

---

## ESSAY

---

---

### RACE, RECKONING, REFORM, AND THE LIMITS OF THE LAW OF DEMOCRACY

---

JOSHUA S. SELLERS<sup>†</sup>

INTRODUCTION.....	167
I. THE RANGE OF RACIAL REFORMS.....	170
II. LAW OF DEMOCRACY SCHOLARSHIP AND BLACK EQUITY.....	176
CONCLUSION .....	185

#### INTRODUCTION

It is a moment of racial reckoning. It is not the first, it will not be the last, and it assures no restitution. But it is, nonetheless, a moment. As befits such moments, assorted conversations are occurring about the significance of race in American life and how to meaningfully improve Black lives. These conversations—debates might be the more accurate noun—have inspired calls for recompense and broad structural reforms.<sup>1</sup> The Black Lives Matter

---

<sup>†</sup> Associate Professor of Law, Arizona State University, Sandra Day O'Connor College of Law. Many thanks to Jamillah Bowman Williams, Guy-Uriel Charles, John Dobard, Lisa Fairfax, Luis Fuentes-Rohwer, Kaipo Matsumura, Bertrall Ross, Aaron Tang, and Justin Weinstein-Tull for helpful feedback on this project, and to Alexis Désiré, Justine Drohan, and the other wonderful editors of the *University of Pennsylvania Law Review Online*.

<sup>1</sup> See, e.g., K. Sabeel Rahman, *Fix America by Undoing Decades of Privatization*, ATLANTIC (Oct. 11, 2020), <https://www.theatlantic.com/ideas/archive/2020/10/public-infrastructure-civil-rights/616671> [<https://perma.cc/3BE7-XT3X>] (“Any 21st-century civil-rights and economic agenda must involve a massive shift in our public investments. The human cost of the failure to invest in these crucial social goods falls disproportionately on Black and brown communities.”).

movement, for example, advocates for reparations, police defunding, education reform, and a restructured political economy.<sup>2</sup>

Scholars from varied disciplines, though united in their commitment to racial equity, likewise contribute to policy debates over reform objectives. These debates frequently echo longstanding disagreements over the fundamental causes of contemporary (i.e., post-Jim Crow) Black disadvantage. According to many, race is *the* principal driver of political, economic, and social outcomes.<sup>3</sup> Others rebut this claim by emphasizing the considerable importance of economic status or class in shaping individuals' lives.<sup>4</sup> As evidence against both views, others underscore how race and class are inextricably related.<sup>5</sup> These debates, while worn, remain generative. They often clarify how racial discrimination persists and which reform strategies are most promising. Legal scholarship, though, rarely contends with the insights generated from these debates. These deficiencies impede our ability in the legal academy to fully ascertain how law shapes and preserves Black disadvantage.<sup>6</sup>

---

<sup>2</sup> See Robin D. G. Kelley, *What Does Black Lives Matter Want?*, BOS. REV. (Aug. 17, 2016), <http://bostonreview.net/books-ideas/robin-d-g-kelley-movement-black-lives-vision> [https://perma.cc/WED2-PU7U] (describing the demands of the Movement for Black Lives coalition); Syreeta McFadden, *Black Lives Matter Just Entered Its Next Phase*, ATLANTIC (Sept. 3, 2020), <https://www.theatlantic.com/culture/archive/2020/09/black-lives-matter-just-entered-its-next-phase/615952> [https://perma.cc/8SMK-WCEQ] (“[T]he Movement for Black Lives presented a robust 2020 platform, connecting the dots among issues of policing, reproductive justice, housing, climate change, immigration, and disabled and trans rights.”).

<sup>3</sup> See, e.g., Desmond S. King & Rogers M. Smith, *Racial Orders in American Political Development*, 99 AM. POL. SCI. REV. 75, 75-78 (2005).

<sup>4</sup> See, e.g., Walter Benn Michaels & Adolph Reed, Jr., *The Trouble with Disparity*, NONSITE (Sept. 10, 2020), <https://nonsite.org/the-trouble-with-disparity> [https://perma.cc/X2M2-8R2R] (“[I]t is practically impossible . . . to imagine a serious strategy for winning the kinds of reforms that would actually improve black and brown working people’s conditions without winning them for all working people and without doing so through a struggle anchored to broad working-class solidarity.”).

<sup>5</sup> See, e.g., Angela P. Harris, *Where is Race in Law and Political Economy*, LPE PROJECT (Nov. 30, 2017), <https://lpeproject.org/blog/where-is-race-in-law-and-political-economy> [https://perma.cc/97VU-VDFX] (providing historical context behind the link between race and class). See also ROBERT L. ALLEN, BLACK AWAKENING IN CAPITALIST AMERICA 223 (1969) (“For black radicals a long-standing unsolved problem lies in finding the proper relationship between a purely national (or racial) analysis and program on the one hand, and a purely class analysis and program on the other.”).

<sup>6</sup> See Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 457 (2018) (“While the winds are now changing, law scholarship has failed to integrate a critique of capitalism or political economy with critiques of how race, gender, sexuality, or even class operate.” (footnote omitted)). Critical Race Theory (CRT) has, of course, long observed a relationship between race and class. Devon W. Carbado & Daria Roithmayr, *Critical Race Theory Meets Social Science*, 10 ANN. REV. L. & SOC. SCI. 149, 151 (2014) (listing the intersection of racism and classism as one of the “key modernist claims” of Critical Race Theory); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1363 n.124 (1988) (“Lest my comments be misunderstood, I am not arguing that the oppression of Black people can be discussed solely in race terms. Rather, I believe that viewing Black oppression in terms of caste combines an understanding of racism with a class analysis.”). The extent to which these observations have meaningfully informed CRT analysis is, however, subject to debate. See Richard

This is apparent even in the context of “law of democracy” scholarship. The law of democracy refers to the system of laws, institutions, and norms that define the rules of our democratic practice. As an academic field, and particularly as compared against other public law fields, the law of democracy is conspicuously race-conscious.<sup>7</sup> More precisely, questions and concerns about the impact of various election-related policies on racial groups are prevalent in law of democracy scholarship (and in election litigation). One might think, then, that law of democracy scholarship would be a deep repository of books and articles explicating the connections between electoral structures and contemporary Black hardship.

Yet, because the vision of equality animating the field is narrow, these connections are obscured. Commonly suggested remedies for Black disadvantage—new, revised, or more consistently enforced federal legislation, evidentiary burden-shifting, minor doctrinal tweaks—rest on the presumption that political participation is inherently fateful. Simply put, there is discordance between what impactful reform looks and sounds like to those outside the law, and reform as commonly conceived of in law of democracy scholarship. Given this disconnect, this Essay argues for a reorientation of law of democracy scholarship toward broader considerations of how electoral structures, policies, and practices impede Black equity.

Black equity, as I conceive it, encompasses political, economic, and social initiatives that afford Black citizens not just the right to vote in periodic elections on roughly equitable terms with others, but the power to combat the maldistribution of resources and opportunities that hinders Black progress. An emphasis on Black equity demands historical analysis of the ways in which the law of democracy has contributed to the entrenchment of Black disadvantage (reckoning) and invites incorporation of public and non-legal scholarly insights about how to meaningfully improve Black lives (reform).

---

Delgado, *Crossroads and Blind Alleys: A Critical Examination of Recent Writing About Race*, 82 TEX. L. REV. 121, 151 (2003) (reviewing CROSSROADS, DIRECTIONS AND A NEW CRITICAL RACE THEORY (Francisco Valdes, Jerome McCristal Culp & Angela P. Harris, eds., 2002)) (“Critical race theorists should also examine the relationship between class and race more carefully than they have done.”); Devon W. Carbado, *Critical What What?*, 43 CONN. L. REV. 1593, 1633 (2011) (“CRT scholars should more directly engage class. For the most part, scholars outside the field of CRT are framing the debate about race and class. The CRT literature on race and class is decidedly thin.”).

