

Mercer Law Review

Volume 71
Number 3 *Lead Articles Edition - Contemporary
Issues in Election Law*

Article 7

5-2020

Voter Fraud as an Epistemic Crisis for the Right to Vote

Atiba R. Ellis

Follow this and additional works at: https://digitalcommons.law.mercer.edu/jour_mlr



Part of the [Election Law Commons](#)

Recommended Citation

Atiba R. Ellis, *Voter Fraud as an Epistemic Crisis for the Right to Vote*, 71 Mercer L. Rev. 757 (2020).

This Article is brought to you for free and open access by the Journals at Mercer Law School Digital Commons. It has been accepted for inclusion in Mercer Law Review by an authorized editor of Mercer Law School Digital Commons. For more information, please contact repository@law.mercer.edu.

Voter Fraud as an Epistemic Crisis for the Right to Vote

by Atiba R. Ellis*

I. INTRODUCTION

Despite the antidiscrimination frameworks contained in the constitutional¹ and statutory² protections for the right to vote, access to the American ballot box is generally perceived as heavily contested. More precisely, many right-to-vote advocates (and their popular supporters) believe that the right to vote is in a crisis of exclusion so

*Professor of Law, Marquette University Law School. Duke University (B.A., 1996, M.A., 2000); Duke University School of Law (J.D., 2000). The author would like to thank the Mercer Law Review and Professor Gary Simson for the gracious invitation to share the foregoing work at their symposium. The Author is also appreciative of the Law Review's support and patience during the editing process. The Author would also like to acknowledge the feedback he received during the presentation and the research support he received from Khadija Choudhry and Aliya Manjee. The Author would also like to acknowledge the support provided for this Article by Dean Joseph Kearney and the Marquette University Law School faculty research fund. All errors are the responsibility of the Author.

1. As to the federal Constitution, *see, e.g.*, U.S. CONST. amend. XIV § 1 (Equal Protection Clause as prohibiting states from unduly burdening the right to vote, *see, e.g.*, *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966); *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008)); XIV § 2 (prohibiting abridgment or denial of the right to vote (except based on criminal activity) by state governments); XV (prohibiting voting discrimination on the basis of race); XIX (prohibiting voting discrimination on the basis of sex); XXIV (abolishing poll taxes); *and* XXIV (setting voting age at eighteen years). Moreover, each state constitution contains a specific right-to-vote provision protecting, in varying degrees, the franchise in all elections in each state. *See* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89 (2013).

2. *See, e.g.*, Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 52 U.S.C. §§ 10301–10314 (2019)); National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77; and Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (2002). Additionally, each state has statutory and administrative regulations that provide protections for those who feel discriminated against in exercising their right to vote.

extreme that it represents a resurgence of Jim Crow racial exclusion from the franchise.³ Advocates for election integrity initiatives and their supporters claim that because of impending threats by “illegal voters” who will distort election results,⁴ initiatives like voter identification laws,⁵ proof of citizenship laws,⁶ and voter purges⁷ are necessary, else the integrity of the electoral process will be destroyed.

These views are diametrically opposed and suggest that what we know about the status of the right to vote itself is at stake. One view is premised on seeing the ecosystem of democracy as replicating intersecting racial and class-driven exclusion. The other sees the world as dominated by the threat of illegal voters and supposes that the threat of voter fraud is an existential threat to American election integrity. That such divergent views exist on exactly what the crisis of voting rights is, suggests that there is a fault in the way we obtain and order our knowledge regarding American democratic practices. Our knowledge about how to understand the right to vote is a contested issue.

3. See, e.g., *Testimony of Leah Aden, Deputy Director of Litigation, NAACP Legal Defense and Educational Fund, Inc.: Hearing Before the S. Comm. On the Constitution, Civil Rights, and Civil Liberties*, 116th Cong. (2019), https://www.naacpldf.org/wp-content/uploads/Written-Testimony-of-Leah-C-Aden-NAACP-Legal-Defense-and-Educational-Fund_v2-FINAL.pdf (describing racial discrimination in voting targeting African Americans and Latinos post *Shelby Cty. v. Holder*, 570 U.S. 529 (2013)); Dahleen Glanton, *What's really going on in North Carolina is Jim Crow, part deux*, CHICAGO TRIBUNE, <https://www.chicagotribune.com/columns/dahleen-glanton/ct-met-dahleenglanton-north-carolina-voter-fraud-20181207-story.html> (last visited Dec. 10, 2018) (arguing that the voter fraud alleged in the North Carolina Ninth Congressional District absentee ballot scandal targeted minorities); Terry H. Schwadron, *Jim Crow Lives On In Efforts To Block African-American And Latino Voters*, DCREPORT, <https://www.dcreport.org/2019/06/21/jim-crow-lives-on-in-efforts-to-block-african-american-and-latino-voters> (last visited June 21, 2019) (arguing that a myriad of laws requiring voter identification, changing registration requirements, and demanding proof of citizenship equate to an effort to suppress Black and Latino votes).

4. See *infra* Part III.

5. See, e.g., Scott Johnston, *Voter ID laws protect election integrity*, http://www.kansas.com/johnston-voter-id-laws-protect-election-integrity/article_916ddcb8-306a-11e8-8a76-93719f0de3ef.html (last visited Mar. 25, 2018).

