

**WHERE'S MY BALLOT?: WHY CONGRESS SHOULD  
AMEND HOUSE BILL H.R.1 TO INCLUDE A NATIONAL  
MANDATE OF DROP BOXES FOR FEDERAL ELECTIONS  
TO HELP PROTECT THE BLACK VOTE**

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ABSTRACT

*Casting a ballot should be easy, but voter suppression continues to be an obstacle for many Black voters. The failure during Reconstruction to address Black suffrage, together with the proliferation of Jim Crow laws, enabled states to abridge the right to vote based on race. The Fifteenth Amendment was intended to eliminate racial restrictions at the polls. Subsequently, the Voting Rights Act of 1965 was passed in a further effort to outlaw discriminatory voting practices; however, in 2013, the Supreme Court effectively gutted the federal government's oversight of voting procedures. Afterwards, states began enacting restrictive voting measures targeting the most marginalized. COVID-19 introduced new challenges to the electoral process. Disproportionately impacted by the ravages of the pandemic, Black voters were faced with the Hobson's choice of deciding whether to safeguard their health or assume the risk of exercising their right to vote in person. This Note calls on Congress to amend House Bill H.R.1 to include a national mandate of drop boxes for all federal elections to protect the Black vote.*

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## INTRODUCTION

Kathy pulled into the Christian City Welcome Center in Atlanta around 3:30 p.m., ready to cast her ballot for the

primary election.<sup>1</sup> After getting out of her car, she discovered hundreds of people waiting in line to also cast their ballots.<sup>2</sup> The polling location was in Union City, an Atlanta suburb with about 22,400 residents, nearly 88% of whom are Black.<sup>3</sup> After five long hours, Kathy finally arrived at the front of the line only to be informed that the polls had officially closed and the electronic scanners were shut down.<sup>4</sup> Poll workers told Kathy that she would need to cast a provisional ballot, but they also guaranteed her that her vote would be counted.<sup>5</sup> Kathy's emotions were reignited as she emphasized that, "I'm now angry again, I'm frustrated again, and now I have an added emotion, which is anxiety. . . . I'm wondering if my ballot is going to count."<sup>6</sup> Georgia is home to some of the most prominent forms of voter disenfranchisement targeting Black voters<sup>7</sup>—despite the fact that states are prohibited from denying citizens the right to vote based on race.<sup>8</sup> Long wait lines at the polls and restrictive voter identification laws are only two tools used to disenfranchise Black voters.<sup>9</sup> In many elections, Kathy, along with many other Black voters, have been forced to participate in an inequitable voting system that is based on the color of your skin.

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1. Stephen Fowler, *Why Do Nonwhite Georgia Voters Have to Wait In Line for Hours? Too Few Polling Places*, NPR (Oct. 17, 2020, 5:01 AM), <https://www.npr.org/2020/10/17/924527679/why-do-nonwhite-georgia-voters-have-to-wait-in-line-for-hours-too-few-polling-pl>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. See Keesha M. Middlemass, *Racial Politics and Voter Suppression in Georgia*, in *AFRICAN AMERICANS IN GEORGIA: A REFLECTION OF POLITICS AND POLICY IN THE NEW SOUTH* 7, 7 (Pearl K. Ford ed., 2010).

8. U.S. CONST. amend. XV, § 1.

9. Middlemass, *supra* note 7; see Fowler, *supra* note 1; Sari Horwitz, *Getting a Photo ID so You Can Vote is Easy. Unless You're Poor, Black, Latino or Elderly*, WASH. POST (May 23, 2016), [https://www.washingtonpost.com/politics/courts\\_law/getting-a-photo-id-so-you-can-vote-is-easy-unless-youre-poor-black-latino-or-elderly/2016/05/23/8d5474ec-20f0-11e6-8690-f14ca9de2972\\_story.html](https://www.washingtonpost.com/politics/courts_law/getting-a-photo-id-so-you-can-vote-is-easy-unless-youre-poor-black-latino-or-elderly/2016/05/23/8d5474ec-20f0-11e6-8690-f14ca9de2972_story.html).

Stacey Abrams, a pioneer activist and former Georgia gubernatorial candidate,<sup>10</sup> once said, “The right to vote is not just sacred, it is the centerpiece of power. . . . [Y]our ability in a democracy to determine your future is . . . predicated on your ability to cast a vote. . . .”<sup>11</sup> Abrams narrowly lost the governorship of Georgia in 2018, a result which many attribute to voter suppression.<sup>12</sup> She is acutely aware of the tactics used to restrict the right to vote, especially as they pertain to Black voters.<sup>13</sup> The Fifteenth Amendment unambiguously prohibits states from enacting voting laws that discriminate against protected minorities.<sup>14</sup> Despite this bar, federal elections reflected how, although everyone deserves the right to vote, Blacks are systematically denied this right.<sup>15</sup>

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10. See Alana Wise, *Stacey Abrams Announces Candidacy in Georgia Governor Race*, NPR (Dec. 1, 2021), <https://www.npr.org/2021/12/01/1060620025/stacey-abrams-announces-candidacy-in-georgia-governors-race>.

11. Van Lathan & Rachel Lindsay, *Stacey Abrams on Modern Voter Suppression and What Her Plan Would've Been as Georgia Governor*, RINGER, at 16:36 (Sept. 4, 2020, 8:20 AM), <https://www.theringer.com/2020/9/4/21422691/stacey-abrams-on-modern-voter-suppression-and-what-her-plan-wouldve-been-as-georgia-governor>.

12. Glenn Kessler, *Did Racially Motivated Voter Suppression Thwart Stacey Abrams?*, WASH. POST (Oct. 20, 2019), <https://www.washingtonpost.com/politics/2019/10/30/did-racially-motivated-voter-suppression-thwart-stacey-abrams/>. As the Washington Post explained, “Kemp oversaw an aggressive effort to purge voters before the election, with nearly 700,000 [voters] removed from the rolls in the year before the election.” *Id.* About 14% of those voters were removed from the rolls, “not because they moved or died or went to prison, but rather because they had decided not to vote in prior elections.” *Id.* (quoting Angela Caputo, Geoff Hing & Johnny Kauffman, *They Didn't Vote . . . Now They Can't*, APM REPORTS (Oct. 19, 2018), <https://www.apmreports.org/story/2018/10/19/georgia-voter-purge>). Additionally, “Kemp placed 53,000 voter registrations in electoral limbo in October,” an estimated 70% of which were Black voters. *Id.* “More than 200 polling places across the state were closed, primarily in poor and minority neighborhoods,” and “[a] still-unexplained 4.2% undervote in the lieutenant governor’s race, especially prevalent in minority precincts, could indicate serious problems with paperless, touch-screen voting machines in those areas.” *Id.* But see Amy Sherman, *No Proof Voter Suppression Kept Stacey Abrams from Governorship, as Democrats Said in Atlanta Debate*, POLITIFACT (Nov. 21, 2019), <https://www.politifact.com/article/2019/nov/21/no-proof-voter-suppression-kept-stacey-abrams-gove/> (arguing that it is nearly impossible to prove if any election law policy in Georgia cost Abrams her narrow loss to Republican Brian Kemp because it is difficult to determine exactly how many people were prevented from voting).

13. See generally ALL IN: THE FIGHT FOR DEMOCRACY (Amazon Prime Video Sept. 9, 2020).

14. U.S. CONST. amend. XV, § 1; see also Carroll Rhodes, *Federal Appellate Courts Push Back Against States' Voter Suppression Laws*, 85 MISS. L.J. 1227, 1229–30 (2017).

15. See *Block the Vote: How Politicians are Trying to Block Voters from the Ballot Box*, ACLU, <https://www.aclu.org/news/civil-liberties/block-the-vote-voter-suppression-in-2020/> (Aug. 18, 2021).

The 2020 election represents only one clear example of the threat that voter suppression poses to the nation.<sup>16</sup> The ongoing COVID-19 pandemic offers yet another obstacle for Black voters,<sup>17</sup> and it has forced legislators to create other resources to allow voters to cast their ballots. The circumstances resulting from the pandemic offered a unique opportunity to modernize the voting system to ensure that *all* citizens, especially those most marginalized, have access to the ballot box. This Note argues that America's voting system is historically oppressive, that Black voter rights remain unprotected, and that the disproportionate effect of COVID-19 on Black voters has exacerbated the problem by multiplying their disenfranchisement at the polls. To remedy these problems, Congress has a pivotal opportunity to modernize the voting system by ensuring that all citizens have access to the ballot box—especially the most marginalized. Towards that end, Congress should bolster the Voting Rights Act of 1965 (VRA) by amending House Bill H.R.1 to include a national mandate of drop boxes for all federal elections.

Part I of this Note discusses the founding period that denied Black suffrage, which shaped the course of history for Black voting rights. Part II addresses the necessity of federal oversight to protect Black voting rights through the VRA and how the precedent of *Shelby County v. Holder* affected it. Part III speaks to the need for an alternative to in-person voting due to the disparate impact of COVID-19 on Black and marginalized voters. Part IV underscores how Congress can support the fight against voter suppression by mandating the use of drop boxes for all future federal elections by expanding House Bill H.R.1 to include drop boxes for all federal elections.

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16. See *id.* (discussing rampant methods of suppression efforts across the U.S. such as strict voter identification laws, cutting early voting, and systemic disenfranchisement).

17. See discussion *infra* Section III.A; see also *Risk for COVID-19 Infection, Hospitalization and Death by Race/Ethnicity*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html> (Sept. 9, 2021).

The nation's history of voter suppression is a nuanced intersectional issue that cuts across lines of race, class, and gender.<sup>18</sup> This Note's primary focus is on Black Americans suffrage because of the nation's deep history and consistent efforts to restrict access to the ballot box for Black citizens.<sup>19</sup> Thus, many points of intersectionality are based on the experiences of Black men and women. The national drop box solution seeks to uplift all marginalized communities, including low-socioeconomic, Latinx, Native American, and Black citizens, to best allow these communities to cast ballots.

## I. LAYING THE FOUNDATION: THE SEEDS OF BLACK VOTER SUPPRESSION

### A. *The Founding*

Voter suppression is not a new phenomenon. The American voting structure was intentionally designed by the Framers of the Constitution.<sup>20</sup> At the Constitutional Convention of 1787, the Founders gathered to decide how the new nation would operate, which included creating a new system to elect leadership.<sup>21</sup> The Framers developed a voting system for only

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18. See Celeste Montoya, *Intersectionality and Voting Rights*, 53 PS: POL. SCI. & POLS. 484, 484 (2020); see generally Kalmanovitz Initiative for Lab. & the Working Poor, *Gender, Race, Class, and the Vote: From the 19<sup>th</sup> Amendment to COVID-19*, FACEBOOK (June 23, 2020), [https://www.facebook.com/watch/live/?v=263517371546632&ref=watch\\_permalink](https://www.facebook.com/watch/live/?v=263517371546632&ref=watch_permalink).

19. See generally Terrance Smith, *Timeline: Voter Suppression in the US from the Civil War to Today*, ABC NEWS (Aug. 20, 2020), <https://abcnews.go.com/Politics/timeline-voter-suppression-us-civil-war-today/story?id=72248473>; Farrell Evans, *How Jim Crow-Era Laws Suppressed the African American Vote for Generations*, HIST. (May 13, 2021), <https://www.history.com/news/jim-crow-laws-black-vote>.

20. See generally PAUL BREST, SANFORD LEVINSON, JACK M. BALKIN, AKHIL REED AMAR & REVA B. SIEGEL, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING CASES AND MATERIALS* 20 (7th ed. 2018) (providing an overview of the debates between the Constitution's framers regarding the adoption of the modern voting structure).

21. *Id.* at 19; see also Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Slouching Toward Universality: A Brief History of Race, Voting, and Political Participation*, 62 HOW. L.J. 809, 818–19 (2019). But see K.A. Dilday, *Voting Rights Aren't Just a Black Issue: They Affect Poor People of All Races*, BLOOMBERG: CITYLAB (Nov. 13, 2018, 1:44 PM), <https://www.bloomberg.com/news/articles/2018-11-13/voter-suppression-targets-blacks-but-affects-all-poor> ("The deconstructors of democracy have always feared black and poor white people voting together . . .").

those who looked like them—white, male property owners.<sup>22</sup> The decision to exclude Blacks from voting rights laid the foundation for subsequent voter disqualification initiatives.<sup>23</sup>

For the first two months of the Constitutional Convention, the delegates discussed what independence looked like and how to protect the nation from foreign powers.<sup>24</sup> When the subject of voting rights arose, some delegates advocated for federalism and leaving voting qualifications up to each state.<sup>25</sup> Others, like James Madison, disagreed, arguing “that because the right to vote was a “fundamental article [] of republican Government”, “it “ought not to be left to be regulated by the Legislature.”<sup>26</sup> Madison and others felt that extending the vote to all “freemen” was too expensive, and instead believed only freeholders should qualify.<sup>27</sup> As one delegate put it, “No one could be considered as having an interest in the government unless he possesses some of the soil.”<sup>28</sup> The new national government gave the states authority over voting rights<sup>29</sup> and did not even attempt to discuss uniform national suffrage that would be more inclusive than what the states were presently doing.<sup>30</sup> The Framers placed federalism over protecting the right to vote and effectuated a pattern where those in leadership would only prioritize those who looked like them.<sup>31</sup>

Federalism at the expense of Black suffrage was again reflected in the Three-Fifths Compromise, relating to apportionment and representation in the House.<sup>32</sup> At first, Southern states were eager to count slaves as full human beings

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22. See Charles & Fuentes-Rohwer, *supra* note 21, at 818–19.

23. See discussion *infra* Part II.

24. See Charles & Fuentes-Rohwer, *supra* note 21, at 815.

25. *Id.* at 818.

