

The Perils and Possibilities for a Multiracial 21st Century America

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Below is Professor Atiba R. Ellis's keynote address at the 2023 Midwestern People of Color Legal Scholarship Conference, hosted by the University of Detroit Mercy School of Law.¹ The focus of the 2023 Conference was "Democracy and the Common Good."

Professor Ellis: Good afternoon.

Audience: Good afternoon.

Professor Ellis: All right, now we're the Midwestern People of Color Legal Scholarship Conference. I think we can, in our grand tradition, be in dialogue and be in community with each other. So, in that spirit, I say to you, good afternoon!

Audience: Good afternoon!

Professor Ellis: Friends. Friends, many of you I know, and I've had the joy of meeting others of you this afternoon and over this wonderful conference. Hello, and I want to start by thanking Professor Wilks for his gracious invitation and thanking the University of Detroit Mercy School of Law for its wonderful hosting of this conference. It's a joy in particular to come back together after the long, several years of struggle over the pandemic and having to engage with each other remotely and in some ways—in ways that have fundamentally changed us, and in some ways, I have to stop even at the beginning and say, and recognize and honor and remember some of us who did not make it with us to

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1. This transcript has been minimally edited to correct errors by the automated transcription service and to clarify statements in the transcript. Due to audio issues, some audience questions were not transcribed, and are marked as such. Citations are added to the transcript for purposes of publishing. An interactive transcript with audio is accessible at: https://www.rev.com/transcript-editor/shared/uvYV_vQ8-Klq1ii5RhpAh9wRxSr7E8UbU5TofYuEQpqPB6ddywJU6HJ0s75hPNCztJnzE50CamMzf0owcckjCWaETsM.

be here—but we come together again, renewed and re-enlivened, and on the course to talk about the theme of this conference: is the law capable of protecting the common good?

So, Professor Wilks, when he asked me to do this, he asked me to pick something up on that theme and in some ways it both poses challenges for us, for going forward, and at the same time, creates a big tent, if you will, for the conversations that we have been involved in over the past couple of days. So, the thing that I want to give a few minutes of thoughts on is the theme of democracy and the common good; [and specifically,] the perils and possibilities for a multiracial 21st century America.

Now, my big idea here is that [the law should pursue the] necessary predicates to an ideal American democracy—and I'm going to just stop right there and say the first thought in my head, and maybe in the heads of many of you is, well, that's never existed, Professor Ellis. But I perceive from the premise that we ought to aspire and inspire and conspire to make an American democracy happen, [a democracy] that is equal to all and inclusive of all.

But I chose this as not only a way to talk about the work that I've been doing around voting rights and how the mechanisms of voting have embedded in [them] the politics of worthiness that serve to excuse exclusion. It poses a bigger question, and I'm going to also admit that this is a little bit of an experiment for me because I want to at least, start from a theoretical frame, the ideal, if you will, and then compare that to the reality and think about where we are today and what is possible for tomorrow.

So, to the big idea: [] the necessary predicates to an ideal American democracy, i.e., the mechanisms that protect the common good, are in peril. The basic legal and social structures that have allowed American democracy to evolve into a somewhat functional, multiracial, interracial democracy over the past two centuries, imperfect though that they may be, may fail because of a renewed wave of White racial authoritarianism² and a resurgence of a post-racial colorblindness.³

This has enabled the erosion of the civil rights era's commitment to race conscious inclusion in the political community and the maintenance of fundamental rights. In other words, we stand at the brink of a moment where—and there are those who argue for a Third

2. See Nicholas T. Davis & Steven Miller, *Racism and Authoritarianism Go Hand In Hand*, VOX (July 2, 2018, 12:20 PM), <https://www.vox.com/mischiefs-of-faction/2018/7/2/17524960/racism-authoritarianism-hand-in-hand>.

3. See generally Adia H. Wingfield, *Color Blindness Is Counterproductive*, THE ATLANTIC (Sept. 13, 2015), <https://www.theatlantic.com/politics/archive/2015/09/color-blindness-is-counterproductive/405037/> (describing inequities associated with racial colorblindness).

Reconstruction⁴ and how it is needed, and in a kind of turning on its head of history—it feels as though we have skipped the reconstruction part and come straight to the redemption part again, in a link of conspiracy between the Supreme Court and its enablement of rights disabling and democracy dismantling, especially in terms of a race conscious democracy that is expressed from the days of the Fifteenth Amendment to the Voting Rights Act.⁵ We have seen much of this either dismantled or on the verge, even this term, of being dismantled.