<sup>7</sup> Joshua S. Sellers, *Election Law and White Identity Politics*, 87 FORDHAM L. REV. 1515, 1517 (2019) (“[Q]uestions about the significance of race occupy center stage in many election law disputes.”); cf. Joy Milligan & Karen Tani, *Seeing Race in Administrative Law: An Interdisciplinary Perspective*, YALE J. ON REGUL.: NOTICE & COMMENT (Sept. 16, 2020), <https://www.yalejreg.com/nc/seeing-race-in-administrative-law-an-interdisciplinary-perspective-by-joy-milligan-and-karen-tani> [<https://perma.cc/Y7ZQ-MAEW>] (“[A]dministrative law, as traditionally taught and studied, often avoids confronting questions of race and racial inequality.”).

Part I of this Essay outlines the range of perspectives informing the public and non-legal academic conversations about race and reform; conversations that are unobservable in law of democracy scholarship. Part II makes the affirmative case for law of democracy scholarship that explicitly contends with how to achieve Black equity.

## I. THE RANGE OF RACIAL REFORMS

In March of 1972, a high school in Gary, Indiana played host to the National Black Political Convention. The event brought several thousand Black Americans of widely divergent political views, including elected officials, together for the purpose of developing a unified Black agenda. To the extent that the three-day affair is remembered, it is often cited as an example of how difficult it is to elide substantive policy and strategic disagreements under the guise of racial unity.<sup>8</sup> Described as “a shotgun wedding of the radical aspirations of Black Power and conventional modes of politics,”<sup>9</sup> the event rendered clear the tension between those seeking Black autonomy, community control, and structural reform,<sup>10</sup> and those seeking greater standing and representation in mainstream politics.<sup>11</sup>

The dissension revealed at the Convention ultimately empowered the burgeoning Congressional Black Caucus (CBC), established in 1969, which emerged as “a power broker on behalf of African Americans in the legislative arena.”<sup>12</sup> Viewing the Convention in retrospect, however, serves as a reminder of

---

<sup>8</sup> MICHAEL C. DAWSON, *BEHIND THE MULE: RACE AND CLASS IN AFRICAN-AMERICAN POLITICS* 118 n.9 (1994) (“[The convention] included African-American nationalists, radicals, and mainstream politicians. The convention was marked by intense ideological struggles that limited the amount of unity achieved.”).

<sup>9</sup> CEDRIC JOHNSON, *REVOLUTIONARIES TO RACE LEADERS: BLACK POWER AND THE MAKING OF AFRICAN AMERICAN POLITICS* 129 (2007).

<sup>10</sup> See Aziz Rana, *Colonialism and Constitutional Memory*, 5 U.C. IRVINE L. REV. 263, 284-86 (2015) (describing various demands proposed at the Black Panther Party’s Revolutionary People’s Constitutional Convention of 1970); Peniel E. Joseph, *The Black Power Movement: A State of the Field*, 96 J. AM. HIST. 751, 754 (2009) (“In their attacks on institutional racism, proponents of black power’s cultural side advocated the building of racially separate schools, communities, even states, to cure systemic problems and also address daily needs.”).

<sup>11</sup> See JOHNSON, *supra* note 9, at 129 (“Inasmuch as black politicians were in a more advantageous position to negotiate directly with the Democratic Party and major public institutions, they readily established themselves as the chief race brokers in the post-segregation context.”); ADOLPH REED JR., *STIRRINGS IN THE JUG: BLACK POLITICS IN THE POST-SEGREGATION ERA* 133 (1999) (“This ‘hundred flowers’ period in black politics wilted and dissolved well before the end of the 1970s. Mainstream politicians asserted a monopoly on credible political strategy and, more fundamentally, on the idea of politics.”).

<sup>12</sup> CHRISTINA R. RIVERS, *THE CONGRESSIONAL BLACK CAUCUS, MINORITY VOTING RIGHTS, AND THE U.S. SUPREME COURT* 67-68 (2012); see also KATHERINE TATE, *FROM PROTEST TO POLITICS: THE NEW BLACK VOTERS IN AMERICAN ELECTIONS* 155 (1994) (“Many

how multifaceted Black political activism once was. While “Black Power!” is recalled as a slogan, the movement it represented was extraordinarily diverse, encompassing socialist, Marxist, cultural nationalist, and integrationist segments, to name but a few. Organizations like the League of Revolutionary Black Workers (LRBW), formed (like the CBC) in 1969, built, in its home city of Detroit, an anti-racist, anti-capitalist, anti-imperialist union-based movement.<sup>13</sup>

The LRBW, like many similar organizations, was ultimately undone by a combination of internal conflicts, pronounced opposition by outsiders, and a growing sense that that surest road to Black advancement was through affiliation with the Democratic Party.<sup>14</sup> “Black officialdom” flourished throughout the 1980s and thereafter, most apparently in the increased election of Black candidates to Congress.<sup>15</sup> As the visibility and influence of the Black activist left diminished, electoral success became the sine qua non of Black political progress.<sup>16</sup>

This history bears directly on the present. In August 2020, the Movement for Black Lives organized the Black National Convention, an online (due to

---

of these leaders later publicly repudiated the policy statements issued from the convention, and a few condemned the convention itself”).

<sup>13</sup> As described by Michael Dawson:

The multitude of League and other black radical activity in Detroit created a cross-class, active, black public sphere that provided an arena for both the critical debate of the key political, economic, social, and cultural issues facing Black Detroit as well as a base for political work ranging from strike work at the plants to united fronts that would be instrumental in electing Detroit’s first black mayor in 1973.

MICHAEL C. DAWSON, *BLACK VISIONS: THE ROOTS OF CONTEMPORARY AFRICAN-AMERICAN POLITICAL IDEOLOGIES* 203, 207 (2001).

<sup>14</sup> See, e.g., Robin D. G. Kelley, Remarks at Boston Review Panel Where Do We Go from Here: A Fundraiser for Black Lives (Aug. 14, 2020) (transcript available at <https://bostonreview.net/race/boston-review-where-do-we-go-here-fundraiser> [<https://perma.cc/PN34-5FTW>] (describing how the League was in part “defeated by a kind of neoliberal rainbow coalition of junior partners. Many of them were Black and brown newly elected officials who, in the 1970s, did not push [the League’s] program.”); see also MIKE DAVIS, *PRISONERS OF THE AMERICAN DREAM: POLITICS AND ECONOMY IN THE HISTORY OF THE U.S. WORKING CLASS* 267-70 (1986) (describing the relationship between U.S. political economy in the 1970s–80s and Black incorporation into the Democratic Party).

<sup>15</sup> REED JR., *supra* note 11, at 37, 119-20.

<sup>16</sup> See Keeanga-Yamahtta Taylor, *The End of Black Politics*, N.Y. TIMES (June 13, 2020), <https://www.nytimes.com/2020/06/13/opinion/sunday/black-politicians-george-floyd-protests.html?login=smartlock&auth=login-smartlock> [<https://perma.cc/9BRN-ZKGM>] (“With seniority, repeated election cycles and without a robust movement as a source of accountability and direction, black elected officials began to govern like typical politicians. Staying in office became a priority, and as black legislators, they often had fewer resources. That meant more fund-raising from entities that may have been at odds with their constituencies.”). Skepticism about the capacity and willingness of Black elected officials to spearhead race-focused structural reforms persisted through the presidency of Barack Obama. See Michael Kazin, *Criticize and Thrive: The American Left in the Obama Years, in THE PRESIDENCY OF BARACK OBAMA* 246, 250-53 (Julian E. Zelizer ed., 2018) (“[Y]oung African Americans who had celebrated Obama’s election . . . quickly realized the president would or, perhaps, could do little to dismantle racist practices in government and the economy.”).