26. *Id.*

27. *Id.* at 818–19.

28. *Id.* at 818.

29. *Id.* at 819; see David S. Tatel, *The Right to Vote*, 159 PROC. AM. PHIL. SOC'Y 1, 1 (2015).

30. See Charles & Fuentes-Rohwer, *supra* note 21, at 819.

31. See *id.*

32. BREST ET AL., *supra* note 20, at 20.

in order to achieve more representation in Congress.<sup>33</sup> For example, South Carolina argued for full representation of slaves—provided they were precluded from voting.<sup>34</sup> After days of deliberation, it was decided at the Constitutional Convention to count Africans as three-fifths a person to determine the number of representatives allocated to each state.<sup>35</sup> The decision to include slaves in apportionment, even in this fractional capacity, increased the political power of southern slave-holding states and rewarded states that left Blacks in an inferior status.<sup>36</sup> Because voting enabled participants to determine who held power in government, Blacks, women, and white citizens with low socioeconomic status were excluded from the process by the Framers.<sup>37</sup>

The Missouri Compromise of 1820, which again centered around the inferiority of Blacks, proved to be the tipping point for the nation,<sup>38</sup> and “marked the beginning of the prolonged sectional conflict over the extension of slavery that led to the American Civil War.”<sup>39</sup> Congress passed a law that admitted Missouri to the Union as a slave state and Maine as a free state.<sup>40</sup>

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33. *Id.*

34. *Id.* Beyond these geographical trends in how delegates approached this matter, a 2008 empirical study has identified many other notable trends in the Constitutional Convention delegates’ voting behavior toward apportionment. Keith L. Dougherty & Jac C. Heckelman, *Voting on Slavery at the Constitutional Convention*, 136 PUB. CHOICE 293, 293 (2008). As far as religious beliefs, for example, the study found that “[d]elegates from religions actively opposed to the slave trade were significantly less likely to support including Blacks in the apportionment relative to delegates from other religions.” *Id.* at 305. This, explained by the author, was “consistent with the notion that delegates with a moral predisposition against slavery would want slaves excluded from apportionment, because including them would [encourage the slave trade].” *Id.* Additionally, the amount of slaves per capita in a state affected the likelihood of delegates voting in a certain way: “Delegates from states with larger slaves per capita were significantly more likely to support the inclusion of Blacks in the apportionment.” *Id.*

35. GLORIA J. BROWNE-MARSHALL, *THE VOTING RIGHTS WAR: THE NAACP AND THE ONGOING STRUGGLE FOR JUSTICE* 22 (2016).

36. See BREST ET AL., *supra* note 20, at 20–21.

37. See Dilday, *supra* note 21.

38. See *Missouri Compromise*, ENCYC. BRITANNICA (July 31, 2019), <https://www.britannica.com/event/Missouri-Compromise>; see also JAMES ALBERT WOODBURN, *THE HISTORICAL SIGNIFICANCE OF THE MISSOURI COMPROMISE* 251, 251–52 (1894).

39. *Missouri Compromise*, *supra* note 38.

40. *Id.*



Despite the growing tension between the North and South, the Compromise remained in force for over thirty years until it was repealed in 1854.<sup>41</sup> Four years later, *Scott v. Sandford* catapulted the country into civil war by inflaming abolitionist movements after the Court's determination that the Missouri Compromise was unconstitutional.<sup>42</sup> The Court reasoned that Blacks were "beings of inferior order. . . [and] that they had no rights which the white man was bound to respect."<sup>43</sup> After Abraham Lincoln was elected president, seven states seceded, with four others following soon after, creating the Confederacy.<sup>44</sup> Fighting for freedom, about 179,000 Black soldiers served in the Union Army<sup>45</sup> which ultimately prevailed over the Confederate Army and secured the Confederates' surrender on April 9, 1865.<sup>46</sup> The nation now had the opportunity to revisit the history of Black disenfranchisement and rebuild anew—or at least that was the hope.

### B. *The Reconstruction Era: White Fragility and Democracy*

The war over voting rights proved to be an ongoing struggle between Black self-determination and white supremacy.<sup>47</sup> The

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41. *Id.*

42. BROWNE-MARSHALL, *supra* note 35, at 23.

43. *Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

44. *Civil War*, HIST., <https://www.history.com/topics/american-civil-war/american-civil-war-history> (Jan. 13, 2021).

45. BROWNE-MARSHALL, *supra* note 35, at 26. Of note, Black soldiers served in the Union army and navy, and about 40,000 died fighting to end Black enslavement. *Id.*

46. Sarah Pruitt, *Why the Civil War Actually Ended 16 Months After Lee Surrendered*, HIST., <https://www.history.com/news/why-the-civil-war-actually-ended-16-months-after-lee-surrendered> (Sept. 1, 2018) (explaining that the surrender at Appomattox on April 9, 1865 "was undoubtedly a decisive victory" even though President Andrew Johnson did not declare an official end to the war until August 1866).

47. See generally *Reconstruction and Rights*, LIBR. OF CONG., <https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/civil-war-and-reconstruction-1861-1877/reconstruction-and-rights/> (last visited Oct. 15, 2021); *The Travails of Reconstruction*, LIBR. OF CONG., <https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/civil-war-and-reconstruction-1861-1877/travails-of-reconstruction/> (last visited Oct. 15, 2021); *Reconstruction*, HIST. (Oct. 29, 2009), <https://www.history.com/topics/american-civil-war/reconstruction>.

Reconstruction era highlighted this tension as the nation grappled with restructuring society to make room for Black enfranchisement.<sup>48</sup> In the years following the Emancipation Proclamation of 1863,<sup>49</sup> three constitutional amendments were passed to improve the status of Blacks.<sup>50</sup> The Thirteenth Amendment abolished slavery, finally recognizing Blacks as full citizens in the new nation.<sup>51</sup> The Fourteenth Amendment guaranteed Blacks equality under the law.<sup>52</sup> Finally, the Fifteenth Amendment guaranteed the right to vote regardless of race, and received sweeping support in both houses of Congress, passing the House of Representatives 144–44 and the Senate 39–13.<sup>53</sup> Blacks voted for the first time in 1867<sup>54</sup> and elected 1,510 Black politicians for the first time in the nation’s history.<sup>55</sup> Black voter turnout was high during the peak of Reconstruction, with “two-thirds of all eligible Black voters [voting in] presidential and gubernatorial elections.”<sup>56</sup>

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48. See *Reconstruction*, *supra* note 47; *The Travails of Reconstruction*, *supra* note 47.

49. The Emancipation Proclamation of 1863 established that slaves in the Confederate states were free. Elizabeth Nix, *What is Juneteenth?*, HIST., <https://www.history.com/news/what-is-juneteenth> (June 17, 2021). However, the actual end of slavery in the United States did not occur until June 19, 1865, when federal troops freed Texas’s 250,000 slaves. *Id.* Juneteenth commemorates this end of slavery in the United States and is considered the longest-running African American holiday. *Id.*; 4 CHARLES REAGAN WILSON, *THE NEW ENCYCLOPEDIA OF SOUTHERN CULTURE: MYTH, MANNERS, AND MEMORY* 239 (2006).

50. See *Landmark Legislation: Thirteenth, Fourteenth, & Fifteenth Amendments*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/generic/CivilWarAmendments.htm> (last visited Oct. 31, 2021).

51. U.S. CONST. amend. XIII, § 1.

52. U.S. CONST. amend. XIV, § 1.

53. U.S. CONST. amend. XV, § 1; *15th Amendment to the U.S. Constitution: Primary Documents in American History*, LIBR. OF CONG., <https://guides.loc.gov/15th-amendment/digital-collections> (last visited Sept. 19, 2021).

54. *The Reconstruction Era and the Fragility of Democracy: Interracial Democracy*, FACING HIST. & OURSELVES, at 0:33–0:39, <https://www.facinghistory.org/reconstruction-era/lessons/interracial-democracy> (last visited Oct. 3, 2021) [hereinafter *Interracial Democracy*].

55. *Id.* at 5:55–5:59 (noting the breakdown of Black officeholders by state: Tennessee elected 20; Arkansas elected 46; Texas elected 49; Florida elected 58; Virginia elected 85; Georgia elected 135; Alabama elected 173; North Carolina elected 187; Louisiana elected 210; Mississippi elected 226; and South Carolina elected 316).

56. Charles & Fuentes-Rohwer, *supra* note 21, at 825.

Blacks pursued alliances with poor whites in an effort to expand their political influence.<sup>57</sup> New state governments were created to rewrite state constitutions that included political and social equity for Black men.<sup>58</sup> Integrated coalitions with Black and white politicians were established, and state constitutions emerged with plans to use state resources to rebuild schools, hospitals, and orphanages.<sup>59</sup> For example, the South Carolina Constitutional Convention reflected an extremely progressive plan for integrated public education supported by state taxes.<sup>60</sup> The Thirteenth, Fourteenth, and Fifteenth Amendments were beacons of hope for Black citizens as they reflected new American values that included Black suffrage.<sup>61</sup> Years after the end of slavery, the lingering seeds of white supremacy began to sprout in the new society.<sup>62</sup> Although many white southerners benefited from reconstruction, the effects came to be viewed as unfairly favoring Black people.<sup>63</sup> The idea that Blacks could freely exercise political power was repugnant to white

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57. See *Interracial Democracy*, *supra* note 54, at 1:42–1:51.

58. See, e.g., LA. CONST. art. XIII (1868) (“All persons shall enjoy equal rights and privileges upon any conveyance of a public character . . . without distinction or discrimination on account of race or color.”); VA. CONST. art. I, § 20 (1870) (“[A]ll citizens of the state are hereby declared to possess equal civil and political rights and public privileges.”).

59. *Interracial Democracy*, *supra* note 54, at 6:44–7:00.

60. *Id.* at 7:56–9:15 (“The Black delegates at the South Carolina Convention understood that without good schools . . . the promise of freedom was always going to be constrained.”).

61. See President Ulysses S. Grant, Special Message to the Senate and House of Representatives (Mar. 30, 1870), <https://www.nps.gov/articles/ulysses-s-grant-the-15th-amendment.htm> (“[T]he adoption of the [F]ifteenth [A]mendment to the Constitution completes the greatest civil change and constitutes the most important event that has occurred since the nation came into life.”); see also Frederick Douglass, At Last, At Last, the Black Man Has a Future: Address Delivered in Albany, New York (Apr. 22, 1870), in FREDERICK DOUGLASS, THE FREDERICK DOUGLASS PAPERS: SERIES ONE: SPEECHES, DEBATES, & INTERVIEWS, VOLUME 4: 1864–80, at 265–71 (John W. Blassingame & John R. McKivigan eds., 1991) (emphasizing the importance of the passage of the Fifteenth Amendment and noting the role that President Grant played in its passage).

62. See *Slavery in America*, HIST. (Nov. 12, 2009), <https://www.history.com/topics/black-history/slavery>; WILSON, *supra* note 49, at 237.

63. *Interracial Democracy*, *supra* note 54, at 11:30–11:51.

southerners and eventually undermined white support for governments that sought equality for Black and white men.<sup>64</sup>

The more blatant disdain for Black political progress began in 1865 with the nation's leader, President Andrew Johnson,<sup>65</sup> who made it easier for white citizens to show their disgust with the new social order.<sup>66</sup> The Civil War destroyed a southern culture built on slave labor and, as a steadfast southerner, President Andrew Johnson was unfazed by the attempts to return Blacks to subservience through the rise of the Ku Klux Klan.<sup>67</sup> The passage of the Reconstruction Amendments revolted Confederate soldiers and spawned backlash despite federal codification.<sup>68</sup> White mob violence reminded Blacks that a Black man "had no rights which the white man was bound to respect," as emphasized in *Scott*.<sup>69</sup> Although federal enforcement undertook the mission to protect Black political rights, the enforcement often needed the support of local prosecutors to bring change.<sup>70</sup> The Enforcement Act of 1870

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64. 10 THE NEW ENCYCLOPEDIA OF SOUTHERN CULTURE: LAW AND POLITICS, 269–70 (Charles Reagan Wilson ed., 2006) ("[E]fforts by southern whites to end Reconstruction began almost as soon as the Radical Republican state government took power . . . Virginia was the first state 'redeemed,' a term southern whites used. Redemption was the process of replacing the Radical governments with conservative southern white governments. It was a well-organized political effort that also involved economic intimidation, community ostracism, political fraud, and violence.").

65. See *Knowing the Presidents: Andrew Johnson*, SMITHSONIAN, <https://www.si.edu/spotlight/knowning-the-presidents-andrew-johnson> (last visited Oct. 17, 2021) (noting that President Johnson's antipathy towards Black civil rights was a major part of his legacy).

66. BROWNE-MARSHALL, *supra* note 35, at 29 (noting that President Johnson vetoed the first, second, and third Reconstruction Acts," and that Congress subsequently "overrode the veto and passed this legislation, providing funding for the federal government to assist newly freed slaves and for the military might to help protect Black rights in the South").