6. Associated Press, *Kansas hopes to resurrect proof-of-citizenship voting law*, NBC NEWS, <https://www.nbcnews.com/politics/elections/kansas-hopes-resurrect-proof-citizenship-voting-law-n984311> (last visited Mar. 18, 2019) (noting that the state of Kansas seeks to continue to implement proof of citizenship laws because it believes “it has a compelling interest in preventing voter fraud.”).

7. See, e.g., Matt Vasilogambros, *The Messy Politics of Voter Purges*, PEW TRUSTS, <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/10/25/the-messy-politics-of-voter-purges> (last visited Oct. 25, 2019) (summarizing motivations why voter purges take place and problems regarding them).

These differing states of knowledge raise a question around what we know, and thus, how we decide questions about the right to vote, which the Supreme Court of the United States has repeatedly called “preservative of all other rights.”⁸ In related contexts, such problems of distorted or misleading knowledge have been called an “epistemic crisis,”⁹ driven by information age tactics which use propaganda and echo chambers to create partisan dichotomies and worldviews concerning practices in American politics.¹⁰ While not using the terms, Anthony Gaughan in his Article, *Illiberal Democracy: the Toxic Mix of Fake News, Hyperpolarization, and partisan Election Administration*, illustrates how “fake news” compounds hyperpolarization in the American public and partisan election administration to defeat public confidence in election integrity and spurs voter suppression.¹¹ Similarly, Heather Gerkin has questioned reasoning about election law in the absence of data and warned against the consequences of ill-shaped policy and the destruction of democratic institutions and the right to vote itself.¹² But the problem of the epistemic crisis—one of not just an

8. This oft-repeated dictum originated in *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). Indeed, the Court underscored the nature of the right to vote and its import nearly a century later when it said:

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.

Reynolds v. Sims, 377 U.S. 533, 561–62 (1964).

9. While there is not a dictionary definition of the phrase “epistemic crisis,” it is fair to say that the phrase has come to mean a crisis or an emergency in the way that communities or societies come to know information. This follows from the definition of “epistemic,” which the Oxford English Dictionary defines as, “Of or relating to knowledge, or to its extent, linguistic expression, or degree of validation.” See epistemic, adj., definition, Oxford English Dictionary Online, <https://www.oed.com/view/Entry/63541?isAdvanced=false&result=1&rskey=tQ5NvA&> (last visited Nov. 23, 2019). Thus, epistemic relates to knowledge itself (as opposed to the adjective “epistemological,” which relates to the field of study of or theories of aspects of knowledge). The phrase itself is drawn from YOCHAI BENKLER, ROBERT FARIS, AND HAL ROBERTS, *NETWORK PROPAGANDA: MANIPULATION, DISINFORMATION, AND RADICALIZATION IN AMERICAN POLITICS* (2018).

10. BENKLER ET AL., *supra* note 9, at 3–43.

11. Anthony Gaughan, *Illiberal Democracy: The Toxic Mix of Fake News, Hyperpolarization, and Partisan Election Administration*, 12 DUKE J. CONST. L. AND PUB. POL’Y 57, 92–94 (2017).

12. Heather K. Gerken, *The Invisible Election: Making Policy in a World Without Data*, 35 OHIO N.U.L. REV. 1013, 1017–18 (explaining through the example of the voter ID debate, the vicissitudes of decision making regarding the right to vote without objective data that provides guidance).

absence of data, or even a refusal to accept data; it is the substitution of a belief in what is false in lieu of understanding policies that are grounded in objective fact—this is the concern of this Article.¹³

Specifically, the crisis of election integrity spurred by the supposed interference by “illegal voters” creates a particular epistemic crisis for the right to vote. This rhetoric is a specific case of the confluence of the rise of the information age with heavily contested, hyper-partisan elections that leads to the diminishing of the right to vote and the legitimacy of election administration. This rhetoric of “illegal voters” from thought leaders from the President of the United States to influencers on the Internet, and its underlying premise of the existence of mass voter fraud, has been a justification for mostly conservative states to move towards heightened regulation of the voting process. There is no proof of this mass voter fraud conspiracy. Yet such conspiratorial thinking continues to be repeated, believed, and used to form a basis for voting rights policy. I have called this cycle of rhetoric and belief the “meme of voter fraud.”¹⁴ I argued that this “meme” is a rhetorical device¹⁵ (based on propaganda rather than evidence) that seeks to persuade policy makers, judges, and the public at large that certain groups of unworthy should be considered to be threats to the political process.¹⁶

In the years since this argument, the meme of voter fraud has been amplified¹⁷ and augmented in the far more dense (and self-selecting) political ecosystem that is Internet-driven American political discourse. The meme has served as justification for not only voting rights policy changes, like voter identification laws, but also to connect the threat of so-called “illegal voters” to issues ranging from proof of citizenship

13. This Article reserves for another day the broader questions regarding knowing and the law of democracy. The epistemic crisis this article details is merely one aspect of how the courts, the government, and the people understand the right to vote, equality, and the creation of boundaries around the political community. Indeed, it is my view that this problem of knowing has a long historical pedigree which has been tied to identity, constitutional structure, and the failure to fulfill the democratic promise through the perpetuation of a rhetoric around illegal voters. The reader should understand this article as one part of my broader project of exploring this American dilemma.

