poor.").

[57] *See* Jocelyn Friedrichs Benson, *Voter Fraud or Voter Defrauded? Highlighting an Inconsistent Consideration of Election Fraud*, 44 HARV. C.R.-C.L. L. REV. 1, 9–10 (2009) (describing types of voter fraud that have occurred in American elections).

[58] *See* David Schultz, *Less Than Fundamental: The Myth of Voter Fraud and the Coming of the Second Great Disenfranchisement*, 34 WM. MITCHELL L. REV. 483, 484 (2008) ("[A]fter the Civil War, many Southerners used Jim Crow laws, poll taxes, literacy tests, grandfather laws, and not so subtle means, such as lynchings, cross burnings, and other techniques to prevent newly freed slaves from voting.").

[59] *See* Ellis, *supra* note 2, at 897 ("Powerful white Americans ensured that . . . poor whites whom would otherwise fail a literacy test or be unable to pay a poll tax, would: (1) be exempt from these requirements; (2) have enough political backing to meet the requirements; or (3) simply have the requirements waived outright.").

[60] *See* DONALD A. DEBATS, VOTE BUYING IN NINETEENTH CENTURY US ELECTIONS 10 (2016), http://sociallogic.iath.virginia.edu/sites/default/files/BeforeSecret-Buying.pdf ("[C]harges of vote-buying, corruption and stolen elections are, and were, almost always self-serving. As is the case today, those who make the charge of voter fraud are often seeking to change the electoral rules and those who seek to change the rules often allege voter fraud.").

course, this was not limited to the Jim Crow South. Similar "machines" such as New York's Tammany Hall and the famous Chicago political machine practiced systemic election fraud in the North.[61] Such fraud was countenanced as part of a tactic of preservation from the danger of vicious threats to the political establishment coupled with a desire to maintain power. Thus, notions of virtue and vice within political culture served instrumentalist ends: "virtuous" voters supported the political establishment, and "vicious" voters were threats to it.

Through this lens, the twenty-first century debates about voter fraud and the demand for policies like voter identification laws, voter purges, and in-person-only voting take a more nuanced meaning.[62] These policies are inextricably linked to the history of the use of pretext to discriminate against subordinated groups in the political process. Thus, we can understand these policies as efforts to use moralistic rhetoric to substitute democratic ideals with an authoritarianism of the "worthy." Similarly, there has been partisan manipulation of the political process in order to win, and the question of whether there is voter fraud and what to do about it is inextricable from these partisan power grabs.[63] Thus, unsubstantiated claims of voter fraud not only criminalize and demean voters, but they also tend to distort democratic legitimacy of the electoral process in the name of an election integrity that is discredited for its lack of inclusiveness.

Moreover, such appeals to virtuousness of the vote and viciousness of certain voters are means to coalesce identity-based groups. Fitting certain citizens within the category of "vicious" voters and fitting others as implicitly "virtuous" justifies ideologies of gender, racial, and alienage subordination. The vicious voter

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[61] *See Tammany Hall*, HISTORY (Aug. 21, 2018), https://www.history.com/topics/us-politics/tammany-hall ("Tammany Hall became known for charges of corruption levied against leaders such as William M. 'Boss' Tweed.").

[62] *See, e.g.*, Schultz, *supra* note 58, at 492–93 ("Efforts to tighten restrictions on African-American franchise rights after the Civil War and upon urban, immigrant, and poor voters during the Populist and Progressive eras were ostensibly to combat election fraud, even though . . . there was little hard evidence to support the rumors and allegations that this type of corruption was systematic." (footnotes omitted)).

[63] *See id.* at 531 ("Like the first wave at the end of the Nineteenth and beginning of the Twentieth Centuries, which augmented the fear of voter fraud as a way to disenfranchise African-Americans, ex-felons, urban poor, and ethnic populations, the new disenfranchisement uses similar fears to accomplish the same today.").

myth directly interacts with these entrenched forms of identity politics to form a framework of intersectional hierarchy creation that shapes our notions of citizenship and how society ought to be structured. Narratives about racial subordination and the right to vote capture much of this, but this Essay hopes to expand our understanding by bringing a broader intersectional lens to accounts of voter suppression and the identity formation dynamic that affects the political community.

IV. RACE AS IDEOLOGY AS MEASURING DEVICE FOR THE WORTHINESS OF THE FRANCHISE

The prior Part served to illustrate the enduring nature of the American voting rights paradox. From the eras of explicit exclusion on account of identity, to Jim Crow's formalist exclusion of the poor and African Americans, to the modern, post-*Shelby County* era of exclusion-by-hyperregulation justified by propaganda, the voting rights paradox of exclusionary democracy—that is, the fact that the right to vote within American democracy has been and arguably continues to be treated as a political question on which the voting majority make a determination—is embedded in the structure of American constitutionalism. Accordingly, revisiting this structure may be required to fix it.

This Part takes a longer view of the American right to vote as read through the lens of race and the voting rights paradox. It uses race in particular to examine how leaving the question of the franchise to political decisions determined by the majority allows ideology to serve as a measuring device for determining who is and is not worthy of exercising the franchise.