67. See *id.*

68. See *id.* at 26–27.

69. *Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. Const. amend. XIV; see also BROWNE-MARSHALL, *supra* note 35, at 27. For example, in Mississippi, "Blacks were arrested under the Ku Klux Klan Act of 1871," which sought to bring Klan members to justice. *Id.* However, "[d]uring the trial, conservative Democrats and Klansmen shot the Republican Judge and several Blacks in the courtroom." *Id.* The riot resulted in conservative Democrats regaining control of the Mississippi legislature and "suppressing the Black vote through terrorism." *Id.*

70. BROWNE-MARSHALL, *supra* note 35, at 27. For example, the Enforcement Act of 1870 mandated "that anyone convicted of conspiring to deprive Blacks of their right to vote or equal

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often “required local prosecutors to bring charges and local police to make arrests, [but] politicians and policemen were often members of the Ku Klux Klan.”<sup>71</sup> Ultimately, the Enforcement Act left Black citizens with federal protection of their rights but no state enforcement.<sup>72</sup>

The election of 1876 halted political advancement for Blacks. Neither the Republican candidate, Rutherford B. Hayes, nor the Democratic candidate, Samuel Tilden, received enough electoral votes.<sup>73</sup> To earn enough votes, “Hayes made an agreement to withdraw federal troops from the South who were protecting the lives, property, and legal rights of [Black citizens].”<sup>74</sup> Abolitionist media outlets also began to turn their backs on Black political advancement, one newspaper stated, “We know this is a sad state of things . . . [but] the Negro must fight his own battle, win his own elevation, prove his own manhood, and accredit his own citizenship.”<sup>75</sup> Reconstruction ended with the withdrawal of federal troops by President

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protection rights faced a \$5,000 fine and six years in prison.” *Id.*; see also Everette Swinney, *Enforcing the Fifteenth Amendment, 1870–1877*, J. S. HIST. 202, 203 (1962) (“The [Third Enforcement Act], popularly known as the Ku Klux Act, made it a federal offense to conspire to ‘overthrow . . . or destroy by force the government of the United States’ or to conspire to prevent persons from holding offices, serving on juries, enjoying equal protection of the laws, or voting.”).

71. BROWNE-MARSHALL, *supra* note 35, at 27.

72. *See id.*

73. *Id.* at 30.

74. *Id.* at 30–31.

75. *Id.*; see also Gene Dattel, *Northern Racism Helped Doom Reconstruction*, ENCOUNTER BOOKS (Oct. 10, 2017), <https://www.encounterbooks.com/features/northern-racism-helped-doom-reconstruction/> (identifying Northern racial hostility as a fierce opponent to free Black citizenship and arguing that this hostility was just as damaging as southern structures in keeping Blacks in an inferior status). Because the country relied on cotton’s export power, as well as fuel for the textile industry, many white Northerners made “extensive efforts” in the years leading up to the Civil War to forge commercial relations with the South. *Id.* White Northerners still needed Blacks to pick cotton to fuel the textile industry and feared that former slaves would refuse to work in cotton fields. *Id.* Thus, whites in both the North and South helped maintain a subordinate role for Black Americans. *Id.*; see also Jacquelyn Dowd Hall, *The Long Civil Rights Movement and the Political Uses of the Past*, 91 J. AM. HIST. 1233, 1240 (2005) (“Gender, class, and race all shaped both migration experiences. Because discrimination in the North shunted [B]lack men into the meanest factory jobs, women carried the burden of a double day. Relegated mainly to domestic service, they combined wage earning not only with homemaking but with kin work and social networking . . . [This] blurr[ed] urban-rural boundaries, ensuring that struggles in the city and the countryside would be mutually reinforcing.”).

Hayes in 1877, and Blacks were left to fight against voter suppression alone.<sup>76</sup>

*C. The Jim Crow Era: The First-Generation Voting Barriers*

After removing federal officers, the Southern states were again free to engage in first generation voter suppression tactics, which were blatantly racist segregation methods meant to suppress the Black vote.<sup>77</sup> The Jim Crow Era symbolized a system of legal segregation that emerged after the Civil War and Reconstruction.<sup>78</sup> This era saw blatantly racist efforts to prevent Blacks from politically participating in society in the form of first generation voting barriers—e.g. poll taxes, literacy tests, all-white primaries, felony disenfranchisement laws, and grandfather clauses, among others.<sup>79</sup> Further, Blacks were barred from hotels, restaurants, trains, barber shops, orphanages, prisons, public transportation, and theaters.<sup>80</sup> In 1896, Jim Crow laws were recognized nationally in the case of *Plessy v. Ferguson*.<sup>81</sup> The Supreme Court upheld the separate but equal doctrine and implicitly authorized states to introduce more restrictive laws in the upcoming years.<sup>82</sup> The

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76. BROWNE-MARSHALL, *supra* note 35, at 31; *see also* C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 6 (Commemorative ed. 2002) (“What the new status of the Negro would be was not at once apparent, nor were the Southern white people themselves so united on that subject at first as has been generally assumed.”).

77. *See* Farrell Evans, *How Jim Crow-Era Laws Suppressed the African American Vote for Generations*, HIST. (May 13, 2021), <https://www.history.com/news/jim-crow-laws-black-vote>; WOODWARD, *supra* note 76, at 6.

78. WILSON, *supra* note 49, at 237.

79. *See* Evans, *supra* note 77.

80. WILSON, *supra* note 49, at 237–38; *see also* WOODWARD, *supra* note 76, at 18–20. The North also supported a system of racial discrimination in political and civil rights. *Id.* at 20. “By custom or by law [Blacks] were excluded from jury service throughout the North” with Massachusetts being the only state to admit Black jurors. *Id.* Further, “[o]nly [6 percent] of Northern Negroes lived in the five states—Massachusetts, New Hampshire, Vermont, Maine, and Rhode Island—that by 1860 permitted them to vote.” *Id.*

81. *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896); Waldo Martin, *Civil Rights, African American*, in 24 NEW ENCYC. OF S. CULTURE 39, 40 (Thomas C. Holt et al. eds., 2013) (noting that the case “legitimized the doctrine of Jim Crow: the myth of separate but equal public accommodations and institutions for blacks and whites in the South”).

82. *See Plessy*, 163 U.S. at 552.

repercussions were palpable;<sup>83</sup> in Louisiana, home of the *Plessy* case, 130,344 Blacks were registered to vote prior to the holding.<sup>84</sup> After the decision, only 5,320 Blacks were registered to vote.<sup>85</sup>

Supreme Court interest in Black political rights eventually waned, as evidenced in *Giles v. Harris*.<sup>86</sup> In that case, Blacks challenged an Alabama state statute that prevented them from registering to vote while allowing whites to register.<sup>87</sup> The Court held that although Blacks were systematically disenfranchised, any changes to the system needed to be made by state or federal legislatures.<sup>88</sup> This holding signified that the Supreme Court would not intervene on Fifteenth Amendment questions.<sup>89</sup> Decades later, just like the Framers, the Supreme Court backed away from enforcing state legislatures to support Black enfranchisement.<sup>90</sup>

With Supreme Court approval, states were free to disenfranchise Black voters.<sup>91</sup> Grandfather clauses in state constitutions were one effective tool utilized to keep Blacks from voting.<sup>92</sup> The clauses provided that “if a Black man’s grandfather had not been eligible to vote in 1865, then his

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83. See, e.g., Charles & Fuentes-Rohwer, *supra* note 21, at 833 (describing stark decreases in Black voter turnout across the South, specifically noting that in Alabama, the number of registered Black voters had dropped from 181,315 to only 2,980 by 1903, and that in both Virginia and North Carolina, the “estimated black voter turnout drop[ped] by virtually 100%.”).

84. BROWNE-MARSHALL, *supra* note 35, at 43.

85. *Id.* Furthermore, Louisiana amended its constitution to exclude Black voters after *Plessy* and the Black vote never reached more than 1% during the Jim Crow era. *Id.* at 106.

86. *Giles v. Harris*, 189 U.S. 475, 487–88 (1903) (declining to find that federal courts had jurisdiction over plaintiffs’ petition to compel the state of Alabama to allow Blacks to vote and holding instead that rights must be remedied through the legislature and the political process); see SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PLIDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 65–67 (3d ed. 2016).

87. *Giles*, 189 U.S. at 482.

88. *Id.* at 488.

89. See ISSACHAROFF ET AL., *supra* note 86, at 68 (emphasizing that, despite *Giles*’ monumental precedence, the case “is nevertheless completely absent from modern sources that define ‘the canon’ of American constitutional law.”).

90. See *id.*; see also Charles & Fuentes-Rohwer, *supra* note 21, at 818–19 (describing the debate that occurred at the Constitutional Convention).

91. See BROWNE-MARSHALL, *supra* note 35, at 14.

92. See *id.* at 37, 42.

descendants were not eligible to vote in 1915.”<sup>93</sup> The Oklahoma legislature carefully added the phrase “voted for ‘some form of government’” to enable Irish immigrants or other whites emigrating from Europe to be able to vote.<sup>94</sup> A few years later, the Supreme Court was again forced to consider the constitutionality of state statutes that were enacted to prevent Black suffrage.<sup>95</sup> In *Guinn v. United States*, the Court finally struck down a state statute that blatantly violated the Fifteenth Amendment.<sup>96</sup> However, the *Guinn* holding was an outlier of its time; the Court generally allowed other voter-suppression legal tactics, like poll taxes, literacy tests, and extensive registration requirements as long as they were racially neutral—although, in reality, these were simply more concealed voter suppression tactics.<sup>97</sup>

One example of a seemingly neutral voting procedure that was actually a concealed suppression tactic was the imposition of voter registration requirements, which proved to be an easy opportunity for racial bias as registrars were given immense discretion to prevent Blacks from voting.<sup>98</sup> Registrars administered tests and evaluated the interpretation of every answer, which gave them the power to choose both the level of difficulty of the question that an applicant must answer and how much assistance each applicant received with answering the questions.<sup>99</sup> Poll taxes and literacy tests were also put in

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93. *Id.* at 42.

94. *Id.*

95. See *Guinn v. United States*, 238 U.S. 347, 354 (1915).

96. See *id.* at 365 (striking down a “grandfather” clause in the Oklahoma constitution, which required all voters, except those whose lineal ancestors were able to vote on or prior to January 1, 1866, to take and pass a literacy test in order to cast their vote). The Court quickly concluded that this grandfather clause violated the Fifteenth Amendment but noted that, because of states’ sovereign power, these literacy tests were lawful as long as they were racially neutral. *Id.* at 366.

97. See BROWNE-MARSHALL, *supra* note 35, at 37.

98. Charles & Fuentes-Rohwer, *supra* note 21, at 831.

99. *Id.* For example, in Louisiana a Black applicant was asked to interpret a section of the Louisiana Constitution,

which states: “Rolling stock operated in this State, the owners of which have no domicile therein, shall be assessed by the Louisiana Tax Commission, and shall be taxed for State purposes only, at a rate not to exceed forty mills on the dollar assessed value.”



place as a way to obstruct people of color, poor whites, and women from casting a ballot.<sup>100</sup> Poll taxes, which required each resident to pay a yearly tax to a local jurisdiction, cunningly cut across race and class, burdening both the poor and Black citizens.<sup>101</sup> The tax was cumulative and due for every year that a resident was eligible to vote.<sup>102</sup> For example, “if after twenty years of not voting . . . [a Black voter] in Alabama . . . was finally able to pay, he or she would need not \$1.50 . . . but rather \$30, which is the equivalent of \$722 in 2016.”<sup>103</sup> Literacy tests barred most Black applicants from registering.<sup>104</sup> For example, “Mississippi required Blacks to complete a twenty-one-page form and give their interpretation of one of 285 sections of the state’s constitution.”<sup>105</sup> Although these restrictions were challenged,<sup>106</sup> they were ultimately upheld by the Supreme Court,<sup>107</sup> and literacy tests became even more diabolical—going as far as requiring prospective voters “to count the number of jelly beans in a large jar just by looking at it.”<sup>108</sup> These tactics

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The applicant answered “it means if the owner which does not have residence within the State, his rollingstock shall be taxed not to exceed 40 Mills on the dollar.” This answer was rejected. In contrast, a registrar asked a white applicant to interpret [another section of the constitution]. The applicant answered: “FRDUM FOOF SPETGH.” The registrar accepted this interpretation.

*Id.* at 836 (citing *Louisiana v. United States*, 380 U.S. 145 (1965)).

100. BROWNE-MARSHALL, *supra* note 35, at 109; *see also* *United States v. Ellis*, 43 F. Supp. 321, 322 (W.D.S.C. 1942) (discussing how Black women challenged the Cherokee County Registration Board for preventing them from voting); Sarah Wilkerson-Freeman, *The Second Battle for Woman Suffrage: Alabama White Women, The Poll Tax, and V.O. Key’s Master Narrative of Southern Politics*, 68 J.S. HIST. 333, 334 (2002) (discussing the emergence of the Women’s Division of the Democratic National Committee and its mission to pursue an anti-poll tax agenda at the national level, which moved white women in Alabama to launch a state anti-poll tax campaign).

101. BROWNE-MARSHALL, *supra* note 35, at 109.

102. CAROL ANDERSON, *ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY* 9 (2018).

103. *Id.* “In the mid-1940s, the National Committee to Abolish the Poll tax estimated that 10 million Americans were denied the right to vote because they simply could not pay.” *Id.*

104. BROWNE-MARSHALL, *supra* note 35, at 109.

105. *Id.* at 123.

106. *See Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45, 45 (1959).

107. *See id.* at 53–54.