14. Atiba R. Ellis, *The Meme of Voter Fraud*, 63 CATH. U.L. REV. 879 (2014).

15. *Id.*

16. Gerken, *supra* note 12, at 913 and accompanying text.

17. By amplification, I mean the idea that an idea, including a meme, can be made stronger or more pervasive (or gain more power) through the dent of repetition or wider availability within the Internet sphere. For a description of the amplification effect in the context of spreading fake news, see Nabihah Syed, *Real Talk About Fake News: Towards a Better Theory for Platform Governance*, 127 YALE L.J. F. 337 (2017) (describing how fake news can move from fringe Internet sites to mainstream relevance through amplification).

requirements, to felon disenfranchisement, the census, and the Electoral College. The evolved, weaponized, amplified voter fraud meme has created an epistemic crisis—a crisis of how we know—for the law of democracy.

This short Article will consider this crisis. The Article will argue that the meme has evolved providing an “alternative facts” explanation for voting threats to the creation of a worldview that underscores an ideology of exclusion of those unworthy to exercise the franchise by expanding the narrative of the persons and communities who pose a threat to American elections. The Article will turn next to explaining my claims about the voter fraud meme and connect that to how it consolidates political power. It will then examine how the meme has evolved and amplified in recent years and consider its ramifications for upcoming election cycles. And then the Article will end by considering the larger, epistemological threat that such meme-driven thinking poses to our democracy, and how the law of democracy is ill-suited to address such problems. But to adequately explain this point, I must first draw on my prior research to explain the sense in which I mean a “meme” and how it relates to voter fraud talk.

II. MEMES AS RHETORICAL POLITICAL CONSTRUCT

A. *What is a Meme—Beyond Cat Pictures on the Internet*

The rhetoric around the existence of present (and possible future) hordes of persons disrupting elections by committing voter fraud can be thought of as a meme, or, as an idea or a narrative that replicates and evolves because of its persuasive power, without regard for its truthfulness.¹⁸ Memes in popular culture are considered creatures of the Internet, but that is a limited sense of the meaning of a meme. A meme is a piece of culture that in itself can replicate, transmit, and evolve.¹⁹

18. A meme, specifically, is “an idea, behavior, style, or usage that spreads from person to person within a culture[.]” Ellis, *supra* note 14, at 883 (quoting Merriam-Webster’s Collegiate Dictionary 774 (11th ed. 2003)). Memes are not only cat pictures and cute versions of the latest craze (as of this writing, such would include the “Baby Yoda” craze). Such ideas and concepts thus, like biological organisms, evolve through replication, variation, transmission, and differential survival within a given environment. That is to say, like biological organisms, ideas, behaviors and other “units of culture”—that is, memes writ generally—can be generated, spread, and then be selected by an audience for their fitness in the environment. Some die off or are forgotten; others stick, and of those that stick, some become viral. *Id.* at 884–87.

19. *Id.* at 883.

By replication, I mean that the idea repeats and alters and thus, spreads from person to person.²⁰ Each time the voter fraud meme is transmitted and then sticks to another person, the meme replicates. And then when that person repeats it—or a variation on it—it then replicates again. Thus, it spreads. In this sense, this rhetoric can be analogized to a virus that inhabits a host and then uses that host to spread to other potential hosts.²¹ Or it can be analogized to propaganda that spreads with strong persuasive force throughout a culture.²²

A meme also survives through connection with other memes, thus forming a “memeplex”—or a worldview—to aid in replication.²³ As such, the particular memes survive or evolve because of their appeal to a worldview and their ability to empower believers of the worldview through re-enforcing the core beliefs.²⁴ In this sense, memes take the appearance of truth without needing to be true to replicate.²⁵ And because it fits and re-enforces the worldview of those who become invested in it, it galvanizes extreme responses in line with the meme—not the truth—and that runs the risk of leading people to endanger rights.²⁶

Meme-driven thinking has the potential to cause people to reason on the basis that the meme is true when the meme is patently false. Thus, analyses based on the meme are prone to ignore issues which might come to light if a critical approach were taken to analyze a question. Such willful ignorance can then lead to the actions that may, in a constitutional rights context, override concerns of deference to or preservation of fundamental rights.

B. The Meme of Voter Fraud as a Political Consolidation Device

Despite the lack of evidence for the meme of voter fraud, the idea that there is a rampant, voter-driven conspiracy to infiltrate elections nonetheless has persuaded some policymakers and the public of its existence.²⁷ The claim supports the conclusion that elections should be more stringently regulated in order to maintain electoral integrity, despite the evidence that voter-impersonation voter fraud is virtually

20. Thus, it is “whatever is transmitted when one person imitates, consciously or unconsciously, another.” *Id.* at 884.

21. *Id.* at 889.

22. *Id.* at 891–92.

23. *Id.* at 888.

24. *Id.* at 901–02, 908.

25. *Id.* 900.

26. *Id.* at 908.

27. *Id.* at 905–06.

non-existent.²⁸ This leads to a heightened risk of exclusion under such more stringent laws.

