

# COMPULSORY VOTING AND BLACK CITIZENSHIP

*Ekow N. Yankah\**

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## INTRODUCTION

Day broke, Wednesday, November 4, 2020, following the election between Donald Trump and Joseph Biden, with a country unsure of who had won the presidency. In several states, early results recorded President Trump ahead, while later-tabulated votes from Democratic strongholds chipped away at his lead.<sup>1</sup> Although experts predicted this scenario, many Trump supporters believed the election was being stolen through massive, coordinated voter fraud.<sup>2</sup> They believed this, in large part, due to the

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1. See Alexander Burns & Jonathan Martin, *As America Awaits a Winner, Trump Falsely Claims He Prevailed*, N.Y. TIMES (Nov. 4, 2020), <https://www.nytimes.com/2020/11/04/us/politics/election-trump-biden-recap.html> [<https://perma.cc/DWP8-78S7>].

2. See, e.g., Miles Parks, *If There's No Election Night Winner, Don't Panic*, NPR, at 00:15 (Oct. 20, 2020, 10:41 AM), <https://www.npr.org/2020/10/20/925563057/it-might-not-be-clear-who-won-on-election-night-but-that-may-not-mean-a-problem> [<https://perma.cc/W2HE-6NZC>].

unprecedented explicit undermining of election results by President Trump himself.<sup>3</sup>

In the midst of this volatile landscape, groups of Trump supporters, sometimes numbering in the hundreds and, at times, armed with military-style rifles, descended on election offices in African American–dominated urban areas, demanding that vote counting be stopped or changed and threatening violence to vote counters.<sup>4</sup> In Detroit, chaos erupted as Trump supporters exceeded the number of permitted challengers, refused to leave election offices, and pounded on windows and doors.<sup>5</sup> Two days later, two hundred protesters, some armed, returned to protest outside the tally room at the TCF Center in Detroit.<sup>6</sup> Similar scenes unfolded in Philadelphia<sup>7</sup>; Maricopa County, Arizona;<sup>8</sup> and Atlanta.<sup>9</sup> The images of furious white “protestors” banging on windows, intimidating Black election workers as they tried to count Black votes, were searing.

It is tempting to note the unique circumstances surrounding these scenes: a bitterly divided country, an international pandemic, and a president openly trafficking in election conspiracies. Those who are skeptical of race as determinative of the American experience will doubt that these protests were driven by the racial makeup of cities like Detroit, Atlanta, and Philadelphia, among others. For these individuals, the simpler explanation is that boiling partisan temperatures caused Trump supporters to target populous Democratic strongholds.<sup>10</sup> There is no reason, the argument goes, to leap

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3. See Burns & Martin, *supra* note 1; Nicholas Kristof, Opinion, *When a President Sabotages His Own Country*, N.Y. TIMES (Nov. 4, 2020), <https://www.nytimes.com/2020/11/04/opinion/donald-trump-election-2020.html> [<https://perma.cc/Y7RT-A5QB>].

4. See Omar Abdel-Baqui et al., *Protesters Rally at TCF Center as Biden’s Lead Overtakes Trump in Key States*, DETROIT FREE PRESS (Nov. 6, 2020, 8:51 PM), <https://www.freep.com/story/news/local/michigan/detroit/2020/11/06/protesters-rally-tcf-center-detroit-biden-ballots/6186881002/> [<https://perma.cc/2WXN-AEV8>].

5. See Tresa Baldas et al., *Chaos Erupts at TCF Center as Republican Vote Challengers Cry Foul in Detroit*, DETROIT FREE PRESS (Nov. 4, 2020, 9:12 PM), <https://www.freep.com/story/news/politics/elections/2020/11/04/tcf-center-challengers-detroit-michigan/6164715002/> [<https://perma.cc/EBY8-6HDX>].

6. See Abdel-Baqui et al., *supra* note 4.

7. See CBS3 Staff, *Tensions Brewing Outside Pennsylvania Convention Center Between Biden, Trump Supporters as Vote Count Continues*, 3CBS PHILLY (Nov. 5, 2020, 11:00 PM), <https://philadelphia.cbslocal.com/2020/11/05/tensions-brewing-outside-pennsylvania-convention-center-between-biden-trump-supporters-as-vote-count-continues/> [<https://perma.cc/572T-DGYF>].

8. See Chris Pleasance & Frances Mulraney, *Arizona Polling Center Is Forced to CLOSE as Armed Trump Supporters Lay Siege—While Republicans Launch Legal Challenges in Michigan, Wisconsin and Georgia and Counting Continues with Biden Needing Two More Contested States to Declare Victory*, DAILY MAIL (Nov. 5, 2020, 10:39 AM), <https://www.dailymail.co.uk/news/article-8915559/Could-Arizona-flip-TRUMP-State-reveals-600-000-votes-counted.html> [<https://perma.cc/3KSG-5L2B>].

9. See Nomaan Merchant & Tim Sullivan, *Election Officials Worried by Threats and Protesters*, ASSOCIATED PRESS (Nov. 6, 2020), <https://apnews.com/article/arrests-vote-count-oregon-new-york-f92075a34ce8dd166ff17bbd9bedc49d> [<https://perma.cc/VV28-RWVD>].

10. This argument, captured in what is largely known as “the structural turn” in voting rights, is more fully explored in *infra* text accompanying notes 58–61.

from the partisan explanation to the conclusion that protestors set out to suppress votes because they were cast by Black voters.

But, for so many Black Americans, these doubts are nearly impossible to credit. This skepticism misunderstands the nature of racial animus regularly expressed in elections. Indeed, partisan motivations need not be absent, and racial animus need not be self-conscious or explicit. Rather, partisan impulses are refracted through racial animus and suspicions that are usually unthought; arguments that would never be forwarded are regularly accepted when Black voters are the subject.<sup>11</sup> Legislative attempts to ban “Souls to the Polls” movements are considered justified.<sup>12</sup> For example, the continued disenfranchisement of wide swathes of former felons, despite its obvious racist history and present effects, is ignored.<sup>13</sup> Political operatives remain convinced that Black votes are the appropriate object of their partisan suspicions, whatever their self-conscious motivations.<sup>14</sup> As *The New York Times* noted in discussing the contestation of votes in Detroit:

Perhaps nowhere was the targeting of Black votes more explicit than in Wayne County, Mich., home to Detroit . . . . In initially resisting the certification of Wayne County’s votes, one of the Republican board members, Monica Palmer, said she was willing to certify every municipality in the county except Detroit, even though some cities, like the largely white Livonia, had worse irregularities.<sup>15</sup>

I am certainly among those who harbor no doubt that voters’ race in Detroit, Atlanta, and Philadelphia, for example, was crucial to the rejection of vote counts coming out of those cities. The entire set piece is part of a much more durable American disease.<sup>16</sup> Once, violence stopped Black Americans from voting; today, contemporary variations attempt to stop Black votes from being counted.<sup>17</sup> Common to both phenomena is a

11. For an extended discussion about how social meaning shapes the meaning of certain actions, see *infra* text accompanying notes 234–39.

12. See Paul M. Schwartz, *Voting Technology and Democracy*, 77 N.Y.U. L. Rev. 625, 647 (2002); Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 FORDHAM L. REV. 1711, 1743 (2005).

13. See 13TH (Netflix 2016); Ekow N. Yankah, *Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment*, 25 CARDOZO L. REV. 1019, 1029–33 (2004); Alec C. Ewald, “Civil Death”: *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1059–61. See generally George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895 (1999).

14. See Jim Rutenberg & Nick Corasaniti, *Republicans Rewrite an Old Playbook on Disenfranchising Black Americans*, N.Y. TIMES (Nov. 22, 2020), <https://www.nytimes.com/2020/11/22/us/politics/trump-republicans-black-voters.html> [<https://perma.cc/DZ7M-6SAJ>].

15. *Id.*

16. See generally CAROL ANDERSON, ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY (2018).

17. See Ari Berman, *Jim Crow Killed Voting Rights for Generations. Now the GOP Is Repeating History.*, MOTHER JONES (June 2, 2021), <https://www.motherjones.com/politics/2021/06/jim-crow-killed-voting-rights-for-generations-now-the-gop-is-repeating-history/> [<https://perma.cc/8F3N-8KNU>]; Brandon Tensley, *America’s Long History of Black Voter*

fundamental belief in the illegitimacy of Black political power; the sense that there is something inherently suspect when Black voters sway political leadership. Suspicion may be couched in vague assertions of voter fraud,<sup>18</sup> but it always targets the Black vote.<sup>19</sup> By contrast, mass armed protests rejecting votes from the nearby liberal enclave Ann Arbor borders on unthinkable.<sup>20</sup>

Protesting Black votes is part of our history of rejecting Black Americans as legitimate wielders of political power and contesting the fullness of Black citizenship.<sup>21</sup> Obviously, hostility toward viewing Black Americans as deserving of the rights owed to other Americans is present in nearly every aspect of American life. But, among the oldest and most contentious hostilities—from the Civil War to Reconstruction to the Civil Rights Movement to contemporary voter suppression efforts—has been the resistance against Black votes. Any opportunity to quell this locus of racial animus calls for urgent address. Particularly, at this moment, when long-standing prophylactic measures such as the Voting Rights Act of 1965<sup>22</sup> (VRA) are being dismantled, a permanent solution to Black disenfranchisement, its material costs, and its symbolic harm, should be pressing.

One simple, if not (politically) easy, solution beckons. Notwithstanding sporadic academic attention, compulsory voting and its connection to Black citizenship has not, to my knowledge, been explored in legal literature. The possible effects of compulsory voting on political inequality, particularly

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*Suppression*, CNN, <https://www.cnn.com/interactive/2021/05/politics/black-voting-rights-suppression-timeline/> [<https://perma.cc/AF3A-GYZ2>] (last visited Sept. 17, 2021).

18. See generally ANDERSON, *supra* note 16. One person interviewed was convinced, without evidence, that “[t]here’s obvious voter fraud, and it’s coming out of the larger Democratic-run cities . . . Atlanta is one them.” Merchant & Sullivan, *supra* note 9. This opinion was offered by a businessman visiting Atlanta, who was convinced the election was being stolen. See *id.*

19. See generally Tensley, *supra* note 17.

20. Obviously, there are other reasons why urban areas attract more attention, including population and, perhaps, being nearer to protesters. Yet, this hardly explains it all, as evidenced by the reports of those who travelled long distances to disrupt voting, including a woman driving from Syracuse, New York, to Detroit. See Abdel-Baqui et al., *supra* note 4. Nor does this explain the strength of the intuition that Ann Arbor would be simply out of bounds for such contestation. In any case, that this is part of a historic pattern of contesting Black political power can hardly be doubted. For example:

Mayor Tom Barrett of Milwaukee noted in an interview that Mr. Trump was hyper-focused on his city, which is about 39 percent Black and 19 percent Latino, and not on the predominantly white and Republican-leaning suburbs outside it, which had the same regulations that the Trump campaign was challenging in Milwaukee.

Rutenberg & Corasaniti, *supra* note 14.

21. See generally J. Morgan Kousser, *Suffrage*, in 3 ENCYCLOPEDIA OF AMERICAN POLITICAL HISTORY: STUDIES OF THE PRINCIPAL MOVEMENTS AND IDEAS 1236 (Jack P. Greene ed., 1984).

22. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

across wealth and class, have been intermittently examined.<sup>23</sup> Scholars who have argued for compulsory voting have also noted the potential material effects of compulsory voting on minority communities, in passing.<sup>24</sup> But, the important symbolic antidote that compulsory voting offers to the history of racist attacks on Black voting remains unexplored.

Despite my conviction that race is central to explaining why certain votes are still systematically contested, the proposal for compulsory voting has another important feature: even for those who are skeptical of the role that race plays in modern voter suppression, compulsory voting ameliorates other democratic problems of inequality, as well. For example, low voter turnout threatens democratic legitimacy by imposing minority rule by the few wealthy and educated.<sup>25</sup> Further, even if one does not view race as a motivating factor in contemporary voting problems, there is no doubt that the history of racist voter suppression has cast a modern-day shadow and that many of our current voting controversies impose disproportionate costs on communities of color.<sup>26</sup> Indeed, compulsory voting holds the promise of addressing even internal, self-negating voting deformations within these communities. Compulsory voting addresses political inequalities of class, income, and race, and, in doing so, presents an important way forward. Thus, even without agreement on the racial motivation behind election contestation, compulsory voting offers important attractions.

A world in which every citizen is legally obligated to vote addresses a slew of democratic ailments. Nowhere would it change more than by permanently foreclosing an entire line of attack on Black citizenship. While I address a few necessary programmatic and doctrinal features, I do not pretend to provide a blueprint for a new government agency. Rather, my goal is to address common philosophical counterarguments and provide normative motivation for universal compulsory voting by illustrating its potential to cure the lasting racial vulnerability surrounding Black citizenship.

This Article proceeds in five parts. Part I briefly outlines the historical contestation of Black Americans' voting. Part II explores the promise of compulsory voting for shoring up democratic legitimacy. Part III imagines how a regime of compulsory voting would ameliorate modern attacks on Black suffrage. Part IV summarizes the distinctive philosophical connection between voting and political belonging. Part V takes up the heart of the argument, that compulsory voting would not only address a slew of democratic ails but also, most importantly, play a decisive role in quelling the historical contestation of Black citizenship. The conclusion follows.

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23. For a classic, see generally Arend Lijphart, *Unequal Participation: Democracy's Unresolved Dilemma*, 91 AM. POL. SCI. REV. 1 (1997).

24. *Id.* at 1–3.

25. See *infra* text accompanying notes 108–11.

26. See, e.g., *infra* notes 155–59 and accompanying text.

## I. THE CONTESTATION OF BLACK FRANCHISE

The American tale of the Black franchise is well known in its outline. There was little question about suffrage for African slaves in colonial America.<sup>27</sup> Slavery is the quintessential state of political inferiority and exclusion. Importantly, American slavery was more than just a juridical concept; harkening back to Aristotelian concepts, Black slaves were considered intrinsically inferior and naturally subservient.<sup>28</sup>

Recall that, in the late 1800s, citizenship and voting were not yet inextricable.<sup>29</sup> Yet, it was clear to many that for “negroes” to claim political equality, the franchise was a necessary marker; none other than Frederick Douglass argued that slavery would not be truly abolished unless Black men could vote.<sup>30</sup> The struggle for Black freedom and a measure of civic equality culminated in the Civil War and the Fourteenth and Fifteenth Amendments.

