POWER FOR THE PEOPLE: RECOGNIZING THE CONSTITUTIONAL RIGHT TO VOTE FOR PRESIDENT

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On January 6, 2021, a mob attacked the United States Capitol to overthrow the certification of the legitimately elected president and install the election loser, Donald Trump. Before this, there was another coup attempt. Trump and his team pressured state legislators and officials not to certify legitimately elected presidential electors, and to instead certify fake electors for Trump. This was based on the theory that the Constitution grants states "plenary power" to select presidential electors, even if this means cancelling citizen elections or rejecting their outcome. The coups failed—this time.

There should be no next time. The Supreme Court should reject the "plenary power" theory, and rule instead that citizens have a right to vote for president under the Constitution.

The "plenary power" theory is radically wrong because several constitutional amendments establish that citizens have what the Constitution calls a "right to vote"—including the right to choose presidential electors. The "plenary power" theory was born in Supreme Court decisions during the late 1800s Jim Crow era and re-embraced by the Court in its controversial 2000 Bush v. Gore *decision. This Article explains how the "plenary power" theory is wrong as a matter of constitutional textualism, irreconcilable with other Court right-to-vote precedent, abrogated by history, and irredeemably illegitimate because of its juridical origins in racism and sexism.*

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INTRODUCTION

We want the power for the people
That's all we ask in our country . . . .[1]

> *No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.*[2]

Do citizens have a constitutional right to vote for president, or do states have "plenary power" to pick a president without citizens' votes? The Constitution is with the citizens. The citizens' right to vote for president is the law under the Constitution's five Amendments that created and grew the right to vote. The history of American democracy tells the same story as the history of the Constitution: a nation born without voting rights now has universal voting rights for citizens over the age of eighteen.[3]

The "plenary power" theory in presidential elections comes from a line of Supreme Court decisions decided from 1874 to 1892.[4] The Court fashioned the "plenary power" theory based on an interpretation of the

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1 Curtis Mayfield, *Power to the People (Demo Version)*, YOUTUBE (Jan. 25, 2017), https://www.youtube.com/watch?v=KNaKL3TwORg [https://perma.cc/GB42-SQC4]. Curtis Mayfield is among Black American musicians who devoted their art to social justice.

2 Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

3 There are important exceptions. Three and a half million citizens in U.S. territories do not have the right to vote in presidential elections, a major exclusion that disenfranchises a population that is over ninety-eight percent comprised of Black, indigenous, and other people of color (BIPOC). ADVISORY MEMORANDUM FROM THE CONNECTICUT ADVISORY COMMITTEE TO THE U.S. COMMITTEE ON CIVIL RIGHTS ON VOTING RIGHTS IN U.S. TERRITORIES 4 (2021), https://www.usccr.gov/files/2021-11/voting-rights-in-the-territories-advisory-memo-ct-sac.pdf [https://perma.cc/9PUL-B93B]. Over five and a half million citizens are disenfranchised by states because of convictions for felony crimes. *Felony Disenfranchisement Map*, AM. CIV. LIBERTIES UNION, https://www.aclu.org/issues/voting-rights/felony-disenfranchisement-laws-map [https://perma.cc/883D-FG5U]. The denial of the right to vote to territorial citizens and those convicted of felonies raises important legal, policy, and moral issues that go beyond the scope of this Article. As described in more detail later in this Article, language in the Constitution creating an exception to the right to vote based on "rebellion and crime" supports the argument that those outside of the exception have the right to vote.

4 Those cases are analyzed in detail *infra* Section II.B.

electoral college provision in Article II, Section 1 of the Constitution.[5] The last of the nineteenth-century cases, *McPherson v. Blacker*, created the "plenary power" theory: citizens have no constitutional right to vote for president because Article II gives states plenary power to decide how presidential electors are chosen.[6] The Court revived *McPherson* in the 2000 *Bush v. Gore* decision.[7]

Part I of this Article describes the radical "plenary power" theory, pointing to academic promotion of the theory and the Trump coup attempt to demonstrate its dangerous threat to democracy. Part II of this Article explains these five reasons why the "plenary power" theory is wrong and why instead there is a citizens' right to vote for president.

1. The text of five Amendments to the Constitution establishes citizens' "right to vote" for president and presidential electors.

The Fourteenth Amendment added a "right to vote . . . for the choice of electors" to the Constitution that cannot be "denied" or "abridged" by states.[8] Four subsequent amendments have expanded the right to vote to all citizens over the age of eighteen.[9] The legislative history leading to the amendments does not contradict—or change—what these plain words say.

2. The Supreme Court's "plenary power" precedent was born in and based on racist and sexist decisions that have been abrogated by history, constitutional amendment, and right to vote decisions on non-presidential elections.

The "plenary power" line of Court cases began with a series of Jim Crow era decisions in the late 1800s that have been effectively overruled by history and constitutional amendment.[10] These decisions had sexist and racist results; they are among the worst in the Court's history. They are also the foundation for the *McPherson* decision relied on without question in the *Bush* embrace of "plenary state power" and rejection of the right to vote for president. *Bush* and its nineteenth-century ancestors are also irreconcilable with contemporary Court precedent which

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5 *See* U.S. Const. art. II, § 1 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.").

6 146 U.S. 1, 34, 37 (1892).

7 531 U.S. 98, 104 (2000).

8 U.S. CONST., amend. XIV, § 2.

9 *Id.*; U.S. CONST. amends. XV, XIX, XXIV, XXVI.

10 Minor v. Happersett, 88 U.S. 162 (1874); United States v. Cruikshank, 92 U.S. 542 (1875); McPherson v. Blacker, 146 U.S. 1 (1892). These three cases are discussed in detail *infra* Section II.B.

correctly recognizes that the right to vote (albeit in non-presidential elections) is a fundamental right foundational to all rights.

3. Supreme Court reliance on history as informing rights supports constitutionalizing two centuries of citizen-based presidential election.

The Court has repeatedly acknowledged that history and tradition demonstrate constitutional rights.[11] The two-century history of citizens voting for president goes beyond tradition: voting for president is at the heart of American national identity. The Court may be catching up with this history. In its most recent case on the electoral college provision, the Court—while not yet holding that citizens have a right to vote for president—did recognize that states may instruct electors that they "have no ground for reversing the vote of millions of its citizens."[12] The trends of history and constitutional expansion of the right to vote reinforce each other, and connecting them demonstrates that the Court's long established practice of looking to history shows there is a constitutional right to vote for president.

4. Plenary state power would restore unconstitutional and antidemocratic exclusion of women, Black Americans, and young people from presidential election.

The "plenary power" theory would allow state legislatures to pick a president and take the vote for president away from citizens. This would have racist, sexist, and ageist results, because state legislatures have far fewer Black citizens, women, and young adults than the general population. This would constitute unconstitutional discrimination in denying the right to vote on the basis of race, gender, and age, in violation of the three constitutional amendments that prohibit such discrimination.

5. Recognition of the right to vote would avert the catastrophic consequences of "plenary power" radicalism—demonstrated by the attempted Trump coup.

The "plenary power" theory allows for antidemocratic presidential selection that would be disruptive at best, destabilizing for certain—and possibly far worse. The Trump coup attempt was centered on radical interpretations of the "plenary power" theory which would have allowed states to disregard citizen votes. A key part of the coup was the attempt to

11 *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

12 Chiafalo v. Washington, 591 U.S. 578, 597 (2020).

pressure state legislators and officials to throw the election to Trump.[13] A constitutional interpretation with consequences this grave cannot be right. The right thing to do is the smart thing to do—recognize and protect citizens' constitutional right to vote for president.

While "plenary power" advocates laud what they call the "value" of "elitism,"[14] the values of democracy are better. Democracy places power with those the people have chosen to govern, provides for electoral accountability, recognizes voting is the right all rights rest on, and vests the fullest rights of citizenship.[15] A better interpretation courts have recognized is that "citizens vote indirectly for the President by voting for state electors."[16] The Constitution should be read to establish a right to vote—including for president.[17]

I. THE PROBLEM—A RADICALLY ANTIDEMOCRATIC CONSTITUTIONAL THEORY THAT DESTROYS CITIZEN VOTING RIGHTS

Most Americans would be shocked that some argue against a constitutional right to vote for president.[18] Over ninety percent believe their right to vote is among the most important in their Constitution.[19] By 1832, all but one state required that presidential electors be chosen by

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13 SELECT COMM. TO INVESTIGATE THE JAN. 6TH ATTACK ON THE U.S. CAPITOL, FINAL REPORT, H.R. DOC. NO. 117-663, at 263–300 (2022) [hereinafter JAN. 6TH REPORT] (describing the Trump campaign's effort to pressure state legislators and officials).

14 Note, *"As the Legislature Has Prescribed": Removing Presidential Elections from the* Anderson-Burdick *Framework*, 135 HARV. L. REV. 1082, 1095 (2022).

15 Martin Luther King, Jr., *Civil Right No. 1—The Right to Vote*, *reprinted in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR., 182, 183, 188 (James M. Washington ed., 1986). Dr. King wrote that voting is "a badge of full citizenship" and citizens cannot "be denied the right to participate in the most fundamental of all privileges of democracy—the right to vote." *Id.* at 183, 188.

16 Igartua De La Rosa v. United States, 32 F.3d 8, 9 (1st Cir. 1994).

17 This Article comes a year after the Supreme Court rejected the "independent state legislature" theory (ISLT). Moore v. Harper, 600 U.S. 1, 22 (2023). While *Moore* affirmed voting rights, the *Moore* Court bypassed the *McPherson* "plenary power" theory instead of extinguishing it. *Id.* at 22, 27–28.

18 Fifty-seven percent of Americans believe that voting is "a fundamental right for every adult U.S. citizen and should not be restricted in any way." Vianney Gómez & Carroll Doherty, *Wide Partisan Divide on Whether Voting Is a Fundamental Right or a Privilege with Responsibilities*, PEW RESEARCH CENTER (July 22, 2021), https://www.pewresearch.org/fact-tank/2021/07/22/wide-partisan-divide-on-whether-voting-is-a-fundamental-right-or-a-privilege-with-responsibilities [https://perma.cc/DH67-BX9A].

19 Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL'Y 143, 144–45 (2008) (citing Brian Pinaire, Miton Heumann & Laura Bilotta, *Barred from the Vote: Public Attitudes Toward the Disenfranchisement of Felons*, 30 FORDHAM URB. L.J. 1519, 1533–34 (2003)).

popular vote.[20] As one scholar put it, "[w]hy, in the twenty-first century, should the right to vote not be considered a privilege of citizenship enjoyed by all adult Americans?"[21]

Unfortunately, the answer depends on who you ask. Supreme Court decisions, most recently *Bush v. Gore*, state that citizens do not have a constitutional right to vote for president.[22] The *Bush* Court relied on Article II, Section 1 of the Constitution, authorizing states to choose the manner in which presidential electors are chosen, to conclude that "the state legislature's power to select the manner for appointing electors is plenary," adding "[t]he individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college."[23] The *Bush* majority was not done wrecking voting rights. They added that states can take presidential voting away from citizens entirely.[24] In a recent Article, Professors Robert J. Delahunty and John Yoo relied on *Bush* and the "plenary state power" theory on their way to making the additionally antidemocratic argument that a vice president may constitutionally determine a presidential election.[25]

In February 2022, the Harvard Law Review (HLR) announced publication of a Note reaching the same conclusion, one that would be startling to most Americans: "Free and fair presidential elections are a cornerstone of American democracy, but are they required by the Constitution? This Note says no . . . ."[26]

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20 Chiafalo v. Washington, 591 U.S. 578, 584 (2020) (citing NEIL R. PEIRCE & LAWRENCE D. LONGLEY, THE PEOPLE'S PRESIDENT: THE ELECTORAL COLLEGE IN AMERICA AND THE DIRECT VOTE ALTERNATIVE 45 (1981)).

21 ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 175 (2019).

22 Bush v. Gore, 531 U.S. 98, 104 (2000).

23 *Id.*

24 *Id.*

25 *See* Robert J. Delahunty & John Yoo, *Who Counts?: The Twelfth Amendment, the Vice President, and the Electoral Count*, 73 CASE W. RES. L. REV. 27, 50–52, 62–63, 65 (2022). Professor Yoo is well-known from his government service when he wrote legal opinions justifying the use of brutal interrogation on national security detainees. *Torturing Democracy: The Archive*, GEO. WASH. UNIV. NAT'L SEC. ARCHIVE (2008), https://nsarchive2.gwu.edu/torturingdemocracy/documents [https://perma.cc/DH67-BX9A]. The Yoo opinions were fully rescinded early in the Obama administration. Exec. Order No. 13491, 74 FR 4893 (Jan. 22, 2009). It is fair to assess Professor Yoo's arguments against democracy in light of his previous positions on human rights.

26 Harvard Law Review (@HarvLRev), X (Feb. 19, 2022, 3:17 PM), https://x.com/HarvLRev/status/1495130316218023942 [https://perma.cc/N4Z8-E8JX]. Note, *supra* note 14, generated considerable debate. *See* Jay Willis, *The Case of the Anti-Democracy Harvard Law Review Note*, BALLS & STRIKES (Feb. 22, 2022), https://ballsandstrikes.org/legal-

Citing *Bush*, the HLR Note contends that the language in Article II of the Constitution giving states authority to appoint electoral college electors translates into "the plenary authority of states" to choose presidents.[27] The Note claims that "plenary power" gives "virtually unlimited authority to the states in determining how presidential electors are chosen, *regardless of the wishes of the voting public*."[28]

There was scholarly discussion shortly after *Bush* that the Court's embrace of "plenary state power" was not to worry over because *Bush* could not possibly mean what it says. One author wrote, "I do not read the *Bush* . . . remark that '[t]he State . . . after granting the franchise . . . can take back the power to appoint electors' as necessarily going that far."[29] The author added, "[t]he likelihood of a state's abolishing popular election altogether was quite low even in 1868 (and essentially nonexistent today)."[30] The author concluded the *Bush* statement that "Article II as giving state legislatures plenary power over how presidential electors are selected cannot be taken at face value."[31]

We know more now. "Plenary power" radicals mean what they say, and Americans should take their threat to citizen voting for president at face value. The extremist "plenary power" theory was central to the attempt to install Donald Trump as president though he lost the 2020 electoral college vote.[32] The HLR Note and Yoo Article are defenses of the most extreme consequences of this radical theory. Along with the Trump conspiracy, this scholarship shows that suffocation of democracy under constitutional pretext—previously unthinkable—is openly contemplated by the "plenary power" theorists.

The HLR Note's startling conclusions deserve attention because they reveal how dangerously wrong it is to contend that citizens do not have the constitutional right to vote for president. While the author made some legitimate critiques of vague standards for adjudging election

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culture/harvard-law-review-anti-democracy-note [https://perma.cc/V2H5-HBXA]. The Note merits attention here because of HLR's influence, and because the author proceeded to a federal clerkship and potential participation in voting rights decisions. *Id.* As will be explained later, while I disagree with the Note, it does describe the radical potential consequences of the "plenary power" theory.

27 Note, *supra* note 14, at 1093.

28 *Id.* at 1088 (emphasis added).

29 Pamela S. Karlan, *Unduly Partial: The Supreme Court and the Fourteenth Amendment in* Bush v. Gore, 29 FLA. ST. U. L. REV. 587, 591 (2001).

30 *Id.* at 590.

31 *Id.* at 594 (footnote omitted).

32 *See infra* Section II.E for a more detailed discussion of the January 6 Committee Report.

cases,[33] the Note did something few explanations of the "plenary power" theory have done. The Note took the "plenary power" theory to its logical conclusions and honestly revealed the radically antidemocratic and elitist consequences if state "plenary power" actually does extinguish the right to vote for president.

The "plenary power" theory would allow nearly limitless state power and antidemocratic abuse of voting rights in presidential elections. One of the Note's most jarring statements is that the law could allow states to replace democracy with authoritarian one party, one candidate elections.[34] The Note acknowledges "undermin[ing] the contention that the Constitution protects the right of voters to have a free choice of presidential candidates."[35] But this is not "a contention"—it is exactly what the Fourteenth Amendment of the Constitution says in establishing a "right to vote" for a "*choice* of electors for President."[36]

After praising the "value" of "elitism," the HLR Note argues the law "allows electoral votes to be awarded based on the wishes of the state political elite," rather than citizen voters, because "[t]he elitist function of the Electoral College counsels in favor of deference to state authority over the voting masses."[37] The elitist, antidemocratic presidential election system constructed by the original Constitution died in practice by 1832, by which time every state but one required that electors be chosen by citizen voting.[38] Today, most Americans do not even want an electoral college,[39] much less for electors to entirely steal away the citizens' right to vote for president.

The HLR Note includes these radical antidemocratic conclusions and recommendations:

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33 The Note addresses the current equal protection analysis for challenges to voting regulations, often described as the *Anderson-Burdick* test because of the two Supreme Court cases from which it is derived. Note, *supra* note 14, at 1084. The author's thesis is that the electoral college provision in the Constitution requires removing presidential elections from the *Anderson-Burdick* framework. *Id.* at 1082–85. While it is fair to say that like many constitutional tests, *Anderson-Burdick* is broad and general, the HLR Note goes on to argue that presidential elections should effectively be placed beyond judicial review. *Id.* at 1100, 1103. It is better for judges to apply broad constitutional voting rights frameworks wisely than to conclude that there are no voting rights and no constitutional protections for democracy.

34 Note, *supra* note 14, at 1103.

35 *Id.* at 1089.

36 U.S. CONST., amend. XIV, § 2 (emphasis added).

37 Note, *supra* note 14, at 1095.

38 Chiafalo v. Washington, 591 U.S. 578, 584 (2020).

39 Jocelyn Kiley, *Majority of Americans Continue to Favor Moving Away from Electoral College*, PEW RSCH. CTR. (Sept. 25, 2023), https://www.pewresearch.org/short-reads/2023/09/25/majority-of-americans-continue-to-favor-moving-away-from-electoral-college [https://perma.cc/A99E-HB8B].

- State authority "include[s] not just the hypothetical authority to appoint electors directly, but also the authority to give their people a limited choice."[40]
- "[T]he majority of states, including some swing states, [could] hold essentially one-candidate presidential elections."[41]
- "[T]he selection of presidential electors could be deemed a nonjusticiable political question," and the Supreme Court should adopt a standard of review under which voting rights "issues that currently drive litigation—such as voter ID laws, signature requirements, or ballot-listing rules—would no longer have an obvious way into court."[42]

The HLR author understatedly concedes this "hands-off approach carries risks for democracy," but claims "it is nonetheless required as a matter of textual fidelity" to the Constitution.[43] The approach does not "risk" democracy; it is not democracy.

As for the *faux* textualism, the electoral college provision is not the only one in the Constitution on voting; constitutional amendments establishing the right to vote do require citizen democracy in presidential elections. In fact, two constitutional amendments actually refer to a "right to vote" "for presidential electors."[44] The history of elections and other Court decisions demonstrate that the constitutional electoral college provisions are now understood to base electoral college votes on citizen voting.[45]

Someone else agreed with the *Bush*/HLR/Yoo argument that states have "plenary power" to pick presidents and that citizens have no constitutional right to vote for president. The theory was adopted by the Trump team that placed that radically extremist theory at the heart of the attempted coup and violent mob attack on the U.S. Capitol.[46] The bipartisan congressional report on the January 6 attack on the Capitol reached this conclusion about the centrality of the radical "plenary state power" theory in the Trump coup:

> This fundamentally anti-democratic effort was premised on the incorrect theory that, because the Constitution assigns to State legislatures the role of directing how electoral college electors are

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40 Note, *supra* note 14, at 1093.

41 *Id.* at 1103.

42 *Id.* at 1098, 1103.

43 *Id.* at 1087. "Textual fidelity" to the Constitution must be centered on the five constitutional amendments that expressly recognize a "right to vote." *See* discussion *infra* Section II.A.2.

44 U.S. CONST., amends. XIV, XXIV.

45 *See* Chiafalo v. Washington, 591 U.S. 578, 583, 592, 595 (2020); *infra* Section II.C.

46 *See* JAN. 6TH REPORT, *supra* note 13, at 266.

> chosen (which every State legislature had done *before* the election, giving that power to the people at the ballot boxes) then the State legislatures could simply choose Trump/Pence electors *after* seeing the election results.[47]

The January 6 Committee reported that after a Trump aide proposed "'[w]e should baldly assert' that State legislators 'have the constitutional right to substitute their judgment for a certified majority of their constituents,'"[48] Trump and his aides followed up with a campaign to pressure state officials to do just that.[49] Not everyone on the Trump team agreed, and some dissented with salty language devoid of academic nicety but full of common sense. One Trump aide said the plan "'just started happening' even though it was . . . 'of the crazy, crazier ideas that w[as] thrown out.'"[50] Another even more bluntly described the Trump team theory that states could overturn the election results as "Bat. Shit. Crazy."[51]

We do not have to conjure unlikely law school hypotheticals to show that the "plenary state power" theory could crush democracy, enable autocracy, and end citizen-based presidential elections. The Trump conspiracy and January 6 riot are grim, deadly proof that extremists will use this dangerous theory to do these things. As a group of scholars warned,

> In decades past, this might have been dismissed as the fear of a fevered imagination, but it is now an unambiguously real threat. The assertion that state legislatures have this power, and the hope that they might actually exercise it, became the foundation stones

47 *Id.* (emphasis in original).