108. BROWNE-MARSHALL, *supra* note 35, at 110; *see also* Paul Finkelman, *The Necessity of the Voting Rights Act of 1965 and the Difficulty of Overcoming Almost a Century of Voting Discrimination*, 76 LA. L. REV. 182, 205 (2015) (discussing how, under the Eight-Ballot box rule, “ballots for

eased past the *Guinn* precedent since they were deemed facially neutral.<sup>109</sup> Jim Crow laws had their desired impact: Black people prioritized survival, and the right to vote was deemed secondary to Black Americans' livelihood.<sup>110</sup>

D. *The Turbulent '60s: A Demand for Black Political Equity*

Black Americans eventually realized that in order to achieve political equity, the protection of the right to vote needed to be enumerated in federal law.<sup>111</sup> The 1960s civil rights marches captured federal attention and catalyzed federal intervention.<sup>112</sup> From 1961–1963, the “Freedom Riders,” both Black and white, sat together on buses traveling through the South, testing the laws banning segregation.<sup>113</sup> The integrated group was beaten with rocks, bottles, and metal pipes as whites relentlessly tried to preserve Black subservience.<sup>114</sup> In 1963, four Black girls aged eleven to fourteen were killed in the bombing of an Alabama church, capturing national attention.<sup>115</sup> The murders brought even the most conservative whites in Congress to listen to Dr. Martin Luther King Jr.'s calls for a nonviolent movement for

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offices had to be placed in separate ballot boxes” and, while “the boxes were usually labeled properly, this meant little to illiterate Black voters [who were] unable to read the labels” and also dealt with election officials who routinely moved the boxes around) *Id.*

109. See *Guinn v. U.S.*, 238 U.S. 354, 366 (1915) (holding the establishment of a literacy test by a state is a lawful and valid power of that state unless on its face it is expressly contrary to the Fifteenth Amendment).

110. See BROWNE-MARSHALL, *supra* note 35, at 110 (“Most Blacks, too intimidated to attempt the [literacy] test, would not dare to ask to take the test. They knew trouble would follow. Others learned early in life that there was no use causing trouble about a test that could never be passed by anyone Black.”).

111. See *id.* at 114; see also Finkelman, *supra* note 108, at 186.

112. BROWNE-MARSHALL, *supra* note 35, at 59.

113. *Id.* at 107.

114. *Id.*; see also Martin, *supra* note 81, at 41–42 (“The Freedom Rides tested the nation’s commitment to desegregated interstate travel.”); *Morgan v. Virginia*, 328 U.S. 373, 386 (1946) (invalidating a Virginia statute that established segregated seating in interstate travel); *Boynton v. Virginia*, 364 U.S. 454, 463 (1960) (outlawing segregated facilities for interstate passengers).

115. See BROWNE-MARSHALL, *supra* note 35, at 123. Cynthia Wesley, Carole Robertson, Addie Mae Collins, and Denise McNair were killed when members of a white supremacist group ignited a dynamite bomb at the Baptist church, which was a popular location for civil rights meetings in Birmingham. *Id.*

social change.<sup>116</sup> Support for the movement began to grow as Dr. King led a series of marches that received nationwide recognition.<sup>117</sup> America watched John Lewis and other activists walk into a “one-sided bloodbath” known today as “Bloody Sunday.”<sup>118</sup> As the 600 marchers walked across the Edmund Pettus Bridge, named after a Klan leader, reporters captured troopers wearing gas masks on the other side.<sup>119</sup> Immediately and wholly unprovoked, all-white state troopers began wildly attacking Black men, women, and children.<sup>120</sup> America watched as troopers on horseback charged into the crowd, beating the elderly unconscious.<sup>121</sup> On March 15th, President Lyndon B. Johnson responded to the calls of Black citizens and “presented his demands for a voting rights law to both houses of Congress.”<sup>122</sup> Although a major accomplishment in the movement for Black political equity, Black Americans “often found they had won the privilege of voting at the expense of their right to live.”<sup>123</sup>

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116. See American Experience, *Martin Luther King on “The Negro and the American Promise”*, PBS, at 0:00–1:50 (Jan. 18, 2004), <http://www.pbs.org/black-culture/explore/civil-rights-movement/> (discussing how non-violent resistance is still a form of resistance in response to Malcom X’s claims that Martin Luther King’s methods play into the hands of the oppressor); BROWNE-MARSHALL, *supra* note 35, at 123.

117. Martin, *supra* note 81, at 42–43.

118. BROWNE-MARSHALL, *supra* note 35, at 127; Martin, *supra* note 81, at 43. King led two marches before President Lyndon Johnson signed the Voting Rights Act into law on August 6, 1965. *Id.* at 42–43. The first was two days after Bloody Sunday, on March 9, 1965. *Id.* There, “King led 2,500 across the bridge to the point of the infamous ‘Bloody Sunday’ attack, but then[,] heeding the police officials rather than forcing the issue,” he ultimately led the group to retreat. *Id.* Then, on March 17th, “King led 8,000, including thousands from across the nation, across the bridge” and into Montgomery, where he “insisted before a crowd of 25,000 that victory in the voting rights struggle was imminent.” *Id.*

119. *Id.*; Lorenzo Reyes, *Who was Edmund Pettus? Selma Bridge Got its Name from Confederate General, KKK Leader*, USA TODAY, <https://www.usatoday.com/story/news/nation/2020/07/24/who-edmund-pettus-selma-bridge-named-confederate-general-senator-kkk/5478635002/> (July 28, 2020); BROWNE-MARSHALL, *supra* note 35, at 127.

120. See BROWNE-MARSHALL, *supra* note 35, at 127; Christopher Klein, *How Selma’s ‘Bloody Sunday’ Became a Turning Point in the Civil Rights Movement*, HIST., <https://www.history.com/news/selma-bloody-sunday-attack-civil-rights-movement> (July 28, 2020).

121. BROWNE-MARSHALL, *supra* note 35, at 127.

122. *Id.* at 129.

123. *Id.* at 127.

## II. THE RISE AND FALL OF THE VOTING RIGHTS ACT OF 1965

A. *The Voting Rights Act of 1965: Adding Teeth to the 15<sup>th</sup> Amendment*

Very few things in American politics have “had as profound or as far-reaching consequences as the passage of the Voting Rights Act of 1965.”<sup>124</sup> The failed efforts to enforce the Fifteenth Amendment sparked the revolutionary Voting Rights Act of 1965.<sup>125</sup> The VRA addressed decades of voter disenfranchisement with the promise of federal oversight.<sup>126</sup> The Supreme Court cemented the need for the VRA by reaffirming its constitutionality in an 8–1 decision in *South Carolina v. Katzenbach*.<sup>127</sup> Finally, Blacks could look to federal legislation and Supreme Court precedent for an avenue of accountability to protect their voting rights.<sup>128</sup>

By focusing on state legislation, the VRA was intended to reverse the impediments to voting that disparately impacted Black voters.<sup>129</sup> The VRA focused on second generation voting barriers, which were facially neutral laws with discriminatory impacts.<sup>130</sup> For example, voter identification laws were discriminatory because minorities were unable to maximize their voting strength even though they were allowed formal

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124. *Id.* at 121.

125. Finkelman, *supra* note 108, at 182.

126. *Id.* at 182–84; ANDERSON, *supra* note 102, at 22 (noting that the VRA passed with overwhelming majorities in the House of Representatives (328-74) and the Senate (79-18)); see *Congress and the Voting Rights Act of 1965*, NAT’L ARCHIVES, <https://www.archives.gov/legislative/features/voting-rights-1965> (June 19, 2019).

127. *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) (holding that the VRA “was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century”).

128. See *id.*; 52 U.S.C. § 10101 (2021).

129. See Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 550, 552 (1973).

130. See Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1838–39 (1992); Derfner, *supra* note 129, at 552–53.

access to the political process.<sup>131</sup> The VRA placed “federal officials in charge of registering voters, banned literacy tests, allowed the national government to monitor elections, and required court approval for changes in voting districts and other aspects of elections.”<sup>132</sup> More specifically, Section 2 included a clause that allowed the government and private parties to seek legal recourse by “challenging denials or abridgements of the right to vote” that were based on color.<sup>133</sup>

However, no sections proved to be more vital than Sections 4 and 5, which were proactive and required immediate action by the states and were enforced by the federal government.<sup>134</sup> Section 4(b) of the VRA required states with an egregious history of voter suppression to receive “preclearance” from the federal government before implementing any changes to voting procedures.<sup>135</sup> The statute established a formula to determine which states needed to be precleared and if the jurisdiction was unable to prove that it did not abridge the right to vote on account of race, then the District Court would deny the state’s

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131. See Derfner, *supra* note 129, at 552–54, 557. In addition, testimony before Congress during the 1970 reauthorization showed that jurisdictions quickly adopted second-generation barriers once the Voting Rights Act became law. See *Voting Rights Act Extension: Hearing on H.R. 4249 and H.R. 5538 Before Subcomm. No. 5 of the H. Comm. on the Judiciary, 91st Cong.* 255 (1969) (statement of Clarence Mitchell, Director, Washington Bureau of the NAACP) (“Immediately after passage of the 1965 Voting Rights Act the Mississippi Legislature . . . passed twelve bills and resolutions which substantially altered the state’s election laws. Alabama, Louisiana, Mississippi and South Carolina have all resorted to various devices to slow down or prevent registration, voting and election to public office. These devices include abolishing offices, switching to so-called ‘at large elections,’ consolidation of counties, ‘full slate voting,’ barring or intimidating poll watchers and giving misleading information to would-be voters.”); see also Issacharoff, *supra* note 130, at 1838–39.

132. Finkelman, *supra* note 108, at 186–87.

133. Frank Deale, *Reflections on the History and Future of the Voting Rights Act in the Wake of Shelby County*, 17 CUNY L. REV. 1, 2 (2013).

134. Charles & Fuentes-Rohwer, *supra* note 21, at 844–45.

135. Deale, *supra* note 133, at 2–3; see also *About Section 5 of the Voting Rights Act*, U.S. DEPT OF JUST., <https://www.justice.gov/crt/about-section-5-voting-rights-act> (Sept. 11, 2020). The first element in the formula focused on states that “maintained on November 1, 1964, a ‘test or device’ restricting the opportunity to register and vote.” *Id.* A state could satisfy the second element of the formula if either “less than 50 percent of persons of voting age were registered to vote on November 1, 1964, or . . . less than 50 percent of persons of voting age voted in presidential election of November 1964.” *Id.* If a state met both of these elements, the state would be subject to the preclearance requirement. *Id.*

requested change and the new voting procedures would remain legally unenforceable.<sup>136</sup>

After the passage of the VRA, Black registration in the region increased in unprecedented numbers, bringing Black voter registration to a record 62%.<sup>137</sup> More importantly, the preclearance requirement proved to be an effective way to discourage states from creating new barriers for voting.<sup>138</sup> For the first time, there were record high numbers indicating that Black Americans were able to freely exercise a right they were denied for decades.<sup>139</sup>

### B. *Shelby County v. Holder: The Loss of Federal Oversight*

As with any progress in voting rights history, the success of the preclearance requirement was short lived.<sup>140</sup> In the early 2000s, the Roberts Court began to question the effectiveness of

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136. *About Section 5 of the Voting Rights Act*, *supra* note 135.

137. ANDERSON, *supra* note 102, at 27 (noting that Black registration “went from less than 10% in 1964 to almost 60% in 1968,” and that “in Alabama, the figure rose from 24% to 57%”).

138. *Voting Rights: A Short History*, CARNEGIE CORP. OF N.Y., <https://www.carnegie.org/topics/topic-articles/voting-rights/voting-rights-timeline/> (last visited Sept. 25, 2021); *see also* Deale, *supra* note 133, at 3 (“When Congress renewed the Act in 2006, it stated that “[s]ignificant progress [had] been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices.”) (alteration in original).

139. *See* Deale, *supra* note 133, at 3 (“[T]he number of African-Americans who are registered and who turn out to cast ballots has increased significantly over the last 40 years, particularly since 1982.”).

140. *See* Lawrence Glickman, *How White Backlash Controls American Progress*, ATLANTIC, <https://www.theatlantic.com/ideas/archive/2020/05/white-backlash-nothing-new/611914/> (May 22, 2020) (discussing how there was growing white resentment and backlash to every political gain for Blacks); *see also* Martin Luther King, Jr., *The Three Evils of Society at the National Conference on New Politics* (Aug. 31, 1967) (“There has never been a solid, unified and determined thrust to make justice a reality for Afro-Americans. The step backward has a new name today, it is called the ‘white backlash,’ but the white backlash is nothing new. It is the surfacing of old prejudices, hostilities, and ambivalences that have always been there. . . . The white backlash of today is rooted in the same problem that has characterized America ever since the black man landed in chains on the shores of this nation. . . . For the good of America, it is necessary to refute the idea that the dominant ideology in our country, even today, is freedom and equality while racism is just an occasional departure from the norm on the part of a few bigoted extremists.”).

the VRA.<sup>141</sup> Although, between 1982 and 2006, the Department of Justice blocked over 700 voting changes “based on a determination that the changes were discriminatory.”<sup>142</sup> When *Shelby County v. Holder* came across court dockets challenging the validity of the preclearance requirement, the Court was already primed to strike down the formula.<sup>143</sup> This decision reopened the door to second-generation voter suppression methods masked as conservative voter laws.<sup>144</sup> In one decision, the Court removed the teeth of the VRA—federal oversight.<sup>145</sup>

The majority in *Shelby County* held that the coverage formula of Section 4(b), which identified states that needed to be precleared before implementing new voting laws, was unconstitutional.<sup>146</sup> The majority began the analysis by backpedaling on their original reasons for establishing preclearance and centered their arguments on the undeniable value of federalism.<sup>147</sup> The Court opined that requiring nine states to obtain federal permission to change their voting laws violates state sovereignty since other states may put parallel laws into action without approval.<sup>148</sup> Despite conceding that the improvements in Black voter turnout were due to the VRA,<sup>149</sup> the majority decided that racial discrimination was a problem of the past. In her cutting dissent, Justice Ginsburg highlighted the importance of the Act in combatting voter discrimination.<sup>150</sup> Justice Ginsburg asserted, “Throwing out preclearance when it

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141. See *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2507 (2009). “Since 1982,” the Court explained, “only 17 jurisdictions—out of more than 12,000 covered political subdivisions—have successfully bailed out of the Act.” *Id.* Thus, the Court concluded, “[i]t is unlikely that Congress intended the [preclearance requirement] to have such limited effect.” *Id.*

142. ANDERSON, *supra* note 102, at 63–64.

143. See *id.* at 39.

144. See Deale, *supra* note 133, at 8–9.

145. See *Shelby County v. Holder*, 570 U.S. 529, 531 (2013) (holding the preclearance formula in Section 4(b) of the VRA unconstitutional).