It is an obvious understatement to note that the struggle to legitimate Black (male) voting did not conclude with the passage of the Fourteenth Amendment.<sup>31</sup> Despite the constitutional prohibition on racial disenfranchisement, the Fifteenth Amendment left states wide discretion to craft other distinctions; for example, white supremacist political structures responded by disenfranchising Black citizens, using proxies like literacy tests, property restrictions, poll taxes, pauper restrictions, and various registration procedures.<sup>32</sup> These voting restrictions also excluded large numbers of ordinary white voters and immigrants, though some of these effects were mitigated by grandfather clauses.<sup>33</sup> As Alabama Senator John

27. While the condition and cruelty of slavery was itself decisive, any question of citizenship was decided in the infamous *Dred Scott* decision. See generally *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

28. Though, natural subservience was also thought to exist alongside natural treachery. See Ariela Gross, *Pandora's Box: Slave Character on Trial in the Antebellum Deep South*, 7 YALE J.L. & HUMANS. 267, 270–78 (1995). The threat of slaves and former slaves as inherently driven to rape white women was a particularly widespread trope. See J. Dickson Bruns, Address to the White League of New Orleans 5 (September 14, 1875).

29. See *infra* notes 188–207 and accompanying text.

30. See FREDERICK DOUGLASS, 4 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 167 (Philip S. Foner ed., 1955).

31. A part of the tumultuous road to Black suffrage was its relationship to women's suffrage. Some prominent leaders, including Susan B. Anthony, held that suffrage was a universal right. See Reva Siegel, *She The People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 948, 989 n.125 (2002). Others, out of racist contempt or cynical political calculation, thought women's suffrage was best advanced by opposing voting rights for African Americans. See *id.* at 985 n.110. Subsequently, many women's suffrage leaders felt deeply betrayed at a political compromise that granted Black men the right to vote but not women. See *id.* at 984–85; AILEEN S. KRADITOR, THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT, 1890–1920, at 163–65 (1965); Richard L. Hasen & Leah M. Litman, *Thin and Thick Conceptions of the Nineteenth Amendment Right to Vote and Congress's Power to Enforce It*, 108 GEO. L.J. 27, 43–44 (2020).

32. See ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 105–71 (2000); STEVEN F. LAWSON, BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944–1969, at 11–12 (1976).

33. See Lane v. Wilson, 307 U.S. 268, 270–71 (1939); R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 851–53 (2004); KEYSSAR, *supra* note 32, at 145–46; Dayna L. Cunningham, *Who Are to Be the Electors?: A*

T. Morgan famously wrote, the mere participation of negroes, surely brimming with hatred, would sully and ultimately destroy democracy.<sup>34</sup>

Alongside “legal” efforts to disenfranchise Black voters were waves of violence and terror aimed at stripping Black Americans of their personal, economic, and political power.<sup>35</sup> White southerners, in particular, reacted to the abolition of slavery and the enfranchisement of Black men by forming the Ku Klux Klan (“the Klan”) and engaging in violent vigilantism to suppress Black aspirations, including through hooded night rides, cross burnings, beatings, branding, and mutilations and killings of terrified Black citizens, all of which sought to redraw the color line the war had erased.<sup>36</sup> It is nearly impossible to estimate accurately the scale of violence inflicted by the Klan, with estimates ranging up to 50,000 killed during this time.<sup>37</sup> Even accurate numbers would not reflect the pervasive threat of violence on every aspect of Black life.<sup>38</sup> While the Klan targeted all aspects of Black social progress, intimidating Black voting was at the core of its mission.<sup>39</sup> Indeed, armed Klansmen often surrounded polling places.<sup>40</sup>

Despite federal law enforcement’s eventual suppression of the Klan between 1871 and 1872, violent resistance to Black voting continued. For example, the “White League,” a white supremacist rifle club, used Klan-style violence to kill Black community leaders attempting to vote.<sup>41</sup> In short, white vigilantes, particularly, but not only, in the South, made clear that Black votes were viewed as illegitimate.<sup>42</sup> The fundamental basis of this

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*Reflection on the History of Voter Registration in the United States*, 9 YALE L. & POL’Y REV. 370, 380–88 (1991).

34. See Senator John T. Morgan, *The Race Question in the United States*, in THE ARENA 385, 390 (1890).

35. See ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863–1877, at 425–44 (1988); KENNETH M. STAMPP, THE ERA OF RECONSTRUCTION, 1865–1877, at 201–04 (1965); Henry L. Chambers, Jr., *Colorblindness, Race Neutrality, and Voting Rights*, 51 EMORY L.J. 1397, 1418–19 (2002); Andrew F. Lang, *Republicanism, Race, and Reconstruction: The Ethos of Military Occupation in Civil War America*, 4 J. CIV. WAR ERA 559, 582–83 (2014). See generally MICHAEL LES BENEDICT, PRESERVING THE CONSTITUTION: ESSAYS ON POLITICS AND THE CONSTITUTION IN THE RECONSTRUCTION ERA, ch. 8 (2006).

36. See ALLEN W. TRELEASE, WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION 29–30 (1971); Jared A. Goldstein, *The Klan’s Constitution*, 9 ALA. C.R. & C.L. L. REV. 285, 295–97 (2018). See generally Guy-Uriel E. Charles, *Colored Speech: Cross Burnings, Epistemics, and Triumph of the Critics?*, 93 GEO. L.J. 575 (2005).

37. See generally JOHN EDWARD BRUCE, THE BLOOD RED RECORD: A REVIEW OF THE HORRIBLE LYNCHINGS AND BURNING OF NEGROES BY CIVILIZED WHITE MEN IN THE UNITED STATES, AS TAKEN FROM THE RECORDS 20 (1901).

38. ASHRAF H.A. RUSHDY, AMERICAN LYNCHING 61 (2012). Professor Lisa Cook elaborates on how spectacular racial violence carried out in any one location then reverberated across the country, discouraging Black economic and scientific accomplishment. See Lisa D. Cook, *Violence and Economic Activity: Evidence from African-American Patents, 1870–1940*, 19 J. ECON. GROWTH 221 (2014).

39. See generally TRELEASE, *supra* note 36.

40. See *id.*

41. See FONER, *supra* note 35, at 558–62.

42. See Michael Kent Curtis, *The Fourteenth Amendment: Recalling What the Court Forgot*, 56 DRAKE L. REV. 911, 956–57 (2008); William W. Van Alstyne, *The Fourteenth Amendment, the “Right” to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33, 45–47.

view was that the American Constitution and its fundamental political structure was the province of white people; in other words, Black people were not truly capable of being political equals, their participation robbed white people of their rightful political power, and their votes sullied the American political project.<sup>43</sup>

The end of Reconstruction essentially ceded the South to the forces of white supremacy.<sup>44</sup> In 1896, *Plessy v. Ferguson*<sup>45</sup> ushered in an era of formalized “separate but equal,” establishing the Jim Crow South.<sup>46</sup> Black efforts at franchise, whether individually or collectively, resulted in violence and death not only in the South but also throughout the country, and Black Americans understood that political ambition, like economic or social ambition, could raise white ire and violence at any moment.<sup>47</sup>

This rejection of the Black right to vote occurred simultaneously with the near universalization of suffrage and its increasing association with “true citizenship.”<sup>48</sup> The adoption of the Nineteenth Amendment in 1920, granting women the right to vote, strengthened the link between voting and equality in the American political imagination.<sup>49</sup> Because negroes were formally American citizens, the Black vote could not be denied without undermining the ideal of voting as a citizen’s inherent right.<sup>50</sup> Thus, passionate rejection of Black voting had to be ostensibly consistent with the universal right to vote; voting restrictions were not the de jure voting restrictions of the past but rather took the form of onerous and arbitrary registration requirements, poll taxes, “citizenship tests,” voter roll purges, and felon disenfranchisement.<sup>51</sup> Such methods did not entirely stop Black Americans from voting but rather sharply curtailed Black political power. And, as iconic scenes of the civil rights era remind us, both vigilante and state violence were

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43. See Goldstein, *supra* note 36, at 301–02.

44. See Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *State’s Rites, Last Rites, and Voting Rights*, 47 CONN. L. REV. 481, 514–19 (2014).

45. 163 U.S. 537 (1896). To be sure, segregation existed before this ruling—most notably, in northern cities.

46. *Id.* at 552 (Harlan, J., dissenting).

47. Of course, the omnipresent threat of violence had long been a deep part of Southern slave culture. See JOHN HOPE FRANKLIN & LOREN SCHWENINGER, *RUNAWAY SLAVES: REBELS ON THE PLANTATION* 42–48, 239–40, 251–52 (2000); KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* 174–79, 186–87 (1969). This continued after emancipation. See EDWARD L. AYERS, *VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH-CENTURY AMERICAN SOUTH* 161 (1984); Lisa Cardyn, *Sexualized Racism/Gendered Violence: Outraging the Body Politic in the Reconstruction South*, 100 MICH. L. REV. 675, 690, 700–06 (2002). For a greater discussion about the widely felt effects of the threat of violence on Black flourishing, see generally Cook, *supra* note 38.

48. See Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L.J. 1289, 1348–50 (2011).

49. See Siegel, *supra* note 31; Hasen & Litman, *supra* note 31, at 46–47.

50. See Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 25, 37–38 (Amy Gutmann ed., 1994).

51. See *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966); BRIAN K. LANDSBERG, *FREE AT LAST TO VOTE: THE ALABAMA ORIGINS OF THE 1965 VOTING RIGHTS ACT* 43 (2007); Fishkin, *supra* note 48, at 1346–49; Jane S. Schacter, *Unenumerated Democracy: Lessons from the Right to Vote*, 9 J. CONST. L. 457, 462–64 (2007).



always at the ready if proxy methods failed, and Black communities attempted mass political mobilization.

Thus, the key battles of the civil rights era included the substantive, not just de jure, enfranchisement of the Black vote and the defeat of nearly all restrictions on voting.<sup>52</sup> In our popular imagination, this struggle culminated in the Twenty-Fourth Amendment<sup>53</sup>—which banned poll taxes—and the Voting Rights Act of 1965.<sup>54</sup> The expansion of the VRA in the following decade, providing nationwide coverage by the U.S. Department of Justice to fight against discriminatory voting practices, seemed to draw the curtain on our national history of undermining the Black vote.<sup>55</sup> With the notable, racially barbed exception of felon disenfranchisement, the grand battles over the legitimacy of the Black vote seemed to be in America's past. Indeed, in signing the 1975 extension of the VRA, President Gerald Ford did not even mention the long struggle to secure Black voting rights and, instead, only affirmed universal voting rights.<sup>56</sup>

It became easy for many Americans to think of the resistance to Black voting as a thing of the past.<sup>57</sup> Nor was this a merely untutored assumption; a new generation of preeminent voting rights scholars insisted that the traditional voting rights jurisprudence had outlived its time.<sup>58</sup> The practice of measuring modern voting restrictions by weighing the individual's right

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52. KEYSSAR, *supra* note 32, at 281–82. As Charles and Fuentes-Rohwer note:

The ultimate proof of racial discrimination was found in the numbers. Voter registration rates had only inched forward since the mid-1950s. For example, voter registration rates in Louisiana between 1956 and 1965 increased from 31.7% to 31.8%; in Mississippi, from 4.4% to 6.4% between 1954 and 1964; and in Alabama, from 14.2% to 19.4% between 1958 and 1964. Most importantly, white registration rates in these jurisdictions “ran roughly 50 percentage points or more ahead of Negro registration.” For a telling example, the Court offered the litigation in Selma, Alabama, sitting in Dallas County with approximately 15,000 voting-age blacks. After four years of litigation and great expense, and even after two federal courts had found “widespread” discrimination in voting, black voter registration only rose from 156 to 383.

Charles & Fuentes-Rohwer, *supra* note 44, at 493.

53. See U.S. CONST. amend. XXIV.

54. Pub. L. 89-110, § 10(a)–(b), 79 Stat. 437, 442; see *City of Rome v. United States*, 446 U.S. 156 (1980); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (confirming the validity of the VRA); see also Charles & Fuentes-Rohwer, *supra* note 44, at 492–93.

55. See, e.g., Fishkin, *supra* note 48, at 1348–50. Additionally, the push to enfranchise Black voters led to an embrace of universal franchise that ultimately extended the vote more broadly to all citizens, including the illiterate and poor. See KEYSSAR, *supra* note 32, at 275, 283.

56. See Gerald R. Ford, Remarks upon Signing a Bill Extending the Voting Rights Act of 1965 (Aug. 6, 1975).

57. In *City of Rome v. United States*, for example, the Supreme Court recognized that Black voters' registration had “improved dramatically” and that the number of Black elected officials had also increased. 446 U.S. 156, 180 (1980). Yet, the Court found that significant registration disparities remained between Black and white voters in covered jurisdictions, and Black elected officials had only gained “relatively minor positions,” unrepresentative of the Black population within the covered jurisdictions. *Id.* at 180–81; Charles & Fuentes-Rohwer, *supra* note 44, at 496–97.

58. See generally Guy-Uriel Charles, *Judging the Law of Politics*, 103 MICH. L. REV. 1099 (2005).

to vote against the state's interest in preventing fraud was deemed antiquated.<sup>59</sup> Such cases, scholars argued, should turn on the structural benefits and harms to the whole of our democracy on both sides of the equation; the old focus on individual rights could be safely retired in favor of a "structural" turn in voting rights.<sup>60</sup> And, while the leading structuralists have not ignored race, it is fair to note that structuralists systematically questioned the centrality of race rather than partisan discrimination in contemporary voting rights cases.<sup>61</sup>

Even as the academy turned its attention, the VRA, the symbol of the federal affirmation of the Black vote, was being gutted by the U.S. Supreme Court.<sup>62</sup> After several warning shots across the bow, the Supreme Court, in *Shelby County v. Holder*,<sup>63</sup> invalidated the coverage formula readopted by Congress, rendering its provisions intact but moot.<sup>64</sup> The Court did so on the premise that the country had changed and largely overcame its historic suppression of the Black vote.<sup>65</sup> Essentially, the Court determined that the "era of big racism" was over.<sup>66</sup>

Yet, the contestation of Black voting never disappeared. Even as the new voting rights cases turned ostensibly more political rather than racial, the undermining of Black and other minority voting power remained clear: gerrymandering, voter-ID laws, and other voter dilution tactics sought to

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59. See JAMES A. GARDNER & GUY-URIEL CHARLES, *ELECTION LAW IN THE AMERICAN POLITICAL SYSTEM* 279 (2d ed. 2012).

60. Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 561 (2004); see also Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 606–07 (2002); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 704 (1998); Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1606 (1999). But see RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* 81–93 (2003); Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915 (1998); Samuel R. Bagenstos, *Universalism and Civil Rights (With Notes on Voting Rights After Shelby)*, 123 YALE L.J. 2838 (2014); Charles, *supra* note 58, at 1120–39.

61. See Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1681 (2001); Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 100 (2013); Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, 49 HOW. L.J. 741, 752 (2006).

62. See generally *Shelby County v. Holder*, 570 U.S. 529 (2013). Indeed, by the time *Shelby County* was presented to the Court, some justices viewed the VRA as the racial problem, likening it to a "racial entitlement." Ellen D. Katz, *A Cure Worse Than the Disease?*, 123 YALE L.J. ONLINE 117, 118, 118 n.7, 120–23 (2013).

63. 570 U.S. 529 (2013).

64. See generally *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009); Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 IOWA L. REV. 1389 (2015).

65. See Charles & Fuentes-Rohwer, *supra* note 44, at 497–500.

66. *Id.* at 497. See generally Ellen D. Katz, *Mission Accomplished*, 117 YALE L.J.F. 142 (2007), <https://www.yalelawjournal.org/forum/mission-accomplished> [<https://perma.cc/6XY3-UAJM>].

reify political power but consistently did so while tracing well-known racial lines.<sup>67</sup>

Further, the long-standing issue of felon disenfranchisement, combined with the racially disproportionate makeup of mass incarcerated individuals, equated to racial disempowerment, barring wide swathes of Black voters from the polls.<sup>68</sup> Felon disenfranchisement cements the view that it is natural for Black voters to be excluded systematically from elections. Where states have reversed felon disenfranchisement, political backlash and retrenchment seeks to stymie the enfranchisement of this disproportionately minority vote.<sup>69</sup>

Although the focus of this Article thus far has been on efforts imposed *on* the Black community to stymie voting, it is worth noting that such sustained efforts also have destabilizing effects from *within* the Black community. Felon disenfranchisement is one such example. In some states, large segments of the Black community are disabled from voting due to their felony records.<sup>70</sup> It is not surprising, therefore, that, stripped of the power to vote, many grow defensive, dismissive, or cynical about the importance of voting.<sup>71</sup> Whether out of self-protection or embarrassment of a bruising experience, a “forfeited” right may quickly become a disdained right. This cynicism is not merely an individualistic concern; rather, just as shared norms among the educated reinforce voting as an important civic duty, shared disdain among the disenfranchised also may sap the proclivity—of even the eligible—to vote.<sup>72</sup> This disdain for voting may quickly spread more

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67. See Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 691–92 (2006).

68. See Christopher Uggen & Jeff Manza, *Democratic Contraction?: Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777, 792–93 (2002).

69. See Patricia Mazzei & Michael Wines, *How Republicans Undermined Ex-Felon Voting Rights in Florida*, N.Y. TIMES (Apr. 30, 2021), <https://www.nytimes.com/2020/09/17/us/florida-felons-voting.html> [https://perma.cc/RZ67-WJ8D]; *Voting Rights Restoration Efforts in Florida*, BRENNAN CTR. FOR JUST. (Nov. 7, 2018), <https://www.brennancenter.org/analysis/voting-rights-restoration-efforts-florida> [https://perma.cc/W3X5-G3KL].

70. See CHRISTOPHER UGGEN ET AL., SENT’G PROJ., 6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT, 2016, at 3 (2016). See generally JEAN CHUNG, SENT’G PROJ., VOTING RIGHTS IN THE ERA OF MASS INCARCERATION: A PRIMER (2021); SENT’G PROJ., REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE: REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM (2013).

71. See Anthony C. Thompson, *Unlocking Democracy: Examining the Collateral Consequences of Mass Incarceration on Black Political Power*, 54 HOW. L.J. 587, 605–08 (2011). See generally Aman McLeod et al., *The Locked Ballot Box: The Impact of State Criminal Disenfranchisement Laws on African American Voting Behavior and Implications for Reform*, 11 VA. J. SOC. POL’Y & L. 66 (2003).

72. See Regina Austin, “The Shame of It All”: *Stigma and the Political Disenfranchisement of Formerly Convicted and Incarcerated Persons*, 36 COLUM. HUM. RTS. L. REV. 173, 177 (2004); Thompson, *supra* note 71, at 607. Some of this thinking is speculative, but it is grounded in the robust evidence of the importance of shared norms in supporting voting behavior. The worry reflects the inverse effects. Such an effect would have to be separated from other sources of widely shared cynicism about voting in distinct communities. Others may question whether disenfranchised ex-felons share demographic

generally from those who can no longer vote, to activists and others who, understandably, (de)cry, “what has voting done for us, lately?” So, the effects of Black voter suppression can radiate out from the inside, hollowing out the desire to vote and corroding Black political participation, even in the absence of obvious obstacles.

Of course, it would be naïve to think that the rejection of Black political power solely centers on voting. The relationship between voting and legitimacy can be subtler. For example, many Americans rejected Barack Obama as a legitimate president based on the baseless, racist myth that he was a foreign-born Muslim.<sup>73</sup> While some may have glommed on to this belief, in part, because they (consciously or unconsciously) perceived Obama’s presidency to be powered by a Black electorate, others simply found a Black president unbearable.<sup>74</sup> Thus, the rejection of voting may simply be one facet of a wider rejection of Black political power; singling out Black voting may be too narrow or simplistic.<sup>75</sup>

But, none of this dismisses the systematic external efforts to undermine the Black vote as such. Even before *Shelby County*, there was constant sniping in the ground war to contain minority voting. Broadly “conservative” forces have consistently argued for stringent ballot measures, the curtailing of extended voting hours, changes in voting practices and technology, and at times, they have attacked legal voting practices, such as “Souls to the Polls,” to, predictably, depress minority voting.<sup>76</sup> Only those with an appropriately dark sense of humor can appreciate the result of the Supreme Court’s conclusion that the country had so changed that the VRA was not needed.<sup>77</sup> Within hours of the VRA being denuded, the Texas legislature proposed new,

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traits that predict they would not regularly vote. *See generally* Thomas J. Miles, *Felon Disenfranchisement and Voter Turnout*, 33 J. LEGAL STUD. 85 (2004). But, even that worry need not derail us. Insofar as compulsory voting would require all citizens to record some version of political preferences, both the corrosion of being stripped of the right to vote and the ex-ante likelihood that one would have voted are addressed.

73. *See* Jesse Byrnes, *Poll: Majority of Republicans Think Obama Is a Muslim*, HILL (Sept. 1, 2015, 8:57 AM), <https://thehill.com/blogs/blog-briefing-room/news/252393-poll-majority-of-republicans-thinks-obama-is-a-muslim> [<https://perma.cc/VSU6-UHVJ>].

74. *See generally* Bryan Adamson, *The Muslim Manchurian Candidate: Barack Obama, Rumors, and Quotidian Hermeneutics*, 25 J. CIV. RTS. & ECON. DEV. 581 (2011); Alex M. Johnson, Jr., *What the Tea Party Movement Means for Contemporary Race Relations: A Historical and Contextual Analysis*, 7 GEO. J.L. & MOD. CRIT. RACE PERSPS. 201 (2015).

75. Many pressed me on this and related arguments. I am particularly grateful to Daniel Fryer for conversation presenting the problem with great subtlety.

76. *See, e.g.*, Schwartz, *supra* note 12, at 647; Tokaji, *supra* note 12, at 1743.

77. From 2013 to 2014, Alabama, Arizona, Arkansas, Florida, Georgia, Iowa, Kansas, Mississippi, Missouri, Montana, North Carolina, Ohio, South Carolina, Texas, and Wisconsin all announced or passed voter suppression laws. *See The Battle to Protect the Ballot: Voter Suppression Measures Passed Since 2013*, ACLU, <https://www.aclu.org/issues/voting-rights/fighting-voter-suppression/battle-protect-ballot-voter-suppression-measures> [<https://perma.cc/HNE5-RERW>] (last visited Sept. 17, 2021) [hereinafter *The Battle to Protect the Ballot*].

more restrictive voting laws certain to depress Black voting.<sup>78</sup> Texas was, predictably, followed by a rash of other states.<sup>79</sup>

Thus, the present is marked by increasingly virulent contestation of minority votes, couched in terms of securing voting integrity, despite the persistent failure of even the most politically motivated to find any evidence of voter fraud.<sup>80</sup> Each instance of resistance takes its place in the long, historical opposition to Black citizenship. Even as I write this manuscript, the Supreme Court has further weakened the VRA, determining that vote tabulation methods that disproportionately burden minority voters do not violate section 2 of the VRA.<sup>81</sup> Although the ramifications are yet to be seen, there is the distinct sense that the VRA's wall of defense has collapsed, and the battles that African American marchers thought were won generations ago will have to be refought.<sup>82</sup> The war to exclude the Black vote may now continue with minimal federal oversight.

The point is clear. Resistance to minority voting, especially against that of Black Americans, is a defining fault line in American voting rights. Such resistance undermines Black Americans' demands to be considered full and equal citizens. Indeed, it is telling that voting legislation that would ease burdens on Black Americans is painted as a ploy to permit mass noncitizen voting. Senator Ted Cruz, for example, falsely and cynically asserted that the proposed "For The People Act"—intended to repair the judicial damage done to the VRA—would permit millions of "illegal aliens" to vote.<sup>83</sup> This rhetoric intertwines calls for Black voting rights with the rights of others who are viewed as outside the core body politic. It elides the call to protect Black votes with those who are, in fact, not full citizens and, in so doing, taps into the historical sense that Black demands come from those who are not fully American. Without needing to be precise, it undermines the claim that franchise belongs equally to Black Americans and is not to be contested.

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78. See Daniel P. Tokaji, *Responding to Shelby County: A Grand Election Bargain*, 8 HARV. L. & POL'Y REV. 71 (2014); Ed Pilkington, *Texas Rushes Ahead With Voter ID Law After Supreme Court Decision*, GUARDIAN (June 25, 2013, 3:32 PM), <https://www.theguardian.com/world/2013/jun/25/texas-voter-id-supreme-court-decision> [<https://perma.cc/C59Z-FJ89>].

79. See *The Battle to Protect the Ballot*, *supra* note 77.

80. See, e.g., Marina Villeneuve, *Report: Trump Commission Did Not Find Widespread Voter Fraud*, ASSOCIATED PRESS (Aug. 3, 2018), <https://apnews.com/article/north-america-donald-trump-us-news-ap-top-news-elections-f5f6a73b2af546ee97816bb35e82c18d> [<https://perma.cc/WK5Q-88BG>].

81. See generally *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021).

82. See Richard L. Hasen, Opinion, *The Supreme Court Is Putting Democracy at Risk*, N.Y. TIMES (July 1, 2021), <https://www.nytimes.com/2021/07/01/opinion/supreme-court-rulings-arizona-california.html> [<https://perma.cc/29PB-3FY4>].

83. Brandon Mulder, *Ted Cruz Repeats False Claim That Voting Bill "Would Register Millions of Illegal Aliens to Vote"*, POLITIFACT (May 14, 2021), <https://www.politifact.com/factchecks/2021/may/14/ted-cruz/ted-cruz-repeats-false-claim-voting-bill-would-reg/> [<https://perma.cc/K8JJ-VZUM>].

## II. COMPULSORY VOTING AND DEMOCRATIC LEGITIMACY

The unfettered right of Black Americans to vote and to be secure in their political equality has been under attack since its inception. Efforts to secure the Black vote by expanding access to voting have obviously changed much, but at every turn, these initiatives have faced renewed resistance.<sup>84</sup> In other words, universal access to voting has been insufficient to secure the Black vote. What is needed now is a change from political norms of allowance to expectation, from permission to obligation. The most decisive way to foreclose the inchoate sense that there is something innately suspicious about Black voting is to establish a regime that legally obligates all Americans to vote.

Advocates for compulsory voting are hardly new; they are nearly as ancient as democracy itself.<sup>85</sup> Yet, compulsory voting advocates in the United States are dismissed out of hand. Such calls are seen as not viable, constitutionally dubious, and perhaps, even anti-American; this is true despite our shockingly low rates of voting participation and gaping political inequality.<sup>86</sup> Thus, an exploration of compulsory voting could address a host of democratic ills apart from the racial focus here. Compulsory voting is an already compelling idea, but importantly, the fact that it can temper our historical racial battle about the meaning of Black citizenship makes it even more urgent.

For clarity's sake, let me define "compulsory voting." A system of compulsory voting is any system in which citizens have a widely known legal duty to participate in a range of local and national elections.<sup>87</sup> The required participation is obviously aimed at prompting eligible voters to register political preferences of some sort, but it may—indeed, in America it probably must—allow them to register a protest vote, most likely by choosing "none of the above" or submitting a blank ballot.<sup>88</sup> Indeed, in some jurisdictions, citizens merely need to register that they appeared at their polling place and need not cast a ballot at all.<sup>89</sup> Complementary to citizens' obligations to vote would be states' requirements to ensure and track compliance with the voting requirement, similar to statutory obligations to track compulsory school

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84. See *supra* Part I.

85. See Richard L. Hasen, *Voting Without Law?*, 144 U. PA. L. REV. 2135, 2173–74 (1996).

86. See *id.*

87. The practical matter of the necessary legal sanctions to enforce such a duty will be explored later. See *infra* text accompanying notes 124–27. The philosophical question of whether coercive sanctions are truly "laws" or simply state-sponsored norms is set aside for now. Elsewhere, I have expressed my doubts that sanctionless norms are properly distinguished as law. See Ekow N. Yankah, *The Force of Law: The Role of Coercion in Legal Norms*, 42 U. RICH. L. REV. 1195 (2008). Kara Woodbury-Smith offers the intriguing view that such norms ought to be considered law because they are "coercion-apt." See Kara Woodbury-Smith, *The Nature of Law and Potential Coercion*, 33 *RATIO JURIS* 223 (2020).

