

# Foreword: Marching to Freedom

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*Theodore R. Johnson\**

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On the Ides of March, 1965, President Lyndon B. Johnson informed Congress and the country that it was time to address the nation’s open wound.<sup>1</sup> Eight days earlier, on a Sunday in Selma, Alabama, hundreds of civil rights marchers protested the state’s unconstitutional voting laws and a recent police killing of a young Black man.<sup>2</sup> As the marchers crossed the river’s bridge, the sheriff, state troopers, and a force of deputized white residents met them with batons, bullwhips, and tear gas.<sup>3</sup> A woman, Amelia, was struck twice by a policeman, knocking her unconscious.<sup>4</sup> A young preacher’s skull was fractured.<sup>5</sup> The wound that President Johnson was referring to was obvious because it was freshest.

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<sup>1</sup> See Lyndon B. Johnson, *We Shall Overcome* (Mar. 15, 1965).

<sup>2</sup> See generally ROBERT A. PRATT, *SELMA’S BLOODY SUNDAY: PROTEST, VOTING RIGHTS, AND THE STRUGGLE FOR RACIAL EQUALITY* (2017) (describing the events that led to Bloody Sunday).

<sup>3</sup> See *id.* at 1-2, 59-64; Athena Jones, *Selma 50 Years Later: John Lewis’s Memories of the March*, CNN, <https://www.cnn.com/2015/03/06/politics/selma-50-years-john-lewis-bridge-anniversary/index.html> [<https://perma.cc/G6ZP-CXKK>] (last updated Mar. 6, 2015, 7:41 PM).

<sup>4</sup> PRATT, *supra* note 2, at 64.

<sup>5</sup> See Billy R. Glasco, Jr., *Selma: The Marches That Changed America*, NAT’L ARCHIVES (Nov. 5, 2020), <https://rediscovering-black-history.blogs.archives.gov/2020/11/05/selma-the-marches-that-changed-america/> [<https://perma.cc/6RAN-6K42>].

“Bloody Sunday” was front-page news everywhere.<sup>6</sup> It was the month’s first attempt to march from Selma to the State Capitol in Montgomery. Two more marches followed, each of them protesting the denial of Black Americans’ constitutional rights to equal protection under the law and voting free of racial discrimination.<sup>7</sup> The second attempt—“Turnaround Tuesday”—took place two days later.<sup>8</sup> Reverend Martin Luther King, Jr. ushered protesters to the foot of the same bridge where police unleashed the state’s violence.<sup>9</sup> After the marchers all knelt in prayer, he turned the group around and led them back toward home, in accordance with the government’s direction and in hopes of avoiding another dangerous confrontation.<sup>10</sup> That night, a group of white men attacked three men who’d made the march.<sup>11</sup> One of them, James Reeb, a minister from Boston, was beaten so severely that he fell into a coma and died days later.<sup>12</sup> These shameful spectacles compelled the president to make his own march to Congress and demand action on a bill to extend the franchise.<sup>13</sup> Voting rights took center stage in a country already on edge.

The third march, ten days after Johnson’s remarks to Congress, was successful. Interventions from the federal government and the courts and television’s watchful eye made the five-day and fifty-four-mile walk from Selma to Montgomery possible.<sup>14</sup> Encampments along the highway served as overnight lodging.<sup>15</sup> To keep the mass manageable, marchers switched in and out.<sup>16</sup> Once they all reached Alabama’s State Capitol, King delivered an epochal address titled “How Long? Not Long.”<sup>17</sup> Afterwards, the marchers petitioned the absent governor by way of his secretary and dispersed.<sup>18</sup> That night, the Ku Klux Klan shot and killed a white mother from Michigan who

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<sup>6</sup> See Omar Wasow, *Agenda Seeding: How 1960s Black Protests Moved Elites, Public Opinion and Voting*, 114 AM. POL. SCI. REV. 638, 638-59 (2020).

<sup>7</sup> See *Selma Marches*, NAT’L ARCHIVES, <https://www.archives.gov/research/african-americans/vote/selma-marches> [<https://perma.cc/98SR-PDDR>] (last updated Dec. 11, 2023).

<sup>8</sup> See *id.*

<sup>9</sup> See *id.*

<sup>10</sup> See PRATT, *supra* note 2, at 73-74.

<sup>11</sup> See *id.* at 74-75.

<sup>12</sup> See Jorge Ribas, *James Reeb Died in Selma 50 Years Ago Today. He Should Be Remembered For How He Lived*, WASH. POST (Mar. 11, 2015, 6:00 AM), <https://www.washingtonpost.com/news/inspired-life/wp/2015/03/11/james-reeb-died-in-selma-50-years-ago-today-he-should-be-remembered-for-how-he-lived/>.

<sup>13</sup> See Colleen Shogan, “*We Shall Overcome*”: Lyndon Johnson and the 1965 Voting Rights Act, WHITE HOUSE HIST. ASS’N (Apr. 8, 2021), <https://www.whitehousehistory.org/we-shall-overcome-lbj-voting-rights> [<https://perma.cc/49RM-QPLK>].