146. *Id.* at 557; see also Carroll Rhodes, *Federal Appellate Courts Push Back Against States’ Voter Suppression Laws*, 85 *MISS. L.J.*, 1227, 1243–44 (2017).

147. *Shelby County*, 570 U.S. at 544–45.

148. *Id.* at 544.

149. *Id.* at 548.

150. *Id.* at 560 (Ginsburg, J., dissenting).

has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”<sup>151</sup>

The majority decision failed to reckon with one clear issue: The VRA worked because of “vigorous federal intervention,” not because racism stopped.<sup>152</sup> The decision was aligned with the attitudes of many Americans who believed that the election of President Barack Obama signaled the end of America’s “race issue.”<sup>153</sup> The *Shelby County* majority ignored the reality that voter suppression could not be eradicated without federal oversight and involvement to ensure Black participation in the electoral process.<sup>154</sup> The effects of *Shelby County* were immediately felt around the country.<sup>155</sup> Mere hours after the decision, states that were previously covered by the preclearance requirement began to utilize once-prohibited tactics to disenfranchise Black voters.<sup>156</sup> From a “rash of voter ID laws, purged voting rolls, redrawn district boundaries, and

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151. *Id.* at 590 (Ginsburg, J., dissenting).

152. ANDERSON, *supra* note 102, at 27.

153. See Jeremy Nesoff, *The Myth of a Post-Racial Society After the Obama Presidency*, FACING HIST. & OURSELVES: FACING TODAY (Feb. 8, 2017), <https://facingtoday.facinghistory.org/the-myth-of-a-post-racial-society-after-the-obama-presidency>.

We live in an era that rightfully celebrates the election of an African American man to the presidency at the same time that more black men are incarcerated than graduate from college. It is an era that celebrates the memorialization of Martin Luther King Jr. alongside Thomas Jefferson and Abraham Lincoln on the National Mall while U. racial inequality increases as the state dismantles policies designed to redress these inequalities. It is an era that honors Rosa Parks, Fannie Lou Hamer, and Coretta Scott King, in the words of President George W. Bush, as “three heroes of American history who devoted their lives to the struggle for human rights,” while black women continue to “epitomize illegitimacy in the national imagination” . . . . As these juxtapositions suggest, the legacy of the Voting Rights Act entails astonishing success and abysmal failure, unprecedented breakthroughs and devastating retrenchment.

Stephen Houston Marshall, *Telling It Just Like It Is: The Tragicomedy of the 1965 Voting Rights Act*, 39 UNIV. CHI. PRESS, 709, 710 (2014).

154. See ANDERSON, *supra* note 102, at 42.

155. *Id.* at 41.

156. See *The Effects of Shelby County v. Holder*, BRENNAN CTR. FOR JUST. (Aug. 6, 2018), <https://www.brennancenter.org/our-work/policy-solutions/effects-shelby-county-v-holder>.



closed and moved polling places,”<sup>157</sup> Black voters were faced with new obstacles to get to the ballot box. Within twenty-four hours after the decision, Texas implemented new legislation that severely limited acceptable forms of government-issued photo identification, which white people were more likely to carry, such as gun licenses.<sup>158</sup>

Mississippi and Alabama also implemented new photo identification laws, which were previously banned due to the preclearance requirement.<sup>159</sup> Alabama “eliminated utility bills, bank statements, and other documents as viable proof of residency” and began requiring government-issued photos to cast a ballot.<sup>160</sup> Despite sanctioning the use of government-issued photo identification as an acceptable form of voter identification, such identification was not on the approved list of acceptable voter identification for those who lived in federal housing, where more Black people are likely to live.<sup>161</sup> The state issued only 5,070 voter cards out of the estimated quarter-million that were needed to ensure voters would be able to cast ballots, based on the state’s calculations.<sup>162</sup> *Shelby County*

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157. ANDERSON, *supra* note 102, at 42. The effects were evident in drastic changes to Black voter turnout: in Wisconsin, for example, between 2012 and 2016, Black voting rates decreased from 78% to less than 50%. *Id.* Even more specifically, “[i]n Milwaukee County, which is overwhelmingly African American, fifty thousand fewer votes were cast in a state that [former President] Donald Trump won by only twenty-seven thousand ballots.” *Id.*

158. See S.B. 14, 82d Legis., Prior Sess. (Tex. 2011); see also *The Effects of Shelby County v. Holder*, *supra* note 156 (“Over 600,000 registered Texas voters did not have an acceptable ID under the new law.”).

159. *The Effects of Shelby County v. Holder*, *supra* note 156; see also P.R. Lockhart, *How Shelby County v. Holder Upended Voting Rights in America*, VOX, <https://www.vox.com/policy-and-politics/2019/6/25/18701277/shelby-county-v-holder-anniversary-voting-rights-suppression-congress> (June 25, 2019, 7:49 PM) (“Since *Shelby*, states have really opened the floodgates to voter suppression, and we’ve seen laws that have discriminated against voters of color all across the country.”).

160. ANDERSON, *supra* note 102, at 124.

161. *Id.* The Alabama Secretary of State supported the law, arguing that “qualified voter IDs could be obtained at the Department of Motor Vehicles” throughout all Alabama counties. After this assertion, the Governor “closed the DMV locations in the six counties where [Black voters] made up more than 70 percent of the population.” *Id.* at 125.

162. *Id.* The Governor also purged the voting rolls and by 2017, John Merrill put 340,162 people on inactive voter status. *Id.* at 127. In response to questions of voter suppression, John Merrill responded:

reignited intentional efforts to disenfranchise Black voters that were in direct response to years of federal oversight.

*C. The Voting Rights Act and Modern-Day Voter Suppression*

Without the promise of federal oversight, Black voters are still subject to an array of voter suppression tactics.<sup>163</sup> The most recurring are the extremely long wait times in poll lines.<sup>164</sup> “Minority voters are six times as likely as white voters to stand in line for more than an hour to vote.”<sup>165</sup> Wait times play a direct role in voter participation;<sup>166</sup> for every hour voters are forced to wait, the probability of voting in the next election drops by one percentage point.<sup>167</sup> Although this does not sound like a lot, this means about 200,000 people did not vote in 2014 because of the lines they encountered in 2012.<sup>168</sup>

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If you're too sorry or lazy to get up off of your rear and to go register to vote . . . then you don't deserve that privilege . . . As long as I'm [S]ecretary of [S]tate of Alabama, . . . you're going to have to show some initiative to become a registered voter in this state.

*Id.*

163. See Howard M. Shapiro, *Geometry and Geography: Racial Gerrymandering and the Voting Rights Act*, 94 YALE L.J. 189, 196 (1984) (discussing how racial gerrymandering “pack[s] minorities into a minimum number of wards, or disperse[s] minority voters into surrounding white districts,” denying Black voters’ equal access to political participation).

164. See German Lopez, *Minority Voters Are 6 Times as Likely as White Voters to Wait More than an Hour to Vote*, VOX (Nov. 8, 2016, 1:30 PM), <https://www.vox.com/identities/2016/11/8/13564406/voting-lines-race-2016>; see also Stephen Pettigrew, *The Racial Gap in Wait Times: Why Minority Precincts Are Underserved by Local Election Officials*, 132 POL. SCI. Q. 527, 527 (2017) [hereinafter Pettigrew, *Racial Gap in Wait Times*] (“In the November 2012 general election, 1 in 10 voters waited in line for more than 30 minutes to cast a ballot. About 3.5 million voters waited in excess of an hour, with some standing in line for longer than five hours. . . . Additionally, minorities are three times as likely to wait longer than 30 minutes and six times as likely to wait more than 60 minutes.”); David A. Graham, *Here's Why Black People Have to Wait Twice as Long to Vote as Whites*, THE ATLANTIC (Apr. 8, 2013), <https://www.theatlantic.com/politics/archive/2013/04/heres-why-black-people-have-to-wait-twice-as-long-to-vote-as-whites/274791/>.

165. Lopez, *supra* note 164.

166. See HANNAH KLAIN, KEVIN MORRIS, MAX FELDMAN & REBECCA AYALA, BRENNAN CTR. FOR JUST., WAITING TO VOTE: RACIAL DISPARITIES IN ELECTION DAY EXPERIENCES 4 (2020), [https://www.brennancenter.org/sites/default/files/2020-06/6\\_02\\_WaitingtoVote\\_FINAL.pdf](https://www.brennancenter.org/sites/default/files/2020-06/6_02_WaitingtoVote_FINAL.pdf).

167. Stephen Pettigrew, *The Downstream Consequences of Long Waits: How Lines at the Precinct Depress Future Turnout*, ELECTORAL STUD. 1, 8 (July 1, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7438211/pdf/main.pdf>.

168. *Id.* at 2.

One main reason Black voters are more likely to wait in longer poll lines is because areas with Black voters often receive fewer election resources.<sup>169</sup> Normally, for most voters, polling places are determined by the name of their assigned precinct.<sup>170</sup> These precincts are assigned their distinct polling locations by each state's local election authority.<sup>171</sup> For many polling places, quality and quantity of polling resources do not account for the high volume of voters. While it would be easy to explain away this issue based on partisan bias, data proves that racial disparities in wait times are not primarily driven by how Republican the state or county is.<sup>172</sup> Both Democratic and Republican counties are susceptible to generating conditions that lead to Black voters spending more time waiting in line at polls.<sup>173</sup>

Inflexible arrival times at polling locations are another reason for long wait times.<sup>174</sup> Voter data collected from smartphone users suggests that voters in Black areas are more likely to show up around the same time.<sup>175</sup> This likely occurs because Black

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169. See Pettigrew, *Racial Gap in Wait Times*, *supra* note 164, at 537–39 (“[T]he percentage of white voters in a precinct is a significant predictor of resource allocation. In the case of both poll workers and voting machines, precincts that have a higher proportion of white voters have fewer registered voters per resource.”); see also M. Keith Chen, Kareem Haggag, Devin G. Pope & Ryne Rohla, *Racial Disparities in Voting Wait Times: Evidence from Smartphone Data* 18 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26487, 2019), [https://www.nber.org/system/files/working\\_papers/w26487/w26487.pdf](https://www.nber.org/system/files/working_papers/w26487/w26487.pdf) (“We find suggestive evidence that [racial disparities in waiting times] could be driven by fewer resources that leads to congestion especially in high-volume polling places.”); David C. Kimball, *Why Are Voting Lines Longer for Urban Voters?* 3 (Mar. 29, 2013) (unpublished manuscript) (on file with the University of Missouri-St. Louis).

170. See, e.g., Chen et al., *supra* note 169, at 41.

171. *Id.*

172. *Id.* at 37–38.

173. *Id.* at 38.

174. See CHARLES STEWART III, CALTECH/MIT VOTING TECH. PROJECT, *MANAGING POLLING PLACE RESOURCES* 8 (2015), <https://web.mit.edu/vtp/Managing%20Polling%20Place%20Resources.pdf> (assuming that voters who wait to vote at times where there is a higher volume of voters and linger waiting time only do so because of an inflexible schedule).

175. See Kevin Morris, *Georgia's Proposed Voting Restrictions Will Harm Black Voters Most*, BRENNAN CTR. FOR JUST. (Mar. 6, 2021), <https://www.brennancenter.org/our-work/research-reports/georgias-proposed-voting-restrictions-will-harm-black-voters-most> (noting that church voting initiatives led to a surge of Black voters on Sundays).

voters have less flexible jobs than white voters.<sup>176</sup> Black voters typically try to cast their ballots either before work or afterwards.<sup>177</sup> Polling lines are a routine issue for many elections and posed an even greater threat when COVID-19 emerged at the beginning of 2020.

### III. THE UNITED STATES' TWO PANDEMICS: VOTER SUPPRESSION AND COVID-19

#### A. *Racially Disparate Effects of COVID-19 on Black Americans*

America's voting system was again challenged in the beginning of 2020 by COVID-19, which upended daily life by forcing Americans inside.<sup>178</sup> While deep health disparities have always existed in the United States, the pandemic brought these harsh realities to the forefront of our nation.<sup>179</sup> As of early 2022, the Centers for Disease Control and Prevention ("CDC") reports that over fifty-six million Americans have been infected,

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176. See ROBERT P. JONES, DANIEL COX, ROB GRIFFIN, MOLLY FISCH-FRIEDMAN & ALEX VANDERMAAS-PEELER, PUB. RELIGION RSCH. INST., AMERICAN DEMOCRACY IN CRISIS: THE CHALLENGES OF VOTER KNOWLEDGE, PARTICIPATION, AND POLARIZATION 15, fig.3 (2018), <https://www.prii.org/wp-content/uploads/2018/07/AMERICAN-DEMOCRACY-IN-CRISIS.pdf>; Emily Badger, *Why Early Voting Is about So Much More than Convenience*, WASH. POST (Sept. 30, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/09/30/why-early-voting-is-about-so-much-more-than-convenience>; see also Jeremy Adam Smith & Teja Pattabhiraman, *How Inequality Keeps People from Voting*, GREATER GOOD MAG. (Oct. 29, 2020), [https://greatergood.berkeley.edu/article/item/how\\_inequality\\_keeps\\_people\\_from\\_voting](https://greatergood.berkeley.edu/article/item/how_inequality_keeps_people_from_voting); see generally Christian E. Weller, *African Americans Face Systematic Obstacles to Getting Good Jobs*, CTR. FOR AM. PROGRESS: ECON. (Dec. 5, 2019, 9:03AM), <https://www.americanprogress.org/issues/economy/reports/2019/12/05/478150/african-americans-face-systematic-obstacles-getting-good-jobs> (discussing the turbulent nature of employment outcomes for African Americans compared to whites).

