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# Echoes of Slavery II: How Slavery’s Legacy Distorts Democracy

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“We are never as steeped in history as when we pretend not to be, but if we stop pretending we may gain in understanding what we lose in false innocence.”

Michel-Rolph Trouillot<sup>1</sup>

## INTRODUCTION

We continue to pay a heavy price for our history in slavery.<sup>2</sup> It is no exaggeration to say that the legacies of slavery determined the

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This is the second in a series of articles exploring the current effects of slavery on our law. The first in the series is *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95 (2010).

<sup>1</sup> MICHEL-ROLPH TROUILLOT, *SILENCING THE PAST: POWER AND THE PRODUCTION OF HISTORY* xix (2015).

outcome of the most recent presidential election. Donald Trump lost the popular vote by 2.8 million votes.<sup>3</sup> As a matter of democracy, and according to the will of the voters, he lost the election. Yet as a matter of constitutional law and state electoral-vote allocations, Trump received a substantial majority of the votes in the electoral college and won the presidency. In addition, millions of otherwise eligible voters were denied the right to vote through calculated voter suppression efforts and felon disenfranchisement.<sup>4</sup> For a few days after the election, there was a brief flicker of interest in the electoral college and its origins in slavery. Now, several months since the election, this interest has waned and there is little reckoning with the reason why we have such undemocratic elections.

Donald Trump won the presidency because of two artifacts of slavery: the electoral college and our post-Reconstruction legacy of state voter suppression and disenfranchisement efforts. The electoral college was created in the Constitution to protect the interests of slave owners.<sup>5</sup> And current voter suppression efforts are a direct legacy of white efforts to prevent blacks from voting after the Fifteenth Amendment prohibited race discrimination in voting.<sup>6</sup>

Our failure to know and appreciate the depth of the legacies of slavery leaves us entirely unprepared to understand why presidential elections come out the way they do. In addition, the lack of historical perspective leads us to accept that certain aspects of elections, like state control over voting qualifications and felon disenfranchisement, are somehow neutral and benign doctrines. State voter-suppression efforts enjoy a surface plausibility they do not deserve.

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<sup>2</sup> These political costs of slavery protection, though substantial, come nowhere near to reflecting the continuing emotional and economic costs to African Americans of slavery and continuing white resistance to acknowledging the effects of slavery and racism.

<sup>3</sup> Judd Legum, *Donald Trump Lost the Popular Vote by 2.8 Million. Most Republicans Are Convinced He Won*, THINKPROGRESS (Dec. 18, 2016, 1:47 PM), <https://thinkprogress.org/donald-trump-lost-the-popular-vote-by-2-8-million-most-republicans-are-convinced-he-won-b0d8d3c0a0b0>.

<sup>4</sup> See *infra* Section II.B.

<sup>5</sup> See Paul Finkelman, *The Proslavery Origins of the Electoral College*, 23 CARDOZO L. REV. 1145, 1155 (2002); Akhil Amar, *The Troubling Reason the Electoral College Exists*, TIME (Nov. 10, 2016, 2:19 PM), <http://time.com/4558510/electoral-college-history-slavery>.

<sup>6</sup> See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE UNCONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 111-12 (2000); J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910*, at 1-6 (1974).

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This Essay describes some of the principal legacies of slavery in our electoral law and their major effects on the most recent presidential election. First, I discuss why the Constitution itself is properly considered a proslavery document. One of the proslavery features of the Constitution is the electoral college, enacted as a way to protect the interests of slave owners. Next, I discuss two aspects of state control over voter qualifications that had a major restrictive impact on the electorate: ostensibly neutral efforts like voter ID laws and felon disenfranchisement laws.

#### I. THE PROSLAVERY CONSTITUTION AND ELECTORAL POLITICS

The United States Constitution was a proslavery document. When I write proslavery, I mean that the Constitution both protected slavery and provided incentives to increase slavery. The proof of its proslavery essence is straightforward. The apportionment clause provides that each state shall have representatives in the House according to the number of free persons and “three fifths of all other persons” that inhabit the state.<sup>7</sup> “Three fifths of all other persons” is a euphemism for slaves. Under this provision, the number of congressional representatives from slave states was increased by the number of persons enslaved. This constitutional arrangement provided extra political representation to protect slavery in the slave states. In addition, the slave import limitation of Article I, Section 9, prohibited Congress from regulating the slave trade until 1808, a twenty-one-year window for additional slave importation.<sup>8</sup> Under these two provisions, slave owners and their elected representatives had a political incentive to increase their number of slaves: more representation in Congress corresponding to more slaves. And the slave import limitation guaranteed their ability to import more slaves for twenty-one years. Therefore, the original, proslavery Constitution provided incentives to own more slaves and protection for the ability to import more slaves.

The Constitution provided additional protections for slave owners. The Fugitive Slave Clause guaranteed the right of slave owners to

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<sup>7</sup> U.S. CONST. art. I, § 2, cl. 3 (“Representatives and direct Taxes shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.”).

<sup>8</sup> *Id.* art. I, § 9, cl. 1 (“The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight . . .”).

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recapture their escaped slaves anywhere in the United States.<sup>9</sup> Article V of the Constitution forbade amending the Constitution to allow Congress to inhibit the slave trade before 1808,<sup>10</sup> one of only three subjects protected from the amendment process in the whole document.<sup>11</sup> Article IV also guarantees federal protection for states against “domestic violence,” a phrase understood at the time to mean slave rebellions.<sup>12</sup>

In addition to the Constitution’s text, we have the words of the Framers themselves. During the constitutional convention, Madison recognized that slavery was the major political fault line between the states:

But [Madison] contended that the States were divided into different interests not by their difference of size, but by other circumstances; the most material of which resulted partly from climate, but principally from (the effects of) their having or not having slaves. These two causes concurred in forming the great division of interests in the U. States. It did not lie between the large & small States: it lay between the Northern & Southern, and if any defensive power were necessary, it ought to be mutually given to these two interests. He was so strongly impressed with this important truth that he had been casting about in his mind for some expedient that would answer the purpose.<sup>13</sup>

Madison also defended the proslavery provisions of the Constitution in the *Federalist Papers*. In *Federalist No. 54*, regarding the apportionment clause, Madison wrote:

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<sup>9</sup> *Id.* art. IV, § 2, cl. 3 (“No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.”).

<sup>10</sup> *See id.* art. V.

<sup>11</sup> *See id.* art. V.

<sup>12</sup> *Id.* art. IV, § 4; *see* ROBERT G. PARKINSON, *THE COMMON CAUSE: CREATING RACE AND NATION IN THE AMERICAN REVOLUTION* 253, 527 (2016); *THE FEDERALIST NO. 43* (James Madison) (“I take no notice of an unhappy species of population abounding in some of the States, who, during the calm of regular government, are sunk below the level of men; but who, in the tempestuous scenes of civil violence, may emerge into the human character, and give a superiority of strength to any party with which they may associate themselves.”).