88. For a vivid imagining of a mass protest vote campaign, see generally JOSÉ SARAMAGO, *SEEING* (2006).

89. See Lijphart, *supra* note 23, at 2.

attendance.<sup>90</sup> We can also compare an obligation to vote to our jury duty ideals, drawing lessons from these systems' successes and failures.

In what follows, I will focus not on the constitutional nor political machinations required to institute compulsory voting.<sup>91</sup> I will only briefly note that compulsory voting might be instituted for federal elections, in all probability, generating similar voting patterns for a wide range of major state and local elections held simultaneously.<sup>92</sup> In any case, it is clear that compulsory voting could be adopted by states individually, securing the important benefits for themselves and influencing national norms.<sup>93</sup> There are also intriguing proposals to mobilize substate local election laws to reinforce voting.<sup>94</sup> But, rather than a manual on how to install compulsory voting, my goal is to address the philosophical arguments for and against it. First, I will survey the considerable democratic arguments for compulsory voting. Then, I will address the most prominent arguments against compulsory voting. Lastly, I will illustrate the important racial benefits it offers.

As mentioned, compulsory voting is an ancient idea.<sup>95</sup> In ancient Athens, voters were shepherded with “red-dyed rope” to voting stations.<sup>96</sup> When that proved ineffective, voters were simply paid to compel voting.<sup>97</sup> Likewise, compulsory voting is an ordinary feature of elections in a number of countries around the world.<sup>98</sup> Not surprisingly, countries that have adopted compulsory voting have vastly higher rates of voting participation, both higher than the United States (an admittedly low bar) and higher than their comparable neighbors.<sup>99</sup> Encouragingly, even nations that have ended experiments with compulsory voting experience elevated voting levels, at least for some period of time.<sup>100</sup>

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90. See, e.g., Matthew P. Miller, Note, *Section Seven: Compliance Issues Between New York State Education Law and the Convention on the Rights of the Child*, 12 N.Y.C. L. REV. 548, 555–56 (2009).

91. See, e.g., Hans A. von Spakovsky, *Compulsory Voting Is Unconstitutional*, HERITAGE FOUND. (Apr. 1, 2015), <https://www.heritage.org/political-process/commentary/compulsory-voting-unconstitutional> [<https://perma.cc/J8D5-ZPVP>].

92. See Brandon Marc Draper, *No More Half Measures: The Case for Compulsory Voting in United States Elections*, 13 ELON L.J. 147, 189–90 (2020); Eric Lund, Note, *Compulsory Voting: A Possible Cure for Partisanship and Apathy in U.S. Politics*, 31 WIS. INT'L L.J. 90, 102–12 (2013).

93. See Draper, *supra* note 92, at 186–88; Lund, *supra* note 92, at 112–14.

94. See generally Joshua A. Douglas, *The Right to Vote Under Local Law*, 85 GEO. WASH. L. REV. 1039 (2017).

95. See generally Hasen, *supra* note 85.

96. See MOGENS HERMAN HANSEN, *THE ATHENIAN ECCLESIA: A COLLECTION OF ARTICLES 1976–83*, at 124 (1983); E.S. STAVELEY, *GREEK AND ROMAN VOTING AND ELECTIONS 80* (H.H. Scullard ed., 1972); DAVID STOCKTON, *THE CLASSICAL ATHENIAN DEMOCRACY 71–72* (1990); Hasen, *supra* note 85, at 2135.

97. See Hasen, *supra* note 85, at 2135–36. Perhaps, too much, Plato accused such payments of making people, “idle and cowardly, and encouraged them in the love of talk and money.” *Id.* at 2135 n.3 (quoting Plato, *Gorgias*, in 7 GREAT BOOKS OF THE WESTERN WORLD 252, 288 (Robert M. Hutchins ed., Benjamin Jowett trans., 1952)).

98. See Hasen, *supra* note 85, at 2169–73. See generally Lijphart, *supra* note 23.

99. See Lijphart, *supra* note 23, at 2–4.

100. See *id.*

Significantly increasing voter participation is surely sufficient reason to visit the idea of compulsory voting.<sup>101</sup> The notoriously low American voter participation rate means that, even in heavily contested national elections, less than a majority of eligible voters are tallied.<sup>102</sup> These numbers are vastly lower in less glamorous, local elections.<sup>103</sup> Ironically, these local elections, though less symbolic than the presidential election, exert the greatest influence on the day-to-day life of voters and their communities.<sup>104</sup> Thus, national policies are often decided by a minority of a minority, while important local policies on policing, housing, and countless other issues are decided by the small set of individuals who bother to vote.<sup>105</sup> Under such conditions, the typically unquestioned democratic warrant of our electoral politics begins to look shaky, indeed.<sup>106</sup> Without guarantees that the minority is perfectly representative of the interests of all, the unavoidable dangers of minority rule loom.<sup>107</sup>

Compulsory voting offers an obvious solution to the democratic legitimacy gap of low voter turnout. One need not imagine perfect compliance to recognize the vast difference between overwhelming portions of the population voting and a small minority determining government policy. Even setting aside the historic combat over Black political power, low voter turnout (i.e., *de facto* minority rule) exacerbates political inequality.

In America, the educated and wealthy disproportionately vote, biasing politics in their favor.<sup>108</sup> Nor is this an easily curable effect of low salience elections because voter inequality is often highest in high turnout (but noncompulsory) elections.<sup>109</sup> This, in combination with the pernicious

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101. See Chris Iovenko, *These Countries Make Voting Mandatory. Could It Work in the United States?*, HUFFINGTON POST (June 1, 2020, 5:54 AM), [https://www.huffpost.com/entry/countries-voting-mandatory-united-states\\_n\\_5ed1301ec5b6658234cf8796](https://www.huffpost.com/entry/countries-voting-mandatory-united-states_n_5ed1301ec5b6658234cf8796) [https://perma.cc/8HSB-TPDF].

102. See RUY A. TEIXEIRA, *THE DISAPPEARING AMERICAN VOTER* 100 (1992); Lund, *supra* note 92, at 90–91.

103. See Lund, *supra* note 92, at 90–91.

104. See generally David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 J.L. & POL. 419 (2007). Of course, it is true that local agencies may control countless matters of minor, but intimate, importance for one's life, from building repair requirements to how many late night bars are open on one's street. But, local agencies may also tackle large-scale problems intertwined with important aspects of life. For an example of how local governmental agencies are seeking to tackle public health issues, see Paul A. Diller, *Local Health Agencies, The Bloomberg Soda Rule, and the Ghost of Woodrow Wilson*, 40 FORDHAM URB. L.J. 1859, 1862–64 (2013).

105. See Lund, *supra* note 92, at 90–91.

106. See Robert Post, *Democracy, Popular Sovereignty, and Judicial Review*, 86 CALIF. L. REV. 429, 438 (1998).

107. For an exploration of the view that nonvoters are sufficiently close, if not identical, to voters, see TEIXEIRA, *supra* note 102, at 100–01. See generally Michael M. Gant & William Lyons, *Democratic Theory, Nonvoting, and Public Policy: The 1972–1988 Presidential Elections*, 21 AM. POL. Q. 185 (1993). For more compelling counterarguments, see Lijphart, *supra* note 23, at 4.

108. See Lijphart, *supra* note 23, at 1–5. Voting is not, surprisingly, the tip of the iceberg. In more intensive and more time-consuming aspects of participation, the inequality in voter participation increases.

109. See *id.*



influence of money in electoral politics, creates the cynical impression among much of the public that politics is a game in which the rich and well-connected divvy up political goods.<sup>110</sup> With both the content of policy and the identity of political leaders dominated by the wealthy and educated, certain political options are simply considered off the table, and the wider public, especially the vulnerable, understand politics as an insider's game.<sup>111</sup> This leads to a vicious cycle in which inequality breeds cynicism, which breeds further inequality.

A cold-eyed or cynical reader may wonder if this inequality is a problem to be solved or a feature to be protected. While *de jure* prohibitions from voting may offend our sensibilities, is forcing insufficiently invested citizens to vote a worthwhile goal? Apathetic or ignorant voters might have random preferences, adding nothing but noise to the political system.<sup>112</sup> Worse, they might be easily manipulated by demagogues (where a demagogue is always read as one appealing to whatever views one abhors).

Such views assume a correct set of political conclusions rarely agreed upon. There are surely abhorrent ways of political reasoning, but there is little reason to think they are confined to the uneducated or turn on suppression of democratic participation. History has given little reason to believe that electoral aristocracies, whether liberal or conservative, reliably result in morally attractive outcomes.<sup>113</sup> Even outside atrocities and genocidal regimes, the politically structured inequalities of our current moment hardly recommend themselves.

But, further, the view that voters are too apathetic and ignorant takes a static view of voter education levels.<sup>114</sup> Academics sometimes seem to delight in evidence detailing voter ignorance.<sup>115</sup> Yet, there is also

110. *See id.*

111. *See id.* at 3–4. Perhaps, the better phrase would be “outside the window.”

112. *See* Keith Jakee & Guang-Zhen Sun, *Is Compulsory Voting More Democratic?*, 129 *PUB. CHOICE* 61, 70 (2006). The argument is regularly deployed in contemporary conversation. *See* Andrew C. McCarthy, *Major League Baseball and the Voting-Rights Con*, *NAT'L REV.* (Apr. 3, 2021, 12:43 PM), <https://www.nationalreview.com/2021/04/major-league-baseball-and-the-voting-rights-con/> [<https://perma.cc/DBD6-9U8J>]; Dan McLaughlin, *Not Everyone Should Be Made To Vote*, *NAT'L REV.* (Mar. 31, 2021, 12:47 PM), <https://www.nationalreview.com/2021/03/not-everyone-should-be-made-to-vote/> [<https://perma.cc/Q4HF-3DFM>]; Kevin D. Williamson, *Why Not Fewer Voters?*, *NAT'L REV.* (Apr. 6, 2021, 7:38 PM), <https://www.nationalreview.com/2021/04/why-not-fewer-voters/> [<https://perma.cc/L3HP-TWT9>].

113. *See* James Allan, *Do Judges Know Best?*, 32 *CONST. COMMENT.* 479 (2017) (reviewing ILYA SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER* (2d ed. 2013)).

114. *See* Hasen, *supra* note 85, at 2174–75; Lijphart, *supra* note 23, at 4.

115. For a recent, extensive argument that voter ignorance makes democratic governance nearly fatally flawed, *see* generally ILYA SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER* (2d ed. 2013). This argument is not new; a classic in the genre is ANGUS CAMPBELL ET AL., *THE AMERICAN VOTER* (1960). Strong evidence indicates little or no increase in political knowledge over time. *See* MICHAEL X. DELLI CARPINI & SCOTT KEETER, *WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS* 62–134 (1996). *See generally* ERIC R.A.N. SMITH, *THE UNCHANGING AMERICAN VOTER* (1989); Stephen Earl Bennett, *Trends in Americans' Political Information, 1967–1987*, 17 *AM. POL.*

encouraging evidence in the opposite direction. For example, voters often learn about relevant issues immediately before elections, even if that knowledge recedes when not needed.<sup>116</sup> Many voters take cues from trusted family, friends, and community leaders, which, if not ideal, is hardly an illegitimate method of voting.<sup>117</sup> Viewed without snobbery, I often suspect the gap between self-declared “educated voters” and disdained “uninformed voters” breaks down rather quickly. In any case, there is reason to believe that, in a world where everyone knows that they are obligated to vote, voters would increase efforts to collect sufficient information, or campaign tactics would change to consider the new electoral reality.<sup>118</sup>

What if voter apathy turns out to be a more hardened or principled resistance? Do voters have a right not to vote, be it a First Amendment right to avoid compelled speech or a deeper, autonomy-based right to ignore the whirling of politics around them? There is certainly a widely held sense that requiring voting would run against a reflexive American individualism and the rejection of positive political duties.<sup>119</sup> Relatedly, even if there were no autonomy-based right against voting, enforcement methods could be unjustifiable.<sup>120</sup>

I find it difficult to credit bald autonomy claims to exit elections. There are countless positive political duties that already inconvenience citizens, from registering with selective services to filing taxes and complying with countless civic regulations. Although each of these positive political duties are met periodically with protestations that they violate one’s autonomy, all

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Q. 422 (1989); Michael X. Delli Carpini & Scott Keeter, *Stability and Change in the U.S. Public’s Knowledge of Politics*, 55 PUB. OPINION Q. 583 (1991).

116. Cf. Doris A. Graber, *Why Voters Fail Information Tests: Can the Hurdles Be Overcome?*, 11 POL. COMM. 331 (1994). See generally SAMUEL L. POPKIN, *THE REASONING VOTER: COMMUNICATION AND PERSUASION IN PRESIDENTIAL CAMPAIGNS* (1991); Milton Lodge et al., *The Responsive Voter: Campaign Information and the Dynamics of Candidate Evaluation*, 89 AM. POL. SCI. REV. 309 (1995); Samuel L. Popkin, *Information Shortcuts and the Reasoning Voter*, in *INFORMATION, PARTICIPATION, AND CHOICE: AN ECONOMIC THEORY OF DEMOCRACY IN PERSPECTIVE* 17 (Bernard Grofman, ed. 1993). Further, there are intriguing suggestions on how to build election districts to foster greater learning by voters. See generally Christopher S. Elmendorf & David Schleicher, *Districting for a Low-Information Electorate*, 121 YALE L. J. 1846 (2012).

117. See generally ARTHUR LUPIA & MATHEW D. MCCUBBINS, *THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW?* (1998); POPKIN, *supra* note 116; Philip E. Converse, *Popular Representation and the Distribution of Information*, in *INFORMATION AND DEMOCRATIC PROCESSES* 369 (John A. Ferejohn & James Kuklinski eds., 1990); Popkin, *supra* note 116. See DONALD WITTMAN, *THE MYTH OF DEMOCRATIC FAILURE: WHY POLITICAL INSTITUTIONS ARE EFFICIENT* 1–6 (1995).

118. New York City’s recent change to rank choice voting and its effect on how candidates choose to campaign to avoid alienating those who may rank them second or third provides an illustration of how election structure can change how information is presented to voters. Cf. Elmendorf & Schleicher, *supra* note 116.

119. See Hasen, *supra* note 85, at 2174–75.

120. It goes without saying that there are legal duties that might be morally acceptable but that would require enforcement methods which are, themselves, unjustified. To take an obvious example, Fourth Amendment restrictions on police power illustrate that whether a criminal law is justified does not mean any police actions to enforce that law will itself be justified.

but the libertarians among us recognize these duties are justified by the public goods they secure. This is particularly compelling for civic duties that scaffold our very political rights.

