



2022

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### Recommended Citation

Lynn Adelman, *A New Stage in the Struggle for Voting Rights*, 43 U. ARK. LITTLE ROCK L. REV. 477 (2021).  
Available at: <https://lawrepository.ualr.edu/lawreview/vol43/iss4/1>

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## A NEW STAGE IN THE STRUGGLE FOR VOTING RIGHTS

*Lynn Adelman\**

When the American republic was founded, laws governing voting rights were quite varied, but the “lynchpin” of such laws “was the restriction of voting to adult men who owned property.”<sup>1</sup> Now almost 250 years later, with the unfortunate exception of state laws disenfranchising felons, the United States has achieved universal suffrage.<sup>2</sup> As the great voting rights historian Alexander Keyssar explains, the expansion of suffrage was generated by such factors as the emergence of increasingly democratic ideas, the use of political parties, the growth of an industrial working class, the settlement of the frontier, the push for participation by the disenfranchised, and, significantly, the fact that the country fought a number of wars.<sup>3</sup> War made a big difference because it was difficult to require men to bear arms while denying them the right to vote.<sup>4</sup>

Professor Keyssar also advises that the history of suffrage in the United States was shaped by forces that “resisted a broader franchise, forces that at times succeeded in contracting the right to vote and often served to retard its expansion.”<sup>5</sup> He further explains that the most significant of the forces opposing a broader franchise, “the single most important obstacle to universal suffrage in the United States from the late eighteenth century to the 1960s,” was resistance by middle and upper classes.<sup>6</sup> The “growth of an industrial working class, coupled with the creation of a free black agricultural working class in the South,” generated widespread apprehension about the harm that extending the franchise to members of these classes might bring about and a “potent[] and sometimes successful opposition to a broad-based franchise in much of the nation.”<sup>7</sup>

Keyssar, who published his magisterial book about the contested history of voting rights in the United States in 2000, identifies four distinct periods in the history of the right to vote in this country, all shaped by class and

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1. ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN AMERICA* 5–6 (Basic Books 2000).

2. *Id.* at xvi.

3. *Id.* at xxi.

4. *Id.*

5. *Id.*

6. *Id.*

7. See KEYSSAR, *supra* note 1, at xxii.

its link to immigration. “The first was a pre- and early industrial era during which the right to vote expanded: this period lasted from the signing of the Constitution until roughly 1850, when the transformation of the class structure wrought by the Industrial Revolution was well underway.”<sup>8</sup> The second period, lasting from 1850 until roughly World War I, was characterized by a growing opposition on the part of the middle class and the affluent to universal suffrage and “a narrowing of voting rights.”<sup>9</sup> The third period ran from World War I until the 1960s and, while it differed in the South and North, was generally characterized by minimal change in the formal scope of the franchise.<sup>10</sup> In the South, nearly all blacks and many poor whites remained disenfranchised as they had been since the advent of Jim Crow, in the last twenty years of the nineteenth century. “[I]n the North this period also was distinguished by state-sponsored efforts to mitigate the significance and power of an unavoidably growing electorate.”<sup>11</sup> The fourth period, “inaugurated by the success of the civil rights movement in the South, witnessed the abolition of almost all remaining restrictions on the right to vote.”<sup>12</sup> During each of these periods the breadth of suffrage was intensely contested; “at stake always was the integration (or lack of integration) of the working poor into the polity.”<sup>13</sup>

As I see it, in the year 2000, roughly speaking, we entered into a new period in the history of voting rights in the United States, a period we are presently in the middle of and in which class is also playing a critical role. Once again, voting rights are the subject of intense disagreement, although this time the dispute is not so much whether people should have the right to vote (although that issue has not gone away) but how much power state legislatures and other state officials who establish the rules and practices governing voting should have to make it more difficult to vote.<sup>14</sup> This dispute has arisen because, even though for a long time Americans have voted at depressingly low rates for a modern democracy,<sup>15</sup> in the last twenty years a

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8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at xxii–xxiii.

12. *Id.* at xxiii.

13. KEYSSAR, *supra* note 1, at xxiii.

14. See Richard L. Hasen, *Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic, and How to Treat and Cure Them*, 19 ELECTION L.J. 263, 264 (2020).

15. See COMM’N ON THE PRACTICE OF DEMOCRATIC CITIZENSHIP, AM. ACAD. OF ARTS & SCI., OUR COMMON PURPOSE: REINVENTING AMERICAN DEMOCRACY FOR THE 21<sup>ST</sup> CENTURY 13 (2020), [https://www.amacad.org/sites/default/files/publication/downloads/2020-Democratic-Citizenship\\_Our-Common-Purpose\\_0.pdf](https://www.amacad.org/sites/default/files/publication/downloads/2020-Democratic-Citizenship_Our-Common-Purpose_0.pdf).

whole range of what some scholars refer to as vote denial devices have become prominent features of the electoral landscape.<sup>16</sup>

With respect to the issue of low voter participation, even in a year where there is relatively high turnout, more than one-third of eligible voters may fail to cast a ballot.<sup>17</sup> In some years the percentage approaches two-thirds.<sup>18</sup> “Electoral turnout has declined significantly over the last century, and it is markedly lower in the United States than in most other nations.”<sup>19</sup> And in a pattern that is “distinctively American, turnout correlates . . . with social class”: those who are educated and have higher incomes are “far more likely to vote” than the poor, minorities, and the less educated.<sup>20</sup> The people who are “most likely to need government help” are the least likely to vote. Keyssar explains that it is no coincidence “that nonvoters come disproportionately from the same social groups that in earlier decades were targets of restrictions on the franchise.”<sup>21</sup> This is so because “the political institutions and culture that evolved during the era of restricted suffrage spawned a political system that offers few attractive choices to the nation’s least well-off citizens. The two major political parties operate within a narrow, ideological spectrum” and generally do not offer “proposals that might appeal to the poor and are commonplace in other nations.”<sup>22</sup> Thus, “[a]lthough the formal right to vote is now nearly universal, few observers would characterize the United States as a vibrant democracy” where there is a rough equality of political rights.<sup>23</sup> Broader participation in voting would bring us closer to such a democracy. Thus, the question of whether public officials should be able to establish laws and practices that make it harder for people to vote is an important one.

The period of disputation in which we now find ourselves could be said to have begun when Al Gore contested the results of the Florida presidential vote, which showed a small margin in favor of George W. Bush. “[T]he Miami-Dade canvassing board voted to recount 10,750 ballots that had been rejected by its electronic machines, letting the 643,250 others stand, a deci-

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16. See Hasen, *supra* note 14, at 284; Lisa Marshall Manheim & Elizabeth G. Porter, *The Elephant in the Room: Intentional Voter Suppression*, 2018 SUP. CT. REV. 213, 214 (2018); BRENNAN CTR. FOR JUSTICE, *NEW VOTING RESTRICTIONS IN AMERICA* 1 (2019) <https://www.brennancenter.org/sites/default/files/2019-11/New%20Voting%20Restrictions.pdf>; Joshua A. Douglas, *Undue Deference to States in 2020 Election Litigation* 2 (Nov. 2, 2020) (unpublished draft), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3720065](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3720065).