48 *Id.* at 268 (alteration in original).

49 *Id.* at 263–300 (describing the attempt to pressure state legislators and election officials premised on the "plenary power" theory).

50 *Id.* at 270.

51 *Id.* To be clear: the *Bush/McPherson* statements on the "plenary power" theory do not justify the Trump attempt to get state legislators in swing states to overturn the citizen votes in those states. Even under the *Bush/McPherson* statements on "plenary power," states must honor the results of citizen votes when state law requires that electoral college votes are determined by citizen vote. *See* Bush v. Gore, 531 U.S. 98, 104 (2000) ("[t]he individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college."). While the "plenary power" theory would allow a state to decide not to use citizen votes to pick electors in the *next* presidential election, it does not allow states to overrule the citizens' vote in the *last* election. The attempted Trump coup to overrule citizens votes was illegal even under the radical "plenary power" theory.

> for the litigation explosion that followed the 2020 election, as well as for the January 6, 2021 assault on the Capitol.[52]

Before turning to the reasons why there is a citizens' right to vote for President, and why the "plenary power" theory is wrong, it is fair to say that this thesis is contrary to established Supreme Court precedent[53] and even the conclusions of some well-respected scholars squarely in the voting rights camp.[54] That said, a deeply examined look into the Constitution, case law, history, and consequences shows that citizens do have the right to vote for president.

II. THE SOLUTION: RECOGNIZING CITIZENS HAVE A CONSTITUTIONAL RIGHT TO VOTE FOR PRESIDENT

There are five reasons why there is a constitutional right for citizens to vote for president and why the "plenary state power" theory is wrong.[55]

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52 Mark Bohnhorst, Reed Hundt, Kate E. Morrow & Aviam Soifer, *Presidential Election Reform: A Current National Imperative*, 438 LEWIS & CLARK L. REV. 437, 443 (2022) [hereinafter Bohnhorst I]. Several of the authors explored the right to vote further in a subsequent article. *See generally* Mark Bohnhorst, Michael W. Fitzgerald & Aviam Soifer, *Gaping Gaps in the History of the Independent State Legislature Doctrine:* McPherson v. Blacker*, Usurpation, and the Right of the People to Choose Their President*, 49 MITCHELL HAMLINE L. REV. 257 (2023) [hereinafter Bohnhorst II].

53 *See* McPherson v. Blacker, 146 U.S. 1, 34, 37 (1892); *Bush*, 531 U.S. at 104.

54 Proponents of voting rights have concluded that there is not a constitutional right to vote. Professor Richard Hasen, a leading election law expert, recently authored a book calling for a constitutional amendment guaranteeing the right to vote. RICHARD L. HASEN, A REAL RIGHT TO VOTE: HOW A CONSTITUTIONAL AMENDMENT CAN SAFEGUARD AMERICAN DEMOCRACY (2024). Professor Hasen writes that "[m]any Americans assume that the constitution includes an affirmative right to vote, but shockingly, it does not." *Id.* at 8. While I hope to avoid a face-off with the dean of voting rights law, I respectfully disagree with Professor Hasen. As explained in the next section, we already have five Amendments that create an affirmative constitutional right to vote for all citizens eighteen and older, and a sixth, while laudatory, is not necessary. For more voting rights advocates who shared Professor Hasen's conclusion, *see* Lani Guinier, *No Affirmative Right to Vote*, N.Y. TIMES (June 22, 2009) https://archive.nytimes.com/roomfordebate.blogs.nytimes.com/2009/06/22/the-battle-not-the-war-on-voting-rights [https://perma.cc/9PJJ-SR48]; Lani Guinier & Penda D. Hair, *A Voting Rights Amendment Would End Voting Suppression*, N.Y. TIMES (Nov. 3, 2014), https://www.nytimes.com/roomfordebate/2014/11/03/should-voting-in-an-election-be-a-constitutional-right/a-voting-rights-amendment-would-end-voting-suppression [https://perma.cc/ZEH9-GW2P] (stating that the right to vote is not guaranteed under the Constitution and that the Constitution includes no language that makes that right explicit). The next Section includes scholars who have concluded that there is a constitutional right to vote that includes the right to vote for president.

55 I gratefully rely on the work of scholars who have written that the text of the Constitution establishes a right to vote generally and for president. *See generally* Peter M. Shane, *Disappearing Democracy: How* Bush v. Gore *Undermined the Federal Right to Vote for Presidential Electors*, 29 FLA. ST. U. L. REV. 535 (2001); Luis Fuentes-Rohwer & Guy-Uriel Charles, *The Electoral College,*

First, the text of the Constitution establishes a right to vote—including for presidential electors—that is not extinguished by state Article II electoral college responsibilities. Second, Supreme Court decisions to the contrary ignored the plain language of the voting rights amendments. Moreover, the "plenary power" line of cases began with three Supreme Court decisions steeped in racism and sexism. These cases cannot be reconciled with contemporary Supreme Court authority correctly establishing that the right to vote is the foundation for all rights. Third, the citizens' right to vote for presidents, developed in constitutional amendments, is also reflected in almost two hundred years of presidential elections by citizen vote; state legislative appointment of presidents promoted by "plenary power" advocates all but died out by 1832. Fourth, the "plenary state power" theory would have racist, sexist, and ageist outcomes, with largely white, male, older legislators pirating voting power from a citizenry with far greater representation of Black Americans, women, and younger citizens. Fifth, "plenary state power" would have a catastrophic outcome, ending democracy and perhaps even the country. By contrast, presidential election by citizens embodies democratic values and puts presidential election power where it belongs—with the people.[56]

A. *Textualism: The Constitution Establishes that Citizens Have the Right to Vote for President—and Forbids States from Denying or Abridging that Right*

The text of the Constitution establishes that citizens have the right to vote for president. There are five Amendments to the Constitution that explicitly refer to the "right to vote."[57] It is the right most frequently referred to and protected in the Constitution.[58]

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the Right to Vote, and Our Federalism: A Comment on a Lasting Institution, 29 FLA. ST. U. L. REV. 879 (2001); Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L.J. 1290 (2011); Bohnhorst I, *supra* note 52.

56 *See* Chiafalo v. Washington, 591 U.S. 578, 597 (2020) (stating that electors "have no ground for reversing the vote of millions of . . . citizens" because under "the Constitution—as well as with the trust of a Nation that here, We the People rule.").

57 U.S. CONST. amends. XIV, XV, XIX, XXIV & XXVI.

58 Rights are not specifically mentioned outside of the Amendments to the Constitution; the rights mentioned other than the right to vote are each mentioned one time. U.S. CONST., amends. I (freedom of speech and right to assemble), II (right to bear arms), IV (right against unreasonable search and seizure), V (right against self-incrimination), VI & VII (right to speedy trial and jury trial), VIII (right against cruel and unusual punishment), IX & X (reservation to the people of unenumerated rights), XIII (right against slavery and involuntary servitude), XIV (right to privileges and immunities of citizenship, due process, equal protection, and birthright citizenship).

The right to vote is unique because it is the only constitutional right refined through multiple constitutional amendments. The right to vote has not just evolved through voting practices and judicial interpretation; it has actually been grown by amendments that changed what the text of the Constitution says. Collectively, the voting rights amendments establish a right to vote for American citizens eighteen years old and older, including the right to vote for president.

1. The Fourteenth Amendment Added a Right to Vote to the Constitution—Including the Right to Vote for President

The Fourteenth Amendment was the first constitutional provision to include the words "right to vote."[59] The Fourteenth Amendment states that a "right to vote at any election *for the choice of electors for President* and Vice President of the United States" could not be "denied to any male inhabitants . . . being twenty-one years of age" of a state "or in any way abridged."[60] While some argue that the right-to-vote amendments are merely prohibitions of discriminatory denial of suffrage,[61] the Fourteenth Amendment is not so limited. It prevents denial or abridgment of the right to vote on nonspecified grounds.[62] As Professor Akhil Amar wrote: "The words 'right to vote' appear in section 2 and are not tethered there

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That said, the pre-Amendment body of the Constitution implicitly recognizes voting rights twice. *See id.*, art. I, § 2, cl. 1 (stating that members of the House of Representatives are "chosen . . . by the People of the Several States"); art. I, § 4, cl. 1 (referencing "Elections for Senators and Representatives" and conferring on states power to determine time, place and manner of such elections). Entitlement to privileges and immunities of citizenships is mentioned twice. *See id.*, art. IV, § 2, cl. 1; amend. XIV, § 1.

59 U.S. CONST. amend. XIV, § 2.

60 *Id.* (emphasis added). Section 2 of the Fourteenth Amendment reads as follows:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

61 *See, e.g.*, Note, *supra* note 14, at 1101. Though the Note contends "textual fidelity" extinguishes citizen presidential voting rights, the texts of the five voting rights amendments are not in the Note. *Id.* at 1086.

62 *See* U.S. CONST. amend. XIV; *see also* Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379, 400 (2014).

to any particular basis of disenfranchisement, such as race. Section 2 affirms a general right to vote . . . ."[63]

Professor Peter Shane wrote that Section 2 of the Fourteenth Amendment is a "straightforward argument" that the "Amendment, persuasively read, does guarantee individual citizens the right to vote for presidential electors."[64] Professor William Van Alstyne noted that "[t]he right to vote protected by [the Fourteenth Amendment] included the right to vote for . . . six specified groups of offices."[65] A collection of scholars more recently agreed, concluding that "[t]he language of Section 2 [of the Fourteenth Amendment] seems quite clear, and . . . underscore[s] the Section's commitment to national protection for the right of citizens—at the time, the right of only male citizens—to vote for the electors of the President and Vice President."[66]

Not only that, but the Fourteenth Amendment imposes a steep penalty for states that deny or abridge the citizens' right to vote. Congressional representation for a state that violates the Fourteenth Amendment right to vote "shall be reduced" proportionally.[67] This is the only amendment which carries a specific penalty for violating a constitutionally enumerated right, and it is severe—loss of representation in Congress and by extension in the electoral college. The plain meaning of the Fourteenth Amendment is what the text of the Fourteenth Amendment says: citizens have a "right to vote . . . for the choice of electors for President," and that if that "right to vote . . . is denied . . . or in any way abridged" by any "such State," then that State's "representation . . . shall be reduced."[68] As constitutional law Professor Amar put it, the protection of the "right to vote" by the Fourteenth Amendment and the penalty imposed by the Amendment when that "right to vote . . . is denied . . . or in any way abridged" means "there can be no disenfranchisement imposed upon the group of presumptive voters textually specified by Section 2."[69]

What about the argument that the Fourteenth Amendment does not create a right and a penalty, but rather frees states to deny citizen voting as long as they are willing to accept reduced congressional representation? This argument fails for at least two reasons. First, nothing

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63 AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 189 (2012).

64 Shane, *supra* note 55, at 539.

65 William W. Van Alstyne, *The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33, 84–85 (1965).

66 Bohnhorst I, *supra* note 52, at 451.

67 U.S. CONST. amend. XIV.

68 *Id.*

69 AMAR, *supra* note 63, at 189.

in the Fourteenth Amendment limits penalties to the reduction of congressional representation.[70] As Professor Amar observed, Section 2 means that judges may treat "disenfranchisements as invalid"—if a state takes away the right to vote either the constitutional penalty must be imposed "*or else the disenfranchisement must end.*"[71] Second, congressional debates suggest that the Section 2 penalty was for protection of the right to vote and not to avoid it; congressmen noted that penalties for crimes did not mean there is a right to commit them.[72] Professor Van Alstyne concluded "it seems quite impossible to conclude that there was a clear and deliberate understanding in the House that § 2 . . . expressly recognized the states' power to deny or abridge the right to vote."[73] The penalty is a penalty for violating the law, not a permission slip that makes the illegal legal.

There is a single exception in the Fourteenth Amendment that expressly permits states to deny the right to vote without penalty. The Section 2 penalty for denying or abridging the vote applies "except for participation in rebellion, or other crime."[74] Under the interpretive principle "expressio unius est exclusio alterius," the expression of a singular exception permitting states to deny or abridge the right to vote for rebellion and crime means that all other infringements on the right to vote are prohibited.[75]

This plain-as-day interpretation of the words "right to vote" in the Fourteenth Amendment, and throughout the voting rights amendments, follows the guidance of the "plain meaning rule" Justice Antonin Scalia

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70 *Cf.* Van Alstyne, *supra* note 65, at 45 ("[t]here was probably no reliable understanding whatever that § 2 would preclude Congress (or the courts) from employing sources of constitutional authority other than § 2 to affect state suffrage power."). The Supreme Court's recent decision in *Trump v. Anderson* may suggest that this current Court would limit the power to impose the Section 2 representation reduction penalty to Congress. *See* Trump v. Anderson, 144 U.S. 662, 667 (2024) (limiting to Congress the power to disqualify persons from the presidency under Section 3 of the Fourteenth Amendment). The right to vote recognized in Section 2 exists independently of that penalty, as perhaps best demonstrated by the repeated recognition of that right in four subsequent amendments. One sensible construction is that courts may enforce the Fourteenth Amendment right to vote, while it is up to Congress to assess whether a state violates that right so gravely that its representation should be reduced. In such instances, Congress could (and probably ought to) look to courts to determine whether a state unconstitutionally denied the right to vote and, if so, whether the gravity of a state's denial of the right to vote warranted the representation penalty. In that sense, court enforcement of the Fourteenth Amendment right to vote would support congressional imposition of the Section 2 penalty.

71 AMAR, *supra* note 63, at 188 (emphasis in original).

72 *Id.* at 63 (citing Cong. Globe, 39th Cong., 1st Sess. 6, 431–32 (1866)).

73 Van Alstyne, *supra* note 65, at 65.

74 U.S. CONST., amend. XIV, § 2.

75 ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107 (2012). The authors went on to observe that the more specific the exclusion, the stronger the application of this interpretive canon. *Id.* at 108.

and Professor Bryan Garner described in their landmark treatise on interpreting the law: "Words are understood in their ordinary, everyday meaning" and this "ordinary meaning rule is the most fundamental semantic rule of interpretation."[76] "Right to vote" means "right to vote." "Right to vote" does not mean "no right to vote, because states can cancel elections." But that is the "plenary power" theory in a nutshell.

The Scalia treatise supports another common sense interpretation of the Fourteenth Amendment. The penalty for violating the constitutional right to vote means that it is unlawful, and unconstitutional, for a state to deny or abridge that right.[77] As a group of scholars recently observed,

> It is logically—as well as textually—impossible that individuals could have "no federal constitutional right to vote for electors for President of the United States" when the Constitution explicitly provides that a state's denial or abridgment of "the right to vote at any election for the choice of electors for President" will give rise to a severe penalty for that state.[78]

There is debate on what the Framers meant when they put the words "right to vote" into the Fourteenth Amendment.[79] This debate centers on what Professor Brandon Hasbrouck described as the "original public meaning[]" of the Amendment.[80] While it is important to consider the history of the Amendment, the legislative history of the Fourteenth Amendment is more of a swamp than a paved highway when it comes to finding a path to constitutional meaning. One scholar, in writing a guide on the legislative history of the Fourteenth Amendment, began by strongly conditioning reliance on legislative history:

> The Amendment came about through a complex process, in which Congress rejected several prior proposals for constitutional amendments before settling on a markedly different proposal that became the Fourteenth Amendment . . . .[S]tatements made during

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76 *Id.* at 69; *see also* Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 476 (1994) ("[W]e construe a statutory term in accordance with its ordinary or natural meaning."). Textualism has its place, but I disagree with the treatise authors' categorial rejection of legislative history and a wrongly narrow application of consequentialism as interpretive guides.

77 Scalia & Garner, *supra* note 75, at 295 (stating that a law that penalizes an act makes it unlawful). By this reasoning, a constitutional amendment that penalizes an act makes the act unconstitutional, and hence denying or abridging the right to vote is unconstitutional.

78 Bohnhorst II, *supra* note 52, at 310 (footnotes omitted).

79 *Compare* Bohnhorst I, *supra* note 52, at 451 (explaining that the history of drafting and ratification of Fourteenth Amendment shows that the framers intended to create a national right to vote for presidential electors), *with* Tolson, *supra* note 62, at 406 (explaining that few in Congress intended to explicitly grant the right to vote through the Fourteenth Amendment).

80 Brandon Hasbrouck, *The Antiracist Constitution*, 102 B.U. L. REV. 87, 129 (2022).

> the drafting and debate over the Fourteenth Amendment do not always yield clear answers to modern questions.[81]

Another scholar called the original intent of the Fourteenth Amendment "the Black Hole of Constitutional Law."[82] Still, another was skeptical about looking to isolated statements in debates to "provide[] the key that unlocks the meaning of the Fourteenth Amendment."[83] The originalist search for nineteenth-century congressional debate snippets to argue that the Fourteenth Amendment words "right to vote" do not mean there is a constitutional "right to vote" brings to mind Justice Scalia's humorous skepticism about legislative history: the use of legislative history is the equivalent of "entering a crowded cocktail party and looking over the heads of the guests for one's friends."[84]

Legislative history can be obscure and subject to all sorts of interpretations, and while it matters when it comes to the Fourteenth Amendment, it is not all that matters. As Professor Hasbrouck explained:

> In exploring what a constitutional provision meant to the public that ratified it, we will almost invariably encounter a range of constructions its contemporaries gave it. . . . We can be reasonably certain of the semantic content of their text. But the range of public meanings—in the sense of legal consequences attributed to the Reconstruction Amendments—cannot be so neatly summed up. Still, there is value in exploring how various contemporaneous interpretations—especially those of the Amendments' drafters and intended beneficiaries—dealt with the potential effects of the new constitutional text.[85]

As another scholar put it, "jurists and scholars can and should use the legislative history of the Fourteenth Amendment to make certain kinds of claims about its original meaning but must exercise caution and recognize the limits of their claims."[86] With that said, here are several conclusions that can be fairly drawn from the congressional debates on Section 2 of the Fourteenth Amendment.

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81 Gregory E. Maggs, *A Critical Guide to Using the Legislative History of the Fourteenth Amendment to Determine the Amendment's Original Meaning*, 49 CONN. L. REV. 1069 (2017).

82 Paul Finkelman, *Original Intent and the Fourteenth Amendment: Into the Black Hole of Constitutional Law*, 89 CHI.-KENT L. REV. 1019, 1019 (2014).

83 MARK GRABER, PUNISH TREASON, REWARD LOYALTY xxxiv (2023). Professor Graber's book is a deep and well-sourced assessment that the goals of the Fourteenth Amendment framers were, as his title states, to keep Union loyalists in power and keep the Confederate (and treasonous) South out of power. *See generally id.* Though I rely on Professor Graber's historical research, it is fair to point out his conclusion that Section 2 of the Fourteenth Amendment does not announce rights suggests a different assessment than mine. *Id.* at xxvi.

84 Scalia, *supra* note 75, at 377.

85 Hasbrouck, *supra* note 80, at 130 (footnote omitted).

86 Maggs, *supra* note 81, at 1073.

The first is that the Framers wanted Black citizens to have the right to vote—and to prevent states from stopping them.[87] But they feared they did not have the votes for extending a right to vote for Black citizens, so they drafted an amendment that would pass and achieve that goal indirectly. Senator Jacob Howard, a leading drafter, spoke in presenting an early version of the amendment to the Senate.[88] He was "sorry" that the draft "d[id] not recognize the authority of the United States over the question of suffrage in the several States . . . nor does it recognize, much less secure, the right of suffrage to the colored race."[89] Senator Howard wanted to "secure suffrage to the colored race to some extent at least," and added: "I could wish that the elective franchise be extended equally to the white man and the [B]lack man . . . ."[90]

However, Senator Howard and the Senate Committee that drafted the Fourteenth Amendment thought Black suffrage and universal suffrage were "impracticable at the present time" and that states would not ratify "the right of suffrage to the colored race."[91] Senator Howard added, "The second section leaves the right to regulate the franchise still with the states, and does not meddle with that right."[92] He also stated that the version of the Amendment then before the Senate did not alter the states' authority to choose presidential electors without a citizen vote.[93]

This sounds very grim for the argument that Section 2 of the Fourteenth Amendment creates a citizens' right to vote for the president and presidential electors—until one considers that for the preliminary version of the Fourteenth Amendment, the version Senator Howard and Representative Thaddeus Stevens were discussing *did not include the words "right to vote" and did not mention elections for presidential electors*—key words that were added to the Amendment before it passed.[94] Instead of providing for a "right to vote," the preliminary draft

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87 The initial proposal for Section 2 barred race discrimination in voting; this was withdrawn. *See id.* at 1104.

88 *See* Senator Jacob Howard, Speech Introducing the Fourteenth Amendment to the Senate (1866), *on* NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/historic-document-library/detail/jacob-howard-speech-introducing-the-fourteenth-amendment-to-the-senate-1866 [https://perma.cc/XG7H-UUJ5].

89 CONG. GLOBE, 39th Cong., 1st Sess. 2766 (May 23, 1866).

90 *Id.*

91 *Id.* Representative Thaddeus Stevens, a leading sponsor of the amendment in the House of Representatives, agreed the early version of the Amendment was "all that can be obtained in the present state of public opinion." *Id.* at 2459.

92 *Id.* at 2766.

93 *Id.* at 2768.