<sup>14</sup> See Roy Reed, *The Big Parade: On the Road to Montgomery*, N.Y. TIMES (Mar. 22, 1965), <https://archive.nytimes.com/www.nytimes.com/learning/general/onthisday/big/0321.html> [<https://perma.cc/P6HH-LJLC>].

<sup>15</sup> See PRATT, *supra* note 2, at 90.

<sup>16</sup> See *id.* at 89.

<sup>17</sup> See *id.* at 95-97.

<sup>18</sup> See *id.* at 97.

was in town helping marchers get around.<sup>19</sup> It was a reminder that the march toward justice is often met with violence, and that the struggle for voting rights is perpetual. “Freedom is never really won,” Corretta Scott King once warned, “you earn it and win it in every generation.”<sup>20</sup>

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The many marches of 1965 forever changed the country. They capture the central dilemma of the United States’ democracy: Who can participate in it? We are a country whose founding document states that government derives its power “from the consent of the governed.”<sup>21</sup> For democracies, voting is how the people most often provide it. As such, the franchise is how we ensure better governance and the means by which we can better access the country’s rights and privileges. Inclusion in the franchise is a sign of belonging. And to those whose participation is outlawed or refused, it is a sign that they do not belong. To understand America at any point in its life, examine who it disenfranchises.

Amid it all, two of the decade’s most consequential people—President Johnson and Reverend King—delivered historic civil rights speeches that defined the problem and the imperative.<sup>22</sup> These were civic sermons, speaking as much to our national identity and purpose as to our rights and laws. They argued that access to the ballot is more than a technocratic debate about election administration and participation. Access defines the *demos*, who the people are. Johnson and King held a mirror up to the country to reveal its shortcomings, both moral and legislative, cultural and political.

Their sermons were based on civic psalms. President Johnson’s address to a joint session of Congress is popularly known as “We Shall Overcome,”<sup>23</sup> the title of a gospel song that became an anthem of the civil rights movement.<sup>24</sup> He placed the phrase at the heart of his speech,<sup>25</sup> legitimizing the claims that civil rights activists made on government and society. At the Alabama State Capitol, King sought to encourage a weary and increasingly impatient people, concluding his remarks with the “Battle Hymn of the Republic.”<sup>26</sup> This ballad was originally adapted from a military marching song during the

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<sup>19</sup> See *Viola Liuzzo: Selma To Montgomery National Historic Trail*, NAT’L PARK SERV., <https://www.nps.gov/people/viola-liuzzo.htm> [<https://perma.cc/HZW6-JDYT>] (last updated Aug. 29, 2023).

<sup>20</sup> 152 CONG. REC. 637 (2006) (statement of Rep. Jackson-Lee).

<sup>21</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>22</sup> See Johnson, *supra* note 1; Martin Luther King, Jr., *Our God is Marching On!* (Mar. 25, 1965).

<sup>23</sup> See Johnson, *supra* note 1.

<sup>24</sup> See Noah Adams, *The Inspiring Force of ‘We Shall Overcome,’* NPR (Aug. 28, 2013, 6:19 PM), <https://www.npr.org/2013/08/28/216482943/the-inspiring-force-of-we-shall-overcome> [<https://perma.cc/6TZC-2XWD>] (tracing the history of the song “We Shall Overcome”).

<sup>25</sup> Johnson, *supra* note 1.

<sup>26</sup> King, *supra* note 22.

Civil War by an abolitionist who sought to consecrate emancipation and a Union victory.<sup>27</sup> King used the hymn to connect voting rights to destiny and providence.

Two years after the men's speeches helped reshape the country, sociologist Robert Bellah called attention to the religious iconography in American civic life. He termed it civil religion, which is "expressed in a set of beliefs, symbols, and rituals."<sup>28</sup> Distinct from sectarian monotheistic religions and not at all theocratic, civil religion employs similar liturgies in service of civic virtue.<sup>29</sup> Political ideas like equality, liberty, and democracy are grounded in the retellings of national blessings and ordinations. Philip Gorski, a Yale University professor of sociology and religious studies, argues civil religion connects past and future, marries sacred and secular, and "embeds our values and commitments within particular stories of civic greatness—and collective failure."<sup>30</sup> He suggests its four elements are narrative, pantheon, canon, and archive.<sup>31</sup> Johnson and King are members of the pantheon, certainly on civil rights; their speeches from March of 1965 are canon and narrative, essential texts on voting rights that interpret the past and envision a better tomorrow.

In this way, their addresses—delivered from vastly different vantages and to largely different audiences—reframed the political debate over federal voting rights protections and the social question of racial equality. They were moral arguments that political action was necessary and social change was imminent. In the process, the nation's mood shifted and provided cover for bold congressional action.<sup>32</sup> Both iconic orations were thick with civil religion, insisting that a multiracial democracy is the fulfillment of a more perfect Union. They were warnings about the danger that awaits large and diverse democracies that lose their way. And they were instructions on where democracies find the inspiration to survive and grow.