COVID-19) “series of conversations, performances, and other activations geared toward engaging, informing, and mobilizing Black communities.”<sup>17</sup> The event was directly inspired by the 1972 National Black Political Convention and involved at least some collaboration between past and present attendees.<sup>18</sup> Many of the concerns raised at the 1972 Convention correspond with those raised in 2020.<sup>19</sup> And, as was the case in 1972, doubtfulness about the gains to be had through a reform strategy centered around electoral success remains.<sup>20</sup>

So, to reiterate, it is a moment. The Movement for Black Lives has expanded the realm of the possible to an extent not seen since the 1970s. It has altered the public conversation about Black advancement in much needed ways,<sup>21</sup> and prominently exhibited—for many, for the first time—the range of perspectives held by Black activists.<sup>22</sup> It has highlighted the limits of incremental change and put pressure on public officials to act. And it has the benefit of hindsight, of learning from what did and did not work between 1972 and the present.

Alongside this participatory movement, academics have similarly, over the past fifty years, considered the most effective means of improving Black lives. The resulting studies are rich and varied and can hardly be summarized in short form. But in brief, some understand race to be the most salient aspect of Black political, economic, and social outcomes. This perspective interprets various ills—residential segregation, labor market inequality, voter suppression, racially-disparate access to medical care—through a predominantly racial

---

<sup>17</sup> *The National Black Convention*, M4BL, <https://m4bl.org/black-national-convention> [<https://perma.cc/US8E-D568>].

<sup>18</sup> Jesús A. Rodríguez, *BLM Organizers See the 1972 National Black Political Convention as a Model. What Can They Learn From It?*, POLITICO (Aug. 28, 2020, 5:18 AM), <https://www.politico.com/news/magazine/2020/08/28/1972-national-black-political-convention-black-lives-matter-blm-401706> [<https://perma.cc/2273-M766>] (“The event is designed to pay tribute to that raucous 1972 convention, and organizers have been in touch with attendees and others affiliated with the earlier convention.”).

<sup>19</sup> *Id.* (providing the examples of “untrammelled voting rights, a reduction in the military budget, the abolition of the death penalty, [and] an end to police violence”).

<sup>20</sup> Tim Craig & Robert Klemko, *Black Lives Matter Movement at a Crossroads as Biden Prepares to Take Office*, WASH. POST (Dec. 1, 2020, 7:25 PM), [https://www.washingtonpost.com/national/black-lives-matter-movement-at-a-crossroads-as-biden-prepares-to-take-office/2020/12/01/8ebb95ce-2f26-11eb-860d-f7999599cbc2\\_story.html](https://www.washingtonpost.com/national/black-lives-matter-movement-at-a-crossroads-as-biden-prepares-to-take-office/2020/12/01/8ebb95ce-2f26-11eb-860d-f7999599cbc2_story.html) [<https://perma.cc/K25B-KYD4>] (explaining some racial justice activists’ concerns about the movement’s strategy under Biden).

<sup>21</sup> See Akbar, *supra* note 6, at 410 (crediting the Movement for Black Lives for “focus[ing] on building power in Black communities, and fundamentally transforming the relationships among state, market, and society” and “offer[ing] transformative, affirmative visions for change designed to address the structures of inequality—something legal scholarship has lacked for far too long”).

<sup>22</sup> See Robin D. G. Kelley, *Big, Glitzy Marches Are Not Movements*, BOS. REV. (Aug. 28, 2013), <http://bostonreview.net/us/robin-kelley-big-glitzy-marches-are-not-movements> [<https://perma.cc/ZD2L-NF2V>] (providing historical context for this range of perspectives).

frame.<sup>23</sup> On these accounts, race-focused remedies are a necessary component of any viable reform effort.

A competing perspective emphasizes the considerable importance of class in shaping individuals' lives. This perspective, once most closely associated with the sociologist William Julius Wilson, contends that economic inequality is the primary impediment to racial equality.<sup>24</sup> This distinction between a predominantly racial frame and one oriented around class is crucial, it is argued, because a misdiagnosis of what ails Black people leads to ineffectual remedies. As two proponents of a class-focused perspective put it, "[r]acism is real and antiracism is both admirable and necessary, but extant racism isn't what principally produces our inequality and antiracism won't eliminate it."<sup>25</sup>

Others emphasize the complex interrelation *between* race and class. Race informs both political economy and class divisions, they assert, making an approach that overreads either race or class imprecise.<sup>26</sup> The utility of this perspective is best revealed through examples. Consider President Bill

<sup>23</sup> See, e.g., King & Smith, *supra* note 3, at 84.

<sup>24</sup> WILLIAM JULIUS WILSON, *THE DECLINING SIGNIFICANCE OF RACE* 19 (2d ed. 1980) ("The problem for blacks today, in terms of government practices, is no longer one of legalized racial inequality. Rather the problem for blacks, especially the black underclass, is that the government is not organized to deal with the new barriers imposed by structural changes in the economy.").

<sup>25</sup> Michaels & Reed, Jr., *supra* note 4.

<sup>26</sup> See, e.g., PAUL FRYMER, *BLACK AND BLUE: AFRICAN AMERICANS, THE LABOR MOVEMENT, AND THE DECLINE OF THE DEMOCRATIC PARTY* 98-107 (2008) (outlining analytical tensions between "race and class scholars" and arguing that both factors must be considered together); DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 220 (1993) ("The issue is not whether race or class perpetuates the urban underclass, but how race and class interact to undermine the social and economic well-being of black Americans."); Joe Soss & Vesla Weaver, *Police Are Our Government: Politics, Political Science, and the Policing of Race-Class Subjugated Communities*, 20 ANN. REV. POL. SCI. 565, 567 (2017) ("Race and class are intersecting social structures and productive social forces that defy efforts to classify people neatly on the basis of subjective identity, socioeconomic status, or possessions."). The race versus class debate is often frustrated by a tendency among some to conflate descriptive, normative, and political arguments. Determining which factor, or combination of factors, most directly affects Black Americans in a particular context, and delineating, ideally, what Black equity entails, are different endeavors than calculating which reforms are politically viable. Opinions differ on the latter. Compare Samuel R. Bagenstos, *On Class-Not-Race, in A NATION OF WIDENING OPPORTUNITIES? THE CIVIL RIGHTS ACT AT 50*, at 110 (Ellen D. Katz & Samuel R. Bagenstos eds., 2015) ("Class-based policies, then, may not be especially politically strong. And there may be circumstances in which programs targeted at racial minorities are quite strong politically—precisely because they appeal to a shared commitment to equal opportunity."), with Matthew Yglesias, *Minimum Wage Wins, Affirmative Action Loses*, SLOW BORING (Nov. 17, 2020), <https://www.slowboring.com/p/minimum-wage-wins-affirmative-action> [https://perma.cc/YLT6-A5U9] ("So if you actually want to close racial gaps by raising the minimum wage, expanding union membership, expanding Medicaid, and reducing student debt, the last thing you want to do is sell people on the idea that this is really all about race.").

Clinton's infamous 1996 welfare reform bill. The bill was racially-coded,<sup>27</sup> yet its enactment cannot be fully explained through a solely racial (or racist) frame. As described by Jonah Birch and Paul Heideman, the bill "was promoted by low-income employers who wanted an even more pliant and desperate workforce."<sup>28</sup> Absent this lobbying, it is not clear that the bill would have found support. As Birch and Heideman conclude, "[y]ou can't understand the course of welfare reform if you leave out the political economy."<sup>29</sup>

Hurricane Katrina offers another useful example. The harrowing televised images of Black Louisianans "abandoned and left to fend for themselves at the Superdome and the Convention Center"<sup>30</sup> supported claims of racism among government officials responsible for providing relief; the images reinforced the view that Black people are expendable. Yet, the vulnerability of Black communities both before and after the storm was also "exacerbated by the dismantling of social welfare by Democratic and Republican administrations alike."<sup>31</sup> Therefore, an audit of the disaster that is inattentive to how race and class intersected in New Orleans risks omitting important details.<sup>32</sup> And such details matter when choosing which reforms to pursue.

