

**CRISIS AND DISCONNECT: ELECTORAL LEGITIMACY AND PROPOSALS
FOR ELECTION REFORM**

*Bradley A. Smith**

INTRODUCTION

There is a crisis in American elections. A large and apparently growing percentage of Americans are simply unwilling to accept that an election lost by their preferred candidates was an honest result. On the political right, the typical cry is “fraud.” On the left, it is “vote suppression.” These beliefs are almost entirely disconnected from the facts. By almost any standard, fraud in American elections is relatively trivial and less common than it has been throughout much of history. And contrary to claims of “suppression,” there have never been fewer obstacles to voting in the United States.

Given this, it is not surprising that many of the solutions being peddled to “fix” American elections are equally disconnected from the problem. Proposals to abolish the electoral college, add new states, or create non-partisan redistricting commissions, as well as most proposals to make voting even easier, bear almost no relationship at all to the fundamental crisis of legitimacy caused by an unwillingness of a large portion of the public to believe the accuracy and honesty of vote tallies and results of elections.

In Part I of this essay, I argue that the crisis of legitimacy goes much deeper than Donald Trump and the election of 2020 and is not confined to the Republican Party. In Part II, I explain why most reform proposals are disconnected from the realities of the crisis. In Part III, I offer a simple alternative—stop major attempts to reform the electoral process but take modest steps to re-emphasize the importance of election day. Part IV provides a brief summation.

* Josiah H. Blackmore II/Shirley M. Nault Professor of Law, Capital University Law School. Former Commissioner (2000-05) and Chairman (2004) of Federal Election Commission. I thank Jeffrey Rosen, the National Constitution Center, the editors of the *University of Pennsylvania Journal of Constitutional Law*, and all the participants in this symposium. Thank you to Andrew Martin and Eric Parker for research assistance.

I. CRISIS

On January 6, 2021, thousands of Americans packed the Ellipse and spilled onto the mall in Washington, D.C. They were there to “Stop the Steal”—the “steal” being the 2020 presidential election, which many in the crowd believed had been won, and stolen from, the incumbent, Donald Trump. This mistaken belief had been fueled by comments from various conservative activists but mostly from President Trump himself. Eventually, the President addressed the crowd, claimed again that the election was being stolen, and urged the crowd to walk to the Capitol, where the House and Senate were meeting in joint session for the ceremonial duty of witnessing the counting of Electoral College votes, to “demand that Congress do the right thing and only count the electors who have been lawfully slated.”¹

Eventually, several hundred protestors pushed past the Capitol police, or in some cases literally stormed walls, and entered the Capitol. One attacker was shot and killed, and several other people were injured before order was restored.²

1 Brian Naylor, *Read Trump's Jan. 6 Speech, A Key Part of Impeachment Trial*, NPR, (Feb. 10, 2021, 2:43 PM), <https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial> [<https://perma.cc/8DRJ-FT96>].

2 See Anthony J. Gaughan, *The Dynamics of Democratic Breakdown: A Case Study of the American Civil War*, 11 BRITISH J. OF AM. LEGAL STUD. (forthcoming 2022) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3815115 [<https://perma.cc/K8CY-UZ8P>]). Many reports, including Gaughan's, attribute as many as five deaths to the riot, but later reports showed this was incorrect. Capitol police officer Brian Sicknick was assaulted and injured during the riot and died the next day. On April 19, 2020, the medical examiner's office in Washington, D.C. concluded that Sicknick's death was unrelated to injuries suffered at the Capitol on January 6. Aruna Viswanatha & Sadie Gurman, *Capitol Officer's Death Ruled to be Natural*, WALL ST. J., (Apr. 20, 2021), p. 1. In addition to one rioter shot by police, two others died of natural causes that day away from the Capitol, and a third from a drug overdose at the Capitol. Kelli Dugan, *D.C. Medical Examiner Confirms Causes of Death of 4 Who Died in Jan. 6 Capitol Riot*, COX MEDIA GROUP (Apr. 7, 2021, 8:44 PM), <https://www.wsocv.com/news/trending/dc-medical-examiner-confirms-causes-death-4-who-died-jan-6-capitol-riot/MZMP3MS2JZGTHKAGBM2YPCRG5I/> [<https://perma.cc/T6TF-RBXR>]. Four police officers committed suicide in the days and weeks following the riot, but there is no evidence that the riot caused their suicides. See Yaron Steinbuch, *National Police Association Rep Slams Left of Politicizing Cop Suicides After Jan. 6 Riot*, N.Y. POST (Aug. 6, 2021, 4:55 PM), <https://nypost.com/2021/08/06/national-police-association-rep-slams-left-for-politicizing-cop-suicides-after-jan-6/> [<https://perma.cc/E46G-7KGY>] (quoting National Police Association spokesperson Betsey Branter Smith, “We don't know why these officers committed suicide. . . . To my knowledge, none of [these four] officers left any kind of detailed accounting of why. That's why it's important that we don't assume, and we don't politicize. . . . We will never know.”). At least

The general consensus seems to be that the riot of January 6 was the result of deep pathology on the Trumpian right, fueled by the rants and conspiracy theories of a uniquely demagogic leader. Despite relentless media repetition that claims of a stolen election were “false,” which is, in this author’s view, almost certainly true, or “without evidence,” which is not true,³ by April 21, polling revealed that as much as 70% of Republicans believed that Joe Biden had not legitimately won the election.⁴ And, to a substantial extent, Republicans in Congress also closed ranks around Mr. Trump rather than publicly reject his “stolen election” rhetoric or censure his post-election behavior.⁵

Talk of electoral illegitimacy is indeed in vogue in Republican circles. But it would be a mistake to think of this as merely a Republican phenomenon. The reaction to the 2020 election results, and the events of January 6, 2021, did not happen in a vacuum. Rather, they were the culmination of two decades of steady attacks, often led by Democrats, on the legitimacy of election results in the United States. It is a bipartisan problem. To make that point, this section focuses on the statements, beliefs, and actions of Democrats. To be clear, I do not claim that Republicans and conservatives have not engaged in similar talk and actions, or that Democrats are more, less, or equally prone than Republicans to question the legitimacy of election results. Nor is it my intent either to draw or deny an equivalency between the storming of the Capitol on January 6, 2021, and violent riots

one rioter is claimed to have committed suicide due to the riot and ensuing events. Gabrielle Fonrouge, *Capitol Rioter Dies by Suicide Because of ‘Broken Heart’ Over Case*, NY POST (Mar. 1, 2022, 4:35 PM), <https://nypost.com/2022/03/01/jan-6-capitol-rioter-dies-by-suicide-because-of-broken-heart-over-case/> [https://perma.cc/3J9D-MH82]. But again, this requires a certain amount of speculation. None of this is to downplay the seriousness of the day’s events—one dead matters, as do the serious physical and possibly psychological injuries suffered.

³ See, e.g., John R. Lott, *Simple Tests for the Extent of Vote Fraud with Absentee and Provisional Ballots in the 2020 US Presidential Election* (forthcoming) (draft paper available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3756988).

⁴ SSRS/CNN Poll, April 21-26, 2021 (Apr. 30, 2021), <https://cdn.cnn.com/cnn/2021/images/04/30/rel3e.-voting.and.elections.pdf>. A December, 2021 poll by YouGov found that only thirteen percent of Republicans viewed the 2020 presidential election as “free and fair.” YouGov, *Yahoo News Survey 4* (Dec. 18-22, 2021), https://docs.cdn.yougov.com/g4w126tqwg/20211222_yahoo_tabs.pdf [https://perma.cc/2CPC-22NP].

⁵ See Weiyi Cai, *A Step-by-Step Guide to the Second Impeachment of Donald J. Trump*, N.Y. TIMES (Feb. 13, 2021), <https://www.nytimes.com/interactive/2021/02/08/us/politics/trump-second-impeachment-timeline.html?register=email&auth=register-email> [https://perma.cc/SP8E-QHTP].

that occurred in the wake of Donald Trump's election and inauguration.⁶ Rather, I focus on Democrats and progressives because the general "narrative" seems to be that this is a uniquely acute problem amongst Republicans. The record, however, shows that this narrative is not true. And that makes the problem all the more acute.

We start in 2000, when Al Gore, having initially conceded defeat in the presidential contest, withdrew that concession, and Democratic lawyers flooded Florida looking for any reason to overturn the results. Initially Gore's team knew of no basis to contest the results, other than to request a standard recount because of the closeness of the race. Gore's efforts began not with a claim, but with lawyers looking for a possible claim.⁷ When Gore's efforts came to a legal end, Gore gracelessly refused to concede that he had lost the election, congratulating George W. Bush only on "becoming" president, rather than being "elected."⁸ In January 2001, a dozen House Democrats objected to the counting of Florida's electoral votes, and several others joined them in a sympathetic walk-out.⁹

In 2004, many Democrats bought into wild conspiracy theories about Bush stealing the election in Ohio.¹⁰ Thirty-one House Democrats, joined by Senator Barbara Boxer (D. Calif.), objected to counting Ohio's twenty

6 See *infra*, text at notes 71–72. Readers will undoubtedly make their own judgments. My goal is not comparison, but recognition.

7 See BILL SAMMON, AT ANY COST: HOW AL GORE TRIED TO STEAL THE ELECTION 75–76 (2001).

8 See CBS News, *Text of Gore's Concession Speech*, (Dec. 13, 2000), <https://www.cbsnews.com/news/text-of-gores-concession-speech/> [https://perma.cc/9JUD-J79E]. Leading Democrats, including Hillary Clinton, continued to reject the legitimacy of Bush's election. See, e.g., Howard Fineman, *The First Families Square Off*, NEWSWEEK (Nov. 3, 2002, 7:00 PM), <https://www.newsweek.com/first-families-square-142141> [https://perma.cc/FE8C-NZNL] (quoting Ms. Clinton saying that Bush was "selected," rather than the elected president).

9 Alison Mitchell, *Over Some Objections, Congress Certifies Electoral Vote*, N.Y. TIMES, at 17 (Jan. 7, 2001). Boston Globe, *Gore Quells Challenge to Bush Win*, BALTIMORE SUN, (Jan. 7, 2001, 12:00 AM), <https://www.baltimoresun.com/news/bs-xpm-2001-01-07-0101070059-story.html> [https://perma.cc/LVT9-FUSL].

10 See, e.g., Robert F. Kennedy, *Was the 2004 Election Stolen?*, ROLLING STONE, (June 1, 2006), http://www.rollingstone.com/news/story/10432334/was_the_2004_election_stolen (available at <https://people.csail.mit.edu/rivest/voting/press/WasThe2004ElectionStolen.pdf> [https://perma.cc/HA8C-LW5H]). For an overview, see Joanna Weiss, *What Happened to the Democrats Who Never Accepted Bush's Election: The 2004 vote-fraud conspiracy movement never really died. What does that mean for Trump's true believers—and America?*, POLITICO (Dec. 19, 2020, 7:00 AM), <https://www.politico.com/news/magazine/2020/12/19/2004-kerry-election-fraud-2020-448604> [https://perma.cc/P5DS-U9YL].

electoral votes.¹¹ The defeated Democratic nominee, John Kerry, did not join the protest, but made it a point to flag the “very troubling questions that have not yet been answered by Ohio election officials.”¹² Others who did not contest the count but nonetheless lent rhetorical support included Senator Richard Durbin (D. Ill.), who by 2020 was the second-ranking Democrat in the Senate, and then-Representative Chris Van Hollen (D. Md.), who by 2020 was seated in the Senate.¹³ A popular book by Mark Crispin Miller prominently alleged that, “it wasn’t ‘moral values’ that swung the 2004 presidential race—it was theft.”¹⁴ Miller followed that with an edited volume, “Loser Take All: Election Fraud and the Subversion of Democracy 2000-2008,” billed as “an indispensable anthology of writings covering the vast election fraud that has been perpetrated by the GOP.”¹⁵

¹¹ CNN, *Democrats Challenge Ohio Electoral Votes*, CNN, [Jan. 6, 2005, 7:08 PM], <https://www.cnn.com/2005/ALLPOLITICS/01/06/electoral.vote.1718/>

[<https://perma.cc/RS9A-ZBQP>]; Tyler Olson, *Democrats Who Praised 2004 Objections to Electoral College Certification Now Slam Hawley*, FOX NEWS (Dec. 31, 2020) <https://www.foxnews.com/politics/democrats-who-praised-2004-objections-to-electoral-college-certification-now-slam-hawley> [<https://perma.cc/V95Q-NHXX>].

¹² CNN, *supra* note 11.

¹³ Olson, *supra* note 11 (quoting Durbin, “Some may criticize our colleague from California . . . I thank her for doing that because it gives members an opportunity once again on a bipartisan basis to look at a challenge that we face not just in the last election in one State but in many States;” quoting Van Hollen, then a congressman, “I believe that Senator Barbara Boxer (D-CA) and Representative Stephanie Tubbs Jones (D-OH) have performed a very valuable public service in bringing this debate before the Congress.”).

¹⁴ MARK CRISPIN MILLER, *FOOLED AGAIN: THE REAL CASE FOR ELECTORAL REFORM* 493 (2007) (Miller’s book was published by a major trade press, Basic Books). Earlier, Harper’s had published Miller’s essay, *None Dare Call it Stolen: Ohio, the Election, and America’s Servile Press*, HARPER’S MAG., (Aug. 2005), <https://harpers.org/archive/2005/08/none-dare-call-it-stolen/> [<https://perma.cc/6KKE-SMCJ>].

¹⁵ MARK CRISPIN MILLER, ED., *LOSER TAKE ALL: ELECTION FRAUD AND THE SUBVERSION OF DEMOCRACY 2000-2008* (2008). The book includes essays by, among others, Robert F. Kennedy, Jr., and was praised by, among others, former Democratic Congressman and presidential candidate Dennis Kucinich. *See also* BOB FITRAKIS, HARVEY WASSERMAN, & STEVE ROSENFELD, *DID GEORGE W. BUSH STEAL AMERICA’S 2004 ELECTION?: ESSENTIAL DOCUMENTS* (2005); Mark Hertsgaard, *Recounting Ohio*, MOTHER JONES (Nov. 2005), <https://www.motherjones.com/media/2005/11/recounting-ohio/> [[https://perma.cc/5N\]G-8JXG](https://perma.cc/5N]G-8JXG)] (reviewing that Hertsgaard is unsure whether Bush “stole” the 2004 election, but believes he did steal the 2000 election and states that in 2004 “there was indeed something rotten in the state of Ohio. . . . This was not a fair election”); Brendan Nyhan, *Marshall Suggests 2004 Election Stolen*, BRENDAN NYHAN BLOG (Oct. 18, 2006), https://www.brendan-nyhan.com/blog/2006/10/marshall_sugges.html [<https://perma.cc/8QZZ-TCWD>] (noting that prominent progressive blogger Josh Marshall, of Talking Points Memo, accused Ohio Secretary of State Ken Blackwell of stealing the 2004 Ohio presidential election).

Sixteen years later, dark stories of conspiracy, including voting machines switching vote totals, continue to hold currency with a shrinking, but by no means trivial, largely progressive audience.¹⁶

President Obama’s solid wins in 2008 and 2012 cooled progressive ardor for conspiracy theories¹⁷—although Salon wrote at length about conspiracy theories alleged by Obama supporters after Hillary Clinton won the 2008 New Hampshire Democratic primary¹⁸—but that passion roared back with Trump’s 2016 victory. For the third time in a row, Democratic House members objected to the electoral vote count in the wake of a Republican victory.¹⁹ Objectors included Rep. Jamie Raskin (D. Md.), a former election law professor who became lead House manager for the impeachment of Trump over the events of January 6, 2021, and later a prominent member of the House Committee investigating January 6, and Representative James McGovern (D. Mass.), who chaired the House Rules Committee that drafted those articles of impeachment.²⁰ Among the states whose electoral votes they protested were Alabama and Wyoming, states Trump won by approximately 28 and 46 points, respectively, margins far beyond any possible fraud, “suppression,” or “irregularities.”²¹ Representative Nancy Pelosi (D. Calif.), then the House Minority Leader, did not join the protest, but stated, “I will support those who object.”²²

¹⁶ Joanna Weiss, *What Happened to the Democrats Who Never Accepted Bush’s Election: The 2004 vote-fraud conspiracy movement never really died. What does that mean for Trump’s true believers—and America?*, POLITICO (Dec. 19, 2020, 7:00 AM), <https://www.politico.com/news/magazine/2020/12/19/2004-kerry-election-fraud-2020-448604> [https://perma.cc/6N63-4UVN].