94 *Id.* at 2766. Here is the version of Section 2 Senator Howard addressed: "But whenever, in any State, *the elective franchise shall be denied* to any portion of its male citizens not less than twenty-one years of age, or in any way abridged, except for participation in rebellion or other crime, the basis of representation in such State shall be reduced . . . ." *Id.* (emphasis added).

of Section 2 stated that "the elective franchise shall not be denied . . . ."[95] That draft did not mention presidential elections.[96] This was changed, so when it comes to what the Fourteenth Amendment means, the legislative discussions on the earlier drafts of the Fourteenth Amendment has to take a backseat to what the Amendment ultimately said and did. As constitutional scholars and Professors William Baude and Michael Stokes Paulsen observed,

> Notoriously, there were *many* different competing proposals for constitutional amendments suggested at early stages in the process that eventually led to proposal of the Fourteenth Amendment. These various proposals had different objectives (sometimes at odds with one another), different points of concern or emphasis, and different language. It is fair to describe the process as fluid, especially at earlier stages.[97]

A second incontestable conclusion from the legislative history is what Congress actually did to the text of the Fourteenth Amendment in the last two days before the Amendment passed: adding the critically important language referring to a right to vote "for the choice of electors for President." The Framers of the Fourteenth Amendment changed Section 2 to replace the reference to "the elective franchise" with "the right to vote at any election for the choice of electors for President and Vice-President of the United States, [and] Representatives in Congress."[98] Congress made these changes in two steps over the course of those two days.

The first changes were proposed on June 6, 1866, to (1) add "right to vote" in replacement of "the elective franchise," and (2) add a reference to the Constitution and federal laws so that the right to vote covered federal constitutional and statutory rights.[99] The final changes were proposed by Senator George Williams on June 8th just before Congress passed the Fourteenth Amendment. These changes replaced the general reference to a "right to vote at any election held under the Constitution and laws of the United States" with more specific identification of a right to vote for specific federal and state offices:

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95 *Id.*

96 *Id.*

97 Will Baude & Michael Paulsen, *The Use and Misuse of Section Three's "Legislative History": Part II*, VOLOKH CONSPIRACY (Feb. 6, 2024, 10:20 AM), https://reason.com/volokh/2024/02/06/the-use-and-misuse-of-section-threes-legislative-history-part-ii [https://perma.cc/TJJ8-PAUE].

98 CONG. GLOBE, *supra* note 89, at 2991, 3011 (June 6, 1866), 3029 (June 8, 1866).

99 *Id.* at 2991 (June 6, 1866). At this point, the operative language of the draft Section 2 stated that "whenever the right to vote at any election held under the Constitution and laws of the United States, or of any State, is denied to . . . or in any way abridged . . . ." *Id.*

> I propose to modify [Section 2] by striking out the words—
>
> But whenever the right to vote at any election held under the Constitution and laws of the United States or of any State—
>
> And to insert the words—
>
> But when the right to vote at any election for the choice of electors for President
>
> and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a State, or members of a Legislature thereof.
>
> Specifying particularly the officers for which these people must be allowed to vote in order to be counted.[100]

This shows that Senator Williams wanted to specify the president as among "the officers for which the[] people must be allowed to vote."[101]

Congress agreed. After that, Senators raised the prior versions of Section 2 for consideration. The Senate, choosing between them and the final proposal, passed what ultimately became Section 2 of the Fourteenth Amendment—the version with the language stating there is a "right to vote at any election for the choice of electors for President."[102]

Congress explicitly voted for a Fourteenth Amendment with the words "right to vote for the choice of electors for President and Vice President"—after adding those words in right before the vote—and rejected two preliminary options that did not include those words.

What to make of all this? What is certain from the legislative history? First, Congress did not pass a right to universal suffrage because only male citizens are covered by Section 2. Second, Congress explicitly rejected language that would have applied Section 2 to "the elective franchise" and instead chose to use the words "right to vote." Third, the words "right to vote" were not in the Constitution before the Fourteenth Amendment, but Congress added them in the Fourteenth Amendment.

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100 *Id.* at 3029 (June 8, 1866).

101 *Id.*

102 *Id.* at 3039–40 (June 8, 1866). The framers did not discuss why they included "judicial officers" of a state. But the timing and content of the changes to the Fourteenth Amendment, along with context, help explain why the Fourteenth Amendment requires citizen voting for president but not uniformly for all state judges. The framers created a constitutional right built around the then-existing state and federal constitutional requirements and a nearly uniform state practice. All but one state required citizen voting for presidential electors. *See supra* note 20 (noting Supreme Court recognition of this history in *Chiafalo*); *infra* Section II.C.1 (describing the history of popular voting). By contrast, voting for state judges is not now, and was not then, a uniform state practice. *Significant Figures in Judicial Selection*, BRENNAN CTR. FOR JUST. (May 8, 2015), https://www.brennancenter.org/our-work/research-reports/significant-figures-judicial-selection [https://perma.cc/X6XS-UQ4Z]. *See generally* Larry C. Berkson, *Judicial Selection in the United States: A Special Report*, 64 JUDICATURE 176 (1980).

Fourth, Congress rejected language that would have attached the right to vote to "any election held under the Constitution and laws of the United States"[103] and instead attached the right to vote specifically to "any election for the choice of electors for President and Vice President of the United States" as well as other elections.[104] Fifth, Congress added the "right to vote" language and applied it directly to presidential elections in the two days before the Fourteenth Amendment passed.

Scholars disagree on what this all means. Professor Franita Tolson noted, "Section 2 of the Fourteenth Amendment, in its final form, reflects a series of political compromises balancing Congress's concerns over intruding on the state's authority over elections against its desire to expand access to the franchise."[105] Though some scholars believe the authors of the Fourteenth Amendment did not intend to create a general affirmative right to vote,[106] others wrote that the legislative history is not conclusive.[107] Professor Van Alstyne described "the inconclusive legislative history of the Fourteenth Amendment"[108] and wrote that "[o]n the whole record . . . it seems quite impossible to conclude that there was a clear and deliberate understanding" that the Fourteenth Amendment "expressly recognized the states' power to deny or abridge the right to vote."[109] More recently, a group of scholars concluded that "[l]eading texts about the Fourteenth Amendment's ratification process and the source material . . . do not contain evidence of opposition to the role of the people rather than the state legislatures . . . ."[110] Though the congressional debate does not bring clarity, Professors Luis Fuentes-Rohwer and Guy-Uriel Charles reviewed the changes in the drafts of the Fourteenth Amendment to correctly observe that "[t]he key phrase—'the right to vote at any election for the choice of electors for President and Vice-President'—was proposed late in the drafting of the Fourteenth

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103 CONG. GLOBE, *supra* note 89, at 2991, 3011 (June 6, 1866), 3029 (June 8, 1866).

104 *Id.* at 3029 (June 8, 1866); *see also* U.S. CONST. amend. XIV.

105 Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 389, 413 (2014) (adding that Congress sought to achieve this indirectly by penalizing states that denied the vote); *see also* Michael Kent Curtis, *The Fourteenth Amendment: Recalling What the Court Forgot*, 56 DRAKE L. REV. 911, 958 (2008) ("Section 2 was a strongly democratic provision. It was designed to induce all states to move toward universal male suffrage and to penalize those that did not.").

106 Tolson, *supra* note 105, at 406.

107 Richardson v. Ramirez, 418 U.S. 24, 43 (1974) ("The legislative history bearing on the meaning of the relevant language of s 2 is scant . . . ."); *see also* FONER, *supra* note 21, at 175. Professor Foner noted that congressional committee history did not "record[] . . . the content of debate, a disappointment to anyone seeking . . . the reasons for changes in the wording as the Fourteenth Amendment evolved." *Id.* at 61.

108 Van Alstyne, *supra* note 65, at 85.

109 *Id.* at 65.

110 Bohnhorst I, *supra* note 52 at 453 n.43.

Amendment."[111] They added that this right to vote was intended to impose the Fourteenth Amendment penalties "if a state legislature elected and appointed the state's electors," concluding that "[t]he language of [the Fourteenth Amendment] seems quite clear, and the history of its drafting and ratification underscore the [Amendment]'s commitment to national protection for the right of citizens . . . to vote for the electors of the President and Vice President."[112]

Historical context further shows that it is correct to interpret Section 2 in favor of establishing a federal right to vote in any election for presidential electors that states could not deny or abridge. The Reconstruction debate was full of post-Civil War concerns about whether individuals (particularly Black citizens) had the right to vote[113] and whether and to what extent the federal government could limit state power (particularly the power of the secessionist Southern states).[114] As Professor Mark Graber recently observed, "[a]ll segments of the Southern community [were] united in their loathing for the free states and free-state citizens."[115] The framers of the Reconstruction Amendments wanted to head off this hostility and believed "[r]estoration [of former Confederate states] without additional constitutional or legal securities threatened disaster for loyal persons of every race."[116] The framers of the Fourteenth Amendment deeply distrusted Southern state sovereignty, as the drafters saw state power as a dangerous means of preserving the Confederate cause—slavery and antidemocratic aristocracy.[117] A proponent of the Amendment stated that "the powers of the States have been limited and the powers of Congress extended."[118]

As the framers saw it, suffrage reform, particularly reform protecting Black voting rights, was required for protecting civil rights and vindicating the Union's Civil War victory.[119] They also wanted to limit state power because the South was beset with racist leadership and violence, with legislatures subverting federal civil rights legislation and

111 *Id.* at 451.

112 *Id.*

113 GRABER, *supra* note 83, at 110, 123–30, 144–52 (discussing the debate on whether Black citizens should have the right to vote); *see also id.* at 250–53 (providing a table showing which Senators and Representatives were proponents of banning race discrimination in voting).

114 FONER, *supra* note 21, at 69 (noting the objection that the Amendment would "utterly obliterate state rights and state authority over internal affairs").

115 GRABER, *supra* note 83, at 54.

116 *Id.* at 81.

117 *Id.*

118 FONER, *supra* note 21, at 258.

119 *Id.* at 189.

vigilante terrorists killing Black citizens and their allies.[120] After passing the Fourteenth Amendment, Congress passed the Reconstruction Act of 1867, requiring the seceding states to ratify the Fourteenth Amendment and guarantee voting rights for all male citizens twenty-one years old before they were readmitted to the Union.[121] All this shows that at the time the Fourteenth Amendment was passed, the country was in a historic, fateful debate about individual voting rights and federal authority over states.

It was at this fraught national moment that Congress decided to add these words into the Constitution: "[T]he right to vote in elections for electors for President and Vice President," along with steep penalties on states if that right is "denied" or "abridged in any way."[122] While some might argue that this still allowed states to withhold the right to vote for President—or, for that matter, to cancel elections entirely—it is hard to imagine that the state-skeptical Reconstruction framers wanted to give states sovereign authority so great as to swallow whole the "right to vote" recognized in the Fourteenth Amendment.[123] As Reconstruction expert Professor Eric Foner put it, framers of the Amendment "did not trust President Johnson or his southern governments."[124] As one early twentieth-century scholar observed, "[a]lthough the primary purpose of the Fourteenth Amendment was undoubtedly . . . to safeguard the [Black Americans] in [their] new status of . . . freem[e]n, its actual scope is vastly wider than that, and its effect has been very far reaching."[125] A crimped interpretation of the Fourteenth Amendment that envisions that the framers gave the states the power to deny the rights established in the plain language of the Amendment defies common sense and history—and the fact that Congress took the dramatic step of amending the Constitution to add a right to vote. The 39th Congress used "right" to mean, as one framer put it in proposing the exact words Congress passed establishing a right to vote for President, "the[] people must be allowed

120 *Id.* at 71; *see also id.* at 60 ("Testimony before [Congress] revealed shocking violations of the basic rights of the former slaves and widespread hostility in the South to . . . Unionists and northerners, reinforcing the conviction that further federal action was necessary.").

121 Reconstruction Act of 1867, 39th Cong., Session II, 5 Stat. 459.

122 CONG. GLOBE, *supra* note 89, at 3029; U.S. Const. Amend. XIV, section 2.

123 *See* AMAR, *supra* note 63, at 281 (explaining that one "central focus" of the Fourteenth Amendment was "the need to prevent state misconduct").

124 FONER, *supra* note 21, at 57.

125 CHARLES K. BURDICK, THE LAW OF THE AMERICAN CONSTITUTION 502 (1922); *see also* GRABER, *supra* note 83, at 91 (stating that the purposes of the Fourteenth Amendment included vindication of the suffering that preserved the Union); *id.* at 77 (describing how the protection of formerly enslaved Black Americans was necessary to protect them and to protect the Union); *id.* at 93 ("[P]roponents of congressional Reconstruction recognized that constitutional reform needed to encompass all of Reconstruction, not merely race relations.").

to vote."[126] This means states have to honor the right to vote, not that states have absolute power to stop people from voting.

There is no doubt that some key legislators said, early during the drafting of the Fourteenth Amendment, that the preliminary drafts did not create universal suffrage and did not displace state power over voting.[127] But there is also no doubt that those legislators wanted to expand voting rights as much as possible—and that the framers changed the Fourteenth Amendment, after initial drafts, to add language that mentioned a right to vote and defined that right with precision that explicitly included voting in presidential elections.[128] What the framers *said* about Section 2 *early* in debates was different from what they *did later* and what the final version of Section 2 *said and did*. Put another way, one read of the legislative history is that that the suffrage-seeking framers said what they needed to say so they could get votes for a Section 2 that created at least a limited right to vote.

"Right to vote" was not some throw away language that was sloppily and imprecisely added to the Fourteenth Amendment. Post-Civil War America was convulsed by two related debates: who could vote and how much power did the federal government have over states. The Fourteenth Amendment decided those debates. The Amendment added the words "right to vote" to the Constitution and penalized states that denied or abridged the now constitutionally recognized right to vote.

Consider also the words the Framers of the Fourteenth Amendment could have drafted instead of using the freighted "right to vote" language. The framers could have written that states would be penalized if they denied or abridged "any opportunity to vote as may be provided by state law, or the right to vote for members of the House of Representatives expressly recognized by the Constitution." That language would have narrowly limited the federal right to vote to House elections and given states broad authority to conduct citizen voting (or not) without designating such voting as a right. Or the framers could have stayed with the original language proposed for the Fourteenth Amendment, stating that "the elective franchise shall not be denied."[129] This language made no reference to a "right to vote" nor did it identify offices for which there was a right to vote.

There were plenty of ways the framers could have drafted the Amendment if they intended to extinguish the notion that there was a right to vote in general or a right to vote for president in particular. But

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126 *See* Maggs, *supra* note 81, at 1105.

127 Some congressional advocates for suffrage rights expressed disappointment that the Fourteenth Amendment had not gone far enough. FONER, *supra* note 21, at 87.

128 *See supra* notes 98–104 and accompanying text.

129 *See* CONG. GLOBE, *supra* note 89, at 2766.

the framers chose instead to draft an Amendment that recognized a right to vote, that extended that right to elections for presidential electors, and that included no language suggesting that states had any discretion in determining whether such a right to vote existed (other than the limited exception for rebellion and crime).[130]

As the Supreme Court acknowledged in warning that inquiries into legislative motive "are a hazardous matter," "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it."[131] Politics are not always pristine, which is all the more reason to rely on the text of the Fourteenth Amendment more than the pre-enactment debate.

The point here is not to ignore legislative history. Rather, it is to contextualize that history. Many of the concerns of the Framers, particularly worries about expanding suffrage to Black citizens and women, are historically and constitutionally moot. There is universal suffrage now and there was not then. Whatever one's read on the congressional debate, it cannot be disputed that over the course of debate and revision, the framers added the words "right to vote" to the Constitution and expressly defined the scope of that right to include presidential elections.[132] The words "right to vote" were not in the Constitution before the Fourteenth Amendment. They are now because the framers of the Fourteenth Amendment put them there.

Which leads back to textualism: it is the language of a constitutional amendment that determines the meaning. The framers of the Fourteenth Amendment recognized a "right to vote" "for a choice of electors for President" in the Amendment, prohibited denial or abridgement of the right without limitation, and imposed a penalty for violation of that right to vote.[133] That is what the Amendment says and means. Leading originalist scholars––Professors Baude and Paulsen—recently explained constitutional textualism in their Article on Section 3 of the Fourteenth Amendment: the text sometimes "overshoot[s]" its drafters' intended purposes.[134]

> The reason does not really matter. It is the rule as drafted and enacted in the written text that counts, whether it goes further than the purposes supposed to have inspired its adoption . . . [It is the]

130 U.S. CONST., amend. XIV, § 2.

131 United States v. O'Brien, 391 U.S. 367, 383–84 (1968).

132 U.S. CONST., amend. XIV, § 2; *see also supra* notes 98–104 and accompanying text.

133 U.S. CONST. amend. XIV, § 2.

134 William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. PA. L. REV. 605, 615 (2024).

> objective meaning that constitutes the law, not the ostensible purposes or motivations that supposedly lay behind it.
>
> The rule as adopted might overshoot the purposes, expectations, or desires of those who voted for it. But the rule is the rule; the text's meaning is the text's meaning . . . the text means what it says.[135]

Later, Professors Baude and Paulsen added, "[i]t is what the people involved wrote down in words, and voted to adopt, that counts––not what they might or might not have 'had in mind.'"[136]

Indeed, as Professor Tolson concluded, the Fourteenth Amendment established "a newly redefined right to vote . . . that was now federally protected and disconnected from its prior status as a privilege reserved to propertied elite."[137] To paraphrase Professor Sherrilyn Ifill, the Fourteenth Amendment is not a suggestion.[138] The Amendment created a right to vote for President that could not be denied or abridged in any way. That is what it says, and that is what it means.

2. The Five Right-to-Vote Amendments Together Extend the Right to Vote for President to All Adult Citizens

The four remaining right-to-vote amendments prohibit discrimination against those exercising the right to vote––states cannot deny or abridge the right to vote on the basis of characteristics of identity (race, sex, and age) or impose poll taxes. The Fifteenth Amendment prohibits denial of the right to vote on the grounds of race or color.[139] The Nineteenth Amendment prohibits denial of the right to vote on the basis of sex.[140] The Twenty-Fourth Amendment prohibits denial of the vote

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135 *Id.* at 615–16.

136 Baude & Paulsen, *supra* note 97.

137 Franita Tolson, *"In Whom Is the Right of Suffrage?": The Reconstruction Acts as Sources of Constitutional Meaning*, 169 U. PENN. L. REV. 2041, 2048 (2021).

138 Sherrilyn Ifill, *Why Are U.S. Courts Afraid of the 14th Amendment? Because It's Radical.*, WASH. POST (Nov. 24, 2023, 6:30 AM), https://www.washingtonpost.com/opinions/2023/11/24/us-courts-fear-14th-amendment-radical [https://perma.cc/X6JX-EUCP]. It is fair to note that elsewhere Professor Ifill wrote that "the [Fourteen]th Amendment includes no express guarantee of voting rights or protections against acts of disenfranchisement." Brief for Sherrilyn A. Ifill as Amici Curiae Supporting Respondents at 6–7, Trump v. Anderson, 144 U.S. 662 (2024).

139 U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.").

140 U.S. CONST. amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.").

because of failure to pay taxes, including poll taxes.[141] The Twenty-Sixth Amendment prohibits the denial of the vote to citizens eighteen years old and older on the basis of age.[142]

The five right-to-vote amendments must be considered holistically as the collective constitutional development of a singular right. This is not an extra-textual argument that the right to vote evolved outside of the Constitution through history and judicial application.[143] Rather, it is a textualist argument that Congress and the ratifying states defined the right to vote through a series of five Amendments that refined what the text of the Constitution itself says about that right.

Justice Scalia's description of holistic interpretation applies in determining whether there is a right to vote for President under the Constitution: "Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear."[144]

In his textualism treatise, Justice Scalia reaffirmed this "whole-text canon": "The text must be construed as a whole . . . the whole-text canon . . . calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts."[145] In one of the seminal constitutional law cases, Justice John Marshall similarly ruled that the Constitution must be interpreted under "a fair construction of the whole instrument."[146]

Read together, the five right-to-vote amendments establish a constitutional right to vote for all U.S. citizens eighteen years old or older. The Fourteenth Amendment established a baseline right to vote for men twenty-one and older. What the subsequent four right-to-vote amendments have done is extend that right from white men to all men (Fifteenth Amendment), from men to women (or other gender identifying persons) (Nineteenth Amendment), and from citizens twenty-one years old and older to all citizens eighteen years old and older (Twenty-Sixth Amendment). The later four right-to-vote amendments

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141 U.S. CONST. amend. XXIV, § 1 ("The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.").

142 U.S. CONST. amend XXVI, § 1 ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.").

143 Judicial precedent and history also support the citizens' right to vote for President. *See infra* Sections II.B.5, II.C.

144 United Sav. Ass'n v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988).

145 SCALIA & GARNER, *supra* note 75, at 167.

146 McCulloch v. Maryland, 17 U.S. 316, 406 (1819).

extended the Fourteenth Amendment constitutional right to vote to all adult Americans. This development of the right to vote is an example of Justice Ruth Bader Ginsburg's observation that "[a] prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded."[147] As one scholar observed,

> The right to vote should be seen as a fundamental privilege of adult American citizens today because of the added protections for the right to vote in Section 2 of the Fourteenth Amendment, in the Fifteenth Amendment, in the Nineteenth Amendment, as well as in the poll tax and eighteen-year-old vote amendments.[148]

The *right* to vote in all elections—including in presidential elections for presidential electors—has been the same since the first of these amendments, the Fourteenth Amendment. The later amendments expanded *who* has that right to vote.[149] Collectively, there is now a right to vote for president for all citizens eighteen years old and older.[150]

It is worth considering here how powerfully the Fourteenth, Fifteenth, and Nineteenth Amendments, considered together, expand rights. First, the Fourteenth Amendment considered holistically in all its parts is a comprehensive and dramatic expansion of rights. Professor Foner wrote that "no change in the Constitution since the Bill of Rights has had so profound an impact on American life as the Fourteenth Amendment."[151] Section 1 protected the privileges and immunities that come with citizenship, required due process of law, and made equal protection under law a constitutional right.[152] Under a holistic analysis of the Fourteenth Amendment, the voting rights protections must be considered part of an amendment that completely restructured and

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147 United States v. Virginia, 518 U.S. 515, 557 (1996).