177. See Badger, *supra* note 176.

178. See generally Reis Thebault, Tim Meko & Junne Alcantara, *Sorrow and Stamina, Defiance and Despair. It's Been a Year.*, WASH. POST, <https://www.washingtonpost.com/nation/interactive/2021/coronavirus-timeline/> (Mar. 11, 2021); Amy Tennery & Rory Carroll, *No Cheering, No Parties: COVID-19 Forces Different Super Bowl Sunday for Fans*, REUTERS (Feb. 6, 2021, 2:57 PM), <https://www.reuters.com/article/us-football-nfl-superbowl-fans/no-cheering-no-parties-covid-19-forces-different-super-bowl-sunday-for-fans-idUSKBN2A60QB>.

179. KAITLIN HUNTER & DAVID KENDALL, *EQUITABLE AND EFFICIENT DISTRIBUTION OF A COVID-19 VACCINE 2* (2020), <http://thirdway.imgix.net/pdfs/equitable-and-efficient-distribution-of-a-covid-19-vaccine.pdf>.

and over 970,000 lives have been lost to the disease.<sup>180</sup> While former Governor Andrew Cuomo and others erroneously referred to COVID-19 as the “great equalizer,” Black and Latinx individuals are disproportionately affected by the virus.<sup>181</sup>

The CDC reports that Blacks are 1.1 times more likely to be infected with the virus, 2.5 times more likely to be hospitalized, and 1.7 times more likely to die because of the virus than white people.<sup>182</sup> The higher death rate for Black Americans was explained, in part, by underlying health conditions such as obesity and diabetes.<sup>183</sup> However, a recent report by Sutter Health proved that even without the underlying health conditions, minorities are still more likely to have adverse health outcomes due to the virus.<sup>184</sup> The data imbalance forced researchers to look for other causes for the disparities in the amount of cases for Black Americans.<sup>185</sup> People of color are 50% more likely to work in the service industry, such as nursing or home healthcare, grocery stores, or mass transit where they are much more likely to be exposed to the virus.<sup>186</sup> Housing also

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180. COVID Data Tracker: United States COVID-19 Cases, Deaths, and Laboratory Testing (NAATs) by State, Territory, and Jurisdiction, CTRS. FOR DISEASE CONTROL & PREVENTION, [https://covid.cdc.gov/covid-data-tracker/#cases\\_casesper100klast7days](https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days) (last visited Mar. 25, 2022).

181. Katherine K.M. Stavropoulos, *The Myth of COVID-19 as the “Great Equalizer,”* PSYCH. TODAY (Aug. 3, 2020), <https://www.psychologytoday.com/us/blog/neuroscience-in-translation/202008/the-myth-covid-19-the-great-equalizer>.

182. COVID-19 Hospitalization and Death by Race/Ethnicity, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html> (Mar. 10, 2022).

183. Richard A. Oppel Jr., Rivert Gebeloff, K.K. Rebecca Lai, Will Wright & Mitch Smith, *The Fullest Look Yet at the Racial Inequity of Coronavirus*, N.Y. TIMES (July 5, 2020), <https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cd-c-data.html>.

184. Kristen M. J. Azar, Zijun Shen, Robert J. Romanelli, Stephen H. Lockhart, Kelly Smits, Sarah Robinson, Stephanie Brown & Alice R. Pressman, *Disparities in Outcomes Among COVID-19 Patients in a Large Health Care System in California*, 39 HEALTH AFFS. 1253, 1261 (2020), <https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.2020.00598>.

185. See *The Dose: Why Are More Black Americans Dying of COVID-19*, COMMONWEALTH FUND, at 4:18 (June 26, 2020), <https://www.commonwealthfund.org/publications/podcast/2020/jun/why-are-more-black-americans-dying-covid-19>.

186. *Id.* at 4:50–5:20.

increases the risk of exposure to COVID-19.<sup>187</sup> “Minorities are more than [25%] more likely to . . . live with multiple generations in the same households.”<sup>188</sup> This includes grandparents, parents, and children in one household, which makes it more difficult to practice social distancing.<sup>189</sup> Lastly, people of color often lack access to basic health care and insurance, “and others risk losing coverage for themselves and their families if they lose their jobs.”<sup>190</sup> As the nation geared up for an unprecedented election season, early data about the virus foreshadowed imminent voter suppression issues.<sup>191</sup>

### B. Politicizing Mail-in Ballots

As the nation adjusted to life indoors, it became clear that the 2020 election process was in dire need of an overhaul to keep Americans safe and prevent the further spread of COVID-19. Although many Americans viewed mail-in voting as a timely alternative to in-person voting, some states sought and received Supreme Court approval to implement measures to restrict the opportunity to vote by mail.<sup>192</sup> The Supreme Court upheld Wisconsin’s voting laws in a 5–3 decision and rejected efforts to count mail-in ballots received the day after election day.<sup>193</sup> The Court reasoned that state legislatures, not Supreme Court Justices, bear the responsibility of setting election rules.<sup>194</sup> Justice Kagan’s dissent highlighted prominent issues that the majority opinion brushed off—the ongoing pandemic and the

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187. *Id.* at 5:28–5:48.

188. *Id.*

189. *Id.*

190. See *Too Many Black Americans are Dying from COVID-19*, SCI. AM. (Aug. 1, 2020), <https://www.scientificamerican.com/article/too-many-black-americans-are-dying-from-covid-19/>.

191. See Isabel Linzer, *COVID-19 is Poised to Deepen Racial Disenfranchisement in November*, FREEDOM HOUSE: PERSPECTIVES (June 22, 2020), <https://freedomhouse.org/article/covid-19-poised-deepen-racial-disenfranchisement-november>.

192. See *Democratic Nat’l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 28 (2020) (Roberts, C.J., concurring).

193. *Id.*

194. *Id.* at 29 (citing U.S. CONST. art. I, § 4, cl. 1).

health risks associated with in-person voting.<sup>195</sup> Justice Kagan reasoned that “in-person voting . . . with its often-long lines, touch screens, and enclosed booths” created unacceptable risks for a voter during the pandemic.<sup>196</sup> Wisconsin was just one of thirty-two states that required absentee ballots be received by election day to be counted.<sup>197</sup> The political debate surrounding mail-in voting continued throughout the election, sending conflicting messages about the reliability of mail-in ballots.<sup>198</sup>

### 1. *The USPS funding crisis*

To assuage their concerns, voters turned to the United States Postal Service (USPS) for reassurance about the reliability of mail-in ballots.<sup>199</sup> The USPS “mission is to provide affordable mail and package delivery services” throughout the United States.<sup>200</sup> The USPS is a government agency and operates solely from revenues garnered from mail and package delivery.<sup>201</sup> The pandemic significantly reduced first-class mail volume, which exacerbated the USPS’s already-strained financial situation.<sup>202</sup>

Data leading up to the primaries demonstrated that Democrats were more likely than Republicans to mail in ballots

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195. *Id.* at 40, 44 (Kagan, J., dissenting).

196. *Id.* at 40.

197. See VOPP: Table 11: Receipt and Postmark Deadlines for Absentee Ballots, NAT’L. CONF. OF STATE LEGISLATURES (Sept. 29, 2020), <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-11-receipt-and-postmark-deadlines-for-absentee-ballots.aspx>.

198. See Nicholas Riccardi, *Here’s the Reality Behind Trump’s Claims About Mail In Voting*, AP NEWS (Sept. 20, 2020), <https://apnews.com/article/virus-outbreak-joe-biden-election-2020-donald-trump-elections-3e8170c3348ce3719d4bc7182146b582>; see also MaryAlice Parks & Kendal Karson, *A Step-by-Step Look at Trump’s Falsehoods on Mail-in Voting: Analysis*, ABC NEWS (Oct. 1, 2020, 5:01 AM), <https://abcnews.go.com/Politics/step-step-trumps-falsehoods-mail-voting-analysis/story?id=73354979>.

199. See Grace Panetta, *What You Need to Know About US Postal Service’s Funding Crisis, and How It Could Impact Your Vote in the November Election*, BUS. INSIDER (Aug. 14, 2020, 6:09 PM), <https://www.businessinsider.com/us-postal-service-delay-funding-crisis-mail-election-trump-explainer-2020-8>.

200. *Id.*

201. *Id.*

202. *Id.*

early,<sup>203</sup> and historically, Black voters are more likely to vote for a Democratic candidate.<sup>204</sup> Although Congress initially agreed to a thirteen-billion-dollar grant for the USPS, Treasury Secretary Steve Mnuchin refused the grant, emphasizing to lawmakers that the USPS could “have a loan, or . . . nothing at all.”<sup>205</sup> In an effort to reduce costs, the new Postmaster General made significant changes to the USPS mail system, including some that increased mail delays.<sup>206</sup> The USPS limited overtime hours for mail carriers, which reduced how much mail carriers could deliver on a given day, and also removed around 15% of its total high-speed processing letter machines.<sup>207</sup> For Black voters, these events increased their skepticism about the election process while simultaneously expanding their anxiousness about choosing between their health or their right to vote.<sup>208</sup>

## 2. Racial disparity in mail-in voting

Regardless of the USPS funding crisis, voter suppression is still implicit in voting-by-mail procedures.<sup>209</sup> Voting by mail disproportionately benefits voters that are older and white.<sup>210</sup>

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203. Justine Coleman, *Democrats More Likely than Republicans to Mail In Ballots Early: Poll*, THE HILL (Sept. 15, 2020, 2:40 PM), <https://thehill.com/homenews/campaign/516521-democrats-more-likely-to-mail-in-ballots-early-than-republicans-poll>.

204. Quentin Kidd, Herman Diggs, Mehreen Farooq & Megan Murray, *Black Voters, Black Candidates, and Social Issues: Does Party Identification Matter?*, 88 SOC. SCI. Q. 165, 165 (2007).

205. Panetta, *supra* note 199.

206. *Id.*

207. *Id.* The Postmaster General also reduced late trips after-hours, which helps deliver the maximum amount of mail each day and did not allow a discounted bulk rate for envelopes to be marked as first-class mail. *Id.*

208. See Corey Williams, *Despite Virus Threat, Black Voters Wary of Voting by Mail*, AP NEWS (Aug. 2, 2020), <https://apnews.com/article/u-s-news-ap-top-news-race-and-ethnicity-michigan-elections-0dc414e6bf09ed27dd3c801344ead71c>.

209. See generally Jane C. Timm, *A White Person and a Black Person Vote by Mail in the Same State. Whose Ballot is More Likely to be Rejected?* NBC NEWS (Aug. 9, 2020, 11:34 AM), <https://www.nbcnews.com/politics/2020-election/white-person-black-person-vote-mail-same-state-whose-ballot-n1234126> (discussing barriers to mail-in voting which disproportionately affect minority voters).

210. *Id.*; see also LAURA WILLIAMSON, UNIVERSALLY ACCESSIBLE AND RACIALLY EQUITABLE VOTE BY MAIL 17 (2020), <https://www.demos.org/policy-briefs/universally-accessible-and->



For starters, “[o]lder, white voters are significantly more likely to vote by mail.”<sup>211</sup> Meanwhile, “[v]oters of color and younger voters are significantly more likely to have their ballots rejected,”<sup>212</sup> which suggests that institutional issues are at work rather than voter error.<sup>213</sup> The most common reason that mail-in votes are rejected is because of late arrival.<sup>214</sup> In lower income communities, where many Black voters live, mail service tends to be less reliable and the pandemic stressed mail service operations even more.<sup>215</sup> 2020 highlighted two clear endemics: voter suppression and COVID-19.<sup>216</sup> As Renaldo Pearson, External Affairs Director at grassroots advocacy organization RepresentUs stated, “When it comes to the Black vote, America is less a story about democracy than it is a story about hypocrisy.”<sup>217</sup> America now has a chance to reverse the hypocrisy and to demonstrate that America is capable of change that protects those most vulnerable in society.

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racially-equitable-vote-mail (explaining that Black and Brown voters use vote-by-mail less than white voters); Daniel A. Smith & Anna Baringer, *Appendix E: County Vote-By-Mail Racial Disparities*, ACLU FLA. (Jan. 2019), [https://www.aclufl.org/sites/default/files/wysiwyg/electionreform\\_vbmrace.pdf](https://www.aclufl.org/sites/default/files/wysiwyg/electionreform_vbmrace.pdf) (noting rejection rate in certain Florida counties were higher for Black and Hispanic voters); Kaelan Deese, *Black North Carolina Voters' Mail-in Ballots Rejected at Twice the Rate as White Voters: Report*, THE HILL (Sept. 25, 2020, 4:31 PM), <https://thehill.com/homenews/state-watch/518292-black-north-carolina-voters-mail-in-ballots-rejected-at-twice-the-rate> (noting the rejection rate is higher for Black North Carolina voters than white North Carolina voters).

211. Timm, *supra* note 209; see also WILLIAMSON, *supra* note 210, at 17 (explaining how Black and Brown voters use vote-by-mail less than white voters); Smith & Baringer, *supra* note 210 (noting rejection rate in certain Florida counties were higher for Black and Hispanic voters); Deese, *supra* note 210 (noting the rejection rate is higher for Black North Carolina voters than white North Carolina voters).