<sup>13</sup> James Madison, *Proceedings of Convention, June 19–July 13*, in 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 322, 486 (Max Farrand ed., 1911); *see also* *THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES* 194-95 (Gaillard Hunt & James Brown Scott eds., 1920).

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The Federal Constitution, therefore, decides with great propriety on the case of our slaves, when it views them in the mixt character of persons and of property . . . . Let the compromising expedient of the Constitution be mutually adopted, which regards them as inhabitants, but as debased by servitude below the equal level of free inhabitants, which regards the *slave* as divested of two fifth of the *man*.<sup>14</sup>

Madison later defended these slavery protections during the Virginia state ratification convention. On June 17, 1788, responding to George Mason's critique of the Constitution, Madison discusses the slave import limitation and the Fugitive Slave Clause:

I should conceive . . . [the slave import limitation] to be impolitic, if it were one of those things which could be excluded without encountering greater evils. The Southern States would not have entered into the Union of America without the temporary permission of . . . [the slave] trade; and if they were excluded from the Union, the consequences might be dreadful to them and to us . . . . Another clause secures us that property which we now possess. At present, if any slave elopes to any of those states where slaves are free, he becomes emancipated by their laws; for the laws of the states are uncharitable to one another in this respect. But in this Constitution, "no person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor; but shall be delivered up on claim of the party to whom such service or labor shall be due." This clause was expressly inserted, to enable owners of slaves to reclaim them. This is a better security than any that now exists. No power is given to the general government to interpose with respect to the property in slaves now held by the states . . . . Great as the evil is, a dismemberment of the Union would be worse. If those states should disunite from the other states for not indulging them in the temporary continuance of this traffic, they might solicit and obtain aid from foreign powers.<sup>15</sup>

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<sup>14</sup> THE FEDERALIST NO. 54 (James Madison), *reprinted in* THE AMERICAN CONSTITUTION FOR AND AGAINST: THE FEDERALIST AND ANTI-FEDERALIST PAPERS 240-41 (J.R. Pole ed., 1987).

<sup>15</sup> James Madison, Speech at the Virginia Ratifying Convention (June 17, 1788),

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During ratification debates in South Carolina on January 17, 1788, General Charles Cotesworth Pinckney, also a participant in the drafting of the Constitution, expressed his satisfaction with the Constitution's protections for slaveholders:

By this settlement we have secured an unlimited importation of negroes for twenty years. Nor is it declared that the importation shall be then stopped; it may be continued. We have a security that the general government can never emancipate them, for no such authority is granted; and it is admitted, on all hands, that the general government has no powers but what are expressly granted by the Constitution, and that all rights not expressed were reserved by the several states. We have obtained a right to recover our slaves in whatever part of America they may take refuge, which is a right we had not before. In short, considering all circumstances, we have made the best terms for the security of this species of property it was in our power to make. We would have made better if we could; but, on the whole, I do not think them bad.<sup>16</sup>

Pinckney's comments are important because he was one of the most ardent defenders of slavery at the convention. Had the Constitution not protected slavery, the greatest form of wealth in the south, he would never have defended its propriety for South Carolina and other slave states.

While this exposition is necessarily brief, the evidence demonstrates that the Constitution was a proslavery document. In addition, the majority position among modern historians is that the Constitution was proslavery.<sup>17</sup> As written by historian George Van Cleve, the

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*reprinted in* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA 453-54 (Jonathan Elliot ed., 2d ed. 1836).

<sup>16</sup> Charles Cotesworth Pinckney, Speech at the South Carolina Ratifying Convention (Jan. 17, 1788), *as reprinted in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA 286 (Jonathan Elliot ed., 2d ed. 1836).

<sup>17</sup> For contemporary scholarship interpreting the Constitution as proslavery, see RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 333-36 (2009); PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON ix (2d ed. 2001); GEORGE WILLIAM VAN CLEVE, A SLAVEHOLDERS' UNION: SLAVERY, POLITICS, AND THE CONSTITUTION IN THE EARLY AMERICAN REPUBLIC 270 (2010); DAVID WALDSTREICHER, SLAVERY'S CONSTITUTION: FROM REVOLUTION TO RATIFICATION 161-68 (2009); James Oakes, "The Compromising Expedient": Justifying a Proslavery Constitution, 17 CARDOZO L. REV. 2023, 2023-27 (1996); cf. DON E.

Constitution “was pro-slavery in its politics, its economics, and its law.”<sup>18</sup> Unfortunately, and notwithstanding the clear evidence and the consensus among historians, the nature and consequences of the proslavery Constitution remain relatively unknown and understudied.<sup>19</sup>

## II. LEGACIES OF SLAVERY AND THE PRESIDENTIAL ELECTION

### A. *Slavery Protection and the Electoral College*

By now everyone knows the paradoxical, undemocratic result of the 2016 election for president. Despite winning the popular vote by 2.8 million votes, Hillary Clinton lost the election to Donald Trump. Trump won a substantial victory in the electoral college, which was dispositive.<sup>20</sup> In the wake of Clinton’s electoral college defeat, many wondered why we have an electoral college at all. Why does the world’s leading democracy rely on an electoral institution that overrides the results of democracy?

The answer to this question can be found in the proslavery provisions of the Constitution. As described earlier, the “three-fifths of all other persons” phrase in the apportionment clause was intended to give additional representation in Congress to the slave states. The electoral college also was created to protect the political interests of slave owners in presidential elections.

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FEHRENBACHER, *THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT’S RELATIONS TO SLAVERY* 39 (Ward M. McAfee ed., 2001) [hereinafter FEHRENBACHER, *THE SLAVEHOLDING REPUBLIC*] (“[The] view of the Constitution as culpably proslavery . . . has gained wide acceptance in modern historical scholarship.”); Matthew Mason, Book Note, 42 *J. INTERDISC. HIST.* 309, 309 (2011) (reviewing VAN CLEVE, *supra*) (“Van Cleve, along with the majority of current scholars, thus places slavery at the heart of the Founding of the United States, in no instance more so than the Constitution . . .”). Some historians continue to argue that the Constitution was essentially neutral on slavery. See DON E. FEHRENBACHER, *THE DRED SCOTT CASE 26-27* (1978) (arguing that slavery was peripheral to the Constitution); FEHRENBACHER, *THE SLAVEHOLDING REPUBLIC*, *supra*, at 47 (“[T]he Constitution as it came from the hands of the framers dealt only minimally and peripherally with slavery and was essentially open-ended on the subject.”).