This propaganda of rampant voter fraud spreads as largely as appeals to a political base. Voter fraud meme replication serves a number of political interests, and thus creates incentives for certain actors to replicate the meme. First, the idea that voter fraud (or the threat of massive voter fraud) currently exists demands immediate action to fix the problem.²⁹ This imperative becomes an impetus for legislation and regulation, as evidenced by the passage of voter identification laws, the curtailment of early voting, and other tactics that some call “voter suppression.”³⁰

Second, voter fraud allegations consolidate political bases.³¹ Proponents of the voter fraud meme frame it as a primary issue for their political party and rally support based on belief in the meme.³² Also, politicians use the meme to gain ground in key electoral battles over time.³³ In this sense, the problem of voter fraud is an instrument to gain political power at the cost of distorting the actual scope of the problem. Conversely, opponents of the meme consider it a tool of political discrimination and suggest that supporters use the meme discussion to attack the opposing political party.³⁴ Both parties gain from the use of the meme, and accordingly both parties continue to deploy it. Thus, the meme becomes a point of contention and a way to entrench political power for both sides. Therefore, politicians have an incentive neither to remedy the voter fraud myth nor engage in analytically driven electoral reform.

The meme of voter fraud propaganda serves as a tactic to blame voters within racial minority or economically disadvantaged districts. For example, during and following the 2012 presidential election,

28. *Id.* at 899–900.

29. See LORAINÉ MINNITE, *THE MYTH OF VOTER FRAUD* 129 (2010) (attributing the recent explosion of voter fraud claims to the voter fraud myth alone).

30. See, e.g., SPENCER OVERTON, *STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION* 150–51 (2007).

31. MINNITE, *supra* note 29, at 10–11, 86–89, 128.

32. *Id.*; See also *Republican Voter Fraud*, VOTER FRAUD FACTS, <http://voterfraudfacts.com/republican-voterfraud.php> (last visited Aug. 20, 2014) (claiming “[t]he Republican election strategy [] involves smearing the competition[] [and] accusing them of voter fraud”); *Vote Fraud News*, REPUBLICAN NAT’L LAW. ASS’N, <http://www.rnla.org/votefraud.asp> (last visited Aug. 20, 2014) (providing consolidated access to news stories covering alleged voter fraud).

33. See MINNITE, *supra* note 29, at 128–30 (describing case studies and the reasons parties use voter fraud to their advantage).

34. Ellis, *supra* note 14, at 902.

claims of rampant voter fraud mostly targeted inner-city and largely minority districts in battleground states, such as Ohio.³⁵ Indeed, voting groups that considered it their role to police elections, groups that Professor Justin Levitt has called “voter vigilantes,” specifically directed their “policing” efforts toward minority and economically suppressed districts.³⁶ This policing treatment draws directly from the stereotype of criminalizing certain voters by forcing some citizens, but not all, to bear the burden of proving that they are legitimate voters.³⁷ In this sense, these concerns about voter fraud echo related concerns regarding policing minority voters and excluding them from the political process in a way that maintains the political status quo.

III. THE EPISTEMIC CRISIS CREATED BY THE MEME OF VOTER FRAUD

The voter fraud meme substitutes belief in the idea of a mass conspiracy of voter-impersonation voter fraud for actual, provable knowledge about the state of the voting process. This propaganda about illegal voters infiltrating the system has, as I previously suggested, existed for as long as American politics have existed. However, the twenty-first century narrative about the meme of voter fraud illustrates the meme’s use as policy justification and a tool of political rhetoric. This section details this rise and illustrates its consequences for the administration of the right to vote.

A. *The Premise of the Twenty-First Century Meme of Voter Fraud*

The premise of the voter fraud meme in twenty-first century American elections was first articulated in the disputed U.S. Senate race in Missouri. The incumbent in that race, then-Senator John Ashcroft, lost to the late Missouri Governor Mel Calahan.³⁸ Ashcroft subsequently became Attorney General under President George W. Bush and decided that a priority of the Justice Department would be to

35. *Id.* at 909.

36. *Id.* at 908 (citing Justin Levitt, *The Truth About Voter Fraud*, BRENNAN CENTER FOR JUSTICE, https://www.brennancenter.org/sites/default/files/2019-08/Report_Truth-About-Voter-Fraud.pdf (2012)).

37. See Rick Lyman, *Pennsylvania Voter ID Law Struck Down as Judge Cites Burden on Citizens*, N.Y. TIMES, (Jan. 17, 2014) <https://www.nytimes.com/2014/01/18/us/politics/pennsylvania-voter-id-law-struck-down.html> (noting that one judge found that voter identification regulations, given their disparate impact on the poor, do not “assure a free and fair election . . .” *Id.*).

38. DOUGLAS KELLNER, *GRAND THEFT 2000: MEDIA SPECTACLE AND A STOLEN ELECTION* 26–27 (2001).

pursue claims of voter fraud through criminal prosecution.³⁹ These investigations yielded little evidence of actual voter fraud.⁴⁰ Yet, this signaled that national policy regarding voting would be directly connected to policing alleged voter fraud.