212. Timm, *supra* note 209.

213. *Id.*

214. *Id.*

215. *Id.*

216. See Panetta, *supra* note 199; see also Grace Panetta, *How Black Americans Still Face Disproportionate Barriers to the Ballot Box in 2020*, INSIDER, <https://www.businessinsider.com/why-black-americans-still-face-obstacles-to-voting-at-every-step-2020-6> (Sept. 18, 2020, 11:00 AM) [hereinafter Panetta, *Disproportionate Barriers*].

217. Panetta, *Disproportionate Barriers*, *supra* note 216.

## IV. DROP BOXES—NOW AND FOREVER

A. *Drop Boxes: A Safe Way to Cast a Ballot*

A national mandate of drop boxes for all federal elections has the potential to eradicate voter suppression across America.<sup>218</sup> A study from King County, Washington, an area containing 2.15 million residents, concluded that an increase of drop boxes per mile increased the “probability of voting by two to seven percentage points.”<sup>219</sup> While this percentage seems low, it supports the proposition that drop boxes have a positive effect on voter turnout.<sup>220</sup> Drop boxes could help cure Black voter suppression at the polls<sup>221</sup> and reduce voter skepticism surrounding mail-in ballots.<sup>222</sup>

Drop boxes are designed to receive ballots effectively and securely no matter the time or place, or the *color* of the person casting the ballot.<sup>223</sup> There are many states that have already ushered drop boxes into their voting systems;<sup>224</sup> Colorado, Oregon, and Washington have successfully used drop boxes for years.<sup>225</sup> Most notably, in Colorado, “75% of all ballots in 2018

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218. See William McGuire, Benjamin Gonzalez O’Brien, Katherine Baird, Benjamin Corbett & Loren Collingwood, *Does Distance Matter? Evaluating the Impact of Drop Boxes on Voter Turnout*, 101 SOC. SCI. Q. 1789, 1802 (2020).

219. Loren Collingwood, William McGuire, Benjamin Gonzalez O’Brien, Katherine Baird & Sarah Hampson, *Do Drop Boxes Improve Vote Turnout? Evidence from King County, Washington*, 17 ELECTION L.J. 58, 60, 71 (2018) (discussing whether drop boxes impact voter turnout and convenience).

220. McGuire et al., *supra* note 218, at 1789.

221. Keith G. Bentele & Erin E. O’Brien, *Jim Crow 2.0? Why States Consider and Adopt Restrictive Voter Access Policies*, 11 PERSPS. ON POL. 1088, 1089–90 (2013) (examining factors associated with both the proposal and adoption of restrictive voter access).

222. See Williams, *supra* note 208.

223. See Holmes Lybrand, *Fact Checking Trump’s Misleading Suggestions That Ballot Drop Boxes Aren’t Secure*, CNN POL., <https://www.cnn.com/2020/08/18/politics/donald-trump-ballot-drop-boxes-fact-check/index.html> (Aug. 18, 2020, 7:04 PM).

224. See Sarah Berlin, *Mail Ballot Drop Boxes: Another Option to Cast Your Ballot!*, DEMOCRACY WORKS, <https://www.democracy.works/blog/dropboxes> (Oct. 14, 2020).

225. See McGuire et al., *supra* note 218, at 1790; see also *Ballot Drop Box Usage by Year*, WA. SEC’Y OF STATE, <https://www.sos.wa.gov/elections/research/ballot-drop-box-usage-by-year.aspx> (last visited Mar. 25, 2022) (noting general election usage of drop boxes was 73.1% in

were returned through ballot boxes, or manually at polling locations.”<sup>226</sup> Drop boxes resemble large postal boxes that are generally bolted to the ground or located near government buildings where they can be monitored.<sup>227</sup> To support ballot security, election administrators are the only people permitted to process and handle ballots once they are submitted.<sup>228</sup> Barcodes allow states to “eliminate any duplicate ballots because a unique code is assigned to each voter.”<sup>229</sup> The barcode method prevents any illegally printed ballots because each ballot is designed by the state, approved by the USPS, and printed by a certified vendor.<sup>230</sup> Fraud or vote tampering with drop boxes is rare because of the chain of custody procedures mandated after a ballot is dropped off in the box.<sup>231</sup> For Black voters, drop boxes have ample advantages to mail-in ballots because “one can vote without the expense or inconvenience of acquiring a postage stamp,” and drop boxes reduce the number of hands through which a ballot is passed.<sup>232</sup>

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Washington for general elections and 49.8% for primary elections across all counties in Washington).

226. *Why Ballot Drop Boxes Are an Easy Alternative to USPS*, CNN POL., at 2:35–2:48, <https://www.cnn.com/videos/politics/2020/08/12/ballot-drop-boxes-voting-phillip-dnt-nwday-vpx.cnn> (last visited Mar. 25, 2022); see also McGuire et al., *supra* note 218, at 1790 (“[Fifty-seven] percent of the 3.4 million votes cast in the 2016 general election were placed in one of the state’s 314 drop boxes.”).

227. Elaine S. Povich, *Rise In Use of Ballot Drop Boxes Sparks Partisan Battles*, PEW (Oct. 16, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/10/16/rise-in-use-of-ballot-drop-boxes-sparks-partisan-battles>; see also Pam Fessler, *Ballot Drop Boxes Become Latest Front in Voting Legal Fights*, NPR (Aug. 11, 2020, 5:01 AM), <https://www.npr.org/2020/08/11/901066396/ballot-drop-boxes-become-latest-front-in-voting-legal-fights> (noting that after an SUV plowed into a Washington drop box, both the box and its contents survived).

228. Lybrand, *supra* note 223; see also CAL. CODE REGS. tit. 2, § 20137 (2021) (mandating a chain of custody procedure identifying specific election officials to take the ballots from drop box sites to election sites); *Why Ballot Drop Boxes Are an Easy Alternative to USPS*, *supra* note 226, at 0:20–0:25, 1:14–1:30 (Connecticut Secretary of State, Denise Merrill, reports that “clerks empty [drop boxes] a couple of times a day, actually, and they usually are in very prominent places”).

229. See Holmes Lybrand & Tara Subramaniam, *Fact-Checking Trump’s Recent Claims that Mail-In Voting is Rife with Fraud*, CNN POL., <https://www.cnn.com/2020/05/27/app-politics-section/donald-trump-mail-in-voter-fraud-fact-check/index.html> (May 28, 2020, 9:35 PM).

230. *Id.*

231. Lybrand, *supra* note 223.

232. McGuire et al., *supra* note 218, at 1790.

As a new resource, drop box data is limited, but there is enough information about their effectiveness<sup>233</sup> to warrant a national mandate. Another study in Washington researched the effectiveness of drop boxes on voter turnout.<sup>234</sup> The most recent study targeted Pierce County, Washington, with over 800,000 residents.<sup>235</sup> This study differed from the first one in King County by intentionally placing drop boxes in specific locations identified by election officials.<sup>236</sup> The study placed drop boxes based on numerous criteria, including “socioeconomic indicators such as income and ethnicity.”<sup>237</sup> The study found that a 1.31 mile decrease to the nearest drop box would likely increase the amount of voters in the county by 1,128.<sup>238</sup> The Pierce County study indicates that when state legislatures account for racial and socioeconomic differences to protect the right to vote, drop boxes are the most effective way to protect Black and marginalized voters.<sup>239</sup> A national mandate requiring drop boxes to be placed in Black and marginalized communities could begin a new chapter for political equity.

Despite questions regarding drop box security from former President Donald Trump, drop boxes played a significant role in the 2020 election.<sup>240</sup> In battleground states such as

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233. *Id.* at 1802.

234. *Id.* at 1789; *see also* Collingwood et al., *supra* note 219, at 71.

235. McGuire et al., *supra* note 218, at 1793–94.

236. *Id.* at 1793.

237. *Id.* at 1795–96. The other factors included: access to public transportation routes, proximity to population centers and density, familiarity of locations for a majority of the population, accessibility features of the sites for voters with disabilities, availability of parking and adequate traffic flow, ability to partner with a public organization and ability to maintain consistent locations for all countywide elections. *Id.*

238. *Id.* at 1802.

239. *See id.*

240. *See* Lybrand & Subramaniam, *supra* note 229; *see also* Donald Trump (@realDonaldTrump), TWITTER (May 26, 2020, 10:17 PM), <https://twitter.com/realDonaldTrump/status/1265255835124539392?s=20>.

There is NO WAY (ZERO!) that Mail-In Ballots will be anything less than substantially fraudulent. Mail boxes will be robbed, ballots will be forged & even illegally printed out & fraudulently signed. The Governor of California is sending Ballots to millions of people, anyone.

Pennsylvania, drop boxes proved to be an extremely necessary resource amid COVID-19.<sup>241</sup> The Pennsylvania Supreme Court ruled that the state election code allows county boards of election to collect mail-in ballots filed at drop box locations.<sup>242</sup> This ruling was particularly important for counties in Pennsylvania that had high infection rates of COVID-19.<sup>243</sup> The court reasoned that although the applicable section in the Pennsylvania election code does not explicitly allow ballot collection facilities,<sup>244</sup> such as drop boxes, the court adopts an interpretation of the election code that favors the fundamental right to vote and enfranchises, rather than disenfranchises, the electorate.<sup>245</sup> The holding also highlighted that differing election codes across the nation can be interpreted differently by each state supreme court.<sup>246</sup> The variation in election legislation underscores the need for uniform election law to ensure that America's most marginalized voters are able to reliably cast a ballot.<sup>247</sup>

### B. A Call to Congress: H.R.1 and Drop Boxes

The Pennsylvania decision highlights the utility of drop boxes as well as the need for a uniform election law. One clear opportunity to tackle both issues is through House Bill H.R.1,

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*Id.* (on file with author). As of January 8, 2021, former President Trump's Twitter account had been permanently suspended due to the violation of numerous Twitter policies, including Glorification of Violence. *Permanent Suspension of @realDonaldTrump*, TWITTER BLOG (Jan. 8, 2021), [https://blog.twitter.com/en\\_us/topics/company/2020/suspension](https://blog.twitter.com/en_us/topics/company/2020/suspension).

241. See, e.g., Jeff Chirico, *Skeptical of USPS Cuts, Philadelphia Voters Hand-Deliver Ballots Instead*, 6 ABC (Oct. 9, 2020), <https://6abc.com/election-2020-vote-presidential-donald-trump/6873694/>.

242. Pa. Democratic Party v. Boockvar, 238 A.3d 345, 361 (Pa. 2020).

243. Max Mitchell, *Pa. Supreme Court Approves Drop Boxes to Accept Mail-in Ballots, Deadline Extensions*, LAW.COM (Sept. 17, 2020, 2:46 PM), <https://www.law.com/thelegalintelligencer/2020/09/17/pa-supreme-court-approves-drop-boxes-to-accept-mail-in-ballots-deadline-extensions/>.

244. *Boockvar*, 238 A.3d 345, 361.

245. Mitchell, *supra* note 243.

246. *Boockvar*, 238 A.3d at 360.

247. See Anthony J. Gaughan, *Ramshackle Federalism: America's Archaic and Dysfunctional Presidential Election System*, 85 FORDHAM L. REV. 1021, 1021 (2016).

which focuses on reforming election law.<sup>248</sup> Although Congress has no express Constitutional authority to “mandate that states adopt uniform standards in presidential elections,” the Elections Clause does provide Congress “sweeping authority over congressional elections.”<sup>249</sup> Taking this route, Congress could reform congressional election standards with H.R.1, thereby “indirectly achiev[ing] the same result for presidential elections” as well.<sup>250</sup> States have been plagued by inconsistent and underfunded federal election administration for decades, due to the delegation of election power to counties,<sup>251</sup> thus creating a need for a large-scale solution. With the authority from both the Constitution and the Voting Rights Act of 1965, Congress is in the best position to utilize its authority to regulate elections<sup>252</sup> to remedy the issue.

H.R.1, also known as the For the People Act, was created to specifically reform election law.<sup>253</sup> H.R.1 invites more expansive redress for voting access that includes race *and* class.<sup>254</sup> The Act’s purpose is “[t]o expand Americans’ access to the ballot box.”<sup>255</sup> The Act was passed by the House of Representatives on March 3, 2021 and, as of December 2021, is awaiting Senate approval.<sup>256</sup> The Act is composed of ten provisions dedicated to modernizing voter registration, election ethics, security, and

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248. H.R. 1, 117th Cong. (2021).

249. Gaughan, *supra* note 247, at 1039; U.S. CONST. art. I, § 4.

250. Gaughan, *supra* note 247, at 1039.

251. *Id.* at 1031 (“Even in non-voter ID states with generous registration procedures, such as California, there are arbitrary, conflicting, and unpredictable voting standards. For example, a July 2016 Los Angeles Times investigation found that California’s rules for provisional ballots vary significantly from county to county.”).

252. Audra L. Wassom, *The Help America Vote Act of 2002 and Selected Issues in Election Law Reform*, 29 T. MARSHALL L. REV. 357, 357 (2004).

253. See H.R. 1, 117th Cong. § 1000 (2021).

254. *Id.* §§ 3(4)(a), 307.