<sup>18</sup> VAN CLEVE, *supra* note 17, at 270.

<sup>19</sup> The question of why only a few of my readers know that the Constitution was proslavery, raises interesting questions of epistemology and the ideology of Constitutional Law casebooks. See Juan F. Perea, *Race and Constitutional Law Casebooks: Recognizing the Proslavery Constitution*, 110 *MICH. L. REV.* 1123, 1125 (2012).

<sup>20</sup> While many Clinton supporters hoped for “rogue electors” who would reject their assigned votes for Trump, this very slim possibility never materialized.

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The problem the Framers tried to solve with the electoral college was this: the Northern states had many more qualified, free white male voters than the slave South, since slaves could not vote.<sup>21</sup> This meant that the antislavery North would outvote the South consistently in elections for Congress and the President. The North's greater political power under representative democracy posed an unacceptable threat to slavery. In order to solve this problem, the Framers adopted the "three-fifths" compromise, which increased the number of representatives from the slave states by a number corresponding to three-fifths the number of slaves held. This compromise equalized roughly, at the time of the convention, the political power of the North and South.

In order to solve this problem in presidential elections, the delegates to the constitutional convention created the electoral college. The need to protect the interests of slave owners was a primary objection to having presidential elections directly by the people. On July 19, 1787, James Madison described both the intuitive appeal of direct democracy and the superseding need for slavery protection through an electoral college:

The people at large was in his opinion the fittest in itself. It would be as likely as any that could be devised to produce an Executive Magistrate of distinguished Character . . . . There was one difficulty however of a serious nature attending an immediate choice by the people. The right of suffrage was much more diffusive in the Northern than the Southern states; and the latter could have no influence in the election on the score of the Negroes. The substitution of electors obviated this difficulty and seemed on the whole liable to the fewest objections.<sup>22</sup>

As Madison describes, the problem with direct democracy was that the free voting population in the North was much larger than that of the South, since slaves could not vote. The southern slave states would never agree to a system in which they could be consistently outvoted by northerners, many of whom opposed slavery. The solution was to bolster southern representation in the electoral college as in legislative apportionment.

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<sup>21</sup> See Finkelman, *supra* note 5, at 1155.

<sup>22</sup> James Madison, *Session of Thursday, July 19, 1787*, in THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES, *supra* note 13, at 282, 285-86.



Votes in the electoral college were allocated to states using the same formula as legislative apportionment.<sup>23</sup> Each state's electoral votes incorporated representation based on three-fifths of the number of slaves, therefore boosting the electoral representation of slave states.<sup>24</sup> The only reason we have an electoral college rather than a more direct popular election was the need of slave owners to have additional representation based on their slave ownership. Without this "slave bonus," Southern slave states, with fewer free white voters, would have been outvoted every time, as Madison recognized.<sup>25</sup>

Unlike any other democracy in the world, the United States has presidential elections distorted in the bizarre manner of the electoral college.<sup>26</sup> The magnitude of the distortion of democracy becomes apparent when we consider the consequences of the electoral college. In two out of the last five elections, in 2000 and 2016, the winner of the popular vote lost the election in the electoral college.<sup>27</sup> The electoral college thus repudiated the results of democracy fully forty percent of the time over the last five elections. Other than a military coup, there is no greater distortion possible than reliance on a system that repudiates the results of democracy.

The electoral college system only makes sense when one considers its original purpose in protecting the interests of slave owners. If the electoral college had any rationality beyond the protection of slave owners' property interests, then it would have been reproduced as a reasonable manner of election somewhere. This is particularly true since the United States has long been considered a leading democracy in the world, modelling democracy for other countries.

Yet there is not a single instance of any other democratic government choosing to reproduce the electoral college. Every other form of election in this democracy, for governors, congressmen,

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<sup>23</sup> U.S. CONST. art. I, § 2; *id.* art. II, § 1, cl. 2.

<sup>24</sup> *See id.* (stating that the number of electors is "equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress" thereby incorporating by reference the "three-fifths" clause, used to calculate the number of representatives of a state in Congress).

<sup>25</sup> *Cf.* GARRY WILLS, "NEGRO PRESIDENT": JEFFERSON AND THE SLAVE POWER 75-76 (2005) (discussing how the "slave bonus" helped Thomas Jefferson become president in 1800).

<sup>26</sup> Finkelman, *supra* note 5, at 1146 ("The system seems to be unique in the United States — applying only to the presidential election — and unique to the United States. I know of no western or industrialized democracy that uses such a system.")

<sup>27</sup> Bill Chappell, *Shades of 2000? Clinton Surpasses Trump in Popular Vote Tally*, NPR (Nov. 9, 2016, 7:22 AM), <http://www.npr.org/sections/thetwo-way/2016/11/09/501393501/shades-of-2000-clinton-surpasses-trump-in-popular-vote-tally>.

senators, state representatives, mayors, and other local elections, relies on a democratic process, not the electoral college.<sup>28</sup> If the electoral college was a reasonable manner of election, or even a rational manner of election, then it would be imitated somewhere. The fact that the electoral college does not exist or function anywhere besides presidential elections in the United States is powerful evidence of just how bizarre it is in a nation now free of slavery.

The electoral college results in myriad other distortions of democracy. Because every state is guaranteed at least three electoral votes regardless of size, small states have disproportionately more representation, and therefore more electoral power, than the larger states.<sup>29</sup> For example, sparsely populated Wyoming has the minimum of three electoral votes, each electoral vote corresponding to 177,556 Wyoming citizens.<sup>30</sup> Densely populated California, in contrast, has fifty-five electoral votes, each corresponding to 668,303 California citizens.<sup>31</sup> Wyoming electoral votes have 3.18 times more than the electoral power of the national average, while California electoral votes have only eighty-five percent of the power of the national average.<sup>32</sup> In the last election this meant that voters in populous California had less electoral clout than voters in sparsely populated Wyoming, a nonsensical result. In addition, most states allocate their electoral votes by winner-take-all, rather than by a proportional process, making many votes appear meaningless.<sup>33</sup> Because of our electoral system, candidates concentrate their attention only on a few swing states and essentially ignore the rest of the country.

We live with a bizarre, undemocratic electoral system because we fail to recognize the proslavery origins of the electoral college and we have not amended the Constitution to provide a more rational alternative. Yet there is little or no chance of achieving sufficient consensus to abolish the electoral college, since the party winning the presidency always benefits from the operation of the college.

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<sup>28</sup> Finkelman, *supra* note 5, at 1146; *see, e.g.*, Amar, *supra* note 5 (explaining that no governorship is decided using an electoral college method).

<sup>29</sup> Finkelman, *supra* note 5, at 1145.