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The Civil Rights Acts of 1964 had become law months earlier and outlawed racial discrimination.<sup>33</sup> But American history has shown that

<sup>27</sup> See Dominic Tierney, "*The Battle Hymn of the Republic*": America's Song of Itself, ATLANTIC (Nov. 4, 2010), <https://www.theatlantic.com/entertainment/archive/2010/11/the-battle-hymn-of-the-republic-americas-song-of-itself/66070/> [<https://perma.cc/F8QL-MRL4>] (discussing the history and meaning of "Battle Hymn of the Republic").

<sup>28</sup> Robert N. Bellah, *Civil Religion in America*, 134 DAEDALUS 40, 42 (2005).

<sup>29</sup> See *id.* at 46.

<sup>30</sup> PHILIP GORSKI, AMERICAN COVENANT: A HISTORY OF CIVIL RELIGION FROM THE PURITANS TO THE PRESENT 14, 36 (2019).

<sup>31</sup> See *id.* at 30-31.

<sup>32</sup> See E.W. Kenworthy, *Congress Ready to Move Swiftly on Voting Rights*, N.Y. TIMES (Mar. 17, 1965), <https://www.nytimes.com/1965/03/17/archives/congress-ready-to-move-swiftly-on-voting-rights-leaders-confident.html> [<https://perma.cc/P3HQ-HH8V>].

<sup>33</sup> See PRATT, *supra* note 2, at 28-29.

assertions of equality—whether the Declaration of Independence or the Fourteenth Amendment’s Equal Protection Clause—usually do not extend to the nation’s democracy without additional legislation.<sup>34</sup> The impetuses for Bloody Sunday’s march were further proof that civil rights and voting rights go hand-in-hand, connected but distinct. Johnson’s landslide victory in the 1964 election put the political winds at his back.<sup>35</sup> So the president arrived in Congress on the Ides to ask for a voting rights bill. That night in Selma, protestors gathered outside around radios to tune in to the president’s national call to action. Police in riot gear surrounded them as they listened.

Bloody Sunday created new urgency at the White House for a voting rights bill and opened a policy window for legislative action. It wasn’t until a meeting with congressional leaders on March 14 that the president decided to make a public statement on voting rights the following day to Congress and the country.<sup>36</sup> Draft legislation had been in the works for months and Johnson’s staff formulated the narrative to pitch the public.<sup>37</sup> By the time he’d arrived at the joint session to make the case for voting rights, the pieces were already in place.

The president began by establishing Selma as sacred ground. He compared it to the Battle of Lexington and Concord that opened the Revolutionary War and to the surrender at Appomattox that closed the Civil War.<sup>38</sup> In doing so, he made the expansion of democracy a goal on par with the existential tasks of independence and reunification. He argued the restriction of the franchise posed a critical threat to the country—more ontological than national security, perhaps, but real, nonetheless.<sup>39</sup> And he characterized the problem as a structural one—one for which we had a ready, if uncomfortable, answer.<sup>40</sup>

Racism has taken many forms in the United States. The most destructive is the sort that casts people as inferior—in intellect, biology, culture, or even by an imagined divine decree. Those ideas are used to justify interpersonal and intergroup violence and deprivation. Public policy has proved better adept at tackling inequality and oppression, which are systemic and structural. Institutions and processes can be changed more easily than minds and social hierarchies. Johnson made clear that the issue at hand was neither the nation’s soul nor its people, but its systems. By scoping it as such, it made the solution achievable by government.

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<sup>34</sup> See *id.* at 29 (“As important as Civil Rights Act of 1964 was, it had not addressed the issue of voting.”).

<sup>35</sup> See Shogan, *supra* note 13.

<sup>36</sup> See *id.*

<sup>37</sup> See *id.*

<sup>38</sup> See Johnson, *supra* note 1.

<sup>39</sup> See *id.*

<sup>40</sup> See *id.*

It also suggested that to do nothing would be un-American, anti-theoretical to our founding ideals and identity. “There is no Negro problem. There is no Southern problem. There is no Northern problem,” Johnson declared.<sup>41</sup> “There is only an American problem. And we are met here tonight as Americans—not as Democrats or Republicans—we are met here as Americans to solve that problem.”<sup>42</sup>

His remarks were not all clarion call. Johnson, the lifelong legislator, was appropriately technocratic. He catalogued the various ways election officials skirted the law and how the new bill would close those gaps.<sup>43</sup> He connected the right to vote to other expectations we have of government, such as good schools, protection from violence, and a fair economy.<sup>44</sup>