17. See Samuel Issacharoff, *Ballot Bedlam*, 64 DUKE L.J. 1363, 1366 (2015).

18. See *id.*

19. KEYSSAR, *supra* note 1, at 320.

20. *Id.*

21. *Id.*

22. *Id.* at 320–21.

23. *Id.* at 320.

sion that, at the time, seemed as though it could tip the vote to Gore.”<sup>24</sup> With a “protest growing inside and around the building,” the board moved the counting to a room on the nineteenth floor “away from the crowd.”<sup>25</sup> The decision to conduct a recount led to a protest, which involved a group of upscale protesters “storm[ing] the counting room in a . . . wave of clenched fists, pleated khakis and button down shirt collars,” “[b]anging on doors and walls, . . . chant[ing], ‘Stop the fraud!’”<sup>26</sup> Reporters variously called this protest the Blue Blazer Riot, the Bourgeois Riot, and the Brooks Brothers Riot.<sup>27</sup> The protesters’ claim of fraudulent counting did not appear to have any evidentiary basis.<sup>28</sup> The board, however, was “sufficiently intimidated” that it “suspended the count less than a quarter of the way through, when it had shown a net gain of nearly 160 votes for Gore.”<sup>29</sup> The count never resumed.<sup>30</sup> “If the rest of the ballots had broken the same way, Gore would have gained more votes than Bush’s final winning margin in Florida of 537.”<sup>31</sup>

Not long after this incident, on December 11, 2000, the Supreme Court, by a five-four vote, ordered a halt to the counting of votes in Florida and awarded the presidency to George W. Bush.<sup>32</sup> The election in Florida exposed numerous problems in American voting procedures, including sloppily maintained voting rolls, the problem of eligible voters being improperly stricken from voting rolls, poorly trained election officials, poorly designed ballots, out-of-date voting machines, antiquated voting procedures, and the absence of national standards governing voting even in presidential elections.<sup>33</sup> Instead of focusing on these issues, however, activists and many state legislatures began to promote the notion that voter fraud was rampant in our electoral system.<sup>34</sup> Possibly, the success of the Brooks Brothers Riot suggested that a claim of election fraud, even one unsupported by facts, could help determine the result of a contested election.<sup>35</sup>

Those claiming fraud focused primarily on a form of retail fraud that they called voter impersonation fraud, in which a would-be voter shows up at the polls pretending to be someone else. Most scholars believe that this

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24. Jim Rutenberg, *The Attack on Voting: How the False Claim of Voter Fraud Is Being Used to Disenfranchise Americans*, N.Y. TIMES MAG., Oct. 4, 2020, at 29, 31.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. Rutenberg, *supra* note 24, at 31.

31. *Id.*

32. *See* *Bush v. Gore*, 531 U.S. 98 (2000).

33. *See* MICHAEL WALDMAN, *THE FIGHT TO VOTE* 176–79 (2016).

34. *See id.* at 183.

35. Rutenberg, *supra* note 24, at 31.

type of fraud is virtually non-existent, and that few people in their right mind would attempt to commit it.<sup>36</sup> This is so because the fraudster would risk going to prison while the candidate on whose behalf the fraud was committed would gain one meager vote.<sup>37</sup> As legal scholar Samuel Issacharoff put it, trying to change the outcome of an election through voter impersonation “is much like trying to change the salinity of the sea by adding a box of salt.”<sup>38</sup> Nevertheless, the claims of fraud served a purpose. They provided a justification for new laws requiring voters to bring to the polls various forms of identification to prove that they were who they said they were.<sup>39</sup> And such laws made it more difficult for people who lacked or could not easily obtain the required documents to vote. And these were people on society’s lower economic rung.<sup>40</sup>

Political observers had long been aware that reducing voter turnout among low-income people likely has a partisan political impact. Issacharoff studied the correlation between voter turnout and partisan success and concluded that “Democrats seem to do better when voter turnout is higher, and worse when turnout is lower.”<sup>41</sup> Seventh Circuit Judge Terence T. Evans made the same point in a dissent in one of the first cases involving voter ID laws, stating, “Let’s not beat around the bush: The Indiana voter photo ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic.”<sup>42</sup> And conservative activist Paul Weyrich mocked what he called the “goo goo” syndrome—referring to good government. “They want *everybody* to vote. I don’t want everybody to vote. . . . As a matter of fact, our leverage in the elections quite candidly goes up as the voting populace goes down.”<sup>43</sup> Relatedly, many political observers believed that voter ID laws would reduce voter turnout.<sup>44</sup> On this point, long-time Texas political operative Royal Masset said that “requiring photo

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36. See Issacharoff, *supra* note 17, at 1377; WALDMAN, *supra* note 33, at 183.

37. WALDMAN, *supra* note 33, at 183.

38. Issacharoff, *supra* note 17, at 1377.

39. See *generally id.* at 1378.

40. See *id.* at 1380.

41. Issacharoff, *supra* note 17, at 1366.

42. *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 954 (7th Cir. 2007) (Evans, J., dissenting).

43. WALDMAN, *supra* note 33, at 185.

44. See Manheim & Porter, *supra* note 16, at 231; Jeff Stone, *Photo Voter ID Laws Reduced Turnout by 4.4 Percent Nationally, Report Finds*, INT’L BUS. TIMES (Nov. 7, 2014, 6:48 PM), <https://www.ibtimes.com/photo-voter-id-laws-reduced-turnout-44-percent-nationally-report-finds-1721071>. *But see* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-14-634, ELECTIONS: ISSUES RELATED TO STATE VOTER IDENTIFICATION LAWS 36–38 (2014), <https://www.gao.gov/products/GAO-14-634> (summarizing mixed results of studies as to actual effect of voter ID laws on turnout).

IDs could cause enough of a drop-off in legitimate Democratic voting to add 3 percent to the Republican vote.”<sup>45</sup>

The connection between claims of voter fraud and efforts to limit participation in voting is not new. Another leading historian of voting in the United States, Michael Waldman, explains that there has long been a link between the specter of voter fraud and opposition to broadening the franchise.<sup>46</sup> In the founding era, middle- and upper-class people worried that the poor would sell their votes, and in the Gilded Age Protestants expressed fears about immigrant voters.<sup>47</sup> Moreover, at times and places in American history, voter fraud has been a real problem, causing people to be genuinely and rightfully offended by the state of political practices and to believe that fraud was epidemic, particularly in the cities.<sup>48</sup> Yet as Professor Keyssar advises, the belief that

fraud was epidemic, particularly in the cities . . . was itself linked to and shaped by class and ethnic tensions. Respectable middle-class and upper-class citizens found it easy to believe that fraud was rampant among the Irish or . . . immigrant workers precisely because they viewed such men as untrustworthy, ignorant, incapable of appropriate democratic behavior, and . . . threatening. Stories about corruption and illegal voting seemed credible—and could be magnified into apprehensive visions of systematic dishonesty—because inhabitants of the slums (like blacks in the South) appeared unworthy or uncivilized and because much-despised machine politicians were somehow winning elections.<sup>49</sup>

And like claims of voter fraud, opposition to a broad-based franchise has not disappeared. Despite the triumph of universal suffrage in the last third of the twentieth century (excepting, of course, felon disenfranchisement), remnants of that opposition remain. In the 1950s, the influential conservative intellectual Russell Kirk wrote a book on a relatively obscure eighteenth-century thinker, John Randolph of Virginia, who notably declared, “I am an aristocrat. I hate equality. I love liberty.”<sup>50</sup> Kirk lauded Randolph for tying suffrage to property ownership and for his opposition to “one man, one vote.”<sup>51</sup> And following the enactment of civil rights legislation in the 1960s, the concerns of states’ rights activists seemed to merge “with the idea that, somehow, the wrong people were being allowed to vote, that a bloated, profligate welfare state was being kept aloft by millions of

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45. WALDMAN, *supra* note 33, at 190.