<sup>30</sup> *See Population vs. Electoral Votes*, FAIRVOTE (last visited Sept. 27, 2017), [http://www.fairvote.org/population\\_vs\\_electoral\\_votes](http://www.fairvote.org/population_vs_electoral_votes) (follow “2008 Population vs. Electors, State-by-State information” hyperlink).

<sup>31</sup> *See id.*

<sup>32</sup> *Id.*

<sup>33</sup> Devin McCarthy, *How the Electoral College Became Winner-Take-All*, FAIRVOTE (Aug. 21, 2012), <http://www.fairvote.org/how-the-electoral-college-became-winner-take-all>.

Instead of struggling in vain for an amendment, the best option for reform today is the National Popular Vote Interstate Compact.<sup>34</sup> States who join the Compact commit to award their electoral votes to the winner of the popular vote.<sup>35</sup> When the total number of electoral votes committed by states joining the Compact reaches 270 or more, the winning total is awarded to the candidate who wins the popular vote.<sup>36</sup> The Compact guarantees that the winner of the popular vote also wins the electoral college and becomes president. To date, eleven states totaling 165 electoral votes have joined the Compact.<sup>37</sup>

*B. State-Centered Voter Qualification Standards and Voter Suppression*

One of the important aspects of federalism today is our state-centered system of voter qualifications in national elections. Prior to the adoption of the Constitution, each colony was able to set its own voter qualifications.<sup>38</sup> In general, suffrage was limited to property-owning white males.<sup>39</sup> The original Constitution was silent on the right to vote, except to specify that state legislatures would determine the “manner” of selection of electors for the presidency.<sup>40</sup> Accordingly, under the Constitution states retained their original colonial powers to determine the qualifications of voters. While subsequent amendments forbade state discrimination with regard to race, sex, age, and poll taxes,<sup>41</sup> states remained free to decide for themselves all other qualifications for voters.<sup>42</sup> This is why different states are able to define different periods for early voting, require different sorts of voter IDs, and use differing standards for felon disenfranchisement.<sup>43</sup>

Voter qualification standards, however, have been used throughout our history as a way to deny African Americans the right to vote. After

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<sup>34</sup> Mark Joseph Stern, *Yes, We Could Effectively Abolish the Electoral College Soon. But We Probably Won't.*, SLATE (Nov. 10, 2016, 2:14 PM), [http://www.slate.com/blogs/the\\_slatest/2016/11/10/the\\_electoral\\_college\\_could\\_be\\_abolished\\_without\\_an\\_amendment.html](http://www.slate.com/blogs/the_slatest/2016/11/10/the_electoral_college_could_be_abolished_without_an_amendment.html).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*; *Agreement Among the States to Elect the President by National Popular Vote*, NAT'L POPULAR VOTE, <http://www.nationalpopularvote.com/written-explanation> (last visited Sept. 12, 2017).

<sup>38</sup> KEYSSAR, *supra* note 6, at 18.

<sup>39</sup> *Id.* at 8, 56.

<sup>40</sup> *Id.* at 4.

<sup>41</sup> See U.S. CONST. amend. XV, XIX, XXIV, XXVI.

<sup>42</sup> KEYSSAR, *supra* note 6, at 4.

<sup>43</sup> See *id.*

the Fifteenth Amendment prohibited overt race discrimination in voting, southern slave owners and their supporters engaged in a prolonged, violent campaign to suppress voting by the newly freed slaves.<sup>44</sup> Violent suppression of the vote was supplemented by laws designed and enforced to eliminate black voting.<sup>45</sup> White-controlled state legislatures enacted ostensibly race-neutral, yet racially targeted voting qualifications and rules to disqualify African Americans, and, in the Southwest, Mexican Americans. These racially suppressive laws included grandfather clauses, poll taxes, felon disenfranchisement, secret ballots, literacy tests and white primaries.<sup>46</sup> Responding to the continuing intimidation and suppression of African American voters, Congress passed the Voting Rights Act of 1965.<sup>47</sup> Considering the long history of voter suppression laws targeted at people of color, it is remarkable that laws restricting voting continue to have any plausibility.

Our history warrants suspicion and careful scrutiny of such laws. Instead, the Supreme Court has legitimized and encouraged voter suppression in its recent voting rights decisions. In *Crawford v. Marion County Election Board*,<sup>48</sup> the Court decided that Indiana's voter identification law was constitutional, notwithstanding its potential effect in suppressing voters.<sup>49</sup> Only Justice Souter, dissenting, recognized that the law was pretextual and intended to benefit

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<sup>44</sup> See JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 253-55 (7th ed. 1994); NICHOLAS LEMANN, REDEMPTION: THE LAST BATTLE OF THE COLD WAR XI (2007) (describing vigilantism in the South to suppress African American rights); JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 44-45 (2006).

<sup>45</sup> MANZA & UGGEN, *supra* note 44, at 44-45.

<sup>46</sup> *Id.* Though initially upheld, the Supreme Court eventually struck down such voting restrictions, mostly during the second half of the twentieth century. See, e.g., *Katzenbach v. Morgan*, 384 U.S. 641, 658 (1966) (stating Congress has power to regulate and invalidate certain literacy requirements); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966) (declaring poll taxes unconstitutional); *Terry v. Adams*, 345 U.S. 461, 470 (1953) (striking down white primaries); *Guinn v. United States*, 238 U.S. 347, 367-68 (1915) (striking down grandfather clauses).

<sup>47</sup> 52 U.S.C. § 10301 (2018).

<sup>48</sup> 553 U.S. 181 (2008).

<sup>49</sup> Indiana's law required all voters casting a ballot in person to present valid, government-issued photo identification. The state justified the measure as a way to prevent voter fraud. The Court found insufficient evidence of the exact number of voters potentially disenfranchised by the photo ID requirement. According to the lead opinion, on the basis of the record that had been made in this litigation, the Court could not "conclude that the statute imposes excessively burdensome requirements on any class of voters." *Id.* at 202.

Republicans.<sup>50</sup> Ironically, Judge Richard Posner, who authored the appeals court decision upheld in *Crawford*, later admitted that he had made a mistake and acknowledged that voter ID laws are “a type of law now widely regarded as a means of voter suppression rather than of fraud prevention.”<sup>51</sup>

In *Shelby County v. Holder*, the Court invalidated the preclearance provisions of the Voting Rights Act (“VRA”) because, according to the Court, the VRA violated the equal dignity of states.<sup>52</sup> Under the VRA prior to *Shelby*, covered jurisdictions, mostly in the Deep South, had to seek preclearance from the Justice Department before executing laws that adversely affected voter participation.<sup>53</sup>

Newly freed from the preclearance requirement, several states promptly enacted new, restrictive voting requirements.<sup>54</sup> The same day as the Court’s ruling, Texas officials vowed to enforce a strict photo ID requirement.<sup>55</sup> Alabama and Mississippi followed suit.<sup>56</sup> North Carolina enacted one of the nation’s most restrictive laws, reducing the availability of voter registration and early voting.<sup>57</sup>

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<sup>50</sup> See *id.* at 224-25 (Souter, J., dissenting).