The First Amendment arguments are equally unavailing. Compulsory voting would not require citizens to vote for any particular candidate. Ballots could allow write-in candidates or explicit voting for “none of the above.”<sup>121</sup> In some compulsory voting regimes, citizens are required to appear at voting stations on election day, but they are not actually required to cast a vote, if they refuse.<sup>122</sup> Indeed, compulsory voting does more to secure a First Amendment right of conspicuous rejection of political options than widespread nonvoting, which makes suppression, apathy, and rejection indistinguishable.

Enforcement concerns are perhaps even less pressing. One robust lesson from the compulsory voting regimes of the world is that even a range of minor inducements and minor formal legal penalties, almost universally unenforced, achieve overwhelming compliance. Italy, for example, “punishes” nonvoters by posting their names on a community notice board and generates the highest voter turnout of Western democracies.<sup>123</sup> Australia threatens nonvoters with a fifty-dollar fine.<sup>124</sup> Even countries that threaten more severe punishments—Greek nonvoters risk imprisonment of one to twelve months—threaten these punishments in name only; indeed, enforcement is so lax—in Australia fines affect only 4 percent of voters, and, in Greece, jail time is not actually used at all—that enforcement provisions border on symbolic.<sup>125</sup> Yet, even with lax enforcement, countries such as Belgium, Australia, Greece, and Italy have among the highest turnouts in the industrialized world, ranging from 78 percent to 94 percent, compared to 54 percent in the United States.<sup>126</sup> Further, countless other incentivizing mechanisms could be used to enforce voting, such as eligibility to government benefits.<sup>127</sup>

Lastly, one might think that, even without harsh sanctions, imposing a legal obligation to vote punishes the most economically and racially vulnerable. High powered professionals tend to have sufficient control over their schedules and, perhaps, live in areas where voting is relatively quick and painless.<sup>128</sup> Yet, as painful election day pictures and the current fights

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121. Draper, *supra* note 92, at 186; Thomas Kleven, *Toward a More Democratic America*, 19 SEATTLE J. SOC. JUST. 1, 15–17 (2020).

122. *See generally* Lijphart, *supra* note 23.

123. Hasen, *supra* note 85, at 2169–70.

124. *See id.*

125. *See id.*

126. *See id.* at 2171–72.

127. Compulsory voting regimes in Brazil and Peru stand as examples. *See* Timothy J. Power & J. Timmons Roberts, *Compulsory Voting, Invalid Ballots, and Abstention in Brazil*, 48 POL. RES. Q. 795, 800 (1995); Lisa Hill, *Compulsory Voting: Residual Problems and Potential Solutions*, 37 AUSTL. J. POL. SCI. 437, 443 (2002).

128. *See* HANNAH KLAIN ET AL., BRENNAN CTR. FOR JUST., WAITING TO VOTE: RACIAL DISPARITIES IN ELECTION DAY EXPERIENCES (2020); CHRISTOPHER FAMIGHETTI, BRENNAN CTR. FOR JUST., LONG VOTING LINES EXPLAINED (2016).

to reduce urban polling stations remind us, many in less well served areas spend hours waiting in line to cast their ballots.<sup>129</sup> For a secretary or machinist who may have much less flexibility to restructure any given workday, the added duty may hardly seem a favor at all.

This utterly sensible concern seems to me, again, to take too static a view of how our voting practices might look under a compulsory voting regime. Central to obligating ordinary citizens to vote is requiring the state to build sufficient infrastructure both to meet and to monitor this requirement. A world in which we invert voting from right to civic duty is one in which the state must reinforce its voting mechanisms, whether by creating voting holidays, opening more polling places, expanding voting periods, or initiating creative ideas, such as using the Internal Revenue Service (IRS) to register voters.<sup>130</sup>

It is fair to question why we should imagine that a legal duty to vote would result in the state's making compliance easy. As a friend reminded me, paying taxes is a legal duty and does not feel particularly easy.<sup>131</sup> While specifically racial facets of this question are addressed later, I think there is reason to be generally optimistic. If legal obligations are hardly effortless to meet, a wider view shows that reciprocal obligations on citizen and state can be transformative. For example, American schools have both a complicated anti-Catholic history, as well as a host of serious problems, but we ought not ignore how transformative the shift to compulsory education was a century ago.<sup>132</sup> Further, registering for selective service or complying with numerous vehicle registration requirements can be unpleasant, but people broadly proceed smoothly with such registration.<sup>133</sup> Even setting aside the annual grumbling, perhaps it is no coincidence that we have enabled and secured electronic tax filing and payment before electronic voting.<sup>134</sup> Paired with state monitoring, financial incentives, and public shaming, we have every reason to believe that compulsory voting would lead, if not to utopian visions, to vast improvements in individuals' ability to vote.

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129. See KLAIN ET AL., *supra* note 128; FAMIGHETTI, *supra* note 128.

130. This suggestion would mimic the practices already in use in Canada, hardly an exotic foreign land. See Jeremy Bearer-Friend & Vanessa Williamson, Opinion, *The I.R.S. Can Register Voters as Well as the D.M.V., and Maybe Better*, N.Y. TIMES (Sept. 29, 2021), <https://www.nytimes.com/2021/09/29/opinion/taxes-voter-registration.html> [<https://perma.cc/WU5U-3HZQ>].

131. I am grateful to Rick Bierschbach and Guy-Uriel Charles for pressing this line of inquiry.

132. See Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism*, 15 YALE L. & POL'Y REV. 113, 127–28 (1996). See generally Mark Tushnet, *Public and Private Education: Is There a Constitutional Difference?*, 1991 U. CHI. LEGAL F. 43.

133. The federal website for registering for selective service proclaims that one can register in one minute. See SELECTIVE SERV. SYS., <https://www.sss.gov/> [<https://perma.cc/LDY6-D8VC>] (last visited Sept. 17, 2021).

134. The ability to pay online is prominently featured on the IRS. website. See *Paying Your Taxes*, IRS, <https://www.irs.gov/payments> [<https://perma.cc/EHR5-TZXT>] (last visited Sept. 17, 2021).

Another rich example of a compulsory duty of citizenship is jury service. Jury service obviously differs in interesting ways from voting. For example, juries reason over a particular set of facts (and some limited questions of law) rather than considering the entire breadth of politics that elections present.<sup>135</sup> Further, jury service is often much more demanding, requiring days, weeks, or even months from individual citizens.<sup>136</sup> But, jury service is a way to empower citizens to reason together, as civic equals, and to direct the state power.<sup>137</sup> There is a similarly long and turbulent history of protecting jury duty against racial and gender exclusion, not only for instrumental reasons but also to secure an important symbol of equal citizenship.<sup>138</sup> The powerful commitment of jury duty is not only that we, as a society, permit citizens to do this but also that we insist that citizens ought to do this. To be sure, jury service is a double-edged example. On one hand, jury service is a model example of compulsory service that is imposed without oppressive criminalization or enforcement.<sup>139</sup> On the other hand, however, jury service cautions against hoping that compulsory service automatically leads to robust financial and institutional support.<sup>140</sup>

These democratic health concerns provide reason to support a compulsory voting regime. Earlier, we discussed the structuralist turn in voting rights, which held that partisan threats had eclipsed the historical threats of racism to our democracy.<sup>141</sup> Despite my efforts to show how central racism remains to the undermining of elections, it is surely too much to pretend that race is the only factor driving the democratic ills canvassed. Further, others may find my explanations unconvincing. Yet, even if we disagree on the precise extent, all but the intractable will see that Black voter suppression remains an American problem and a hovering threat. Further, we can reach consensus that our bruising history gives Black Americans reason to be wary of such

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135. In his now classic article, Paul Butler focuses on juries' long understood power not only to determine issues of fact but also, at times, to decide issues of law, particularly through jury nullification. See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995). Butler advocates for juries to systematically reject racially unjust criminalization of narcotics and to mitigate the disproportionate punishment of Black Americans. See *id.* In that sense, Butler's suggestion is a jury-focused cousin to the arguments found here. See generally *id.*

136. See JANICE T. MUNSTERMAN ET AL., THE RELATIONSHIP OF JUROR FEES AND TERMS OF SERVICE TO JURY SYSTEM PERFORMANCE 24 (1991); Nancy J. King, *Juror Delinquency in Criminal Trials in America, 1796–1996*, 94 MICH. L. REV. 2673, 2696 (1996).

137. See Melissa Schwartzberg, *Aristotle and the Judgment of the Many: Equality, Not Collective Quality*, 78 J. POL. 733, 734–36 (2016).

138. See generally *Batson v. Kentucky*, 476 U.S. 79 (1986); Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Q.J. ECONS. 1017 (2012). On the importance of sharing the equal privilege and burden of jury duty as a sign of full citizenship across gender, see generally *Duren v. Missouri*, 439 U.S. 357 (1979) (overturning conviction on the basis that allowing a gender-based exception for women to serve on a jury both discriminated against men and treated women as less than equally valued citizens). Many scholars pressed the important analogy of jury service on me. I am particularly grateful to Beth Wilensky for her instructive exploration.

139. See generally King, *supra* note 136; MUNSTERMAN ET AL., *supra* note 136.

140. See, e.g., King, *supra* note 136, at 2696.

141. See *supra* notes 57–61 and accompanying text.

voter suppression. And, failing even that, it is easy to note that compulsory voting secures a unique form of political equality across class, education, and myriad other markers. Noticing these other democratic reasons to support compulsory voting is not merely a rearguard strategy. One could be ecumenical about the precise equality securing features of compulsory voting and still support it.

The ultimate argument that compulsory voting would simply violate American norms boils down to little more than, “we don’t want to because we don’t want to.” Worse yet, some of the American allergy to universal voting surely stems from our historic distaste for Black voting. But, the point here is to give reasons for why we should change just such a norm. An individual autonomy right to be left alone or fear of coercive enforcement measures does not stand up as a reason to avoid compulsory voting.

### III. REINFORCING THE LEGITIMACY OF BLACK VOTING

The most common objections to compulsory voting are unconvincing. But, more importantly, the promise of compulsory voting to close—or at least temper—a long-lasting racial wound has hardly been noticed. Understandably, some may be skeptical of such an ambitious claim. Part of the examined history reveals how Black voting has met racist challenges, despite formal legal protections. Why, then, should we believe that compulsory voting would protect the Black franchise where other measures have failed?

Given our history, it would be foolhardy to offer guarantees. Still, the through lines in the distrust of Black voting are particularly vulnerable to a regime of compulsory voting. While rejection of Black citizenship is premised on the racist view that Black Americans cannot legitimately exercise political power, this view can no longer be consciously (or, perhaps, even unconsciously) presented as a straightforward rejection of Black Americans’ legal right to vote. Thus, it is expressed in vague assertions of voter fraud. To be sure, those who traffic in these claims rarely make them with precision.<sup>142</sup> But, contemporary versions are a stew of imagined votes by noncitizens and ballot-harvesting, where politically naïve or disinterested potential voters are manipulated, along with fabricated votes from minority communities. In short, the claims turn on the unfounded, but unshakeable, suspicion that there are “too many votes” coming out of minority communities.<sup>143</sup>

Compulsory voting would end one of the more intractable claims challenging Black votes: the untethered claim that displays of Black voting power are, by themselves, suspicious. Such claims are particularly frustrating because they are often dressed up as entirely objective rejections

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142. Dave Boucher, *Sidney Powell, Kraken Legal Team Face Sanctions, Court Costs and Potential Disbarment over Election Lawsuits*, DETROIT FREE PRESS (Aug. 26, 2021, 12:37 PM), <https://www.freep.com/story/news/politics/2021/08/25/federal-judge-sanctions-sidney-powell-kraken-team-over-election-case/5484021001/> [<https://perma.cc/K8F7-5DZ5>].

143. See Rutenberg & Corasaniti, *supra* note 14.

based on predicted voter turnout. But, such expectations are typically based on thin evidence, often with racist assumptions built in. Indeed, the “too many votes” contestation need not be based on evidence at all; rather, as noted in the attack on election offices<sup>144</sup> and suspicion by ordinary, hostile white Americans, a merely uneasy sense that Black Americans are voting en masse is enough to engender suspicion. Obviously, a regime of compulsory voting denudes this sentiment. In a world in which 75 to 95 percent of the population complies with a voting requirement, there is little room for malicious conspiracy theories when minority votes are tallied.

A regime of universal compulsory voting inverts our expectations, thus sapping such claims of their power. By its very nature, a legal duty to vote dismisses the argument that some are intellectually incapable or too naïve to vote. Requiring citizens to vote places on them the duty to educate themselves in light of a civic duty. But, in any case, it makes concrete the constitutional commitment that no authority can be trusted to determine if a citizen’s vote is informed enough. Compulsory voting ends challenges rooted in a citizen’s adequacy to vote, whether in historical applications of intelligence or literacy tests or more modern disparagement that Black voters are simply too stupid to know their true interests.

So far, we have focused on the more global ways in which compulsory voting addresses suspicions surrounding Black Americans’ voting. The focus on this wider view is important because inverting the assumption that widespread Black voting is suspicious is as important as any particular doctrinal shift. Still, it is encouraging to note that, as we zoom in on discrete contemporary racial voting battlegrounds, compulsory voting also offers fresh solutions to many granular controversies.

Take, for example, the explosive debate around Georgia’s recently passed election law. Supporters claim the law was mischaracterized, merely standardizing Georgia’s election practices and instituting voter integrity measures.<sup>145</sup> Critics charged something much darker, portraying the law as a rebirth of the Jim Crow South.<sup>146</sup> In particular, provisions ending “Souls to the Polls”<sup>147</sup> programs by closing Sunday voting and prohibiting giving anything of value, including water, to people waiting to vote, continued the

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144. See Baldas et al., *supra* note 5.

145. See Peter W. Stevenson, *Expand Access? A Historic Restriction? What the Georgia Election Law Really Does.*, WASH. POST (Apr. 5, 2021, 3:33 PM), <https://www.washingtonpost.com/politics/2021/04/03/georgia-voting-law-explained/> [https://perma.cc/7NTV-DATN].