46. *See id.* at 183–85.

47. *Id.* at 184.

48. *Id.* at 74–76.

49. KEYSSAR, *supra* note 1, at 161.

50. WALDMAN, *supra* note 33, at 184.

51. *Id.*

new voters.”<sup>52</sup> Further, in 1977 when Jimmy Carter lamented that “voter participation in the United States ranked twenty-first among democracies [and] proposed a nationwide system that would allow people to register on Election Day,” anti-voting activists objected and the proposal never came up for a vote.<sup>53</sup>

More recently, a number of writers and officials have expressed similar views. Columnist Matthew Vadum wrote that “registering the poor to vote . . . is like handing out burglary tools to criminals,”<sup>54</sup> and the president of the Tea Party Nation stated that imposing a property requirement on voting made “a lot of sense” because “property owners have a little bit more of a vested interest in the community than non-property owners.”<sup>55</sup> Florida Congressman Ted Yoho told supporters, “I’ve had some radical ideas about voting and it’s probably not a good time to tell them, but you used to have to be a property owner to vote.”<sup>56</sup> In the 2018 election cycle, Mississippi Senator Cindy Hyde-Smith expressed the opinion that “there’s a lot of liberal folks . . . who maybe we don’t want to vote. Maybe we want to make it just a little more difficult.”<sup>57</sup> And the Secretary of State of Georgia expressed concern about the negative effects of registering more minority voters.<sup>58</sup>

More prominent political figures have also assailed the right to vote in various contexts. Both Utah Senator Mike Lee, “considered one of the Senate’s brightest constitutional thinkers,” and former Texas governor Rick Perry have suggested that it was a mistake to adopt the Seventeenth Amendment, which enabled citizens to vote for United States senators rather than having state legislatures choose them.<sup>59</sup> And Lee recently tweeted another edgy political belief, namely that “[w]e’re not a democracy.”<sup>60</sup> Voting rights expert Rick Hasen explained that “Lee is articulating a view that has long been in vogue on the American right . . . . The premise is that liberty is a higher value than democracy, and . . . liberty . . . mean[s] a right to property that precludes redistribution. That is to say, the far right does not merely view progressive taxation, regulation and the welfare state as impediments

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52. *Id.*

53. *Id.* at 184–85.

54. *Id.* at 196 (alteration in original).

55. *Id.* at 197. Waldman refers to Ted Yoho as a “Minnesota Republican,” but Yoho actually represented Florida. *Representative Ted S. Yoho*, CONGRESS.GOV, <https://www.congress.gov/member/ted-yoho/Y000065?s=3&r=2152&searchResultViewType=expanded> (last visited Mar. 28, 2021).

56. WALDMAN, *supra* note 33, at 197.

57. Manheim & Porter, *supra* note 16, at 243–44 n.156.

58. *Id.* at 244.

59. WALDMAN, *supra* note 33, at 197.

60. See Rick Hasen, *Senator Mike Lee Hates Democracy*, ELECTION LAW BLOG (Oct. 8, 2020, 8:20 AM), <https://electionlawblog.org/?p=116465>.



to growth, but as fundamentally oppressive.”<sup>61</sup> Thus, concern about the unruly passions of the masses has not gone away.

While it may be politically difficult for elected officials to advocate restricting suffrage, it is less difficult to invoke the specter of voter fraud to justify passing laws that make it harder to vote. As discussed, claims of voter fraud have a certain resonance and play into the fears and suspicions of the poor and minorities as such claims once did about Irish and Eastern European immigrants.<sup>62</sup> Thus, in the years after *Bush v. Gore*, activists commenced an intense public relations campaign espousing the view that voter fraud was a serious problem. For example, after a Missouri court allowed polling places to stay open two hours longer in a hotly contested election, Senator Kit Bond “charg[ed] that the election had been stolen by ‘a major criminal enterprise to defraud voters.’”<sup>63</sup> Hans von Spakofsky, a fellow at the Heritage Foundation and a leading promoter of the idea that voter fraud was widespread, wrote dozens of articles warning of fraudulent ballots and created what he called an Election Fraud Database containing some 1,298 entries that he described as “proven instances of voter fraud.”<sup>64</sup> A joint investigation by USA Today, Columbia journalism investigations, and the PBS series “Frontline,” however, found that “[f]ar from being proof of organized, large-scale vote-by-mail fraud, the Heritage database presents misleading and incomplete information that overstates the number of alleged fraud instances and includes cases where no crime was committed . . . [and that] a deeper look at the cases in the list shows that the vast majority put just a few votes at stake.”<sup>65</sup> Other high-profile promoters of the voter fraud narrative included Fox News, which set up a “Voter Fraud Watch,”<sup>66</sup> and political consultant and pundit Dick Morris, who, after observing poor people voting in Ohio, warned that “[p]hoto IDs are necessary to combat this rampant voter fraud.”<sup>67</sup>

As stated, however, most scholars conclude that most of the claims of fraud lack an evidentiary basis. Law professors Lisa Marshall Manheim and Elizabeth Porter characterize the threat of widespread voter fraud as a “fantasy.”<sup>68</sup> Rutgers University political scientist Lorraine Minnite put it this way: “It’s the same thing over and over and over—say it, say it, say it—and

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61. *Id.*

62. See Keyssar, *supra* note 1, at 161.

63. WALDMAN, *supra* note 33, at 186.

64. Catharina Felke et al., *Database of Fraud Overstates Threat*, MILWAUKEE J. SENTINEL, Oct. 24, 2020, at 1A.

65. *Id.*

66. Michael Waldman, *What’s Behind the Voter Fraud Witch Hunt?*, BRENNAN CTR. FOR JUSTICE (Mar. 30, 2016), <https://www.brennancenter.org/our-work/analysis-opinion/whats-behind-voter-fraud-witch-hunt>.