<sup>51</sup> RICHARD A. POSNER, REFLECTIONS ON JUDGING 85 (2013); John Schwartz, *Judge in Landmark Case Disavows Support for Voter ID*, N.Y. TIMES (Oct. 15, 2013), <http://www.nytimes.com/2013/10/16/us/politics/judge-in-landmark-case-disavows-support-for-voter-id.html?mcubz=1>. In a subsequent dissent, Posner wrote, “There is only one motivation for imposing burdens on voting that are ostensibly designed to discourage voter-impersonation fraud, if there is no actual danger of such fraud, and that is to discourage voting by persons likely to vote against the party responsible for imposing the burdens.” *Frank v. Walker*, 773 F.3d 783, 796 (7th Cir. 2014) (Posner, J., dissenting).

<sup>52</sup> See *Shelby County v. Holder*, 133 S. Ct. 2612, 2623-24 (2013). According to a recent report, the decision in *Shelby County* has had three major effects: Section 5 no longer blocks or deters discriminatory voting changes, as it did for decades and right up until the Court’s decision; challenging discriminatory laws and practices is now more difficult, expensive, and time-consuming; and the public now lacks critical information about new voting laws that Section 5 once mandated be disclosed prior to implementation. TOMAS LOPEZ, BRENNAN CTR. FOR JUSTICE, *SHELBY COUNTY: ONE YEAR LATER 1* (2014), [http://www.brennancenter.org/sites/default/files/analysis/Shelby\\_County\\_One\\_Year\\_Later.pdf](http://www.brennancenter.org/sites/default/files/analysis/Shelby_County_One_Year_Later.pdf).

<sup>53</sup> See *Shelby County*, 133 S. Ct. at 2619-20.

<sup>54</sup> See Michael Cooper, *After Ruling, States Rush to Enact Voting Laws*, N.Y. TIMES (July 5, 2013), <http://www.nytimes.com/2013/07/06/us/politics/after-Supreme-Court-ruling-states-rush-to-enact-voting-laws.html?mcubz=1> (discussing moves made by state officials of former VRA-affected states to pass new voter ID laws).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> Ari Berman, *North Carolina Passes the Country’s Worst Voter Suppression Law*, NATION (July 26, 2013), <https://www.thenation.com/article/north-carolina-passes-countrys-worst-voter-suppression-law>.

### 1. Ostensibly Neutral Voter Suppression

These voter suppression laws are another legacy of slavery that affected the 2016 election. Republican-controlled legislatures in many states enacted laws that made voting more difficult for persons of color and other presumptively Democratic voters. Since 2010, twenty states enacted restrictive new laws.<sup>58</sup> In fourteen states, more restrictive laws became newly effective during the 2016 election.<sup>59</sup> Wisconsin's voter ID law, for example, suppressed 200,000 votes.<sup>60</sup> The suppression targeted African-American and likely Democratic voters, whose voter turnout was disproportionately reduced.<sup>61</sup> Since Donald Trump won Wisconsin by a bare 22,748 votes, one-tenth of the number of suppressed votes, voter suppression probably determined the outcome in that swing state.<sup>62</sup>

Republicans have attempted to justify these laws by claiming that they are intended to reduce voter fraud and to boost voter confidence in elections.<sup>63</sup> This explanation is pretextual, since there is virtually no in-person voter fraud in United States elections.<sup>64</sup> Evidence demonstrates that the actual intent of these laws was exactly what they accomplished: the suppression of African-American and other likely Democratic voters. As one writer noted, “[t]he passage of voter ID laws is ‘highly partisan, strategic, and racialized.’”<sup>65</sup> And as noted by the federal judge who initially overturned Wisconsin's voter restrictions, “The evidence . . . casts doubt on the notion that voter ID laws foster integrity and confidence. The Wisconsin experience demonstrates that a preoccupation with mostly phantom election fraud leads to real incidents of disenfranchisement, which undermine

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<sup>58</sup> Vanessa Williamson, *Voter Suppression, Not Fraud, Looms Large in U.S. Elections*, BROOKINGS INST. (Nov. 8, 2016), <https://www.brookings.edu/blog/fixgov/2016/11/08/voter-suppression-in-u-s-elections>.

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

<sup>60</sup> Ari Berman, *Wisconsin's Voter-ID Law Suppressed 200,000 Votes in 2016 (Trump Won by 22,748)*, NATION (May 9, 2017), <https://www.thenation.com/article/wisconsins-voter-id-law-suppressed-200000-votes-trump-won-by-23000>. It is important to note that the statistics cited in this source were collected by an agency with ties to the Democratic Party and have not been peer-reviewed, but they are corroborated by data collected by the Government Accountability Office. *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *See id.*

<sup>63</sup> *See, e.g.,* N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 235 (4th Cir. 2016).

<sup>64</sup> Frank v. Walker, 773 F.3d 783, 791 (7th Cir. 2014) (Posner, J., dissenting).

<sup>65</sup> Williamson, *supra* note 58.

rather than enhance confidence in elections, particularly in minority communities.”<sup>66</sup>

According to one writer, North Carolina was “the epicenter of voter suppression efforts during the 2016 campaign.”<sup>67</sup> Prior to the *Shelby County* decision, North Carolina was a covered jurisdiction under the VRA, required to submit legislation affecting voting rights to the Justice Department for preclearance.<sup>68</sup> Days after *Shelby County* eliminated the preclearance requirement, the Republican-controlled legislature considered new, extensive voting restrictions.<sup>69</sup> The legislators requested information on voter behavior by race, and decided to restrict practices that were used most frequently by black voters.<sup>70</sup> Hoping to reduce black voter participation, which had reached historic highs, the legislature voted to require specific voter IDs known to be less available to African Americans, and to reduce early voting, same-day registration, out-of-precinct voting, and preregistration.<sup>71</sup> In July 2016, these extensive voting restrictions were declared unconstitutional because they targeted black voters.<sup>72</sup> Because black voters were targeted “with almost surgical precision,”<sup>73</sup> the court concluded that “because of race, the legislature enacted one of the largest restrictions of the franchise in modern North Carolina history.”<sup>74</sup>

Contrary to the appellate court’s negative appraisal, North Carolina Republicans boasted about the effectiveness of their voter restrictions in suppressing the black vote. According to a Republican press release, “fewer black voters cast early ballots this year than they did in 2012. ‘African American Early Voting is down 8.5 percent from this time in 2012.’”<sup>75</sup> This decline in black voting was the cumulative result of Republican voter suppression efforts.<sup>76</sup>

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<sup>66</sup> *One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 903 (W.D. Wis. 2016).