148 Curtis, *supra* note 105, at 1007; *see also* AMAR, *supra* note 63, at 189 (Nineteenth and Twenty-Sixth Amendments establish a "presumptive right to vote based on the Fourteenth Amendment").

149 *See* Fuentes-Rohwer & Charles, *supra* note 55, at 916 ("For most of American history, the franchise was restricted to white male property-owners. Undoubtedly, our conception of the franchise has evolved from these early understandings. The Constitution amply reflects these changes." (footnote omitted)).

150 As stated earlier, the constitutional creation of universal suffrage defeats one argument from the Fourteenth Amendment legislative debate. *See supra* Section II.A.1. To the extent that members of Congress wanted to preserve exclusion of women and younger voters from suffrage or were afraid to explicitly grant suffrage rights to Black citizens, those concerns are now constitutionally abrogated by the Fifteenth, Nineteenth, and Twenty-Sixth Amendments. *See supra* Section II.A.2.

151 FONER, *supra* note 21, at 55–56 (stating that the Fourteenth Amendment is the "longest Amendment ever added to the Constitution" and had "many purposes").

152 U.S. CONST. amend. XIV, § 1. The Equal Protection and Privileges and Immunities Clauses also "combat voter suppression." Hasbrouck, *supra* note 80, at 159.

prioritized individual rights and restricted states' ability to trample them.[153]

The Fifteenth Amendment, ratified just two years after the Fourteenth Amendment,[154] did what the framers of the Fourteenth Amendment were afraid to do: give Black citizens a constitutionally protected right to vote. Professor Hasbrouck added that "[t]he Reconstruction Congress realized that voter suppression was a serious threat to an abolition democracy."[155] The Fourteenth and Fifteenth Amendments together established a constitutional right to vote for all male citizens twenty-one years old and older.[156]

The next giant step in suffrage rights came in 1920, when the Nineteenth Amendment extended the right to vote to white women, creating a universal right to vote under the Constitution for all citizens twenty-one and older.[157] The Nineteenth Amendment vindicated the long struggle of women for human rights and political empowerment.[158] Professor Joseph Fishkin observed that the Amendment's affirmation that women "had an equal right to vote[] shook the conceptual foundation of voting and citizenship."[159] He concluded that the Nineteenth Amendment replaced prior conceptions on voting with the "individualistic idea that each citizen has a right to vote."[160]

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153 Judicial treatment of the Fourteenth Amendment backs up the idea of treating the Amendment as an integrated framework of constitutional protection for individual rights. Voting rights have been protected under the Fourteenth Amendment—but not under the Section 2 representation penalty, which has never been enforced. GRABER, *supra* note 83, at xxv. Instead, voting cases have been brought under the clauses in Section 1 of the Amendment—the Privileges and Immunities and Equal Protection clauses. *Id.*; *see, e.g.*, Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 668 (1966) (finding poll taxes unconstitutional under the Equal Protection Clause); Reynolds v. Sims, 377 U.S. 533, 569, 575–76 (1964) (finding districting unconstitutional under the Equal Protection Clause).

154 *15th Amendment to the U.S. Constitution: Voting Rights (1870)*, NAT'L ARCHIVES (May 16, 2024), https://www.archives.gov/milestone-documents/15th-amendment [https://perma.cc/SGB9-ANMH].

155 Hasbrouck, *supra* note 80, at 160.

156 *Id.* at 163 ("To enact this radical vision, the Reconstruction Congress provided a new, systematic approach to freedom and equality in the Constitution. . . . [T]hese guarantees were supported by the political enfranchisement of all American men, irrespective of race.").

157 *19th Amendment to the U.S. Constitution: Women's Right to Vote (1920)*, NAT'L ARCHIVES (Feb. 8, 2022), https://www.archives.gov/milestone-documents/19th-amendment [https://perma.cc/39ZT-4K5Y].

158 *See* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 949–52 (2002).

159 Fishkin, *supra* note 55, at 1344.

160 *Id.*

In sheer numbers, the Nineteenth Amendment extended voting rights to roughly half the citizens in the country.[161] The Nineteenth Amendment ended the notion that voting was a privilege for men only and made the right to vote universal. Perhaps the best evidence that, by 1919, Congress concluded there was a "right to vote" in the Constitution is the title of the bill that eventually became the Nineteenth Amendment: "[P]roposing an amendment to the Constitution *extending the right of suffrage* to women."[162] In 1971, the Twenty-Sixth Amendment expanded the constitutional right to vote to citizens eighteen years old and older.[163]

The argument against the textualist basis for the right to vote for president has three related parts: (1) the Constitution does not establish a federal right to vote or require states to provide a right to vote, but rather merely prevents the states from interfering with citizen voting *if states provide such rights*;[164] (2) the constitutional amendments are limited to a series of antidiscrimination proscriptions;[165] and (3) the Constitution establishes merely a "negative" right to vote.[166] But these arguments cannot be squared with the plain language of the right-to-vote Amendments for several reasons. First, as explained previously, the arguments do not address that the protection in the Fourteenth Amendment is not limited to discrimination.

Second, the antivoting rights argument seems to be that what these Amendments mean is that there is not a right to vote for president unless states allow this, and that only if states allow voting for president, then they cannot discriminate—and that despite all this, states can simply deny the right to vote for president altogether. This is a pretty tangled constitutional read. It creates an incentive for states to deny the vote to more citizens and protects states most when they deny the vote to all citizens. This may have been what some people thought in 1866, but it does not make sense today. Moreover, contrasted with the unambiguous

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161 *See* AMAR, *supra* note 63, at 279 (stating that women's "Suffrage Revolution marked the largest numerical expansion of the franchise in American history"); *id.* at 286 (noting that the "doubling of suffrage" in Nineteenth Amendment was one of three "great democratic revolutions").

162 58 CONG. REC. 78 (1919) (statement of Rep. Mann) (emphasis added).

163 *The 26th Amendment: An Explainer*, ROCK THE VOTE, https://www.rockthevote.org/explainers/the-26th-amendment-and-the-youth-vote [https://perma.cc/G6C6-BYSR].

164 *See* Pamela S. Karlan, *Framing the Voting Rights Claims of Cognitively Impaired Individuals*, 38 MCGEORGE L. REV. 917, 923 (2007) ("The Supreme Court has recognized that the right to vote is a (conditional) fundamental right—that is, '[o]nce the franchise is granted to the electorate,' the state cannot exclude qualified citizens from participating. However, the constitutional right remains, at its core, a negative right protected only against state interference.").

165 Note, *supra* note 14, at 1101 ("[T]he Constitution does enshrine the right to vote, albeit in negative terms. The Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments all bar various kinds of discrimination between voters . . . .").

166 *Id.*; Karlan, *supra* note 164, at 923; *see also* Guinier, *supra* note 54 (writing that the Fifteenth and Nineteenth Amendments "protect[] citizens only in the negative").

constitutional establishment of a right to vote, there is no language in the Constitution that expresses this "now you see it, now you don't" theory that states can create a right to vote for president or not, or create a right to vote and later rescind it, as long as they do this for all citizens and not just a few.

Third, the Amendments, read together, have to mean that there is an independent federal constitutional right to vote that states cannot abridge or deny.[167] While the Fourteenth Amendment does allow states to deny the vote for "rebellion or other crime,"[168] there is no other language in the Fourteenth Amendment that suggests that the right to vote established there is limited to only such rights as states may, in their discretion, create or withhold. The words "right to vote" in the additional four constitutional right-to-vote Amendments should be construed to refer to, and expand, the federal right to vote established by the Fourteenth Amendment. Those four Amendments explicitly refer to "*[t]he right of citizens of the United States to vote*" and state *that* right "shall not be denied or abridged by the United States or by any State."[169] The right referred to in the last four right-to-vote Amendments is *not* limited to state created rights—it includes the independent, constitutionally created federal right to vote that belongs to "all citizens of the United States." The federal right to vote, initially established in the Fourteenth Amendment, means the same thing in the remaining amendments.[170] These Amendments confirm that the Fourteenth Amendment must be construed as establishing a federal constitutional right to vote—over and above any state rights—that states cannot abridge or deny.

Fourth, the argument that the right-to-vote amendments are limited to a "negative" right is a curious one. Yes, the Amendments establish the right to vote by prohibiting states (and the United States) from denying or abridging the right. To that extent, the amendments are framed in negative terms—states cannot do things that interfere with or extinguish the right. But that is what individual rights are. Rights are things that a government cannot deny, abridge, or take away.

Other constitutional rights are also expressed in "negative" language prohibiting governmental interference. The First Amendment states

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167 *See* SCALIA & GARNER, *supra* note 75, at 167 ("The text must be [considered] as a whole . . . .[E]ach clause [helps] interpret the other.").

168 U.S. CONST., amend. XIV, § 2. The crime exception is significant and goes beyond the scope of this Article.

169 *See supra* notes 139-142 (emphasis added).

170 *See* Tolson, *supra* note 137, at 2048 (discussing that the Fourteenth Amendment created a redefined, federally protected right to vote); *see also* SCALIA & GARNER, *supra* note 75, at 170 ("A word or phrase is presumed to [have] the same meaning throughout a text.").

"Congress shall make no law" establishing a religion or "prohibiting" the free exercise of religion.[171] It also prevents the government from "abridging" the freedom of speech, press, or assembly.[172] No one seriously contends that First Amendment rights are limited to "negative" restrictions that state governments have discretion to virtually eradicate. The First Amendment rights are affirmative rights—they grant people a right to do things. Similarly, the Second Amendment negatively states that the "right . . . to bear arms" "shall not be infringed."[173] No one seriously contends that there is not a federal right to bear arms but rather a limited "negative" right subject to state creation or elimination. As Professor Foner observed, "there were precedents for constitutional provisions establishing a right by forbidding some action rather than stating it in positive language, among them the First and Fourteenth Amendments. Subsequent amendments relating to voting . . . would be framed in the same manner."[174]

Similarly, Professor Amar maintains that the cumulation of right-to-vote amendments make it "textually, historically, and structurally apt to read each affirmation of a 'right to vote' not by negative implication but by positive implication."[175] Each Amendment extended an affirmative right to vote to tens of millions of people. There is really no such thing as an exclusively negative right. All rights are affirmative in that they grant a person the right to do the thing they have the right to do. All rights are negative in that the government cannot stop the person from doing the thing they have the right to do.

The commonsense interpretation of the plain language of the right-to-vote amendments is that they establish a constitutional right to vote for president for all U.S. citizens eighteen years old and older. This is a correct read of the five Amendments, as compared to the strained "negative rights" view that the Constitution means (1) that states are only prohibited from discriminatorily denying voting rights they choose to establish and (2) that Article II means states have such "plenary power" over presidential election that they can refuse to allow citizen voting for president at all.

The better view—and the one expressed in the text of the Constitution—is that there are two layers of constitutional protection of voting rights:

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171 U.S. CONST. amend. I.

172 *Id.*

173 U.S. CONST. amend. II.

174 FONER, *supra* note 21, at 106.

175 AMAR, *supra* note 63, at 191 (citations omitted).

> One layer of the law . . . protects individual citizens' right to vote without any regard for group membership. A separate layer of the law protects [various] groups against group-based harm. The Fourteenth Amendment . . . operate[s] in each of these layers . . . . This layer of the law establishes a floor of individual inclusion: before resolving any questions of group disadvantage, our law ensures that each individual citizen has the right to vote.[176]

Professor Amar similarly concluded that "the emphatic repetition of the phrase 'right to vote' . . . in the text of the amended and reamended Constitution" meant that "[c]ertain textually specified bases for disenfranchisement were *per se* unconstitutional—race, sex, age (above eighteen)—whereas all other disenfranchisements were presumptively suspect as violating a more general right-to-vote principle."[177]

But what about the state's responsibility to appoint electors under Article II, Section 1? Nothing in Article II preempts the right-to-vote Amendments—indeed, since the Amendments came later, they necessarily modified Article II to prevent states from abridging citizens' right to vote. Citizens have a constitutional "right to vote" for "electors for President" that "shall not be denied or abridged" by states. That is what the words in the Constitution say. Article II does not mention citizen voting rights. The most specific mention of citizen voting rights in the Constitution is in the five Amendments that establish those rights.

Several more tenets of textualism additionally support the constitutional right to vote for president. First, and most fundamentally, "[c]onstitutional amendments, by their very nature, change the Constitution."[178] The newer right-to-vote Amendments are "new provisions, when added to the Constitution, [that] supersede, displace, qualify, adjust, correct, or simply must be considered to satisfy earlier constitutional rules."[179] To the extent the right-to-vote Amendments "depart[] from or alter[] prior constitutional understandings, that new constitutional language must be given full effect and priority over earlier provisions."[180]

Second, "provisions should be interpreted in a way that makes them compatible, not contradictory."[181] Article II is compatible with the established citizen right to vote for presidential electors if it is properly considered to allow states to carry out the administration of the presidential electoral process while the citizen voters choose the electors.

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176 Fishkin, *supra* note 55, at 1351.

177 AMAR, *supra* note 63, at 191.

178 Baude & Paulsen, *supra* note 134, at 660.

179 *Id.*

180 *Id.*

181 SCALIA & GARNER, *supra* note 75, at 100.

The "plenary state power" theory contradicts the constitutional Amendments that establish citizen voting rights, and therefore must be rejected. Third, since the right-to-vote Amendments are specific as to citizen voting rights, and those rights are not mentioned in Article II, the right-to-vote Amendments govern.[182] Moreover, the right-to-vote Amendments modify Article II because they came subsequent to Article II. As Alexander Hamilton put it in *The Federalist Papers* " the last [rule] in order of time shall be preferred to the first."[183]

Justice Scalia described another fundamental canon of interpretation that applies here: "General terms are to be given their general meaning" and "are not to be arbitrarily limited."[184] "Right to vote" means "right to vote," not "no right to vote, just any privilege or chance to vote that a state might allow, but doesn't really have to, and can take back at any time." The Constitution means what it says five times about this right. Citizens have a right to vote that cannot be abridged or denied by states. There is a "constitutional guarantee that presidential elections are decided by the votes of the people, and not by state legislatures."[185] Professor Shane's conclusion on the Constitution is right: "It is unthinkable, against this history of constitutional development, that a state legislature should still be deemed authorized to usurp the people's role in choosing presidential electors." [186]

B. *"A Sad Chapter in the History of . . . Democracy":[187] The Supreme Court's Rejection of a Constitutional Right to Vote for President Is Wrong*

There is a line of four Supreme Court cases leading to the conclusion that citizens do not have a constitutional right to vote for president; the last two expressly reasoned that state legislators have "plenary power" to pick presidential electors. The four cases are *Minor v. Happersett*,[188] *United States v. Cruikshank*,[189] *McPherson v. Blacker*,[190] and *Bush v. Gore*.[191] The first three of the four cases—*Minor*, *Cruikshank*, and

182 *Id.* at 183 ("If there is a conflict between a general provision and a specific provision, the specific provision prevails.").

183 THE FEDERALIST NO. 78 (Alexander Hamilton).

184 SCALIA & GARNER, *supra* note 75, at 101.

185 Bohnhourst I, *supra* note 52, at 439.

186 Shane, *supra* note 55, at 549.

187 FONER, *supra* note 21, at 131.

188 Minor v. Happersett, 88 U.S. 162, 163 (1874).

189 United States v. Cruikshank, 92 U.S. 542, 545–46 (1875).

190 McPherson v. Blacker, 146 U.S. 1, 35 (1892).

191 Bush v. Gore, 531 U.S. 98, 104 (2000).

McPherson—were late nineteenth-century cases decided when the Supreme Court crushed the emancipatory possibility of Reconstruction amendment civil rights reform, paving the way for the racism of Jim Crow. One scholar called this "[t]he Supreme Court and the Betrayal of Reconstruction,"[192] concluding the late 1800s Court decisions "opened the door to . . . the legal regime of Jim Crow."[193] Another agreed that the nineteenth-century antivoting cases "make plain the depth of the nation's commitment to Jim Crow."[194] *Bush* has been roundly criticized, with two prominent constitutional scholars stating "*Bush* was wrong in just about every way that it is possible for a case to be wrong"[195] and another writing that *Bush* ignored "the conspicuous trajectory of our constitutional development toward more democracy."[196] In two of the cases—*McPherson* and *Bush*—the extinction of citizen voting rights in presidential elections and promotion of the "plenary state power" theory was dicta extraneous to the holdings.[197] The Supreme Court should reject these decisions, overturn the "plenary power" theory, and recognize that the Constitution establishes a right to vote for president for citizens. Here is a closer look at the four cases.

1. *Minor v. Happersett* (1874)

In *Minor*, the Supreme Court upheld the denial of the right to vote to women.[198] The *Minor* case stemmed from a challenge to a Missouri law banning women from voting.[199] The Court acknowledged that if voting was "one of the necessary privileges of a citizen of the United States, then . . . laws . . . confining it to men are in violation of the Constitution . . . ."[200]

But then the *Minor* Court decided that the Fourteenth Amendment did not add a federal constitutional right to vote—instead, the Court

192 James Gray Pope, *Snubbed Landmark: Why* United States v. Cruikshank *(1876) Belongs at the Heart of the American Constitutional Canon*, 49 HARV. C.R.-C.L. L. REV. 385, 423 (2014).

193 *Id.* at 441.

194 FONER, *supra* note 21, at 167.

195 Vikram David Amar & Akhil Reed Amar; *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislation Notion and Related Rubbish*, 2021 SUP. CT. REV. 1, 2 (2021).

196 Shane, *supra* note 55, at 536.

197 *Id.* at 537 (stating that the "entitlement [of citizens] to vote" was "not actually at issue" in *Bush*). *McPherson*, despite dicta supporting plenary state power to appoint electors, did not address that issue. *Id.* at 545 n.41.

198 Minor v. Happersett, 88 U.S. 162, 178 (1874).

199 *Minor*, 88 U.S. at 165; Fishkin, *supra* note 55, at 1340.

200 *Minor*, 88 U.S. at 170.

ruled that the Amendment only protected federal rights that existed when the Constitution was enacted.[201] Since there was no right to vote in 1789, the Court found that U.S. citizenship did not include a constitutional right to vote.[202] According to the *Minor* Court, women did not have the constitutional right to vote because "the Constitution of the United States does not confer the right of suffrage upon any one."[203] The *Minor* Court found that there was no constitutional right to vote *for anyone* so it could deny the right to vote *to women*. As one commentator observed, "[t]o justify this holding, the Court had to define the political meaning of 'citizen' in a way that did not entail a right to vote. Awkwardly, it did so."[204]

Minor is important because it was relied on by the Court in *Cruikshank* and *McPherson* (and implicitly in *Bush*, which relied on *McPherson*).[205] *Minor* was foundational to the Supreme Court line of cases dismissing citizen voting rights in presidential elections. The Nineteenth Amendment[206] and history abrogated *Minor*; its sexist outcome alone is reason to overturn it. *Minor* set the table for the more explicitly stated "plenary power" theory in later cases: the Court held that the Article II's electoral college provision meant "[t]he power of the state . . . is certainly supreme until Congress acts."[207]

Minor's critics observed that its outcome-oriented reasoning destroyed Fourteenth Amendment rights. One wrote that *Minor* "was one of a string of cases of its era in which the Court eviscerated the Privileges or Immunities Clause [of the Fourteenth Amendment] by holding that there are essentially no meaningful privileges of national citizenship."[208] *Minor*'s "remarkably weak argument about voting and citizenship was by no means unique, nor was it new in the post-Reconstruction period."[209] The Reconstruction/Jim Crow voting cases, including *Minor*, "use[d] a hollowed-out conception of 'citizen' that ignored the actual practices, especially voting, that are constitutive of what it means, politically, to be a citizen."[210] The Nineteenth Amendment effectively overruled *Minor* and established that every adult citizen is

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201 *Id.* at 171.

202 *Id.*

203 *Id.* at 178.

204 Fishkin, *supra* note 55,at 1340; *see id.* at 1340 n.228 (citing *The Slaughter-House Cases*, 83 U.S. 36 (1872)).

205 *McPherson*, 146 U.S. at 34–35, 37–38 (citing *Minor* and *Cruikshank*); *Bush*, 531 U.S. at 104 (citing *McPherson*).

206 U.S. CONST., amend. XIX.

207 *Minor*, 88 U.S. at 171.

208 Fishkin, *supra* note 55, at 1340 n.228.

209 *Id.* at 1341.