67. *Id.*

68. Manheim & Porter, *supra* note 16, at 233.

push it out there. . . . It functions just like propaganda.”<sup>69</sup> Legal scholar Justin Levitt explains that while allegations of voter fraud make for enticing headlines, on closer examination they usually generate a lot of “smoke” and little “fire.”<sup>70</sup>

In almost all cases, the allegations simply do not pan out. A study conducted in Wisconsin provides an example. The *Milwaukee Journal Sentinel* conducted a study of voter fraud claims in the state and concluded that “[i]llegal voting is exceptionally rare.”<sup>71</sup> The study found only a couple dozen cases of improper voting, comprising “a minute fraction of all ballots cast,” over a three-year period.<sup>72</sup> Further, the improper voting that did occur was mostly due to error rather than fraud.<sup>73</sup> The inflated claims, however, are harmful in that they distract attention from the many real problems that need attention and because claims of voter fraud are used to justify policies that disenfranchise real voters. Journalist James Rutenberg comments that “[i]t is remarkable, but not at all accidental, that a narrative built from minor incidents, gross exaggeration and outright fabrication is now at the center of the [2020 presidential campaign].”<sup>74</sup> He sees this narrative as the result of “a decades-long disinformation campaign—sloppy, cynical and brazen, but often quite effective—carried out by a consistent cast of characters with a consistent story line.”<sup>75</sup>

Public officials such as FBI Director Christopher Wray who have examined the question also debunk the fraud claim.<sup>76</sup> Wray testified before Congress that the FBI had “not historically seen ‘any kind of coordinated national voter fraud effort in a major election.’”<sup>77</sup> And President Trump’s Advisory Commission on Election Integrity was disbanded without having found evidence of significant fraud.<sup>78</sup> The non-partisan Brennan Center for

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69. Sam Levine & Spenser Mestel, ‘Just Like Propaganda’: The Three Men Enabling Trump’s Fraud Lies, *GUARDIAN* (Oct. 26, 2020, 9:00 PM), <https://www.theguardian.com/us-news/2020/oct/26/us-election-voter-fraud-mail-in-ballots>.

70. JUSTIN LEVITT, BRENNAN CTR. FOR JUSTICE, THE TRUTH ABOUT VOTER FRAUD 3 (2007), <https://www.brennancenter.org/our-work/research-reports/truth-about-voter-fraud>.

71. Eric Litke, *Prosecutors Received 158 Voter Fraud Referrals Since 2016. Few Proved to Be Criminal.*, *MILWAUKEE J. SENTINEL* (Oct. 30, 2020, 3:03 PM), <https://www.jsonline.com/story/news/politics/elections/2020/10/30/voter-fraud-wisconsin-prosecutors-find-few-criminal-cases/6087613002/>.

72. *Id.*

73. *Id.*

74. Rutenberg, *supra* note 24, at 30.

75. *Id.*

76. Alison Durkee, *FBI Director Says No Evidence of ‘National Voter Fraud Effort,’ Undercutting Trump*, *FORBES* (Sept. 24, 2020, 2:23 PM), <https://www.forbes.com/sites/alisondurkee/2020/09/24/fbi-director-says-no-evidence-of-national-voter-fraud-effort-undercutting-trump/?sh=5cc89d604974>.

77. *Id.*

78. Rutenberg, *supra* note 24, at 34–35.

Justice analyzed the issue and found that incidence rates of voter fraud in past elections were negligible.<sup>79</sup> Seventh Circuit Judge Richard Posner, in a dissent regarding the constitutionality of a voter ID law, stated, “As there is no evidence that voter impersonation fraud is a problem, how can the fact that the legislature says it’s a problem turn it into one? If the Wisconsin legislature says witches are a problem, shall Wisconsin courts be permitted to conduct witch trials?”<sup>80</sup> Finally, there is a stark disconnect between the rare cases of documented voter fraud (such as those associated with the theft of absentee ballots) and the practices that legislatures target through restrictive measures (primarily those associated with in-person voting and voter registration).<sup>81</sup> The 2018 midterm elections, for example, did see one ballot fraud effort.<sup>82</sup> It involved political operatives in North Carolina who conspired to request hundreds of ballots on behalf of unwitting voters and then intercept them and fill them out on behalf of the congressional candidate they were working for.<sup>83</sup> But the restrictive legislation that North Carolina enacted including a strict voter ID law was unrelated to this type of fraud. When proponents of the voter fraud narrative are forced to face the fact that there is vanishingly little evidence of fraud at the retail level, they sometimes fall back on the contention that it is important to address the *perception* of voter fraud because that perception undermines public confidence.<sup>84</sup> This assertion, however, is also unsupported. In fact, there is empirical evidence that voter fraud has no impact on voter participation.<sup>85</sup>

Notwithstanding the absence of voter fraud, the public relations campaign to the contrary, designed to create support for restrictive voting laws, has achieved considerable success. Since 2010, twenty-five states have put in place new voting restrictions—fifteen states enacted more restrictive voter ID laws “(including six states with strict photo ID requirements), [twelve] have laws making it harder for citizens to register . . . , ten made it more difficult to vote early or absentee, and three took action to make it harder to restore voting rights for people with past criminal convictions.”<sup>86</sup> And the voter fraud narrative played a part in justifying another method of making voting more difficult, namely the way states manage the logistics of voter registration. Like many states, the State of Ohio, for example, presumes that registered voters have moved and accordingly purges their names from the

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79. LEVITT, *supra* note 70, at 3.

80. Frank v. Walker, 773 F.3d 783, 795 (7th Cir. 2014) (Posner, J., dissenting from denial of rehearing en banc).

81. See Manheim & Porter, *supra* note 16, at 233.

82. See *id.*

83. *Id.*

84. *Id.* at 235.

85. *Id.* at 235 n.122.

86. BRENNAN CTR. FOR JUSTICE, *supra* note 16, at 1.

voting rolls if they engage in no voting activity for six years and fail to return a postcard to the state confirming their address.<sup>87</sup> The effect of this practice is that a large number of eligible and registered voters are needlessly and routinely purged from the voting rolls. Further, these eligible voters are not informed that they are not registered until they show up at the polls and discover that they cannot vote. These purges tend disproportionately to affect low income and minority voters. A 2016 analysis found that Ohio removed at least 144,000 people from the voter rolls in Cleveland, Cincinnati, and Columbia.<sup>88</sup>

Voting rights advocates challenged Ohio's purge practice, and in *Husted v. A. Philip Randolph Institute*, the Supreme Court addressed the challenge.<sup>89</sup> A number of the briefs in support of Ohio argued that "corrupted voter rolls" caused voter fraud to flourish.<sup>90</sup> The Supreme Court approved Ohio's practice, stating that nationwide twenty-four million voter registrations are "invalid or significantly inaccurate" and that 2.75 million people "are said to be registered to vote in more than one State."<sup>91</sup> As Professors Manheim and Porter point out, "this statistic appeals to promoters of a voter-fraud narrative based on the assumption that these inaccuracies facilitate fraudulent voting. Yet the Court cites no evidence to support this inference."<sup>92</sup> The decision also encourages states to engage in purging. A recent Brennan Center study found that the number of states engaging in purging has increased, four have unlawfully purged names from voter rolls, and another four have implemented unlawful rules governing purging.<sup>93</sup> The study also found that states often use inaccurate information to purge voters and that "[a] new coterie of activist groups is pressing for aggressive purges."<sup>94</sup> Such a group, for example, unsuccessfully brought a lawsuit seeking to compel Wisconsin to purge 200,000 names from the voter rolls.<sup>95</sup>

Thus, it is indisputable that by enacting voter ID laws, aggressively purging eligible voters, and taking other actions, including making voter registration and absentee voting more complicated and limiting the number

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87. Manheim & Porter, *supra* note 16, at 222.