<sup>67</sup> Max J. Rosenthal, *North Carolina GOP Brags About How Few Black People Were Able to Vote Early*, MOTHER JONES (Nov. 7, 2016, 7:17 PM), <http://www.motherjones.com/politics/2016/11/north-carolina-gop-brags-about-how-few-black-people-were-able-vote-early>.

<sup>68</sup> *McCrary*, 831 F.3d at 215.

<sup>69</sup> *See id.* at 216.

<sup>70</sup> *See id.* at 216-18.

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

<sup>72</sup> *See id.* at 214-15.

<sup>73</sup> *Id.* at 214.

<sup>74</sup> *Id.* at 242.

<sup>75</sup> Rosenthal, *supra* note 67.

<sup>76</sup> *Id.* (“The decline in early voting among black voters is likely a result of yearslong efforts by North Carolina’s Republican officials and political operatives to

Wisconsin and North Carolina are just two of the states that sought to curb voting by African Americans and other likely Democratic voters. Taking the history of attempts to eliminate black voting into account, we can understand that even ostensibly neutral laws like voter ID requirements are merely present-day attempts to suppress black voters and democrats. The Supreme Court's decisions finding such requirements constitutional deny history and condone these attempts to curb black voting. If the Court took the history of racially discriminatory voter suppression seriously, it would be impossible to condone these restrictions by accepting pretextual state interests in eliminating non-existent fraud or bolstering the credibility of elections.

## 2. Felon Disenfranchisement

Alone among major world democracies, the United States allows millions of criminal convicts to be barred from voting.<sup>77</sup> Felon disenfranchisement played a large role in the 2016 presidential election. Over *six million* otherwise eligible voters were unable to vote because of felony convictions.<sup>78</sup> In Florida, for example, fully twenty-one percent of the African American voting population was disenfranchised because of a felony conviction.<sup>79</sup> There is little doubt that Hillary Clinton would have won Florida outright if felons had not been disenfranchised.<sup>80</sup> The very close outcomes in important swing states also might have been different but for felon disenfranchisement: in Michigan, the number of disenfranchised felons, 44,221, far exceeded Trump's margin of victory, 10,704; in Wisconsin, the number of felons disenfranchised, 65,606, was much larger than Trump's margin of victory, 22,748; and in Pennsylvania, the number of disenfranchised felons, 52,974, was larger than Trump's margin of

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impose voting restrictions in the state. Emails obtained last week by Reuters showed that Republican officials pushed successfully to restrict early voting sites and cut down on early voting on Sundays, when many black churches hold 'Souls to the Polls' mass voting drives.").

<sup>77</sup> ERIN KELLEY, BRENNAN CTR. FOR JUSTICE, RACISM & FELONY DISENFRANCHISEMENT: AN INTERTWINED HISTORY 1 & 4 n.1 (2017), [https://www.brennancenter.org/sites/default/files/publications/Disenfranchisement\\_History.pdf](https://www.brennancenter.org/sites/default/files/publications/Disenfranchisement_History.pdf); MANZA & UGGEN, *supra* note 44, at 41.

<sup>78</sup> CHRISTOPHER UGGEN ET AL., THE SENTENCING PROJECT, 6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT, 2016, at 3 (2016), <http://www.sentencingproject.org/wp-content/uploads/2016/10/6-Million-Lost-Voters.pdf>.

<sup>79</sup> *Id.*

<sup>80</sup> This assumes that felons would have voted in roughly the same proportions as their voting-eligible counterparts.



victory, 44,292.<sup>81</sup> According to one estimate, 68.9% of disenfranchised felons would have a preference for democrats.<sup>82</sup> Depending on turnout, felon disenfranchisement probably made a significant difference in the 2016 election.

As with other restrictions on voting, felon disenfranchisement came into wide use to suppress the votes of newly enfranchised African American voters after Reconstruction.<sup>83</sup> Even though the Thirteenth Amendment formally abolished slavery, the Amendment contains an exception allowing involuntary servitude “as a punishment for crime whereof the party shall have been duly convicted.”<sup>84</sup> Recalcitrant Southern former slave owners were determined to re-establish white rule and to deny their recent ex-slaves the right to vote by all means necessary, including violence.<sup>85</sup>

Since the Fifteenth Amendment prohibited direct race discrimination in voting, southern whites acted by proxy, shaping criminal law in such a way that disenfranchised newly freed blacks.<sup>86</sup> First, “black codes” were enacted that “criminalize[ed] black life.”<sup>87</sup> This included criminalizing activities that whites thought blacks were more apt to engage in.<sup>88</sup> Thus, southern states disenfranchised any person found to be “a landless laborer, a vagrant, or a farmer who

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<sup>81</sup> UGGEN ET AL., *supra* note 78, at 15 (depicting the data for felon disenfranchisement); *Presidential Election Results 2016*, CNN, <http://edition.cnn.com/election/results/president> (last visited Sept. 27, 2017) (depicting data of Trump’s margin of victory over Clinton).

<sup>82</sup> See MANZA & UGGEN, *supra* note 44, at 190-92.

<sup>83</sup> See *id.* at 43.

<sup>84</sup> U.S. CONST. amend. XIII, § 1.

<sup>85</sup> See DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II*, at 53 (2008) (“The attitudes among southern whites that a resubjugation of African Americans was an acceptable — even essential — element of solving the ‘Negro question’ couldn’t have been more explicit.”); see MANZA & UGGEN, *supra* note 44, at 56-57.

<sup>86</sup> See, e.g., *Hunter v. Underwood*, 471 U.S. 222, 299 (1985) (“[T]he Alabama Constitutional Convention of 1901 was part of a movement that swept the post-Reconstruction South to disenfranchise blacks.”).

<sup>87</sup> BLACKMON, *supra* note 85, at 53 (“[E]very southern state enacted an array of interlocking laws essentially intended to criminalize black life . . . . Few laws specifically enunciated their applicability only to blacks, but it was widely understood that these provisions would rarely if ever be enforced on whites.”); see PIPPA HOLLOWAY, *LIVING IN INFAMY: FELON DISENFRANCHISEMENT AND THE HISTORY OF AMERICAN CITIZENSHIP* 52 (2014) (“In this critical period when black southerners gained U.S. citizenship and secured their voting rights, white southern political leaders pushed back, hoping to deny this population both citizenship and political power . . .”).