Given the danger described above of masking or avoiding the interrelationship of racial subordination and the structure of democracy, examining the "historical racial context" of discrimination is necessary to elucidate issues around racism and its interaction with the political process.[64] This Part will examine

[64] In other words, an epistemic grounding that draws on historical context and situates modern election laws in the long trajectory of exclusion is essential to addressing problems of modern racial vote denial. *See* Janai S. Nelson, *The Causal Context of Disparate Vote Denial*, 54 B.C. L. REV. 579, 633 (2013) (arguing for a more robust understanding of historical context in VRA Section 2 cases); Caitlin Swain, *Why the South Matters Now: The Voting Rights Act, North Carolina, and the Long Southern Strategy*, 12 DUKE J. CONST. L. & PUB. POL'Y 211

the historical trends regarding race and democracy to illustrate the source of, and the subversion of, federal intervention that lies in tension with the structures of white supremacy.

Racial subordination has been one of the defining structures and heuristics of the constitutional discourse around democratic republicanism.[65] Indeed, as I have argued elsewhere, racial domination is the "cornerstone fact of America."[66] In *Normalizing Domination*, I argued that the history of political, racial subordination is the legacy that we must confront as a democracy in a race conscious way to ultimately subvert reassertions of white supremacy.[67]

Indeed, this suggests that, in approaching the problem of race, one must examine clearly the constitutional legacy of how the U.S. Constitution was created with the purpose of reinforcing the political economy of slavery, how its reinvention during Reconstruction nonetheless reinforced racial subordination, and even ultimately, in the post-formal racial subordination world, the law of democracy is still dominated by racial subordination and exclusions. This pattern of reemergence of forms of racial subordination throughout each epoch shows how such ideology reinvents and then transforms (or recalibrates) the law to allow its existence.[68]

In this sense, the idea of American constitutional republicanism has existed in tension with—and at times has enabled or has been at odds with—racial equality. This concern is as old as the original

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(2017) (arguing that an understanding of the "Long Southern Strategy" for racial vote polarization and voter suppression will yield better understandings of the current battle over voting rights).

[65] *See* BELL, *supra* note 44, §§ 6.1–6.14 (exploring how racism has caused democratic domination in the United States); GLORIA J. BROWNE-MARSHALL, RACE, LAW, AND AMERICAN SOCIETY: 1607 TO PRESENT 177–205 (2d ed. 2013) (examining the history of enfranchisement of racial minorities in the United States); GILDA R. DANIELS, UNCOUNTED: THE CRISIS OF VOTER SUPPRESSION IN AMERICA 10 (2020) ("The efforts to enslave and depress the votes of people of color in the 1800s, 1900s, and 2000s have a strand that connects through the centuries . . . .").

[66] Atiba R. Ellis, *Normalizing Domination*, 20 CUNY L. REV. 493, 495 (2017).

[67] *Id.* at 503–04.

[68] *See* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997) ("The ways in which the legal system enforces social stratification are various and evolve over time. Efforts to reform a status regime bring about changes in its rule structure and justificatory rhetoric . . . . In short, status-enforcing state action evolves in form as it is contested.").

U.S. Constitution itself. The original Constitution was designed to reinforce and enhance slavery in one of its political bases.[69] The Electoral College enhanced the political power of slaveholding states based upon the Three-Fifths Compromise, which allowed slaveholding states to count slaves as three-fifths of a person for purposes of apportioning political representation.[70] Thus, the political interests of southern slaveholders were directly represented in the House of Representatives and impacted the election of the President of the United States.[71] This, coupled with the Fugitive Slave Clause, in turn allowed slaveholding states to extend the economic exploitation of slavery.[72]

Moreover, the delegation of regulation of federal elections to the states through the Elections Clause,[73] coupled with Congress's reticence to use the power under the Clause to assert federal power over the states, left the states the power to define the franchise by whatever terms they saw fit.

These two provisions working together allowed lawmakers to use racial caste as a way of distributing political power over the scope of the American experiment. Even though there is evidence that free African Americans could participate in the political process in antebellum America,[74] those who were enslaved could not.

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[69] *See* Wilfred Codrington III, *The Electoral College's Racist Origins*, ATLANTIC (Nov. 17, 2019), https://www.theatlantic.com/ideas/archive/2019/11/electoral-college-racist-origins/601918/ (describing how southern framers used the Electoral College and the Three-Fifths Compromise to gain political advantages over the North).

[70] *See id.* ("With about 93 percent of the country's slaves toiling in just five southern states, that region was the undoubted beneficiary of the compromise, increasing the size of the South's congressional delegation by 42 percent. When the time came to agree on a system for choosing the president, it was all too easy for the delegates to resort to the [Three-Fifths Compromise] as the foundation.").

[71] *Id.*

[72] The Fugitive Slave Clause required that "Person[s] held to Service or Labour"—i.e., slaves—must be returned to their place of enslavement upon capture. U.S. CONST. art. IV, § 2, cl. 3.