We live in this era where things that we have taken as settled as part of our democracy are now being unsettled to the point that we can stand and watch in real time, on CNN, the attempted overthrow of our government.⁶ Now, I have things to say about this[.] but [this problem posed by the January 6 Insurrection relates to] the theme of threat to the rule of law in the context of the stated purpose in our reconstructed Constitution of having a multiracial democracy.⁷

Now, I know many of you [in the audience], and I know some of your work in particular, and again, I come back to that theme of, “Well, yes Ellis, but that has never really existed here. How are we to think about this?” Well, I realize that part of my purpose as a scholar is oftentimes to speak to the future, to speak to what can be and what should be and to critique today in that light.

So, in that spirit, I want to explore a few ideas. First, the first question is, given the theme of our conference and its mission to ask the question, is law capable of protecting the common good? Then we ought to start from a premise of what is the common good in this context and, especially with my emphasis on voting rights and election law, asking ourselves about the possibilities of democracy, what ought to be the common good? And then proceeding thereafter to talking about America as a flawed democratic republic in the 21st century and outlining some of those structures of democracy distortion that we face in the here and now. But then I want to look towards possibilities for the future. I’ve had the opportunity to give a number of addresses over the course of this past semester.

The opportunity came in part because of my move to Case [Western] and [how the move provided generous amounts of time for

4. See, e.g., *Join Us as We Build the Third Reconstruction*, POOR PEOPLE’S CAMPAIGN, <https://www.poorpeoplescampaign.org/join-us-as-we-build-the-third-reconstruction/> (last visited Oct. 23, 2023); Anthony Michael Kreis, *Clause Essentialism and the Third Reconstruction*, 38 CONST. COMMENT 115 (2023), <https://ssrn.com/abstract=4610335>.

5. U.S. CONST. amend. XV, § 1.

6. Meg Wagner et al., *Congress Finalizes Biden’s Win After Riot Disrupts Capitol*, CNN (Jan. 7, 2021, 5:15 PM), https://www.cnn.com/politics/live-news/congress-electoral-college-vote-count-2021/h_d05427522929cd5a14c876b25d8872c9.

7. U.S. CONST. amend. XIII-XV.

me to] speak. There's also the tragedy of it all, which is the need to talk about this because the unspeakable has been spoken of, the unthinkable has been thought and acted upon, the whole notion of, 'do we have to think about whether there might be another civil war in our lifetime,' has been floated as a serious premise by elected representatives of our government.⁸ So, we stand at a crisis, and I want us to deconstruct it a bit so that we can, at the end of the day, talk about possibilities for a Third Reconstruction.⁹ But the challenge with Third Reconstruction talk is that the flawed premises of the American democratic republic need to be unpacked first and truly dismantled before we can even seriously talk about a Third Reconstruction.

Many of my friends on the left fall into that trap because they want to build on the democratic structure that already exists without deconstructing the ideology that animates that structure. So I'm going to talk a bit about the flaws of institutional design as well as the wave of voter suppression and the dismantling of fundamental rights in the course of saying, this is what we can deconstruct in order to open up a possibility of reconstruction, to truly—in the spirit of Frederick Douglass, let's say—think about an abolition democracy that is inclusive of all of us.¹⁰ To get to that, let's talk about democracy and the common good, and if these pose a couple of questions of what should be. Now, in preparing for this . . . and by the way, the PowerPoint is here, but I'm here and we are in this lovely space and hopefully, even with the PowerPoint, there will then be ample space for questions. So, I'm hoping that these thoughts open a conversation in the spirit of the thing that I am advocating for, a deliberative communal democracy. So, let's talk a little.

Now, according to the political theorists, there are basic questions that we should answer,¹¹ and the first question—and the question that I often pose to my students in whatever class I'm in—is why? Why democracy? As I alluded to at the very beginning of this talk, there is this question of “why democracy?” as if democracy had existed in the United States. The answer to this is—I believe that there is—an opportunity to make good on the language that has framed our

8. See, e.g., Jay Reeves & Julie Carr, *Some in the GOP Parrot Far-Right Talk of a Coming Civil War*, PBS (Jan. 16, 2021), <https://www.pbs.org/newshour/politics/some-in-the-gop-parrot-far-right-talk-of-a-coming-civil-war>.

9. Peniel E. Joseph, *The Perils and Promise of America's Third Reconstruction*, TIME (Sept. 15, 2022, 6:00 AM), <https://time.com/6211887/america-third-reconstruction/>.

10. See *id.*; Frederick Douglass, WHITE HOUSE HIST. ASS'N, <https://www.whitehousehistory.org/frederick-douglass> (last visited Oct. 23, 2023).

