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Johanna Kalb

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REASSESSING AMERICAN DEMOCRACY: THE ENDURING CHALLENGE OF RACIAL EXCLUSION

Johanna Kalb* & Didi Kuo**

American democracy is in trouble.¹ Since the 2016 election, a sizable literature has developed that focuses on diagnosing and assessing the state of American democracy, most of which concludes that our system of government is in decline.² These authors point to the rise in party polarization, the increasingly bipartisan abandonment of the norms of the democratic process, the rise of populism, the degradation of the public sphere, and the proliferation of gerrymandered districts and voting restrictions to illustrate the breakdown. And while attributing varying levels of significance to these factors, a common theme is that American democracy, once stable, is now threatened.

On closer observation, however, it is unclear that American democracy was ever really as healthy as it may have appeared. This Essay argues that the stability of the American system has always been built and dependent upon racial exclusion; over the course of our history, each major movement

* Professor of Law, Loyola University New Orleans College of Law. This Essay benefitted from exchanges with Sarah Knight, Ian Haney López, Heather Richardson, Reuben Teague, and Alicia Bannon, and from an April 2018 event on “The Undemocratic American State” at New America with Marcia Chatelain, Kimberley Johnson, and Theodore Johnson. We are grateful to the Michigan Law Review for their editorial assistance.

** Research Scholar, Stanford University Center on Democracy, Development, and the Rule of Law.

1. In 2016, the United States became a “flawed democracy” according to the annual Democracy Index from the Economist Intelligence Unit. See The Data Team, *Declining Trust in Government Is Denting Democracy*, *ECONOMIST* (Jan. 25, 2017), <https://www.economist.com/graphic-detail/2017/01/25/declining-trust-in-government-is-denting-democracy> [<https://perma.cc/JR6C-XZEV>]. See also Uri Friedman, *Is American Democracy Really Under Threat?*, *ATLANTIC* (June 21, 2017), <https://www.theatlantic.com/international/archive/2017/06/american-democracy-trump/530454/> [<https://perma.cc/G2UT-GT44>].

2. Among the most influential contributions to the debate are STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2018) (highlighting the erosion of the democratic norms of mutual tolerance and forbearance); YASCHA MOUNK, *THE PEOPLE VS. DEMOCRACY: WHY OUR FREEDOM IS IN DANGER AND HOW TO SAVE IT* (2018) (describing declining public confidence in democratic systems); Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 *UCLA L. REV.* 78 (2018) (analyzing the risk of democratic backsliding).

toward a more fully representative participatory democracy has prompted a backlash that was resolved only by the adoption of policies that worked to undermine the full citizenship of communities of color. The point of this reframing is not to suggest that the United States has made no progress over its history. Nor does it diminish the accomplishments of those who have advocated for equality over the course of our history or minimize the importance of working to repair our democratic institutions. Rather, this reframing is necessary to avoid romanticizing our democratic history and to inform the choices in this moment as we seek to stabilize our country.

* * *

For decades, a country was considered to be democratic if it had successfully developed and maintained a necessary procedural infrastructure, including free and fair elections, and some level of political competition. But as an increasing number of transitioning democracies got stuck in some form of semiauthoritarian rule, political scientists developed more nuanced definitions, differentiating between the formal structures of democracy and the culture and institutions that make them meaningful.³ Most conceptions of consolidated democracy include respect for the rule of law, norms of fair play, and robust intermediary institutions, not just peaceful transfers of power. Consolidated democracy also requires meaningful and inclusive participation.⁴

The United States is the world's oldest constitutional democracy and has held many contested elections over the course of our history. The expansion of suffrage took place over the course of two centuries, punctuated by achievements including the Fourteenth and Fifteenth Amendments, the Nineteenth Amendment, and the Twenty-Fourth Amendment.⁵ However, a closer look shows that our country has also repeatedly failed to reach a steady state of inclusive participation. Rather, each push toward greater inclusivity has put our democratic structure under terrible strain.

There is no definition of democracy that the United States, pre-1965, actually meets. Any working definition of democracy includes the full right to vote for all citizens. The United States was founded on racial exclusion through slavery. In the 1850s, the battle over slavery "broke America's democracy," leading to the country's bloody civil war.⁶ Following the war, partisan wounds ran deep, with white supremacist groups such as the Ku Klux Klan organizing campaigns of terror and violence during Reconstruction. This was only resolved "after the issue of racial equality was

3. Andreas Schedler, *What Is Democratic Consolidation?*, J. DEMOCRACY, April 1998, at 91.

4. ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION (1971).

5. These Amendments guaranteed due process and equal protection under law, and prohibited voting exclusions based on race, sex, and ability to pay.