146. See e.g., Ari Berman, *Texas’s Voter-Registration Laws Are Straight Out of the Jim Crow Playbook*, NATION (Oct. 6, 2016), <https://www.thenation.com/article/archive/texas-voter-registration-laws-are-straight-out-of-the-jim-crow-playbook/> [https://perma.cc/E7A4-U7QE].

147. “Souls to the Polls” is the colloquial description of organized get-out-the-vote drives, often in minority communities, in which civic leaders encourage and organize voting immediately after church services, thus, increasing minority participation. See James Doubek & Steve Inskip, *Black Church Leaders in Georgia on the Importance of “Souls to the Polls.”* NPR (Mar. 22, 2021, 11:48 AM), <https://www.npr.org/2021/03/22/977929338/black-church-leaders-in-georgia-on-the-importance-of-souls-to-the-polls> [https://perma.cc/8BEM-P9PN].

long history of contesting Black voting.<sup>148</sup> Further, ominous proposed bills give Republicans with (unfounded) suspicious of voting fraud power to control voting in Fulton County, which is a disproportionately Black county, while leaving the rest of Georgia untouched.<sup>149</sup>

In a world in which voting is a requirement, such machinations become largely nonsensical or counterproductive. Where the state is obligated not only to allow but also to ensure that every eligible person votes, there is little reason to stymie any particular moment of voting. Indeed, under such a regime, a state would plausibly enlist such civic organizations to meet the legal requirement. As we noted in discussing the needed structural election reinforcement, a state that imposed an obligation to vote and had a reciprocal obligation to track compliance would be incentivized to expand, rather than restrict, voting opportunities.<sup>150</sup>

It would be foolhardy to think this would mean there could never be contestation of Black votes. Defining and counting the number of eligible voters, for example, might become hotly contested, much as population and racial data are in the census.<sup>151</sup> But, once the general shape of the population was known, it would be a marker of state failure if it were shown that an embarrassingly low percentage of Black Americans, Hispanic Americans, or Asian Americans, etc., had complied. By analogy, though public school systems are plagued with racial discrepancies, where these discrepancies come to public light, they engender heated public and political debate.<sup>152</sup> Likewise, compulsory jury service stands as a model that has inverted long-standing racial scars. Whatever the important failings on the ground,

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148. See Eugene Scott, *New Georgia Legislation Would Curb "Souls to the Polls,"* WASH. POST (Feb. 24, 2021, 7:30 AM), <https://www.washingtonpost.com/politics/2021/02/24/new-georgia-legislation-would-curb-souls-polls/> [<https://perma.cc/Q8C6-BKEG>].

149. See Ian Millhiser, *Georgia Republicans Didn't Waste Any Time in Using Their New Voter Suppression Law*, VOX (Aug. 5, 2021, 8:30 AM) <https://www.vox.com/22607616/georgia-republicans-fulton-county-atlanta-voter-suppression-sb202-jim-crow> [<https://perma.cc/UHG3-P455>].

150. See *supra* note 90 and accompanying text.

151. See William H. Frey, *The Nation Is Diversifying Even Faster Than Predicted, According to New Census Data*, BROOKINGS (July 1, 2020), <https://www.brookings.edu/research/new-census-data-shows-the-nation-is-diversifying-even-faster-than-predicted/> [<https://perma.cc/N53E-EKXP>]. For a sense of the long running contestation over racial census data, see Thomas B. Edsall, Opinion, *Who's Afraid of a White Minority*, N.Y. TIMES (Aug. 30, 2018), <https://www.nytimes.com/2018/08/30/opinion/america-white-minority-majority.html> [<https://perma.cc/239T-W87W>].

152. Two obvious examples include: (1) current national debates surrounding the disproportionately low numbers of Black students in selective classes and high schools and (2) the disproportionately high number of Black students disciplined in school. See Lauren Camera, *New York City's Most Selective High Schools Also Most Segregated*, U.S. NEWS & WORLD REP. (Mar. 19, 2019, 11:18 AM), <https://www.usnews.com/news/education-news/articles/2019-03-19/race-divides-elite-new-york-city-high-schools> [<https://perma.cc/7GXM-F4CS>]; Eliza Shapiro, *This Year, Only 10 Black Students Got into N.Y.C.'s Top High School*, N.Y. TIMES (Dec. 18, 2020), <https://www.nytimes.com/2020/03/19/nyregion/nyc-schools-numbers-black-students-diversity-specialized.html> [<https://perma.cc/99SU-HMEB>]. See generally CATHERINE Y. KIM, ET AL., *THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM* (2010); Jason P. Nance, *Dismantling the School-to-Prison Pipeline: Tools for Change*, 48 ARIZ. ST. L.J. 313 (2016).



the fact that jury service is compulsory means that legal and political conversation centers on the gap between Black representation on juries rather than the once held reflexive supposition that Black representation is suspicious.<sup>153</sup>

The same applies to the slew of proposals and recently passed laws imposing voter-ID requirements in several states. Critics rightfully point out that such laws “protect” against a nonexistent problem; there is voluminous evidence that in-person voter fraud is nearly nonexistent.<sup>154</sup> Such laws do, however, disproportionately disenfranchise minority voters.<sup>155</sup> Proponents often express elaborate bafflement that a simple identification requirement could be problematic, insisting these laws are nothing more than commonsense security measures.<sup>156</sup> A further, more subtle argument could recognize that, while actual instances of voter fraud are exceedingly rare, voter-ID laws receive widespread popular support and thus play an important role in the perceived legitimacy of elections.<sup>157</sup>

Once again, a compulsory voting regime reorients the debate, curing the poisonous racial politics. One reason voter-ID laws have become so highly

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153. For a critique that discrimination in prosecutions, grand juries, and juries is reflective of the inherent racism of the criminal law system, see generally Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 75 (2016).

154. See *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUST. (Jan. 31, 2017), <https://www.brennancenter.org/our-work/research-reports/debunking-voter-fraud-myth> [<https://perma.cc/XJ3J-6W93>]; Jessica Huseman, *How the Case for Voter Fraud Was Tested—And Utterly Failed*, PROPUBLICA (June 19, 2018, 3:40 PM), <https://www.propublica.org/article/kris-kobach-voter-fraud-kansas-trial> [<https://perma.cc/5DLF-XVB3>]; Rebecca Shabad, *Barr Claims Voting by Mail Will Lead to Fraud, “Counterfeiting.” Admits He Has Zero Evidence.*, NBC NEWS (June 26, 2020, 7:39 AM), <https://www.nbcnews.com/politics/2020-election/barr-claims-voting-mail-will-lead-fraud-counterfeiting-admits-he-n1232208> [<https://perma.cc/R38B-X84U>].

155. See WENDY R. WEISER & MAX FELDMAN, BRENNAN CTR. FOR JUST., *THE STATE OF VOTING 2018* (2018), <https://www.brennancenter.org/our-work/research-reports/state-voting-2018> [<https://perma.cc/XL4F-DHFH>]; Vann R. Newkirk II, *How Shelby County v. Holder Broke America*, ATLANTIC (July 10, 2018), <https://www.theatlantic.com/politics/archive/2018/07/how-shelby-county-broke-america/564707/> [<https://perma.cc/8QFJ-W2DQ>].

156. See LORI MINNITE & DAVID CALLAHAN, DEMOS, *SECURING THE VOTE: AN ANALYSIS OF ELECTION FRAUD 14* (2003), [https://www.demos.org/sites/default/files/publications/EDR\\_-\\_Securing\\_the\\_Vote.pdf](https://www.demos.org/sites/default/files/publications/EDR_-_Securing_the_Vote.pdf) [<https://perma.cc/27HA-T8UR>]; Derek T. Muller, *What’s Old Is New Again: The Nineteenth Century Voter Registration Debates and Lessons About Voter Identification Disputes*, 56 WASHBURN L.J. 109, 109 (2017); Ross Douthat, *Opinion, The Myths of Voter ID*, N.Y. TIMES (Feb. 12, 2019), <https://www.nytimes.com/2019/02/12/opinion/voter-id-study-republicans-democrats.html> [<https://perma.cc/8TYN-AGSZ>]. Whatever their legitimacy, voter-ID laws, when surveyed, enjoy broad support. See HANS VON SPAKOVSKY, HERITAGE FOUND., *VOTER PHOTO IDENTIFICATION: PROTECTING THE SECURITY OF ELECTIONS 5* (2011), <http://www.heritage.org/research/reports/2011/07/voter-photo-identification-protecting-the-security-of-elections> [<https://perma.cc/CE9V-THZC>]; *Results of SurveyUSA News Poll #17639*, SURV. USA (Nov. 4, 2010), <http://www.surveysusa.com/client/PollReport.aspx?g=a26c8f3-4a0a-40e5-a503-66444130ca17> [<https://perma.cc/TF87-VEQH>]. Further, sheer empirical clarity is unlikely to settle debates about the relative risks and costs of even small amounts of voter fraud. See LORRAINE C. MINNITE, *THE POLITICS OF VOTER FRAUD 8–9* (2007); Chad Flanders, Note, *How to Think About Voter Fraud (and Why)*, 41 CREIGHTON L. REV. 93, 94–95 (2007).

157. See generally Flanders, *supra* note 156.

contested is both because of their racially disproportionate impact and because voter-ID advocates often resist widespread ID access, undermining claims that such proposals are good faith attempts absent racial animus.<sup>158</sup> Where everyone is required to vote, the question of whether identification is required becomes a technical process question. Under a compulsory voting regime, if the state required an ID to vote, it would also be an obligation to make required identification easily accessible. Indeed, by the same token, voter-ID advocates argue that, if the perception of election security is symbolically important, so, too, is the perceived legitimacy of large swathes of the electorate having access to voting, particularly Black voters, who have weighty historical reasons to be suspicious of attempts to disenfranchise them.<sup>159</sup> Those who held a genuine interest in election security ought to be amenable to state-provided verification, and those motivated by racial and partisan animus would understand that there was nothing to gain.

A similar pattern holds for a number of tangential voting ills squarely addressed by a legal requirement for compulsory voting. The current fights in state after state over voting reforms, from early voting to rank choice voting to insufficient voting stations and frustratingly long lines, would not be solved by simple fiat.<sup>160</sup> But, reversing norms such that universal voting is a duty and expectation makes it natural for states to massively expand voting opportunities.<sup>161</sup> State and federal oversight, stiffened by financial incentives, could spur compliance.<sup>162</sup> Even the most recent voting controversies, such as whether votes cast in the wrong precinct ought to be discarded,<sup>163</sup> may seem more naturally resolved when the norm is one of universal voting.

To be sure, not every form of voter contestation can be settled by simply overlaying compulsory voting on the current electorate. The racially disproportionate effects of felon disenfranchisement have historically contributed to the same lines of electoral contestation of Black votes.<sup>164</sup> Compulsory voting does not, without more, settle this question. In a regime of compulsory voting, therefore, we must still decide whether voting is required of currently eligible voters or whether the franchise should be

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158. See Deuel Ross, *Pouring Old Poison into New Bottles: How Discretion and the Discriminatory Administration of Voter ID Laws Recreate Literacy Tests*, 45 COLUM. HUM. RTS. L. REV. 362, 377–85 (2014); see also *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008) (discussing the burdens of obtaining required voter IDs, even when free). For political and legislative pushes to pair voter-ID laws with alternatives or expansion of identification methods, see generally Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631 (2007) and Brandon Whit Maxey, Note, *A Proposal for a Voter-Identification Law Limiting Voter Disenfranchisement*, 67 ARK. L. REV. 457 (2014).

159. See *supra* Part I.

160. See Draper, *supra* note 92, at 155–59.

161. For a creative example, see generally Michael J. Pitts, *Opt-Out Voting*, 39 HOFSTRA L. REV. 897 (2011) and Michael S. Kang, *Voting as Veto*, 108 MICH. L. REV. 1221 (2010).

162. For an example of how federal funds spur state compliance, see generally Mathilda McGee-Tubb, *Deciphering the Supremacy of Federal Funding Conditions: Why State Open Records Laws Must Yield to FERPA*, 53 B.C. L. REV. 1045 (2012).

163. See generally *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021).

164. Yankah, *supra* note 13, at 1029–31.

expanded to include offenders currently serving prison time. There are important arguments for allowing those in prison to vote because it protects an important civic or human right, it keeps these individuals more tightly civically bound, it reduces recidivism, and it would be more racially just.<sup>165</sup> Others plausibly argue that loss of the franchise is a natural feature of rehabilitation, a period in which one is temporarily removed from the body politic.<sup>166</sup> Whatever the answer to that question, a compulsory voting regime establishes a clear ethos as to what should happen after one has served their sentence.<sup>167</sup> For those attracted by curing our current democratic legitimacy gap and healing the racial wound around voting, the answer is clearly to restore former offenders to full voting status, alongside other citizens who are required to vote. An obligation to vote reinforces our interlocking bonds as citizens, particularly when they are frayed by our violent racial history, and it repudiates the view that former offenders must remain forever cast away from the rest of society.<sup>168</sup>

Further, an obligation to vote holds promise for another potentially acidic effect of felon disenfranchisement. As mentioned, the racially disproportionate distribution of felon disenfranchisement not only makes it seem all too natural to suspicious white voters that Black and Hispanic voters are excluded but also may cause Black voters to internalize the same view.<sup>169</sup> A community in which the ability to vote is disrupted for many is less likely to inculcate voting norms in the next generation.<sup>170</sup> There is important evidence that those who are steered toward voting at a young age remain committed voters.<sup>171</sup> Meanwhile, many of those who are foreclosed from voting will become cynical or disdainful of its importance.<sup>172</sup> Such cynicism is too easily spread. Thus, requiring the right to vote equally for ex-offenders can easily arrest the corrosive ways in which Black voters with the ability to vote have turned their backs on voting.

Of course, universal voting may not solve—and indeed, may heighten—battles over partisan gerrymandering.<sup>173</sup> Facing the prospect of universal minority voting, partisans will draw districts to maximize political advantage. The effects of such gerrymandering are highly situation-specific.

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165. See Ekow N. Yankah, *The Right to Reintegration*, 23 NEW CRIM. L. REV. 74, 100–03 (2020).

166. See *id.*

167. See *id.*

168. Antje du Bois-Pedain, *Punishment as an Inclusionary Practice: Sentencing in a Liberal Constitutional State*, in CRIMINAL LAW AND THE AUTHORITY OF THE STATE 199, 207 (Antje du Bois-Pedain et al. eds., 2017).