255. H.R. 1.

256. *Annotated Guide to the For the People Act of 2021*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/policy-solutions/annotated-guide-people-act-2021> (Mar. 18, 2021); see also *H.R.1 - For the People Act of 2021*, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/house-bill/1/text> (last visited Dec. 22, 2021) (showing text and status of bill).

enforcing campaign finance laws.<sup>257</sup> For example, H.R.1 seeks to end partisan gerrymandering in federal elections, prohibit voter roll purging, and cut down on long poll lines.<sup>258</sup> Title I's focus is on election access, proposing to create a new national automatic voter registration, allowing same-day voter registration and online voter registration.<sup>259</sup>

Section 311 addresses the use of secured drop boxes for absentee ballots rather than for *all* ballots for federal elections.<sup>260</sup> The section requires each state to provide in-person, secured, and clearly labeled drop boxes where voters can drop off absentee ballots.<sup>261</sup> To determine the amount of drop boxes per county, states are required to follow a formula,<sup>262</sup> which provides that for counties with 20,000 or more residents who are registered to vote in the given election, "the number of drop boxes shall be a number equal to or greater than the number of such individuals divided by 20,000."<sup>263</sup> All other counties are required to have at least one drop box.<sup>264</sup> Lastly, Section 311 provides the states with various criteria to determine the location of drop boxes, the first of which is that the drop boxes must be "available to all voters on a non-discriminatory basis."<sup>265</sup>

However, the criteria requiring that the boxes are "available to all voters on a non-discriminatory basis"<sup>266</sup> is far too vague to ensure that the most marginalized are protected. As successfully indicated in the Pierce County study in Washington, drop boxes need to be targeted to specific

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257. *See* H.R. 1 § 307.

258. *See id.* § 2501.

259. *Id.* §§ 1000(b)(1), 1012, 304, 6A.

260. *See id.* § 311(a).

261. *Id.*

262. *Id.* § 311(d)(1).

263. *Id.* § 311(d)(1)(A).

264. *Id.* § 311(d)(1)(B).

265. *Id.* § 311(e).

266. *Id.* The Act specifically ensures that drop boxes are installed in rural communities and on Tribal lands and provides specific actions such as the need for states to consult with Tribal leaders before installing the boxes. *Id.* § 311(f).

communities<sup>267</sup> with high rates of Black citizens and those of lower socioeconomic status to ensure that drop boxes are well located. As written, H.R.1 is not explicit enough in its provisions to ensure placement of drop boxes in marginalized communities, and the federal government should oversee the implementation of drop boxes around the country. Congress must utilize the authority it does have to regulate federal elections<sup>268</sup> to protect those marginalized, especially Black voters, because of the history of disenfranchisement.<sup>269</sup>

States may resist the national mandate of drop boxes for any federal election because of both the cost and potential Tenth Amendment challenges. As written, H.R.1 does not address funding for drop boxes;<sup>270</sup> however, the cost of drop boxes could, and should, be funded by Congress. While the estimated cost of \$10,000 to administer drop boxes may be a hurdle,<sup>271</sup> Congress has the authority<sup>272</sup> and the financial capacity to support the implementation of ballot boxes across the nation—starting with marginalized communities. Additionally, from a constitutional perspective, this implementation method could implicate the Tenth Amendment, which provides that all powers not granted to Congress are reserved to the states.<sup>273</sup> However, with H.R.1, Congress would only be focusing on federal elections, which is within their plenary power, and states would be left to decide how to run their state elections.<sup>274</sup> In a perfect world, state elections would follow suit with drop

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267. See McGuire et al., *supra* note 218, at 1790–91.

268. See U.S. CONST. art. I, § 4.

269. See discussion *supra* Part I.

270. See H.R. 1.

271. Levi Leidy, *Here's How Much It Would Cost for Americans to Vote by Mail*, LAS VEGAS REV.-J. (Aug. 26, 2020, 5:17 AM), <https://www.reviewjournal.com/life/heres-how-much-it-would-cost-for-americans-to-vote-by-mail-2103871/>.

272. Gaughan, *supra* note 247, at 1039.

273. U.S. CONST. amend. X; see Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 506 (1995) (quoting *United States v. Darby*, 312 U.S. 100, 123–24 (1941)).

274. See H.R. 1 § 3.



boxes, but this proposed solution leaves states to remain laboratories of new ideas for state elections.<sup>275</sup>

### *C. Drop Boxes and Voter Suppression*

The American voting system is rooted in systemic racism and has the potential to revert into precedented patterns of disenfranchisement if not properly addressed.<sup>276</sup> This threat can be minimized with a mandate from Congress putting the states on notice about the seriousness of the federal government's intention to protect the right to vote. The mandate would require that the number of drop boxes in every state be based on the number of citizens in every county, rather than the number of registered voters, but H.R.1 only implements drop boxes based on the number of registered voters in each county.<sup>277</sup> These measures would provide the extra security and congressional oversight in a consistent manner to protect voting rights for Black and marginalized citizens.

In the 2020 election, Texas Governor Greg Abbott signed a proclamation requiring a single designated drop-off location per county pursuant to his statutory disaster authority.<sup>278</sup> A plaintiff challenged the proclamation arguing that the limited drop box location unreasonably increased the risk of COVID-19 infections while simultaneously burdening the right to vote.<sup>279</sup> The state supreme court determined the proclamation was a

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275. See Chemerinsky, *supra* note 273, at 525.

276. See discussion *supra* Part I; see also S.B. 202, S.J. Res. § 33 (Ga. 2021) (making it a misdemeanor to hand out "any money or gifts, including, but not limited to, food and drink" within 150 feet of a polling place or 25 feet from any person standing in line to vote); Zachary B. Wolf, *At Least 45 States Have Seen Bills Aimed at Voter Suppression. Here's Why*, CNN POL., <https://www.cnn.com/2021/03/16/politics/voting-rights-debates-by-state/index.html> (Mar. 26, 2021, 7:38 AM).

277. H.R. 1 § 311(d).

278. *Abbott v. Anti-Defamation League Austin, Sw., & Texoma Regions*, 610 S.W.3d 911, 914 (Tex. 2020); see Jolie McCullough, *Texas Counties Will be Allowed Only One Drop-Off Location for Mail-In Ballots, State Supreme Court Rules*, TEX. TRIB. (Oct. 27, 2020, 6:00 PM), <https://www.texastribune.org/2020/10/27/texas-voting-elections-mail-in-drop-off/>.

279. *Abbott*, 610 S.W.3d at 916.

valid exercise of the state's goal to prevent forgery.<sup>280</sup> The court reasoned that the proclamation did not cast any constitutional doubt on an otherwise nondiscriminatory voting regulation.<sup>281</sup> The court further asserted that this was especially the case in Texas where mail-in voters still had an option to avoid the lines and crowds either by putting their ballots in the mail or dropping off their ballot at a single location on election day.<sup>282</sup>

This decision rendered a fatal blow to Texas voter advocacy groups as it reflected the court's indifference to COVID-19 exposure when citizens cast a ballot. The language used in the decision mirrored the holding in *Shelby County* by embracing state sovereignty under America's federalism framework.<sup>283</sup> Similar to *Shelby County*, this decision also failed to address significant voter suppression issues strategically framed as achieving state goals.<sup>284</sup> The court reasoned that only a few voters would experience a small burden due to the lone drop off location.<sup>285</sup> In reaching that conclusion, the court ignored that those apt to be the most hindered by the single drop box were more likely to be poor and Black.<sup>286</sup> Other southern states with a history of voter suppression—possibly motivated by the Texas Supreme Court ruling—found ways to uproot the effectiveness of drop boxes.<sup>287</sup> As foreshadowed by *Shelby County*, any decision that directly or indirectly creates a pathway for voter suppression has imminent effects on those most marginalized.<sup>288</sup>

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280. *Id.* at 922.

281. *Id.*

282. *Id.*

283. *Compare Abbott*, 610 S.W.3d at 919, with *Shelby County v. Holder*, 570 U.S. 529, 544 (2013).

284. *See Abbott*, 610 S.W.3d at 922.

285. *Abbott*, 610 S.W.3d at 921–22.

286. *See id.* at 922–23.

287. *See* Amy Sherman, *Ballot Drop Boxes Were Popular In 2020. Then They Became a GOP Target*, POLITIFACT (May 19, 2021), <https://www.politifact.com/article/2021/may/19/ballot-drop-boxes-were-popular-2020-then-they-beca/>.

288. *See Block the Vote: How Politicians are Trying to Block Voters from the Ballot Box*, ACLU, <https://www.aclu.org/news/civil-liberties/block-the-vote-voter-suppression-in-2020/> (Aug. 18, 2021).

Voter intimidation by poll watchers provides another effective way to disenfranchise voters,<sup>289</sup> especially in cases where there is only one drop off box in the county. Although expressly prohibited by federal law,<sup>290</sup> poll watchers utilize implicitly racist tactics to monitor voters deemed by them to look suspicious.<sup>291</sup> More often than not, those that they are suspect of are Black voters.<sup>292</sup> The qualifications for poll watchers differ based on state laws, but most are usually appointed by candidates and election officials to monitor procedures at voting precincts.<sup>293</sup> To assess whether poll watching statutes are constitutional, courts conduct a balancing test measuring the interests of states in regulating elections against the burdens imposed on an individual's right to vote.<sup>294</sup> The Supreme Court has repeatedly held that the prevention of election fraud is a compelling state interest justifying the use of poll watchers<sup>295</sup> despite evidence of voter intimidation and its impact on marginalized communities.<sup>296</sup> Although fraud prevention is the theoretical reason, poll watcher duties are far too often discharged in a manner that leads to voter intimidation and voter suppression, especially for marginalized

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289. See, e.g., Danny Hakim & Nick Corasaniti, *Trump Campaign Draws Rebuke for Surveilling Philadelphia Voters*, N.Y. TIMES (Nov. 7, 2020), <https://www.nytimes.com/2020/10/22/us/politics/trump-campaign-voter-surveillance.html>.

290. 52 U.S.C. § 20511(1).

291. Barton Gellman, *The Election That Could Break America*, THE ATLANTIC (Sept. 23, 2020), <https://www.theatlantic.com/magazine/archive/2020/11/what-if-trump-refuses-concede/616424/>.

292. *Id.*

293. Heather S. Heidelbaugh, Logan S. Fisher & James D. Miller, *Protecting the Integrity of the Polling Place: A Constitutional Defense of Poll Watcher Statutes*, 46 HARV. J. ON LEGIS. 217, 218 (2009).

294. See, e.g., *Crawford v. Marion Cnty. Election Bd.*, 128 S. Ct. 1610, 1616 (2008) (upholding Indiana's voter identification law requiring a photo identification to vote as a reasonable and not unduly burdensome means of curbing voter fraud).

295. See *id.* at 1612 ("There is no question about the legitimacy or importance of a State's interest in counting only eligible voters' votes."); see also *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) ("A State indisputably has a compelling interest in preserving the integrity of its election process.") (quoting *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989)); *Burson v. Freeman*, 504 U.S. 191, 199 (1992) ("[A] State has a compelling interest in ensuring that an individual's right to vote is not undermined by fraud in the election process.").

296. Gellman, *supra* note 291.

communities.<sup>297</sup> Drop boxes would eradicate the need for poll watchers, since available data revealed that drop boxes are an effective and secure way to vote.<sup>298</sup> Drop boxes obviate the need for patrol as voters drop off their ballots in the boxes.

Amending H.R.1. to ensure that drop boxes are used for all federal elections and are properly placed in the correct locations would benefit marginalized citizens, especially Black voters. Both the mandate and the accompanying federal government oversight would ensure every citizen has a right to cast a ballot.

### CONCLUSION

The perpetual evolution of racism has maintained a strong hold in voting. This Note began by exploring the ugly reality of a systemically plagued voting system that often falls into patterns of disenfranchisement. What started as an effort by the Framers to restrict the right to vote to white, land-owning males morphed over time into a movement to exclude historically marginalized citizens from casting a ballot.<sup>299</sup> After failed enforcement of the Fifteenth Amendment, the demand for Black equity came to the forefront of the nation's agenda in the 1960s and Black voters received a pathway to accountability with the Voting Rights Act of 1965.<sup>300</sup> Although the effort to disenfranchise Black voters began with federal and state legislatures, the courts throughout the years have aided their efforts. As stated by the Court of Appeals for the Fourth Circuit, some of the most exclusionary voting initiatives "target African Americans with almost surgical precision."<sup>301</sup> When the Roberts Court began to question the essential preclearance requirement for states with a history of disenfranchisement, the tide against

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297. See Heidelbaugh, et al., *supra* note 293, at 227; see also Sherry A. Swirsky, *Minority Voter Intimidation: The Problem That Won't Go Away*, 11 TEMP. POL. & CIV. RTS. L. REV. 359, 367-68 (2002).

298. See Lybrand, *supra* note 223.

299. See Charles & Fuentes-Rohwer, *supra* note 21, at 814.

300. See Finkelman, *supra* note 108, at 182.

301. N.C. State Conf. of NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016).

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the work to eradicate voter suppression began to shift. By 2013, *Shelby County v. Holder* severely limited federal oversight of voting procedures and states began to reenact voting measures to prevent Black voters from voting.<sup>302</sup> From long poll lines to voter identification requirements, Black citizens were routinely denied access to the ballot box.<sup>303</sup> The fact that these types of initiatives persist and continue to be pursued underscores the criticality of Congress amending H.R.1 to ensure that drop boxes are used for all federal elections and properly placed in marginalized communities.

Congress has an opportunity to not only address America's history of voter suppression, but to revive the legacy of *Shelby County*. A national mandate that places drop boxes in locations based on the number of people in each county with a specific emphasis on counties that house a majority of Black individuals is an effective method to enfranchise Black voters. Drop boxes ensure that "[r]ural or urban, Black or white, rich or poor, every [U.S.] citizen has the human right to vote."<sup>304</sup> This is a call to action on our leadership to implement an effective and secure way to protect Black votes with drop boxes—a goal that should stay at the forefront of any conversation about voter suppression.

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302. See *Shelby County v. Holder*, 570 U.S. 529, 529 (2013); *The Effects of Shelby County v. Holder*, *supra* note 156.

303. See Lopez, *supra* note 164.

304. US: *Ensure Equitable Voting Access in Georgia Runoffs*, HUM. RTS. WATCH (Dec. 3, 2020, 10:00 AM), <https://www.hrw.org/news/2020/12/03/us-ensure-equitable-voting-access-georgia-runoffs>.