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

[74] *See* Paul Finkelman, *The Necessity of the Voting Rights Act of 1965 and the Difficulty of Overcoming Almost a Century of Voting Discrimination*, 76 LA. L. REV. 181, 194–95 (2015) (describing how African American men had the right to participate in elections at the time of the founding of the republic, but that over the course of the early nineteenth century, southern states eliminated the Black vote in exchange for universal white male suffrage).

Moreover, in *Dred Scott v. Sanford*, the U.S. Supreme Court effectively abolished *all* African Americans' right to citizenship, including the right to vote.[75]

Yet after the Civil War, a form of citizenship was enshrined in the Reconstruction Amendments to undo the genesis of racial exclusion during the antebellum period. This definition lies in the Fourteenth Amendment,[76] which builds on the Thirteenth Amendment's abolishment of slavery.[77] Moreover, Section 2 of the Fourteenth Amendment provided an anti-voter suppression clause designed to penalize states that stripped their population of the right to vote.[78] And given the political exigencies of the time, the Reconstruction Congress passed the Fifteenth Amendment to make explicit the antidiscrimination principle in voting.[79]

While this created a moment of political equality for the recently freed African American men, the southern redemption transformed Reconstruction into Jim Crow racial and political subordination. While not explicitly racialized—as prohibited by the most literal (and least expansive) interpretation possible of the Fifteenth Amendment[80]—this implicitly racialized political subordination was implemented with regulatory burdens that were nearly impossible for minorities, who were mostly poor, to overcome. Indeed, in this era of "separate but equal," this core inequality ensured the reinvention of a slavery-like racial caste that was unable to effectively use political power to advocate for equal treatment.[81] Thus, second-class status for African Americans

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[75] 60 U.S. 393, 413 (1856) (holding that even free African Americans "were not citizens within the meaning of the Constitution").

[76] *See* U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States . . . are citizens of the United States and of the State wherein they reside.").

[77] U.S. CONST. amend. XIII, § 1.

[78] *See* U.S. CONST. amend. XIV, § 2 ("[W]hen the right to vote at any election . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged . . . , the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.").

[79] U.S. CONST. amend. XV, § 1.

[80] *See generally* Guinn v. United States, 238 U.S. 347 (1915) (declaring grandfather clauses unconstitutional as regulations of voting rights based on race).

[81] For discussion, see generally BELL, *supra* note 44.

through the black codes,[82] felon disenfranchisement,[83] poll taxes,[84] the White primary,[85] and naked political exclusion tied the roots of mass incarceration and hyper-criminalization of the Black body to political exclusion.[86]

Over the course of the thirty years between the height of Reconstruction and the emergence of Jim Crow, the African American male electorate was effectively destroyed. Paul Finkelman explained that African American male political participation during Reconstruction in the South Carolina was estimated at 77% in 1880.[87] By 1912, participation had dropped to 2%.[88] This was true across the South.[89]

Ironically, the United States required statutory intervention to begin to fulfill the promise of constitutional political equality for racial minorities. The work of a half-century of political and civil rights advocacy came to fruition through the passage of the Voting Rights Act of 1965. Section 2 of the VRA codified a remedy for plaintiffs who suffered discrimination in voting, whether through outright vote denial or by abridgment of the right to vote on the basis of race through laws that have a disparate impact.[90] Moreover, Section 5 of the VRA directly intervened in the nearly unfettered discretion that states had to diminish minority political participation.[91] Section 5 set of a system of preclearance—or preapproval—of election laws in states that had a history of

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[82] *See* Atiba R. Ellis, *The Cost of the Vote: Poll Taxes, Voter Identification Laws, and the Price of Democracy*, 86 DENV. U. L. REV. 1023, 1041 (describing the operation and impact of Jim Crow-era voter suppression mechanisms).

[83] *Id.* at 1024–25.

[84] *Id.* at 1041.

[85] *Id.* at 1031.

[86] It is worth emphasizing that the problem of felon disenfranchisement is directly rooted in, and reflective of, the larger patterns of Jim Crow disenfranchisement, and that these practices lay the seeds for the modern problem of mass incarceration. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (discussing the systemic and institutional causes of mass incarceration that disproportionately affect African Americans).

[87] Finkelman, *supra* note 74, at 208.

[88] *Id.*

[89] *See* Ellis, *supra* note 82, at 1044 ("The end result [of Jim Crow] was that for over sixty years, whites of all classes could vote while poor Blacks could not.").

[90] 52 U.S.C. § 10301 (2018).