11. See, e.g., David Fromkin & Ian Shapiro, *Democratic Ideas From Pericles to Rawls*, BRITANNICA, <https://www.britannica.com/topic/democracy/The-theory-of-democracy> (last visited Oct. 23, 2023).

constitution and our political life. We have a government premised on the Declaration of Independence, which speaks of the consent of the governed, being the legitimating factor for government.¹²

The first words of our Constitution are “We the people.”¹³ We all know that “we” in 1789 did not include basically everyone in this room. But it is a constitution open to amendment, and political theorists like John Dewey¹⁴ and Robert Dahl¹⁵ would say, part of the premise has to be, we have to be able to criticize and we have to be able to demand reform in order for it to be a democracy in the first place. So, the answer to the question, “why democracy?” is the answer of: it is possible to change democracy by asserting accountability to the people. In the course of that, ensuring that the people, the demos, as the political philosophers would say, or the political community, as I might say here, is inclusive of all of us. And so that “who belongs” question becomes the central question of this story. Then, there is a related question of how should government function.

How should it function in order to live out democracy in its original Greek terms: “the people rule”? How should government pick that out? And it’s easy to think back to the days of being in small villages and small homes and thinking that everybody can raise their hand and vote about, “Okay, who’s going to go slay the mastodon today?” In our complicated, large, and diverse country that spans thousands of miles, we have this idea of representative democracy as the invention. And I could spend a whole talk from the textbooks thinking about why representative democracy came into being, but it is this whole notion that we have a structure where the people elect the people who rule, and that representativeness then has its legitimacy through its accountability.

But democracy is more than that because to think of it just in terms of the rules of elections, which I typically do as an election law scholar, is to diminish the idea. Because democracy, as John Dewey put it, is a mode of associated life.¹⁶ We live together in a community when we think about a democracy and that there is a particular kind of community that enables us to collectively seek the common good, hence the connection to our conference. But, in doing so, we associate

12. See DECLARATION OF INDEPENDENCE (U.S. 1776).

13. U.S. CONST. pmb.

14. See *John Dewey and the Reconstruction of American Democracy*, CRF, <https://www.crf-usa.org/bill-of-rights-in-action/bria-24-1-c-john-dewey-and-the-reconstruction-of-american-democracy> (last visited Oct. 23, 2023).

15. See Douglas Martin, *Robert A. Dahl Dies at 98; Yale Scholar Defined Politics and Power*, N.Y. TIMES (Feb. 7, 2014), <https://www.nytimes.com/2014/02/08/us/politics/robert-a-dahl-dies-at-98-defined-politics-and-power.html>.

16. See John Steen, *Dewey on Democracy*, VTDIGGER (Aug. 4, 2019, 6:00 PM), <https://vtdigger.org/2019/08/04/john-steen-dewey-on-democracy/>.

with a set of values. We appreciate individual freedom in order to ascertain self-growth and development, the freedom of association, the freedom to decide what, for each of us, is the good life and how to pursue it. As Dewey might put it, we do so in a spirit of mutual respect and goodwill. Of course, what about when we don't agree on what "the good life" ought to look like?

Of course, the challenge and the sort of basic premise informed by John Locke of our political society, our democratic republic, is that there ought to be majority rule and that the political institutions that we establish and have accountable for us then do the governing, and that those systems are constrained from the risk of majority tyranny by a well-settled and strongly enforced structure of fundamental rights.¹⁷ This is the thing we learned from civics class and the implicit lesson that we teach in law school. Why teach the rule of law if we are not engaged in that premise of protecting fundamental rights? So, this is what enables us as a democracy.

By the way, as law professors sitting in this room, we stand as the bulwarks of that work, which is easy enough to say, but history has proven that inclusion tends to be a contingent value in our society.

Indeed, the flaw of American constitutional design at the beginning is that the design from 1789 and its premises that come before it were all built on the notion that "We the people" only includes a particular segment of property-owning people who are deemed to be qualified to exercise the rights and responsibilities of a democratic republic.¹⁸ Now, this is a story that you all know, but I think it's worth appreciating at this particular moment, at this time of the change of the tide, precisely because we're seeing the rise of this politics of worthiness, and it is playing out in all sorts of facets of our democratic life [***] in ways that range from the typical exclusion to the shocking and astounding open racist assertions of authoritarianism.

Now, this is the threat, but I would argue that these challenges to our democratic order follow a pattern and fit particular streams of attack that are mediated forms of political and social violence. The challenge, then, is how do we overcome that violence in order to find that ideal community? So, first, the violence defined, right? I frame this as the politics of worthiness, the belief that inclusion into the political community must be qualified by some measure of identity or conformity, which is my fancy way of saying that there are a variety of

17. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 98–99 (Peter Lanslett ed., Cambridge Univ. Press 1988) (1690).

18. *See generally* Mark Brower, *What Does the Constitution Say About the Right to Vote?*, DEMOCRACY DOCKET (Feb. 3, 2022), <https://www.democracydocket.com/analysis/what-does-the-constitution-say-about-the-right-to-vote/> (explaining history surrounding the right to vote and subsequent changes following the voting amendments).

measures of worthiness that get deployed by the majority or, in this [increasingly diversifying] society that we live in, by those who hold power to determine who [is] worthy to participate and who [is] not worthy to participate.