210 *Id.*

entitled to vote. Unfortunately, before the Nineteenth Amendment was ratified in 1920, *Minor* was extended in other Jim Crow era Supreme Court cases that eviscerated the right to vote.[211]

2. *United States v. Cruikshank* (1875)

In *Cruikshank*, the Supreme Court relied on *Minor* to again reject a federal constitutional right to vote under the Fourteenth Amendment.[212] The Court decided that the right to vote came from states, and that federal constitutional voting rights were limited to prohibitions of discrimination in any voting right a state might create.[213]

The brutal facts that brought about the case show what the Court chose to protect instead of voting rights: one of the most shockingly violent acts of racist terrorism in the Jim Crow era, the Colfax massacre of 1873. After an election, Black residents in Colfax, Louisiana, cordoned off a government building to protect the racially integrated, elected government.[214] White residents attacked, and killed 280 Black residents.[215] The white residents killed fifty of the Black men after they had surrendered.[216]

The Supreme Court (and the Circuit Court before it) dismissed charges that the white mob interfered with right to vote.[217] The *Cruikshank* ruling that citizens do not have a constitutional right to vote was devastating to Black civil rights and "gave a green light to terror."[218]

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211 The Court also held that Section 2 of the Fourteenth Amendment was limited to male voters, and that therefore did not establish a right for women to vote. *Minor*, 88 U.S. at 174–75.

212 92 U.S. 542, 555–56 ("[T]he Constitution of the United States has not conferred the right of suffrage upon any one, and that the United States have no voters of their own creation in the States . . . the right of suffrage is not a necessary attribute of national citizenship . . . [t]he right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States.").

213 *Id.* at 556.

214 ERIC FONER, RECONSTRUCTION—AMERICA'S UNFINISHED REVOLUTION: 1863–1877 437 (2005); Esther Schrader, *'Long Overdue': Black Men Killed in Infamous Colfax Massacre Commemorated on New Monument*, S. POVERTY L. CTR. (Apr. 28, 2023), https://www.splcenter.org/news/2023/04/28/colfax-louisiana-massacre-memorial [https://perma.cc/P8QA-9CF8].

215 FONER, *supra* note 214, at 437.

216 *Id.*

217 *Cruikshank*, 92 U.S. at 556; United States v. Cruikshank, 25 F. Cas. 707, 715 (C.C.D. La. 1874). The Circuit Court decision was handed down by Supreme Court Justice Joseph Bradley. FONER, *supra* note 21, at 188–89.

218 FONER, *supra* note 214, at 531.

One commentator concluded that *Cruikshank* enabled the infamous *Plessy v. Ferguson*[219] decision upholding Jim Crow segregation.[220]

On the specific issue of voting rights, *Cruikshank* "opened the door to the legal regime of Jim Crow" and to generations of "election rigging and terrorist violence."[221] Shockingly, neither the Circuit Court decision nor the Supreme Court decision referenced the brutal massacre that the case was about.[222] Just like *Minor*, the *Cruikshank* Court did not mention that the Fourteenth Amendment says there is a "right to vote." The Court ignored the facts in a case about whether a mass racist murder over an election dispute was unconstitutional—and ignored that one of the amendments addressed in the opinion states there is a "right to vote."

Historically, impactful Black scholars criticized *Cruikshank* for these reasons from the nineteenth century to today. Dr. W. E. B. Du Bois wrote of the decision, "[b]oth the Fourteenth and Fifteenth Amendments were thus made innocuous so far as the Negro was concerned . . . ."[223] Professor John Hope Franklin observed that *Cruikshank* "dealt an effective blow to any effort to protect African Americans in exercising the franchise."[224] More recently, a scholar testified to Congress that *Cruikshank* "legitimized" the "violent coup[]" in Colfax and "removed the ability of the federal government to stop white domestic terrorism."[225] Experts on civil rights during Reconstruction told Congress that *Cruikshank* was among the cases:

> Starting in the 1870s, [where] the Supreme Court interpreted the 14th and 15th Amendments narrowly, shrinking the federal government's power to protect individual rights and throwing many matters associated with civil rights and voting back under state jurisdiction. . . even when—as was the case of the Colfax Massacre and the ensuing *Cruikshank* case—the suppression of African Americans' political rights had included organized violence and murder.[226]

The Southern Poverty Law Center observed, "[t]he *Cruikshank* ruling ensured that the most basic constitutional rights for Black citizens

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219 Plessy v. Ferguson, 163 U.S. 537 (1896).

220 Pope, *supra* note 192, at 390–91.

221 *Id.* at 440–41.

222 *Id.* at 423.

223 W. E. B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 691 (1st ed. 1935).

224 JOHN HOPE FRANKLIN, RECONSTRUCTION AFTER THE CIVIL WAR 202 (Daniel J. Boorstin ed., 3d ed. 2013).

225 *The Role of White Rage and Voter Suppression in the Insurrection on January 6, 2021: Hearing Before the H. Select Comm. to Investigate the Jan. 6th Attack on the U.S. Capitol*, 117th Cong. 4 (2022) (statement of Carol Anderson).

226 *Our Fragile Democracy: Political Violence, White Supremacy, and Disenfranchisement in American History: Hearing Before the H. Select Comm. to Investigate the Jan. 6th Attack on the U.S. Capitol*, 11–12 (2022) (statement of Kate Masur & Gregory Downs).

would be constricted well into the twentieth century."[227] Professor Ifill wrote that in *Cruikshank*, "the Supreme Court . . . left unprotected Southern Black people seeking to vote and engage in the political process in the face of deadly violence by White mobs seeking to disenfranchise them."[228] The *Cruikshank* decision demonstrates how the Court has devastated human lives and civil rights by repeatedly failing to acknowledge that the Constitution expressly creates a federal voting right.

3. *McPherson v. Blacker* (1892)

McPherson relied on *Minor* and *Cruikshank* and extended those decisions to dig a deeper grave for voting rights, with the Court explicitly concluding for the first time that states have "plenary power" to choose presidential electors.[229] The question in *McPherson* was narrow. Michigan awarded electoral college votes on a district basis, with the presidential candidate who won in each congressional district receiving the electoral college vote in that district.[230] The issue was not whether citizens had a right to vote for presidential electors; rather, it was whether they had a right to vote for all of the electors in a state and not just one elector in their respective districts.[231] It was in this context that the Court concluded "the practical construction of [Article II of the Constitution] has conceded plenary power to the state legislatures in the matter of the appointment of electors."[232] The Court added that "the appointment and mode of appointment of electors belong exclusively to the states under

227 Schrader, *supra* note 214 (describing the Colfax massacre and *Cruikshank* as a "historic human rights violation that changed the country, [and] diverted the country from a democratic path."); *id.*

228 Ifill, *supra* note 138.

229 McPherson v. Blacker, 146 U.S. 1, 34–35, 37–38 (1892).

230 *Id.* at 24. The congressional district method of awarding electoral college votes is used today by Maine and Nebraska. *Maine and Nebraska*, FAIRVOTE, https://fairvote.org/archives/the_electoral_college-maine_nebraska [https://perma.cc/4DZB-PYEW].

231 *McPherson*, 146 U.S at 24. As a group of scholars observed, it was unnecessary to address whether there is a right to vote for president in *McPherson*, because either outcome in the case—upholding a district by district vote for a single elector or requiring a state-wide vote for a panel of electors—would have affirmed citizen voting. Bohnhorst II, *supra* note 52, at 305.

232 *McPherson*, 146 U.S. at 35.

the constitution of the United States."[233] *McPherson* was later central to the *Bush* plenary power reasoning.[234]

The *McPherson* conclusion that Article II creates "plenary state power" in presidential elections is wrong for several reasons. First, the Court relied on the sexist ruling in *Minor* and the racist ruling in *Cruikshank*.[235] The *McPherson* Court adopted the flawed *Minor* reasoning that no one has a constitutional right to vote (the reasoning used in *Minor* to prop up the sexist denial of the right to vote to women).[236] *McPherson* followed this by relying on the *Cruikshank* holding that the Constitution does not create a federal right to vote but rather only prohibits states from discriminating in any right to vote that states create (reasoning used in *Cruikshank* to dismiss constitutional charges against the perpetrators of a racist massacre).[237]

Finally, the *McPherson* conclusion that states have "plenary power" to appoint presidential electors was dicta, unnecessary to the narrow question the Court decided.[238] For this reason, Professor Amar criticized the expansive interpretation of *McPherson* on state presidential election power as a "daft notion."[239] The *McPherson* Court could have decided that Michigan's system was constitutional because it provided citizens with the right to vote for president and electors; it did not have to rule that states had plenary power to cancel citizen voting for president entirely.

Just as *Cruikshank* "set the stage" for the Supreme Court's infamous approval of Jim Crow segregation in *Plessy*,[240] *McPherson* too is directly connected to *Plessy*. The *Plessy* decision came just four years after *McPherson*. Five of the seven justices in the *Plessy* majority previously joined in the unanimous *McPherson* opinion.[241] They were terribly wrong both times.

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233 *Id.* The Court reasoned that the Fourteenth Amendment right to vote protections apply only if a state chooses to allow a citizen vote for presidential electors. *Id.* at 39 ("The right to vote intended to be protected refers to the right to vote as established by the laws and constitution of the state. There is no color for the contention that under the amendments every male inhabitant of the state . . . [has] a right to vote for presidential electors.").

234 Bush v. Gore, 531 U.S. 98, 104 (2000).

235 *McPherson*, 146 U.S. at 38.

236 *Id.* (citing Minor v. Happersett, 88 U.S. 162 (1874)).

237 *Id.* (citing United States v. Cruikshank, 92 U.S. 542 (1875)).

238 Shane, *supra* note 55, at 545 n.41.

239 Amar & Amar, *supra* note 195, at 30–31.

240 Pope, *supra* note 192, at 390–91.

241 *Justices 1789 to Present*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx [https://perma.cc/6PAM-TFY9]. The five justices who participated in the majorities in both the 1892 *McPherson* decision and the 1896 *Plessy* decision were Chief Justice Melville Fuller and Associate Justices Stephen J. Field, Horace Gray, Henry B. Brown, and George Shiras, Jr. *Id.*

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Before moving to *Bush v. Gore*, it is worth considering just how wrong and destructive the late nineteenth-century Supreme Court cases were that created the "plenary state power" theory. Those Court decisions were racist and sexist and have no place in governing voting rights in the twenty-first century.

Justice Thurgood Marshall included *Cruikshank* among Jim Crow era cases that "interpret[ed] the Civil War Amendments in a manner that sharply restricted their substantive protections."[242] *Minor* and *Cruikshank* have been ranked in the "anticanon" of the worst Supreme Court decisions of all time.[243] "*Cruikshank* lays bare the true origins of [constitutionally restrictive] doctrines" by "immunizing overtly racist terrorism."[244] *Minor* "was one of a string of cases of its era in which the Court eviscerated the Privileges or Immunities Clause [of the Fourteenth Amendment]."[245] *Minor* denied the vote to women.[246] *Cruikshank* refused to recognize a federal constitutional right to vote when Black Americans were murdered protecting an elected government, giving impunity to the murderers.[247] Yet these are the very cases the *McPherson* Court relied on in creating the notion that Article II of the Constitution affords states "plenary power" to choose presidential elections.[248] Not only that—the *Cruikshank* Court's reasoning led to the theory adopted in the *Plessy* segregation decision, which was handed down by five justices from the *McPherson* Court.[249]

These cases are part of a shameful era for the Supreme Court when the Court's suffocation of the emancipatory purpose of the rights conferred by the Fourteenth Amendment (including the right to vote) ushered in generations of racist oppression. Professor Foner wrote that "the late nineteenth-century decisions constitute a sad chapter in the history of race, citizenship, and democracy in the United States."[250] One scholar observed that "the jurisprudence of the Reconstruction-era Court

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242 Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 391 (1978) (Marshall, J., concurring).

243 Pope, *supra* note 192, at 389 n.24 ("[I]t is possible that *Cruikshank* should be relegated to the 'anticanon,' the subset of canonical decisions that are treated as negative precedents . . . ."); Fishkin, *supra* note 55, at 1344 ("In light of the repudiation of th[e] central pillar of its reasoning in addition to its result, *Minor* is best read today as an anticanonical case.").

244 Pope, *supra* note 192, at 390.

245 Fishkin, *supra* note 55, at 1340 n.228.

246 Minor v. Happersett, 88 U.S. 162, 174–75, 178 (1874).

247 United States v. Cruikshank, 92 U.S. 542, 555–56 (1875). For a description of the underlying facts about the murderous riot that led to the case, but which the Supreme Court did not include in its decision, see *supra* notes 211–213, 221, 223–224.

248 *McPherson*, 146 U.S. at 38 (citing *Minor*, 88 U.S. 162; *Cruikshank*, 92 U.S. 542).

249 *See supra* note 241 and accompanying text.

250 FONER, *supra* note 21, at 130.

appears less remarkable for its particular stance on issues of federalism than for its wholehearted embrace of the white supremacist claim [about] states' rights."[251] Professor Foner described the destructive impact of the Jim Crow-era Court:

> [B]eginning in the early 1870s, a new protagonist entered the debates over the meaning of the three [Reconstruction] amendments. In a series of decisions over the course of the ensuing decades, the Supreme Court would grapple with the question of how far the constitutional system and the rights of citizens had been transformed. Its answers would spell disaster for [B]lack Americans and for the Reconstruction dream of a democratic society of equals.[252]

Referring to his description of the post-Civil War amendments as the "second founding," Professor Foner noted that "in almost every instance, the Court chose to restrict the scope of the second founding."[253] Addressing the devastating late nineteenth-century antivoting Court decisions, Professor Foner observed that "[b]y the time [Court-enabled] disenfranchisement had been completed in the early twentieth century, African-Americans' right to vote, enshrined in the Constitution in 1870, had been eliminated throughout the old Confederacy as well as in Oklahoma and Delaware."[254] Professor Foner concluded that

> [The Fifteenth] amendment's fate was an extraordinary act of constitutional nullification and an unusual event in the history of democracy. There cannot have been many instances in which millions of persons who enjoyed the right to vote suddenly had it taken away.[255]

There was a contemporaneous reaction to the series of nineteenth-century Supreme Court cases demolishing Fourteenth and Fifteenth Amendment rights. One lawyer, in 1890, excoriated "that grave of liberty, the Supreme Court of the United States."[256] A group of prominent Black lawyers, the Brotherhood of Liberty, wrote a 600-page book in 1889,

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251 Pope, *supra* note 192, at 391.

252 FONER, *supra* note 21, at 122.

253 *Id.* at 127. Justice Ketanji Brown Jackson quoted and agreed with Professor Foner. Students for Fair Admissions, Inc. v. Presidents and Fellows of Harvard College, 600 U.S. 181, 387 (2023) (Jackson, J., dissenting) ("[T]his Court facilitated that retrenchment [from the Reconstruction Amendments].").

254 FONER, *supra* note 21, at 164.

255 *Id.* at 165. *This* is exactly what "plenary power" would be today: an "instance[] in which millions of persons who enjoyed the right to vote [would] suddenly ha[ve] it taken away." *Id.* (citations omitted).

256 *Id.* at 156 (citing Thaddeus B. Wakeman, *Science: A Weekly Newspaper of All the Arts and Sciences*, SCI., Jan. 10, 1890, at 26).

Justice and Jurisprudence,[257] that was "the first sustained critique by [B]lack Americans of Supreme Court rulings related to the Reconstruction amendments."[258] The Brotherhood called the Court's Fourteenth Amendment cases "the overthrow and nullification of the organic law of the land by the juristical sophistries,"[259] and warned that the "beautiful growth of the Constitution . . . is now brought again into jeopardy, by the legal fictions which have endeavored to subvert it."[260] The Brotherhood wrote that as a result of the nineteenth-century Supreme Court decisions, "Civil-Rights . . . stood trembling in the presence of the courts."[261] Among the Brotherhood's conclusions: the Court's decisions on the Fourteenth Amendment raised the issue of "whether the civil rights bestowed in name and form can by a legal fiction be taken away":[262]

> The judicial branch of the government . . . admonished the country, that . . . it was not expedient to conform American jurisprudence to the . . . standard of morality . . . proposed by the nation, and which the political reformation of the Fourteenth Amendment sought to enforce.[263]

The Brotherhood's conclusions apply today with equal force to arguments that the Fourteenth Amendment does not establish a right to vote for president. Contemporary constitutional and civil rights experts agree with nineteenth-century critics of the Jim Crow era decisions undermining Reconstruction Amendment rights. Professor Hasbrouck observed that "[o]riginalism's bad faith [wa]s particularly apparent in the judicial mistreatment of the Reconstruction Amendments" during the Jim Crow era and that "[t]he Reconstruction Amendments can and must mean more than the narrow interpretations they were given."[264]

The late nineteenth-century cases decimating the right to vote were sexist, racist, and among the worst in the history of the Supreme Court. These decisions legalized the horrors of Jim Crow violence that stopped Black Americans from voting and kept women from voting for almost fifty years. The antivoting cases were part of a quarter-century era where

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257 THE BROTHERHOOD OF LIBERTY, JUSTICE AND JURISPRUDENCE: AN INQUIRY CONCERNING THE CONSTITUTIONAL LIMITATIONS OF THE THIRTEENTH, FOURTEENTH, AND FIFTEENTH AMENDMENTS (1889).

258 FONER, *supra* note 21, at 125–26.

259 THE BROTHERHOOD OF LIBERTY, *supra* note 257, at 432.

260 *Id.* at, 441.

261 *Id.* at 429.

262 *Id.* at 403.

263 *Id.* at 429.

264 Brandon Hasbrouck, *Allow Me to Transform: A Black Guy's Guide to a New Constitution*, 121 MICH. L. REV. 883, 893 (2023).

the Supreme Court's decisions stripped the emancipatory Reconstruction amendment rights of their meaning and impact. Leading Black lawyers, scholars, and historians criticized the decisions as destructive of the emancipatory purpose of the Fourteenth and Fifteenth Amendments. As Professor Foner observed, the late nineteenth-century Supreme Court cases "ma[d]e plain the depth of the nation's commitment to Jim Crow."[265] Not only that, but the cases were the wrong read of the Constitution because they ignored the plain meaning of the textual language explicitly establishing a "right to vote." Two—*Minor* and *Cruikshank*—did not even acknowledge that the words "right to vote" are in the Fourteenth Amendment. As Professor Curtis observed, "[a] common theme reappears throughout this analysis of the Fourteenth Amendment. The theme consists of the United States Supreme Court repeatedly interpreting the Amendment in ways that frustrate the protection of the basic liberties and the equality of American citizens."[266]

The debate on the Twenty-Fourth Amendment, which bars poll taxes,[267] again shows how the antidemocratic Jim Crow era Supreme Court decisions were the product and instruments of discrimination. Poll taxes had been used to stop Black citizens from voting despite the protections of the Fourteenth and Fifteenth Amendments.[268] The Twenty-Fourth Amendment ended this. Those arguing *for* the racist poll taxes relied on *Minor* and *McPherson* to claim that "the Constitution of the United States does not confer the right of suffrage on anyone"[269] and that states had the power to condition the "privilege" of voting by making people pay to do it.[270] Thankfully, that was the losing argument in the 1960s. It is the losing argument today. It is past time for those antivoting cases—and their legacy of sexism and racism—to go.

With all that, one would think that the antivoting cases from *Minor* to *Cruikshank* to *McPherson* would have been overruled and cast away. As Professor Hasbrouck put it: "Plenty of people involved in the drafting and later interpretation of the Constitution favored a social order dominated by white men. But the preferences of the dead hardly form a

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265 FONER, *supra* note 21, at 167.

266 Curtis, *supra* note 105, at 961.

267 U.S. CONST. AMEND. XXIV.

268 *Voting Rights for African Americans*, LIBR. OF CONG., https://www.loc.gov/classroom-materials/elections/right-to-vote/voting-rights-for-african-americans [https://perma.cc/BK7B-V76M].

269 108 CONG. REC. 17651, 17659 (Aug. 27, 1962) (statement of Rep. Tuck) (quoting Minor v. Happersett, 88 U.S. 162 , 178 (1874)).

270 108 CONG. REC. 17651, 17666 (Aug. 27, 1962) (statement of Rep. Whitten) (citing Breedlove v. Suttles, 302 U.S. 277, 283 (1937)).

reasonable basis for organizing our society today."[271] Professor Hasbrouck proposed that "we could read the clearly rights-affirming text of the Constitution in good faith and decline to limit it to what . . . white men over a century ago could conceive."[272] Instead, the *Bush* Court—over a century after the Jim Crow era cases ruled against citizen voting rights—revived the nineteenth-century cases and rendered another historically wrong antivoting decision.

4. *Bush v. Gore* (2000)

The nineteenth-century antivoting cases, after over a century of slumber, were re-awakened by the Court in *Bush v. Gore*. The case is most famous and controversial because of its outcome: the *Bush* Court stopped the manual recount of votes in several Florida counties,[273] and thus the Court effectively decided that George W. Bush won the 2000 presidential election.[274]

The charged political result and high stakes led to fulsome debate about the decision.[275] Constitutional scholars counted *Bush* as one of the worst decisions of the previous half century.[276] Professor Amar wrote that "*Bush* was wrong in just about every way that it is possible for a case to be wrong."[277] One scholar criticized the racially exclusive impact the *Bush* decision had on Black American voters; the Court voted against the candidate the vast majority of Black voters voted for.[278] Another observed

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271 Hasbrouck, *supra* note 265, at 884 (citing ELIE MYSTAL, ALLOW ME TO RETORT: A BLACK GUY'S GUIDE TO THE CONSTITUTION 129 (2022)). One need only read Justice John M. Harlan's dissent in *Plessy v. Ferguson* to see how true this is. Though rightly praised for rejecting the majority's approval of segregation, Justice Harlan said in his dissent: "The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time . . . ." Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

272 Hasbrouck, *supra* note 265, at 894 (citing MYSTAL, *supra* note 271, at 134–35).

273 Bush v. Gore, 531 U.S. 98, 111 (2000).

274 One *Bush* critic observed that "[n]ever before in the history of democratic government has an unelected judicial organ chosen the head of state by preventing the counting of votes." Shane, *supra* note 55, at 536.