¹⁷ *But see* David A. Graham, *Democrats Are Short on Votes and Long on Irony*, THE ATLANTIC, (Apr. 6, 2021), (discussing “a palimpsest of Democratic freak-outs” about election legitimacy over the past decade).

¹⁸ *See* Farhad Manjoo, *Was the New Hampshire Vote Stolen?*, SALON (Jan. 11, 2008, 10:52 PM) https://www.salon.com/2008/01/11/new_hampshire_vote/ [https://perma.cc/454G-E9W9] (“The Web is abuzz with allegations of fraud The charges don’t hold water, but this problem is not going away.”).

¹⁹ Leigh Ann Caldwell, *Despite Objections, Congress Certifies Donald Trump’s Election*, NBC NEWS, (Jan. 6, 2017, 2:24 PM), <https://www.nbcnews.com/politics/congress/despite-objections-congress-certifies-donald-trump-s-election-n704026> [https://perma.cc/5LGZ-MG6N].

²⁰ 163 Cong. Rec. H186 (daily ed. Jan. 6, 2017), <https://www.congress.gov/115/crec/2017/01/06/CREC-2017-01-06-pt1-PgH185-8.pdf>.

²¹ Federal Election Commission, *Election Results for the U.S. President, the U.S. Senate and the U.S. House of Representatives*, FEC (Dec. 2017), <https://www.fec.gov/resources/cms-content/documents/federalections2016.pdf> [https://perma.cc/M7ZL-J6U7].

²² Stephen Ohlemacher, *House Democrats Plan to Raise Objections During Electoral College Vote Count*, PBS (Jan. 6, 2017, 12:52 PM), <https://www.pbs.org/newshour/politics/traditional-end-unconventional-election-congress-count-electoral> [https://perma.cc/2WJB-UL9E].

The day before the 2016 presidential election, New York Times columnist Paul Krugman proclaimed the election “rigged” against Hillary Clinton.²³ After the election, Trump, despite winning, casted allegations of voter fraud,²⁴ but leading Democrats also continued to question the results. Numerous Democrats made claims about “Russians” interfering with the elections.²⁵ Of course, there was a Russian effort to influence American opinion, primarily through approximately \$100,000 worth of on-line ads, and a number of ham-fisted, fake social media accounts trying to create discord between Americans²⁶—hardly the first time Russians have sought to influence American voters.²⁷ And there is evidence that various cyberhackers, often originating in Russia, sought, unsuccessfully, to attack software used by poll workers, voter registration lists, and campaign finance records.²⁸

But many comments seemed designed to leave the impression that Russian espionage successfully altered vote tallies, and some specifically made that claim, even long after it had been discredited.²⁹ Congresswoman

²³ Paul Krugman, *How to Rig an Election*, N.Y. TIMES (Nov. 7, 2021), <https://www.nytimes.com/2016/11/07/opinion/how-to-rig-an-election.html> [<https://perma.cc/63K5-VQKW>].

²⁴ See, e.g., Tom LoBianco, *Trump Falsely Claims ‘Millions of People Who Voted Illegally’ Cost Him Popular Vote*, CNN (Nov. 28, 2016, 6:56 PM), <https://www.cnn.com/2016/11/27/politics/donald-trump-voter-fraud-popular-vote/index.html> [<https://perma.cc/QL5M-H4LT>].

²⁵ David Smith, *FBI Covered Up Russian Influence on Trump’s Election Win, Harry Reid Claims*, THE GUARDIAN (Dec. 10, 2016, 1:34 PM.), <https://www.theguardian.com/us-news/2016/dec/10/fbi-russia-trump-election-harry-reid-james-comey-wikileaks> [<https://perma.cc/RJY9-TDPZ>].

²⁶ Scott Shane & Vindu Goel, *Fake Russian Facebook Accounts Bought \$100,000 in Political Ads*, N.Y. TIMES (Sept. 6, 2017), <https://www.nytimes.com/2017/09/06/technology/facebook-russian-political-ads.html> [<https://perma.cc/B3Y8-T2NG>].

²⁷ Seth G. Jones, *Russian Meddling in the United States: The Historical Context of the Mueller Report*, CTR. FOR STRATEGIC & INT’L STUD. 1, 2 (Mar. 2019), https://cis-website-prod.s3.amazonaws.com/s3fs-public/publication/190328_RussianMeddlingintheUS_WEB_V.2.pdf [<https://perma.cc/BN8F-5A8L>].

²⁸ NATIONAL SECURITY AGENCY, RUSSIA/CYBERSECURITY: MAIN INTELLIGENCE DIRECTORATE CYBER ACTORS, TARGET U.S. COMPANIES AND LOCAL U.S. GOVERNMENT OFFICIALS USING VOTER REGISTRATION-THEMED EMAILS, SPOOF ELECTION-RELATED PRODUCTS AND SERVICES, RESEARCH ABSENTEE BALLOT EMAIL ADDRESSES; AUGUST TO NOVEMBER 2016, (2017); Matthew Cole, Richard Esposito, Sam Biddle, & Ryan Grim, *Top-Secret NSA Report Details Hacking Effort Days Before 2016 Election*, THE INTERCEPT (June 5, 2017, 3:44 PM), <https://theintercept.com/2017/06/05/top-secret-nsa-report-details-russian-hacking-effort-days-before-2016-election/> [<https://perma.cc/MJ72-SMQN>].

²⁹ S. SELECT COMM. ON INTEL., RUSSIAN TARGETING OF ELECTION INFRASTRUCTURE DURING THE 2016 ELECTION: SUMMARY OF INITIAL FINDINGS AND RECOMMENDATIONS, U.S. SENATE

Barbara Lee (D. Calif.) gave as her reason for objecting to the Electoral College vote count, “overwhelming evidence of Russian interference in our election.”³⁰ In June 2017, liberal columnist Charles Pierce informed *Esquire* readers that, “[i]t increasingly looks like Russian hackers may have affected actual vote totals,” and, in an unexplained non-sequitur, that this occurred “because of the interference by the Supreme Court in *Bush v. Gore*, by the curious goings-on in Ohio in 2004, by a relentless campaign to convince the country of an imaginary epidemic of voter fraud, and by a decade of voter suppression by any means necessary.”³¹ MSNBC’s leading talk host, Rachel Maddow, repeatedly referenced Russian hacking on both her own show and on others’ shows.³² In 2019, Hillary Clinton falsely claimed that “the Russians were in the county election systems of every county in Florida.”³³

Prominent Democrats continued to make such claims well into 2020. In the summer of 2020, former Senate Majority Leader Harry Reid (D. Nev.) claimed that in 2016, “Russians manipulated the votes. It’s that simple.”³⁴ Hillary Clinton warned that Trump would “sneak or steal his way” to victory.³⁵ A few days later, Clinton added, “Joe Biden should not concede

(2018), <https://www.intelligence.senate.gov/publications/russia-inquiry> [<https://perma.cc/YFH2-ZQT8>].

³⁰ Doina Chiacu & Susan Cornwell, *U.S. Congress Certifies Trump’s Electoral College Victory*, REUTERS (Jan. 6, 2017, 1:17 PM), <https://www.reuters.com/article/us-usa-trump-congress-idUSKBN14Q25R> [<https://perma.cc/HU9C-K89P>].

³¹ Charles P. Pierce, *The Hard Truth Keeps Trickling Out, Little by Little*, *ESQUIRE* (June 13, 2017), <https://www.esquire.com/news-politics/politics/news/a55603/russia-hack-voting-totals/> [<https://perma.cc/2QZ4-CAMJ>].

³² See Aaron Mate, *MSNBC’s Rachel Maddow Sees a “Russian Connection” Lurking Around Every Corner*, *THE INTERCEPT* (Apr. 12, 2017), <https://theintercept.com/2017/04/12/msnbc-rachel-maddow-sees-a-russian-connection-lurking-around-every-corner/> [<https://perma.cc/K4D8-2TUM>]; see also 11TH HOUR, *Maddow Explains Why Putin’s Russia Hacked the 2016 Election*, MSNBC (Oct. 17, 2019), <https://www.msnbc.com/11th-hour/watch/maddow-explains-why-putin-s-russia-hacked-the-2016-election-71531077730> [<https://perma.cc/WU3D-8NXF>] (discussing the “Russian investment in screwing up our elections,” and Maddow responding by citing the “Russian attack” on the 2016 election).

³³ Tara Law, *Hillary Clinton Said Russia Infiltrated All Florida Election Systems. A State Official Disputes That*, *TIME* (Apr. 25, 2019, 5:07 PM), <https://time.com/5578267/florida-election-interference-russia-clinton/> [<https://perma.cc/ZRR5-MCLG>].

³⁴ Anthony Leonardi, *Harry Reid: Russia ‘Manipulated’ Votes in 2016*, *WASH. EXAMINER* (June 25, 2020, 6:28 PM), <https://www.washingtonexaminer.com/news/harry-reid-russia-manipulated-votes-in-2016> [<https://perma.cc/UW2G-82Z3>].

³⁵ Quint Forgey, *Hillary Clinton Warns of Trump Trying to ‘Sneak or Steal His Way’ to a Second Term*, *POLITICO* (Aug. 19, 2020, 10:20 PM), <https://www.politico.com/news/2020/08/19/hillary-clinton-dnc-speech-398893> [<https://perma.cc/EE8-PXKU>].

under any circumstances,”³⁶ a statement apparently based on the presumption that only fraud could account for a Biden defeat. In October, she again claimed that the 2016 election was “not on the level.”³⁷

Joe Biden’s running mate, Kamala Harris, warned that, “I do believe that there will be foreign interference in the 2020 election, and that Russia will be at the front of the line.”³⁸ Specifically asked if it could cost Biden the election, she answered “[y]es.”³⁹ Harris’s comments could certainly be interpreted as suggesting that vote totals were likely to be altered. Biden himself stated that “[t]his president is going to try to steal this election,”⁴⁰ and later that “the only way we lose this is by the chicanery going on.”⁴¹

Nor was fraud-mongering by Democrats limited to the 2016 and 2020 presidential elections. Most prominently, after losing the 2018 race for Georgia governor by more than 50,000 votes, Democratic nominee Stacey Abrams continued to insist that she had won the race, losing only due to fraud and “suppression.”⁴² Yet rather than being dismissed as a kook, Abrams became something of a celebrity in progressive circles, and has been

³⁶ Rebecca Shabad, *Hillary Clinton Says Biden Should Not Concede the Election ‘Under Any Circumstances,’* NBC NEWS (Aug. 26, 2020, 7:44 AM), <https://www.nbcnews.com/politics/2020-election/hillary-clinton-says-biden-should-not-concede-2020-election-under-n1238156> [<https://perma.cc/MM94-93PE>].

³⁷ Mairead McArdle, *Hillary Clinton Maintains 2016 Election ‘Was Not on the Level’: ‘We Still Don’t Know What Really Happened’*, NAT’L REV. (Oct. 9, 2020), <https://news.yahoo.com/hillary-clinton-maintains-2016-election-160716779.html?guccounter=1> [<https://perma.cc/ZMC9-AG3F>].

³⁸ Chelsea Janes, *Harris Warns of Russian Interference in November Election*, WASH. POST (Sept. 6, 2020, 12:06 PM), https://www.washingtonpost.com/politics/harris-warns-of-russian-interference-in-november-election/2020/09/06/b4f0489a-f04a-11ea-b796-2dd09962649c_story.html [<https://perma.cc/F6KY-B62WJ>].

³⁹ *Id.*

⁴⁰ Rebecca Shabad & Marianna Sotomayor, *Biden’s Biggest Fear: ‘This President is Going to Try to Steal This Election’*, NBC NEWS (June 11, 2020, 8:32 AM), <https://www.nbcnews.com/politics/congress/biden-s-biggest-fear-president-going-try-steal-election-n1229761> [<https://perma.cc/5EEU-9CDX>].

⁴¹ Joseph Gamp, *Biden Hints He Won’t Accept Election Defeat Saying ‘Only Way’ He Can Lose Is Through Vote Tampering*, THE U.S. SUN (Oct. 11, 2020, 3:15 PM), <https://www.the-sun.com/news/1616131/biden-trump-chicanery-presidential-election-results/> [<https://perma.cc/WE3P-ZW9P>].

⁴² Adam Shaw, *Stacey Abrams Again Claims She Won Georgia Governor’s Race: ‘I’m not’ a Good Sport*, FOX NEWS (May 4, 2019, 3:31 PM), <https://www.foxnews.com/politics/stacey-abrams-again-claims-she-won-georgia-governors-race-im-not-a-good-sport> [<https://perma.cc/596G-CJ6Z>]; see also David Knowles, *Republicans Go After Stacey Abrams at Senate Hearing on Voting Rights*, YAHOO NEWS (Apr. 21, 2021), <https://au.news.yahoo.com/republicans-go-after-stacey-abrams-at-senate-hearing-on-voting-rights-191509411.html> [<https://perma.cc/UY5T-R2EC>] (noting that at a congressional hearing in April 2021, Abrams continued to insist the election was stolen).

lauded for using her unsubstantiated claims of fraud and suppression to whip the vote.⁴³ Kamala Harris, then a U.S. Senator, was supportive of Abrams' claims, saying, "[l]et's say this loud and clear: Without voter suppression, Stacey Abrams would be the governor of Georgia."⁴⁴ For good measure, Harris also claimed that the 2018 Florida governor's race was illegitimate, adding, "Andrew Gillum is the governor of Florida."⁴⁵ When Harris made these comments, Gillum, a Democrat who lost by just under 34,000 votes, had long since conceded the race.⁴⁶ Meanwhile, in the spring of 2022, President Biden placed two advocates of the "Abrams wuz robbed" school to prominent government posts—one of them, in fact, to the Federal Election Commission.⁴⁷

Given this long history of prominent Democrats and progressives challenging the legitimacy of election results, it should not be shocking that

⁴³ Melanye Price, *Stacey Abrams Is Playing the Long Game for Our Democracy*, N.Y. TIMES (Aug. 15, 2019), <https://www.nytimes.com/2019/08/15/opinion/stacey-abrams-elections.html> [<https://perma.cc/VCN9-27UE>] ("Everywhere she goes, Stacey Abrams is treated like a rock star."); see also Martin Pengelly, *Biden VP Contenders in Spotlight After Rayshard Brooks Police Killing*, THE GUARDIAN (June 14, 2020, 11:45 AM), <https://www.theguardian.com/us-news/2020/jun/14/biden-vp-contenders-stacey-abrams-keisha-lance-bottoms-rayshard-brooks-police-killing> [<https://perma.cc/W7NR-ZKBH>] (discussing Abrams, who has never held an office higher than state representative and never faced a major party opponent in a general election, made Biden's short list for the Vice-Presidential spot—hardly a ringing denunciation of election fraud mongering). For Abrams' electoral history, see Staff, *Georgia 2006: Your Guide to Tuesday's Election in DeKalb and Rockdale Counties*, ATLANTA JOURNAL-CONSTITUTION (Nov. 2, 2006); *Stacey Abrams*, BALLOTPEDIA, https://ballotpedia.org/Stacey_Abrams [<https://perma.cc/29XB-QDJN>] (last visited Apr. 12, 2021).

⁴⁴ Alexandra Hutzler, *Kamala Harris Says Stacey Abrams, Andrew Gillum Would Have Won 2018 Elections Without Voter Suppression*, NEWSWEEK (May 6, 2019, 11:01 AM), <https://www.newsweek.com/kamala-harris-voter-suppression-abrams-gillum-1415903> [<https://perma.cc/UF54-M3E6>].

⁴⁵ *Id.*

⁴⁶ Jonathan Allen & Allan Smith, *Gillum Officially Concedes Florida Governor Race, Congratulates DeSantis on Winning*, NBC NEWS (Nov. 17, 2018, 5:42 PM), <https://www.nbcnews.com/politics/elections/gillum-officially-concedes-florida-governor-race-congratulates-desantis-winning-n936786> [<https://perma.cc/VFF7-LUXJ>].