6. LEVITSKY & ZIBLATT, *supra* note 2, at 122. See also AVIDIT ACHARYA, MATT BLACKWELL, & MAYA SEN, DEEP ROOTS: HOW SLAVERY STILL SHAPES SOUTHERN POLITICS (2018).

removed from the political agenda.”⁷ As Steven Levitsky and Daniel Ziblatt explain, “The disenfranchisement of African Americans preserved white supremacy and Democratic Party dominance in the South, which helped maintain the Democrats’ national viability. With racial equality off the agenda, southern Democrats’ fears subsided. Only then did partisan hostility begin to soften.”⁸ Democrats were given free rein to establish authoritarianism in the southern states by eliminating political competition and instituting racial segregation. African Americans were excluded from all elements of political, social, and economic life; later, restrictive Jim Crow laws produced *de facto*, if not *de jure*, noncitizenship.

This compromise of exclusion stabilized American democracy for another hundred years. The United States survived victorious through two world wars and the Great Depression. Progressive and populist reforms created new levels of accountability for elected officials and democratic institutions. But many came at the expense of Black Americans, particularly the social policies of the New Deal. The Agricultural Adjustment Act provided incentives to plantation owners to end their production of cotton, resulting in the eviction of their black tenant farmers.⁹ The National Housing Act of 1934 expanded mortgage availability, but “did so in a way that fostered segregation and excluded blacks from equal access . . .”¹⁰ The Social Security Act was only passed after capitulation to southern Democratic demands to exclude domestic servants and farm laborers.¹¹ As the United States emerged out of the Depression, Black Americans were quite purposefully left behind.¹²

Then came the civil rights movement, culminating with the 1965 Voting Rights Act (“VRA”), which again tried to create the conditions for a truly participatory democracy. Since that historic moment, the United States has probably met the formal definition of a consolidated democracy.¹³ However, the VRA’s legislative guarantee of full equality for citizens of color did not go uncontested. The movement for inclusion that culminated in the VRA launched a fundamental realignment of the parties that began to polarize the electorate along racial lines. White southerners began to defect to the Republican party, motivated in part by their perception that the Democratic

7. LEVITSKY & ZIBLATT, *supra* note 2, at 124.

8. *Id.* at 124–25. See also EDWARD GIBSON, BOUNDARY CONTROL: SUBNATIONAL AUTHORITARIANISM IN FEDERAL DEMOCRACIES (2013); RICHARD M. VALELLY, THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT (2004).

9. Steve Valocchi, *The Racial Basis of Capitalism and the State, and the Impact of the New Deal on African Americans*, 41 SOC. PROBS. 347, 352 (1994).

10. *Id.* at 353 (citation omitted).

11. IRA KATZNELSON, FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME 226 (2013).

12. *But see* KIMBERLEY JOHNSON, REFORMING JIM CROW: SOUTHERN POLITICS IN THE STATE AND THE AGE BEFORE BROWN 96–100 (2010) (describing the ways in which the economic reforms of the New Deal helped build momentum for elimination of the poll tax).

13. See *supra* notes 3–4 and accompanying text.

party had come to represent black interests at the expense of white ones.¹⁴ As pollster Stanley Greenberg explained after a survey he conducted in 1985, “white Democratic defectors express a profound distaste for blacks, a sentiment that pervades almost everything they think about government and politics.”¹⁵ This racial polarization posed a new kind of threat to American democracy by linking party identity more explicitly to race.¹⁶ As Marina Ottaway explains, successful democracy requires some group of citizens to shift between parties based on the issues of the moment.¹⁷ “[I]f citizens never change their allegiances, permanent majorities are formed, making it difficult for the eternal losers to accept a system that guarantees defeat for them.”¹⁸ Polarization by racial and ethnic and religious lines makes these party allegiances about identity, rather than ideology, and therefore much more intractable.¹⁹ Thus, the passage of the VRA, which allowed the United States to become, for the first time, a consolidated democracy, also seeded the racial polarization that immediately began to undermine it. And while the VRA created some legal barriers to disenfranchisement based on race, other strategies soon arose to undermine the democratic participation of African Americans and other citizens of color.²⁰

* * *

For Democrats, the racial realignment following the VRA posed an almost immediate challenge to their ability to win national elections. After Goldwater’s crushing defeat in 1964, the Republican Party won all but one presidential election from 1968 through 1988 by consolidating white voters.²¹ By contrast, the Democrats were riven by splits within the party

14. KEVIN M. KRUSE, *WHITE FLIGHT: ATLANTA AND THE MAKING OF MODERN CONSERVATISM* 259–266 (2005); MATTHEW LASSITER, *THE SILENT MAJORITY: SUBURBAN POLITICS IN THE SUNBELT SOUTH* 198–220 (2006); Ilyana Kuziemko & Ebonya Washington, *Why Did the Democrats Lose the South? Bringing New Data to an Old Debate* (Nat’l Bureau of Econ. Research, Working Paper No. 21703, 2016).