Evaluated against these public and academic conversations, law of democracy scholarship reads as fractional. Its vision of progress is decidedly modest. As is true across other public law fields, legal rights are overemphasized with little to no consideration of how those rights translate

<sup>27</sup> Claire Jean Kim, *Managing the Racial Breach: Clinton, Black-White Polarization, and the Race Initiative*, 117 POL. SCI. Q. 55, 62 (2002) ("Clinton's vow to 'end welfare as we know it' and his call for welfare recipients to take personal responsibility over their own lives signaled his impatience with black demands and his sympathy with white attitudes on this highly racialized issue.").

<sup>28</sup> Jonah Birch & Paul Heideman, *The Trouble With Anti-Antiracism*, JACOBIN (Oct. 11, 2016), <https://www.jacobinmag.com/2016/10/adolph-reed-blm-racism-capitalism-labor> [<https://perma.cc/CSD2-UT7Y>].

<sup>29</sup> *Id.* See also JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS 182 (2010) (connecting welfare reform to the Democratic Party's push towards deficit reduction).

<sup>30</sup> Jean Ait Belkhir & Christiane Charlemaine, *Race, Gender and Class Lessons from Hurricane Katrina*, 14 RACE, GENDER & CLASS J. 120, 132 (2007).

<sup>31</sup> *Id.* at 125.

<sup>32</sup> See MICHAEL C. DAWSON, NOT IN OUR LIFETIMES: THE FUTURE OF BLACK POLITICS 56 (2011) (discussing how Katrina taught America a lesson, that "race and class both fundamentally matter"); EDDIE S. GLAUDE JR., IN A SHADE OF BLUE: PRAGMATISM AND THE POLITICS OF BLACK AMERICA 129 (2007) ("The structural dimensions of racism that revealed themselves in the very material conditions of poor black New Orleanians could not be captured in a sound bite or in the traditional language of the civil rights establishment."); Kent B. Germany, *The Politics of Poverty and History: Racial Inequality and the Long Prelude to Katrina*, 7 J. AM. HIST. 743, 750 (2007) ("Katrina dramatically exposed this fragile state of race and poverty and highlighted a complicated political bargain made by leaders responsible for cities at every level . . .").



into substantive gains.<sup>33</sup> Thus, many of us writing in the area focus attention on which institutions—Congress, the federal courts, state governments, state courts—are most democracy-enhancing.<sup>34</sup> We rehearse long-running debates over the limits of congressional power and federal courts’ remedial authority.<sup>35</sup> We debate the most effective methods of curbing partisanship in the design of election rules.<sup>36</sup> And we offer nuanced takes on how to evaluate state laws affecting voter participation.<sup>37</sup>

---

<sup>33</sup> See STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS* 5 (2d. ed. 2004) (“The assumption is that litigation can evoke a declaration of rights from courts; that it can, further, be used to assure the realization of these rights; and, finally, that realization is tantamount to meaningful change.”); Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 373 (1992) (“What was it about our reliance on racial remedies that may have prevented us from recognizing that abstract legal rights . . . could do little more than bring about the cessation of one form of discriminatory conduct that soon appeared in a more subtle though no less discriminatory form?”).

<sup>34</sup> Compare, e.g., Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 932 (2021) (“Even though it cannot end there, reclaiming democracy is a project that must begin in the states.”), with James A. Gardner, *Illiberalism and Authoritarianism in the American States*, 70 AM. U. L. REV. 829, 911 (2021) (referring to “a turn to authoritarianism not only at the national level, but at the state level as well, where states seem to be clustering into two groups, one still committed to democratic liberalism and the other willing to entertain a radical and highly risky experiment in authoritarianism”). There are also differing opinions on the efficacy of courts as institutions for enhancing democracy. Compare Yasmin Dawood, *The Antidomination Model and the Judicial Oversight of Democracy*, 96 GEO L.J. 1411, 1417 (2008) (“While courts are not particularly well-suited as an institutional matter to maximize a particular democratic ideal, I shall suggest that they are better suited to minimizing or stopping particular actions that lead to democratic harms.”), with Richard L. Hasen, *The Supreme Court’s Pro-Partisanship Turn*, 109 GEO. L.J. ONLINE 50, 79 (2020) (“Those paying enough attention will see federal courts, especially the Supreme Court, as allowing and sometimes perhaps even mandating greater politicization of election rules and redistricting.”).

<sup>35</sup> Compare Michael T. Morley, *Prophylactic Redistricting? Congress’s Section 5 Power and the New Equal Protection Right to Vote*, 59 WM. & MARY L. REV. 2053, 2086 (2018) (identifying a “serious risk” that the Supreme Court will find Section 2 of the Voting Rights Acts to exceed congressional enforcement power), with Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377, 417-18 (2012) (“The Boerne objection can be met by treating Section 2 as a response to, inter alia, the underappreciated problem of election outcomes that are unconstitutional because of the racial bias of the electorate’s verdict.”).

<sup>36</sup> Compare Richard L. Hasen, *Race or Party?: How Courts Should Think About Republican Efforts to Make It Harder to Vote in North Carolina and Elsewhere*, 127 HARV. L. REV. F. 58, 62, 75 (2014) (calling for judicial interpretation of the Equal Protection Clause that “recognize[s] that states often make voting rules for partisan reasons under the pretext of following sound election administration practices”), with Edward B. Foley, *Due Process, Fair Play, and Excessive Partisanship: A New Principle for Judicial Review of Election Laws*, 84 U. CHI. L. REV. 655, 660 (2017) (“Due process, instead, provides a more promising basis for constraining partisan overreach. Due process embodies the principle of fair play, and fair play is an appropriate concept to employ as a constraint on excessive partisanship.”).

<sup>37</sup> Compare Lisa Marshall Manheim & Elizabeth G. Porter, *The Elephant in the Room: Intentional Voter Suppression*, 2018 SUP. CT. REV. 213, 253 (defending a novel legal claim that would expand voting opportunities despite its potential advantage to the Democratic Party as “a natural, and we would argue necessary, consequence of the Constitution’s universalist protection of the right to vote”), with Derek T. Muller, *The Democracy Ratchet*, 94 IND. L.J. 451, 496-99 (2019) (questioning the wisdom and legitimacy of a legal regime in which voting opportunities can only ever expand).

What we do not do, however, is interrogate the racial consequences resulting from the law of democracy. We fail to consider how electoral structures, election administration choices, and legal doctrines contribute to Black disadvantage experienced *outside of* the political process.<sup>38</sup> As a result, our scholarship exists at a remove from the public and academic racial reform conversations outlined above. Part II makes the affirmative case for law of democracy scholarship that explicitly contends with how to achieve Black equity.

## II. LAW OF DEMOCRACY SCHOLARSHIP AND BLACK EQUITY

The right to vote is “preservative of all rights,” Supreme Court Justice Stanley Matthews told us well over a century ago.<sup>39</sup> Years later, Chief Justice Earl Warren proclaimed “[t]o the extent that a citizen’s right to vote is debased, he is that much less a citizen.”<sup>40</sup> Understood accordingly, the right to vote, this uniquely generative right, is foundational; it is the requisite for our political and economic arrangements. Little surprise, then, that a significant volume of law of democracy scholarship examines the extent to which the right to vote is freely and fully exercised. However, analyses narrowly centered on individual or group voting rights tend to place the racial consequences resulting from the law of democracy out of view.