⁴⁷ Those nominees were Karine Jean-Pierre to be White House Press Secretary and Dara Lindenbaum to the FEC. See Jessica Chasmar, *Biden's New WH Press Secretary Claimed Trump, Ga. Gov. Kemp 'Stole' Elections*, FOX NEWS (May 10, 2022, 1:06 AM), <https://www.foxnews.com/politics/bidens-wh-press-secretary-brian-kemp-stacey-abrams> [<https://perma.cc/E9XC-SHEB>]; Fred Lucas, *Biden FEC Pick Claimed Georgia Voting Machines 'Switched' Votes From Abrams to Kemp in 2018*, FOX NEWS (May 1, 2022, 6:42 AM), <https://www.foxnews.com/politics/biden-fec-pick-claimed-georgia-voting-machines-switched-votes-abrams-kemp-2018> [<https://perma.cc/BJ3R-S8HP>].

polling data shows little difference between Democrats and Republicans, or progressives and conservatives, when it comes to questioning election results.

Pollsters too often tend to ask broad questions that may exaggerate public skepticism of election results. For example, a common polling question asks whether “the last election was conducted fairly.”⁴⁸ This can be interpreted by respondents in many ways. “[D]oes ‘the election’ refer to the counting of the votes on Election Day, or the broader electoral campaign, which may entail considerations of campaign finance and media systems?”⁴⁹ Along those lines, a Reuters/Ipsos poll conducted shortly after the 2020 election found that 68% of Republican voters “strongly agree[d]” or “somewhat agree[d]” that the election was “rigged.”⁵⁰ “Rigged” might mean that vote totals were altered or massive fraud occurred, but the term could also be used by those who accept that Trump lost, but believe that the hyper-partisanship of the media, alleged “big tech” censorship of conservatives, and the Democrats’ enormous monetary advantage⁵¹ simply made the election unfair. Similarly, when a University of Chicago poll found that 90% of Democrats believe that “Russia tried to influence the 2016 election results,”⁵² it is probably safe to assume that many respondents were merely thinking of the long-standing, traditional Russian practice of trying to influence, and

⁴⁸ Michael W. Sances & Charles Stewart III, *Partisanship and Confidence in the Vote Count: Evidence from U.S. National Elections Since 2000*, 40 *ELECTORAL STUD.* 176, 177 (2015).

⁴⁹ *Id.*

⁵⁰ Press Release, Ipsos, Most Americans Agree Joe Biden is Rightful Winner of 2020 Election (Nov. 18, 2020), https://www.ipsos.com/sites/default/files/ct/news/documents/2020-11/topline_reuters_post_election_survey_11_18_2020.pdf [<https://perma.cc/K29F-E7J6>]; *see also* Press Release, Ipsos, Attitude Toward Russia Investigation (July 17, 2018), https://www.ipsos.com/sites/default/files/ct/news/documents/2018-07/ipsos_russia_investigation_topline_071718_0.pdf [<https://perma.cc/3NDY-D5F5>] (showing eighty-five percent of Democrats believe that Russia “interfered” with 2016 election.)

⁵¹ Shane Goldmacher, *Biden Has \$466 Million in Bank, and a Huge Financial Edge on Trump*, *THE N.Y. TIMES* (Oct. 13, 2020), <https://www.nytimes.com/2020/09/20/us/politics/20biden-trump-election-finance.html> [<https://perma.cc/53H8-95S7>].

⁵² *Americans Split on Relationship with Russia*, *ASSOCIATED PRESS* (Oct. 2, 2020), <https://apnorc.org/projects/americans-split-on-relationship-with-russia/> [<https://perma.cc/LJ7Q-5DAU>].

perhaps play havoc with, American public opinion,⁵³ as opposed to the false accusations of vote tampering.⁵⁴

Other polls, however, asking more carefully worded questions, have found lesser but still disturbing percentages of Americans falling for stories questioning the legitimacy of election tallies. A December 2020 Quinnipiac poll found that 77% of Republicans believe that there was “widespread voter fraud in the 2020 presidential election.”⁵⁵ A Monmouth poll in March 2021 found 65% of Republicans (and 35% of independents) believing that Biden had won due to “voter fraud.”⁵⁶

Democrats have hardly been immune from these fantasies. An Economist/YouGov poll in December 2016 found that 52% of Democrats (and 18% of Republicans) considered it “definitely” or “probably” true that “Russia tampered with vote tallies in order to get Donald Trump elected President.”⁵⁷ (The same poll found that 52% of Republicans, 52% of Independents, and—remarkably, given that this was a theme advanced almost exclusively by Trump and his allies—even 36% of Democrats believed that it was “definitely or probably true” that “millions of illegal votes were cast in the election.”)⁵⁸

⁵³ See Jones, *supra* note 27. Consider also that the Russian government operates a cable news channel in the United States, RT (formerly “Russia Today”), which caters to a largely progressive audience with hosts such as Thom Hartman. Of course Russia tried to influence the 2016 election results, and most other presidential elections as well. But trying to influence election results by influencing public opinion, even with disinformation, is hardly the same as vote tampering.

⁵⁴ See *supra* note 29. This same type of vagueness in terminology is why it is troublesome when prominent politicians carelessly use such phrases. They fuel unsubstantiated theories or conspiracy or fraud, while allowing the speaker a plausible denial when and if the speaker is called out.

⁵⁵ Press Release, Quinnipiac University, 60% View Joe Biden’s 2020 Presidential Victory as Legitimate, Quinnipiac University National Poll Finds; 77% of Republicans Believe There Was Widespread Voter Fraud (Dec. 10, 2020), <https://poll.qu.edu/national/release-detail?ReleaseID=3685> [https://perma.cc/W6G3-CZF9].

⁵⁶ Press Release, Monmouth University, Majority Back Capitol Riot Commission (Mar. 17, 2021), https://www.monmouth.edu/polling-institute/documents/monmouthpoll_us_031721.pdf [https://perma.cc/AVN8-YWFM].

⁵⁷ *The Economist/You Gov Poll*, YOUGOV, p. 62 (Dec. 17-20, 2016), https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/ljv2ohxmzj/econTabReport.pdf [https://perma.cc/C9PV-FY29].

⁵⁸ *Id.* at 61; see also Paul Farhi, *How Three Major News Organizations All Got a Story About Rudy Giuliani Wrong*, WASH. POST (May 3, 2021, 8:07 PM), https://www.washingtonpost.com/lifestyle/media/giuliani-correction-washington-post-new-york-times/2021/05/03/3d422f42-ac34-11eb-b476-c3b287e52a01_story.html?utm_source=newsletter&utm_medium=email&utm_campaign=news

Pollster Scott Rasmussen notes that over half of Americans believe that at least one of the last two presidents was illegitimately put into office.⁵⁹ Rasmussen found that 75% of Republicans, and even 30% of Democrats, believe that it is at least “somewhat likely” that in 2020 “Democrats stole votes or destroyed pro-Trump ballots in several states.”⁶⁰

A predisposition to believe in fraud was evident in both parties even before the election. Entering the 2020 election cycle, Democrats were preoccupied with foreign election interference. One poll found that 84% of Democrats (and 59% of Republicans) expected “foreign interference.”⁶¹ Again, the imprecision of the question should make us approach these findings with caution. Given that of course there is foreign—and particularly Russian—interference in the broad sense of efforts to sway public opinion, this might be viewed as unremarkable. But it is likely that a high percentage of respondents did equate “interference” with actual vote tampering or altercations of results. Indeed, another survey specifically found that 66% of Democrats were “concerned” about foreign governments “tampering with voting systems or election results.”⁶²

Although Trump’s claims of impending “fraud” drew most of the media attention, in an October 2020 poll, 44% of Democrats—nearly identical to 45% of Republicans—“believed that if the other side won, it would be at

etter_axiosam&stream=top) [https://perma.cc/ES3F-YSEY]. It may be that high-ranking Democrats continue stoking these fears. In May of 2021, the Washington Post, The New York Times, and NBC News all had to retract a story—apparently based on information from anonymous “current and former U.S. officials”—resurrecting many of the Russian conspiracy fears.

⁵⁹ Scott Rasmussen, *Just 26% Believe the Right Person Was Declared Winner in Last Two Presidential Elections* (Mar. 8, 2021), <https://scottrasmussen.com/just-26-believe-the-right-person-was-declared-winner-in-last-two-presidential-elections/> [https://perma.cc/P98M-C5ZE].

⁶⁰ *61% Think Trump Should Concede to Biden*, RASMUSSEN REPORTS (Nov. 19, 2020), https://www.rasmussenreports.com/public_content/politics/elections/election_2020/61_think_trump_should_concede_to_biden [https://perma.cc/L49R-EP53].

⁶¹ Hannah Gilberstadt, *Large Majority of Americans Expect That Foreign Governments Will Try to Influence the 2020 Election*, PEW RSCH. CTR. (Feb. 12, 2020), <https://www.pewresearch.org/fact-tank/2020/02/12/large-majority-of-americans-expect-that-foreign-governments-will-try-to-influence-the-2020-election/> [https://perma.cc/BV9B-UK4E] (As noted above, “influence” and “interference” may be interpreted by respondents as relating to vote tampering, as opposed merely to efforts to influence public opinion.).

⁶² Associated Press/NORC, *Americans Split on Relationship With Russia*, Oct. 2, 2020, <https://apnorc.org/projects/americans-split-on-relationship-with-russia/> [https://perma.cc/4J63-3GZH].

least somewhat likely due to fraud.”⁶³ The poll also found that while 70% of Republicans believed that mail-in ballots would be used to “rig” the election, 56% of Democrats believed that the U.S. Postal Service would attempt to “rig” the election by refusing to return marked ballots.⁶⁴

This distrust is also reflected in long-term, more generalized data. For example, between 2000 and 2012, the percentage of Americans expressing confidence in the accuracy of the national vote count, as expressed in various polls, declined precipitously, from well over 50% to something typically in the range of twenty to thirty percent, depending on the poll.⁶⁵ This was almost entirely due to a decline in confidence amongst Republicans, who in 2000 were twenty to thirty percentage points more likely to have confidence in the vote count but by 2012 had less confidence than Democrats. The decline in Republican confidence merely brought the parties into rough equilibrium, with Democratic confidence in the accuracy of the vote count in 2012 remaining close to where it had been in 2000.⁶⁶ This high level of Democratic distrust is remarkable given the tendency of voters to have more confidence in the results when their preferred party has been winning,⁶⁷ coupled with the fact that Democrats had scored major victories in two of the three election cycles preceding the poll. The loss of legitimacy over the

⁶³ Adam M. Enders & Joseph E. Uscinski, *Voters Always Imagine Fraud. Politicians Usually Don't Go Along With It*, WASH. POST (Nov. 12, 2020), <https://www.washingtonpost.com/outlook/2020/11/12/fraud-conspiracy-theories-election-public-opinion/> [https://perma.cc/YC9H-WD2U].

The published polling data for this poll can be found at https://www.joeuscinski.com/uploads/7/1/9/5/71957435/codebook_pdf_version.pdf [https://perma.cc/C2Z9-9BUE].

⁶⁴ Joseph E. Uscinski & Casey Klofstad, *Whether Biden or Trump Wins, Many Americans Will Call the Election Rigged*, NEWSWEEK (Oct. 30, 2020, 2:13 PM), <https://www.newsweek.com/whether-biden-trump-wins-many-americans-will-call-election-rigged-opinion-1543631> [https://perma.cc/J9NW-9TF8].

⁶⁵ See Sances & Stewart, *supra* note 48, at 179 (fig. 1), 180 (showing that voters had considerably more confidence when asked whether their own vote would be properly counted).

⁶⁶ *Id.*

⁶⁷ *Id.* at 177, 180 (“[T]here is a clear winner effect for confidence in general, and this effect is larger when voters are asked to evaluate the national vote count as opposed to their own polling place.”); see Jack Edelson, Alexander Alduncin, Christopher Krewson, James A. Sieja, & Joseph E Uscinski, *The Effect of Conspiratorial Thinking and Motivated Reasoning on Belief in Election Fraud*, 70 POL. RES. Q. 933, 937-38 (2017); see also Eric W. Dolan, *Losers Are More Likely to Believe in Conspiracy Theories, Study Finds*, PSYPOST, (Sept. 17, 2017), <https://www.psypost.org/2017/09/losers-likely-believe-conspiracy-theories-study-finds-49694> [https://perma.cc/RXQ5-PY44] (quoting Joseph Uscinski, a co-author of the study, summarizing its results: “Conspiracy theories are for losers. . . . Conspiracy theories follow the ebb and flow of power and losers tend to propagate them the most.”).

period studied less illustrates a Republican issue than one that moved from being almost entirely a Democratic problem to one that is now a bipartisan problem. This is also reflected in post-2012 data.⁶⁸ In 2018, Pew reported that “there is now no partisan divide” in “confidence in the vote count across the country.”⁶⁹

In sum, belief in electoral conspiracies and fraud is not a province of either the left or the right. Though belief in particular theories may emanate from partisanship, the general predisposition to believe in electoral conspiracies does not.⁷⁰

Finally, the Capitol riots of 2021 were not the first time in recent history that election results led to violent rioting in the nation’s capital. We need look back no further than November 2016, when news of Trump’s election led to violent riots in Washington, D.C. and elsewhere.⁷¹ Leftist protestors also engaged in violence at Trump’s inauguration.⁷²

⁶⁸ See ASSOCIATED PRESS, *supra* note 52, (discussing that sixty-six percent of Democrats expected foreign “tampering with . . . election results” prior to the 2020 election).

⁶⁹ Pew Research Center, *Public Expects Gridlock, Deeper Divisions with Changed Political Landscape*, at 24 (Nov. 15, 2018), <https://www.pewresearch.org/politics/2018/11/15/3-confidence-in-vote-count-and-election-administration/> [<https://perma.cc/ANH5-7KNE>]; see also Edelson et al., *supra* note 67 (finding no partisan differences when it came to conspiratorial predispositions between Democrats and Republicans).

⁷⁰ See Edelson et al., *supra* note 67 at 943 (“[W]e find consistent evidence supporting the role of conspiracy predispositions even when controlling for partisan preferences, strength of partisanship, and trust in government.”).

⁷¹ Although the press generally called the protests “largely peaceful” and downplayed violence – see, e.g., Christopher Mele & Annie Correal, *Not Our President: Protests Spread After Donald Trump’s Election*, THE N.Y. TIMES (Nov. 10, 2016) (describing the protests as “mostly peaceful”); Camila Domonoske & Martha Ann Overland, *Across the Country, Crowds March in Protest Against Trump’s Victory*, NPR (Nov. 9, 2016, 10:16 PM), <https://www.npr.org/sections/thetwo-way/2016/11/09/501513889/anti-trump-protests-break-out-in-cities-across-the-country> [<https://perma.cc/QL4F-GB2R>] (“The protests largely have been peaceful.”) – many of the protests had a violent element, though it seemed left to the foreign press to report on that aspect. See, e.g., Simon Tomlinson & Sam Webb, *Donald Trump’s U.S. Presidential Election Win Sparks Riots by Hillary Clinton Fans as Fighting Erupts Outside the White House*, THE SUN (Nov. 9, 2016, 7:24 PM), <https://www.thesun.co.uk/news/2147684/violence-erupts-across-the-us-as-pro-clinton-fans-riot-after-donald-trumps-shock-election-win/> [<https://perma.cc/A74C-K9CX>] (describing the violence following Trump’s inauguration). It should be noted that “largely peaceful” is also a phrase that could be applied to Trump’s “Stop the Steal” rally, where only a small fraction of the thousands in attendance entered the Capitol, and many of those simply walked in, often unaware of any earlier violence.