15. Jonathan Chait, *Bill Clinton, O.J. Simpson, Clarence Thomas, and the Politics of 1990s Racial Backlash*, N.Y. MAG.: DAILY INTELLIGENCER (July 4, 2016), <http://nymag.com/daily/intelligencer/2016/06/clinton-and-the-politics-of-90s-racial-backlash.html> [<https://perma.cc/CX52-JM4K>].

16. As Ian Haney López has documented, the Republican Party has been purposeful and adept in using coded racial messaging both to mobilize white voters and to undermine their confidence in liberal government and their commitment to the social welfare programs of the New Deal. See IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* 17–31 (2015).

17. MARINA OTTAWAY, *DEMOCRACY CHALLENGED: THE RISE OF SEMI-AUTHORITARIANISM* 169 (2003).

18. *Id.*

19. *Id.* at 169–70. See also LILIANA MASON, *UNCIVIL AGREEMENT: HOW OUR POLITICS BECAME OUR IDENTITY* (2018).

20. See, e.g., *Shaw v. Reno*, 509 U.S. 630 (1993) (striking down congressional districts drawn along racial lines).

21. HEATHER RICHARDSON, *TO MAKE MEN FREE: A HISTORY OF THE REPUBLICAN PARTY* 273–306 (2014).

between Jesse Jackson's "Rainbow Coalition" and more centrist and conservative wings.²² In the 1992 presidential election, Bill Clinton set out to create a new coalition by winning back some of these lost white voters.²³ The Democratic Leadership Council, the vehicle for his campaign and policies, advocated moving to the right on social and economic policy. Clinton therefore adopted many of the coded racial messages that had proven so potent for the Republicans, targeting the votes of educated white professionals in urban areas instead of the party's historic working-class base.²⁴

During his second presidential campaign, Clinton picked up the Republicans' anti-government message, promising that "the era of big government is over" and pledging to "end welfare as we know it."²⁵ His reform legislation "replaced the federal safety net with a block grant to the states, imposed a five-year limit on welfare assistance, added work requirements, barred undocumented immigrants from licensed professions, and slashed overall public welfare funding by \$54 billion . . ."²⁶ Then, as now, white preferences for welfare spending were directly correlated with their level of support for spending to improve the lives of black people.²⁷ Therefore, some Democrats hoped that welfare reform could deracialize the problem of poverty and "signal renewed commitment[] [by the party] to personal responsibility and the white working class."²⁸ In addition, as Michelle Alexander has detailed, Bill Clinton was determined to be perceived as tough on crime, even flying home before the New Hampshire primary to oversee the execution of Ricky Ray Rector, a mentally disabled black man.²⁹ As president, he oversaw and enabled a massive expansion of the carceral state, with the result that by 2000, prison admissions for drug offenses for African Americans were more than 26 times their level in 1983.³⁰ The democratic impacts of these policies were significant, given that all but two states deny the right to vote to prisoners, and the large majority also disenfranchises people on probation and parole.³¹

22. See JEREMY D. MAYER, *RUNNING ON RACE: RACIAL POLITICS IN PRESIDENTIAL CAMPAIGNS 1960-2000* 185–86 (2002).

23. *Id.* at 248–50.

24. LILY GEISMER, *DON'T BLAME US: SUBURBAN LIBERALS AND THE TRANSFORMATION OF THE DEMOCRATIC PARTY* 278–79 (2014).

25. Michelle Alexander, *Why Hillary Clinton Doesn't Deserve the Black Vote*, *NATION* (Feb. 10, 2016), <https://www.thenation.com/article/hillary-clinton-does-not-deserve-black-peoples-votes> [<https://perma.cc/G794-BWSF>].

26. *Id.*

27. See Joe Soss & Sanford F. Schram, *Welfare Reform as a Failed Political Strategy: Evidence and Explanations for the Stability of Public Opinion*, *FOCUS*, Fall–Winter 2006, at 19.

28. *Id.* at 17–18.

29. Alexander, *supra* note 25.

30. *Id.*

31. *Felon Voting Rights*, *NAT'L CONF. ST. LEGISLATURES* (Apr. 30, 2017), <http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx> [<https://perma.cc/K795-PSN9>].