88. Andy Sullivan & Grant Smith, *Use It or Lose It: Occasional Ohio Voters May Be Shut Out in November*, REUTERS (June 2, 2016, 6:05 AM), <https://www.reuters.com/article/us-usa-votingrights-ohio-insight-idUSKCN0YO19D>.

89. 138 S. Ct. 1833 (2018).

90. See Manheim & Porter, *supra* note 16, at 7–8.

91. *Husted*, 138 S. Ct. at 1838.

92. Manheim & Porter, *supra* note 16, at 237.

93. JONATHAN BRATER ET AL., BRENNAN CTR. FOR JUSTICE, PURGES: A GROWING THREAT TO THE RIGHT TO VOTE 1 (2018), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Purges\\_Growing\\_Threat.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Purges_Growing_Threat.pdf).

94. *Id.* at 2.

95. State *ex rel.* Zignego v. Wis. Elections Comm'n, \_\_\_ N.W.2d \_\_\_, 2021 WI 32 (Wis. 2021).

of drop off boxes where voters can deposit ballots, many states have made it harder to vote. As numerous studies have shown, these actions have impacted the poor and the disadvantaged more than others.<sup>96</sup> From a voting rights perspective, however, at least as problematic as the activity by states has been the response of the courts, particularly the Supreme Court and the federal appellate courts. The Supreme Court has considerable latitude in interpreting the Constitution relative to voting rights issues. This is so not only because it is the Supreme Court but also because the Constitution does not contain language affirmatively granting the right to vote.<sup>97</sup> When the Constitution was established, states controlled voting, and the Constitution did not change that.<sup>98</sup> Nor did the Fifteenth Amendment enacted by the Reconstruction Congress.<sup>99</sup> Rather, the Fifteenth Amendment prohibited states from denying the right to vote “on account of race, color, or previous condition of servitude.”<sup>100</sup> Professor Keyssar explains that this less robust treatment of voting rights came about because opponents of an amendment affirmatively granting a right to vote wanted to retain the power to control voting rights based on ethnicity, class, sex, religion, property, and education.<sup>101</sup> And, of course, during the Jim Crow era, many states got around the Fifteenth Amendment by barring blacks from voting based on grounds other than race.<sup>102</sup> Not until the 1960s did the Constitution provide all citizens with the right to vote.<sup>103</sup> And this was not because of a change in the Constitution but rather because of the work of voting rights activists and the Warren Court.<sup>104</sup>

In a series of cases, including one that Chief Justice Warren regarded as the most important of his career,<sup>105</sup> the Warren Court developed a set of constitutionally derived rules governing elections.<sup>106</sup> Most importantly, the Court understood the Reconstruction Amendments to require, among other things, that state laws and practices impacting the franchise satisfy searching judicial scrutiny.<sup>107</sup> In a 1966 case, for example, the Court insisted that “any

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96. See Issacharoff, *supra* note 17, at 1379–80; Bertrall L. Ross II & Douglas M. Spencer, *Passive Voter Suppression: Campaign Mobilization and the Effective Disenfranchisement of the Poor*, 114 *Nw. U. L.R.* 633, 635–36 (2019).

97. Edward B. Foley, Opinion, *Think the Constitution Protects Your Right to Vote? That’s Not Really True—But It Should.*, *WASH. POST* (Oct. 19, 2020, 4:10 PM), <https://www.washingtonpost.com/opinions/2020/10/19/does-the-constitution-protect-your-right-to-vote/>; KEYSSAR, *supra* note 1, at 4.

98. KEYSSAR, *supra* note 1, at 4–5.

99. Foley, *supra* note 97.

100. U.S. CONST. amend. XV.

101. KEYSSAR *supra* note 1, at 101–02.

102. *Id.* at 111–12.

103. Foley, *supra* note 97.

104. *Id.*

105. *Baker v. Carr*, 369 U.S. 186 (1962); WALDMAN, *supra* note 33, at 135.

106. WALDMAN, *supra* note 33, at 134–39.

107. See KEYSSAR, *supra* note 1, at 266–68.

alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”<sup>108</sup> The Court based this principle on the equal protection clause of the Fourteenth Amendment and also alluded to other constitutional sources.<sup>109</sup> In the interest of promoting “the legitimacy of representative government,” the Court sought to constitutionalize the democratic ideal of voting rights for all.<sup>110</sup> Moreover, since the Warren Court’s decisions establishing a constitutional right to vote, federal courts have expanded on the principle to make clear that the greater the burden imposed by a state law on voting rights, the more justification the state must have for enacting the law.<sup>111</sup> Under this formula, the Court first invalidated poll taxes and property qualifications and then a number of other electoral regulations.<sup>112</sup> And the Warren Court’s emphasis on the individual’s right to exercise the franchise in a free and unimpaired manner remained the guiding principle of voting rights law for the next fifty years.

The current Court does not view the Constitution as protecting the right to vote as robustly as the Warren Court did, and it has employed a less demanding standard of review of state laws that impact voting rights, one that is more deferential to state legislatures and state officials.<sup>113</sup> Law professor Joshua Douglas explains that traditionally, if a voting restriction imposes a severe burden on voting rights, the Court applies strict scrutiny review. And if the restriction does not create a severe burden but still impacts the right to vote, courts apply intermediate-level scrutiny by identifying “the precise interests put forward by the state as justifications for the burden imposed by its rule” and determining “the extent to which those interests make it necessary to burden the plaintiff’s rights.”<sup>114</sup> Douglas argues that the Court has too readily deferred to states and, in so doing, derogated the constitutional right to vote. Without specifying new standards, Douglas points out, the Court has failed to require states to identify the “precise interests” served to justify a restrictive voting rule or to explain why “those interests make it necessary to burden” the right to vote.<sup>115</sup>

One of the early indicators of the Court’s shift in approach came in 2006 in the case of *Purcell v. Gonzales*.<sup>116</sup> In *Purcell*, the Ninth Circuit had enjoined Arizona from enforcing a newly enacted voter-ID requirement pur-

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108. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667 (1966).

109. *Id.* at 669.

110. *See Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969).

111. *KEYSSAR*, *supra* note 1, at 272.

112. *Id.* at 269–72.

113. Douglas, *supra* note 16, at 3.

114. *Id.*; *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celbrezze*, 460 U.S. 780, 789 (1983)).