⁷² See Jonathan Landay & Scott Malone, *Violence Flares in Washington During Trump Inauguration*, REUTERS (Jan. 20, 2017), <https://www.reuters.com/article/us-usa-trump-inauguration-protests->

Other recent examples have shown that the progressive side of the spectrum is not averse to entering and occupying government property and using physical force to prevent legislatures from carrying out their duties. In 2011, for three weeks, crowds numbering up to 100,000 persons physically occupied Capitol Square, and at times the state capitol itself, in Madison, Wisconsin, in an effort to prevent the state legislature from passing a series of budget measures.⁷³ Similarly, in Texas in 2013, thousands of pro-choice demonstrators occupied the state capitol and physically prevented the legislature from passing legislation.⁷⁴

In summary, the loss of legitimacy that led to the Capitol riots of January 6 is not a “Republican problem” or a “conservative problem,” but a bipartisan one, and we should not presume that Donald Trump and a handful of prominent Republicans are the only politicians willing to fan the flames of illegitimacy. Trump’s margin of defeat in 2020 was narrow—almost exactly inverse to his margin of victory in 2016. Recent history suggests that had Trump again squeaked out a victory, it is all but certain that multiple House Democrats would have objected to the counting of electoral votes for Trump, and that prominent Democratic politicians would be accusing

idUSKBN1540J7 [https://perma.cc/WD66-Z7ZJ] (reporting that “[a]t least 217 people were arrested,” six police officers were injured in Washington, D.C., and that “activists . . . threw rocks and bottles at officers wearing riot gear”; some “activists used chunks of pavement and baseball bats to shatter the windows of a Bank of America branch and a McDonald’s outlet, . . . Multiple vehicles were set on fire”; in Seattle, “one person was shot in the abdomen”; and in Portland, “protesters threw rocks, bottles and flares at police”).

⁷³ See Patrik Jonsson, *Wisconsin Protests: “Democracy in Action” Or “Mob Rule”?*, CHRISTIAN SCI. MONITOR (Mar. 12, 2011), <https://www.csmonitor.com/USA/Politics/2011/0312/Wisconsin-protests-democracy-in-action-or-mob-rule> [https://perma.cc/AQ5U-BTQM] (noting protestors physically prevented legislators from working and police made eighteen arrests over a three week period). Police had allowed protestors into the Capitol after thousands of protestors threatened to “Break down the door!” State Journal Staff, *Thousands Storm Capitol as GOP Takes Action*, WIS. STATE J. (Mar. 10, 2011), https://madison.com/wsj/news/local/govt-and-politics/thousands-storm-capitol-as-gop-takes-action/article_260247e0-4ac4-11e0-bfa9-001cc4c03286.html [https://perma.cc/Y538-QY6W]. At one point, over three dozen rounds of ammunition were found on the Capitol grounds. David A. Lieb, *Pro-Protesters Peacefully Leave Capitol After Ruling*, MINN. PUB. RADIO NEWS (Mar. 4, 2011, 11:21 PM), <https://www.mprnews.org/story/2011/03/03/protesters-leave-madison-capitol> [https://perma.cc/VQN6-M5FC].

⁷⁴ Aman Batheja, *Occupy Movement, Socialists Helped Stoke Abortion Furor*, SAN MARCOS MERCURY (July 1, 2013), <http://smmercury.com/2013/07/01/occupy-movement-socialists-helped-stoke-abortion-furor/> [https://perma.cc/D5CL-RPDP] (describing how during closing hours of legislative session, “thousands of protestors stopped a restrictive abortion bill in its tracks by yelling at the top of their lungs”).

Trump of stealing the election. Equally likely, a substantial portion of the Democratic rank and file, probably a majority, would accept such claims. There is reasonable probability that we would have seen more of the type of violent protest—in Washington and elsewhere—that occurred after Trump’s 2016 victory and at his 2017 inauguration. And while it seems unlikely, it is not inconceivable that a mob, perhaps stirred on by false claims from a celebrity progressive politician such as Stacey Abrams, would have marched on the Capitol.

Loss of trust in the legitimacy of elections is a bipartisan affair, and the elephant in the room when the topic turns to election reform.

II. DISCONNECT

Next to this loss of belief in the honesty of the electoral count, other ailments in American democracy are trivial. “Simply put, if citizens do not believe in the election process, then the entire system of republican government becomes a questionable enterprise.”⁷⁵ Despite this, many proposals for election reform do not even acknowledge, let alone address, this problem.

Reform proposals tend to fall into three categories: “representational” reforms aim at altering the core methods of selecting our representatives and translating votes into legislative power; “get-out-the-vote” reforms aim at removing legal barriers and inconveniences to voting; and “election integrity” reforms intend to ensure that only legally eligible votes are cast and counted.

A. *Representational Reforms*

Representational reforms tend to operate on two beliefs: that the U.S. system is too oriented toward protecting the rights of political minorities and that the system does a poor job of translating voter desires into legislative and executive power, and hence, of satisfying voters. Three representational reforms popular among the electoral intelligentsia, and all raised in this symposium, include Electoral College Reform, restricting gerrymandering

⁷⁵ Lonna Rae Atkeson, R. Michael Alvarez & Thad E. Hall, *Voter Confidence: How to Measure It and How It Differs from Government Support*, 14 *ELEC. L.J.* 207, 209 (2015).

through the use of independent, non-partisan redistricting commissions, and some type of ranked-choice voting.

Perhaps nothing better exemplifies the disconnect between the problem of legitimacy and the ideas of reformers than the remarkable focus on the Electoral College.⁷⁶ The Electoral College has been in existence since the adoption of the Constitution, with significant constitutional reform via the Twelfth Amendment in 1804, and with practical changes created by the movement of states to “winner-take-all” systems in the early nineteenth century.⁷⁷ It is doubtful that the Electoral College has ever been either well understood or particularly “popular” with the public in any abstract sense,⁷⁸ and, accordingly, over the years, literally hundreds of constitutional amendments have been proposed to do away with it. But none have passed, and only once, in 1969-70, did electoral college abolitionists come close.⁷⁹ The College is more popular today, at least as reflected in public opinion polls, than was the case throughout the early decades of public opinion polling, and actually reached a high water mark in public polling as recently as 2016.⁸⁰ After each of the Electoral College controversies in 2000, 2016,

⁷⁶ Five of the seven speakers on the last two panels of the live portion of this symposium on January 28, 2021 explicitly called for abolishing the electoral college. Professor Guy Uriel Charles did not, but he did offer a broad endorsement of H.R. 1, pending legislation that includes a call for reform of the College. This author was the seventh.

⁷⁷ See Devin McCarthy, *How the Electoral College Became Winner-Take-All*, FAIR VOTE (Aug. 21, 2012), <https://www.fairvote.org/how-the-electoral-college-became-winner-take-all> [<https://perma.cc/5RCD-42YH>] (describing how a majority of states have used statewide allocation of electors since 1824; from 1836 through 1868, only South Carolina did not use statewide allocation by popular vote; in 1872, for the first time, every state used statewide allocation by popular vote).

⁷⁸ Luis Fuentes-Rohwer & Guy-Uriel Charles, *The Electoral College, the Right to Vote, and Our Federalism: A Comment on a Lasting Institution*, 29 FLA. ST. U. L. REV. 879, 891 (2001) (“The best defense we have is [James] Madison’s position that ‘no better way’ than the Electoral College was found.”).

⁷⁹ See Christopher DeMuth, *The Man Who Saved the Electoral College*, 51 NAT’L AFFAIRS (2020), <https://www.nationalaffairs.com/publications/detail/the-man-who-saved-the-electoral-college> [<https://perma.cc/3EWF-5W59>] (explaining how a constitutional amendment to abolish the electoral college was almost adopted in 1969-70).

⁸⁰ See Megan Brenan, *61% of Americans Favor Abolishing Electoral College*, GALLUP NEWS (Sept. 24, 2020), <https://news.gallup.com/poll/320744/americans-support-abolishing-electoral-college.aspx> [<https://perma.cc/U83U-W262>] (showing abolition favored over retention by 61%-38%; and support for the Electoral College peaking at 47% in 2016). Support for the College declined in 2018 and again in 2020, but these polls nonetheless showed the second and third highest levels of support for the College since Gallup resumed regular polling on the issue in 2000. *Id.* Between 1944 and 1980, support for abolishing the College in favor of direct population never fell below

and 2020, support for the College, as measured by Gallup and Pew, rose, suggesting that when voters actually focus their attention on the College, it fairs better than when it is an abstract issue.⁸¹ In both 2000 and 2004, when Democrats disputed the presidential results, the concern was not the justice of the Electoral College, but which candidate had actually won specific states—Florida in 2000; Ohio in 2004. It is the vote count, not the Electoral College process, that has been the primary cause of perceived illegitimacy.

There are good arguments both for and against the Electoral College,⁸² but it's very hard to argue that the Electoral College has much to do with the

58% in Gallup. This occurred in 1967, and the overall difference between abolish/retain that year was thirty-six points. By comparison, while a slightly higher percentage (61%) sought to abolish the College in 2020, the overall difference between abolish/retain was just twenty-three points, with much greater support for the College. In 1968, 80% favored replacing the College with direct popular vote. Frank Newport, *Americans Support Proposal to Eliminate Electoral College System*, GALLUP NEWS (Jan. 5, 2001), <http://www.gallup.com/poll/2140/AmericansSupport-Proposal-Eliminate-Electoral-College-System.aspx> [https://perma.cc/HPS2-FDZ5]. A Pew poll taken in January 2021 found just 55% in favor of abolishing the Electoral College for a popular vote. Bradley Jones, *Majority of Americans Continue to Favor Moving Away from Electoral College*, PEW RSCH. CTR. (Jan. 27, 2021), <https://www.pewresearch.org/fact-tank/2021/01/27/majority-of-americans-continue-to-favor-moving-away-from-electoral-college/> [https://perma.cc/3WSH-KRV3]. This was down from 58% in a January 2020 Pew survey. See Andrew Daniller, *A Majority of Americans Continue to Favor Replacing Electoral College with Nationwide Popular Vote*, PEW RSCH. CTR. (Mar. 13, 2020), <https://www.pewresearch.org/fact-tank/2020/03/13/a-majority-of-americans-continue-to-favor-replacing-electoral-college-with-a-nationwide-popular-vote/> [https://perma.cc/Y376-MEYJ].

⁸¹ See, e.g., Brenan, *supra* note 80 (“[S]upport for amending the Constitution to abolish the Electoral College only fell below the majority level once—in November 2016 after Donald Trump won the electoral vote and Hillary Clinton the popular vote.”); Newport, *supra* note 80 (showing a 2% decrease for Americans in favor of ending the College after 2000 Election and a 2% increase in support for it); Art Swift, *Americans’ Support for Electoral College Rises Sharply*, GALLUP NEWS (Dec. 2, 2016), <https://news.gallup.com/poll/198917/americans-support-electoral-college-rises-sharply.aspx> [https://perma.cc/P276-2JDG] (stating that the percentage of Americans wanting to keep the electoral college rose from 35% in 2004 to 47% in 2016); Bradley Jones, *Majority of Americans Continue to Favor Moving Away from Electoral College*, PEW RSCH. CTR. (Jan. 27, 2021), <https://www.pewresearch.org/fact-tank/2021/01/27/majority-of-americans-continue-to-favor-moving-away-from-electoral-college/> [https://perma.cc/SJ9H-SJKD] (showing support for the Electoral College rising from 38% in pre-election Gallup poll – available at Brenan, *supra* note 80 – to 43%, with opposition falling from 61% to 55%).

⁸² See generally JESSE WEGMAN, *LET THE PEOPLE PICK THE PRESIDENT* (2020); TARA ROSS, *WHY WE NEED THE ELECTORAL COLLEGE* (Gateway Editions; Reprint Addition, 2019). I cannot help but take this moment to comment on a point made by Mr. Benenson at the live symposium. I suggested that the Electoral College forced candidates to build national coalitions, thus moderating their stances to compete in states they might otherwise forego, and cited Joe Biden’s effort to compete—successfully, it turns out—in Nevada, Georgia, and Arizona. Mr. Benenson responded

loss of trust in election results. Abolition of the College appears to be a hobby horse of the post-graduate educational elite.⁸³

On the legislative side, much attention has been focused on gerrymandering, with calls to take districting out of the hands of elected officials and lodge it within appointed, “non-partisan” agencies. But like the Electoral College, the practice of gerrymandering has been around for a long time, and there’s no convincing argument as to why it is a particular problem for American democracy *now*, especially for election legitimacy.

Some argue that gerrymandered districts, coupled with primary elections, may lead to the election of less moderate candidates,⁸⁴ and that the election of more moderate candidates may restore some faith in elections, perhaps by the very indirect step of simply placing less at stake in each election—more moderate candidates are less threatening to the losers, and hence, perhaps, less likely to be seen as illegitimate. But it seems equally plausible that ending gerrymandering will have the effect of increasing public distrust in election results. Data consistently show that voters are more likely to view election results as legitimate when their favored candidate has won.⁸⁵ Thus, gerrymandering may have the effect of increasing legitimacy, by packing like-minded voters into districts where they are likely to elect their preferred candidates.⁸⁶ Having maps drawn by panels that are not

that Biden didn’t compete in those states to try to win them, but to force Donald Trump to expend resources in those states. This seems a bit like arguing that the allies did not bomb Calais in May of 1944 in order to liberate France, but to distract the Germans from focusing their attentions on the Normandy invasion to liberate France. For Biden to successfully force Trump to defend Arizona, thereby improving his odds of winning the electoral college vote, he had to moderate his proposals to gain enough support in that traditionally “red” state that his victory seemed possible.

⁸³ See Jones, *supra* note 81 (showing 61% of post-graduates support abolishing the College while only 39% support keeping it).

⁸⁴ See Richard H. Pildes, *The Constitution and Political Competition*, 30 NOVA L. REV. 253, 258 (2006) (noting that “partisan gerrymander[ing]” contributes to greater polarization). *But see* Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 273, 308-15 (2011) (concluding “I am no longer convinced,” of this argument).

⁸⁵ See Peter Grier, *Many Americans Don’t Trust Elections. What Can Be Done?*, CHRISTIAN SCI. MONITOR (May 21, 2021), <https://www.csmonitor.com/USA/Politics/2021/0521/Many-Americans-don-t-trust-elections.-What-can-be-done> [<https://perma.cc/77DP-PUCJ>] (quoting Professor Charles Stewart III – “[I]here are really only two major factors that affect voter trust in an election [t]he first is whether their candidate won or not.”).

⁸⁶ See generally THOMAS BRUNELL, REDISTRICTING AND REPRESENTATION: WHY COMPETITIVE ELECTIONS ARE BAD FOR AMERICA (2008). Of course, gerrymandering may not do that, depending in part on the goals and tactics of those doing the gerrymandering. For example, a party

accountable at the ballot box, and typically chosen under Rube Goldberg-type systems to assure “independence,” would seem to be a recipe for further distrust. As with the Electoral College, there are legitimate arguments for and against the practice of gerrymandering, and over whether independent commissions are capable of staying truly independent, and do a better or worse job of districting.⁸⁷ But even if gerrymandering reform leads to the election of more moderates, it seems doubtful that it would have any meaningful effect on the legitimacy of the vote count. And if non-partisan commissions succeed in creating more competitive districts—often cited as a goal of non-partisan gerrymandering⁸⁸—they may have a detrimental effect on voter confidence in election results, since it is when elections are close that claims of fraud gain salience.

Another reform that is slowly gaining traction is “ranked choice” or “instant runoff” voting. There are a number of forms that ranked choice voting can take, the particulars of which need not concern us here.⁸⁹ The suggested benefits typically include sparing voters from the feeling that they

may try to pack opposing voters into a small number of districts, while controlling a larger number of relatively competitive districts. But this is a risky and less common strategy.

⁸⁷ See, e.g., Seema Mehta, *Redistricting Commission Accused of Violating Open-Meetings Law and Other Failures*, L.A. TIMES (May, 12, 2021, 7:00 AM), <https://www.latimes.com/politics/story/2021-05-12/redistricting-commission-open-meetings-law-failures> [https://perma.cc/VX3G-9ZUQ] (reporting an accusation that California’s independent redistricting commission violated the “transparency provisions of state law”).