I can't go [on] further without saying that the original form of the politics of worthiness is racism—an obvious statement at a conference such as this. But it's worth saying precisely because we face a movement where saying that idea in and of itself has become a dangerous thing. Saying that idea is speech that [certain elected officials] seek to have outlawed, but to preview a little bit of the flaw of the democratic design, when it's the government exercising its power to educate that is deciding what the limit of the curriculum is, the First Amendment concerns become very different than if it were the government telling a private person not to say [the idea]. And within that tension, it looks like the forces of the radical racial authoritarian right have created an avenue to rewrite history, to give the patina of a democracy that is fair and just an open to everyone who fits their particular politics of worthiness.

This exercise through these speech codes¹⁹ that are being sought to be applied in places like Florida²⁰ and Texas²¹ and elsewhere, coupled with the structures of democratic exclusions so that [. . .] these authoritarians become insulated in their political strength, serv[ing] as a mechanism for a silent ongoing re-fighting of the Civil War. In fact, re-fighting the Civil War is the wrong phrase because the Civil War never stopped.²² There was a [military] surrender at Appomattox in 1865,²³ but the ideology has persisted ever since; and like I said, this is the resurgence of that [ideology]. And, in particular, we face a cycle of exclusion and inclusion that continues forward. And we'll talk a little bit about voter fraud as one particular example of that cycle—but to the cycle. Oftentimes this persuasion starts with coded ideological persuasion that forces politics to shift, and office holders who get to hold these things in . . . these decisions about the law get to hold power.

Through their exercise of power, formally and informally, they destabilize the electoral system and the broader democracy system, and

19. *What Are Speech Codes?*, FIRE, <https://www.thefire.org/research-learn/what-are-speech-codes> (last visited Oct. 23, 2023).

20. FLA. STAT. §1004.097 (2018).

21. TEX. EDUC. CODE ANN. §51.9315 (West 2019).

22. Eugene Robinson, *It's No Surprise We're Refighting the Civil War—It Never Really Ended*, WASH. POST (Aug. 24, 2017, 3:59 PM), https://www.washingtonpost.com/opinions/its-no-surprise-were-refighting-the-civil-war—it-never-really-ended/2017/08/24/fd9b2d00-88fe-11e7-a94f-3139abce39f5_story.html.

23. *Appomattox Court House: Lee's Surrender*, AM. BATTLEFIELD TRUST, <https://www.battlefields.org/learn/civil-war/battles/appomattox-court-house> (last visited Oct. 23, 2023).

then, in the course of that, their ideas get embedded and get normalized, and then the laws get more and more strict in order to legitimize exclusion. And in doing that, the authoritarian exclusion gets made real. But then, of course, there is pushback, there is resistance and then, through that same ideological shift, inclusion gets affirmed, but then the idea reemerges. So, we are locked in this cyclical pattern. Now, briefly, because I only have 30 minutes—those of you who know me well, know that 30 minutes is just enough time for me to clear my throat. Let’s just say a few words about voter fraud and a couple of other ideas.

[I]f you look at this particular trilogy of cases—*Crawford v. Marion County*,²⁴ which legitimized voter identification laws; *Shelby County v. Holder*,²⁵ which struck down Section Five of the Voting Rights Act,²⁶ making it inoperative by rewriting the formula by which Section Five can be carried out; and then *Brnovich v. Democratic National Committee*,²⁷ which, out of nowhere, created a set of preconditions for using Section Two of the Voting Rights Act²⁸ to pursue voter suppression—we have the through line of a retelling of the story of race and voter suppression through that post racialist colorblindness lens in order to undo the political settlement of the Voting Rights Act of 1965,²⁹ the moment that America actually became a multiracial democracy on par with other open democracies in the United States.

Put briefly, *Crawford*,³⁰ rather than treating access to the franchise as an issue of fundamental rights and subjecting it to strict scrutiny, like *Harper v. Virginia*,³¹ instead said, let us balance the concerns of the voters with the concerns of the government. Then, it credited the notion of voter fraud. Now, if I had some more time, I would tell you about how voter fraud is merely a stalking horse for this ideology of exclusion because it invents threats and then says, “Oh, we are concerned about the threat of illegitimate voters overwhelming the franchise, and therefore, we have to clamp down the law,” despite the lack of any evidence of those illegitimate voters showing up in the guise of voter impersonation, fraud, or in the guise of voters who innocently might not pay attention to their voter registration—but they did all the things to register, and that ought to be enough.

24. *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008).

25. 570 U.S. 529 (2013).

26. 52 U.S.C. § 10304.

27. 141 S. Ct. 2321 (2021).

28. 52 U.S.C. § 10301(b).

29. *Id.*

30. *See Crawford*, 553 U.S. 181 (2008).