[91] *See supra* notes 15–17, 35 and accompanying text.

discrimination against minorities in voting.[92] Section 4(b) of the VRA set the formula by which jurisdictions could qualify for Section 5 supervision.[93]

Yet the courts also invented new dimensions for political equality. In *Reynolds v. Sims*, the Court began to implement the idea of one person, one vote, and thus created a structure for ensuring that each vote of each person would, at least in theory, be weighted similarly.[94] And in *Harper v. Virginia State Board of Elections*, the Court abolished the poll tax in state elections under the Equal Protection Clause,[95] which, coupled with the passage of the Twenty-Fourth Amendment,[96] eliminated the most pernicious form of facially neutral but racially discriminatory election regulations. These changes have transformed racial politics throughout the United States.[97]

Yet, this landmark transformation has nonetheless been limited in its scope and impact. This long road of limitation may well represent a period of contraction that constitutes a third epoch of racial discrimination. For example, the constitutional scope of the voting rights revolution has been limited by the U.S. Supreme Court which has required that Fifteenth Amendment claims must show proof of purposeful discrimination, rather than just disparate impact.[98] This rationale has been extended to VRA litigation regarding felon disenfranchisement and other forms of voter suppression.[99] Thus, intentional discrimination theories are now

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[92] *See* Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After* Shelby County, 115 COLUM. L. REV. 2143, 2145 (2015) (exploring the belief that a more robust Section 2 may take the place of the nullified Section 5 preclearance regime).

[93] *See supra* notes 14, 21–22 and accompanying text.

[94] *See* 377 U.S. 533, 568 (1964) ("[A]n individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State.").

[95] *See* 383 U.S. 663, 670 (1966) ("[W]ealth or fee paying has . . . no relation to voting qualifications; the right to vote is . . . too fundamental to be so burdened or conditioned.").

[96] *See* U.S. CONST. amend. XXIV ("The right of citizens of the United States to vote . . . shall not be denied or abridged . . . by reason of failure to pay any poll tax or other tax.").

[97] *See, e.g.*, Elmendorf & Spencer, *supra* note 92, at 2144 (noting that the VRA has been highly successful and inexpensive).

[98] *See* City of Mobile v. Bolden, 446 U.S. 55, 69–70 (1980) (plurality opinion) (holding that evidence of intentional discrimination is needed to find a constitutional violation).

[99] *See* Farrakhan v. Gregoire, 623 F.3d 990, 993 (9th Cir. 2010) (en banc) (per curiam) ("[P]laintiffs bringing a section 2 VRA challenge to a felon disenfranchisement law . . . must

limited to when there is express evidence of racial animus, as was exposed in *Hunter v. Underwood*,[100] or circumstantial evidence that strongly infers the existence of racially discriminatory policy choices, as the Fourth Circuit held in *North Carolina State Conference of the NAACP v. McCrory*.[101] Similarly, despite the Twenty-Fourth Amendment, in the wake of *Crawford v. Marion County Election Board*,[102] states may pass along indirect costs of voting and use voter identification laws to restrict access to the franchise.

With the heightened bar for constitutional protections from strict voter identification laws and the maze of felon disenfranchisement laws, the twenty-first century has seen a rise in the hyperregulation of the vote. In itself, this parallels the elimination of African Americans from the franchise in the mid-nineteenth century via the undoing of Reconstruction and the promise of the Fifteenth Amendment through poll taxes, literacy tests, and other entry barriers. This third period of federal intervention through the VRA nonetheless protected racial minorities from the diminution of their voting rights.[103]

Additionally, access to the ballot has become increasingly threatened due to the contraction of the VRA. In particular, and as discussed at length earlier, in *Shelby County v. Holder*, the U.S. Supreme Court found that the aforementioned Section 4(b) of the

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at least show that the criminal justice system is infected by intentional discrimination or that the felon disenfranchisement law was enacted with such intent."); Simmons v. Galvin, 575 F.3d 24, 41 (1st Cir. 2009) ("Congress has excepted from the reach of the VRA protections from vote denial for claims against a state which disenfranchises incarcerated felons."); Hayden v. Pataki, 449 F.3d 305, 322–23 (2d Cir. 2006) (en banc) (holding that the VRA does "not encompass felon disenfranchisement laws" because of the "wealth of persuasive evidence that Congress . . . never intended to extend the coverage of the [VRA] to felon disenfranchisement provisions"); Johnson v. Governor of Fla., 405 F.3d 1214, 1233–34 (11th Cir. 2005) (en banc) (same).

[100] *See* 471 U.S. 222, 228–29 (1985) (noting that a "zeal for white supremacy" motivated the challenged law).

[101] *See* 831 F.3d 204, 219 (4th Cir. 2016) (holding that the challenge law was "enacted with racially discriminatory intent" based upon circumstantial evidence).

[102] 553 U.S. 181 (2008) (plurality opinion) (upholding a voter identification law).

[103] In the pre-*Shelby County* voting rights enforcement world, Section 5 preclearance allowed the opportunity for the federal government, or, if necessary, the courts to ensure that proposed voting rights changes would not harm minority voters. *See* Ellis, *Reviving the Dream*, *supra* note 9, at 842 & n.262 (noting that courts used Section 5 of the VRA to block voter ID laws in South Carolina and Texas).