⁸⁸ See *Veith v. Jubilirer*, 541 U.S. 267, 331 (2004) (Stevens, J., dissenting) (remarking how radically gerrymandered districts run the risk of elected officials not being beholden to constituents); MO. CONST. art. III, § 3(b)(5) (requiring districts to achieve “both partisan fairness and, secondarily, competitiveness”); Stuart Chinn, *Procedural Integrity and Partisan Gerrymandering*, 58 HOUSTON L. REV. 597, 630-31 (2021) (summarizing arguments about how partisan gerrymandering decreases competition); Kevin Wender, *The “Whip Hand”: Congress’s Elections Clause Power as the Last Hope for Redistricting Reform After Rucho*, 88 FORDHAM L. REV. 2085, 2088 (2020) (“[E]xtreme partisan gerrymander[ing] ha[s] had a corrosive effect on American democracy by decreasing competitive elections . . .”); Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 615, 622-24 (2002) (arguing that fair representation requires an “appropriately competitive electoral process”); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 646-58 (1998) (analogizing “appropriate democratic politics” to a “robustly competitive market”).

⁸⁹ See Richard H. Pildes & G. Michael Parsons, *The Legality of Ranked-Choice Voting*, 109 CAL. L. REV. 1773, 1784 (2021) (describing the features of ranked choice voting). Professor Foley has recently suggested “round robin” voting in election contests, in which the candidates are matched in a series of head-to-head votes. This proposal would require ranked choice voting. See Edward B. Foley, *Requiring Majority Winners for Congressional Elections: Harnessing Federalism to Combat Extremism*, 26 LEWIS & CLARK L. REV. 365, 391 (2022) (advocating for a round robin approach to voting in a multicandidate election).

are trapped into voting for the lesser of two evils; assuring that candidates are elected with majority support; fostering moderation; and reducing harsh, often misleading negative campaigning, due to the need of candidates to attract second and third choice votes on the ballot. These all seem to be laudatory goals, and ranked-choice voting may help to accomplish them. But again, these goals seem disconnected from the fundamental threat to American democracy. In fact, like non-partisan redistricting, ranked choice voting may increase the problem of legitimacy. Legitimacy in elections seems to hang on a number of factors, but one is the existence of an easily understood system, with which voters are familiar. In the United States, the vast majority of political elections have always relied on the “first past the post system”—the candidate who gets the most votes wins, or maybe goes to a runoff with the second place finisher. Ranked choice voting is not particularly difficult, but nor is it particularly clear to much of the electorate. Why did the person with the most votes not win? Why did some voters, but not others, get to count their second choices? Where it is used, apparent confusion with ranked choice voting has led to relatively high levels of voter “drop off,”⁹⁰ and voters who “exhaust” their ballot run the risk of not having their ballot counted in the final tally.⁹¹

Beyond these proposals are more radical suggestions, such as those of Mr. Dowd, calling for the creation of several more states.⁹² Such proposals fail to address the question of legitimacy of results, and because of the potential to benefit one party or the other, would almost certainly spark broad partisan warfare, fueling distrust in the process.

B. Get Out the Vote Reforms

Another batch of proposed reforms can be generally referred to as “voting” reforms. These proposals are premised on the idea that voter turnout is the fundamental sign of a healthy democracy, and the belief that the primary obstacles to voter turnout are legal impediments and general inconvenience.

⁹⁰ Craig M. Burnett & Vladimir Kogan, *Ballot (and Voter) ‘Exhaustion’ Under Instant Runoff Voting: An Examination of Four Ranked-Choice Elections*, 37 ELEC. STUD. 41, 41-42 (2015).

⁹¹ See, e.g., *Baber v. Dunlap*, 376 F. Supp. 3d 125, 131 n.6 (D. Me. 2018) (describing how over 14,000 votes—nearly five percent of the total—were exhausted and not included in the final count).

⁹² Matthew Dowd, *University of Pennsylvania Journal of Constitutional Law Vol. 23 Symposium: The Past, Present, and Future of Presidential Elections* (Jan. 29, 2021) (transcript at 01:19:24).

The “For the People Act” (hereinafter “S. 1”), the massive reform bill introduced by Democrats in the 117th Congress, provides a solid list of these reforms, though there may be others.⁹³ They include: Internet voter registration,⁹⁴ automatic voter registration,⁹⁵ registration of sixteen and seventeen year-olds,⁹⁶ limits on efforts to “purge” voter lists of invalid registrations,⁹⁷ mandatory election day registration,⁹⁸ new limits on challenges to voter eligibility,⁹⁹ restoration of voting rights for convicted felons,¹⁰⁰ a minimum of fifteen days of early voting of at least ten hours per day,¹⁰¹ a prohibition on state prohibitions on curbside voting,¹⁰² an end to state prohibitions or limits on “ballot harvesting” (the practice of allowing ballots to be handled and delivered by persons other than the voter),¹⁰³ the mandate for absentee voter applications be available on-line,¹⁰⁴ mandatory no-fault absentee balloting with a prohibition on the use of voter ID or witness verification,¹⁰⁵ mandatory use of “drop boxes” to receive ballots at least forty-five days before the election,¹⁰⁶ and a requirement that ballots be counted if post-marked by election day and received within ten days of election day.¹⁰⁷ S. 1 then goes on to create a slew of new regulations for campaign finance,¹⁰⁸ establish a system of taxpayer subsidies to campaigns,¹⁰⁹ and reconstitute the Federal Election Commission from a six-member body, free from partisan control, to a five-member body under control of the

⁹³ For the People Act, S. 1, 117th Cong. (2021). Dubbed the “For the People Act,” S. 1, as introduced is over 800 pages, broken into three “Divisions,” 10 “Titles,” and 77 “Subtitles.” At the symposium, Professor Uriel-Charles specifically endorsed H.R. 1/S. 1.

⁹⁴ *Id.* at § 1001-03.

⁹⁵ *Id.* at § 1012-13.

⁹⁶ *Id.* at § 1094.

⁹⁷ *Id.* at §§ 1201, 2502.

⁹⁸ *Id.* at §1031.

⁹⁹ *Id.* at § 1201.

¹⁰⁰ *Id.* at §§ 1403, 1405.

¹⁰¹ *Id.* at § 1611.

¹⁰² *Id.* at § 1907.

¹⁰³ *Id.* at § 1621.

¹⁰⁴ *Id.* at § 1101.

¹⁰⁵ *Id.* at § 1621.

¹⁰⁶ *Id.* at § 1906.

¹⁰⁷ *Id.* at § 1621.

¹⁰⁸ *Id.* at Division B—Campaign Finance.

¹⁰⁹ *Id.* at § 5111.

President's appointees and hence, functionally, under control of the President's party.¹¹⁰

Reasonable arguments can be made for many of the ideas of S. 1. However, if one agrees that the major problem facing democracy is the lack of trust in election results, it is hard to see these proposals addressing the problem and easy to see them exacerbating it.

For instance, campaign finance regulation has not been shown to increase voter trust.¹¹¹ It would seem probable, however, that passage of new rules on a purely partisan basis will erode trust, at least among the minority party. The proposal to restructure the FEC, allowing it to fall under effective one-party control, seems particularly ruinous to voter trust and a violation of the fundamental principles under which the agency was established.¹¹² Government financing of campaigns, meanwhile, is particularly unpopular, and has not been shown to increase trust.¹¹³ Furthermore, the current government financing scheme of choice, used in S. 1—hefty government matches of small dollar contributions—seems designed to favor more polarizing candidates, which may increase fear of defeat and hence the propensity of losers to distrust the results.¹¹⁴

Similarly, the voting provisions of S. 1 are being offered on the basis of a narrative that defies reality: First, that the primary reason some people do not vote is because of the difficulty of voting; and second, that there is

¹¹⁰ *Id.* at § 6002.

¹¹¹ See DAVID M. PRIMO & JEFFREY D. MILYO, CAMPAIGN FINANCE & AMERICAN DEMOCRACY: WHAT THE PUBLIC REALLY THINKS AND WHY IT MATTERS 154 (2020) (questioning the ability of campaign finance regulations to increase voter trust in government).

¹¹² See Letter from Thomas J. Josefiak et al. to Speaker of the House Nancy Pelosi et al. (Feb. 9, 2021), https://www.ifs.org/wp-content/uploads/2021/02/2021-02-09_Former-FEC-Commissioners-Letter_Concerns-With-HR-1-And-S-1.pdf [<https://perma.cc/WCS5-CBMF>] (letter of nine former FEC Commissioners to Speaker Nancy Pelosi, arguing, *inter alia*, “shifting the Commission from a bipartisan, six-member body to a five-member body subject to partisan control, would be highly detrimental to the agency’s credibility. It would lead to more partisanship in enforcement and in regulatory matters, shattering public confidence in the decisions of the FEC. The Commission depends on bipartisan support and universal regard for the fairness of its actions. The FPA frustrates these goals with likely ruinous effect on our political system.”); see also Bradley A. Smith, *Feckless: A Critique of Critiques of the Federal Election Commission*, 27 GEO. MASON L. REV. 503, 507-18 (2020) (discussing the creation of FEC and congressional determination to create a bipartisan body that could not be controlled by either party).

¹¹³ See PRIMO & MILYO, *supra* note 111, 159-60.

¹¹⁴ See generally Richard H. Pildes, *Participation and Polarization*, 22 U. PA. J. CONST. L. 341 (2020) (discussing the correlations between small-donor donations and political polarization).

currently a “great suppression” of voting¹¹⁵ that merits, at the highest levels of government, serious comparison to “Jim Crow.”

In fact, there have never been fewer obstacles to voting in the United States. The Fifteenth,¹¹⁶ Nineteenth,¹¹⁷ Twenty-Fourth,¹¹⁸ and Twenty-Sixth¹¹⁹ Amendments to the Constitution guaranteed voting rights to most adult Americans; Supreme Court decisions including *Kramer v. Union Free School District*,¹²⁰ *Harper v. Virginia State Board of Elections*,¹²¹ and *Cipriano v. City of Houma*¹²² eliminated statutory barriers based on wealth or payment of taxes; *Carrington v. Rash*¹²³ and *Dunn v. Blumstein*¹²⁴ struck lengthy residency requirements. The Voting Rights Act of 1965, one of the most successful pieces of legislation in American history, barred literacy tests and led to massive increases in minority voter registration and turnout.¹²⁵ These achievements are generally taken for granted today, and there is no serious movement to repeal any of them.

These advancements have removed almost all legal barriers to voting by adult American citizens without felony convictions.¹²⁶ What remains, and what is today cited as “disenfranchisement,” are not legal prohibitions on voting, but inconveniences incurred by persons in order to vote. Of course, sufficient inconvenience can be as effective, or nearly so, in limiting the vote as outright legal prohibitions, and when mere “inconvenience” crosses the line into “suppression” will, in some cases, be a difficult call. But not every “inconvenience” is “suppression.” By definition, the decision to vote requires

¹¹⁵ See, e.g., ZACHARY ROTH, *THE GREAT SUPPRESSION: VOTING RIGHTS, CORPORATE CASH, AND THE CONSERVATIVE ASSAULT ON DEMOCRACY* (2016).

¹¹⁶ U.S. CONST. amend. XV.

¹¹⁷ U.S. CONST. amend. XIX.

¹¹⁸ U.S. CONST. amend. XXIV.

¹¹⁹ U.S. CONST. amend. XXVI.

¹²⁰ *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969).

¹²¹ *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966).

¹²² *Cipriano v. City of Houma*, 395 U.S. 701 (1969).

¹²³ *Carrington v. Rash*, 380 U.S. 89 (1965).

¹²⁴ *Dunn v. Blumstein*, 405 U.S. 330 (1972).

¹²⁵ Voting Rights Act of 1965, 52 U.S.C. § 10101 (1965); ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 212 (rev. ed. 2009); H.R. Rep. No. 109-478 at 12-16 (2008).

¹²⁶ Additionally, the Americans with Disabilities Act and the Help America Vote Act of 2002 assure that anyone with a mental disability is permitted to vote in federal elections, so long as the person has the capacity to vote. See Americans with Disabilities Act, 42 U.S.C. § 12101 (1990); Help America Vote Act, 52 U.S.C. § 20901 (2002).

action in place of some other activity, and some expenditure of time, and in many cases of money, as in transportation to and from polls, to give one example.

Even in terms of convenience, voting has never been easier. The Voting Accessibility for the Elderly and Handicapped Act of 1984 requires accessible polling places in federal elections for elderly individuals and people with disabilities.¹²⁷ The Voting Rights Act requires election officials to allow blind or disabled voters to receive assistance from a person of the voter's choice.¹²⁸ The Help America Vote Act of 2002 requires jurisdictions to provide at least one accessible voting system at each polling place for persons with disabilities.¹²⁹ Since 1975, the Voting Rights Act has required jurisdictions to print ballots in multiple languages.¹³⁰

In 2000, only seventeen states and the District of Columbia offered voters who did not appear on the registration list a provisional ballot.¹³¹ Since the passage of HAVA in 2002, every state has been required to offer some form of provisional balloting.¹³²

Meanwhile, in 2020, thirty-four states offered no-excuse absentee voting, something that not a single state allowed prior to the 1974 election cycle.¹³³ Early in-person voting is another phenomenon of the twenty-first century. California became the first state to offer limited early, in-person voting in late 1978 and as recently as 1994, early in-person voting was almost non-

¹²⁷ 52 U.S.C. § 20102(a) (1984).

¹²⁸ 52 U.S.C. § 10508 (1982).

¹²⁹ 52 U.S.C. § 20901(b)(1)(G) (2002) (mandating states to use allocated government funds to “improv[e] the accessibility and quantity of polling places, including providing physical access for individuals with disabilities. . .”).

¹³⁰ 52 U.S.C. § 10303 (1975).

¹³¹ THE CONSTITUTION PROJECT, ELECTION REFORM BRIEFING: THE PROVISIONAL CHALLENGE 3 (2002),

<https://web.archive.org/web/20060601222613/http://www.electionline.org/Portals/1/Publications/Provisional%20Voting.pdf> [<https://perma.cc/WHE8-5WTW>] (reporting that another seven states had same day registration systems, making provisional ballots unnecessary).

¹³² *Provisional Ballots*, MIT ELECTION DATA + SCIENCE LAB (last visited June 18, 2022), <https://electionlab.mit.edu/research/provisional-ballots> [<https://perma.cc/3MQU-4GA6>].

¹³³ *Table 1: States with No-Excuse Absentee Voting*, NSCL, (Jan. 3, 2021), <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-1-states-with-no-excuse-absentee-voting.aspx> [<https://perma.cc/7PPV-7LV2>]; see also Daniel R. Biggers & Michael J. Hanmer, *Who Makes Voting Convenient? Explaining the Adoption of Early and No-Excuse Absentee Voting in the American States*, 15 STATE POL. & POL'Y Q. 192, 199 (2015) (charting no-excuse absentee voting).

existent.¹³⁴ It grew to 2.7% of the national total in 1996, and by 2016 was 19.1% of the total.¹³⁵

Voter registration has also grown easier. In 2015, California and Oregon became the first states to use automatic voter registration (“AVR”), in which voters are registered if they interact with any of a wide range of state agencies.¹³⁶ By 2020, twenty states and the District of Columbia used AVR.¹³⁷ Forty states and the District of Columbia now offer on-line registration,¹³⁸ something that was obviously unheard of just three decades ago.

Administrative problems play a relatively insignificant role in non-voting behavior. In the U.S. Census Bureau’s Current Population Survey of the 2016 election, just 3% of unregistered voters said it was because they did not know where or how to register. A more substantial 12% were unregistered because they missed registration deadlines, but it is probably safe to presume that in many cases that indicated a low level of interest in the election.¹³⁹ No effort is made to determine what effort these unregistered voters made to learn about registration or to register. Among registered voters who did not vote, just 2% cited inconvenient polling places, and 4% cited unspecified “registration problems.”¹⁴⁰ This latter problem has declined by nearly half since HAVA mandated provisional balloting in 2002.¹⁴¹ Similarly, a 2012 survey found that less than 1% of non-voters did not vote because of

¹³⁴ See UNITED STATES CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 1994, tbl.15 (June 1996), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/ppl-25-rv.html> [https://perma.cc/R4V2-9KLM] (providing no early in person voting option in breaking down the data).