Consider the legal academy’s discussion of partisan gerrymandering, the manipulation of electoral district lines for the purpose of “debasing” the votes of political opponents. Few, if any, topics within the law of democracy received more scholarly attention in recent years. The reason was simple: the Supreme Court was poised, it appeared, to, at long last, announce standards under which federal courts could resolve partisan gerrymandering claims. Over two terms, the Court heard arguments about excessively manipulated

---

<sup>38</sup> Professor Lani Guinier’s classic monograph is a notable exception. See LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 68 (1994) (“Of course, black electoral success alone cannot transform the depressed political and economic state of the black community, especially given that blacks are concentrated in politically impotent and economically isolated parts of urban metropolitan areas where racial polarization continues.”). In addition, some attention has been given to racial disadvantage experienced outside of the political process when discussing Congress’s power to enact the Voting Rights Act and when discussing felon disenfranchisement. See Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725, 740 (1998) (discussing how Congress must pass the Voting Rights Act for Black communities to have their needs met and heard); Pamela S. Karlan, *The Reconstruction of Voting Rights*, in *RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS* 34, 41 (Guy-Uriel E. Charles, Heather K. Gerken & Michael S. Kang eds., 2011) (“If punitive offender disenfranchisement statutes bar over one million African Americans from voting, their disenfranchisement is not just their own business: It deprives the black community . . . of political power and can skew election results sharply to the right, creating legislative bodies hostile to civil rights and economic justice for the franchised and disenfranchised alike.”).

<sup>39</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

<sup>40</sup> *Reynolds v. Sims*, 377 U.S. 533, 567 (1964).

district lines in Wisconsin, Maryland, and North Carolina. Esteemed law reviews were piqued.<sup>41</sup> A glimpse at this literature is instructive.

Professors Guy-Uriel Charles and Luis Fuentes-Rohwer, in the lead-up to the Court decision declaring partisan gerrymandering claims to be nonjusticiable in federal courts,<sup>42</sup> endorsed “a utilitarian or instrumental conception of judicial restraint.”<sup>43</sup> Under this conception, federal courts would be wise to adjudicate partisan gerrymandering claims, so as to mitigate foreseeable, downstream abuses of the political process.<sup>44</sup> Absent judicial intervention, it was argued, many of those abuses would wind up, at a later date, under review by the Court.<sup>45</sup> Framed in this way, the overriding harms to be avoided by curbing partisan gerrymandering are further partisan manipulations of the electoral process,<sup>46</sup> and, in turn, future Court involvement in sensitive political disputes.

Professor Michael Kang, in his impressive canvass of what he calls “the general norm against government nonpartisanship,”<sup>47</sup> notes that partisan gerrymandering “violates a basic sensibility about democratic competition and fairness.”<sup>48</sup> It “is the definition of a process failure begging judicial intervention.”<sup>49</sup> The persistent irresolution over how to resolve partisan

<sup>41</sup> See, e.g., Michael McDonald, *The Predominance Test: A Judicially Manageable Compactness Standard for Redistricting*, 129 YALE L.J. F. 18 (2019); Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Judicial Intervention as Judicial Restraint*, 132 HARV. L. REV. 236 (2018); Nicholas O. Stephanopoulos & Eric M. McGhee, *The Measure of a Metric: The Debate over Quantifying Partisan Gerrymandering*, 70 STAN. L. REV. 1503 (2018) [hereinafter *Measure of a Metric*]; Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 351 (2017); Samuel S.-H. Wang, *Three Tests for Practical Evaluation of Partisan Gerrymandering*, 68 STAN. L. REV. 1263 (2016); Bertrall L. Ross II, *Partisan Gerrymandering, the First Amendment, and the Political Outsider*, 118 COLUM. L. REV. 2187 (2018); Wendy K. Tam Cho, *Measuring Partisan Fairness: How Well Does the Efficiency Gap Guard Against Sophisticated as Well as Simple-Minded Modes of Partisan Discrimination?*, 166 U. PA. L. REV. ONLINE 17 (2017), <https://www.pennlawreview.com/wp-content/uploads/2020/05/166-U-Pa-L-Rev-Online-17.pdf> [<https://perma.cc/TV6C-QE6W>]; Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831 (2015) [hereinafter *Efficiency Gap*].

<sup>42</sup> *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

<sup>43</sup> Charles & Fuentes-Rohwer, *supra* note 41, at 241.

<sup>44</sup> *Id.* at 268 (“The Court should curb partisan gerrymandering to limit the propensity of political elites to manipulate election rules for partisan gains, thereby averting the need for the Court to adjudicate political disputes. Judicial restraint, in other words, counsels in favor of the justiciability of partisan gerrymandering claims.”).

<sup>45</sup> *Id.* at 269 (“Intervening now will allow the Court to play a less interventionist role down the road because fewer or different cases will be presented for its review.”).

<sup>46</sup> Such manipulations include “voter identification rules, voter registration rules, voter purge practices, racial gerrymandering, election administration practices, disputes about the location of polling places, and the like.” *Id.* at 240.

<sup>47</sup> Kang, *supra* note 41, at 354.

<sup>48</sup> *Id.* at 353.

<sup>49</sup> *Id.*

gerrymandering claims, in Kang's telling, "impede[d] a coherent judicial approach toward modern hyperpartisanship."<sup>50</sup>

Professor Nicholas Stephanopoulos and public policy analyst Eric McGhee, in multiple articles, introduced and defended the "efficiency gap," a metric for measuring the severity of partisan gerrymanders.<sup>51</sup> Intently focused, as they were, on devising a metric with litigation utility, Stephanopoulos and McGhee characterized the harm of partisan gerrymandering as unearned political strength.<sup>52</sup> It is, as they stated, "partisan unfairness that lies at the heart of partisan gerrymandering. Thus, only such unfairness should be revealed by a gerrymandering measure."<sup>53</sup> Writing separately, Stephanopoulos has identified ideological misalignment between voters and elected officials<sup>54</sup> and compromised political party functions<sup>55</sup> as additional harms.

Other scholars similarly describe the harms caused by partisan gerrymandering as reduced legislative responsiveness<sup>56</sup> and entrenched partisan bias.<sup>57</sup> These characterizations are ubiquitous throughout the literature. To my knowledge, among law of democracy scholars, only Professor Bertrall Ross has considered in any detail the broader impact of partisan gerrymandering on citizens, including non-voters and others he labels "political outsiders."<sup>58</sup> Yet Ross, who seeks to increase political participation among marginalized populations, identifies political outsiders as "undereducated and low-income individuals,"<sup>59</sup> two categories that are both underinclusive and overinclusive of Black citizens.

---

<sup>50</sup> *Id.* at 411.

<sup>51</sup> See, e.g., *Efficiency Gap*, *supra* note 41; *Measure of a Metric*, *supra* note 41.

<sup>52</sup> See *Efficiency Gap*, *supra* note 41, at 852 ("A gap in a party's favor enables the party to claim more seats, relative to a zero-gap plan, *without claiming more votes.*"); *id.* at 853 ("The gerrymandering party enjoys a political advantage not because of its greater popularity, but rather because of the configuration of district lines. The parties do not compete on a level playing field.").

<sup>53</sup> *Measure of a Metric*, *supra* note 41, at 1508.

<sup>54</sup> See Nicholas O. Stephanopoulos, *The Causes and Consequences of Gerrymandering*, 59 WM. & MARY L. REV. 2115, 2147 (2018) (discussing how gerrymandering harms both voters and political parties).

<sup>55</sup> See generally Nicholas O. Stephanopoulos & Christopher Warsaw, *The Impact of Partisan Gerrymandering on Political Parties*, 45 LEGIS. STUD. Q. 609 (2020).