The idea that mass voter fraud must be policed persisted in the legislative imagination. Congress passed the Help America Vote Act of 2002,⁴¹ which contained a provision that suggested the need for voter identification legislation in order to protect against fraud concerns.⁴² Moreover, state legislatures began to pass initiatives for voter identification to protect against voter fraud concerns. Indeed, the state of Indiana passed a voter identification law in 2006, which was, for its time, the strictest voter identification law in the country. Upon its passage, voter advocacy groups sued, alleging its facial unconstitutionality in *Crawford v. Marion County Election Board*.⁴³

B. Crawford and the Meme of Voter Fraud

In *Crawford*, the Supreme Court upheld Indiana's voter identification law and in doing so, gave credence to the meme of voter fraud Indiana used to justify its law.⁴⁴ The Court determined that Indiana's interest in enforcing the "strict" voter identification law outweighed any (speculative) negative impact that the statute would have on voters potentially shut out by the law.⁴⁵ Despite a lack of evidence of fraudulent activities, the opinion explicitly credited Indiana's argument that the voter identification law was necessary to maintain electoral integrity.⁴⁶ Specifically, the Court recognized Indiana's interest in both modernizing its elections and protecting against voter fraud, but did not name specific types of recent voter fraud against which the state wished to pursue protections.⁴⁷

39. ALEXANDER KEYSSAR, BARRIERS TO VOTING IN THE TWENTY-FIRST CENTURY, IN REPRESENTATION: ELECTIONS AND BEYOND 49 (Jack H. Nagel & Rogers M. Smith eds., 2013); MINNITE, *supra* note 29, at 218–21.

40. See KEYSSAR, *supra* note 39, at 49–50 (recounting that only 120 indictments and eighty-six convictions resulted from the Department of Justice (DOJ) investigations); MINNITE, *supra* note 29, at 222–24 (explaining the difficulty involved in identifying an accurate number of instances of voter fraud).

41. 42 U.S.C. §§ 15301–15545 (2019).

42. *Id.* § 15303(b)(1)(A) (creating a requirement that all voters who register by mail must present photo identification prior to being allowed to vote).

43. 553 U.S. 181 (2008).

44. *Id.* at 204.

45. *Id.* at 194–97.

46. *Id.* at 191, 194.

47. *Id.* at 191.

The Court instead relied on recent and historic instances of fraud in the Midwest, such as machine politics in Chicago, and considered that history sufficient justification for the state's concerns about fraud.⁴⁸ Finally, the Court highlighted the state's interest in safeguarding voter confidence, specifically to protect "public confidence 'in the integrity and legitimacy of representative government.'"⁴⁹ In this sense, the Court acceded to Indiana's claim that voter fraud posed a threat based purely on the state's speculation regarding the issue, in the absence of actual proof of voter-impersonation voter fraud.⁵⁰ In his concurring opinion, Scalia argued the law was subject to rational basis review, and concluded that the government met this standard because the law was generally applicable and non-discriminatory.⁵¹

Justices Souter and Breyer dissented, arguing that the evidence was sufficient to tip the scales in favor of the plaintiff.⁵² Justice Souter claimed that the number of Indiana voters adversely affected by the law could be measured.⁵³ He also argued that the government's rationale for the law fell short due to the absence of voter fraud cases in Indiana.⁵⁴ Justice Breyer argued that the law placed a substantial and disproportionate burden on voters without a photo identification or the means to obtain one.⁵⁵

This reasoning by the Court majority—though bifurcated—nonetheless failed to search for substantiation beyond acceding to the government's premise that election integrity must be protected. In this sense, the Court relied upon the idea of the threat of voter fraud—rather than the existence of voter fraud itself—as the basis for its holding that the law passes scrutiny. Essentially, *Crawford* provided state legislatures with authorization to pursue voter identification and other restrictive laws using policy justifications of election integrity and the supposition of massive voter fraud, or at least the threat thereof.⁵⁶

48. See *id.* at 195–96 (demonstrating that the Court also relied upon the Chicago Mayor primary vote in 2003, as well as historical examples from other states).

49. *Id.* at 197.

50. The Court also relied on the fact that the plaintiffs suing to overturn the law could not attribute any actual discrimination to the law, nor could it forecast the effect of the law. *Id.* at 200–02.

51. *Id.* at 204 (Scalia, J., concurring).

52. *Id.* at 209, 237 (Souter, J. and Breyer, J., dissenting).

53. See *id.* at 220 (Souter, J., dissenting) (stating that up to 43,000 voters could be burdened by the law).

54. *Id.* at 226.

55. *Id.* at 237 (Breyer, J., dissenting).

56. See *Crawford*, 533 U.S. at 191 (detailing the alleged threat to voting that justified the existence of Indiana's voter identification law).

And that threat was emphasized by, if not created by, the meme of voter fraud.

C. *The Meme and the Legislative Imagination*

On this premise, a variety of voter identification initiatives ensued.⁵⁷ These regulations generally may be classified as either “non-strict” or “strict” identification requirements.⁵⁸ States that passed non-strict voter identification requirements simply added a photo-identification option to the list of methods by which a voter may prove her identity.⁵⁹ On the other hand, strict voter identification statutes mandated that government-issued photographic identification was the exclusive means by which a prospective voter could identify herself.⁶⁰

Although some argue that the vast majority of potential voters can easily satisfy this requirement, particularly people who vote routinely,⁶¹ opposing advocates argue that these laws disproportionately target and impact low-income, minority, and elderly voters.⁶² For example,

57. See Wendy Underhill, *Proof at the Polls*, *St. Legislatures*, 58–59, NATIONAL CONFERENCE OF STATE LEGISLATURES (July 2011), <http://www.ncsl.org/LinkClick.aspx?fileticket=boF7MsJI-ac%3D&tabid=23269> [hereinafter Underhill, *Proof at the Polls*] (claiming that the voter identification regulation was a high-profile issue in many state legislatures in 2014, although not as active as in the previous three years.). Since 2014, a total of thirty-five states have adopted some form of voter identification law. The remaining fifteen states verify identity by requesting a signature match or other method. See Wendy Underhill, *Voter Identification Requirements | Voter ID Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Jan. 1, 2020), <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx> [hereinafter Underhill, *Voter Identification Requirements*].