¹³⁵ THOM FILE, CHARACTERISTICS OF VOTERS IN THE 2016 PRESIDENTIAL ELECTION 13 tbl.3 (U.S. Census Bureau 2018).

¹³⁶ *Automatic Voter Registration*, BALLOTPEDIA (last visited May 28, 2021), https://ballotpedia.org/Automatic_voter_registration [https://perma.cc/96EM-STJ2].

¹³⁷ *Id.*

¹³⁸ *Online Voter Registration*, BALLOTPEDIA (last visited May 28, 2021), https://ballotpedia.org/Online_voter_registration [https://perma.cc/8JCE-3E4Y].

¹³⁹ FILE, *supra* note 135, at 15 tbl.4. Three percent of Whites, African-Americans, and Hispanics, and 4% of Asian-Americans, responded not knowing where or how to register. Twelve percent of Whites, 13% of African-Americans and Hispanics, and 11% of Asian Americans responded that they had missed deadlines.

¹⁴⁰ *Id.* Inconvenient polling places were cited by 2% of Whites and African-Americans, 3% of Hispanics, and 1% of Asian-Americans. Registration problems were cited by 4% of Whites and African-Americans, 5% of Hispanics, and 3% of Asian-Americans.

¹⁴¹ For pre-HAVA data, see AMIE JAMIESON, HYON B. SHIN, & JENNIFER DAY, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2000 10 fig.8 (U.S. Census Bureau 2002).

“inconvenient hours or polling place location, or lines too long.”¹⁴² Lack of interest in politics and elections, and dislike of the candidates, were far and away the most common responses for both a failure to register and a failure to vote if registered.¹⁴³

Even further divorced from reality is the notion that the country is undergoing a wave of voter suppression which places “Americans’ access to the vote ... in unprecedented peril”¹⁴⁴ or which warrants comparisons to “Jim Crow” laws of the nineteenth and twentieth centuries, or, in the words of President Biden, “Jim Crow on Steroids.”¹⁴⁵

As of May 31, 2021, the Brennan Center, a progressive advocacy group, had compiled a list of 389 bills with “restrictive provisions” introduced (but the vast majority not passed) in states across the country.¹⁴⁶ But at the same time, almost 900 bills have been introduced to further liberalize voting rules or to attempt to reduce voter inconvenience.¹⁴⁷ Many of the proposals cited by the Brennan Center as “significant voter suppression” are little more than modest rollbacks of the rapid expansion of no-fault absentee voting, early voting, liberalization of “ballot harvesting” rules, and easier registration requirements of the past decade, many enacted specifically as temporary measures in response to the Covid-19 epidemic of 2020.

To use just the most prominent example, the Brennan Center describes Georgia’s Election Integrity Act of 2021 (“SB 202”), as “a full-fledged assault on voting.”¹⁴⁸ What exactly merits this description?

Among elements cited by the Brennan Center, SB 202 reduced the time to apply for an absentee ballot from 180 days before the election to “just” 78

¹⁴² Charles Stewart III & Stephen Ansolabehere, *Waiting in Line to Vote*, ELECTION ASSISTANCE COMM’N (July 28, 2013), <https://www.eac.gov/documents/2017/02/24/waiting-in-line-to-vote-white-paper-stewart-ansolabehere> [<https://perma.cc/4Y7P-C9UE>].

¹⁴³ FILE, *supra* note 135, at 15 tbl.4.

¹⁴⁴ *Voting Laws Roundup: May 2021*, BRENNAN CTR. FOR JUST. (May 28, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021> [<https://perma.cc/X54V-9L56>].

¹⁴⁵ See Brett Samuels, *Biden Would Back MLB Moving All-Star Game Out of Georgia*, THE HILL (Mar. 31, 2021, 10:32 PM), <https://thehill.com/homenews/administration/545903-biden-would-back-mlb-moving-all-star-game-out-of-georgia/> [<https://perma.cc/8646-6XRX>] (quoting President Biden).

¹⁴⁶ *State Voting Bills Tracker 2021*, BRENNAN CTR. FOR JUST., (last updated May 28, 2021, last visited May 19, 2022), <https://www.brennancenter.org/our-work/research-reports/state-voting-bills-tracker-2021> [<https://perma.cc/AG98-77GH>].

¹⁴⁷ *Id.*

¹⁴⁸ BRENNAN CTR. FOR JUST., *supra* note 144.

days before the election.¹⁴⁹ Whereas applications previously needed to be returned only by the Friday before the election, SB 202 moved that deadline back one week.¹⁵⁰ Given the potential problems of getting an application received less than ninety-six hours before election day processed, and the ballot mailed to the voter, received, and returned by election day, this is probably a sensible means to assure that administrative error, overload, or voter neglect do not result in the failure of voters to receive and return ballots on a timely basis. The legislation also made permanent the use of “drop boxes” to which voters could return absentee ballots—an emergency pandemic measure that had not been used in Georgia before 2020—but at a lower number than some Georgia counties had used in 2020. These drop boxes were required to be placed to locations where they could be monitored and tampering made less likely.¹⁵¹ The bill standardized early voting hours, shortening them for some counties but enlarging them for most counties.¹⁵² SB 202 was criticized for prohibiting the gifting of water to people in line to vote,¹⁵³ but in fact, most states prohibit persons other than election workers from even approaching voters waiting to vote, an old prohibition aimed at preventing pressure and campaigning, and keeping order, at the polls.¹⁵⁴

It bears repeating that this Georgia law is routinely cited as the most prominent “significant voter suppression,” and “a full-fledged assault on voting,” by advocates of the voter suppression theory,¹⁵⁵ and it was this law

¹⁴⁹ S.B. 202, 2021-2022 Reg. Sess. § 25 (Ga. 2021).

¹⁵⁰ *Id.* at § 25(a)(1)(A).

¹⁵¹ *Id.* at § 26(c).

¹⁵² *Id.* at § 28.

¹⁵³ *Id.* at § 33(a).

¹⁵⁴ For a compilation of such laws, see *Electioneering Prohibitions*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Apr. 1, 2021), <https://www.ncsl.org/research/elections-and-campaigns/electioneering.aspx> [<https://perma.cc/WK4C-T7LQ>]. These laws, though rarely so specific, are routinely interpreted to prohibit giving away food and beverages. Compare Wis. Stat. § 12.03(b)(1) (2022) (“No person may engage in electioneering during polling hours on any public property on election day within 100 feet of an entrance to a building containing a polling place.”) with Mary Spicuzza, *Offering Snacks to People Waiting in Line to Vote Sounds Kind, but There are Rules Against It in Wisconsin*, MILWAUKEE J. SENTINEL, (Oct. 29, 2020, 3:53 PM), <https://www.jsonline.com/story/news/politics/elections/2020/10/28/offering-food-voters-waiting-line-not-allowed-wisconsin/6062772002/> [<https://perma.cc/8NE7-NX8H>] (quoting the Wisconsin Elections Commission Spokesman Reid Magney: “Nobody should be approaching voters who are waiting in line to vote, whether it is to talk to them, offer them literature or give them food or beverages.”).

¹⁵⁵ See, e.g., BRENNAN CTR. FOR JUST., *supra* note 148 (referring to the Georgia voting law as an assault on democracy).

that President Biden specifically called “Jim Crow on Steroids” and “Jim Eagle.”¹⁵⁶ If “[a]cross the nation, Americans experienced unprecedented voter suppression” in 2020, as claimed by Representative Zoe Lofgren (D. Cal.),¹⁵⁷ someone forgot to tell the American people, who turned out in record raw numbers and at the highest rate in a century.¹⁵⁸

¹⁵⁶ See Samuels, *supra* note 145; President Biden, Remarks By President Biden in Press Conference, (Mar. 25, 2021) (“Jim Eagle”) (transcript available at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/03/25/remarks-by-president-biden-in-press-conference/> [<https://perma.cc/P4WJ-XEEZ>]). Others who invoked the term “Jim Crow” in connection with SB 202, before President Biden’s statement, include Stacy Abrams, quoted in Osita Nwanevu, *Democracy’s Moment of Reckoning*, THE NEW REPUBLIC (May 13, 2021), <https://newrepublic.com/article/162272/republican-voter-suppression-texas-democracy-reckoning> [<https://perma.cc/HL4V-JPMM>] (“It’s Jim Crow in a suit + tie . . .”); Scott Hogan, Executive Director of the Democratic Party of Georgia quoted in *Statement: DPG Responds to SB 202 Passage Through Committee*, GEORGIA DEMOCRATS (Mar. 22, 2021), <https://www.georgiademocrat.org/statement-dpg-responds-to-sb-202-passage-through-committee/> [<https://perma.cc/4Q7M-CZ74>] (“[I]t really is – modern day Jim Crow”); Council on American-Islamic Relations Georgia Legal & Policy Director Murtaza Khwaja, quoted in *Action Alert: Join CAIR-Georgia in Urging GA Assembly to Vote ‘NO’ on Voter Suppression Bill SB 202*, COUNCIL ON AMERICAN-ISLAMIC RELATIONS (Mar. 24, 2021), https://action.cair.com/a/action-alert-join-cair-ga-urging-ga-assembly-vote-no-voter-suppression-bill-sb-202?fbclid=IwAR0ALMrz_f8dqkXtkqXtk1hamu4R1nx45tMEvEap4Otmitt4S4YkV8TQOn [<https://perma.cc/8TFC-F47S>] (describing SB 202 as an “amateur-hour Jim Crow act. . .”); MSNBC Host Joy Reid and Political Contributor Jason Johnson endorsed the characterization on Reid’s program, *Transcript: The ReidOut*, MSNBC, (Mar. 25, 2021, 7:00 PM), <https://www.msnbc.com/transcripts/transcript-reidout-3-25-21-n1262133> [<https://perma.cc/7TAF-43AB>] (“It’s Jim Crow American.”); and Congresswoman Nikema Williams (D. Ga.) quoted in *Statement: Democratic Party of Georgia Responds to Signing of SB 202 by Governor Brian Kemp*, GEORGIA DEMOCRATS (Mar. 25, 2021), <https://www.georgiademocrat.org/statement-democratic-party-of-georgia-responds-to-signing-of-sb-202-by-governor-brian-kemp/> [<https://perma.cc/EJ37-QPSS>] (“Rest assured that we will fight tooth and nail in court to put this legislation where it rightfully belongs: in the ash heap of history along with the rest of Jim Crow.”). I assume that any sentient, moderately educated person knows that whatever the merits of the legislation, it bears no resemblance to “Jim Crow,” and it belittles the speaker, the audience, and especially the people who lived under and resisted “Jim Crow,” to argue that it does. But lest we forget, see generally C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1955); JERROLD M. PACKARD, *AMERICAN NIGHTMARE: THE HISTORY OF JIM CROW* (2002).

¹⁵⁷ 167 CONG. REC. H980 (daily ed. Mar. 2, 2021) (statement of Rep. Lofgren), <https://www.congress.gov/117/crec/2021/03/02/CREC-2021-03-02.pdf> [<https://perma.cc/89KB-9QJX>].

¹⁵⁸ Natalie Colarossi, *The Highest Voter Turnouts in History of U.S. Elections*, NEWSWEEK (Nov. 5, 2020, 4:29 PM), <https://www.newsweek.com/highest-voter-turnouts-history-us-elections-1545235> [<https://perma.cc/5LKW-FQP4>] (“So far, the 2020 presidential election has set the record for the highest voter turnout in 120 years, and the highest record for mail-in voting ever.”). The first

Beyond the fatuous “voter suppression” narrative, the types of voting reforms proposed in S. 1 are aimed at goosing voter turnout by not only removing legal impediments to voting, which are few, but by making voting as convenient as possible. There is substantial doubt, however, that many of the remedies proposed will increase turnout. This is particularly true of early voting, both in-person and through no-excuse absentee voting. For example, a study from the University of Wisconsin found that early voting actually had a negative effect on turnout, probably due the difficulties it creates for voter mobilization efforts, and the loss of the excitement and general social pressure (such as the ubiquitous “I Voted!” stickers) of voting on election day.¹⁵⁹

Strict photo ID laws are the one common reform of the past twenty years that actually create a new obstacle to voting. Prior to 2000, no U.S. state had such a law.¹⁶⁰ However, voter ID laws are common in Europe,¹⁶¹ and were a recommendation of the 2005 report of the Carter/Baker

election under Georgia’s new law, the May 2022 primary, also saw record turnout of early and absentee voters. *Record Early Voting Turnout Continues*, GA. SEC’Y OF STATE (May 19, 2022), <https://sos.ga.gov/news/record-early-voting-turnout-continues-4> [https://perma.cc/FGN5-REG3].

¹⁵⁹ Barry C. Burden, David T. Canon, Kenneth R. Mayer, & Donald P. Moynihan, *Election Laws, Mobilization, and Turnout: The Unanticipated Consequences of Election Reform*, 58 AM. J. POL. SCI. 95, 98 (2014) (“Early voting almost certainly brings out some new voters . . . but it more than offsets this increase by dissipating the energy of Election Day over a longer period of time”). See also Paul Gronke, Eva Galanes-Rosenbaum, & Peter A. Miller, *Early Voting and Turnout*, 40 Pol. Sci. & Pol. 639, 642 (2007) (showing that after an initial “novelty effect,” no-excuse absentee balloting and early in-person voting have a more limited effect on turnout); GOVERNMENT ACCOUNTABILITY OFFICE, ISSUES RELATING TO REGISTERING VOTERS AND ADMINISTERING ELECTIONS 97 (2016) (“We reviewed 20 studies [on early in-person voting] from 12 publications, and these studies had varied findings. Seven studies found no statistically significant effect, another 8 studies found that the policy decreased turnout, and 5 studies reported mixed evidence.”); *Id.* at 103 (“We reviewed 18 studies [on no-excuse absentee voting] from 12 publications that had varied findings. Reported effects from these studies ranged from a 3.2 percentage point increase to a 4.0 percentage point decrease, with many studies (10 of 18) reporting mixed evidence or no statistically significant effects.”).

¹⁶⁰ Suevon Lee & Sarah Smith, *Everything You’ve Ever Wanted to Know About Voter ID Laws*, PRO PUBLICA (Mar. 9, 2016, 8:33 AM), <https://www.propublica.org/article/everything-youve-ever-wanted-to-know-about-voter-id-laws> [https://perma.cc/ZJ99-QJWV] (acknowledging that Indiana was the first state to enact a strict voter ID law in 2006).

¹⁶¹ See John R. Lott, Jr., *Why Do Most Countries Require Photo Voter IDs?: They Have Seen Massive Vote Fraud Problems*, CRIME PREVENTION RSCH. CTR. 6 (2021) (showing that of the forty-seven countries in Europe, forty-six require government-issued voter IDs to vote), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3849068.

Commission.¹⁶² By 2020, twenty-one states required some form of photo ID to vote.¹⁶³ Even here, however, the notion that this constitutes suppression on a constitutional scale is overblown at a minimum, and simply incorrect by normal standards of reasonableness.¹⁶⁴ Studies of voter ID laws have failed to find significant effects on turnout,¹⁶⁵ and court challenges have tended to fail for lack of evidence.¹⁶⁶ Any effect ID laws have on actual electoral outcomes appears to be minimal.¹⁶⁷

¹⁶² COMMISSION ON FEDERAL ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS 21 (2005), https://www.foxnews.com/projects/pdf/election_reform_report.pdf.

¹⁶³ A summary compilation of state ID laws is provided at *Voter Identification Laws by State*, BALLOTEDIA (accessed June 1, 2021), https://ballotpedia.org/Voter_identification_laws_by_state [<https://perma.cc/5A5R-9JME>].

¹⁶⁴ See, e.g., *Crawford v. Marion County*, 553 U.S. 181, 204 (2008) (upholding Indiana ID law against facial challenge).