VRA was unconstitutional because it failed to consider the evidence of transformation in participation in voting that the states under the preclearance regime had experienced.[104] Chief Justice Roberts, speaking for the majority, deemed this necessary because of the burdens imposed on the states subject to preclearance requirements as compared to the lack of burden on states not under the preclearance regime.[105] He crafted a narrative based on the idea that "things have changed dramatically" regarding minority voting rates and the number of minority officeholders.[106] Justice Ginsburg in her dissent rejected this premise as derisive of congressional authority and as disconnected from the realities of racial voter suppression.[107]

In the post-*Shelby County* world, states that are largely controlled by Republican legislatures, and that were most closely tied to the history of racial exclusion, have proceeded to implement laws to increase the regulation of the vote. The exemplary case in this regard is the action of the North Carolina legislature documented in *McCrory*.[108] In the wake of the *Shelby County* decision, the Republican-controlled North Carolina legislature redistricted its state and congressional districts[109] as well as redesigned its election regulation laws.[110] In particular, the North Carolina General Assembly redrafted voter qualification statutes at issue in *McCrory* in a scheme to intentionally dismantle minority-preferred voting practices.[111] This conduct was sufficient to allow the Fourth Circuit to determine, using circumstantial evidence, that

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[104] *See supra* notes 13–27 and accompanying text.

[105] *See supra* notes 25–27 and accompanying text.

[106] Shelby Cnty. v. Holder, 570 U.S. 529, 547 (2013).

[107] *See supra* notes 28–36 and accompanying text.

[108] N.C. State Conf. of NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016) ("[O]n the day after the Supreme Court issued *Shelby County v. Holder*, eliminating preclearance obligations, a leader of the party that newly dominated the legislature (and the party that rarely enjoyed African American support) announced an intention to enact what he characterized as an 'omnibus' election law." (citation omitted)).

[109] *See id.* at 225 (discussing a prior case where a three-judge court "held that race was the predominant motive in [the state's redistricting plan], in violation of the Equal Protection Clause").

[110] *See id.* at 216 (describing the "number of voting restrictions" in the North Carolina law).

[111] *See id.* at 222 ("Using race as a proxy for party may be an effective way to win an election. But intentionally targeting a particular race's access to the franchise because its members vote for a particular party, in a predictable manner, constitutes discriminatory purpose.").

North Carolina had intentionally violated the Fourteenth Amendment of the U.S. Constitution.[112] This was deemed the case despite the state's defense that it was engaging in an effort to disenfranchise Democratic voters (who also happened to be in large part African American).[113]

North Carolina certainly was not the only state to engage in a post-*Shelby County* wave of heightened election regulation. Texas, Alabama, Mississippi, and Virginia all passed voter identification laws almost immediately after the Court's decision.[114] Two cities in Texas changed local representation rules that directly affected Latino participation.[115] And the city of Macon, Georgia moved the date of city elections from November to July, when African American turnout traditionally had been low.[116] Moreover, a new wave of voter qualification regulation took place in North Carolina, Virginia, and, notably, outside of the old Section 5 area in Wisconsin.[117] Given the influence of the internet and the already demonstrated impact that Russian election interference has had on American elections—both in terms of targeting minority voters and in manipulating the electorate along the axis of race[118]—the vistas for manipulation and suppression of minority votes appear even more clearly than they had in the last fifty years.

V. POLITICAL PROBLEMS AND STRUCTURAL SOLUTIONS

The voting rights paradox in a sense is the "invisible hand" that shapes the nature of the right to vote in American democracy. This Essay has sought to illustrate this reality by pointing out what is obvious but not stated explicitly: that our democracy is shaped by

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[112] *See id.* at 219 ("We hold that the challenged provisions of [the North Carolina law] were enacted with racially discriminatory intent in violation of the Equal Protection Clause of the Fourteenth Amendment and § 2 of the Voting Rights Act.").

[113] *Id.* at 226.

[114] *See* Elmendorf & Spencer, *supra* note 92, at 2145–46 (outlining the timeline of these laws' enactments).

[115] *See id.* at 2146 (describing the changes in Pasadena and Galveston County, Texas).

[116] *Id.*

[117] *See* Atiba R. Ellis, *Economic Precarity, Race, and Voting Structures*, 104 KY L.J. 607, 619–25 (2015) (describing litigation over these laws).

[118] *See generally* Darin E.W. Johnson, *Russian Election Interference and Race-Baiting*, 9 COLUM. J. RACE & L. 191 (2019) (discussing the impact of Russian interference on U.S. elections through the suppression of minority turnout and the stoking of racial division).

ideological assumptions that inform and shape the structure of election law. This Essay has explored this by looking specifically at the most intractable problem of all: racial discrimination.

Yet Americans often pride themselves on the progress we have made towards a universalist conception of the right to vote. Across the ideological spectrum, this progressive vision of voting rights is celebrated in varying degrees. Oftentimes, conservatives (like Chief Justice Roberts in *Shelby County*) laud the elimination of formal barriers to the right to vote but at the same time pass measures that target voters who are politically opposed to them.[119] The narrative of progress has become another ideological tool that allows for attention to be drawn away from the scope and severity of voter suppression and, unsurprisingly, permits its continued impact.

Liberals celebrate progress while critiquing voter suppression,[120] but in viewing the voting rights struggle as one of transforming practices and eliminating particular patterns of suppression, they treat the symptoms but do not necessarily embrace what might actually cure this cycle of tyrannical majoritarianism. The particulars of the debate concern the legislation designed to suppress rather than the mechanisms that enable the suppression. The cycle of contested rights thus perpetuates itself without taking on the larger problem of how ideology informs this structure.