But mostly, it was a challenge to be brave in a historic moment that posterity would long remember. Garth Pauley, a scholar on rhetoric, argues that Johnson’s speech used “key values and myths in the American civil religion—including freedom, equality, the myth of origin, and the myth of America as chosen people—in order to assign a divine meaning to the particular struggle confronting the nation at that historical moment.”<sup>45</sup> After sketching out the stakes, he made the call to action: Congress must extend voting rights to the people that state governments had unconstitutionally denied.<sup>46</sup> Then, after a short review of the places where Americans have been courageous—in war, in protest—his address seemed to ask the members of Congress and the public if they will be brave now, too.<sup>47</sup>

Pauley notes that “Johnson’s speech also gives Selma a broader historical meaning by associating the terms *freedom* and *equality* with the terms *purpose* and *promise*.”<sup>48</sup> By framing it in this way, Black Americans become the protagonists in the nation’s newest parable. They are recast as model citizens, civic exemplars. “The real hero of this struggle is the American Negro,” Johnson proclaimed.<sup>49</sup> “His actions and protests, his courage to risk safety and even to risk his life, have awakened the conscience of this nation.”<sup>50</sup> It is an assertion that the United States is improved when those who were once excluded are welcomed and given a voice. And that democracy is weakened by privileged access but strengthened by the demands of a people seeking equal access.

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

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

<sup>44</sup> *See id.*

<sup>45</sup> Garth E. Pauley, *Rhetoric and Timeliness: An Analysis of Lyndon B. Johnson’s Voting Rights Address*, W.J. COMM’N 26, 40 (1998).

<sup>46</sup> *See Johnson, supra note 1.*

<sup>47</sup> *See id.*

<sup>48</sup> Pauley, *supra note 45*, at 40.

<sup>49</sup> *See Johnson, supra note 1.*

<sup>50</sup> *See id.*

In the president's speech—for all the partisan advantages to be found in the timing and nature of his charge to Congress—the defining democratic dilemma was not just a question about who can participate, but also a demand to know why some remained chosen for exclusion.

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Ten years earlier, in 1955, King led a successful boycott of the Montgomery bus system.<sup>51</sup> It was America's and the state of Alabama's first glimpse of the young reverend.<sup>52</sup> By the time he completed the march to Montgomery in March of 1965, both knew him very well. Helmeted police officers with batons dangling from their belt loops waited on the Capitol steps for him and the mass of 25,000 marchers.<sup>53</sup> Government leaders and office workers gathered behind law enforcement while a band of press, photographers, and microphones was positioned in front of the crowd at the base of the steps.<sup>54</sup> There, King ascended to a makeshift stage on the back of a flatbed truck.<sup>55</sup>

He began by describing a people's journey through hardship and against all odds, employing civil religious analogies to highlight their heroism, faith, and perseverance.<sup>56</sup> He then described how Black and White working-class voters once worked together to reshape local elections across the South during Reconstruction.<sup>57</sup> And how “the southern aristocracy”—using mass media and a “revised doctrine of White supremacy”—exploited racial segregation and social hierarchies to break interracial political cooperation and reclaim its vice grip on power and governance.<sup>58</sup> The vote, King argued, was how that stranglehold must be broken. It was the justification for his speech's seven repeated calls for a “march on the ballot box.”<sup>59</sup> He consecrated these voting rights protests by equating them to a battle in the Bible where a chosen people faithfully marched along an adversarial city's impenetrable wall for seven days until, with divine intervention, it fell.

Whereas Johnson fashioned the fight for voting rights as one between the people and the state, King characterized it as a struggle against caste, racial and economic. Both men's speeches framed the problem as structural

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<sup>51</sup> See generally DAYBREAK OF FREEDOM: THE MONTGOMERY BUS BOYCOTT 1-33 (Stewart Burns ed., 1997) (detailing King's direction and leadership of the Montgomery bus boycott).

<sup>52</sup> See *id.* at 1 (“When the mass protest persevered against unrelenting pressures from city hall, county courts, and white extremists, King emerged as a national and international symbol of the African American freedom struggle and was embraced by white and black media alike.”).

<sup>53</sup> See *Alabama State Capitol*, NAT'L PARK SERV., <https://www.nps.gov/places/alabama-state-capitol.htm> [<https://perma.cc/PYE8-VJLA>] (last updated Nov. 18, 2023).

<sup>54</sup> See *id.*

<sup>55</sup> See *id.*

<sup>56</sup> See King, *supra* note 22.

<sup>57</sup> See *id.*

<sup>58</sup> See *id.*

<sup>59</sup> See *id.*



and announced that solving it must be the nation's destiny. And both believed the country could only resolve its domestic tensions if the franchise was extended to the people long excluded, those on society's lowest rung. King's argument was that the marchers' quest for inclusion is driven by the same spirit that abolished slavery and restored the Union. It's for this reason he closed with the lyrics from "Battle Hymn of the Republic," a song that's been called a warrior's cry, a second national anthem, and a mirror of American idealism and providence.<sup>60</sup>