¹⁶⁵ See Enrico Cantoni & Vincent Pons, *Strict ID Laws Don't Stop Voters: Evidence From a U.S. Nationwide Panel, 2008-2018* (Nat'l Bureau of Econ. Rsch., Working Paper No. 25522, 2021) (“[W]e find that the laws have no negative effect on registration or turnout, overall or for any group defined by race, gender, age, or party affiliation.”); M.V. Hood III & Charles Bullock, *Much Ado About Nothing? An Empirical Assessment of the Georgia Voter Identification Statute*, 12 STATE POL. & POL'Y Q. 394, 394 (2012) (finding voter ID lowered turnout by roughly four-tenths of one percentage point, but had no racial or ethnic component); cf. Daniel J. Hopkins, Marc Meredith, Michael Morse, Sarah Smith, & Jesse Yoder, *Voting But for the Law: Evidence from Virginia on Photo Identification Requirements*, 14 J. EMPIRICAL LEGAL STUD. 79, 79 (2017) (finding turnout was *higher* in areas where more registered voters lacked a driver's license). But see Zoltan Hajnal, Nazita Lajevardi, & Lindsay Nielson, *Voter Identification Law and the Suppression of Minority Votes*, 79 J. Pol. 363 (2017) (finding negative impact on racial and ethnic minorities). Once again, the Government Accountability Office provides a nice summary through the 2012 election: “10 studies GAO reviewed showed mixed effects of various forms of state voter ID requirements on turnout Five of these 10 studies found that ID requirements had no statistically significant effect on turnout; in contrast 4 studies found decreases in turnout and 1 found an increase in turnout that were statistically significant.” GOVERNMENT ACCOUNTABILITY OFFICE, ISSUES RELATED TO STATE VOTER IDENTIFICATION LAWS 1 (2015).

¹⁶⁶ See *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 951-52 (7th Cir. 2007), *aff'd* 553 U.S. 181 (2008) (“There is not a single plaintiff who intends not to vote because of the new law”); see also the district court decision in the case: “Plaintiffs . . . have not introduced evidence of a single, individual Indiana resident who will be unable to vote as a result of [the voter ID law] or who will have his or her right to vote unduly burdened by its requirements.” *Ind. Democratic Party v. Rokita*, 458 F. Supp.2d 775, 783 (S.D. Ind. 2006), *aff'd sub nom. Crawford v. Marion Cnty. Election Bd.* 472 F.3d 949 (7th Cir. 2007), and *aff'd* 553 U.S. 181 (2008); *Democratic Party of Ga. v. Perdue*, 707 S.E.2d 67, 75 (Ga. 2011) (“[plaintiffs rely] on testimony from one voter who did not possess a statutorily authorized photo ID and because of age and physical infirmities could not travel without great difficulty to her local county office to obtain a free voter identification card (notably, these infirmities also limited her ability to get to her place of voting). Nonetheless, that individual was not prevented from voting as she subsequently voted . . .”).

¹⁶⁷ See Mark Hoekstra & Vijetha Koppa, *Strict Voter Identification Laws, Turnout, and Election Outcomes 3* (Nat'l Bureau of Econ. Rsch., Working Paper No. 26206, 2019) (“Even under the most extreme

In summary, there are plausible theoretical and practical arguments—which I have not considered here, pro or con—for the types of reforms promoted in S. 1, aimed at pushing up turnout by making voting as convenient as possible. But as a solution for the core problem of legitimacy of outcome, this approach seems based on a clearly incorrect diagnosis of the problem. Their enactment would, therefore, have to be based on other grounds (although, even on its own terms—promoting turnout—there is serious doubt that making voting more convenient has much effect).¹⁶⁸ In the meantime, we can note that the removal of the last major legal barriers to voting by adults, culminating in the late 1960s and early 1970s, did not correspond with a collapse in voter confidence in the integrity of election results; but the effort to make voting as convenient as possible, beginning with the widespread adoption of no-excuse absentee voting in the late 1970s, has correlated with that collapse. Correlation is not causation, but it may be cause for reflection.

C. *Election Integrity Reforms*

The final approach to reform consists of a variety of measures promoted as “anti-fraud” or “election integrity” measures. Promoted by Republicans in state legislatures and the conservative Heritage Foundation in Washington, D.C., this approach is largely the mirror image of the “get-out-the-vote” approach to reform. The most prominent initiative in this camp has been the proliferation of photo ID laws, but it has also included, at times,

assumption – that all votes cast without an ID for the winner (and none for the runner-up) would be excluded under a strict law – we estimate that a strict law could have changed the election outcome in fewer than 0.35 and 0.09 percent of local and state/national elections in Florida, respectively. Similarly, we show that fewer than 0.55 percent of state and national elections in Michigan could have been affected.”)

¹⁶⁸ See Adam Berinsky, *Making Voting Easier Doesn't Increase Turnout*, STAN. SOC. INNOVATION REV. (Feb. 8, 2016), https://ssir.org/increasing_voter_turnout/entry/making_voting_easier_doesnt_increase_turnout [<https://perma.cc/TE3P-CN6L>] (“The recent wave of electoral reforms does not seem to have had any significant effect on voter turnout.”); R. MICHAEL ALVAREZ ET AL., CALTECH/MIT VOTING TECH. PROJECT, VOTING: WHAT IS, WHAT COULD BE 39 (2001), <https://www.sos.wa.gov/documentvault/thecaltechmitvotingtechnologyprojectvotingwhatiswhatcouldbejuly2001-1025.pdf> [<https://perma.cc/X7B7-JGS5>] (“There is no evidence that liberalizing absentee voting laws or enacting early or vote-by-mail schemes has increased voter turnout dramatically.”).

efforts to restrict “ballot harvesting,”¹⁶⁹ to reduce absentee and early in-person voting,¹⁷⁰ to restrict some use of provisional ballots,¹⁷¹ and similar measures.

Contrary to much of the criticism, these efforts are not inherently “anti-democratic”¹⁷²—good faith efforts to eliminate fraud and assure an accurate count are pro-democratic.¹⁷³ Moreover, these arguments are, more than those of the “representational reform” or “get-out-the-vote” schools, clearly directed at the problem of credibility in electoral results. The problem is that, like the “get-out-the-vote-efforts,” these proposed reforms are based on a narrative that is substantially divorced from reality.

¹⁶⁹ Michelle L. Price, *New Voting Laws Revive Fights Over ‘Ballot Harvesting,’* AP NEWS (Aug. 16, 2020), <https://apnews.com/article/virus-outbreak-nv-state-wire-donald-trump-elections-voting-e8aeca434b2b1040525d533e2d3b7ed> [<https://perma.cc/M7VK-2AJG>].

¹⁷⁰ See Janie Boschma, Fredreka Schouten, & Priya Krishnakumar, *Lawmakers in 47 States Have Introduced Bills that Would Make it Harder to Vote. See Them All Here*, CNN (Apr. 3, 2021, 10:05 AM), <https://www.cnn.com/2021/04/03/politics/state-legislation-voter-suppression/index.html> [<https://perma.cc/9C9P-CFHK>] (discussing bills introduced to restrict voting, including bills relating to early voting and absentee/mail-in voting).

¹⁷¹ *State by State Provisional Ballot Laws*, BALLOTPEDIA (accessed June 2021), https://ballotpedia.org/State_by_State_Provisional_Ballot_Laws [<https://perma.cc/AUG8-Q5JW>].

¹⁷² Zachary Roth, *The Rise of Legislative Anti-Democracy*, BRENNAN CTR. FOR JUST. (Mar. 12, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/rise-legislative-anti-democracy> [<https://perma.cc/ZPV2-EJ8M>] (arguing that there has been an explosion of “legislative anti-democracy”).

¹⁷³ Unfortunately, there are examples of some Republicans seeking to make it harder for eligible voters to vote as a partisan end in itself. See, e.g., Michael Wines, *Some Republicans Acknowledge Leveraging ID Law for Political Gain*, THE N.Y. TIMES (Sept. 16, 2016); William Wan, *Inside the Republican Creation of the North Carolina Voting Bill Dubbed the ‘Monster’ Law*, WASH. POST (Sept. 2, 2016) (quoting a Republican consultant as saying, “Of course it’s political. Why else would you do it? . . . [I]f African Americans voted overwhelmingly Republican, they would have kept early voting right where it was . . . It wasn’t about discriminating against African Americans. They just ended up in the middle of it because they vote Democrat.”). It would be wrong to ascribe this motivation to most public support for these efforts, just as it would be wrong to suggest that most support for the types of proposals in H.R. 1/S. 1 is motivated by simple partisanship. For example, polls consistently show that substantial majorities of Democrats favor photo ID requirements—presumably not because they see such laws as favoring Republicans; and substantial numbers of Republicans favor Automatic Voter Registration—presumably not because they see such laws favoring Democrats. See *Public Supportive of Many Voting Reforms*, AP-NORC (Apr. 2, 2021), <https://apnorc.org/projects/public-supportive-of-many-voting-reforms/> [<https://perma.cc/V84V-DKPW>] (showing 56% of Democrats and 72% of independents favor photo ID laws; and showing 47% of Republicans and 46% of independents favor automatic voter registration). Thus, various reform proposals should be analyzed on the merits, with an assumption of good faith.

As with the “voter suppression” narrative, we cannot say that there is *no* evidence to support fraud claims, particularly in absentee balloting. Indeed, until quite recently, there was a broad consensus that absentee balloting was more prone to fraud than in-person voting.¹⁷⁴ Similarly, most democracies require photo ID to vote as a basic anti-fraud measure.¹⁷⁵ And early in-person voting has also raised concerns about increased fraud, as it allows “more opportunities for misconduct (deliberate or accidental) by election officials . . . increases the burden of protecting ballots and voting equipment

¹⁷⁴ See, e.g., ALVAREZ ET AL., *supra* note 168 at 10, 41 (“[T]he greatest fraud problems may lie in absentee balloting; . . . [F]raud appears to be especially difficult to regulate in absentee systems. In-precinct voting or ‘kiosk’ voting is observable. Absentee voting is not. The prospect for coercion is increased with absentee voting on demand.”); UNITED STATES ELECTORAL ASSISTANCE COMMISSION, AN INITIAL REVIEW AND RECOMMENDATIONS FOR FUTURE STUDY 9 (2006) (“[A]bsentee balloting is subject to the greatest proportion of fraudulent acts.”); COMMISSION ON FEDERAL ELECTION REFORM, *supra* note 162 at 35, 46 (2005) (“Vote by mail . . . raises concerns about privacy, as citizens voting at home may come under pressure to vote for certain candidates, and it increases the risk of fraud . . . Absentee ballots remain the largest source of potential voter fraud.”). The principle was considered basic enough to be included in the American Law Institute’s Principles of Election Law. PRINCIPLES OF THE LAW, ELECTION ADMINISTRATION: NON-PRECINCT VOTING AND RESOLUTION OF BALLOT COUNTING DISPUTES, § 103 cmt. d (AM. L. INST. 2019) (“[A]bsentee voting poses a greater risk than in-person voting of voter fraud, as well as undue influence.”); see also, e.g., Stephanie Saul & Reid J. Epstein, *Trump is Pushing a False Argument on Vote-By-Mail Fraud. Here are the Facts*, THE N.Y. TIMES (Sept. 28, 2020) (quoting Charles Stewart III, founder of the Massachusetts Institute of Technology Election Data and Science Lab, “Voting fraud in the United States is rare, [but] less rare is fraud using mail ballots”), <https://www.nytimes.com/article/mail-in-voting-explained.html> [<https://perma.cc/97A4-2UNX>]; Adam Liptak, *Error and Fraud at Issue as Absentee Voting Rises*, THE N.Y. TIMES (Oct. 6, 2012), <https://www.nytimes.com/2012/10/07/us/politics/as-more-vote-by-mail-faulty-ballots-could-impact-elections.html> [<https://perma.cc/2GRT-GKWX>] (“[V]otes cast by mail are . . . more likely to be compromised . . . than those cast in the voting booth, statistics show.”); Richard L. Hasen, *A Détente Before the Election*, THE N.Y. TIMES (Aug. 5, 2012, 9:13 PM), <https://campaignstops.blogs.nytimes.com/2012/08/05/a-dtente-before-the-election/> [<https://perma.cc/V4VQ-NIJY>] (“I have not found a single election over the last few decades in which impersonation fraud had the slightest chance of changing an election outcome—unlike absentee-ballot fraud, which changes election outcomes regularly.”); Greater Birmingham Ministries v. Sec’y of State for Ala., 992 F.3d 1299, 1305 (11th Cir. 2021) (describing several cases of absentee ballot fraud in Alabama during the mid-1990s); Allison R. Hayward, *Bentham & Ballots: Tradeoffs Between Secrecy and Accountability in How We Vote*, 26 J. L. & POL. 39, 57-61 (2009) (discussing incidents of absentee ballot fraud from the late nineteenth century through the early 1980s); JOHN R. LOTT, WHY DO MOST COUNTRIES BAN MAIL-IN BALLOTS?: THEY HAVE SEEN MASSIVE VOTE FRAUD PROBLEMS (2020) (noting that a majority of European nations ban all absentee voting for voters living in the country).

¹⁷⁵ See Lott, *supra* note 161 (listing countries that require voter ID for voters to obtain absentee ballots).

from tampering or damage” and places extra pressure on chain of custody procedures.¹⁷⁶

But to note that there is some fraud, or even that it is more prevalent among absentee balloting, is not to say that there is much fraud. Just as voter ID laws can, on rare occasions, alter the results of a race,¹⁷⁷ one can find episodes of voter fraud that have altered election results.¹⁷⁸ But such episodes are rare. There is relatively broad agreement among experts that election fraud is not a major problem¹⁷⁹ and that the 2020 election was not “stolen” from President Trump.¹⁸⁰ Indeed, the Heritage Foundation’s database of proven cases of fraud may actually indicate just how free of fraud American elections are. For example, the Heritage database cites twenty incidents of fraudulent impersonation of a voter at the polls over the past decade.¹⁸¹ If one were to assume that 10,000 such violations went undetected for each one

¹⁷⁶ American Law Institute, *supra* note 174 at § 103, cmt. c.

¹⁷⁷ See Hoekstra & Koppa, *supra* note 167 at 11-12, 21 (demonstrating the effect of strict voter ID laws on turnout and election outcomes).

¹⁷⁸ Two prominent examples are the 1997 mayoral election in Miami, Florida, where large-scale fraud, particularly through absentee ballots, was used, resulting in courts overturning the election results, and the 2018 election in North Carolina’s 9th Congressional district, where widespread “harvesting” of absentee ballots resulted in nullification of the results and a new election. See *In re the Matter of Protest Election Returns and Absentee Ballots in the Nov. 4, 1997 Election for City of Miami, Fla.*, 707 So. 2d 1170 (Fla. App. 1998), *rev. denied* 725 So. 2d 1108 (Fla. 1998); Amy Gardner, *N.C. Board Declares a New Election in Contested House Race After the GOP Candidate Admitted He Was Mistaken in His Testimony*, WASH. POST (Feb. 21, 2019), https://www.washingtonpost.com/politics/candidate-says-new-congressional-election-warranted-in-north-carolina/2019/02/21/acae4482-35e0-11e9-854a-7a14d7fec96a_story.html [<https://perma.cc/5L6B-PWRE>].

¹⁷⁹ See Ray Christensen & Thomas J. Schultz, *Identifying Election Fraud Using Orphan and Low Propensity Voters*, 42 AM. POL. RSCH. 311, 314-17, 330-31 (2014) (noting a consensus among experts that voting fraud is rare and finding little voting fraud using a method of low propensity and orphan voters to detect fraud); see also Sami Edge & Sean Holstege, *No, Voter Fraud Actually Isn’t a Persistent Problem*, WASH. POST (Sept. 1, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/09/01/voter-fraud-is-not-a-persistent-problem/> [<https://perma.cc/8VSD-4YA3>] (quoting a number of experts who say that voting fraud is not a significant problem). Colloquially, of course, some might argue that the election was “stolen” in the sense of being unfair, see *infra* text accompanying notes 48-51, but that is a different matter than vote totals.

¹⁸⁰ See *It’s Official: The Election Was Secure*, BRENNAN CTR. FOR JUST. (Dec. 11, 2020), <https://www.brennancenter.org/our-work/research-reports/its-official-election-was-secure> [<https://perma.cc/BMF6-DNLB>] (“These government officials, judges, and elected leaders, overwhelmingly Republican, have publicly acknowledged confidence in the November election.”).