In this sense, there is both a dilemma of legal structure and a problem of epistemic values. The legal and structural dilemma is that, as this Essay shows, discrimination will continue to reinvent itself through laws that separate the intention of the law from its desired effects when given cover by heuristics, such as "election integrity" and deference, due to the structure that allows deference to the states and to local majorities bent on disenfranchising.[121] This deference is built into the structure of the U.S. Constitution,[122] therefore harms can be policed via the VRA and the Equal

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[119] *See supra* notes 23, 106 and accompanying text.

[120] *See, e.g.*, Erica Y. King, *Florida Voters Approve Amendment to Restore Right to Vote for Felons Who Have Served Their Time*, ABC NEWS (Nov. 7, 2018, 1:27 AM), https://abcnews.go.com/Politics/florida-voters-approve-amendment-restore-vote-convicted-felons/story?id=59019248 (discussing the restored of voting rights to Florida felons and praise by Democrat officials for the initiative).

[121] *See, e.g.*, Cady & Glazer, *supra* note 49, at 225–27 (discussing the use of voter fraud as a pretext for voter intimidation).

[122] *See supra* notes 12, 73 and accompanying text.

Protection Clause, but only in relatively limited circumstances.[123] This perpetuates the paradox and enables suppression to continue.

This leaves us the question of how to break out of the cycle. Given the defects of the structure, the only apparent way out is to reimagine the constitutionalism of the right to vote in a way that sets the doctrine on a more truly democratic footing.

I have argued in the past that a communitarian vision is needed for this end.[124] Scholars who have theorized about the right to vote have recognized that voting rights are partly about the individual's right to participate and partly about a communitarian notion of protecting the value that each of us shares in having a legitimate, truly democratic version of the franchise.[125] The need for an election law structure more firmly rooted in democratic theory is an intervention that will forestall the problems outlined here and which will highlight the exclusionary, expressive, and epistemological harms of voter suppression.

This begins with eliminating the core problem, which is the voting rights paradox that allows those with an exclusionary ideology to manipulate the franchise to achieve an exclusionary end. This outsized control over the franchise effectively allows those with power to own the democracy—whether they are given the cover of majoritarianism or act as a minority who can, through procedure, stymie the will of the majority.[126] As history has shown us, this ideology allows those in control to exclude the marginalized and gives cover to its purveyors.[127] Thus, the voting rights paradox can be expressed in its simplest form: the democracy belongs to those with power, and not to all of the people.

A communal vision that emphasizes the collective nature of democracy to the exclusion of ideological forces that seek to shape democracy for the benefit of a few is the only plausible response to the paradox. Taking on exclusionary ideology is a necessary first

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[123] *See supra* notes 98–102 and accompanying text.

[124] Ellis, *Tiered Personhood*, *supra* note 9, at 489–92.

[125] *See, e.g.*, *id.* at 481 n.105.

[126] As to this dilemma in particular, Terry Smith has described how antidemocratic majoritarianism, under the guise of white grievance, has had a detrimental effect on American democracy, particularly in the era of Trumpism. *See generally* TERRY SMITH, WHITELASH: UNMASKING WHITE GRIEVANCE AT THE BALLOT BOX (2020) (discussing the resurgence of antidemocratic majoritarianism motivated by white Americans' fear and resentment of strides towards racial equality).

[127] *See supra* notes 44–45 and accompanying text.

step because, without such considerations, the structures of the law may yet be manipulated to achieve exclusionary ends. This is the cycle of voting suppression that continues to repeat. These cycles of history, as Gilda Daniels has described, persist because our solutions do not imagine democracy broadly enough.[128]

Thus, the efforts to pass the For the People Act, which would address issues like partisan gerrymandering and voter access, and the John Lewis Voting Rights Advancement Act, which would restore the Section 5 preclearance mechanism under a new Section 4(b) of the VRA, are good first steps.[129] They would repair the system and move us to a pre-*Shelby County* state of affairs. And, to the extent that these measures address partisan gerrymandering and similar problems, they advance the law of democracy in ways that the Court has declined to recognize.[130]

However, at the time of this writing, ideological mechanisms imperil these solutions before they have a chance to be passed into law. Tactics like the filibuster in the U.S. Senate may allow the conservative minority to stall these laws so that they do not get a vote.[131] And, even if those laws are passed, the deferential U.S. Supreme Court may declare such laws unconstitutional under an

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[128] *See* Gilda R. Daniels, *Voting Realism*, 104 KY. L.J. 583, 586 (2015) (arguing that a need for "voting realism" that recognizes the salience of racial subordination and a more imaginative approach to achieving racial equality is necessary for voting rights generally); Gilda R. Daniels, *Voter Deception*, 43 IND. L. REV. 343, 371–87 (2010) (arguing for stronger constitutional protections of the right to vote).