115. Douglas, *supra* note 16, at 1.

116. 549 U.S. 1 (2006).

portedly adopted to prevent fraud. The Supreme Court held that it was too close to the election to block the law because revising the rules might cause confusion.<sup>117</sup> And without citing evidence, the Court stated that “[v]oter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised.”<sup>118</sup> Thus, it was clear that the hulabaloo about voter fraud had reached the nation’s highest court. Reacting to this statement, Professor Keyssar said scornfully: “*Feel* disenfranchised? Is that the same as ‘being disenfranchised?’ So if I might ‘feel’ disenfranchised, I have a right to make it harder for you to vote?”<sup>119</sup>

Although it rests on the reasonable notion that courts should consider how their rulings might affect an upcoming election, *Purcell* has developed into a rigid rule that bars courts from intervening even in the face of late-breaking problems that threaten the right to vote. For example, in April 2020, the Court reversed a lower court decision<sup>120</sup> extending the absentee ballot receipt deadline for the Wisconsin primary by six days to enable election clerks to respond to the overwhelming number of requests for absentee ballots resulting from the pandemic and allow voters to return their ballots. In doing so, the Court put many Wisconsin citizens in the position of having to vote in person and incur a risk to their health or not vote.<sup>121</sup> Before *Purcell*, courts did not close the door to voters whose right to vote was burdened simply because an election was approaching. Rather, they applied the traditional equitable standards including the likelihood of success on the merits, the balance of hardships, and the public interest.<sup>122</sup>

Two years after *Purcell* in *Crawford v. Marion County Election Board*, the Court faced a direct constitutional challenge to a photo ID law, this one from Indiana.<sup>123</sup> The Court was very deferential to the state, characterizing the photo ID requirement as an inconvenience rather than a substantial burden and unskeptically accepting the claim that the law was justified by concern about voter fraud.<sup>124</sup> This was so despite the absence of evidence of in-person voter fraud or of any effort by Indiana to combat more prevalent forms of fraud, and despite evidence that legislators may have been motivated at least in part by a partisan interest in making it harder for people on the lower economic rung to vote.<sup>125</sup> The Court cited two examples of voter-

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117. *Id.* at 4–6.

118. *Id.* at 4.

119. WALDMAN, *supra* note 33, at 193.

120. Democratic Nat’l Comm. v. Bostelmann, 451 F. Supp. 3d 952 (W.D. Wis. 2020).

121. Republican Nat’l Comm. v. Democratic Nat’l Comm., 140 S. Ct. 1205 (2020).

122. *See* Hasen, *supra* note 14, at 282.

123. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008).

124. *Id.* at 195–96, 198.

125. *See* Manheim & Porter, *supra* note 16, at 228–29.

impersonation fraud, one of which occurred in 1868 when voters allegedly shaved off mustaches and beards in order to vote more than once and the other of which occurred in the State of Washington, but deemed these anecdotes sufficient to say that “the risk of voter fraud [is] real” and that “it could affect the outcome of a close election.”<sup>126</sup> The Court also said that to trigger heightened scrutiny, voting rights plaintiffs had to produce evidence of the negative effect of voting restrictions.<sup>127</sup> However, it is very difficult to prove with any degree of precision the extent to which a restriction burdens voters, and the Court did not explain how the burden should be measured. Nor did the Court address the burden of the law on narrower groups of voters such as the poor. Ultimately, as Michael Waldman explains, the Court treated the law not as a serious restriction on voting rights but as a “bland” technical provision “designed to uphold ‘the integrity and reliability of the electoral process.’”<sup>128</sup> The phrase “electoral integrity,” also quite bland, came to be commonly used in judicial opinions involving voting restrictions.<sup>129</sup>

Because of the large volume of voting rights cases filed in 2020, the Court’s deferential approach has already had a substantial impact. Litigation in 2016 more than doubled the pre-2000 rate and has only continued to grow.<sup>130</sup> Over four hundred cases in forty-four states were filed before the 2020 election.<sup>131</sup> Lawsuits involving voting are now part of the normal voting wars between hyperpolarized political parties. The judiciary itself is also divided. In at least eighteen recent cases, district courts ruled in favor of voting rights plaintiffs on constitutional grounds, often because of difficulties resulting from the pandemic, only to see their decisions reversed.<sup>132</sup> The appellate courts have consistently permitted states to make voting more difficult, often justifying their decisions on the basis of concerns about voter fraud.<sup>133</sup> For example, in reversing a district court decision rejecting the Governor of Texas’ directive to allow only one ballot drop off location per county regardless of the size of the county, the Fifth Circuit cited Texas’s stated goal of preventing fraud.<sup>134</sup> Another Fifth Circuit case reversed a district court decision requiring Texas to allow voters to cure alleged signature

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126. *Crawford*, 553 U.S. at 195 nn.11–12, 196; WALDMAN, *supra* note 33, at 194.

127. *See id.* at 200–03.

128. WALDMAN, *supra* note 33, at 194–95.

129. *Id.* at 195.

130. Richard L. Hasen, Op-Ed, *Don’t Let Our Democracy Crash*, N.Y. TIMES (July 15, 2017), <https://www.nytimes.com/2017/07/15/opinion/sunday/dont-let-our-democracy-collapse.html?partner=rss&emc=rss>.

131. Douglas, *supra* note 16, at 22.

132. *Id.* at 5.

133. *Id.* at 6–10.

134. *Tex. League of United Latin Am. Citizens v. Hughs*, 978 F.3d 136, 146–47 (5th Cir. 2020).



mismatches on absentee ballots, again citing the possibility of voter fraud and the need to preserve electoral integrity.<sup>135</sup> The court also cited *Crawford* for the proposition that a state could restrict voting based on fraud without presenting evidence of fraud.<sup>136</sup>

The jurisprudence of other circuits is to the same effect. The Sixth Circuit, for example, reversed a district court decision staying a ban imposed by Michigan on paying people for providing transportation to the polls.<sup>137</sup> The appellate court credited the state's interest in preventing fraud resulting from "vote hauling,"<sup>138</sup> while the dissenting judge noted that the plaintiffs merely wanted to help people get to the polls and that companies like Uber were willing to provide discounted rides as they had in other states.<sup>139</sup> Another Sixth Circuit decision upheld on standing grounds a district court decision denying a preliminary injunction against a Tennessee statute establishing procedures for verifying signatures on absentee ballots.<sup>140</sup> In dissent, Judge Moore characterized the decision as "another chapter in the concentrated effort to restrict the vote," enabling Tennessee to "disenfranchise hundreds, if not thousands of its citizens . . . . [R]uling by ruling, many courts are chipping away at votes that ought to be counted."<sup>141</sup>

Professor Douglas indicates that the results of these and other circuit court decisions are not necessarily mistaken but rather that the courts did not require the states to demonstrate the "precise interests" that justified burdening the right to vote.<sup>142</sup> A dissent by Judge Jane Kelly in a case from the Eighth Circuit illustrates Douglas's point. The Eighth Circuit stayed a district court decision that had invalidated a newly enacted Missouri rule that mail-in voters—those at risk for Covid-19 but without another excuse not to vote in person—could return their ballots only by mail and had to have them in by 7:00 p.m. on election day, even though absentee voters with a valid excuse other than the pandemic could return their ballots in person.<sup>143</sup> The court called the rule "a reasonable . . . exercise of the State's authority,"<sup>144</sup> whereas Judge Kelly pointed out that although the state asserted an "interest in preserving the integrity of its election process," such an interest "cannot merely be asserted in the abstract."<sup>145</sup> Judge Kelly went on to explain that "the state interest must be linked in some meaningful way to the particular

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135. *Richardson v. Hughs*, 978 F.3d 220, 224 (5th Cir. 2020).

136. *Id.* at 240.

137. *Priorities USA v. Nessel*, 978 F.3d 976, 978–79 (6th Cir. 2020).

138. *Id.* at 983.

139. *Id.* at 990 (Cole, C.J., dissenting).

140. *Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 382 (6th Cir. 2020).

141. *Id.* at 392, 417 (Moore, J., dissenting).