169. See Ekow N. Yankah, *Punishing Them All: How Criminal Justice Should Account for Mass Incarceration*, 97 RES PHILOSOPHICA 185, 190–91 (2020); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1281–97 (2004).

170. See Thompson, *supra* note 71.

171. See *id.* at 607.

172. See Yankah, *supra* note 169, at 189–92. See generally Roberts, *supra* note 167; Thompson, *supra* note 71.

173. See generally Heather K. Gerken, *Rashomon and the Roberts Court*, 68 OHIO ST. L.J. 1213 (2007).

In some places, packing in minorities will be seen as an attempt to limit voting power to token representatives. In other places, packed minority districts will be viewed as an attempt to guarantee minority voters jurisdictions where they exert decisive political power. As with the census, heated fights may intensify when the political stakes are raised.<sup>174</sup> There is little chance of predicting any clear dispositions, as results will be sensitive to the strength of demographic voting preferences, housing segregation, and countless other variables.

These concerns, while of terrific importance, have largely focused, albeit at a high level of generality, on how compulsory voting would affect the mechanisms of our political culture. But, the reason voting is the grounds of such pitched battle, does not, it seems to me, reduce its admittedly important role in determining political power. Nor is voting merely about collecting information on citizen preferences. Were that all that were involved, we could replace voting with ever more sophisticated sampling methods or allow statistically representative sample sizes of the electorate to vote. Voting stands for something more immediately obvious and, yet, romantic and hard to qualify; it stands for belonging, civic equality, the right to have one's say and duty to reason together.<sup>175</sup> Imagining the wide-ranging effects that compulsory voting would have on our voting structures is difficult, but its effects on the underlying political claims and on the democratic dignity of Black Americans would be even more profound. Ultimately, compulsory voting is a contribution to securing a shared view of equal Black citizenship.

#### IV. FRANCHISE AND CITIZENSHIP

The link between voting and citizenship is ancient. Aristotle makes clear that an important measure of full citizenship is the right to an equal voice in civic matters.<sup>176</sup> Others might contribute to the good of a polity: metics (resident aliens) and tradesmen contributed to a society's functioning and wealth, women participated in the good of a household, and even slaves, like useful tools, promoted the collective well-being.<sup>177</sup> But, the mark of full citizenship was the right to share in public governance by voting and holding

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174. See Edsall, *supra* note 151; Frey, *supra* note 151.

175. This sense of belonging is important enough to be preserved, even when materially costly. One obvious example is the American norm of paying taxes and its relationship to a sense of citizenship and self-esteem. This sense of civic duty is, despite high-profile examples of tax evasion, a powerful driver as to why people comply with the tax laws. Linked in this way, even citizens who are not legally obligated to pay their taxes are often haunted by knowing that they will be viewed as incomplete citizens if they do not comply. See generally *Comprehensive Taxpayer Attitude Survey*, IRS (Nov. 11, 2020), <https://www.irs.gov/pub/irs-pdf/p5296.pdf> [<https://perma.cc/XJC7-FUF4>]. I am grateful to Nicole Appleberry for conversations pressing this line of thought.

176. See ARISTOTLE, *THE BASIC WORKS OF ARISTOTLE*, POLITICA, bk. III, ch. 5 (Richard McKeon ed., 2001); see also Ekow N. Yankah, *The Sovereign and the Republic: A Republican View of Political Obligation*, in *POLITICAL LEGITIMACY* 102 (Jack Knight & Melissa Schwartzberg eds., LXI ed. 2019).

177. See ARISTOTLE, *supra* note 176, bk. III, ch. 4.

office; to rule, and be ruled, in turn.<sup>178</sup> Hence, to be a citizen was to be endowed with “franchise,” the full rights and responsibilities of a Greek citizen.<sup>179</sup> It is from this term that we associate “disenfranchisement” as the loss of voting privileges.<sup>180</sup>

Through the tumultuous dictatorships and empires of ancient Athens and Rome, there remained an understanding that the fullest citizens should share in steering the direction of the state.<sup>181</sup> For otherwise eligible individuals to be stripped of their vote was considered a mark of infamia or a form of “civil death.”<sup>182</sup> These ideas found their way through classic Western philosophical texts, making explicit the connection between voting and political equality.

The intellectual heritage of Greek and Roman debates around citizenship were entirely alive to the educated men forming America.<sup>183</sup> This political tradition directly influenced nascent political institutions and leaders, like George Washington, who viewed themselves as embodying classical archetypes.<sup>184</sup> Classic concepts of equality as requiring representation were, ironically, part of the revolutionary call, and public debates constantly referenced political freedoms idealized in ancient Athens, Sparta, Carthage, or some smaller city in Asia Minor.<sup>185</sup> James Madison, for example, made explicit the connection between citizenship and the right of wealthy and poor, honored and humble alike, to participate in elections.<sup>186</sup> In short, from the beginning, a notion of shared rule, reflected in a “republican form of government” was intertwined in the American concept of full citizenship.<sup>187</sup>

Such idealization shows that the right to vote has been a fixed star in ancient conceptions of full political membership. But, it is painfully obvious that wide swathes glimpsed this star from underneath deep shadows: the omission of the majority of the polity from the exercising of political voice is as ancient as the noble exaltations of citizenship.

178. *See id.*

179. *See* C.S. LEWIS, *STUDIES IN WORDS* 125 (2d ed. 1967); Philip Pettit, *The Freedom of the City: A Republican Ideal*, in *THE GOOD POLITY: NORMATIVE ANALYSIS OF THE STATE*, 142–44 (Alan Hamlin & Philip Pettit eds., 1989). Ancient franchise was broader than voting, encompassing the full bundle of rights and obligations of citizenship, such as holding office and jury duty. *See* Schwartzberg, *supra* note 137, at 733, 734–36.

180. *See* Pettit, *supra* note 179, at 142–44.

181. *See* Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 *FLA. L. REV.* 443, 451–52 (1989).

182. Ewald, *supra* note 13, at 1059–61. *See generally* Fletcher, *supra* note 13.

183. *See* CARL J. RICHARD, *THE FOUNDERS AND THE CLASSICS: GREECE, ROME AND THE AMERICAN ENLIGHTENMENT* 1 (1994); Robert G. Natelson, *A Republic, Not a Democracy?: Initiative, Referendum, and the Constitution’s Guarantee Clause*, 80 *TEX. L. REV.* 807, 815–22 (2002); Louis J. Sirico, Jr., *The Federalists and the Lessons of Rome*, 75 *MISS. L.J.* 431, 433–36, 447–48, 451–56 (2006).

184. *See* RICHARD, *supra* note 183, at 70–72; E. Christian Kopff, *Open Shutters on the Past: Rome and the Founders*, in *VITAL REMNANTS: AMERICA’S FOUNDING AND THE WESTERN TRADITION* 71, 77–78 (Gary L. Gregg II ed., 1999).

185. *See* Natelson, *supra* note 183, at 818–19; Sirico, *supra* note 183, at 433–35.

186. *See* *THE FEDERALIST NOS. 51, 57* (James Madison).

187. Natelson, *supra* note 183.

Even our starting point betrays this tension. Aristotle is foundational in the Western tradition of grounding citizenship in shared civic voice.<sup>188</sup> Lacking franchise was to understand that you were not in the project of joint governance, you were being ruled over; a subject, rather than a coauthor, of your political community.<sup>189</sup> Indeed, on the most ambitious readings of Aristotle, such political agency was critical in realizing one's full human agency.<sup>190</sup> Although Aristotle would not have used the modern locution, one would naturally think that being denied such coauthorship would undermine one's fealty to the polity.<sup>191</sup>

Yet, in nearly the same passages in which he recognizes the importance of an equal civic voice, Aristotle casually dismisses the vast majority of the population as neither capable nor appropriate for citizenship.<sup>192</sup> The reasons are varied and unattractive. Debates over who truly counted as an Athenian were of similar ferocity as our contemporary debates over undocumented immigrants; meanwhile, ordinary laborers were presumed to be too burdened with their daily tasks for political responsibilities.<sup>193</sup> The bulk of metics were considered to have insufficient capacities of reason to gain citizenship, women were hardly considered at all, and, infamously, some were born natural slaves and, thus, were never meant to share in civic deliberations.<sup>194</sup> While all contributed to the polity and shared in its success, no more than a handful were citizens.

These deficiencies are hardly limited to ancient blind spots. From ancient times, Jews in Europe were systematically excluded from full citizenship.<sup>195</sup> John Locke penned his paeans to equality and liberty when indentured servitude was common, universal suffrage distant and while he was becoming an influential and wealthy British administrator for the American slave trade.<sup>196</sup> Thomas Jefferson penned the Declaration of Independence while owning hundreds of slaves.<sup>197</sup> George Washington's relentless pursuit

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188. See ARISTOTLE, *supra* note 176, bk. III, ch. 4; RICHARD KRAUT, ARISTOTLE: POLITICAL PHILOSOPHY 251–52 (2002); Yankah, *supra* note 176.

189. See ARISTOTLE, *supra* note 176, bk. I.

190. See Kyron Huigens, *Virtue and Inculcation*, 108 HARV. L. REV. 1423, 1444–45 (1995); cf. HANNAH ARENDT, *What is Freedom?*, in BETWEEN PAST AND FUTURE 143, 145 (1961).

191. See Yankah, *supra* note 176.

192. See ARISTOTLE, *supra* note 176, bk. II, ch. 9.

193. See *id.* bk. VII, chs. 8, 9.

194. See generally *id.*; Dorothea Frede, *Citizenship in Aristotle's Politics*, in ARISTOTLE'S POLITICS: CRITICAL ESSAYS 167 (Richard Kraut & Steven Skultety eds., 2005).

195. See generally NORMAN F. CANTOR, THE SACRED CHAIN: THE HISTORY OF THE JEWS 110 (1994); Thomas M. Franck, *Is Personal Freedom a Western Value?*, 91 AM. J. INT'L L. 593 (1997).

196. See Onur Ulas Ince, *John Locke and Colonial Capitalism: Money Possession, and Dispossession* 5 (May 19, 2017) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2971326](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2971326) [<https://perma.cc/E2ZJ-MLK8>].

197. See generally William G. Merkel, *A Founding Father on Trial: Jefferson's Rights Talk and the Problem of Slavery During the Revolutionary Period*, 64 RUTGERS L. REV. 595 (2012).

of Ona Judge, a slave that escaped from his home, is now well known.<sup>198</sup> Indeed, even as they wrote soaring speeches comparing taxation without representation to slavery, the majority of the “Founding Fathers” owned slaves.<sup>199</sup>

The historical exclusion of women from voting is also illustrative of the complex relationship between citizenship and franchise.<sup>200</sup> While foreigners and slaves were, by definition, excluded from citizenship, women were excluded for reasons ranging from the danger of political domestic strife at home to their supposed irrationality.<sup>201</sup> Further, a woman’s political interests were thought to be sufficiently represented by the male head of household.<sup>202</sup> Yet, importantly, women, unlike foreigners and slaves, unquestionably belonged within the polity.

This tension was highlighted in the late 1800s when Virginia Minor, a Missouri suffragette, sued<sup>203</sup> for the right to vote under the recently passed Fourteenth Amendment.<sup>204</sup> There was no doubt that Minor was a citizen, and thus, could not have her “privileges and immunities” abridged; instead of enfranchising women, the Court infamously held that voting simply was not a necessary privilege of citizenship.<sup>205</sup> Rather than the lofty ideal of an equally shared voice, citizenship merely implied “reciprocal obligations” of “[a]llegiance and protection” between the individual and the state.<sup>206</sup> Thus, “the words ‘subject,’ ‘inhabitant,’ and ‘citizen’” were all interchangeable names for “membership” in a nation.<sup>207</sup>

So, we see a tension as old as our concepts of citizenship. On the one hand, an ideal of citizenship is defined by sharing a voice through voting.<sup>208</sup> On the other hand, for most of history, it seemed plain that only a small set of persons—in the “West,” propertied white men—would enjoy that first-class status.<sup>209</sup>

There is no doubt which side of this tension carried the day; the ideal form of citizenship proved too attractive to remain reserved for a chosen few. From the sweeping histories of the French, English, or American revolutions

198. See Brandon Hasbrouck, *White Saviors*, 77 WASH. & LEE L. REV. ONLINE 47, 48–49 (2020); *President George Washington Offers Reward for Capture of Black Woman Fleeing Enslavement*, EQUAL JUST. INITIATIVE, <https://calendar.eji.org/racial-injustice/may/23> [<https://perma.cc/N2HR-TQRR>] (last visited Sept. 17, 2021).

199. See William W. Freehling, *The Founding Fathers and Slavery*, in THE LAW OF AMERICAN SLAVERY: MAJOR HISTORICAL INTERPRETATIONS 219, 219–20 (Kermit L. Hall ed., 1987).

200. See generally Siegel, *supra* note 31.

201. See *id.* at 994–95.

202. See *id.* at 981–93.

203. See generally *Minor v. Happersett*, 88 U.S. 162 (1874).

204. See U.S. CONST. amend. XIV, § 1.

205. *Minor*, 88 U.S. at 165–66.

206. *Id.*; see Fishkin, *supra* note 48, at 1340–41.

207. *Minor*, 88 U.S. at 165–66; Fishkin, *supra* note 48, at 1340–41; see also JAMES H. KETNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870, at 316–17 (1978).

208. See Fishkin, *supra* note 48, at 1338–57.

209. See *id.* at 1340–41; see also ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 286–409 (1997).

to the Civil War to women's suffrage, citizenship and the franchise became inextricably intertwined.<sup>210</sup> The concept of first-class citizens with special rank gave way to a conception that citizenship itself imbued all with special dignity.<sup>211</sup> The modern age is marked by what Charles Taylor dubbed, the "politics of universalism," defined in principle, if not in practice, by "the equal dignity" of all citizens.<sup>212</sup> It is reflected in Supreme Court jurisprudence, harkening back to the Aristotelian richness of citizenship and making the right to vote central in that conception.<sup>213</sup>

Thus, having your right to vote recognized, and uncontested, is not merely an instrumental good for use in effecting political interests; it is also a central marker of one's full membership in a political society and equal dignity with fellow citizens.<sup>214</sup> It would be an overstatement to believe that the right to vote settled every question of equal political membership.<sup>215</sup> But, it is, in a real sense, both the core and minimum of modern political equality.<sup>216</sup> To have that vote denied, undermined, or contested without reason is to have one's belonging and equality challenged.<sup>217</sup>

Understanding the significance of having one's vote counted reveals the full meaning of armed protestors trying to stop votes from being counted.<sup>218</sup> Whatever the conscious intent of the protestors, rejecting votes from Detroit, Philadelphia, and Atlanta, without evidence of fraud, denies the citizenship and belonging of those casting the votes. And, of course, this rejection cannot be understood outside of the history of white rejection of Black claims of citizenship.