[129] *See generally* Wendy R. Weiser, Daniel I. Weiner & Dominique Erney, *Congress Must Pass the 'For the People Act*,*'* BRENNAN CTR. FOR JUST. (Mar. 18, 2021), https://www.brennancenter.org/our-work/policy-solutions/congress-must-pass-people-act (describing the provisions of the For the People Act); Sonia Gill, *Passage of the John Lewis Voting Rights Advancement Act Is the First Step to Heal Our Democracy*, HILL (Feb. 24, 2021, 5:30 PM), https://thehill.com/blogs/congress-blog/politics/540381-passage-of-the-john-lewis-voting-rights-advancement-act-is-the ("To heal our democracy, lawmakers must begin with affirmative legislation that confronts this legacy problem of our republic. That bill is the John Lewis Voting Rights Advancement Act.").

[130] *See generally* Rucho v. Common Cause, 139 S. Ct. 2484 (2019) (holding that partisan gerrymandering is a political question that the federal courts will not address).

[131] *See* Devan Cole, Aileen Graef & Daniella Diaz, *Manchin Defends Bucking Voting Rights Bill and Digs in Against Eliminating the Filibuster*, CNN (June 7, 2021, 9:54 AM), https://www.cnn.com/2021/06/06/politics/joe-manchin-for-the-people-act-voting-filibuster/index.html (noting that at least one Democratic Senator will not support abolishing the filibuster and will oppose the For the People Act but stating that this Senator supports passing the John Lewis Voting Rights Advancement Act).

aggressively expansive doctrine that would make state legislatures the sole arbiters of the voting mechanisms in a state.[132]

Realignment of the underlying ad hoc political philosophy at play in the politics of worthiness for citizenship is necessary to promote truly democratic values. It ought to be the case that the ability to vote in America belongs to each citizen individually and to all citizens collectively, and not to those who might have the advantage of their political position to determine who is and who is not worthy. This is, to use Derrick Bell's phrase, "democratic domination" set under the guise of neutral law of general applicability.[133]

Embracing such a philosophy in the law of democracy—and thus addressing the paradox itself—may begin with the passage of a Right to Vote Amendment in the U.S. Constitution that is based upon notions of open access to the ballot. As Joshua Douglas has explained, a number of states have such strictures in their constitutions.[134] But no such stricture exists in the U.S. Constitution.[135] Such a constitutional command would insulate the right to vote from partisans seeking to manipulate the law to reflect their version of worthiness. Uniform standards for voting rights across the country based on this vision of liberal access could then be articulated. The political consensus around weakening voting rights for racial minorities could also be eliminated. Indeed, Gilda Daniels argues for this broader approach through methods grounded in the reality of racism and the need to affirmatively address those problems through an explicit right to vote.[136]

However, this would require a consensus concerning the collective knowledge we have about the right to vote. It would require an epistemic realignment regarding what our democracy seeks to accomplish and what we, as citizens, owe to each other in our political community. By this, I mean that our ability to effectively understand the nature and state of our democracy from

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[132] For a historical defense of the "independent state legislature doctrine," see generally Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1 (2020).

[133] *See supra* note 44.

[134] *See* Douglas, *supra* note 3, at 101 ("Forty-nine states explicitly grant the right to vote through specific language in their state constitutions.").

[135] *See id.* ("In contrast to the U.S. Constitution, all fifty states provide explicit voting protection for their citizens.").

[136] *See* Daniels, *Voting Realism*, *supra* note 128, at 600–01 (advocating for a more race-conscious approach to voter suppression).

an objective point of view is a necessary corrective to addressing the voting rights paradox.[137] Indeed, in the United States in 2021, we face an epistemic crisis where a substantial number of citizens believe that the 2020 presidential election was stolen, despite the complete lack of evidence of any voter fraud.[138] The proliferation of propaganda surrounding a "stolen election" represents a new form of crisis in the right to vote and the ability of a voter fraud meme to exercise what J.M. Balkin would call hermeneutic power—i.e., the power to shift and shape understanding in order to manufacture a crisis in democracy.[139] And as recent justifications for stricter regulations around voting laws suggest, it is this shaping of understanding that fuels voter exclusion.

Yet, as this Essay (and my prior work) would suggest, this problem of disinformation in American elections is nothing new. The ideology of exclusion is the defining problem of the law of democracy, and it has persevered in various forms throughout American history.[140] Only with the passage of the Voting Rights Act

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[137] I certainly take Daniels as advocating for a similar sense of addressing this problem with collective understanding, specifically around the salience of race. *See id.* at 600 ("[I]t is imperative that we do not choose to ignore race, but instead acknowledge it as a consideration in naming societal wrongs and developing remedies."). However, as this Essay has sought to illustrate, even if race is foremost in our considerations regarding democracy, other categories of identity and moral standing also serve as denominators of exclusion within the political community of the United States. In this sense, the complete erasure of the paradox this Essay complains of is the ultimate approach for reinforcing democracy.