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

Crawford opens this door to voter fraud as a legitimating force.³² Along this, a different line, *Shelby County v. Holder*, tells the story of: “the South has changed,” that there is multiracial democracy enough that Congress has to go do its homework again;³³ its homework in ratifying the Voting Rights Act five different times by Presidents, Republican and Democratic, by near overwhelming, almost unanimous majorities in Congress³⁴—yeah, that work isn’t enough, and we’re just going to ignore that the Constitution says you have the power to implement this. But notice it’s driven by “the South has changed,” and racism, though not gone, is submerged enough that, as Chief Justice Roberts basically told us, you have to go redo your racial calculus.³⁵

And, of course, in a divided house of today, that Bill will never leave the Senate. And then *Brnovich* rewrites the history of the 1982 amendments of the Voting Rights Act by finding all sorts of preconditions, but again saying laws that are neutral on their face and premised on legitimate concerns like fighting voter fraud ought to basically be given a pass under the Voting Rights Act, despite the impact on communities of color.³⁶

Now, there’s a lot more to talk about here, and let’s start with the Tennessee Three³⁷ and this is . . . I was giving a version of this talk at Howard University last week, and I had all my notes together, and I was going to talk about gerrymandering for a while and then, I got the news about the Tennessee Three. These senators do what politicians do: throw a political stunt. Then, in the course of their stunt, get ushered off the floor; and by stunt, I mean the kind of civil rights demonstration that is to call attention to the tragedy of gun violence in this country. But then the brazenness strikes. The two Justins, these young articulate brothers who are representatives from Tennessee, who get expelled from the Tennessee legislature; but the White lady doesn’t.³⁸

You do the math. Notice this open, naked, racist attack on representatives of the people asserting their rights. And notice also the consequences. You’re stripping their voters of their representation, and even certain representatives in Tennessee threatened that their

32. 553 U.S. 181.

33. 570 U.S. 529.

34. *See id.*

35. *See id.*

36. *See Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021).

37. Nadine Yousif et al., *Lawmakers Expelled: What to Know About the ‘Tennessee Three’*, BBC NEWS, <https://www.bbc.com/news/world-us-canada-65182502> (last visited Oct. 23, 2023).

38. Clyde McGrady & Emily Cochrane, *‘The Justins’ Follow a Legacy of Resistance in Tennessee*, N.Y. TIMES (Apr. 17, 2023), <https://www.nytimes.com/2023/04/14/us/justin-pearson-justin-jones-tennessee.html>.

jurisdictions would get stripped of their money if they sent these brothers back to the Tennessee legislature.

Naked and brazen. And moreover, as our late great dear departed brother, Terry Smith pointed out in his book, *Whitelash*,³⁹ given the structure of the Tennessee House, where the state of Tennessee does not have any accountability over and above this legislature, there is no accountability for the House other than the ballot box for this act. In any other context, under law, such an obvious racist employment action would lead to a violation of Title VII.⁴⁰ Now, some of you know better than me that analysis, but it seems that at least on its face, that is what would happen. So, naked, brazen, racist attacks. Now, there is more to do here, and if you're interested, we can talk in the questions about *Merrill v. Milligan* [now *Allen v. Milligan*],⁴¹ but the upshot is this narrative of race neutrality is attacking the underpinnings of the Voting Rights Act,⁴² turning the Voting Rights Act in its race conscious nature into a null point or, as Justice Ketanji Brown Jackson put it in the oral arguments, why are you arguing for race neutrality in a law that was intentionally race conscious?⁴³

The answer that we know they wouldn't say in court, but we know in this room, is because they don't like the race conscious law because they can't take advantage of it. And, put very simply, Black Alabamans are owed a second congressional district, but did not get one under the maps the legislature drew, and as a result, their representation is diminished, and the Alabama legislature wants to get away with it. We can talk about *Moore v. Harper*⁴⁴ and the questions and the partisan gerrymandering there.

More important is the rewriting of the Constitution [by] the Republican Party in North Carolina, which is to say, the time, places, and manners of holding elections are to be prescribed by the legislature.⁴⁵ They want it to mean the legislature solely in absent checks and balances from the state constitution or other branches of the state, or maybe even federal, government. By the way, and not for

39. See TERRY SMITH, *WHITELASH: UNMASKING WHITE GRIEVANCE AT THE BALLOT BOX* (2020).

40. 42 U.S.C. § 2000e-2(a).

41. *Allen v. Milligan*, 599 U.S. 1 (2023).

42. See 52 U.S.C. § 10101.

43. Transcript of Oral Argument at 57-60, *Allen v. Milligan*, 599 U.S. 1 (2023) (J. Jackson asserting that the Equal Protection Clause, Fourteenth Amendment, and Fifteenth Amendment were all adopted with race in mind, so a law's race-consciousness does not inherently violate any of the aforementioned constitutional protections).

44. 143 S. Ct. 2065.