¹⁸¹ See *Election Fraud Cases*, HERITAGE FOUND. (last accessed Aug. 23, 2022), https://www.heritage.org/voterfraud-print/search?combine=&state=All&year=&case_type=All&fraud_type=24493 [<https://perma.cc/M3AP-LPWD>]. Note that these numbers change regularly as the list is updated; but this snapshot gives an accurate picture of the relative scarcity of proven fraud.

caught, that would amount to 180,000 incidents out of over 610 million votes cast in elections for federal office from 2012 through 2020—a rate of approximately three-one hundredths of 1%. But even this number does not include primary elections and elections where no candidates for federal office were on the ballot. To be fair, Heritage does not claim its database is exhaustive, and in-person impersonation fraud is one of the rarest forms of fraud in the database. Further, low rates of fraud do not mean that rates would not rise, perhaps significantly over time, if deterrents to fraud were removed. But the notion that fraud is a major crisis requiring significant reform in election administration is extremely difficult to square with incidents of fraud actually observed.

Finally, election integrity reforms are sometimes proposed as measures that will, themselves, increase public confidence in elections.¹⁸² So far, however, at least in regard to the most visible “integrity” measure—voter ID laws—data has simply failed to back up that proposition.¹⁸³

D. Summary

In summary, all three major reform approaches—representational, get-out-the-vote, and election integrity—are advocating for major reforms to American elections and democratic institutions on the basis of the flimsiest of evidence that their proposals will have the desired effects.

¹⁸² See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008) (discussing the state’s interest in “protecting public confidence”). Writing nearly fifteen years ago, I gave some credence to that notion. Bradley A. Smith, *Broken Windows & Voting Rights*, 156 U. PA. L. REV. PENNUMBRA, 242, 243-44 (2007). But later research is, at most, inconclusive. See Charles Stewart III, Stephen Ansolabehere, & Nathaniel Persily, *Revisiting Public Opinion on Voter Identification and Voter Fraud in an Era of Increasing Partisan Polarization*, 68 STAN. L. REV. 1455, 1460 (2016); Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV. 1737, 1756 (2008) (finding that voter confidence in the electoral process is not correlated with voter identification laws).

¹⁸³ See Stewart III, Ansolabehere, & Persily, *supra* note 182 at 1480 (arguing that people who live in states with voter ID laws do not have greater confidence in elections); Shaun Bowler, Thomas Brunell, Todd Donovan, & Paul Gronke, *Election Administration and Perception of Fair Elections*, 38 J. ELEC. STUD. 1, 1 (2015) (“Voter identification laws . . . are not associated with greater confidence in elections.”); Ansolabehere & Persily, *supra* note 182 at 1740 (“We find that voters who have been forced to show identification are no less likely to perceive fraud than those not similarly subject to an ID requirement.”).

III. THE RUKEYSER APPROACH

A. *A Truce in the Voting Wars*

From 1970 to 2002, the impeccably-dressed, soft-spoken, silver-haired Louis Rukeyser hosted PBS's *Wall Street Week*, introducing millions of middle-class Americans to investing in stocks. One bit of Rukeyser advice during periods of market turbulence: "Don't just do something. Stand there."¹⁸⁴ In other words, stay calm, and take some time to really consider the problem and the potential responses. In that spirit, I offer the following suggestion for reform: Stop.

There is probably no reform that would be as valuable as a temporary truce in the voting wars. I have suggested in this essay that reform proposals should be evaluated on the merits, not on the suspected partisan motivation for them.¹⁸⁵ But in addition to finding the evidence for most reform proposals wanting, we cannot ignore the fact that within both major parties, a large percentage of voters look on any proposal through partisan eyes, and we cannot help but notice that whether we are discussing Republican proposals in the states, or Democratic proposals in Congress, the efforts rarely draw any measure of bipartisan support. Perhaps voting could be made a bit more convenient, and perhaps that would be a good thing. At this point, is it worth the cost in legitimacy and trust to push for it? Perhaps fraud could be made even more rare. Is that game worth the candle in this environment?

As I have noted, the Electoral College is justified not in spite of, but because of the fact that it periodically produces winners who do not win the aggregated state popular votes. Given the importance of majority rule in our value hierarchy, if that happened regularly, we might wish to recalibrate.¹⁸⁶ But we have other values than pure majoritarianism, and those have a role in the Constitution, too. Twice in a period of four elections in the late nineteenth century, the winner of the aggregated state popular votes did not win the electoral college. Then it didn't happen again for over 100 years. Now it has happened twice in a period of five elections—six if we include

¹⁸⁴ If one prefers the medical profession, we might think of the Hippocratic Oath: "First, do no harm."

¹⁸⁵ See *supra* note 174 (noting that some partisan motivations should not be attributed to the public at large).

¹⁸⁶ See generally Bradley A. Smith, *How the Electoral College Protects and Nurtures Our Republic*, HERITAGE FOUND., May 11, 2020; Bradley A. Smith, *Vanity of Vanities: National Popular Vote and the Electoral College*, 7 ELECTION L.J. 3, 196 (2008).

2020. Can we live with that? Perhaps we should have a bit more patience before throwing away our institutions. Likewise, we have lived with partisan gerrymandering since, well, the days of Elbridge Gerry. Is reform suddenly a true necessity, or merely a passing partisan passion? A handful of states and localities are now beginning to experiment with forms of ranked choice voting.¹⁸⁷ Perhaps we should pause and see if RCV actually delivers on its promises, in a manner superior to the more intuitive, and readily understood, first-past-the-post system that has been the historic norm in the U.S., before pushing it through more widely.

And here I am speaking only of the more modest proposals for reform. Does anyone really think more radical proposals, such as vastly expanding the size of the House of Representatives, or adding large numbers of new states,¹⁸⁸ is going to cool partisan passions and restore basic trust in election procedures and results?

It is, in a word, a vanity to think that one can solve the thorny issues of representative democracy by making structural changes to American democracy based on current fads, theories, and trends.¹⁸⁹ Meanwhile, the evidence that the United States faces a crisis of either electoral fraud or voter suppression simply is not there.

B. Why We Vote

While “stand there” is usually good advice, let me argue that we should in fact take a few small steps—steps backward, to what worked when confidence in election results was higher. Although there is reason to believe that statements of partisan leaders such as Donald Trump and Stacy Abrams

¹⁸⁷ The advocacy group, FairVote, maintains a tally of states experimenting with forms of ranked choice voting. See *Where Ranked Choice Voting is Used*, FAIRVOTE (last updated July 2022), <https://fairvote.org/our-reforms/ranked-choice-voting-information/#where-is-ranked-choice-voting-used> [<https://perma.cc/4RWE-E2KV>] (“As of July 2022, 55 cities, counties, and states are projected to use RCV for all voters in their next election.”).

¹⁸⁸ See Dowd, *supra* note 92, at 01:19:24 (suggesting expanding the size of the House of Representatives and adding new states).

¹⁸⁹ See generally Bradley A. Smith, *Vanity of Vanities: National Popular Vote and the Electoral College*, 7 *ELECTION L.J.* 3, 196 (2008) (arguing that the current electoral system works well and advocating against changing it based on current sentiment).

can erode confidence,¹⁹⁰ the fact is that, other than having one's preferred candidate win, we have very little knowledge of what fosters voter confidence in election results.

The one thing we know with some certainty, however, is that people who vote in person have greater confidence in the integrity of the election, and those who vote by mail tend to be less confident.¹⁹¹ Note that the critical factor is not whether others are voting by mail—where perceptions of fraud might be shaped by statements from politicians such as Mr. Trump—but whether the respondent voted by mail. Why is this so is unclear? Perhaps the loss of the privacy of the voting booth leads some absentee voters to feel coerced or pressured; perhaps some of it is loss of assistance from a poll worker if the voter has questions; or the simple inability to see the process in action, to see the people involved, and, in many cases, to see one's vote at least properly deposited into the counting machine or ballot box.

Let me suggest, with hesitation and little more than intuition, that voting in person on election day is also an inherently more satisfying civic experience. Discussion of election reform has, for several decades now, focused almost exclusively on turnout and partisan power. The last twenty years, in particular, have seen a marked effort to remove all inconveniences to voting. Analysis of these reforms and the countermeasures of “election integrity” enthusiasts, have been analyzed almost entirely in terms of the distribution of political power rather than the civic good, with countless pixels devoted to analyzing the effects of any change on various minority or partisan groups, and to convince partisans that they should support or oppose

¹⁹⁰ See Emma Hurt, *Trump Hasn't Conceded Georgia. Neither Did Stacey Abrams. What Changed?*, NPR (Nov. 18, 2020, 8:00 AM), <https://www.npr.org/2020/11/18/935734198/trump-hasnt-conceded-georgia-neither-did-stacey-abrams-what-changed> [https://perma.cc/RRJ4-YRUS] (discussing the backlash against Stacey Abrams' and Donald Trump's refusal to concede their respective elections).

¹⁹¹ This finding has been consistent. See Bowler et al., *supra* note 183, at 6-7 (explaining that voter turnout has a positive correlation with voter perception that election officials are fair); R. Michael Alvarez, Thad E. Hall, & Morgan H. Llewellyn, *Are Americans Confident Their Ballots Are Counted?*, 70 J. POL. 754, 761-62 (2008) (“[A]ny technology other than a paper ballot cast in a voting precinct appears to reduce the confidence of white voters”); Lonna Rae Atkeson & Kyle L. Saunders, *The Effect of Election Administration on Voter Confidence: A Local Matter?*, 40 POL. SCI. & POL. 655, 657 (2003) (describing the significant negative effect that voting absentee has on voter confidence). See also Thad E. Hall, J. Quin Monson, & Kelly D. Patterson, *The Human Dimension of Elections: How Poll Workers Shape Public Confidence in Elections*, 62 POL. RES. Q. 507, 519 (2009) (noting that positive interaction with poll workers improves voter confidence).

particular laws because of their partisan effects.¹⁹² The pressure to vote is typically presented as a matter of making sure that “your” side wins. Having a paid ballot “harvester” nag you for your ballot does not leave one feeling confident that a civic duty has been performed; and voting from the privacy of one’s home may be thoughtful and reflective, but it can also be a narcissistic act, in which it is easy to forget about the public consequences of one’s vote.

We tend to think of voting as a “right,” and indeed it is, and an important one. But it is also a “power” we exercise over our fellow citizens. It is a power to participate in governance of the state. As such, it can be used to protect the rights of our fellow citizens, but it can also be used to violate their rights and subject them to our will through the collectivist instrumentality of the vote:

[T]hough voting is one means among many to protect rights and liberties, if unchecked it is also the power to destroy rights and liberties. Individuals who violate our rights, through robbery, criminal assault, torts and the like, are subject to punishment. But who is punished when the government violates substantive rights through acts of the legislature, serving as the duly elected representatives of the people? Private citizens may not lawfully turn the right to bear arms into a means to seize the property of some and give it to others (through armed robbery, theft and the like), but they may use their votes to empower their legislatures to do so¹⁹³

To combat the tendency to abuse the franchise in this way, voting should be and historically has been a public act.¹⁹⁴ “The person undertaking it

¹⁹² This is most obvious in the fight over voter ID laws. Although such laws retain substantial support across the board, there has been a slowly emerging split between Democrats and Republicans on the issue. See *75% Support Voter ID Laws*, RASMUSSEN REPS. (Mar. 17, 2021), https://www.rasmussenreports.com/public_content/lifestyle/general_lifestyle/march_2021/75_support_voter_id_laws [<https://perma.cc/6ZGL-4KZ5>] (showing that 89% of Republicans and 60% of Democrats support voter ID requirements).

¹⁹³ Smith, *supra* note 182, at 246.

¹⁹⁴ Although we have adopted the secret ballot, until the late nineteenth century, secret balloting was not the norm in the United States. See Emily Wagman, *But First, (Don't) Let Me Take a Selfie: New Hampshire's Ban on Ballot Selfies and First Amendment Scrutiny*, 25 WM. & MARY BILL OF RTS. J. 343, 345-46 (2016) (“Ultimately, it was not until the end of the nineteenth century that each state, led first by New York, adopted the secret, or Australian, ballot.”). And there is no federal constitutional right to a secret ballot. See *Doe v. Reed*, 561 U.S. 186, 224 (2010) (Scalia, J., concurring) (“We have acknowledged the existence of a First Amendment interest in voting . . . but we have never said that it includes the right to vote anonymously.”). Until the recent craze for no-excuse absentee voting, the act of voting remained public.

should reflect on its consequences for the public good, not just for himself If convenience is the only criterion for voting, we should not be surprised if people vote selfishly.”¹⁹⁵

While people may complain about the “hassles” of voting, perhaps voting on election day provides a greater sense of civic engagement. One is reminded that voting is not merely a match-up of “our side” against “theirs,” but an important means by which we come together as a people to govern ourselves and to make choices that we will all abide by, until the next election. “A voter who stands in line with his or her fellow citizens at a polling place is likelier to keep their needs—and more important, the common good—in mind.”¹⁹⁶ And, we might add, that person is probably less likely to think that the citizen standing next to him in line is trying to “steal” the election.

Early in-person voting and no-excuse absentee voting are popular and, in some cases, necessary innovations allowing some to vote. But one way to restore a sense of normalcy to elections, and hence to boost voter confidence, may be to restore the presumption that voting takes place in person, on election day. Accordingly, states that have adopted early voting and, especially, no-excuse absentee voting, should not expand or take steps to encourage its use. States that have not yet adopted these procedures should not do so, or do so only in limited form for those who truly need an alternative to voting at the polls. To the contrary, reducing these options, at least at the margin, would be an appropriate place to start.

Such modest cutbacks in early voting may not meet as many objections as some believe. For example, while substantial majorities favor some form of early voting, substantial pluralities also believe it should not exceed fifteen days.¹⁹⁷ Certainly this would be a reasonable place to begin, and a small step towards re-orienting our entire approach to voting, and hence our thoughts about legitimacy.

¹⁹⁵ Greg Weiner, *Bringing in the Republican Vote*, L. & LIBERTY (Apr. 6, 2021), <https://lawliberty.org/how-conservatives-should-think-about-voting-reform/> [https://perma.cc/J6S8-LZKM].

¹⁹⁶ *Id.*

¹⁹⁷ Scott Rasmussen, *Our Election System Needs Reform, and Most Americans Agree*, DESERET NEWS (Mar. 8, 2021, 12:00 AM), <https://www.deseret.com/opinion/2021/3/7/22317863/scott-rasmussen-election-reform-hr1-bipartisan-support-vote-by-mail-voter-id-ballots> [https://perma.cc/85E3-9S3W] (stating that 46% of voters believe the early voting period should not exceed fifteen days). See also COMMISSION ON FEDERAL ELECTION REFORM, *supra* note 162, at 36 (proposing a fifteen day maximum on early voting for the Carter/Baker Commission).

IV. CONCLUSION

In this essay, I have suggested—implicitly—that American elections are actually quite healthy. Neither fraud nor voter suppression are serious problems in the twenty-first century United States. Unfortunately, healthy elections are not the same as, nor do they guarantee, a healthy democracy. I have taken pains to argue that Americans’ loss of confidence in election results is not simply a Republican problem or something that is likely to pass when Donald Trump leaves the political scene—to the contrary, the problem is also deeply rooted in the Democratic party and will survive in both parties *apres* Trump.

I have noted that the types of reform proposals being floated in this symposium and elsewhere are almost totally disconnected from solving this problem, or, if aimed at solving the problem (as in the “get-out-the-vote” and “election integrity” camps) disconnected from the reality of American elections, and hence both a) unlikely to succeed, and b) potential contributors to further breakdown of public confidence.

Finally, I have concluded that the best “reform” we could make in the current circumstances is simply to stop reforming—the Rukeyser approach of “stand there.” But I would go further and suggest a most modest step at rewinding the clock, to a time when Americans had more confidence in elections: We should place renewed emphasis on “election day,” by cutting back or at least discouraging private voting from home (vote by mail and no-excuse absentee voting) and early voting, in favor of in-person voting on the scheduled day of the election.

Restoring confidence must involve a renewed emphasis on voting as civic act of self-governance, in which any one person’s small to infinitesimal contribution to who wins a particular election is less important than how we think about ourselves and the interests, concerns, and rights of our fellow citizens.