<sup>56</sup> See Tam Cho, *supra* note 41, at 32 ("It should be easy to agree that unfairness is inherently undesirable in any form. Accordingly, a sensible goal for a measure of partisan fairness is to tap both responsiveness and bias, related, but separate dimensions of the same underlying unfairness phenomenon."); Wang, *supra* note 41, at 1320 ("Partisan gerrymandering distorts relationships between voting and representation that would otherwise arise naturally, generates seats that are unresponsive to shifts in public opinion, and chills the freedom of voters to associate with a political party of their choosing.").

<sup>57</sup> See McDonald, *supra* note 41, at 19 ("Gerrymandering leads to distortions in representation—in the worst cases, consistently preventing a party with a voting majority from electing a legislative majority.").

<sup>58</sup> See Ross, *supra* note 41, at 2190 (defining political outsiders as "nonvoters or those who generally do not affiliate with or vote for candidates of either of the two parties").

<sup>59</sup> *Id.* at 2213.

In sum, for all the virtues of this line of scholarship, and however well it succeeds on its own terms, one can consume it in full without obtaining a clear sense of what partisan gerrymandering puts at stake. To be sure, one gets the strong impression in the literature that partisan gerrymandering distorts democracy, weakens political parties, and can be assessed by courts in manageable, even principled, ways. But one will not find engagement with—and certainly not a reckoning on—what partisan gerrymandering has wrought for Black people.

Consider Wisconsin, the site of some of the more egregious partisan gerrymanders in recent years.<sup>60</sup> The state’s 2012, 2014, and 2016 redistricting plans, all of which gave a disproportionate number of state legislative seats to the Republican Party, culminated in the first of the Court’s two most recent partisan gerrymandering cases, *Gill v. Whitford*.<sup>61</sup> Because of this salience, partisan gerrymandering in Wisconsin was a hot topic among law of democracy scholars.

The “pro-Republican skew” of the redistricting plans was striking.<sup>62</sup> As summarized by the *Gill* plaintiffs, “[i]n 2012, Republicans won a supermajority of sixty seats (out of ninety-nine) while *losing* the statewide vote. In 2014 and 2016, Republicans extended their advantage to sixty-three and sixty-four seats, respectively, even though the statewide vote remained nearly tied.”<sup>63</sup> It was these figures, more than anything, that invited criticism both before and after the Court issued its opinion in *Gill*.

Before the opinion was issued, it was argued that “the preservation of the Constitution now requires a curtailment of gerrymandering,”<sup>64</sup> given “[t]he Court’s duty . . . to interpret the text of the Constitution in a way most likely to preserve its original meaning and purpose.”<sup>65</sup> That original meaning and purpose was understood to include “the essential republican principle that elections to the House of Representatives must reflect government ‘of the people, by the people, and for the people.’”<sup>66</sup> Wisconsin’s partisan gerrymandering failed in this regard. Commentary following the *Gill* opinion

<sup>60</sup> See Emily Bazelon, *The New Front in the Gerrymandering Wars: Democracy vs. Math*, N.Y. TIMES (Aug. 29, 2017), <https://www.nytimes.com/2017/08/29/magazine/the-new-front-in-the-gerrymandering-wars-democracy-vs-math.html?auth=login-email&login=email> [https://perma.cc/TM28-MY87] (describing gerrymandering in Wisconsin); Galen Druke, *Should Partisan Gerrymandering Be Illegal?*, FIVETHIRTYEIGHT: GERRYMANDERING PROJECT (Dec. 7, 2017), <https://fivethirtyeight.com/features/should-partisan-gerrymandering-be-illegal> [https://perma.cc/N34W-8EQM] (discussing the gerrymandering practices in Wisconsin that led to *Gill v. Whitford*, 138 S. Ct. 1916 (2018)).

<sup>61</sup> The Court remanded the case after concluding that the plaintiffs lacked standing. *Gill*, 138 S. Ct. at 1933-34.

<sup>62</sup> Motion to Affirm at 1, *Gill*, 138 S. Ct. 1916 (No. 16-1161) (describing the pro-Republican nature of the plans).

<sup>63</sup> *Id.*

<sup>64</sup> Edward B. Foley, *Constitutional Preservation and the Judicial Review of Partisan Gerrymanders*, 52 GA. L. REV. 1105, 1152 (2018).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

criticized the Court for “its failure to grasp the core injury inflicted by partisan gerrymandering.”<sup>67</sup> In keeping with the snapshot literature review above, that core injury was defined as the systemic disadvantage placed upon the state’s Democratic party and voters.<sup>68</sup>

But there are other ways of conceptualizing the injuries caused by Wisconsin’s extreme partisan gerrymandering, ones that move us beyond anodyne discussions of unfairness. What, after all, is the point of mastering the intricacies of law of democracy doctrines if not to grapple with the ways in which the doctrines influence the lived experiences of the citizenry? For Black people, the connections between law, the provision of public goods, and the health and wellbeing of the community, are palpable. Yet, within the legal academy we have an underdeveloped capacity to think about Black equity in holistic terms.

With these observations in mind, consider a more expansive survey of how, over the past ten years, partisan gerrymandering impacted Wisconsin’s Black residents. According to the Center on Wisconsin Strategy, a think tank, the state “has the regrettable distinction of ranking among the worst states in the nation in terms of racial equality.”<sup>69</sup> In 2015, the rate of Black unemployment exceeded that of whites by over seven percentage points.<sup>70</sup> Median white household income was twice that of Black households,<sup>71</sup> and “three of ten African American families live in poverty.”<sup>72</sup> Black grade-school students in Wisconsin score at or near the bottom of national student achievement measures.<sup>73</sup> And the state’s Black incarceration rates are staggering.<sup>74</sup>

A separate 2018 report summarized the state of affairs in Milwaukee, a majority-minority city, as follows: “Recent attention to racial segregation in Milwaukee, poor economic, educational, and social outcomes for black children in Wisconsin, and large racial differences in incarceration rates

---

<sup>67</sup> Daniel P. Tokaji, *Denying Systemic Equality: The Last Words of the Kennedy Court*, 13 HARV. L. & POL’Y REV. 539, 546 (2019).

<sup>68</sup> *See id.* at 546-47 (“In other words, the essence of the claim is that the plan as a whole denies an equal voice to people who support the non-dominant party disadvantaged by a redistricting plan.”).

<sup>69</sup> CTR. ON WIS. STRATEGY, WISCONSIN’S EXTREME RACIAL DISPARITY 1 (2017), <https://cows.org/wp-content/uploads/sites/1368/2020/04/2017-Wisconsin-Extreme-Racial-Disparity-2017.pdf> [<https://perma.cc/8XN6-5WFJ>].

<sup>70</sup> *Id.* at 2 tbl.1.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 3.

<sup>73</sup> *See, e.g.,* Lydia Mulvaney, *Black Students Near Bottom in Nation on Benchmark Math, Reading Test*, MILWAUKEE-WIS. J. SENTINEL (Nov. 8, 2013), <https://archive.jsonline.com/news/education/states-black-students-rank-lowest-in-reading-math-scores-b99136626z1-230903121.html> [<https://perma.cc/C3VK-9GXX>] (noting that in 2013 “the gap between black and white students in Wisconsin was the widest in the nation . . . in every test category” for national benchmark tests).