But before preaching the hymn, he used the Black church's tradition of call-and-response to mark the speech's climax. There was a growing impatience within Black America that ran contrary to the movement's strategy of nonviolent resistance and reignited Black separatist politics. King sought to soothe the impulse by making a voting rights victory seem imminent and inevitable, by giving the moment motion and temporality. He repeated the phrase, "We are on the move now," and that neither government nor vigilantism can stop their "triumphant march to the realization of the American dream" or their arrival in "the land of freedom."<sup>61</sup> He promised the audience and the country that, "However difficult the moment, however frustrating the hour, it will not be long."<sup>62</sup> For several lines, he asked, rhetorically, "How long?" before answering, "Not long."<sup>63</sup> The audience, rising to a fever pitch, began to answer the question with him, chanting, "Not long!"<sup>64</sup>

King reveals a core truth about the United States system of government: It is strengthened when marginalized people insist it must seek their consent, too. The people on the fringes of democracy are often its most ardent champions and, as a result, its perfectors. For all of the nation's hypocrisies and shortcomings, the common thread in the American narrative—from the founders to the abolitionists, suffragists, and civil rights marchers—is the demand for democratic participation.

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We know the speeches' objectives were accomplished. Johnson signed the Voting Rights Act of 1965 that August, and its near immediate effects included a rapid increase in voter registration among Black Americans in the Jim Crow South.<sup>65</sup> It changed the nation's politics and parties. New voters shaped election outcomes, and new people ran for office. Within a decade, there were more Black representatives in Congress than there'd ever been.<sup>66</sup> The Act was reauthorized in 1982 and, again, in 2006 when it passed the

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<sup>60</sup> See Tierney, *supra* note 27.

<sup>61</sup> King, *supra* note 22.

<sup>62</sup> *Id.*

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

<sup>64</sup> *Id.*

<sup>65</sup> KEVIN J. COLEMAN, CONG. RSCH. SERV., R43626, THE VOTING RIGHTS ACT OF 1965: BACKGROUND AND OVERVIEW 12 (2015).

<sup>66</sup> See *id.*



Senate 98-0.<sup>67</sup> This year marks the sixtieth anniversary of this landmark law that permanently transformed the United States. It is one of the nation's greatest achievements.

Yet, the day after Johnson's invocation, law enforcement in Selma mounted on horseback and used whips and lariats and clubs to break up the groups of demonstrators.<sup>68</sup> And sixty years later, the fight for voting rights continues in the most participatory democracy of the nation's history. A few years after the most recent unanimous reauthorization, the Supreme Court, in *Shelby County v. Holder*,<sup>69</sup> declared the Act's preclearance formula to be outdated and unconstitutional. In response, states have passed nearly 100 restrictive voting laws.<sup>70</sup> North Carolina was so blatant in its voter suppression strategies that a federal appeals court declared that Black voters had been targeted "with almost surgical precision."<sup>71</sup>

Recent case law provides the contours of today's fight. *Shelby County's* opinion, penned by Chief Justice John Roberts, acknowledged "voting discrimination still exists; no one doubts that."<sup>72</sup> But the Court explained its decision to weaken federal voting protections as a product of the law's success and of a need to treat states equally. "The Act has proved immensely successful at redressing racial discrimination," Roberts conceded, "and integrating the voting process."<sup>73</sup> Yet, he argued, it still engaged in the "disparate treatment of States" by employing an outdated formula to present-day realities.<sup>74</sup> An increased rate of Black electoral participation was offered as evidence that reprioritizing the rights of states was now acceptable and in order.

In 2019's *Rucho v. Common Cause*, the Court declared partisan gerrymandering nonjusticiable. It stipulated that "excessive partisanship in districting leads to results that reasonably seem unjust" and that such gerrymandering is "incompatible with democratic principles."<sup>75</sup> But the Roberts-authored opinion concluded that, "partisan gerrymandering claims present

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<sup>67</sup> See *id.* at 20, 22.

<sup>68</sup> See Roy Reed, *Police Rout 600 In Montgomery; 8 Marchers Hurt*, N.Y. TIMES (March 17, 1965), <https://timesmachine.nytimes.com/timesmachine/1965/03/17/97187205.pdf> [<https://perma.cc/ZST9-6KXW>]; *Civil Rights Movement History 1965: Selma & the March to Montgomery*, C.R. MOVEMENT ARCHIVE (2024), <https://www.crmvet.org/tim/timhis65.htm#1965m2mtial2> [<https://perma.cc/YV86-24P3>].

<sup>69</sup> *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013).

<sup>70</sup> Jasleen Singh & Sara Carter, *States Have Added Nearly 100 Restrictive Laws Since SCOTUS Gutted the Voting Rights Act 10 Years Ago*, BRENNAN CTR. FOR JUST. (June 23, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/states-have-added-nearly-100-restrictive-laws-scotus-gutted-voting-rights> [<https://perma.cc/X85R-DWVK>].

<sup>71</sup> N.C. State Conf. of NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016).

<sup>72</sup> *Shelby Cnty.*, 570 U.S. at 536.

<sup>73</sup> *Id.* at 548.

<sup>74</sup> *Id.* at 544.