275 *See, e.g.*, Amar & Amar, *supra* note 195, at 3 nn.2–3 (describing scholarly criticism and support for *Bush*). Several academic Articles cited here were part of a 2001 Florida State University Law Review forum on the *Bush* decision. *See* Symposium, *The Law of Presidential Elections: Issues in the Wake of Florida 2000*, 29 FLA. ST. U. L. REV. 325 (2002).

276 Amar & Amar, *supra* note 195, at 4 (citing Andrea Sachs, *The Worst Supreme Court Decisions Since 1960*, TIME (Oct. 6, 2015, 11:36 AM), https://time.com/4056051/worst-supreme-court-decisions [https://perma.cc/U2E7-94UK]).

277 *Id.* at 2.

278 Spencer Overton, Bush v. Gore *Through the Lens of Race*, 29 FLA. ST. U. L. REV. 469, 471, 482 (2001).

that the Court's exclusionary use of the Fourteenth Amendment's Equal Protection Clause to discontinue vote counting departed from the traditional application of the Clause to promote inclusion.[279] One of the dissenting justices described the *Bush* majority decision as inflicting a "wound" to the confidence in the courts, concluding that *Bush* would lead to the loss of "the Nation's confidence in the judge as an impartial guardian of the rule of law."[280] One of the Justices from the majority, Sandra Day O'Connor, later expressed regret that the Court took the case.[281]

What brings us to *Bush* here is a specific wrong: the Court's restatement of the radical "plenary state power" theory. The Court began its legal analysis with the "plenary power" theory and a citation to *McPherson*:

> The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College. This is the source for the statement in McPherson v. Blacker, that the state legislature's power to select the manner for appointing electors is plenary; it may, if it so chooses, select the electors itself, which indeed was the manner used by State legislatures in several States for many years after the Framing of our Constitution.[282]

After noting that states have vested citizens with authority to vote for presidential electors, the Court added that "[t]he State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors."[283]

Here are the reasons why the *Bush* Court was wrong. First comes textualism—the Court was wrong in its lead sentence that "[t]he individual citizen has no federal constitutional right to vote for electors for the President of the United States."[284] As explained previously, the Fourteenth Amendment expressly established a "right to vote . . . for the

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279 Richard Briffault, *Bush v. Gore as an Equal Protection Case*, 29 FLA. ST. U. L. REV. 325, 347–49, 372 (2001).

280 Bush v. Gore, 531 U.S. 98, 128–29 (2000) (Stevens, J., dissenting).

281 *See O'Connor Questions Court's Decision to Take* Bush v. Gore, CHI. TRIBUNE (Aug. 24, 2021, 1:37 PM), https://www.chicagotribune.com/2013/04/27/oconnor-questions-courts-decision-to-take-bush-v-gore [https://perma.cc/U3ET-M4EF].

282 *Bush*, 531 U.S. at 104 (first citing U.S. CONST., art. II, § 1; and then *McPherson v. Blacker*, 146 U.S. 1, 28–33, 35 (1892)).

283 *Id.* (citing *McPherson*, 146 U.S. at 35).

284 *Bush*, 531 U.S. at 104.

choice of electors for President."[285] Just like *Minor* and *Cruikshank*, the *Bush* Court did not mention that the words "right to vote" are in the Fourteenth Amendment. The Court failed to even mention four of the five constitutional right-to-vote amendments. As Professor Shane observed, the "very starting point [of *Bush*]—the asserted authority of the states to disenfranchise voters altogether from participation in the selection of presidential electors—is unpersuasive in the face of the text and history of the Fourteenth Amendment."[286]

Continuing with the *Bush* anti-textualism about the "right to vote,"[287] the majority failed to examine the five constitutional right-to-vote Amendments. They did not consider whether the first of the Amendments—the Fourteenth Amendment—creates a federal right to vote for president, or that the remaining four Amendments refer to the "right of *citizens of the United States* to vote."[288] The failure of the *Bush* Court to consider, or even mention, the right-to-vote Amendment language means the decision was wrong in its assessment of citizens' federal voting rights in the Constitution. As Professor Shane observed, *Bush* ignored "the conspicuous trajectory of our constitutional development toward more democracy."[289] So much for textualism. *Bush* cannot be an authoritative assessment of rights that the Court did not consider.

The *Bush* Court made a second textual error: it was wrong about Article II.[290] Article II does not refer to citizen voting rights, much less condition those rights on state legislative decisions about electors. There is nothing in Article II or in the right-to-vote Amendments that establishes state power to take voting away from citizens. As explained earlier, those Amendments establish citizen voting rights that include the right to vote for electors and prohibit states from denying those voting rights. The use of the word "right"—and the prohibition of state denial or abridgement of that right—demonstrates the existence of a federal, constitutional citizen right to vote for electors that cannot be denied or abridged by states.

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285 U.S. CONST. amend. XIV, § 2; *see* Shane, *supra* note 55, at 539 (describing the "straightforward argument" that "the Fourteenth Amendment, persuasively read, does guarantee individual citizens the right to vote for presidential electors").

286 *Id.* at 536.

287 The *Bush* decision did not mention the "right to vote" language in the five Amendments. Professor Shane wrote that "[t]he failure even to address these issues mocks the majority's supposed commitments to textualism and originalism in other contexts." *Id.* at 585.

288 *See* U.S. CONST. amends. XIV, XV, XIX, XXIV, XXVI.

289 Shane, *supra* note 55, at 536.

290 *Bush*, 531 U.S. at 104; U.S. CONST. AMEND. XXIV.

Third, the *Bush* Court relied on the *McPherson* "plenary power" dicta.[291] As previously explained, the precedential authority of *McPherson* is damaged beyond remedy by its reliance on the sexist *Minor* decision and racist *Cruikshank* decision.[292] These Jim Crow era decisions on citizen voting rights have been constitutionally and historically abrogated. As a group of commentators put it, "[d]uring the Court's rush to judgment in *Bush v. Gore*, the Court dusted off *McPherson* . . . to beget alarming potential dogma."[293]

Fourth, the *Bush* Court's statement that state legislative selection of presidential electors was "the manner used by State legislatures in several States for many years after the Framing of our Constitution" is quite selective.[294] By 1832, all but one state chose presidential electors by citizen vote, and by 1868, all states did.[295] One commentator observed *Bush* "takes no serious account . . . [of] nearly universal practice since 1868, and the conspicuous deepening of our constitutional commitment to democracy in the ensuing 132 years."[296]

Fifth, like *McPherson*, the *Bush* "plenary state power" language was dicta unnecessary to the Court's decision.[297] The Court did not have to reach the issue of whether states had exclusive power to choose electors or whether citizens could vote to choose them; the Florida voters chose electors. The issue was whether it was constitutional to recount the votes cast by citizens manually.

Finally, the *Bush* decision disregards and degrades the value of American democracy. Professor Shane described the *Bush* premise of a "state legislature's authority to disenfranchise the entire citizenry" as "one of the opinion's most extraordinary aspects, its obliviousness to the values of democracy."[298] Adding that it was "stunning" that the *Bush* majority did not mention democracy,[299] Professor Shane concluded that "in resolving a dispute over the world's most important elected office, the Supreme Court penned an opinion in which our national commitment to democracy—indeed, the very word, 'democracy'—does not appear."[300]

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291 *Bush*, 531 U.S. at 104.

292 *See supra* notes 235–37, 249.

293 Bohnhorst II, *supra* note 52, at 307.

294 *Bush*, 531 U.S. at 104.

295 *See* Chiafalo v. Washington, 591 U.S. 578, 584 (2020); *see also* Shane, *supra* note 55, at 545 (describing the virtually uniform practice of citizen vote for electors after the Fourteenth Amendment).

296 Shane, *supra* note 55, at 584–85.

297 *Id.* at 535 (describing *Bush* dicta as "cavalier utterance"); *id.* at 537 ("*Bush v. Gore* commences its legal analysis by addressing a problem not actually at issue in the case.").

298 *Id.* at 535.

299 *Id.* at 579.

300 *Id.* at 585.

There is a fundamental constitutional problem with the entire line of "plenary power" and "no right to vote for president" cases. The cases read the words "right to vote" out of the right-to-vote amendments, starting with the Fourteenth Amendment. They presume that the five Amendments that recognize a right to vote did not change the Constitution to add this right. As Professors Baude and Paulsen observed in analyzing another clause in the Fourteenth Amendment:

> [T]he idea that constitutional amendments should presumptively be read so as not to change the Constitution (!)—that they should be construed to avoid *conflict* or even mere *disaccord* with prior constitutional law—is indefensible. *Of course* constitutional amendments change prior constitutional law. That is their purpose and function. Now, that doesn't warrant reading them to change more than they really do. But a presumption that constitutional amendments should be read to change as little as possible makes no sense.[301]

And what does make sense? Holding that five Amendments to the Constitution that state that there is a "right to vote"—including two that recognize a "right to vote" for "presidential electors"[302]—means citizens have a right to vote for presidential electors.

The *Bush* "plenary state power" dicta is wrong. It ignores the plain language of the right-to-vote amendments, and wrongly relies on tainted racist and sexist precedent abrogated by history and constitutional amendment. The *Bush* read on history stops at 1832 and ignores the democratic election of presidents by citizen vote since. It is an antidemocratic opinion that does not mention democracy, and it is wrong about the Constitution (which it largely ignores). The *Bush* embrace of "plenary state power" and rejection of citizens' right to vote should be overruled.

5. Plenary Power Is Irreconcilable with Court Decisions Properly Affirming the Right to Vote

The *Minor*, *Cruikshank*, *McPherson*, and *Bush* line of cases divesting citizens of constitutional presidential voting rights is wrong for another reason: "plenary state power" cases are irreconcilable with the Supreme Court's protection of voting rights in all other elections. A central principle in these laudable Court decisions is that the right to vote is fundamental because it protects all other rights. Since the 1886 decision

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301 Baude & Paulsen, *supra* note 134 , at 653–54.

302 U.S. CONST., amends. XIV, XXIV.

in *Yick Wo v. Hopkins*, the Court has correctly recognized "'the political franchise of voting' as 'a fundamental political right, because [it is] preservative of all rights.'"[303] As the Court later put it:

> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.[304]

In *Reynolds v. Sims*, the Court explained this in detail, demonstrating why there is a citizen's right to vote under the Constitution that must include the right to vote for president:

> *Undeniably the Constitution of the United States protects the right of all qualified citizens to vote*, in state as well as in federal elections. . . . It has been repeatedly recognized that *all qualified voters have a constitutionally protected right to vote*, and to have their votes counted . . . [and] ["]the right to put a ballot in a box." The right to vote can[not] be denied outright . . . ."Obviously included within *the right to choose, secured by the Constitution*, is the right of qualified voters within a state to cast their ballots and have them counted[.]" . . . The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.[305]

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303 Reynolds v. Sims, 377 U.S. 533, 562 (1964) (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)).

304 *Reynolds*, 377 U.S. at 561–62.

305 *Reynolds*, 377 U.S. at 554–55 (emphasis added) (first citing Ex parte Yarbrough, 110 U.S. 651 (1884); then United States v. Mosley, 238 U.S. 383 (1915); then quoting *Mosley*, 238 U.S. at 386; then citing Guinn v. United States, 238 U.S. 347 (1915); then Lane v. Wilson, 307 U.S. 268 (1939); then quoting United States v. Classic, 313 U.S. 299, 315 (1941)). *But see* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 n.78 (1973) (reasoning that "the right to vote, per se, is not a constitutionally protected right," but that there is a right "to participate in state elections on an equal basis with other qualified voters"). The *Rodriguez* Court stated without citation or explanation that it was assuming the "equal basis" language was really what *Reynolds* and other cases meant in stating the right to vote was constitutionally protected. *Id.* The statements in *Rodriguez* that the constitutional right to vote is conditioned on, and limited to, state recognition of the right cannot be squared with the Court's unambiguous—and unconditional—language embracing voting rights as protected by the Constitution in other cases and detailing the far-reaching reasons and consequences of the constitutional right to vote. *See* discussion of *Yick Wo v. Hopkins*, *Reynolds v. Sims*, and *Wesberry v. Sanders*, *supra* notes 303–305 and accompanying text. Contrary to the *Rodriguez* Court's position that *Reynolds* conditioned the right to vote, what the Court actually held in *Reynolds* was that "[u]ndeniably the Constitution of the United States protects the right of all qualified citizens to vote," adding that "the right to choose, secured by the Constitution" is a "right" of "voters" to "cast their ballots and to have them counted." *Reynolds*, 377 U.S. at 554–55.

These principles were similarly stated in *Wesberry v. Sanders*: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."[306]

The principle that the right to vote is fundamental and foundational to all rights has been repeatedly embraced by Congress.[307] Presidents of both parties, too. President Lyndon B. Johnson, in his nationally televised speech for the 1965 Voting Rights Act, said:

> The most basic right of all [is] the right to choose your own leaders. . . . Every American citizen must have an equal right to vote. There is no reason which can excuse the denial of that right. . . . It is wrong . . . to deny any of your fellow Americans the right to vote in this country.[308]

President Gerald Ford, in extending the Voting Rights Act, stated: "The right to vote is at the very foundation of our American system . . . There must be no question whatsoever about the right of each eligible American, each eligible citizen to participate in our elective process."[309] Perhaps most significantly, the Court's pre-*Bush* authority also provides a more limited assessment of state power under the Article II Elector's Clause than the "plenary power" assertion in *Bush*. In *Williams v. Rhodes*, the Court recognized that "of course, [there] can be no question but that [Article II] does grant extensive power to the States to pass laws regulating the selection of electors."[310] However, the Court added:

> But the Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution.[311]

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306 Wesberry v. Sanders, 376 U.S 1, 17 (1964).

307 The National Voter Registration Act states that the right to vote is a "fundamental right." 52 U.S.C. § 20501(a) ("The Congress finds that (1) the right of citizens of the United States to vote is a fundamental right."). In extending the Voting Rights Act, Congress observed that "[t]he right to vote is the most fundamental right in our democratic system of government because its effective exercise is preservative of all others." H.R. REP. NO. 109-478, at 6 (2006).

308 Lyndon B. Johnson, *Special Message to the Congress: The American Promise*, AM. PRESIDENCY PROJECT (Mar. 15, 1965), https://www.presidency.ucsb.edu/documents/special-message-the-congress-the-american-promise [https://perma.cc/C83Y-D7MJ].

309 Remarks Upon Signing a Bill Extending the Voting Rights Act of 1965, 2 PUB. PAPERS 1118 (Aug. 6, 1975).

310 393 U.S. 23, 29 (1968).

311 *Id.*

This appropriately limited application of the Electors' Clause would require that the Clause "not be exercised in a way that violates other specific provisions of the Constitution"[312] that establish a right to vote—the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments. The *Williams* Court cited the Fifteenth, Nineteenth, and Twenty-Fourth Amendments (the case was decided before the Twenty-Sixth Amendment was passed) and concluded: "Obviously we must reject the notion that Art. II, § 1, gives the States power to impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions."[313]

The nineteenth-century notion that "plenary state power" extinguishes citizens' presidential voting rights cannot be reconciled with the Court's recognition that voting is a fundamental and foundational right. As Professor Pamela Karlan observed, writing on *Bush*: "That is why the per curiam's assertions in *Bush v. Gore* are so jarring: they are completely out of step with the Court's general jurisprudence."[314]

Let's come back to common sense. One cannot sensibly conclude that citizens have a constitutional right to vote that is foundational for all of their other rights—except that there is no citizen constitutional right to vote in the most important election of all, the election of a president. The Court got it right in the cases where it held that the right to vote is the foundational right for all rights. Citizens have a constitutional right to vote for president and presidential electors, and that right is fundamental and cannot be denied or infringed by the states. The Supreme Court should acknowledge that right, expand on its rejection of unlimited state election authority in *Moore v. Harper*—and depart from the elitist, archaic, and autocratic extinction of citizen voting for president in the radical "plenary state power" theory.

It is time to end what Professor Ifill correctly described as "the often outright resistance courts have shown to the [Fourteenth] Amendment's guarantees and protections."[315] She added that "post-Reconstruction courts have rarely upheld or applied in full the ambitious demands of the [Fourteenth] Amendment."[316] The case for citizen voting rights is even stronger when one considers how the right-to-vote amendments since the Fourteenth Amendment has grown the right to vote to universal suffrage. The Supreme Court should recognize this by discarding the Jim Crow relic of "plenary state power" to pick presidents and replacing it with a constitutional citizens' right to vote for president.

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312 *Williams*, 383 U.S. at 29.

313 *Id.* at 29.

314 Karlan, *supra* note 29, at 594.

315 Ifill, *supra* note 138.

316 *Id.*

C. *History: Two Centuries of Presidential Election by Citizens Confirm the Constitutional Right to Vote For President*

It is well-established that history informs what the Constitution means. As Justice Frankfurter noted in the landmark *Steel Seizure* decision, "[d]eeply embedded traditional ways of conducting government cannot supplant the Constitution . . . but they give meaning to the words of a text or supply them."[317] In 2022, the Court stated that one test of constitutionality is whether the purported right "is rooted in the Nation's history and tradition and . . . is an essential component of 'ordered liberty.'"[318] In the 2023 *Moore* voting rights decision, the Court added: "We have long looked to 'settled and established practice' to interpret the Constitution. And we have found historical practice particularly pertinent when it comes to the Elections and Electors Clauses."[319]

1. Citizens Have Chosen Presidents Since 1832

Few things are more "deeply rooted in American history and tradition," or more "settled and established practice," than citizens voting for president. One might even say that history has voted, and it has voted for the democratic election of presidents by citizens. By the middle of the 1800s, our current-day presidential voting practice was well-established.[320] Citizen voters vote for president and electors faithfully

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317 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

318 Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 216 (2022). For those seeking less charged precedent, Justice Ginsburg also recognized that a right should be "deeply rooted in [our] history and tradition" and is essential to the nation's "scheme of ordered liberty." Timbs v. Indiana, 139 U.S. 682, 686, 689 (2019) (quoting McDonald v. Chicago, 561 U.S. 742, 767 (2010) (considering Eighth Amendment protections). The *Dobbs* Court also held that it mattered if the Constitution makes "express reference to a right" and whether that right is "mentioned in the Constitution." *Dobbs*, 597 U.S. at 235. The citizens' right to vote for president passes the "mentioned in the Constitution test" five times. *See* U.S. Constitution, Amends XIV, XV, XIX, XXIV, and XXVI.

319 Moore v. Harper, 600 U.S. 1, 32 (2023) (quoting Okanogan, Methow, San Poelis (or San Poil), Nespelem, Colville, & Lake Indian Tribes or Bands of State of Washington v. United States (The Pocket Veto Case), 279 U.S. 655, 689 (1929)).

320 Chiafalo v. Washington, 591 U.S. 578, 584 (2020) (citing PEIRCE & LONGLEY, *supra* note 20, at 45). All but one state required citizen voting for electors by 1832. *Id.* The last state, South Carolina, joined in this after the Civil War. LAWRENCE D. LONGLEY & NEAL R. PEIRCE, THE ELECTORAL COLLEGE PRIMER 25 (1996). Legislatures chose electors in Florida in 1868 and Colorado in 1876. *Id.* at 201 n.23 (citing *The Electoral College*, Congressional Quarterly Guide to Current American Government (Spring 1970)).

follow citizens' electoral choice.[321] While there have been exceptions when electors have departed from this practice, this has been exceedingly rare.[322] By the time of the post-Civil War amendments protecting the citizens' right to vote in 1868 and 1870, the practice of choosing presidential electors by citizen vote was in place.[323] Presidential election by citizens has been continued and expanded by constitutional amendment for over 150 years since the Reconstruction Amendments were passed.[324] The post-voting rights amendment history of presidential elections shows that citizen voters pick the presidential electors and the president.[325]

The proponents of the "plenary state power" theory argue that the Constitution vests unlimited presidential electoral power in an "elite" electoral college and in "state political elite[s]," and that citizen voting is a frill that can be constitutionally dispensed with.[326] But the history shows that the early 1800s era election model championed by the "plenary power" camp was abandoned by all but one state by 1832 and has not been followed for almost 200 years. Since then, the citizen voters vote for president, and the electors in each state carry out the choice for president made by citizen voters.

Part of the history and tradition of voting for presidents is the expansion of the vote in the Constitution and the voting booth, to the point where universal suffrage is now constitutionally protected and recognized as a fundamental right. Reverend Dr. Martin Luther King Jr. wrote, promoting the right to vote for Black citizens, that "Civil Right No. 1 [is] The Right to Vote" and that this right is "the most fundamental of all."[327] Susan B. Anthony wrote, advocating for women's suffrage, that "[s]uffrage is the pivotal right" because when citizens "elect those who

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321 *Id.* The trend toward state electors automatically pledging to vote for the candidate who won the popular vote in the state began in the early 1800s. Wilfred U. Codrington III, *Can the Members of the Electoral College Choose Who They Vote for?*, BRENNAN CTR. FOR JUST. (July 6, 2020), https://www.brennancenter.org/our-work/research-reports/can-members-electoral-college-choose-who-they-vote [https://perma.cc/U7ZZ-93VG].