142. Douglas, *supra* note 16, at 16.

143. *Org. for Black Struggle, Inc. v. Ashcroft*, 978 F.3d 603 (8th Cir. 2020).

144. *Id.* at 608.

145. *Id.* at 611 (Kelly, J., dissenting).

rule or regulation that allegedly imposes a burden on a citizen's right to vote."<sup>146</sup>

Thus, twenty years after the end of a period in American history in which voting rights activists, elected officials who enacted ground-breaking laws like the Voting Rights Act, and courts struck down long-standing barriers to African-American voting rights and brought about something close to universal suffrage, the right to cast a ballot easily is once again intensely contested. As discussed, many states have made voting more difficult, and courts are less vigilant about protecting voting rights than they once were. Further, some elected officials and commentators feel free to propound large amounts of disinformation about the prevalence of voter fraud.<sup>147</sup> Thus, the relatively high turnout in the 2020 election should not cause us to gloss over the fact that, in addition to being underfunded, overly complicated, and flawed in many respects, our present electoral system makes it hard for a considerable number of eligible voters to participate.

In a talk celebrating the great Alabama-based federal judge Frank Johnson, Jr., who dealt with major voting rights cases in the 1960s, Professor Kathryn Abrams compared the means of suppressing votes then with the so-called second generation of vote denial devices used today.<sup>148</sup> She pointed out that both techniques of suppression are tools of a strategy designed to "achieve electoral advantage," and both use facially neutral laws to prevent the enfranchisement of disadvantaged groups so as to "perpetuate a more privileged and homogeneous electorate."<sup>149</sup> The voter suppression tactics of the 1960s, however, were more blatant, making it easier to infer a racially discriminatory motive, and the suppressive effects were more extensive, possibly having a 90% rather than a 5% effect.<sup>150</sup> These differences may partly account for the fact that courts have been less receptive to recent challenges.<sup>151</sup>

What then, if anything, can be done to address these new barriers to voting rights, the disenfranchisement of those unable to overcome them and the reluctance of courts to vindicate voting rights? Although many voting rights advocates and scholars have offered ideas, it is fair to say that as a result of the hyper-polarized state of American politics, few people believe that change is imminent. Rather, the present period of struggle seems likely to be with us for a while. Nevertheless, many of the ideas offered are inter-

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146. *Id.* at 612.

147. *See* WALDMAN, *supra* note 33, at 189–90; Levine & Mestel, *supra* note 69.

148. Kathryn Abrams, *Bridging Past and Future: Judge Frank Johnson and Minority Vote Suppression*, 71 ALA. L.R. 819, 823–24 (2020).

149. *Id.* at 823.

150. *See id.* at 819–20.

151. *Id.* at 824.

esting and important, and I will conclude by briefly discussing several of them.

Professor Abrams offers Judge Johnson's approach to voting rights cases as a model for judges, particularly emphasizing several features of his jurisprudence, the most important being that he viewed the right to vote as fundamental.<sup>152</sup> If the right to vote is regarded as fundamental, any restriction that arguably affects it will be viewed skeptically, and the state will not receive the benefit of the doubt. Further, a voting rights plaintiff will rarely, if ever, be required to present hard evidence about the number of voters harmed or deterred by the restriction. Finally, in a voting rights case, it is essential that a judge develop a detailed factual record including whatever evidence the state possesses that purportedly justifies the measure. Put differently, the court must be extraordinarily sensitive to pretext. The cases stemming from the 2020 election indicate that many judges, particularly district judges, share Judge Johnson's approach but also that many do not.<sup>153</sup>

Professors Manheim and Porter propose an innovative legal theory as a means of directly confronting voter suppression efforts by states, pointing out that the approaches relied on so far have failed for various reasons, such as courts' embrace of baseless voter fraud claims and the difficulty of proving the extent of the burden created by a restriction.<sup>154</sup> They argue that intentional voter suppression by states, without more, violates the Constitution.<sup>155</sup> This is so regardless of the racial impact of the restriction, how much it burdens voters, or whether it serves partisan goals. The assumption underlying their theory is pretty basic: if voting is a constitutional right, a state cannot intentionally undermine it.<sup>156</sup> Manheim and Porter urge attorneys for voting rights plaintiffs to develop this theory.<sup>157</sup> They acknowledge the obstacles to proving the claim, not the least of which is establishing the element of intent. Thus, they suggest a burden-shifting framework which, upon a sufficient showing by the plaintiff, would require the state to demonstrate a legitimate justification for the law.<sup>158</sup> This would address the problem of excessive deference. As they put it, deference to states is a "menace" if states are not acting in good faith.<sup>159</sup> They also argue that adopting this framework would have other positive effects, such as discouraging states from enacting

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152. *Id.* at 820.

153. *See* Douglas, *supra* note 16, at 4.

154. Manheim & Porter, *supra* note 16, at 218.

155. *Id.* at 238.

156. *Id.* at 239–40.

157. *See id.* at 250.

158. *Id.* at 247–48.

159. *Id.* at 246.

laws designed to discourage voting and politicians from attempting to reopen the issue of universal suffrage.<sup>160</sup>

Other observers, who are concerned about a variety of deficiencies in the administration of elections, advocate a legislative response.<sup>161</sup> They argue that both Congress and state legislatures should enact laws that would make voting less difficult and thus increase voter turnout.<sup>162</sup> Take, for example, voter registration. Presently some states register voters automatically and mail them ballots,<sup>163</sup> whereas others require registration weeks before an election and, unless voters have a valid excuse for voting absentee, require them to show up at the polls in person.<sup>164</sup> At the polls they may face long lines, poorly trained poll workers, unreliable equipment, and, last year, the coronavirus. In some states,<sup>165</sup> if a voter hasn't registered by election day, he or she is barred from voting.<sup>166</sup> A related issue is that of universal mail-in voting. Currently only nine states and the District of Columbia send ballots to all registered voters.<sup>167</sup> Of the remaining states, thirty-five allow absentee voting upon request, while six require voters to vote in person unless they have an excuse beyond the pandemic.<sup>168</sup> A third issue is that the electoral system is fragmented and usually administered by elected officials who are sometimes influenced by partisan considerations.<sup>169</sup> Thus, some scholars argue that pursuant to its authority under the Constitution's Election Clause,

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160. Manheim & Porter, *supra* note 16, at 243.

161. *See, e.g.*, Douglas, *supra* note 16, at 15; AM. ACAD. OF ARTS & SCIS., *supra* note 15, at 32–39.

162. AM. ACAD. OF ARTS & SCIS., *supra* note 15, at 32–39.

163. *Automatic Voter Registration*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/elections-and-campaigns/automatic-voter-registration.aspx> (last updated Feb. 8, 2021); *VOPP: Table 18: States with All-Mail Elections*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 21, 2020), <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-18-states-with-all-mail-elections.aspx>.

164. *Voter Registration Deadlines*, NAT'L CONF. OF STATE LEGISLATURES (Oct. 2, 2020), <https://www.ncsl.org/research/elections-and-campaigns/voter-registration-deadlines.aspx>; *VOPP: Table 2: Excuses to Vote Absentee*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 20, 2020), <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-2-excuses-to-vote-absentee.aspx>.