58. See Underhill, *Voter Identification Requirements*, *supra* note 57.

59. *Id.* This raises an important point I have made before, see Ellis, *supra* note 14, at 905, but bears repeating:

Voters have always been required to prove their identity in order to vote. No one legitimately contests that there has been no identification mechanism. The question at stake in the voter identification debate is: “what requirements should be used to prove a voter’s identity and how onerous those requirements should be?” Such shifting in rules, when those shifts affect a particular group without justification, creates an ideological effect that harms the excluded groups. This exclusion problem lies at the center of the voting restrictions debate.

Ellis, *supra* note 14, at 905 (internal source omitted).

60. See Underhill, *Proof at the Polls*, *supra* note 57 (noting that a voter cannot cast a valid ballot without first presenting ID).

61. See, e.g., *Crawford*, 533 U.S. at 198 (claiming that obtaining identification that satisfies voting regulations does not impose any burdens beyond those usually required to vote, and suggesting that many will already possess the requisite identification).

62. See, e.g., *Overton*, *supra* note 30, at 153 (noting that “[a] photo-ID requirement would exclude Americans of all backgrounds, but the poor, the disabled, the elderly,

statistics show that almost ten percent of Americans lack identification that meets the requirements of voter identification statutes.⁶³ This figure increases to almost twenty-five percent when considering solely African American voters.⁶⁴

Many of the current legal challenges to these laws rely on the theory that these laws, if implemented, will disparately affect minority and low-income citizens. Indeed, in both South Carolina and Texas, in the immediate aftermath of *Crawford*, the United States brought challenges to state voter identification laws under the Voting Rights Act of 1965 (VRA).⁶⁵ The government argued that the disproportionate impact of the state laws on African American and Latino voters would violate the VRA's non-retrogression standard.⁶⁶ As a result of the lawsuits, South Carolina altered its voter identification law to moderate the law's effects.⁶⁷ Moreover, a Texas federal court enjoined the law

students, and people of color would bear the greatest burden"); Joel A. Heller, *Fearing Fear Itself: Photo Identification Laws, Fear of Fraud, and the Fundamental Right to Vote*, 62 VAND. L. REV. 1871, 1873 (2009) (stating that voting regulations typically impact the "indigent, elderly, or members of minority populations"); Josh Israel, *Study: Voter ID Laws Affect Young Minorities Most*, THINK PROGRESS (Mar. 13, 2013, 8:20 P.M.), <http://thinkprogress.org/justice/2013/03/13/1710351/study-voter-id-laws-affect-young-minorities-most/> (claiming that voter regulations primarily "impact young people, especially young minorities"); Tamara Manik-Perlman, *The Voter ID Law and Its Effect on This Year's and Future Elections*, AZAVEA (September 6, 2012), <http://www.azavea.com/blogs/newsletter/v7i4/voter-id-law-and-its-effect-on-elections/> (describing the "clear relationship between the racial and ethnic makeup of a ward division and the proportion of voters without [identification] . . .").

63. *Policy Brief on Voter Identification*, BRENNAN CENTER FOR JUSTICE, <http://www.brennancenter.org/analysis/policy-brief-voter-identification> (last updated Sept. 12, 2006). Data regarding the suppressive effects of voter identification laws is difficult to develop given the nature of the harm. However, for a summary of more recent studies that describe the possible suppressive effects of such laws, see Denise-Marie Ordway, *New insights on US voters who don't have photo ID*, <https://journalistsresource.org/studies/politics/elections/voter-photo-id-law-research/> (August 16, 2018) (describing political science studies of Michigan and Texas voters that support the premise that voter ID laws hamper participation).

64. *Id.*

65. *See, e.g.*, *Texas v. Holder*, 888 F. Supp. 2d 113, 115 (D.D.C. 2012), *vacated*, 570 U.S. 928 (2013). *See also* Rick Hasen, *Breaking News: DOJ Blocks South Carolina Voter ID Law Under Voting Rights Act; Case Could Be Vehicle to Get Supreme Court to Strike Down Section 5 of VRA Relatively Soon*, ELECTION LAW BLOG, <http://electionlawblog.org/?p=26991> (last visited Dec. 23, 2011) (describing DOJ's position that "racial disparities in the [new] effect of the photo id [sic] law preclude[] allowing preclearance.").

66. *See Holder*, 888 F. Supp. 2d at 139–41 (classifying the resulting inability of African Americans to vote as "retrogression").