322 From 1796 to 1999, only nine out of over 21,000 electors did not follow voter direction. LAWRENCE D. LONGLEY & NEAL R. PEIRCE, THE ELECTORAL COLLEGE PRIMER 2000 113 (1999). In the modern era (since 1948), twenty-one electors out of over 4,500 disregarded the voters' choice. *Electoral College Fast Facts*, U.S. H.R.: HIST. ART & ARCHIVES, https://history.house.gov/Institution/Electoral-College/Electoral-College [https://perma.cc/2S5P-J6D9].

323 *See supra* Section II.A.

324 *See supra* Section II.A.

325 Shane, *supra* note 55, at 545–46. On only two occasions since the Fourteenth Amendment was passed did state legislatures choose electors without citizen voting. One was in 1868 when Florida chose electors and the second was in 1876 when Colorado did. *Id.*; *see also supra* Section II.A.

326 *See* Note, *supra* note 14, at 1091, 1095, 1103.

327 King, *supra* note 15, at 182.

make [laws], they [can] be in the position of sovereigns instead of subjects."[328]

The post-1830 history of voting is reflected in the trajectory of constitutional amendment and the development of the constitutional right to vote.[329] As one commentator observed:

> [T]he universalist turn . . . established that in addition to protections against group-based discrimination in voting, our law now correctly conceives of voting as a universal fundamental right of citizens. The wrongness of disenfranchisement is not simply the wrongness of race discrimination or other similar group-based exclusion: it is also a violation of a fundamental right of citizens.[330]

The "plenary state power" theory ignores the vitally important history of how deeply the citizens' right to vote is part of the soul and identity of this country. Most of the voting rights amendments were born from our country's most iconic and defining moments. The horrors of the Civil War led to amendments that honored President Abraham Lincoln's pledge that our "government of the people, by the people, for the people, shall not perish from the earth."[331] In 1889, the Brotherhood of Liberty linked the Fourteenth and Fifteenth Amendments directly to the brutal cost of the Civil War and President Lincoln's vision of democracy.[332] In 1964, the Supreme Court joined with the Brotherhood in the *Reynolds* case affirming constitutional voting rights, reasoning that the Equal Protection Clause was "the heart of Lincoln's vision of 'government of the people, by the people, [and] for the people.'"[333]

The argument that states have "plenary power" to elect presidents without citizen voting is oblivious to this history. It is an argument that

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328 Susan B. Anthony, *The Status of Woman, Past, Present, and Future*, *in* THE ARENA 1, 905 (1897).

329 Fishkin, *supra* note 55, at 1339 (explaining that from Reconstruction through the 1970s, "American law followed an individualistic path to a brand of universalism that connects *individual* citizenship with the right to vote").

330 *Id.* at 1345.

331 Abraham Lincoln, President, Gettysburg Address (Nov. 19, 1863) (transcript available at *The Gettysburg Address*, ABRAHAM LINCOLN ONLINE, http://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm [https://perma.cc/4RDQ-J6TM]).

332 THE BROTHERHOOD OF LIBERTY, *supra* note 257, at 501. The Brotherhood wrote that "[t]he authors of these three amendments realized, that the expensive, bloody, roundabout process of a war" required "a constitutional foundation for the perpetuity of the equality of rights." *Id.* The Brotherhood quoted the Gettysburg Address, including President Lincoln's closing plea for government by, of, and for the people. *Id.* at 327. President Lincoln was a particular inspiration for the Brotherhood: there are over twenty-five references to President Lincoln in the Brotherhood's defense of the Reconstruction Amendments and critique of Supreme Court decisions about them. *Id.* at 1, 3, 5, 25, 28, 46, 64–68, 143, 166, 192–93, 226, 235, 239, 271, 284, 327, 381, 446, 455, 457, 481–83, 485, 490–92, 495, 513–14, 515–18.

333 Reynolds v. Sims, 377 U.S. 533, 568 (1964) (alteration in original).

we can capriciously abandon almost 200 years of citizens choosing presidents, with electors honoring the citizens' choice in their respective states. The historically established system of presidential election based on citizen votes is required by the voting rights constitutional amendments. That system is part of our national identity. It would be cataclysmically irresponsible to discard a 200-year-old presidential election system driven by citizen voting and replace it with undemocratic state autocracy that strips citizens of the right to vote for president.

2. *Chiafalo v. Washington*—A Supreme Court Step Toward Constitutionalizing The Historical Right to Vote for President

History and the Constitution rhyme—the expansion of voting rights in polling places matches the expansion of the "right to vote" in the Constitution and in Supreme Court right-to-vote cases like *Harper* and *Kramer*.[334] As Professor Amar observed:

> All adult-citizen . . . residents are presumptively eligible voters. This is the group textually identified by section 2 of the Fourteenth Amendment, as updated by the later Woman and Youth Suffrage Amendments. It is also the lived-constitutional baseline suggested by actual modern practice in the fifty states.[335]

The Court's 2020 *Chiafalo* decision suggests that the Justices may be reading this history and following it toward the conclusion that there is a right to vote for president. In ruling that states could fine electors who voted against presidential candidates chosen by citizen electors, the Court, in an opinion written by Justice Elena Kagan, acknowledged that "'long settled and established practice' may have 'great weight in a proper interpretation of constitutional provisions.'"[336]

Chiafalo was about a state law that imposed fines on "faithless elector[s]" who voted for a presidential candidate who lost the state's popular vote instead of the candidate who won.[337] In deciding that the law was constitutional, Justice Kagan considered the history and text of the Article II electoral college provision.[338] The decision did not address

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334 AMAR, *supra* note 63, at 227 (discussing Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969)).

335 *Id.*

336 Chiafalo v. Washington, 591 U.S. 578, 592 (2020) (quoting The Pocket Veto Case, 279 U.S. 655, 689 (1929)).

337 *Chiafalo*, 591 U.S. at 585–86.

338 *Id.* at 581–85, 587–92, 595–97.

citizens' right to vote; rather, the issue was whether electors had a constitutional right to vote as they pleased.[339]

The *Chiafalo* Court continued to recognize what it described as states' "far-reaching authority over presidential electors" under Article II.[340] The Court added, "Article II includes only the instruction to each State to appoint, in whatever way it likes, as many electors as it has Senators and Representatives."[341] This broad power allowed states to penalize faithless electors.[342]

Despite recognizing a state's broad election authority, much of the opinion was based on the need to protect citizens' voting choices. Here, *Chiafalo* marked a departure from prior Court "plenary power" Article II cases in several respects. The Court applied Article II with much more emphasis on: (1) the brevity of Article II and what Article II left out,[343] (2) the not too illustrious history of Article II's enactment,[344] and (3) the history of presidential voting since Article II was enacted in 1789.[345] In addition to what the Court did, what the Court did not do is significant in two key ways. First, the Court did not use the term "plenary power" to describe the states' Article II presidential election responsibilities. Second, the Court did not cite *Bush*.

Returning to the Court's treatment of Article II, here, the Court tracked the debate on, and brevity of, Article II, contrasting that with the long history and development of citizen voting rights since the mid-1800s.[346] Justice Kagan began by observing that the origins of Article II were not illustrious: the provision was "an eleventh-hour compromise" that uber Framer James Madison described as the product of "the hurrying influence produced by fatigue and impatience."[347] She then described Article II itself as "barebones" with "sparse instructions," adding that "the Constitution left much to the future" when it came to how presidents are chosen.[348] Justice Kagan added, in language acknowledging the turn to citizen election of presidents: "the future did

339 *Id.* at 595–97.

340 *Id.* at 588.

341 *Id.* at 590.

342 *Id.* at 588–90, 596–97.

343 *Id.* at 582–83 (noting that the Constitution's Electors' Clause is "fairly slim" and that it "failed to anticipate the rise of political parties, and soon proved unworkable" and thus required changes in the Twelfth Amendment).

344 *Id.* at 582.

345 *Id.* at 584–85.

346 *Id.* at 582–85.

347 *Id.* at 581–82 (quoting Letter from James Madison to George Hay (Aug. 23, 1823), *in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 458 (Max Farrand ed., 1st ed. 1911)).

348 *Chiafalo*, 591 U.S. at 590, 592.

not take long in coming. Almost immediately, presidential electors became trusty transmitters of other people's decisions."[349]

She then cited nineteenth-century commentators who observed that electors voted for the presidential candidate that the citizens voted for.[350] Justice Kagan's final holding gives constitutional primacy to the votes of citizens: "Electors . . . have no ground for reversing the vote of millions of . . . citizens. That direction accords with the Constitution—as well as with the trust of a Nation that here, We the People rule."[351]

Chiafalo is a walk-back from prior Article II "plenary power" rulings. The decision correctly recognized that Article II was a short compromise that left voting rights unaddressed and was almost immediately overtaken by the history of citizen voting. The implications of Justice Kagan's reasoning are that a hyper-technical read of Article II that disenfranchises citizens is constitutionally ridiculous.

D. *Discrimination: "Plenary State Power" Has Unconstitutional Racist, Sexist, and Ageist Consequences in Presidential Election Power*

I start by acknowledging that proponents of the "plenary power" theory recognize that the Equal Protection Clause applies to presidential elections and that elections are subject to constitutional antidiscrimination protections.[352] I am not contending that those who argue for the "plenary power" theory are racist, sexist, or ageist. However, there would be enormously racist, sexist, and ageist consequences from the voting regime that would result from the theory. The "plenary power" theory was born in Supreme Court decisions during the Jim Crow era and its antecedent cases—*Minor* and *Cruikshank*—which had racist and sexist outcomes then.[353] The theory would operate today as it did during Jim Crow: by eliminating the right to vote for all citizens, it would allow denial of the vote for specific groups of citizens targeted by antidemocratic forces.

There is no doubt that the displacement of citizen voting with presidential selection by "state political elite[s]"[354] will have racist, sexist, and ageist consequences. Under the "plenary power" theory, state legislatures would have the power to pick presidents and exclude

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349 *Id.* at 592.

350 *Id.* at 595 (citations omitted).

351 *Id.* at 597.

352 Note, *supra* note 14, at 1088, 1101; Delahunty & Yoo, *supra* note 25, at 65–66 n.213 (citation omitted).

353 *See supra* Sections II.B.1–2.

354 Note, *supra* note 14, at 1095.

citizens.[355] This pirating of power away from citizen voters would take presidential selection power away from Black citizens and give it to white legislators, because state legislatures have far fewer Black members proportionally than the voting population.[356] According to one study, "every single state in the country has a legislature that is disproportionately white."[357] The problem is particularly acute for Republicans—"less than 3 percent of GOP state legislators are nonwhite."[358]

The "plenary state power" theory would also have a sexist consequence where only 29% of state legislators are women.[359] Younger voters are also tremendously underrepresented in state legislatures. Millennials and Generation Z (collectively, those under 43 years old) comprise over 42% of the population.[360] Yet these younger voters comprise under 10% of legislators in 41 states and under 20% in all 50 states.[361]

Shoving citizens aside to give presidential election power to state legislatures would dramatically shrink the power of Black Americans, women, and young voters in the presidential selection process all over the nation in every single state.[362] The "plenary power" theory was born in Supreme Court decisions with racist and sexist outcomes; the modern-day application of that radical theory would rebirth this bigotry in voting power. Thankfully, the Constitution prohibits this: the Fifteenth Amendment prohibits denying or abridging the right to vote on the basis of race, the Nineteenth Amendment prohibits denying or abridging the right to vote on the basis of sex, and the Twenty-Sixth Amendment prohibits denying or abridging the right to vote on the basis of age.[363]

While addressing discrimination, it is important to recognize how central race has been to the history of voting rights. The malignancy and

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355 *See* Bush v. Gore, 531 U.S. 98, 104 (2000).

356 Renuka Rayasam, Nolan D. McCaskill, Beatrice Jin & Allan James Vestal, *Why State Legislatures Are Still Very White—and Very Male*, POLITICO (Feb. 23, 2021, 2:13 PM), https://www.politico.com/interactives/2021/state-legislature-demographics [https://perma.cc/HC2K-9QP7].

357 *Id.*

358 *Id.*

359 *Id.*

360 *Population Distribution in the United States in 2023, by Generation*, STATISTA (July 5, 2024), https://www.statista.com/statistics/296974/us-population-share-by-generation [https://perma.cc/M29S-FC2V].

361 *State Legislator Demographics*, NAT'L CONF. STATE LEG. (Dec. 21, 2020), https://www.ncsl.org/about-state-legislatures/state-legislator-demographics [https://perma.cc/TL69-ZXV4].

362 That is, at least until state legislatures are more representative than they are now.

363 *See supra* notes 139–140, 142.

persistence of racism has prompted much of the nation's work to restore voting rights. This started in 1868 with the Fourteenth Amendment, intended in part to indirectly create and protect Black suffrage rights.[364] The Reconstruction Act of 1867 required the seceding states to grant voting rights to all men twenty-one and older and ratify the Fourteenth Amendment,[365] with Congress concluding that Black suffrage was a necessary condition for reentry.[366] The Fifteenth Amendment, passed in 1869, expressly prohibited denial of the right to vote based on race.[367] All of these steps were taken in the face of political opposition, violence, and administrative burdens such as literacy tests and poll taxes—all intended to stop Black citizens from voting.[368]

When racist violence and opposition to Black suffrage continued—despite two constitutional amendments and a statute protecting voting rights—Congress enacted a series of laws in 1870 and 1871 collectively referred to as the Ku Klux Klan Act.[369] The Act prohibits interference with the right to vote.[370] The racist Colfax Massacre took place in 1873, shortly after the Act was passed, and the attempt to prosecute the murderers under the Act and Constitution ended with the 1876 Supreme Court decision in *Cruikshank*, affirming the dismissal of the charges.[371] Racism virtually obliterated Black voting rights in the South during the Jim Crow period from the 1870s to the mid-twentieth century.[372]

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364 Graber, *supra* note 83, at 123–30 (describing support for Black voting rights among supporters of the Fourteenth Amendment); FONER, *supra* note 21, at 83; *see also* FONER, *supra* note 214, at 253, 259 (explaining the Fourteenth Amendment penalty as an indirect incentive to grant Black citizens voting rights).

365 Reconstruction Act of 1867, 39th Cong., Session II, 5 Stat. 459.

366 *Id.*; FONER, *supra* note 214, at 276–78 (noting that "Black suffrage was the most radical element of Congressional Reconstruction" and that it "derived from a variety of motives and calculations").

367 U.S. CONST. amend. XV.

368 FONER, *supra* note 21, at 105 (poll taxes and literacy tests), 107 (political opposition based on states' rights and racism), 116–18 (KKK and other racist violence).

369 COMM. ON H. ADMIN. OF THE U.S. H.R., BLACK AMERICANS IN CONGRESS 1870–2007, H.R. DOC. NO. 224, at app. J (2008). The Act is currently codified at 42 U.S.C. § 1985.

370 42 U.S.C. § 1985(3).

371 FONER, *supra* note 21, at 144–46; United States v. Cruikshank, 92 U.S. 542.

372 The Jim Crow era saw an array of racist voter suppression tactics, ranging from poll taxes to literacy tests to violence and massacres to all white primaries to antidemocracy Supreme Court decisions. Brandon Tensley, *America's Long History of Black Voter Suppression*, CNN (May 2021), https://www.cnn.com/interactive/2021/05/politics/black-voting-rights-suppression-timeline [https://perma.cc/R7WK-G66X]; Russell G. Brooker, *Voting Rights For Blacks and Poor Whites in the Jim Crow South*, AMERICA'S BLACK HOLOCAUST MUSEUM, https://www.abhmuseum.org/voting-rights-for-blacks-and-poor-whites-in-the-jim-crow-south [https://perma.cc/E35Y-QN2Y]. The percentage of Black citizens who voted was as low as 6.7% in some states as late as 1965, when the Voting Rights Act was passed. German Lopez, *How the Voting Rights Act Transformed Black*

The 1960s Civil Rights era brought two more laws protecting Black voting rights—the Civil Rights Act of 1965, which prohibiting states or local governments from denying or abridging the right to vote on the basis of race[373] and the Twenty-Fourth Amendment, which prohibited poll taxes[374] often used to stop Black citizens from voting.[375]

Even with all of this constitutional and statutory protection, Black voter suppression continues.[376] In 2022, Professor Ifill, then President and Director of the NAACP Legal Defense Fund, stated that "Black and brown Americans face the greatest assault on our voting rights since the Jim Crow Black Codes rolled back the progress made during Reconstruction."[377] Professor Ifill cited the January 6, 2021 insurrection attempts to reduce vote counts in communities of color, and threats to Black voting officials.[378] Racism against Black voters has gone on and on in our country, persisting over 160 years despite three constitutional amendments and at least three major federal laws protecting Black suffrage. This history shows that the theoretical denial of voting rights to all Americans under a "plenary state power" doctrine will almost surely lead to the targeted, actual denial of voting rights for Black Americans.

E. *Consequentialism: A Right to Vote for President Is Better than "Plenary State Power" Because Continuing Democracy Is Better than Ending It*

This leads to the fifth reason that the radical "plenary state power" theory is wrong and the constitutional right to vote for president is right. The Court warned against decisions with "damaging consequences" that "enflame[] debate and deepen[] division" when considering how the Constitution ought to be interpreted and applied.[379] In 1869, Chief Justice

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Voting Rights in the South, in One Chart, VOX (Aug. 6, 2015, 8:35 AM), https://www.vox.com/2015/3/6/8163229/voting-rights-act-1965 [https://perma.cc/2VWL-B9RD].

373 52 U.S.C. § 10101.

374 U.S. CONST. amend XXIV.

375 Deborah N. Archer & Derek T. Muller, *The Twenty-Fourth Amendment*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/amendments/amendment-xxiv/interpretations/157 [https://perma.cc/TN7B-U5QM].

376 *Voter Suppression and Continuing Threats to Democracy: Hearing Before the Subcomm. on Const., C.R., & C.L. of the H. Comm. on the Judiciary*, 117th Cong. (2022) (statement of Sherrilyn Ifill, President and Director-Counsel, NACCP Legal Defense and Educational Fund).

377 *Id.* at 2.

378 *Id.* at 4, 6–7, 9, 11–15.

379 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231–32 (2022). *Dobbs* itself may be precisely the sort of inflammatory decision the Court warned about. Most Americans disagree with the decision, which has contributed to the Court's loss of support. Steven Shepard, *The Supreme*

Salmon Chase similarly reasoned that judges should take care to avoid constructions that would cause "great public and private mischief" and urged consideration of consequences.[380]

Consequences matter. A read of the Constitution that will tear the nation apart must be wrong. It is hard to imagine a thing more searing in today's America than for states to prevent citizens from voting for president, for states to otherwise stand in the way of citizens' presidential voting rights, for states to choose electors against the will of voters, or for states to decide that there is only one candidate citizens can vote for. Or, for that matter, for courts to bless autocratic usurpation of the citizens' rights and choice. It is possible that the nation would be torn apart if any of this happens. Yet under the "plenary power" theory, all of these things are possible.

I hasten to add that I am unconditionally against the nation splitting up and for peaceful resolution of political differences. But a national schism could result if the "plenary state power" extremists get their way. As the Supreme Court correctly recognized in decisions cited earlier, if citizens do not have voting rights, then they do not have any rights.[381] And then what? What happens if most citizens in this country decide they do not have a say in who is president or do not have a right to vote? What happens if most citizens in this country decide that "elites" have fixed presidential elections and are deciding who wins, and that whatever rump elections that are allowed by elites are a sham? What happens if most citizens in this country connect the denial of their voting rights to the denial of any rights they have to achieve political goals or make policy? What happens if most citizens in this country lose faith in the law after deciding it serves only to prop up and protect an autocratic regime? What happens if most citizens in this country decide that they do not really get to be citizens anymore, because all the power of democratic citizenry has

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Court Dramatically Changed Public Opinion on Abortion, POLITICO (June 24, 2023, 7:00 AM), https://www.politico.com/news/2023/06/24/supreme-court-public-opinion-abortion-00103493 [https://web.archive.org/web/20231209155432/https://www.politico.com/news/2023/06/24/supreme-court-public-opinion-abortion-00103493] (noting the Court "significantly and—so far—durably altered public opinion on one of the most controversial and intractable issues in American politics.").

380 *In re* Griffin, 11 F. Cas. 7, 24 (C.C.D. Va. 1869). The full quote from the case follows:

> But, on the other hand, a construction, which must necessarily occasion great public and private mischief, must never be preferred to a construction which will occasion neither, or neither in so great degree, unless the terms of the instrument absolutely require such preference. Let it then be considered what consequences would spring from the literal interpretation contended for in behalf of the petition.

Id. Chief Justice Chase ruled as a Circuit Judge, common practice at the time. Baude, *supra* note 134, at 35.