The Clinton years can therefore be viewed as a response to the democratic instability generated by the civil rights movement. Unable to build a winning national coalition without its lost white voters, Democrats attempted to bridge the partisan divide by agreeing to policy reforms that appealed to educated urban whites but marginalized and disenfranchised communities of color. The Democrats once again became competitive, reversing some of the trend toward permanent race-based party identities, but they did so at tremendous expense to their black constituents.

In the 2000s, these compromises again began to break down with the election of President Barack Obama, the growing attention to the country's continuing racial inequities, the call for immigration reform to give status to tens of thousands of lifelong residents who were denied the benefits of citizenship, and the movement to end mass incarceration.³² As momentum built behind the creation of a truly multiracial democracy, so too did the resistance to this vision of our nation.³³ Donald Trump expertly exploited and exacerbated these underlying cracks in our democratic commitments. He prepared for his electoral run by launching an attack on the legitimacy of America's first black president.³⁴ During his campaign, he accused a federal judge of bias due to his Mexican ancestry, characterized Mexican immigrants as terrorists, and called for a ban on Muslim refugees.³⁵ He repeatedly raised the specter of widespread voting fraud by nonwhite

32. See, e.g., Corey Date, *A New Generation of 'Dreamers' Goes Public*, NPR (June 28, 2011, 5:06 PM), <https://www.npr.org/2011/06/28/137476280/a-new-generation-of-dreamers-goes-public> (on file with the *Michigan Law Review*) (describing the increased activism of undocumented immigrants after Congress failed to pass the DREAM Act); Marc Mauer & David Cole, *Five Myths About Incarceration*, WASH. POST (June 17, 2011), https://www.washingtonpost.com/opinions/five-myths-about-incarceration/2011/06/13/AGfWvYH_story.html?utm_term=.bf8495f71b21 [<https://perma.cc/P96M-PZB9>] (asserting that “[n]o country on Earth imprisons more people per capita than the United States.”).

33. The United States is also becoming far more racially diverse, given high levels of immigration. Demographic trends predict that by 2055, whites will no longer constitute a majority of the population. See D’Vera Cohn & Andrea Caumont, *10 Demographic Trends That Are Shaping the U.S. and the World*, PEW RESEARCH CTR.: FACT TANK (Mar. 31, 2016), <http://www.pewresearch.org/fact-tank/2016/03/31/10-demographic-trends-that-are-shaping-the-u-s-and-the-world/> [<https://perma.cc/7REQ-AQVA>].

34. See Jeff Greenfield, *Donald Trump’s Birther Strategy*, POLITICO (July 22, 2015), <https://www.politico.com/magazine/story/2015/07/donald-trumps-birther-strategy-120504> [<https://perma.cc/Q9R8-LYQ2>] (describing how the “birther” conspiracy was “fanned greatly by the comments of Donald Trump stretching back more than three years”).

35. See Adam Liptak & Michael D. Shear, *Trump’s Travel Ban Is Upheld by Supreme Court*, N.Y. TIMES (June 26, 2018), <https://www.nytimes.com/2018/06/26/us/politics/supreme-court-trump-travel-ban.html> (on file with the *Michigan Law Review*); Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, TIME (Aug. 31, 2016), <http://time.com/4473972/donald-trump-mexico-meeting-insult/> [<https://perma.cc/7WUV-WFEG>]; Jia Tolentino, *Trump and the Truth: The “Mexican” Judge*, NEW YORKER (Sept. 20, 2016), <https://www.newyorker.com/news/news-desk/trump-and-the-truth-the-mexican-judge> [<https://perma.cc/BJ8Z-P9WW>].

immigrants.³⁶ He was rewarded with the Republican nomination and then with the presidency. Having successfully exposed our thin national commitment to norms of democratic equality, Trump has proceeded to go after the other pillars of our democracy. From his refusal to divest his private assets, to his threats to jail his defeated opponent Hillary Clinton, to his attacks the FBI and DOJ, to his encouragement of white supremacist groups, the early years of the Trump Administration (and the Republican party's response to it) have shattered the illusion that democratic principles matter more than control of the levers of power and—by extension—the maintenance of white supremacy.