#### V. FRANCHISE, RESISTANCE, AND CITIZENSHIP

We began with the ancient insight that voting is a marker of full inclusion and equality in one's polity; it is the line between citizen and subject.<sup>219</sup> There is little mysterious about this sense of being a coauthor of your

210. See JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 2–3 (1991).

211. See Jeremy Waldron, *Dignity and Rank: In Memory of Gregory Vlastos (1907–1991)*, 48 EUR. J. SOC. 201, 217–21 (2007); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748–50 (2011).

212. Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 25, 37–38 (Amy Gutmann ed., 1994). See generally William N. Eskridge, Jr., *The Relationship Between Obligations and Rights of Citizens*, 69 FORDHAM L. REV. 1721 (2001).

213. See *Afroyim v. Rusk*, 387 U.S. 253, 257 (1967). See generally *Ng Fung Ho v. White*, 269 U.S. 276 (1922); Erwin Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575 (1983).

214. See generally Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245 (1983).

215. See Yankah, *supra* note 165, at 100–03.

216. See ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 109–11 (1989); IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* 6 (2000).

217. See RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 187 (2000). One can see this impulse in modern efforts to expand voting to include other marginalized communities, including the poor, the homeless, and the intellectually disabled.

218. See *supra* notes 5–16 and accompanying text.

219. See *supra* notes 188–91 and accompanying text.



government as opposed to being ruled over. To be endowed with the franchise was, in the ancient parlance, to be able to look fellow citizens in the eye and to carry yourself without subservience or being disdained.<sup>220</sup> Understanding this, the ability to vote is much more than an instrumental good. It is a “a certificate of full membership in society . . . [conferring] a minimum of social dignity.”<sup>221</sup>

Those who have never much considered the right to vote may find such claims melodramatic. For example, were I to move to Provence, exchanging my vote for a life of rosé and seafood, it would seem dramatic to toss around claims of enslavement. Even in our own country, voting rates are shockingly low among those who have no legal barriers to voting.<sup>222</sup> But, such analogies are misleading. It is a very different thing to move to another country or decline to vote than to have one’s vote undermined. The recognition that one is not fully a member of the polity is often natural and, at times, even part of the point of immigrating to another country. While the politics of a new country may have practical impact, there is often a recognizable gap in an immigrant’s ties of citizenship, both felt and recognized in law: tax burdens, property rights, national privileges, and other responsibilities, such as registering for the army, may all be different or absent.<sup>223</sup>

But, the natural distance between immigrant and citizen may be altered in myriad ways. For some, long-standing influence or domination by another country may imbue a sense that one is owed some measure of citizenship as common in former colonial relationships.<sup>224</sup> Nor is it surprising that after sufficient time, many seek citizenship in their new countries or eventually chafe at being excluded. Those born in or taken very young to countries where they are not citizens often find their legal status as immigrants cognitively and emotionally dissonant.<sup>225</sup> It is not surprising they may feel it a deep injustice that they are not recognized as full citizens.

In any case, such examples invite us to question whether being denied the franchise is inherently scornful, but they are distant from the American resistance to the Black franchise. Whereas denying the immigrant need not convey disparagement,<sup>226</sup> the resistance to the Black franchise is historically

220. See PHILIP PETTIT, *ON THE PEOPLE’S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY* 47, 84 (2012); Pettit, *supra* note 179, at 142–43.

221. SHKLAR, *supra* note 210, at 2–3.

222. See generally Ihaab Syed, *How Much Electoral Participation Does Democracy Require?: The Case for Minimum Turnout Requirements in Candidate Elections*, 66 *UCLA L. REV.* 2024 (2019).

223. See Robert E. Goodin, *What Is So Special About Our Fellow Countrymen?*, 98 *ETHICS* 663, 667–73 (1988); cf. ALASDAIR MACINTYRE, *IS PATRIOTISM A VIRTUE?* (1984).

224. Cf. E. Tendayi Achiume, *Migration as Decolonization*, 71 *STAN. L. REV.* 1509, 1553–54 (2019).

225. See Elizabeth Keyes, *Defining American: The DREAM Act, Immigration Reform and Citizenship*, 14 *NEV. L.J.* 101, 103–05 (2013). See generally HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2006).

226. Of course, the connection between citizenship, full belonging, and the franchise is so interwoven that being excluded from voting too often subsidizes xenophobia and leads to prejudice.

based in contempt for Black intellectual and moral capabilities.<sup>227</sup> Denying the legitimacy of Black voting not only connotes that Black people are not full members of the community but also communicates that Black people are not part of the community because they are beneath white people.<sup>228</sup> As Martin Luther King, Jr. recognized, “[t]he denial of the vote not only deprives the Negro of his constitutional rights—but what is even worse—it degrades him as a human being.”<sup>229</sup> So, too, when legislatures engage in tactics to undermine Black voters or protestors descend on election offices counting Black votes, they communicate that Black people—not simply the abstraction of Black voters—are degraded.

Of course, those engaged in these acts will strenuously reject the characterization of their efforts as racist degradation.<sup>230</sup> However outlandish the conspiracy theories about the “stolen” presidential election are, there is no doubt of the passionate intensity of those banging on windows or that a swath of the country genuinely believes these claims.<sup>231</sup> These actors will insist they are motivated only by the danger of voter fraud<sup>232</sup> rather than by racial animus.

Admittedly, I am largely unmoved by bald protestations of good faith. From the very passing of the Reconstruction Amendments, there were those who strenuously protested that they held no animus toward the negro, while advocating shockingly racist ideas.<sup>233</sup> Although comforting to some, it is a bizarre idea that actions cannot be racist unless recognized as such by those committing them.<sup>234</sup> But, more importantly, protests by individuals that they do not intend a racist message are quite beside the point. The long history of violent resistance to Black Americans’ voting fixes the social meaning of such acts. By social meaning, I mean that some acts carry messages because they fall within certain social understandings. Going to church or on a date or using a racial epithet has a social meaning because it is embedded in a history and shared understanding. Of course, the understanding of any particular social understanding can itself be contested and evolve. The meaning of going to church or on a date and the use of “the N word” are each under constant contestation. But, individuals cannot singularly decide that their actions stand apart from their sociohistorical contexts.

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227. See Morgan, *supra* note 34, at 390.

228. See, e.g., GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 84–88 (1944).

229. Martin Luther King, Jr., Speech Before the Youth March for Integrated Schools (Apr. 18, 1959), in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 21, 21–22 (James Melvin Washington ed., 1986).

230. See *supra* notes 1–20 and accompanying text.

231. See Abdel-Baqi et al., *supra* note 4; Tim Alberta, *The Senator Who Decided to Tell the Truth*, ATLANTIC (June 30, 2021), <https://www.theatlantic.com/politics/archive/2021/06/michigan-republican-truth-election-fraud/619326/> [<https://perma.cc/6HB2-YJFJ>].

232. See generally Flanders, *supra* note 156.

233. See Governor Aycock on “The Negro Problem,” ANCHOR, <https://www.ncpedia.org/anchor/governor-aycock-negro> [<https://perma.cc/8G69-GBFT>] (last visited Sept. 17, 2021).

234. See generally Ekow N. Yankah, Ahmaud Arbery, *Reckless Racism and Hate Crimes: Recklessness as Hate Crime Enhancement*, 53 ARIZ. STATE L.J. 681 (2021).

Further, because social meanings exist independently of any individual's control, it is nearly impossible for our behavior to be entirely unaffected by social tradition. Modern dating structures courtship, informing how we signal romantic interests. So, too, social context structures how segments of society push back on what they see as unfair or illegitimate. When white vigilantes hear unsubstantiated rumors that there are "too many suspicious" Black votes coming out of Philadelphia or Atlanta and they react with armed intimidation of election officials, that, too, is imbued with a social meaning.<sup>235</sup> When legislatures act to dilute the Black vote or undermine organized efforts to mobilize Black voters, that, too, has a social meaning. These actions depend on conscious or unconscious beliefs that there is something illegitimate about "too many Black votes" holding sway in political elections. Intentional or not, this behavior depends on seeing Black voters as sufficiently separate from "real" voters or that their votes demand special scrutiny.<sup>236</sup> It harkens back to an implicit understanding that political power is legitimate only when it flows from a legal structure upholding white domination.<sup>237</sup>

This social understanding reinforces the ugliness of rejecting the Black vote. The political explosions regarding minority voting, whether attempting to stop vote counting or politicians who find it natural to curtail minority voting, involve not only underlying instrumental questions of political power but also the deeper question of who can legitimately shape that power. It is precisely the resistance of so many white voters to Black voting power, the prerogative of equals, that renders the boundaries of Black franchise an intense battleground and lends racially based voter suppression its sense of betrayal and humiliation.<sup>238</sup>

It would be myopic to ignore that the freedom of Black voting has changed by leaps and bounds in our history.<sup>239</sup> But, periods of advancement have often been followed by retrenchment of white power and political resistance.<sup>240</sup> What is clear is that the Black franchise has been an inescapable arena of contestation that implicates not only Black political power but also equality and full citizenship. To the extent this battleground exists, there will always be denials and violent rejections of Black political equality seeping into our politics.

#### CONCLUSION

Such considerations lead us back to the global concern with which we started. Why should we believe that changing another set of laws would meaningfully end the undermining of Black votes and the attack on Black

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235. See *supra* note 4 and accompanying text.

236. See, e.g., MYRDAL, *supra* note 228, at 84–88; Rutenberg & Corasaniti, *supra* note 14.

237. See generally Goldstein, *supra* note 36.

238. See SHKLAR, *supra* note 210, at 38.

239. See Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643, 644–46 (2006).

240. See *supra* notes 57–67 and accompanying text.

citizenship? After all, we have canvassed how an unimaginably bloody Civil War and a set of constitutional amendments could not overcome the deep-seated belief in Black inferiority and illegitimacy.<sup>241</sup> Thus, the same problems we have now—attacks on the legitimacy of Black votes and the political power of Black cities—can reproduce themselves under a system of compulsory voting. Curing the electoral veneer does not cure the motivating racism which can infect any system.<sup>242</sup>

Our history carries much warning, and this deep worry, undoubtedly, carries much weight. Yet, three related responses give reason to persevere. First, just as our history has taught us about the reliance and adaptability of racism, it also has taught us about the ability of the dedicated and the brave to effectuate political change. I have carefully noted how the contestation of the Black vote survived the Civil War, Reconstruction, Jim Crow, and the VRA.<sup>243</sup> But, it would be lunacy to allow our sharp gaze on what remains to be done to blind us to all that has been accomplished. The heady election coverage of President Biden's resurrection, powered by South Carolina's Black voters and the breathless coverage of demographic shifts moving election results, is a testimony to generations of legal progress toward securing the vote.<sup>244</sup>

Of course, none of this occurred in the realm of politics alone. But, that merely brings us to the second point. Too sharply cleaving the issue into a legal problem and a racism problem ignores the deeply important ways laws influence norms.<sup>245</sup> I do not question that women are my professional and personal equals (or bosses!) because of the vast economic and social changes advanced by preceding generations. But, those changes were, too, partially structured by laws prohibiting discrimination and sexual harassment in the workplace, marketplace, and so on.<sup>246</sup> The world of "Mad Men" is not only socially untenable but also legally impermissible. So, too, a regime of compulsory voting would slowly, but powerfully, change the way America relates to voting in general and, in particular, to minority voting. Analogously to how many men now think of some behaviors as foreclosed in the workplace, we should not underestimate that, over time, many people could grow to find questioning why people voted peculiar . . . and questioning why Black people voted, thus, foreclosed.

But, lastly, even granting the power of the objection does not dissuade me. If the objection is that compulsory voting cannot end the racism that infects so much of American life, then, surely, I can admit that is true. But, as with

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241. See *supra* notes 29–31 and accompanying text.

242. These doubts were pressed upon me by a number of colleagues. I am particularly grateful to Bernadette Atuahene for her trenchant criticism.

243. See *supra* Part I.

244. See, e.g., Jelani Cobb, *Joe Biden's South Carolina Win, Black Voters, and the Democrats' Way Forward*, NEW YORKER (Mar. 2, 2020), <https://www.newyorker.com/news/daily-comment/joe-bidens-south-carolina-win-black-voters-and-the-democrats-way-forward> [<https://perma.cc/GG4L-AVB9>].

245. See generally Yankah, *supra* note 234.

246. See generally Laura A. Rosenbury, *Work Wives*, 36 HARV. J.L. & GENDER 345 (2013).

each important legal step that has come before, a compulsory voting regime can move the ball forward on the racial undermining of democratic citizenship. Just as I am grateful for those who marched to secure what tincture of democratic virtue we currently hold, so, too, we owe the next generation what progress we can seize.

Even if compulsory voting does not solve every electoral battle, it would be a mistake to reduce its effects to piecemeal assessments of our myriad electoral issues. Compulsory voting would offer fresh ways of breaking the logjam over a number of current election law skirmishes. In an ambitious imagination, compulsory voting could be a template for investment in other pro-civic educational and citizen constituting cites, from universal mandatory state-sponsored jury duty<sup>247</sup> to the periodically debated national service requirement. More importantly, it would reorient our collective assumptions about voting from suspicion over which votes are authentic to the duty to collect all votes.

A generation of Americans could grow up internalizing that everyone is supposed to vote, rather than buying into the inculcated idea that “some votes” are the product of unworthy voters, or that too many such votes were cast due to illegitimate manipulation. Most importantly, historic battle lines, which always return to the undermining of Black voting as a rightful expression of an equal citizen, would simply be foreclosed. And, with it, a painful and persistent method of rejecting Black Americans as being full members of our shared political community, healed.

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247. I am grateful to Stephanos Bibas for making this intriguing suggestion. For an insightful, Aristotelian view of the role of juries in both creating and securing citizenship, see Schwartzberg, *supra* note 137, at 734–36. Alexis De Tocqueville suggested the same. See 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 158, 275 (J.P. Mayer ed., George Lawrence trans., 1969) (1835).