<sup>75</sup> *Rucho v. Common Cause*, 588 U.S. 684, 718 (2019).

political questions beyond the reach of the federal courts.”<sup>76</sup> *Brnovich v. Democratic National Committee* tested Section 2 of the Voting Rights Act, and the Court argued that racially disparate impacts are not reason enough to prevent restrictive voting changes.<sup>77</sup> Taken together, these cases suggest a jurisprudence more concerned with disparate impacts on states than on historically marginalized groups. And when states use judicially-protected powers in ways admittedly unjust and incompatible with democracy, the Court sees remediation as beyond its purview.

The iconic addresses from Johnson and King are grounded in a people’s just demand for the franchise and the nation’s sacred role to extend and protect it. Since our founding, however, the counterargument to participatory democracy has been that states’ rights matter most and that certain factions know best. Today’s Court has taken some steps to keep that impulse in check—*Allen v. Milligan* (2023) found that Alabama’s redistricting racially discriminated against Black voters;<sup>78</sup> *Moore v. Harper* (2023) rejected the independent state legislature theory’s assertion that state assemblies can veto the popular vote’s choice for its presidential electors.<sup>79</sup> And it is true that the 2020 presidential election had the highest voter turnout rate of any since 1900.<sup>80</sup> But recent caselaw seems to consider the question of state prerogative rather than the people’s rights.

The fight for voting rights continues because there are groups still targeted for exclusion and people still on the fringes of our democracy. The historic addresses in the month of Selma’s marches tied the future of the country to the expansion of democracy. Using civil religious appeals, they asserted that the will to extend the franchise is born of the same will required for the United States’ creation and reunification, the country’s first and second foundings. They centered people at the margins and positioned the excluded as heroes in a new American story. And they signaled to a nation that the first principles of our democracy are revealed not only by the actions of those with access to it, but also in the desires of those who have been subjugated by it.

The Voting Rights Act of 1965 made our multiracial democracy possible, and any weakening—by the courts, executives, legislatures, and electoral vigilantes—threatens the people’s freedom and equality, and thereby the well-being of a nation. In this *Symposium*, scholars take up the nation’s defining democratic dilemma by analyzing how voter suppression tactics have evolved, examining why many formerly incarcerated people and

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<sup>76</sup> *Id.*

<sup>77</sup> *Brnovich v. Democratic Nat’l Comm.*, 594 U.S. 647, 680-81 (2021).

<sup>78</sup> *Allen v. Milligan*, 599 U.S. 1, 24-42 (2023).

<sup>79</sup> *Moore v. Harper*, 600 U.S. 1, 23-34 (2023).

<sup>80</sup> See Michael P. McDonald, *National Turnout Rates 1789–Present*, U.S. ELECTIONS PROJECT, <https://www.electproject.org/national-1789-present> [<https://perma.cc/BR6N-SYXE>] (last visited Sept. 29, 2024).

noncitizens are chosen for exclusion, and considering *Milligan*'s meaning for Section 2 of the Voting Rights Act.

I. IMMIGRANT VOTING RIGHTS AND THE QUEST FOR UNIVERSAL SUFFRAGE  
BY RON HAYDUK

Political scientist Ron Hayduk, a leading expert on immigrant and noncitizen voting rights with a career dedicated to exploring the intersection of citizenship and democratic participation, assesses the question of immigrant and noncitizen voting by reviewing its history, challenges, and successes. Millions of taxpaying people who are integral to communities and economies across the country are excluded from the democratic process by virtue of their immigration and citizenship status. They want the ability to select local leaders who'll make decisions that deeply impact their families and to insist that their consent matters, too. Federal law prohibits people who are not United States citizens from voting in federal elections,<sup>81</sup> but Washington, D.C. enacted the Local Resident Voting Rights Amendment Act in 2022, which allows noncitizen District residents to vote in local elections.<sup>82</sup> Municipalities in Maryland, Vermont, and California also permit noncitizen residents to participate in local elections.<sup>83</sup> Through the eyes of these American denizens, Hayduk brings the edges and nature of our democracy into clearer view.

Policy battles on immigration and pathways to citizenship have long polarized the nation's politics, and the road to resolution remains rocky and contentious. Meanwhile, millions of noncitizens are denied access to the franchise and are thus less able to shape the communities, states, and country where they have made a home. Hayduk points out that this system has corollaries in American history: the disenfranchisement of enslaved Black Americans, women, immigrants, and people without property—all of whom were central to the United States' founding, economic and national security, and democratic legitimacy. Each of these exclusions were unjust and were corrected over time in sociopolitical movements championed by people who would become the newest Americans.

Democracy's first principle is the right of participation, and Hayduk argues that refusing noncitizens' access to the ballot is a question of denizens' rights more than immigration policy. People who pay taxes, maintain residence, and are counted in the determination of congressional districts as

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<sup>81</sup> See 18 U.S.C. § 611.