[138] The 2020 election concluded with baseless allegations proffered by then-President Donald Trump and his supporters that rampant voter fraud caused the election of President Joe Biden. *See* Jonathan Easley, *Majority of Republicans Say 2020 Election was Invalid: Poll*, HILL (Feb. 25, 2021, 12:08 PM), https://thehill.com/homenews/campaign/540508-majority-of-republicans-say-2020-election-was-invalid-poll ("About half of all Republicans said they believe their votes were counted, while 42 percent said the system is corrupt and that their vote 'probably doesn't get counted anyway.'"). This reflects the underlying epistemic crisis regarding knowledge about the election and the electoral process. I provided an account of this phenomena in prior work. *See* Ellis, *supra* note 5, at 773–76 (describing Donald Trump as an amplifier of the meme of voter fraud leading up to the 2020 election season). The 2020 election, the subsequent voter fraud litigation, and the ultimate insurrection at the capital were the logical outcomes of this voter fraud disinformation campaign.

[139] J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 YALE L.J. 105, 166–67 (1993). I take Balkin's sense of hermeneutic power as the ability for an idea to have such explanatory power over the scope of reality that it diverts the believer from a sense of reality grounded in objective fact. The aftermath of the 2020 election certainly illustrates this power.

[140] *See supra* notes 65–68 and accompanying text.

in 1965 has American democracy constrained its discriminatory understandings through the rule of law.[141] But the hermeneutic power of memes—coupled with the ability for the unfiltered internet to rapidly spread disinformation—would seem to circumvent this in twenty-first century America.[142] This problem poses a direct threat to democracy and provides an avenue for a third generation of voter suppression—exclusion based on disinformation—to come into existence.

Solutions to this problem are difficult to imagine. The free speech issues involved here, as measured by current First Amendment doctrine that allows core protection for political speech, may very well be insurmountable.[143] Disinformation and propaganda about the right to vote lie at the heart of what is protected by the First Amendment, and thus structural solutions that would circumvent the effect of such speech would seem to be necessary. The disinformation attack at the end of the 2020 election showed that standards of evidence maintained by the courts that retain a commitment to objective truth are the first line of defense.[144] Imagining how that would transmit to the body politic generally—through education, disclaimers, or exclusion of certain disinformation from certain platforms—are efforts that have been proposed recently,[145] but they do not provide complete remedies to

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[141] *See* Daniels, *Voter Deception*, *supra* note 128, at 344–45 ("In the last half century, the U.S. Congress has journeyed into the world of election administration on three distinct and important occasions: the passage of the Voting Rights Act of 1965 (VRA), the National Voter Registration Act of 1993 (NVRA), and the Help America Vote Act (HAVA)." (footnotes omitted)).

[142] *See generally* Ellis, *supra* note 5 (discussing the pervasiveness of the voter fraud meme).

[143] At least within the context of actors speaking on behalf of the government, however, Caroline Mala Corbin has proposed a remedy regarding the First Amendment concerns. *See* Caroline Mala Corbin, *The Unconstitutionality of Government Propaganda*, 81 OHIO ST. L.J. 815, 815 (2020) ("This Article argues that government propaganda, although government speech, ought to be regarded as covered by, and in violation of the Free Speech Clause.").

[144] *See* Rosalind S. Helderman & Elise Viebeck, *'The Last Wall': How Dozens of Judges Across the Political Spectrum Rejected Trump's Efforts to Overturn the Election* (Dec. 12, 2020, 2:12 PM), https://www.washingtonpost.com/politics/judges-trump-election-lawsuits/2020/12/12/e3a57224-3a72-11eb-98c4-25dc9f4987e8_story.html ("Judges consistently found there was no substantive evidence to support claims of fraud and irregularities — that Biden's votes were, in fact, legal votes.").

[145] Lori Ringhand has summarized proposals regarding digital literacy as a means to combat the disinformation crisis concerning political speech. *See generally* Lori A. Ringhand, *First Amendment (Un)Exceptionalism: A Comparative Taxonomy of Campaign Finance Reform Proposals in the United States and United Kingdom*, 81 OHIO ST. L.J. 405 (2020).

the problem. Yet, the propagation of a communal vision for our democracy, the belief that each of us owe it to each other to allow all citizens to participate, might serve in itself as the counternarrative necessary to preserve what we have.

VI. CONCLUSION

This Essay has sought to articulate the contours of the voting rights paradox—that within American democracy, legislation from antidemocratic premises that value the right to vote for some over others continues influence our democratic practices. The paradox represents a commitment to ideologically driven standards of worthiness for admission to the franchise and the willingness of the majority to allow propaganda to influence policy around the question of who is worthy to participate in the franchise—i.e., who is "worthy" of citizenship. This occurs despite appeals to America as a democracy that rhetorically embraces equality of all citizens.

Ultimately, I believe it matters that we deconstruct this rhetoric of worthiness as a fundamental barrier to the right to vote. The ideology of worthiness allows for those in power marginalize others in American democracy through the passage of laws that exclude people merely because of their status—whether it be race, felon status, or wealth—and the ability for propaganda to disparage democratic practice in a way that claims to save it but actually endangers it. Only a shift in our legal structure and a commitment to a communitarian conception of the right to vote will transform our democratic practice so all may participate freely and fairly.