<sup>74</sup> *See* George Joseph, *How Wisconsin Became the Home of Black Incarceration*, BLOOMBERG: CITYLAB (Aug. 17, 2016, 3:41 PM), <https://www.bloomberg.com/news/articles/2016-08-17/how-wisconsin-became-the-home-of-black-incarceration> [<https://perma.cc/82WK-NGEP>] (“As of the 2010 census, Wisconsin had the highest incarceration rate of black males nationwide . . .”).

suggests that populations of color are not faring well in the state and especially not in Milwaukee.<sup>75</sup> One expert's top-line summary of life in the city describes it as "a neighborhood of concentrated poverty, pervasive joblessness, plunging incomes, and mass incarceration—a neighborhood of 'cumulative disadvantages,' each reinforcing the other, that limit economic opportunity and pose daunting challenges for policies of neighborhood revitalization."<sup>76</sup>

Rather than address these challenges in earnest, Governor Scott Walker and the Republican-controlled (due to partisan gerrymandering) state legislature focused their efforts on "[t]he coordinated decimation of organized labor."<sup>77</sup> Most prominently, Governor Walker signed legislation drastically limiting the collective bargaining rights of public-sector workers.<sup>78</sup> A series of additional actions further undermined public employment.<sup>79</sup> These

---

75 TIMOTHY M. SMEEDING & KATHERINE THORNTON, POVERTY, INCOMES, RACE AND ETHNICITY IN WISCONSIN AND MILWAUKEE: A SUPPLEMENT TO THE 2016 WISCONSIN POVERTY REPORT 2 (2018), <https://www.irp.wisc.edu/wp/wp-content/uploads/2018/09/Supplement-WIPovRept-September2018.pdf> [<https://perma.cc/E624-RSUM>].

76 MARC V. LEVINE, CTR. FOR ECON. DEV., MILWAUKEE 53206: THE ANATOMY OF CONCENTRATED DISADVANTAGE IN AN INNER CITY NEIGHBORHOOD, 2000–2017, at 4 (2019).

77 S. Ani Mukherji, *Racism and the Wisconsin Idea*, BOS. REV. (Oct. 29, 2018), <http://bostonreview.net/race/s-ani-mukherji-racism-and-wisconsin-idea> [<https://perma.cc/4QAU-LJWE>]; see also Arne L. Kalleberg & Till M. von Wachter, *The U.S. Labor Market During and After the Great Recession: Continuities and Transformations*, RSF: RUSSELL SAGE FOUND. J. SOC. SCIS., Apr. 2017, at 1, 12–13 (2017) (discussing declining union membership in the wake of the Great Recession, in part due to the rise of conservative governments in states like Wisconsin and Indiana); Monica Davey, *Unions Suffer Latest Defeat in Midwest with Signing of Wisconsin Measure*, N.Y. TIMES (Mar. 9, 2015), <https://www.nytimes.com/2015/03/10/us/gov-scott-walker-of-wisconsin-signs-right-to-work-bill.html> [<https://perma.cc/7SJF-WG6Q>] (discussing Governor Walker's signing of a bill that prevents unions from requiring workers to pay dues).

78 See Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 403 (2015) ("In 2011, for instance, the Republican-dominated Wisconsin legislature overhauled the state's collective bargaining laws to profoundly curtail unions' ability to participate effectively in politics."); Monica Davey, *Wisconsin Senate Limits Bargaining by Public Workers*, N.Y. TIMES (Mar. 9, 2011), <https://www.nytimes.com/2011/03/10/us/10wisconsin.html?pagewanted=all> [<https://perma.cc/BJ75-LCBM>] (discussing how the state senate's Republican party successfully adopted a bill that "sharply curtail[ed] collective bargaining for public-sector workers").

79 See NELSON LICHTENSTEIN, STATE OF THE UNION: A CENTURY OF AMERICAN LABOR 287–88 (Princeton Univ. Press rev. ed. 2013) (discussing Governor Walker's campaign against unionized public employees, and the public response); Richard Michael Fischl, "Running the Government Like a Business": *Wisconsin and the Assault on Workplace Democracy*, 121 YALE L.J. ONLINE 39, 40 (2011) (explaining that there is some public support for limiting public employee unions, though there is consensus that Governor Walker "overplayed his hand"); see generally DAN KAUFMAN, THE FALL OF WISCONSIN: THE CONSERVATIVE CONQUEST OF A PROGRESSIVE BASTION AND THE FUTURE OF AMERICAN POLITICS (2018) (describing how Wisconsin went from a more progressive state politically to a conservative one). Some commenters have also noted that this undermining of unionized public employees had real economic impacts in the state, explaining that

Wisconsin's Act 10 decimated the state's public sector, leading to a loss of both public-sector jobs and the private-sector jobs that those public dollars supported. The

workplace reforms were coupled with drastic cuts to welfare benefits.<sup>80</sup> Milwaukee, as reported in *The New Republic*, was the target of several state-led decisions seemingly designed to thwart its autonomy.<sup>81</sup>

Collectively, these efforts directly threaten the economic security of Black residents, a disproportionate number of whom, in Wisconsin and elsewhere, work in the public sector.<sup>82</sup> Governor Walker's decision to, with the support of the state legislature, reject the Affordable Care Act's Medicaid expansion money,<sup>83</sup> likely impacted Black residents' access to affordable health care.<sup>84</sup> And the state's defunding of public education stymied the prospect of reducing the racial opportunity gap.<sup>85</sup>

---

combination of Act 10 and the adoption of a so-called right to work law led to a dramatic decline in the share of Wisconsin workers in unions. This almost certainly dampened wage growth, and it likely contributed to the state's weaker income growth and slower progress reducing poverty.

DAVID COOPER, ECON. POL'Y INST., AS WISCONSIN'S AND MINNESOTA'S LAWMAKERS TOOK DIVERGENT PATHS, SO DID THEIR ECONOMIES 21 (2018), <https://files.epi.org/pdf/145177.pdf> [<https://perma.cc/346K-E2BA>].

<sup>80</sup> See Kalena Thomhave, *Why Scott Walker's Welfare Legacy Will Outlast Him*, AM. PROSPECT (Jan. 14, 2019), <https://prospect.org/economy/scott-walker-s-welfare-legacy-will-outlast> [<https://perma.cc/N7SZ-NKM5>] (describing Scott Walker's restrictions on welfare benefits including food stamp benefits and the state Medicaid program).

<sup>81</sup> Alec MacGillis, *The Unelectable Whiteness of Scott Walker*, NEW REPUBLIC (June 15, 2014), <https://newrepublic.com/article/118145/scott-walkers-toxic-racial-politics> [<https://perma.cc/H27W-XZNN>] ("Milwaukee has been badly hurt by the state funding cuts that accompanied the public-employee union emasculation. City leaders are angry that the state is withholding from Milwaukee much of the settlement award for fraudulent mortgage practices in the city. They feel betrayed by a new state law overturning Milwaukee's city residency requirement for police officers and firefighters.").

<sup>82</sup> See Mazher Ali, *Class, Race, and the Attacks on Public Employees*, 18 RACE, POVERTY & ENV'T, no. 1, 2011, at 27, 27 (explaining the "vital role of the public sector in providing opportunities to people of color" and that "Black workers are significantly more likely than other groups in the workforce to hold government positions" and why, therefore, "across-the-board cuts to the federal, state, and even local budgets would have particularly ruinous effects on Black workers and their communities"); Alyssa Battistoni, *Wisconsin & the Dirty Secret of Public Sector Union Busting*, UNITED FOR FAIR ECON. (Feb. 24, 2011), [http://www.faireconomy.org/wisconsin\\_the\\_dirty\\_secret\\_of\\_public\\_sector\\_union\\_busting](http://www.faireconomy.org/wisconsin_the_dirty_secret_of_public_sector_union_busting) [<https://perma.cc/ZR56-5CNQ>] ("The demise of public sector unions would be most detrimental to women and African-Americans, who make up a disproportionate share of the public sector workforce.").

<sup>83</sup> See Jonathan Martin, *Health Law Is Dividing Republican Governors*, N.Y. TIMES (Nov. 21, 2013), <https://www.nytimes.com/2013/11/22/us/politics/health-law-is-dividing-republican-governors.html> [<https://perma.cc/WL2E-D8NT>] (quoting Governor Walker about his decision to reject the expansion money).