165. Charlotte Hill & Lee Drutman, *Opinion, America Votes by 50 Sets of Rules. We Need a Federal Elections Agency*, N.Y. TIMES (Nov. 5, 2020), <https://www.nytimes.com/2020/11/05/opinion/election-federal-agency-voting.html>.

166. *Cf. Voter Registration Deadlines*, *supra* note 164.

167. Austin Williams, *Voting by Mail: 9 States Send Ballots Automatically, 35 Allow COVID-19 as an Excuse, 6 Require Other Reason*, FOX5 N.Y. (Aug. 31, 2020), <https://www.fox5ny.com/news/voting-by-mail-9-states-send-ballots-automatically-35-allow-covid-19-as-an-excuse-6-require-other-reason>; Ian Ayers & Pranjal Drall, *The Unpersuasive Empiricism Regarding Universal Mail-In Voting Fraud*, BALKINIZATION (Oct. 7, 2020), <https://balkin.blogspot.com/2020/10/the-unpersuasive-empiricism-regarding.html>.

168. Williams, *supra* note 167.

169. Hill & Drutman, *supra* note 165.

Congress should create a federal election agency, modeled on those in other democracies such as Canada, that could impose uniform national rules, at least for federal elections.<sup>170</sup> They contend that such an agency could effectively address some of the practices that plague our present system, including disproportionate purges of minority voters, the invalidation of minorities' ballots at higher rates because of technicalities, and the distribution of false or misleading information.<sup>171</sup> As columnist Farhad Manjoo puts it, we should not go on as we have, "[f]rom the endless lines to the pre-election legal wrangling," to the situation we endured this year where "every ballot cast . . . was a leap of faith: Would it get there in time? . . . Would they try to toss it out because you voted from a car" or "signed your name carelessly" or because they changed the mail-in deadline?<sup>172</sup> "Would you ever be able to find the one dropbox in your sprawling county?" And after all that, would people trust the outcome?<sup>173</sup>

Some election law scholars believe that legislation would not be sufficient to protect voting rights, that adding an amendment to the Constitution is ultimately the only way to protect democracy as we have come to expect.<sup>174</sup> Professor Edward Foley, for example, explains that the Warren Court relied on the equal protection clause to protect voting rights because it was the best constitutional basis available.<sup>175</sup> He fears, however, that a Court with a different philosophy could disagree.<sup>176</sup> This is so because "the equal protection clause was not originally intended to protect voting rights."<sup>177</sup> We know this because of other language in the Fourteenth Amendment and because otherwise the Fifteenth and Nineteenth Amendments would have been unnecessary.<sup>178</sup> Although Professor Douglas believes that federal legislation easing the burden on voters, adopting best practices for the administration of elections, and requiring states to adopt pro-voter rules would be a good short term fix, he is also skeptical that a statute would be enough, given the possibility that the Court could continue to uphold restrictive state voting rules and/or strike down federal legislation.<sup>179</sup> Professor Hasen also makes a strong case for a constitutional amendment, arguing that reliance on the

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170. *See id.*

171. *Id.*

172. Farhad Manjoo, Opinion, *2020 Should Be the Last Time We Vote Like This*, N.Y. TIMES (Nov. 4, 2020), <https://www.nytimes.com/2020/11/04/opinion/election-day-voting.html>.

173. *Id.*

174. *See* Hasen, *supra* note 14, at 265; AM. ACAD. OF ARTS & SCI., *supra* note 15, at 28; Douglas, *supra* note 16, at 20–22.

175. Foley, *supra* note 97.

176. *See id.* (postulating that current Court holds a different philosophy).

177. *Id.*

178. *Id.*

179. Douglas, *supra* note 16, at 20.

courts is not a sustainable long-term strategy, both because of the Supreme Court's new approach and because courts are institutionally incapable of solving the problems created by fragmented and partisan control of the electoral process.<sup>180</sup> Hasen argues that it is critical that such an amendment be "specific" and contain more than "aspirational language" as is the case with some state constitutional provisions, and that it must accomplish three things: (1) protect the right of all citizens to vote and provide that when a state restriction is challenged, the state must establish that it is nondiscriminatory and necessary to serve an important state interest, (2) create an independent nonpartisan agency to run federal elections, and (3) "provide that states must meet certain . . . standards guaranteeing the right to vote."<sup>181</sup>

Other observers have begun to discuss an idea that voting rights advocates, political scientists and legal scholars in the United States have historically paid little attention to, that of compulsory voting.<sup>182</sup> The lack of attention to this issue is likely the result of a deep-seated pessimism that such an idea could ever be seriously considered in a country like the United States, which prides itself on being individualistic and often seems to define individualism as opposing anything that government says is beneficial. Nevertheless, there are a number of powerful arguments in support of compulsory voting. Voting is arguably the core duty of citizenship and should be recognized as such. It is every bit as important as jury service, which is a requirement in all states. In addition, compulsory voting strengthens democratic values. It also substantially increases voter turnout.<sup>183</sup> Significantly, in 2018 the American Academy of Arts and Sciences created a commission to consider ways to revitalize democracy. This project resulted in a document entitled "Our Common Purpose," a set of thirteen proposals, one of which was a universal voting mandate.<sup>184</sup> Many other countries employ some system of mandatory voting.<sup>185</sup> Australia has had it since 1924.<sup>186</sup> In Australia, citizens are required to submit ballots, and all ballots include the option of voting for none of the above.<sup>187</sup> Votes remain secret, exemptions are available and penalties are modest, particularly for the first offense.<sup>188</sup> Voter turnout is over ninety percent.<sup>189</sup> Supporters of compulsory voting understand

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180. Hasen, *supra* note 14, at 282.

181. *Id.* at 283.

182. Win McCormack, *Yes, You Have a Duty to Vote*, NEW REPUBLIC (Oct. 22, 2020), <https://newrepublic.com/article/159690/yes-duty-vote-2020>.

183. *Id.*

184. AM. ACAD. OF ARTS & SCIS., *supra* note 15, at 7.

185. John Misachi, *Countries with Mandatory Voting*, WORLD ATLAS (May 28, 2018), <https://www.worldatlas.com/articles/countries-with-mandatory-voting.html>.

186. AM. ACAD. OF ARTS & SCIS., *supra* note 15, at 38.

187. *Id.*

188. *See id.*

189. *Id.*

that it would have only a modest impact on many problems in the United States but believe that on balance it would be a great gain in that it would strengthen citizens' allegiance to democracy and dramatically increase voter turnout.<sup>190</sup>

In conclusion, it is important to note that other factors besides voting laws and practices and judicial philosophies affect the quality of a democracy. In this respect, it is worth mentioning a country that has achieved exceptionally high voter turnout without universal mandatory voting, Denmark.<sup>191</sup> Political scientists explain that this "results from an 'early and rapid socialization of new generations to vote in national elections,' . . . a high level of trust in government, relative economic equality, and a widely held and deeply ingrained norm that voting is a civic duty."<sup>192</sup> These characteristics may not be easily emulated, but as individuals and groups in the United States continue to press for greater democratization and equality, they surely should be kept in mind.

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190. *See id.*

191. McCormack, *supra* note 182.

192. *Id.*