Trump's success caught our country's leaders off guard. In part, this is because widespread acceptance of the legitimacy and stability of our democratic institutions has blinded us to the relationship between our history of racial subjugation and the health of our democracy.³⁷ Relatedly, our singular (and important) focus on the processes of democracy (limits on the franchise, racial gerrymandering, and the explosion of money in politics) has left us less able to recognize, acknowledge, and respond to other more insidious, but equally potent forms of democratic suppression. For example, political scientists Joe Soss and Vesla Weaver note that mainstream research focuses on the "liberal democratic 'face' of the state," while neglecting the state's coercive and repressive apparatus.³⁸ As a result, we are poorly equipped to understand the democratic implications of not just of crime policies, but also of the disparate impact of public policy wrought at the intersection of race and class.³⁹

A full understanding of our current democratic challenges thus requires acknowledging the reality that the opportunities and experiences available to American citizens have always been, and continue to be, dependent on race. It also requires better understanding how these inequities of access in education,⁴⁰ income,⁴¹ and government aid⁴² impact democratic legitimacy

36. See *Background on Trump's "Voter Fraud" Commission*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/everything-you-need-know-about-trumps-voter-fraud-commission> [https://perma.cc/V7PR-4QZF].

37. See, e.g., Laurel Eckhouse, *White Riot: Race, Institutions, and the 2016 U.S. Election*, POL. GROUPS & IDENTITY, Apr. 26, 2018, at 1.

38. See generally Joe Soss & Vesla Weaver, *Police Are Our Government: Politics, Political Science, and the Policing of Race-Class Subjugated Communities*, 20 ANN. REV. POL. SCI. 565, 567 (2017).

39. Jason Stanley & Vesla Weaver, Opinion, *Is the United States a 'Racial Democracy'?*, N.Y. TIMES (Jan. 12, 2014, 7:00 pm), <https://opinionator.blogs.nytimes.com/2014/01/12/is-the-united-states-a-racial-democracy/> [https://perma.cc/7Z8X-3TPP] (describing the decline in voting participation among Black Americans following criminal justice system interactions); See also Desmond S. King & Rogers Smith, *Racial Orders in American Political Development*, 99 AM. POL. SCI. REV. 75 (2005).

40. Schools today are more segregated today than sixty years ago, according to some measures. See GARY ORFIELD & ERICA FRANKENBERG WITH JONGYEON EE & JOHN KUSCERA, CIVIL RIGHTS PROJECT, *BROWN AT 60: GREAT PROGRESS, A LONG RETREAT AND AN UNCERTAIN FUTURE* 27–31 (2014), <https://www.civilrightsproject.ucla.edu/research/k-12->

and participation. These racial disparities are not simply lagging indicators of our racist past but rather the product of repeated political compromises intended to preserve our democratic stability by finding new and different ways to reassure white voters of their privileged place.

* * *

Viewed through this lens, the stability of democracy in the United States has always rested on undemocratic preconditions. That means we need to view our current project very differently. Our task is not to try to resurrect some lost glory but rather to take on the challenge of building a truly representative and sustainable democracy. The frame matters in part because of the way our democratic crises have historically been resolved, which is through discriminatory bargains that undermine the full citizenship of people of color. More of these options are on the table now—for example, in work requirements for government aid and in ongoing restrictions of voting rights—and are being advanced as a way to get past the current fractured and scary moment. Democrats around the country are again being urged to move beyond “identity politics” to reengage disenchanted white voters. The choice is framed, as it has in the past, “as staying true to liberal principles and losing elections, or winning by strategically pulling back from unpopular groups and liberalism too.”⁴³ What our history tells us, however, is that these compromises get us nowhere, at least if the goal is a truly stable, diverse participatory democracy. They are not an incremental step that helps lay the foundation for that vision but rather a concession to its impossibility.

What is required in this moment is a true strategy for democracy promotion for the United States. And at its core, the focus needs to be on strategies for building a real multiracial democracy. This will require a continued focus on pushing procedural reforms to help make our democratic system more inclusive and representative. But it will also necessitate a more complete reckoning with our past and a rejection of the kinds of exclusionary compromises that have held together our fractured society for decades.

education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf [https://perma.cc/P2FH-5JAW].

41. Rising inequality has exacerbated a staggering racial wealth gap. “[A] black child born to parents in the top quintile is roughly as likely to fall to the *bottom* family income quintile as he or she is to remain in the top quintile[.] . . .” RAJ CHETTY ET AL., U.S. CENSUS BUREAU, RACE AND ECONOMIC OPPORTUNITY IN THE UNITED STATES: AN INTERGENERATIONAL PERSPECTIVE 3 (2018) (emphasis in original).

42. Decentralized social policy allows states to impose work requirements or deny aid, which disproportionately impacts communities of color. See generally ROBERT C. LIEBERMAN, SHIFTING THE COLOR LINE 166–76 (1998) (describing how racial distinctions are built into the structure of the welfare state); JAMILA MICHENER, FRAGMENTED DEMOCRACY 60–83 (2018) (illustrating how the federalist structure of Medicaid permits for disparities among beneficiaries by race and socioeconomic status).

43. HANEY LÓPEZ, *supra* note 16 at 32.