45. Steve Doyle, *What Does 'Manner' Mean? North Carolina Elections Could Change Depending on Supreme Court's Decision*, FOX (Dec. 7, 2022, 9:46 AM), <https://myfox8.com/news/north-carolina/what-does-manner-mean-north-carolina-elections-could-change-depend-on-supreme-courts-decision/>.

nothing, in a state like North Carolina, partisan gerrymandering and racial gerrymandering basically almost track. Who's being attacked here?

So, I just want to get to the last slide here in terms of the possibilities, and let me lift up two in closing. One is the centrality of the right to vote. The upshot of this conversation is that the powers that be are doing everything that they can, just short of turning this into an authoritarian state, in order to maintain power.

They can't take away the actual right to vote.⁴⁶ They can put barriers up for it, but they can't take it away itself unless they just want to be Russia.⁴⁷ Which means there is an opportunity for mobilization and civil rights activism to do the work of reclaiming the democracy or fulfilling the promise of a Third Reconstruction. The other thing is the epistemic and existential crisis.⁴⁸ All these stories, as I've said, are about rewriting our thinking about where the democracy is, if it is at all, and to what extent it embraces racial equality. So, we have to speak about race, we have to speak about these concerns. We have to resist the efforts to rewrite our thinking in order to even open the door to a Third Reconstruction. Thank you.

Speaker 2: So, we've got about 15 minutes to take questions. Just put your hands up if you want, and you can field them, and I'll let you know

46. In other words, in the American context specifically, the core formalistic practice of democratic access to the ballot box likely will not be disturbed in the foreseeable future. Barriers may be erected to frustrate and stymie the exercise of the right, as this talk alluded to, but the appearance of democratic republicanism in the image of "We the People" will likely be maintained by those invested in projecting that image. This kind of preservation through interest convergence—where all sides are invested in the maintenance of the most formalistic mechanisms of access to the ballot—parallels Professor Derrick Bell's arguments around why the maintenance of the perception of democratic legitimacy led to the decision in *Brown v. Board of Education*. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

47. See, e.g., *Russian Elections Once Again Had a Suspiciously Neat Result*, ECONOMIST (Oct. 11, 2021), <https://www.economist.com/graphic-detail/2021/10/11/russian-elections-once-again-had-a-suspiciously-neat-result>.

48. For more on the author's views around the epistemic crisis of American democracy, see, e.g., Atiba R. Ellis, *Race, the Epistemic Crisis of Democracy, and the First Amendment*, KNIGHT FIRST AMEND. INST. (Oct. 12, 2021), <https://knightcolumbia.org/blog/race-the-epistemic-crisis-of-democracy-and-the-first-amendment> (arguing that the "voter fraud" discourse is racially coded and that understanding should force us to reconsider the First Amendment's robust protections of fraud talk); Atiba R. Ellis, *Voter Fraud as an Epistemic Crisis for the Right to Vote*, 71 MERCER L. REV. 757 (2020) (examining the divergent around the crisis in voting rights to suggest that there is a fault in the way participants in the American discourse around voting rights obtain and order knowledge regarding democratic practices, with the effect that how to understand the right to vote becomes a contested issue).

when we're out of time so that we can cut up for the next part, the next final part of the workshop. Thank you.

Professor Ellis: Questions?

Speaker 3: So, I'm interested in your perspective on the efforts to post 2020 election, the efforts to . . . in Georgia in particular, to make voting as difficult as possible, because I am probably way too optimistic, I had an ongoing argument with my family members living in Georgia, that those efforts were just going to make voters who are more determined to get out to the polls and to vote. That okay, you can't provide water within however many feet of the polling place, so someone was going to set up a water stand, that number of feet and one from the polling place. And I'm wondering if you have any thoughts about that, that those possibilities are that vague-

Professor Ellis: So, in a lot of ways, another way to [] encapsulate what I'm saying is that there are levels of frustration that can be mounted. There's the high-level gerrymandering, there's the lower-level sort of aggressive voter purging and the like and then, there's the, 'let's put as many obstacles in your way in order to go vote as possible' level. I think one way to frame that concern is to say, because a lot of these rules, again, are motivated by voter fraud concerns or other kind of election integrity concerns, things like not letting people have water get argued as, it's an inducement to let people come vote. They're getting a benefit by voting, and that sounds like fraud because it reminds us of the Tammany Hall days⁴⁹ where we're paying people off to vote and anything that looks like paying.

So, this fraud idea spirals out of control and thus motivates these things where, like you say, the true motivation seems to be, "Oh, let's make it as difficult as possible for the voters who are likely to vote against us to show up." And notice this kind of stringency is being paid attention to in Atlanta and its suburbs. You're not hearing this saying kind of roiling about in Macon or somewhere more remote and who lives in Atlanta as opposed to the rest of Georgia? Black and Brown people. It's also . . . notice how much work fraud is doing. Fraud is evading the idea of an actual racially explicit barrier, illegal from the 13th Amendment,⁵⁰ but it also repeats the pattern of the kind of *Giles*

49. See generally William "Boss" Tweed and Political Machines, BILL OF RTS. INST., <https://billofrightsinstitute.org/essays/william-boss-tweed-and-political-machines> (last visited Oct. 24, 2023) (summarizing the fraud that occurred at Tammany Hall).