<sup>82</sup> D.C. CODE § 24-242 (2022); Ellie Silverman & Jenny Gathright, *In a First, Noncitizens are Voting in D.C. Here's What It Means To Them*, WASH. POST (June 3, 2024, 4:45 PM), <https://www.washingtonpost.com/dc-md-va/2024/06/03/dc-noncitizen-voters-primary-election/>.

<sup>83</sup> See *Laws Permitting Noncitizens to Vote in the United States*, BALLOTPEdia, [https://ballotpedia.org/Laws\\_permitting\\_noncitizens\\_to\\_vote\\_in\\_the\\_United\\_States](https://ballotpedia.org/Laws_permitting_noncitizens_to_vote_in_the_United_States) [https://perma.cc/RNX8-PHQH] (last visited Nov. 29, 2024).

well as a state's representation in Congress and the Electoral College can lay a justifiable claim to the franchise, just as in eras past. Hayduk suggests such an approach accords with the spirit of democracy and that it is time the letter of the law catches up.

## II. DESMOND MEADE AND ANGEL SANCHEZ *IN CONVERSATION*

Desmond Meade, a prominent advocate for voting rights restoration and the architect behind Florida's Amendment 4, alongside Angel Sanchez, a legal scholar and advocate for returning citizens, discuss the plight of returning citizens seeking access to the ballot box. In an edited conversation, the two Floridians share their lived experiences post-incarceration and their lessons from their present-day leadership on voting rights restoration. They share the many ways that a previous incarceration complicates all aspects of a person's return to democratic society, and how their continued disenfranchisement runs counter to the public's expressed will.

Nearly 150 years ago, in post-Reconstruction Florida, the state amended its constitution to permanently disenfranchise people convicted of a felony.<sup>84</sup> In modern times, only the governor-led State Board of Executive Clemency could return the right.<sup>85</sup> Then, in 2018, a state ballot initiative—Amendment 4—won support from nearly 65 percent of voters, automatically restoring voting rights to people convicted of felonies upon completion of their sentences.<sup>86</sup> But the state government blocked its implementation and then created an election police force that prioritized arresting returning citizens who'd made errors with their voter registration.<sup>87</sup> This conversation exposes how partisanship and government's abuse of power staunch the benefits that returning citizens bring to democracy.

Importantly, Meade and Sanchez reveal how the republican system of government is wielded to defy the democratic process. Though the voting reform enjoyed overwhelming and bipartisan support from Florida's voters, the governor and state assembly effectively blocked its implementation through administrative measures, fueled by partisan expedience. Their discussion highlights the broad line of demarcation between a democracy and a republic on the question of voting rights, and how power concentrated in the latter can undermine the rights granted by the former, even when the governed have provided their consent.

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<sup>84</sup> FLA. CONST. ART. XIV, § 2 (amended 1968) (“[N]or shall any person convicted of felony be qualified to vote at any election unless restored to civil rights.”); Allison J. Riggs, *Felony Disenfranchisement in Florida: Past, Present and Future*, 28 J. C.R. & ECON. DEV. 107, 108 (2015).

<sup>85</sup> See Riggs, *supra* note 84, at 109-11.

<sup>86</sup> *Voting Rights Restoration Efforts in Florida*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-florida> [https://perma.cc/2G84-QXN2] (last updated Nov. 18, 2024).

<sup>87</sup> See *id.*

## III. ENDING THE CYCLES OF VOTER SUPPRESSION BY GILDA DANIELS

Law professor Gilda Daniels, an experienced civil rights attorney who specializes in voting rights, traces the long and inglorious history of voter suppression in the United States. Black America's interminable struggle for the franchise is marred by numerous executive, legislative, and judicial actions that have prevented or complicated its access. Given the nation's history, the strategies used to deny Black people's voting rights crystallize the central quandary of participatory democracy: Keeping the vote at arms-length is not just about the franchise per se, but also about preventing new people from leading. In this way, Daniels shows how voter suppression is as much about shaping the electorate for partisan gain as it is about a tactic to keep Black Americans, in particular, from the reins of government.

In the United States' beginning, there was the Three-Fifths Compromise, which entrenched the exclusion of enslaved Black people in the Constitution.<sup>88</sup> Not even the Civil War and the transformative Reconstruction amendments could keep the infringement of Black Americans' voting rights at bay. Enter Jim Crow, a set of statutory and social measures that targeted Black Americans for removal from the *demos*. Daniels marks how violence and political expedience in the federal government and in the states repeatedly facilitated the denial of constitutional voting protections.

The Great Society legislation of the 1960s, emboldened by the Supreme Court's landmark decision in *Brown v. Board of Education* that outlawed "separate but equal" racial segregation,<sup>89</sup> finally made voting rights accessible to the broader public.<sup>90</sup> Constitutional amendments lowered the voting age to eighteen and banned poll taxes.<sup>91</sup> The Court, though, left the door open for challenges to the Voting Rights Act. And in 2013, *Shelby County v. Holder* hollowed out the Act and declared part of it unconstitutional.<sup>92</sup> Daniels cites the numerous voter suppression measures that immediately followed, implemented in the states and having disparate impact on Black Americans. New tactics and terms have entered the discourse: voter ID laws, voter purges, expansions of electioneering and administrative restrictions, election integrity, and the like.<sup>93</sup> Each of them is little more than a euphemism for voter suppression.