67. Richard L. Hasen, *The 2012 Voting Wars, Judicial Backstops, and the Resurrection of Bush v. Gore*, 81 GEO. WASH. L. REV. 1865, 1874 (2013).

altogether.⁶⁸ Additionally, in *Obama for America v. Husted*,⁶⁹ an Ohio federal court prevented that state from implementing restrictive voting policies in the face of the 2012 elections.⁷⁰ Thus, though the voter fraud meme replicates by situating itself in the larger memplex of election integrity, the courts have created what Richard Hasen calls a “judicial backstop” against abuse of the electoral system.⁷¹

D. The Post-Shelby County Era—Race and Consequences of the Meme

However, all of this changed with the Supreme Court’s decision in *Shelby County v. Holder*⁷² in 2013. In *Shelby County*, the Supreme Court struck down Section 4(b) of the Voting Rights Act, which contained the formula by which the federal government determined which jurisdictions in the United States would be considered covered jurisdictions and as a result would have to be subjected to preclearance.⁷³ The opinion of Chief Justice John Roberts for the *Shelby County* majority found that Congress, in reauthorizing the Voting Rights Act, had not taken into account changes in the rates of participation in voting in the South nor had Congress taken into account the concept of equal sovereignty among the states when it came to the federal government’s power to regulate areas that were traditionally considered provinces of state authority.⁷⁴ On this basis, the Court struck down Section 4(b), which had the effect of leaving the Section 5 preclearance regime inoperative while leaving open the opportunity for Congress to pass a new Section 4(b) that took into account the changes in political culture on which the Court relied.⁷⁵

In the wake of *Shelby County*, legislatures previously covered by Section 5, like North Carolina and Texas, immediately undertook legislation to change their voter qualifications laws and their redistricting schemes. Their justification for doing so was to ensure election integrity and to stop voter fraud. Because North Carolina no longer needed to preclear its election regulation changes, the state took the opportunity to pass voting regulations that fully comported to their

68. See *Holder*, 888 F. Supp. 2d at 144 (denying “Texas’s request for declaratory relief.”).

69. 888 F. Supp. 2d 897 (S.D. Ohio 2012), *aff’d* 697 F.3d 423 (6th Cir. 2012).

70. *Id.* at 910–11.

71. Hasen, *supra* note 67, at 1868.

72. 570 U.S. 529 (2013).

73. 52 U.S.C. § 10303(b) (2012).

74. *Shelby County*, 570 U.S. at 544–45.

75. *Id.* at 556–57.

particular political ends.⁷⁶ Accordingly, during a special session in July and August of 2013, North Carolina reconsidered all of the political measures that it deemed necessary to pass and focused on establishing a “strict” voter identification provision, limiting same-day voting registration, limiting early voting opportunities, eliminating Sunday voter registration opportunities, and other provisions.

In reaching this decision, the legislature specifically “requested and received racial data as to usage of the practices changed by the proposed law.”⁷⁷ The data the legislature received showed that African Americans disproportionately did not possess the voter identification credentials that would be required under its act, that African Americans disproportionately used early voting in both 2008 and 2012, and that African Americans disproportionately used the first seven days of early voting.⁷⁸ The data also showed that African Americans disproportionately used same-day registration and provisional voting. Further, the legislature had data that showed that African Americans disproportionately used preregistration (the practice of allowing sixteen- and seventeen-year-olds to register to vote prior to turning eighteen, so long as they would be eligible to vote by the next election).⁷⁹

The United States Court of Appeals for the Fourth Circuit observed that after receipt of this data, the legislature eliminated or restricted all of these voting practices so that they impacted African American preferences.⁸⁰ Thus, at the end of this session, the legislature, over objections from Democrats and civil rights groups, passed new rules

76. A statement by the Republican Chairman of the North Carolina Senate Rules committee issued the day after the *Shelby County* decision said, “I think we’ll have an omnibus bill coming out” and that the Senate would pass the “full bill.” N.C. State Conf. of the NAACP v. McCrory, 182 F. Supp. 3d 320, 339 (M.D.N.C. Apr. 25, 2016).

77. N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204, 216 (4th Cir. 2016).

78. *Id.*

79. *Id.* at 217.

80. Indeed, the Fourth Circuit noted that the district court had observed the following:

The district court found that not only did [the omnibus voting law] eliminate or restrict these voting mechanisms used disproportionately by African Americans, and require IDs that African Americans disproportionately lacked, but also that African Americans were more likely to “experience socioeconomic factors that may hinder their political participation.” This is so, the district court explained, because in North Carolina, African Americans are “disproportionately likely to move, be poor, less educated, have less access to transportation, and experience poor health.”

Id. at 218 (quoting *McCrory*, 182 F. Supp. 3d at 432).

regarding election regulations.⁸¹ These rules included passage of a voter identification provision limiting same-day registration opportunities, limiting early voting opportunities, and other related provisions.⁸² The General Assembly passed those rules to take effect during the 2014 election cycle. Yet, civil rights groups sued and obtained a stay of several of those regulations.⁸³ The district court denied the stay, but the Fourth Circuit ordered stayed the elimination of the same-day registration and out-of-precinct voting changes. The Supreme Court lifted the Fourth Circuit's stay pending its decision on certiorari, but then denied certiorari, which then reinstated the Fourth Circuit's stay. The other rules from the omnibus voting law were implemented in 2014.⁸⁴