50. U.S. CONST. amend. XIII, § 1.

v. Harris era of 1903 where the court is basically saying, “As long as you don’t say race, you can regulate as stringently as possible.”⁵¹

So, it’s using racial coding⁵² in this sense, but the other thing is about resistance. I would say that part of the story of resistance is all kinds of examples throughout history where folks complied with the rules in order to obtain electoral majorities and then their representatives changed the rules, and part of my point here is that that possibility is still open. It’s more complicated, and the sort of middle of the road left is captured in its own version of ideological blindness, in as much as these conversations kind of get forestalled. Or, as I said at the very beginning of the talk, they’re wanting to build new structures on top of the old foundation without excavating the ideological problems of the old foundation. So, this all becomes an example of finding a third way of some sort, but it also reminds us that the act of voting is in and of itself, an act of resistance. I answered it all? Professor.

Speaker 4: [inaudible 00:39:48]. Are there steps that you think could legitimately be made to lessen the impact of the Supreme Court as it is currently constituted?

Professor Ellis: Yes, there are. Two, one you would expect and one that I imagine you wouldn’t. There’s an advantage that comes from election law federalism, right? Yep, there is a good news story here. For all the Georgias and Floridas and Texasases, there are Washingtons and Californias, and fighting the battle on the state level, and making these issues of state law evades the US Supreme Court. So, the difference between those two groups of states is that the former is doing all these things from banning water being brought to lines to aggressive voter purges to . . . and by the way, talk about an ideological boogeyman through creating and instituting, voter fraud police, like literal election integrity police forces that go out and they found next to no fraud.

The fraud that they have found was specious to begin with,⁵³ versus states where automatic voter registration and same day registration and vote by mail—which is a thing that 45 made a big deal about being per se fraud—actually works, it works well, and the studies prove it out.⁵⁴

51. *Giles v. Harris*, 189 U.S. 475 (1903).

52. Cf. Atiba R. Ellis, “*This Lawsuit Smacks of Racism*”: *Disinformation, Racial Coding, and the 2020 Election*, 82 LA. L. REV. 453 (2022) (detailing the concept of racial coding in the context of the election denial litigation after the 2020 election).

53. Judy Woodruff & Christina Cassidy, *Exhaustive Fact Check Finds Little Evidence of Voter Fraud, But 2020’s ‘Big Lie’ Lives on*, PBS (Dec. 17, 2021, 6:30 PM), <https://www.pbs.org/newshour/show/exhaustive-fact-check-finds-little-evidence-of-voter-fraud-but-2020s-big-lie-lives-on>.

54. Lauren Sforza, *Trump Says Automatic Voter Registration in Pennsylvania Will Harm Him*, THE HILL (Sept. 25, 2023, 10:27 AM), <https://thehill.com/homenews>

Oregon has better voter participation than many states in the country, precisely because they make it easier. So, on all these levels, as my friend Josh Douglass has pointed out,⁵⁵ sometimes this battle needs to be about fighting it state to state. The other thing, of course, as my friend Franita Tolson has pointed out, is that maybe we need to just have a constitutional amendment that takes a lot of this off the Supreme Court's plate.⁵⁶ Of course, the politics of that are far more difficult because you would have to get congressional sign off and two-thirds of the state legislatures to approve,⁵⁷ but there is a way, though it [will] be hard.

Speaker 5: [Inaudible 00:42:37].

Professor Ellis: Well, you took the answer in your question, right? I mean, if the only way to target the Court directly is to pass a court packing plan and to overrule say, *City of Mobile v. Bolden*,⁵⁸ which basically too . . . which would require actually questioning the impact of the *Washington v. Davis*⁵⁹ line of thinking, that the Constitution is not equipped to look at disparate impact because of course, the 15th Amendment is useless because it's constrained to purposeful discrimination, and you need evidence of that either directly on the record or circumstantially.⁶⁰ Not that cases have not been won on that ground. In my world, I always point to *North Carolina NAACP v. McCrory* in 2016, where the Fourth Circuit, not known for its liberalism, said, "Oh, the North Carolina legislature targeted Black voters in North Carolina with 'almost surgical precision' in terms of targeting their disenfranchisement."⁶¹

/campaign/4221525-trump-says-automatic-voter-registration-in-pennsylvania-will-harm-him/; *Donald Trump: The 45th President of the United States*, THE WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/presidents/donald-j-trump/> (last visited Oct. 24, 2023). See generally Kelly Beadle et al., *The Impact of Voting Laws on Youth Turnout and Registration*, CIRCLE (Mar. 17, 2022), <https://circle.tufts.edu/latest-research/impact-voting-laws-youth-turnout-and-registration> (demonstrating recent research on the success of online voter registration, same-day registration, pre-registration, automatic voter registration, and voting by mail).