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<sup>88</sup> See U.S. CONST. art. I, § 2, cl. 3. The Three-Fifths Compromise provided: "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, 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.*" *Id.* (emphasis added).

<sup>89</sup> 347 U.S. 483 (1954).

<sup>90</sup> The centerpiece of the Great Society legislation was the Voting Rights Act of 1965. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. §§ 10301-10314, 10501-10508, 10701-10702).

<sup>91</sup> U.S. CONST. amends. XXIV, XXVI.

<sup>92</sup> 570 U.S. 529 (2013).

<sup>93</sup> See *Voting Laws Roundup: September 2024*, BRENNAN CTR. FOR JUST. (Sept. 26, 2024), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-september->

Daniels reminds us, though, that as in eras past, voter suppression is not uncontested. Voting rights champions have introduced legislation with sweeping reforms that would reinstate federal oversight protections and update the system of democracy for freer and fairer elections. Civic engagement has also proven effective with advocates educating and mobilizing voters to such an extent that voter suppression in some places is having little to no effect on targeted Black communities.<sup>94</sup> And, finally, Daniels notes the need to amend the Constitution to include an affirmative right to vote.

#### IV. A REPRIEVE FOR DEMOCRACY: READING *ALLEN V. MILLIGAN* ON THE SIXTIETH ANNIVERSARY OF THE VOTING RIGHTS ACT BY DEUEL ROSS

Civil rights attorney Deuel Ross, who has argued voting rights cases before the United States Supreme Court and is Deputy Director of Litigation at the NAACP Legal Defense and Educational Fund, reviews the meaning of *Allen v. Milligan*, a case from Alabama concerning the state's majority-minority congressional districting.<sup>95</sup> After a string of Supreme Court decisions that weakened voting rights protections, this case declared Section 2 of the Voting Rights Act to be constitutional.<sup>96</sup> Ross argues it was a victory for voting rights and a hopeful sign of how the fight can be waged from this point forward.

Following *Shelby County's* undermining of Sections 4 and 5, voting rights advocates increasingly sought federal protection under Section 2.<sup>97</sup> In 2021's *Brnovich v. Democratic National Committee*, the Court found that a restrictive voting law in Arizona did not intend to discriminate against Black, Hispanic, and Native American voters.<sup>98</sup> It also effectively established that disparate impact is insufficient for successful challenges under this section.<sup>99</sup> However, in *Milligan* just two years later, the Court determined that a recent redistricting in Alabama amounted to minority vote dilution and violated Section 2.<sup>100</sup> It ordered the state to draw a second majority-Black district, a positive development that Ross explores in depth.

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2024 [<https://perma.cc/2JMH-XK4L>] (discussing the latest restrictive voting laws that have been passed).

<sup>94</sup> See John Wihbey, *Voter ID Laws and the Evidence: A Report from the Government Accountability Office*, JOURNALIST'S RES. (Oct. 16, 2014), <https://journalistsresource.org/politics-and-government/voter-id-laws-empirical-evidence-government-accountability-office/> [<https://perma.cc/EP6V-TDL6>].

<sup>95</sup> 599 U.S. 1 (2023).

<sup>96</sup> *Id.* at 41.

<sup>97</sup> See generally Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 COLUM. L. REV. 2143 (2015) (proposing that reformation of Section 2 could fill the void left by Section 5).

<sup>98</sup> 594 U.S. 647 (2021).

<sup>99</sup> See *id.* at 685.

<sup>100</sup> *Allen v. Milligan*, 599 U.S. at 19-23.

The fight, however, continues. Ross examines the emerging jurisprudence as ensuing decisions in Section 2 cases are made, outlining the boundaries of this provision's protections. The resulting philosophy suggests a Court that views *Milligan* as a question about fair representation given the demographics of a state's population rather than as a means to permit remediation of past racially discriminatory voting practices or to ensure historically marginalized groups maintain a fair share of districts where they are in the majority. Whether the Court views Section 2 as race-conscious or colorblind determines the Voting Rights Act's shifting penumbra, outlining who can seek relief under it and for what reasons.

#### CONCLUSION

In each article, as here in the *Foreword*, there lurks a central question: Who can belong in America? The answer is always traced out by the right to vote. The marchers of Selma and the speeches of Johnson and King capture the purpose of a people left out. They turned that purpose into a national interest and etched their story into the national canon. And they paved the way for tomorrow's heroes of democracy—perhaps noncitizens, or returning ones, or existing voters protecting the right for themselves and others. The many marches of 1965 improved our democracy and are the bases for the appeals of all who desire fair, equal, and just access today, sixty years later. It all is part of the inexorable march of freedom—and it is our turn to earn it, and to win it once again.