<sup>88</sup> MANZA & UGGEN, *supra* note 44, at 43.

allowed his animals to graze on common lands.”<sup>89</sup> States also disenfranchised blacks who were jobless, who used “insulting gestures or language,” or who “preach[ed] the Gospel without a license.”<sup>90</sup>

Second, white legislators reclassified former misdemeanors, such as petty theft and other minor offenses, as felonies, keeping former slaves imprisoned longer and simultaneously disenfranchising them.<sup>91</sup> One historian commented on the “region-wide pattern of expanded punishment for petty theft that was identified at the time as intended to disfranchise African Americans.”<sup>92</sup>

These techniques yielded double benefits to former slave owners, as they perceived it. First, their imprisoned former slaves could be leased out profitably to plantation owners, thus guaranteeing a captive work force to labor in the fields and toil in the mines.<sup>93</sup> Second, their former slaves would be disenfranchised as felons, practically guaranteeing that they could never have voting power again.<sup>94</sup>

The evidence shows that the intention of these disenfranchisement laws was to eliminate black voting and bolster white supremacy. In 1896, the Mississippi Supreme Court approved of the state’s felon disenfranchisement scheme, which punished nonviolent offenses committed by blacks, but preserved the voting rights of whites convicted of violent crimes like rape and murder:

The convention swept the circle of expedients to obstruct the exercise of the franchise by the negro race. By reason of its previous condition of servitude and dependence, this race had acquired or accentuated certain peculiarities of habit, of temperament and of character, which clearly distinguished it, as a race, from that of the whites — a patient docile people, but careless, landless, and migratory within narrow limits, without forethought, and its criminal members given rather to furtive offenses than to the robust crimes of the whites. Restrained by the federal constitution from discriminating against the negro race, the convention discriminated against its

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<sup>89</sup> ELIZABETH A. HULL, *THE DISENFRANCHISEMENT OF EX-FELONS* 20 (2006).

<sup>90</sup> *Id.*; see also ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877*, at 253-61, 323-24 (1988).

<sup>91</sup> HOLLOWAY, *supra* note 87, at 56.

<sup>92</sup> HOLLOWAY, *supra* note 87, at 57.

<sup>93</sup> See, e.g., BLACKMON, *supra* note 85, at 54-57.

<sup>94</sup> See *id.*

characteristics and the offenses to which its weaker members were prone.<sup>95</sup>

During its constitutional convention in 1901, Alabama added to the offenses yielding disenfranchisement. The convention began disenfranchising felons for “crimes of moral turpitude,” including vagrancy and living in adultery, crimes assumed to be more commonly committed by blacks.<sup>96</sup>

In *Hunter v. Underwood*, the Supreme Court struck down Alabama’s felony disenfranchisement provision because it was intended to be racially discriminatory:

The delegates to the all-white convention were not secretive about their purpose. John B. Knox, president of the convention, stated in his opening address: “And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State.”<sup>97</sup>

Although the Court responded appropriately to the evidence of outright racial discrimination in *Hunter v. Underwood*, as a general proposition the Court has approved of a wide array of ostensibly neutral reasons that states may use as reasons for disenfranchisement.<sup>98</sup> This means that where there is little or no direct evidence of racial discrimination, it will likely be difficult to challenge felon disenfranchisement laws. Indeed, Alabama recently re-enacted disenfranchisement for felonies involving “moral turpitude,” this time

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<sup>95</sup> *Ratliff v. Beale*, 20 So. 865, 868 (Miss. 1896); MANZA & UGGEN, *supra* note 44, at 42.

<sup>96</sup> MANZA & UGGEN, *supra* note 44, at 58; *see Hunter v. Underwood*, 471 U.S. 222, 226 (1985).

<sup>97</sup> *Hunter*, 471 U.S. at 229 (quoting 1 OFFICIAL PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA, MAY 21ST, 1901 TO SEPTEMBER 3RD, 1901, at 8 (1940)).

<sup>98</sup> *See Richardson v. Ramirez*, 418 U.S. 24, 53 (1974) (“Although the Court has never given plenary consideration to the precise question of whether a State may constitutionally exclude some or all convicted felons from the franchise, we have indicated approval of such exclusions on a number of occasions. In two cases decided toward the end of the last century, the Court approved exclusions of bigamists and polygamists from the franchise under territorial laws of Utah and Idaho. Much more recently we have strongly suggested in dicta that exclusion of convicted felons from the franchise violates no constitutional provision. In *Lassiter v. Northampton County Board of Elections* . . . the Court said, ‘Residence requirements, age, previous criminal record are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters.’” (citations omitted)).

avoiding overt discussions of race while accomplishing exactly the same discriminatory result.<sup>99</sup>

While felon disenfranchisement may seem intuitively reasonable, it becomes much less so when one examines some of the actual felonies that result in disenfranchisement. Felonies include the serious crimes that immediately come to mind, like violent crimes. Violent crimes, however, constituted only nineteen percent of felony convictions in state courts in 2002.<sup>100</sup> Drug trafficking and drug possession together constituted thirty-one percent of felony convictions.<sup>101</sup> In certain states, some remarkably minor crimes are classified as felonies, rather than misdemeanors, also leading to disenfranchisement. In Maryland, for example, “relatively innocuous [offenses] such as passing bad checks, using fake IDs, and possessing fireworks without a license” can result in disenfranchisement.<sup>102</sup> In Alabama, a conviction for vagrancy will result in the loss of voting rights.<sup>103</sup>

Felon disenfranchisement, which expanded after Reconstruction to eliminate black voting, today operates in much the same way. Six million otherwise eligible voters were denied the vote in the 2016 presidential election because they were deemed felons.<sup>104</sup> Given the disparate enforcement of criminal law against communities of color and the expansion of crimes deemed felonies, it is no surprise that felon disenfranchisement has a disproportionate disqualifying effect on communities of color. The racially discriminatory character of felon disenfranchisement laws is also made evident by the examples of Vermont and Maine. Neither of these states disenfranchises felons.<sup>105</sup> Indeed, felons in these states can even vote from their prison cells.<sup>106</sup> The population of both states is overwhelmingly white, over ninety

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<sup>99</sup> See Kira Lerner, *Alabama Governor Signs Law Giving Thousands of Felons Their Right to Vote Back*, THINKPROGRESS (May 24, 2017, 5:29 PM), <https://thinkprogress.org/alabama-voting-restoration-86d82cc1c2d0>. More recently, the governor signed legislation clarifying the definition of “moral turpitude” which restored voting rights to some felons. “*Definition of Moral Turpitude Act*” (HB 282), ACLU ALABAMA, <https://www.aclualabama.org/en/legislation/definition-moral-turpitude-act-hb-282> (last visited Jan. 26, 2018).