55. See, e.g., Joshua A. Douglas, *Undue Deference to States in the 2020 Election Litigation*, 30 WM & MARY BILL RTS. J. 59 (2021).

56. Franita Tolson, *Legal Analysis of the Durbin-Warren Right to Vote Amendment* (unpublished manuscript) (July 2020), <https://advancementproject.org/wp-content/uploads/2020/08/Professor-Franita-Tolsons-Legal-Analysis-of-the-Right-to-Vote-Amendment.pdf>.

57. Brenda Erickson, *Amending the U.S. Constitution*, NCLS (Aug. 1, 2017), <https://www.ncsl.org/about-state-legislatures/amending-the-us-constitution>.

58. *Mobile v. Bolden*, 446 U.S. 55 (1980).

59. *Wash. v. Davis*, 426 U.S. 229 (1976).

60. U.S. CONST. amend. XV, § 1.

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

So they found intention, but *McCrorry* is like the exception not the rule. If the 15th amendment got abandoned in the Jim Crow era and then the coffin was nailed even tighter in that 1980 decision, which, by the way, the 1982 amendments to the Voting Rights Act were designed to circumvent.⁶² So in that spirit of talking about constitutional design, the Voting Rights Act can get disabled unless Congress passes a new law or we can pass a constitutional amendment and that narrows the role that the court can play, but if you want zero influence from the court, then put justices to outvote the current six.

Speaker 6: Something that troubled me is a story. I heard on the news that the mayors of a major city, major urban cities . . . were railing against progressive prosecutors . . . [inaudible 00:46:36].

Professor Ellis: So part of this, there seems to be a disjuncture in that, in terms of the folks we would elect who you would think would be supportive of the progressive prosecutor movement actually working against it. But I think in a variety of ways, and this is a challenging thing to say in a room full of people of color in expert scholars, and I will caveat that I am not an expert in criminal procedure. But from a democracy point of view, there seems to be a disjuncture between the accountability and voting for these folks to represent progressive interest and the reality of them. There would, on the basic level, be the notion of anyone who would say that would not get my vote. But I think there's a deeper premise here that I think, as a movement of people of color scholars, we all confront in our work at some point or another.

The disjuncture between alliances, which might be presumed because we have all come up as people of color in America and allies, and the reality of how ideology knows no race in the sense of . . . and in fact, we can start with Clarence Thomas.⁶³ The whole notion of Whiteness is not a racial thing, it's an investment in an ideology; or as I put it the politics of worthiness or a framework of thinking, and that as some of your work has written as well as mine, we all know that the investment in that political power and the willingness to keep it might override other moral and ethical concerns. We ignore conceptions of the common good in the name of trying to seize political power. So, is law capable of protecting the common good? Not when it's corrupted

62. Caroline Sullivan, *Ten Voting Rights Cases That Shaped History*, DEMOCRACY DOCKET (Mar. 22, 2022), <https://www.democracymarket.com/analysis/ten-voting-rights-cases-that-shaped-history/>.

63. Corey Robin, *Clarence Thomas's Radical Vision of Race*, NEW YORKER (Sept. 10, 2019), <https://www.newyorker.com/culture/essay/clarence-thomass-radical-vision-of-race>.

by greed for money (Clarence Thomas) for reelection, the mayors of New York and, well, Chicago, I mean.

That's the other side of the story. Folks figured out who Lori Lightfoot was and voted her out.⁶⁴ I think the ultimate challenge . . . and I see Professor Wilks standing there, so I'm going to wrap up, but let me leave this thought. This ideological construct that I have sought to illustrate today, its ultimate tool—the one that is most invisible to us and thus the most effective—is to force us, to make us think that we ought to disown our own empowerment.

So, in answer to your question, I think the political accountability, especially on the more local level, has to be reasserted. The stakes have to be raised. Stories of voter suppression and gerrymandering and the devaluing of the vote damage our agency, which . . . and I could do a whole other talk about how Frederick Douglass and Martin King and John Lewis all taught us that it is the agency that each of us have to be equals in our democratic republic that ultimately can't be dominated.

They can set obstacles up for it, but it can't be dominated. So, remember that friends, as we go do the work, each in our own way, of reclaiming a Third Reconstruction.

64. Julie Bosman & Mitch Smith, *Mayor Lori Lightfoot of Chicago Loses Her Bid For Re-election*, N.Y. TIMES (Mar. 1, 2023), <https://www.nytimes.com/2023/02/28/us/chicago-mayoral-election-lightfoot-vallas.html>.