381 *Supra* Section II.B.5.

been stolen from them and belongs forever in someone else's hands? As one scholar warned,

> [I]f a state . . . failed to elect the most important officials, instead choosing officials through some other process, that would raise serious questions—not about the equal treatment of individuals, but about whether the state remained a democracy and its inhabitants remained "citizens" at all.[382]

This must be considered in the context of our current crisis of democracy in this country. Millions of Americans wrongly believe the lie that the 2020 election result was fraudulent.[383]

The 2020 and 2021 Trump coup conspiracy shows just how dangerous the "plenary state power" theory is once it leaps off the pages of law review Articles and Supreme Court decisions and pounces into a strategy to overthrow democratic presidential elections. The January 6 Committee found that the "plenary state power" theory was central to the Trump coup plot: "This fundamentally anti-democratic effort was premised on the incorrect theory that, because the Constitution assigns to State legislatures the role of directing how electoral college electors are chosen . . . then the State legislatures could simply choose Trump/Pence electors after seeing the election results."[384]

One of Trump's key lawyers testified that the issue of state legislatures having "plenary authority" to replace citizen-chosen electors came up "[r]ight after the election."[385] This lawyer believed the most radical interpretation of the "plenary power" theory:

> The Constitution of the United States grants plenary power to state legislators to choose the electors of the state. . . . [T]hat power granted in the Constitution to state legislatures—legislatures [sic], is complete and total. There's nothing in the Constitution about allowing people, citizens to vote on electors. . . . The legislature has the authority to choose the electors.[386]

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382 Fishkin, *supra* note 55, at 1336 n.213.

383 CNN, CNN POLL ON DEMOCRACY, JANUARY/FEBRUARY 2022 (Feb. 2022), https://www.documentcloud.org/documents/21202374-cnn-poll-on-democracy-januaryfebruary-2022 [https://perma.cc/NZK4-8L2Z]. Thirty-seven percent of Americans do not believe President Biden won the 2020 election. *Id.* at 5.

384 JAN. 6TH REPORT, *supra* note 13, at 266.

385 SELECT COMMITTEE TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE U.S. CAPITOL, DEPOSITION OF CLETA MITCHELL 71–72 (May 18, 2022) https://www.govinfo.gov/content/pkg/GPO-J6-TRANSCRIPT-CTRL0000083769/pdf/GPO-J6-TRANSCRIPT-CTRL0000083769.pdf [https://perma.cc/HF93-RFBT].

386 *Id.* at 20–21. The lawyer's belief that "[t]here's nothing in the Constitution allowing people, citizens to vote on electors," is wrong. *Id.* at 21. The Fourteenth Amendment states that citizens

The Trump "plenary power" coup plan accelerated when one White House advisor promoted "state legislature plenary power under Constitution to state electoral college electors."[387] The advisor said "[w]e should baldly assert' that state legislators'have the constitutional right to substitute their judgment for a certified majority of their constituents."[388]

Trump's confidante and son told the White House Chief of Staff "that 'State Assemblies can step in and vote to put forward the electoral slate[,] Republicans control Pennsylvania, Wisconsin, Michigan, North Carolina, etc. we get Trump electors.'"[389] The Chief of Staff followed up and told legislators in at least one state that "[t]he state legislature can take over the electoral process."[390] One Trump lawyer told a gathering of Pennsylvania legislators "that although Pennsylvania law dictates that electors are chosen by popular vote, '[y]ou can take that power back at any time.'"[391] The January 6 Committee concluded that "[t]he Trump campaign set up an operation to contact hundreds of State legislators and ask them to support an effort to appoint electoral college electors for the Trump/Pence ticket in states that Trump lost."[392] The January 6 Committee found that "in the two months between the November election and the January 6 insurrection, President Trump or his inner circle engaged in at least 200 apparent acts of public or private outreach, pressure, or condemnation, targeting either State legislators or State or local election administrators, to overturn State election results."[393] One pro-Trump organization emailed state legislators on "an important briefing for legislators who hold the power to decertify the results of their state elections," urging them to "[a]ssert your plenary power."[394]

This effort was targeted at getting legislators to decertify the electors chosen by citizen voters in seven states Trump lost and replacing them

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have a "right to vote . . . for the choice of electors for President." U.S. CONST. amend. XIV, § 2. The Twenty-Fourth Amendment refers to "[t]he right of citizens of the United States to vote in any primary or other election for President . . . [and] for electors for President." U.S. CONST. amend. XXIV.

387 JAN. 6TH REPORT, *supra* note 13, at 309 n.28.

388 *Id.* at 268 (alteration in original).

389 *Id.* at 267 (alteration in original).

390 *Id.*

391 *Id.* at 277.

392 *Id.* at 281.

393 *Id.* at 271.

394 *Id.* at 299.

with fake electors.[395] A federal judge found this plan was illegal.[396] The January 6 Committee concluded:

> President Trump and his allies zeroed in on key battleground States the President had lost, leaning on Republican State officials to overrule voters, disregard valid vote counts, and deliver the States' electoral votes to the losing candidate. Had this scheme worked, President Trump could have, for the first time in American history, subverted the results of a lawful election to stay in power. His was a deeply anti-democratic plan: to co-opt State legislatures . . . Had enough State officials gone along with President Trump's plot, his attempt to stay in power might have worked.[397]

Though the "plenary power" theory does not require threats or violence, it is a lot easier to bully a few hundred legislators than over 200 million voters. For Trump and his team, part of the plan was incitement: "Trump's rhetoric endangered innocent officials and private citizens, and fueled death threats against Georgia election workers, sexualized threats . . . and harassment at the homes of [state] election officials."[398] The Trump conspiracy culminated in the January 6, 2021, mob attack on the Capitol to stop the certification of President Biden's election. The attack could have been far worse were it not for the courage of Capitol police and good judgment of those whose decisions repelled the attack.[399]

The "plenary state power" theory does not come alone. It comes with all this. It allows for precisely this kind of attack on democracy and voting rights. Is this how America wants to choose presidents?

The attackers of democracy are not done. All this sets the stage for historic chaos and crisis in the 2024 elections. Here are steps antidemocratic forces have taken since the January 6 attack to make sure that the next effort to overturn democracy through "plenary state power" succeeds:

- State legislators have introduced legislation empowering legislatures to appoint electors;[400]

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395 *Id.* at 341. Trump and his team claimed the voting for President Biden was fraudulent. However, all but one of the over sixty lawsuits Trump's team filed to challenge the election were dismissed, and none found evidence of fraud sufficient to invalidate the election. *Id.* at 210. The Trump Administration Attorney General and Department of Justice agreed that there was no evidence of fraud. *Id.* at 12.

396 *Id.* (noting that Federal District Judge David Carter wrote that this initiative to "certify alternate slates of electors for President Trump" constituted a "critical objective of the January 6 plan.") (citing Order Re Privilege of 599 Documents Dated November 3, 2020–January 20, 2021, at 23, Eastman v. Thompson, 636 F. Supp.3d 1078 (C.D. Cal. 2022)).

397 JAN. 6TH REPORT, *supra* note 13, at 264.

398 *Id.* at 264, 300.

399 *Id.* at 150.

400 Bohnhorst I, *supra* note 52, at 443–44.

- State legislatures have proposed almost 400 bills in forty-eight states making it harder to vote.[401] Criticism of this is bipartisan. A former Republican presidential election campaign lawyer testified to Congress that protection of voting rights "has taken on renewed importance in the face of the dramatic increase in state legislatures pushing bills that make it more difficult to vote for no good reason;"[402]
- Republicans nominated "scores" of candidates for state office with election oversight authority who would not have certified President Biden's 2020 election;[403]
- Local Republican election authorities mimicked the "plenary power" theory at the county level by refusing to certify Republican losses.[404]
- In 2021, thirty-two laws were enacted in seventeen states which allow state legislatures to politicize, criminalize election administration activity, or otherwise interfere with elections.[405]

The President and Director-Counsel of the NAACP Legal Defense Fund, Janai Nelson, testified to Congress that "[t]hese new rules allow white-dominated legislatures or Statewide bodies to assert control over majority Black local jurisdictions."[406]

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401 State Voting Bills Tracker, BRENNAN CTR. FOR JUST. (May 28, 2021), https://www.brennancenter.org/our-work/research-reports/state-voting-bills-tracker-2021 [https://perma.cc/H4TE-UGT2].

402 *On the January 6th Investigation: Hearing Before the H. Select Comm. to Investigate the January 6th Attack on the U.S. Capitol*, 117th Cong. 113 (2022) (statement of Trevor Potter, Founder and President Campaign Legal Center).

403 Amy Gardner & Isaac Arnsdorf, *More Than 100 GOP Primary Winners Back Trump's False Fraud Claims*, WASH. POST (June 14, 2022, 6:00 AM), https://www.washingtonpost.com/politics/2022/06/14/more-than-100-gop-primary-winners-back-trumps-false-fraud-claims [https://perma.cc/G6CU-RGK6]; Amy Gardner, *Election Deniers March Toward Power in Key 2024 Battlegrounds*, WASH. POST (Oct. 12, 2022, 4:37 PM), https://www.washingtonpost.com/politics/2022/08/15/election-deniers-march-toward-power-key-2024-battlegrounds [https://perma.cc/DLK9-XVJU].

404 Annie Gowen, *New Mexico's Supreme Court Orders County Commission to Certify Vote*, WASH. POST (June 15, 2022, 6:46 PM), https://www.washingtonpost.com/politics/2022/06/15/new-mexicos-supreme-court-orders-county-commission-certify-vote [https://perma.cc/3EWB-JQ6W].

405 Memorandum from States United Democracy Center, Protect Democracy, and Law Forward to Interested Parties (Dec. 23, 2021), at 2, https://s3.documentcloud.org/documents/21169281/democracy-crisis-in-the-making-report-update_12232021-year- end-numbers.pdf [https://perma.cc/56KS-RX5T].

406 *Hearing Before the H. Select Comm. to Investigate the January 6th Attack on the U.S. Capitol*, 117th Cong. 8 (2022) (statement of Janai Nelson, President and Director-Counsel, NAACP Legal Defense and Education Fund).

As a bipartisan election protection organization reported to Congress, those who plotted the 2020 coup "have now developed a playbook for future elections: [f]irst, they change the rules of elections; then, they change the referees—the people who will enforce those rules."[407] Central to this antidemocratic "playbook" is "to put highly partisan State legislators in charge of basic decisions about our elections—with the ostensible goal being to rig election outcomes and give a political party the ability to nullify the votes of the people."[408] The goal is "to ensure that 2020 was the last time that they will ever be denied control over government in this country—regardless of what the voters say."[409]

Perhaps most chilling of all is that a former president and current nominee for president is openly promising to end democracy and keep power by antidemocratic means. On July 26, 2024, Trump told a crowd that if they voted for him "in four years, you don't have to vote again. [W]e'll have it fixed so good you're not going to have to vote."[410]

This is what the radical "plenary power" theory is all about giving states the power to do virtually anything to cheat out an election win. If a state can impose a one party, one candidate choice on voters, or arbitrarily strip citizens of the opportunity to vote, then states can toss out election results, alter vote counts votes, or appoint sham electors. None of this is hypothetical. Trump's team tried all this in 2020.[411]

If this makes you uncomfortable, good. The ascent of autocracy and extinction of democracy should make us uncomfortable. President Lincoln and Dr. King, among the greatest of Americans, unflinchingly warned America that grave damage comes to the country when fundamental rights are crushed.[412] When it comes to autocracy, we are

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407 *Id.* at 163 (statement of Christine Todd Whitman et al., former Governor of New Jersey).

408 *Id.*

409 *Id.* at 172.

410 Tim Reid, *Trump Tells Christians They Won't Have to Vote After This Election*, REUTERS (July 28, 2024, 7:41 AM), https://www.reuters.com/world/us/trump-tells-christians-they-wont-have-vote-after-this-election-2024-07-27 (last visited Aug. 2, 2024).

411 *See generally* JAN. 6TH REPORT, *supra* note 13, at 4, 31, 41–44, 46–47. Chapter 2 of the Report describes the effort to pressure state officials to alter vote counts, and Chapter 3 describes the fake elector scheme. *Id.* at 263–300, 341–54); *see also* Rosalind S. Helderman, *All The Ways Trump Tried to Overturn the Election—and How It Could Happen Again*, WASH. POST (Feb. 9, 2022), https://www.washingtonpost.com/politics/interactive/2022/election-overturn-plans/?itid=lk_interstitial_manual_40 [https://perma.cc/FL9K-9T5S].

412 In his Second Inaugural Address, President Lincoln said that God "gives to both North and South this terrible war as the woe due to those by whom the offense came." President Abraham Lincoln, Lincoln's Second Inaugural Address (Mar. 4, 1865) (transcript available at https://www.nps.gov/linc/learn/historyculture/lincoln-second-inaugural.htm [https://perma.cc/DAQ6-MTN4]). Dr. King frequently invoked the biblical admonition that "you shall reap what you

dangerously close to reaping that whirlwind. As two democracy experts testified at the January 6 Committee, "[u]nless we take action now to fortify democracy, the United States risks backsliding toward authoritarianism."[413] NAACP President Nelson agreed, warning Congress that "the threat of our democracy breaking apart at the seams and sliding irreversibly into authoritarianism has not been as acute since the Civil War."[414] Election expert Professor Richard Hasen concluded that there is "a serious risk that the 2024 presidential election, and other future U.S. elections, will not be conducted fairly and that the candidates taking office will not reflect the free choices made by eligible voters."[415]

As Frederick Douglass said, nations "are taught less by theories than by facts and events."[416] The facts and events of January 6 should teach the nation what the purpose of the "plenary power" theory is—to attack citizens' power to choose the president.

This is a crisis. Part of the solution is simple. It is not a return to the American legal voting regime before the 1960s (or the 1860s) or the death of free and fair citizen elections for president. Rather, the solution is to honor citizens' right to vote, let citizens vote, help citizens vote, count all citizens' votes, and make the person who gets the most citizens' votes president.

The solution is democracy. Douglass again explained why a democratic election is the best way to resolve national strife: "The true way and the easiest way is to make our government entirely consistent with itself, and give to every loyal citizen the elective franchise[]—a right and power which will be ever present, and will form a wall of fire for [their] protection."[417]

The values served by democracy and citizen election of presidents are also reasons why democratic election of presidents by citizens is better

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sow" in challenging racism, including at a speech he gave for voting rights in Selma, Alabama, a week after the infamous police attack on racial justice voting rights activists peacefully protesting. Martin Luther King Jr., Our God is Marching On! Reverend Martin Luther King, Jr. Speech (Mar. 25, 1965) (transcript available at http://americanradioworks.publicradio.org/features/prestapes/mlk_speech.html [https://perma.cc/83LE-U4E4]).

413 *How Four Historic Threats to Democracy Fueled the January 6, 2021 Attack on the United States Capitol: Hearing Before the H. Select Comm. to Investigate the Jan. 6th Attack on the U.S. Capitol*, 117th Cong. 9 (2022) (statement of Suzanne Mettler & Robert C. Lieberman), https://www.justsecurity.org/wp-content/uploads/2023/04/Mettler-Lieberman-Statement-Jan-6-Select-Committee-5.1.22.pdf [https://perma.cc//2DK3-F7W7].

414 Nelson, *supra* note 406, at 112.

415 Richard L. Hansen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, 135 HARV. L. REV. F. 265 (2022).

416 FREDERICK DOUGLASS, LIFE AND TIMES OF FREDERICK DOUGLASS 341 (1881).

417 Frederick Douglass, *Reconstruction*, XVIII ATLANTIC 761, 762 (Dec. 1866), https://cdn.theatlantic.com/media/archives/1866/12/18-110/131866976.pdf [https://perma.cc/S26U-LCXT].

than "plenary state power" elitism. First is presidential legitimacy: "The core virtue of the democratic method of choosing a President is the connection of the chief executive to the people: The President gains legitimacy to govern with the consent of the governed."[418] A second related value is presidential accountability—"[v]oters also have interests in governance: in what elected officials actually do once in office."[419] Third, the right to vote is deeply linked to full and equal citizenship.[420] Fourth, as Dr. King, Susan B. Anthony, Congress, presidents, and the Supreme Court recognized, voting is the right that protects all rights.[421] Finally, all of this is because "[t]he simplest reason to value the right to vote is that voting affects who wins."[422] Citizens should decide that, not just "elites."

Part of the solution is up to the Supreme Court and Congress. This much is clear. Democracy and common sense are the best way forward. The Supreme Court's laudatory decision against the independent state legislature theory in *Moore* is a strong foundation for rejecting the similarly radical "plenary state power" theory. The Court should hold that citizens have a constitutional right to vote for president under the five voting rights amendments in the Constitution, and that states do not have "plenary power" to extinguish that right or pick a president in any other way. The Court's voting rights decisions should protect the citizens' constitutional right to vote. The *Minor*, *Cruikshank*, *McPherson*, and *Bush* cases should be overruled on these issues. Congress should pass voting rights legislation and explicitly base such protection on the principle that citizens have a fundamental right to vote for president in the Constitution. The courts and legislators should not decide a presidential election against the expressed choice of citizen voters as reflected in the electoral college count (as long as the college is retained).

CONCLUSION

Professor Foner closed his groundbreaking work on the "Second Founding" in the Reconstruction Amendments with this challenge of a question: "Why, in the twenty-first-century, should the right to vote not be considered a privilege of citizenship enjoyed by all adult Americans?"[423] That is the right question. The right of citizens to vote for

418 Bohnhorst I, *supra* note 52, at 439.

419 Fishkin, *supra* note 55, at 1298.

420 *Id.* at 1333.

421 *See supra* note 15, 304–10 and accompanying text.

422 Fishkin, *supra* note 55, at 1332.

423 FONER, *supra* note 21, at 175.

president is a common sense right—and it is right in the Constitution. By contrast, the arguments for state "plenary power" do not make sense. It does not make sense to argue that states have absolute power to deny citizens the right to vote for president when the Constitution repeatedly says citizens have the right to vote that states cannot deny or abridge—including the right to vote for presidential electors. It does not make sense to argue that citizen voting is a fundamental right that is the basis for all other rights, except that citizens have no right to vote for president. It does not make sense to argue that it is unconstitutional for states to deny some citizens' right to vote for certain reasons (such as race, gender, or age), but that it is constitutional for states to deny the vote to all citizens for no reason.

The "plenary power" theory is a dangerous, radical antidemocratic theory that would do the same thing today as it did during the depths of Jim Crow: keep power in the hands of the powerful and out of the hands of the people. The "plenary power" theory is a blueprint for courts and legislatures to use that extremist theory of state authority to rubber stamp the antidemocratic installation of a president who loses the vote, or perhaps to approve some other state effort to fix the election, based on the argument that states have the power to pick whoever they want as electors—or for that matter as president. This is deeply troubling now, when democracy is under assault in America and all over the world.

It should not be ignored that the proponents of the "plenary power" theory were and are privileged and powerful elites and that the theory's victims are largely less powerful citizens who will have their power to vote stripped away. It should not be ignored that the denial of rights to all voters allows antidemocratic forces to deny the right to vote for specifically targeted groups of voters. It should not be ignored that voters targeted for disenfranchisement have *always* included Black citizens,[424] and often women and younger voters. It should not be ignored that many of these antidemocratic Articles and Supreme Court opinions are just like the Jim Crow era *Cruikshank* decision in several respects. Many do not mention the Constitution's words—"right to vote." They do not mention citizens whose rights they would crush, and they do not mention how those human beings have suffered and will suffer from losing the right to vote.

The worst thing about the radical "plenary power" theory is how soulless it is about what it means to be an American. Choosing a president matters to citizens and is a deeply felt part of being an American. I have

424 The persistence of racist voter suppression is perhaps best demonstrated by the fact that since 1866, America has tried to protect the rights of Black voters with three constitutional amendments (the Fourteenth, Fifteenth, and Twenty-Fourth), and at least three major civil rights statutes—the Reconstruction Act of 1867, the Ku Klux Klan Act of 1872, and the Voting Rights Act of 1965.

worked polls on election day, and watching people vote is one of the most moving experiences I have had as an American. I saw Black American men walk arm in arm after voting for President Obama. I watched an eighty-year-old grandmother thank our voter protection lawyers for helping her vote. She made a promise to her husband, before he died, that she would always vote because he risked his life fighting fascists for that right in World War II. The grandmother came to our office after she voted to tell us, "I want to thank the voting lawyers, because of you I kept my promise." One voter arranged a call to our voter protection team from an ambulance on the way to a hospital after a heart attack to ask if he could cast an absentee ballot. He could not because it was too late to vote absentee. We told him he had more urgent concerns, and thankfully he survived the heart attack. We later told him that though he was stopped from voting, he was a great citizen because he was the voter who cared the most.

These people are not "the voting masses" to be cast aside or overruled by state "elites." They are Americans and this country belongs to them. I wish elites who would snuff out citizens' right to choose the president could see these people, and hear these people, and care about these people. I have watched Americans cry with joy after casting their vote. On election day, every American voter matters, and every American voter has power to decide who will be president.

Those asking about the enforceability of a law often ask the figurative question, "does the law have teeth?" But the better and wiser question is, does it have heart? The argument that under the Constitution citizens do not have the right to choose the president has no heart. Ending American democracy and replacing it with the installation of presidents chosen by the state, has no heart. The radical antidemocratic "plenary state power" read of the Constitution has no heart for the source of American greatness and it has no heart for the legitimacy of American power. It has no heart for the American people.

Closing where I opened, with the great Curtis Mayfield,

> "It is now the nation's turn for all to be concerned
> We can be freer still, it is the people's will
> And bring back the power for the people
> That's all we ask in our country . . . ."[425]

425 Mayfield, *supra* note 1.