<sup>100</sup> MANZA & UGGEN, *supra* note 44, at 70.

<sup>101</sup> *Id.*

<sup>102</sup> HULL, *supra* note 89, at 5.

<sup>103</sup> *Id.*

<sup>104</sup> UGGEN ET AL., *supra* note 78; Annie Gurvis, *Six Million Americans Are Not Allowed to Vote*, URB. INST. (Oct. 3, 2016), <http://www.urban.org/2016-analysis/six-million-americans-are-not-allowed-vote>.

<sup>105</sup> Vann R. Newkirk II, *Polls for Prisons*, ATLANTIC (Mar. 9, 2016), <https://www.theatlantic.com/politics/archive/2016/03/inmates-voting-primary/473016>.

<sup>106</sup> HULL, *supra* note 89, at 6.

percent white.<sup>107</sup> Felon disenfranchisement in those states would disqualify white people, which may explain why they eschew disenfranchisement altogether. In a democracy we should be highly suspicious of laws whose current functioning excludes people of color nearly as effectively as their more overtly racist forebears intended.

#### CONCLUSION: WHY THIS HISTORY MATTERS NOW

Protections for slavery and for white supremacy determined the outcome of the most recent election. Hillary Clinton lost the election only because we cling to the bizarre electoral college, created simply to bolster the political power of slave owners. And the continued acceptance of state voter suppression laws, including felon disenfranchisement, artificially disqualified millions of otherwise eligible voters, and discouraged many thousands of others from any participation.

So why does it make a difference to know the proslavery and white supremacist origins of the electoral college and voter suppression efforts? First, we can understand that we have a bizarre electoral process because of the Framers' desire to protect slave owners in their slave ownership. These are the real, evidence-based origins of the electoral college. If the reason for the college was unclear before, now it makes sense. We can understand that the world we inhabit continues to be shaped in important ways by slavery and its aftermath. The continuing legacies of slavery need to be explored further to improve our understanding of our society. This clarity of understanding is important for its own sake.

But this is not just an idle venture into history — this history is dismayingly relevant, since the legacies of slavery continue to have grave consequences for our society. Few things are more important in a democracy than the election of a President and the consequences of that election, such as the appointments of Supreme Court justices and decisions to make or avoid war. We must recognize the proslavery origins of our electoral politics to understand why change is necessary. Once we understand this, then we can begin imagining different ways of doing things that get us beyond the legacies of slavery. Clarity of understanding leads to clarity of diagnosis. Clarity of diagnosis enables meaningful strategies for change.

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<sup>107</sup> Newkirk, *supra* note 105; *Population Distribution by Race/Ethnicity*, KAISER FAM. FOUND. (2016), <https://www.kff.org/other/state-indicator/distribution-by-raceethnicity/?currentTimeframe=0&sortModel=%7B%22collId%22:%22Location%22,%22sort%22:%22asc%22%7D>.

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So what can be done once we have understanding? The problem posed is an interesting one. To what extent should rules adopted to protect slavery and slave owners, and later to prevent newly freed slaves from political participation, continue to affect our national elections? Many of us would answer “not at all.” Yet when we consider possible responses to this history, there are interesting political dynamics that come into play that make change difficult.

First, consider the electoral college. We should amend the Constitution to eliminate the electoral college. Interestingly, though, there appears to be little sustained interest in that possibility.<sup>108</sup> Even if interest were sustained, it is hard to imagine reaching sufficient national consensus to achieve an amendment. Whichever party wins the election will have benefitted from the college and will therefore be loath to change it. This happened in the most recent election, with Republicans singing retroactively the praises of the electoral college. The most plausible alternative today is the National Popular Vote Interstate Compact, which, if adopted by enough states, would award the winning margin of 270 electoral votes to the winner of the popular vote.<sup>109</sup> Alternatively, more states could choose to award their electoral votes proportionately, rather than winner-take-all. To date, only two states, Nebraska and Maine, have chosen to award their electoral votes proportionately.<sup>110</sup>

Another avenue for reform is to reduce state discretion in defining voter qualifications. At present, states can define their own voter qualifications as long as they comply with constitutional amendments abolishing race, sex, and age discrimination. Notwithstanding the *Shelby County* decision, much of the Voting Rights Act remains constitutional as an enforcement of the Fifteenth Amendment, which

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<sup>108</sup> Attention to the college disappeared quickly, just as it did when Al Gore won the popular vote but lost the election in the electoral college. See Mario Trujillo, *After Bush v. Gore, Obama, Clinton Wanted Electoral College Scrapped*, HILL (Oct. 27, 2012, 10:00 AM), <http://thehill.com/homenews/campaign/264347-obama-clinton-backed-reforms-to-electoral-college-after-bush-v-gore> (“The outcome triggered an intense — if shortlived — debate over reforming the Electoral College.”).

<sup>109</sup> Stern, *supra* note 34 (“The NPVIC is a proposed agreement among the states and the District of Columbia to render the Electoral College obsolete by ensuring that the winner of the popular vote also wins a majority of electoral votes . . . . If a state passes the NPVIC, it vows to assign its electors to whichever candidate wins the national popular vote — but only once enough states have joined the NPVIC to guarantee that candidate 270 electoral votes.”).

<sup>110</sup> See *Maine & Nebraska*, FAIRVOTE, [http://www.fairvote.org/maine\\_nebraska](http://www.fairvote.org/maine_nebraska) (last visited Sept. 24, 2017).

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prohibits race discrimination in voting.<sup>111</sup> Recognizing the proslavery and racist origins of much state law defining voter qualifications, there is a strong basis for further regulation under the Fifteenth Amendment.

Lastly, there could be an important role for judicial review in dealing with these vestiges of slavery. Given the demonstrable history of racism with regard to state voter-qualifications law, the courts should be extremely skeptical of any voter qualifications that reduce access to voting. A democracy should protect, encourage, and facilitate voting, rather than facilitate the denial of access to voting. Unfortunately, recent Supreme Court decisions like *Crawford* and *Shelby County* offer little hope that the current Court has any interest in protecting minority voting rights.

So we come full circle. I began with the proposition that “we are never as steeped in history as when we pretend not to be.”<sup>112</sup> We pretend that our Constitution is sound, and that the electoral college and mostly unregulated, state-created voter qualifications are natural features of our legal environment. But now we can know this is false: large electoral consequences result from our history of slavery. These vestiges of slavery cost us — black, white, Latino, other people of color, and people of good will — dearly.

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<sup>111</sup> See *Shelby County v. Holder*, 133 S. Ct. 2612, 2631 (2013) (“Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2. We issue no holding on § 5 itself, only on the coverage formula.”).

<sup>112</sup> TROUILLOT, *supra* note 1, at xxiii.