<sup>84</sup> Alex Tausanovich & Emily Gee, *How Partisan Gerrymandering Limits Access to Healthcare*, CTR. FOR AM. PROGRESS (Feb. 24, 2020, 5:00 AM), <https://www.americanprogress.org/issues/democracy/reports/2020/02/24/480684/partisan-gerrymandering-limits-access-health-care> [<https://perma.cc/H9PH-5U2V>] (reporting that 108,000 Wisconsin residents were left uninsured due to the failure to expand Medicaid).

<sup>85</sup> See Valerie Strauss, *Wisconsin Gov. Scott Walker's Assault on Public Education Could Be Coming Back to Bite Him*, WASH. POST. (Oct. 16, 2018, 11:10 AM), <https://www.washingtonpost.com/education/2018/10/16/wisconsin-gov-scott-walkers-assault-public-education-could-be-coming-back->



Partisan gerrymandering, even if not the mainspring, unquestionably enabled and rendered more durable many economic and social hardships imposed on Wisconsin's Black residents. As noted by Representative Gwen Moore, who, in 2004 became the first Black person ever elected to Congress from Wisconsin, "the burden of gerrymandering tends to fall particularly heavily on African American and other minority communities."<sup>86</sup> But for the manipulation of Wisconsin's electoral districts, placing control of the legislature with the Republicans, Governor Walker's hostility towards labor unions, opposition to welfare benefits, and disdain for public education, would have been merely rhetorical.

To be sure, partisan gerrymandering does not entirely explain Wisconsin politics or the racial and economic disadvantages suffered by the state's Black population. Activists in Milwaukee, for their part, have recently outlined a broad agenda, seeking, in addition to electoral reforms, "[p]assage of policies that ensure that basic needs are met with a special focus on mental health, living wages, and violence interruption programs,"<sup>87</sup> "[c]reation of rent controls that limit excessive increases in rent,"<sup>88</sup> "[p]assage of policies that strengthen environmental protections to reduce all forms of pollutions including but not limited to air, water, soil, food, etc.,"<sup>89</sup> and "equitably and fully fund[ed] schools."<sup>90</sup> These appeals indicate that electoral reforms are but one aspect of a program of transformative change. Yet partisan gerrymandering is surely part of this story. Just not one that appears in law of democracy scholarship.

While the summary of Wisconsin's recent political history has served to illustrate the fractional nature of law of democracy scholarship, the lesson applies to virtually every law of democracy topic. Consider the most obvious topic: the right to vote. For all that law of democracy scholarship has to say about the right to vote, we are only beginning to unpack its relationship with Black equity. Professor Abhay Aneja has documented what he calls the "politics-economics nexus."<sup>91</sup> The phrase captures the empirical relationship he identified between Black citizens' political power and their improved

---

bite-him [<https://perma.cc/W9CY-U43B>] (discussing Governor Walker's efforts to cut public school funding and decrease the strength of teachers' unions).

<sup>86</sup> Rep. Gwen Moore, *The Burdens of Gerrymandering Are Borne by Communities of Color*, NBC NEWS: THINK (Nov. 6, 2017, 3:51 PM), <https://www.nbcnews.com/think/opinion/burdens-gerrymandering-are-borne-communities-color-ncna817446> [<https://perma.cc/YAS2-EX7H>].

<sup>87</sup> BLACK LEADERS ORG. FOR CMTYS., *THE BLOC AGENDA: A PLATFORM FOR PROSPERITY* (2019), <https://static1.squarespace.com/static/59b15de8d7bdcec266038669/t/5df3fb64b1e93317fdcf42ce/1576270701146/BLOC+Agenda-12%3A07%3A2019.pdf> [<https://perma.cc/8HYD-XD7N>].

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Abhay P. Aneja, *Voting for Welfare: The Voting Rights Act as Socioeconomic Empowerment*, CAL. L. REV. (forthcoming 2021) (manuscript at 14) (on file with author).

economic standing.<sup>92</sup> Specifically, according to his findings, the Voting Rights Act of 1965 (VRA) led, not only to increased political participation by Black citizens, but a host of empirically observable “‘downstream’ economic outcomes at an individual level, including reductions in both levels of severe poverty and income inequality.”<sup>93</sup>

Aneja, therefore, draws explicit connections between voting rights and economic security. Yet, as he astutely notes, in a world of limited resources, inevitable choices must be made about how and when voting rights reforms should supersede alternatives. Given these tradeoffs, and to the extent that Black equity is the goal, reform efforts exclusively centered around voting rights litigation may not be *the most* prudent reform strategy.<sup>94</sup> The reason for this, in Aneja’s telling, is that “even favorable outcomes in vote denial litigation are unlikely to cause major changes in a city/state’s median voter.”<sup>95</sup> Absent a meaningful shift in the composition or preferences of the electorate, legislators have little electoral incentive to pursue Black equity. This line of reasoning leads Aneja to conclude that “[a]dvocates concerned with the racialized dimensions of poverty, joblessness, and social inequality should focus on increasing the class diversity of the electorate.”<sup>96</sup>

The foregoing discussion, as should be apparent, is an example of how law of democracy scholarship can supplement and engage with the previously described conversations about race, class, and Black equity. Directly engaging those conversations will only serve to enhance law of democracy scholarship. Failure to do so will obscure the connections between election law and the lived experiences of Black people, and more problematically, perpetuate the overreading of conventional legal reforms.

---

<sup>92</sup> *Id.*; see also Abhay P. Aneja & Carlos F. Avenancio-Leon, *The Effect of Political Power on Labor Market Inequality: Evidence from the 1965 Voting Rights Act* 33 (October 2020) (unpublished manuscript), <https://equitablegrowth.org/working-papers/the-effect-of-political-power-on-labor-market-inequality-evidence-from-the-1965-voting-rights-act> [<https://perma.cc/6S8G-HLUV>] (“[M]inority political empowerment has important labor market benefits for previously disenfranchised minorities”).

<sup>93</sup> Aneja, *supra* note 91 (manuscript at 34).

<sup>94</sup> *Id.* (manuscript at 60) (“A political strategy focused exclusively on ‘vote denial’ is unlikely to change election outcomes, much less produce meaningful reductions in inequality on downstream social and economic dimensions.”); see also Bertrall L. Ross II & Douglas M. Spencer, *Passive Voter Suppression: Campaign Mobilization and the Effective Disfranchisement of the Poor*, 114 NW. L. REV. 633, 702 (2019) (“But if the goal is an inclusive democracy, then voting rights advocates will need to target something more than the new voter suppression. State decisions to increase barriers to voting are not the primary source of the large disparities in participation between different classes of voters . . .”).

<sup>95</sup> Aneja, *supra* note 91 (manuscript at 60)

<sup>96</sup> *Id.*

## CONCLUSION

In a recent *New York Times* opinion column, Professor Richard Pildes asserted that “[e]very [political] reform proposal must be judged through this lens: Is it likely to fuel or to weaken the power of extremist politics and candidates?”<sup>97</sup> Use of that metric, he argued, is necessary given the rise of “extremist forces that have rapidly gained ground in our politics.”<sup>98</sup> This Essay suggests that scholars and reformers consider another metric: Is a reform proposal likely to further Black equity? Expanding our conception of how the law of democracy impacts Black equity is the first step in the development of complementary legal theories that challenge the persistence of both racial and economic disadvantage.<sup>99</sup> Serious, committed work awaits.

---

<sup>97</sup> Richard H. Pildes, *How to Keep Extremists Out of Power*, N.Y. TIMES (Feb. 25, 2021), <https://www.nytimes.com/2021/02/25/opinion/elections-politics-extremists.html> [<https://perma.cc/55S2-XR6L>].

<sup>98</sup> *Id.*

<sup>99</sup> Some scholars have already taken steps in this direction. See, e.g., Atiba R. Ellis, *Reviving the Dream: Equality and the Democratic Promise in the Post-Civil Rights Era*, 2014 MICH. ST. L. REV. 789, 849-50 (advocating for legislation and judicial scrutiny focused “specifically at the intersection of race and class”).