After several attempts at further legislative modification by the North Carolina legislature, the lawsuit went forward. Although the district court upheld the North Carolina law in its entirety, a panel of the Fourth Circuit unanimously struck down the law because it explicitly and intentionally targeted African Americans in the electoral process with, in the words of the court, "surgical precision."⁸⁵ Indeed, the court admonished the North Carolina General Assembly for seeking evidence regarding the voting practices of African American voters and then acting specifically to curb those practices without any consideration of the impact of targeting those practices would have on the minority communities. Moreover, the court was not persuaded by North Carolina's argument that it was simply using race as a proxy for political party affiliation.⁸⁶ The court determined that race and party are inextricably linked in North Carolina, and that historically, the nature of that link is one of the use of race as a means to subordinate minority racial groups.⁸⁷

One can sense in the Fourth Circuit's opinion in *NAACP v. McCrory* an effort to reject the use of race as a substitute for party and focuses on the maltreatment of a specific racial group through the historical lens of

81. See H.B. 589, 2013 N.C. Sess. Laws 381. This session law "eliminated one of two 'souls-to-the-polls' Sundays in which African American churches provided transportation to voters," eliminated same-day voter registration, and "the bill retained only the kinds of IDs that white North Carolinians were more likely to possess." *McCrory*, 831 F.3d at 216–17.

82. 2013 N.C. Sess. Laws 381.

83. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 248–49 (4th Cir. 2014).

84. *North Carolina v. League of Women Voters of N.C.*, 574 U.S. 927 (2014) (mem.).

85. *McCrory*, 831 F.3d at 214–15.

86. *Id.* at 214, 222–23.

87. *Id.* at 225.

African Americans' treatment by North Carolina in the past.⁸⁸ Indeed, this opinion stands in contrast with the vision of voting rights articulated in *Shelby County*, which focused on the subsidence in such discriminatory treatment as grounds for eliminating the voting rights protections contained in Section Five of the Voting Rights Act.⁸⁹ Moreover, this resurgence in racial discriminatory impact, as a result of policy prompted by the voter fraud meme, points to the consequences of the meme—the creation of a pretext to allow invidious discrimination to take place.

Compare this decision with the United States Court of Appeals for the Fifth Circuit's recent decision in *Veasey v. Abbott*,⁹⁰ an ongoing voter identification litigation. That case addressed the 2014 Texas voter identification provision passed in the wake of *Shelby County* on a similar basis of preserving election integrity and fighting voter fraud. There, a majority of the Fifth Circuit en banc agreed with the district court that there was a disparate impact on the basis of race in regards to Texas voting changes, but this majority fractured in regards to whether discriminatory intent was findable on the evidence presented.⁹¹

The Fifth Circuit majority fractured as to whether the evidence was sufficient to support a finding of discriminatory intent. A unified dissent of the Fifth Circuit demanded that evidence be more in depth in regards to the Texas voter ID litigation. The various dissents demanded that there effectively be proof of some sort of agreement or motivation that ranged towards what would be tantamount to a conspiracy geared towards disenfranchising African American and Latino voters in Texas.⁹² In other words, the dissenters did not take the view that the Fourth Circuit did regarding the toxic link between race and politics. Indeed, some judges in dissent vociferously argued that the danger of accusing government entities of acting on the basis of race in violation of the Constitution was highly dangerous and violated democratic norms rather than confronting the use of such malformed race consciousness directly. This unwillingness to analyze ill-informed racial stereotyping as a basis for legislation would eviscerate the ability for

88. See 831 F. 3d 204.

89. See 570 U.S. 529; Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, 439 (1965).

90. 830 F.3d 216 (5th Cir. 2016).

91. *Id.* at 225 n.1.

92. *Id.* at 281 (Jones, J. dissenting) (by allowing the discriminatory intent claim to go forward, "the majority fans the flames of perniciously irresponsible racial name-calling"); *id.* at 325 (Clement, J., dissenting) ("The plurality also overlooks the total absence of direct evidence of a discriminatory purpose and the effect of plaintiffs' failure to unearth such evidence—despite repeated assertions that such evidence exists.").

courts to mediate claims regarding race, which in and of itself would be quite problematic, thus the Fifth Circuit's precedent would seem to reveal the tension between notions of colorblind jurisprudence and notions of carrying out the Fifteenth Amendment's command to prevent discrimination on the basis of race.

As such, it seems doubtful that the en banc Fifth Circuit would view the Texas situation in the same way that the Fourth Circuit viewed the North Carolina situation. This is revelatory of the gap that persists due to the differences in view about the continued force and relevance of the tie between race and subordinationist politics. And as we have seen, it is the justification of fighting voter fraud that animates the discourse in this area.

IV. DONALD TRUMP AND THE MEME OF VOTER FRAUD

Probably the most prominent advocate and amplifier for the voter fraud meme is the forty-fifth President of the United States. His claims of voter fraud have led to an ongoing investigation by an Election Integrity Commission, which critics believe is intended to sponsor further crackdowns regarding strict rules for voter qualifications and voter access. Indeed, President Trump's activities have been the single most noticeable source of amplification of the meme of voter fraud, as well as the most direct application of the meme as a pretext to change the meaning of election integrity.⁹³

This activity by the President has a clear history. During the 2016 campaign, as noted above, Trump used the meme of voter fraud to suggest his supporters should engage in voter intimidation, violence, and subversion of the rule of law.⁹⁴ He claimed during one of the presidential debates that fraud by millions of wrongful voters would thwart his candidacy.⁹⁵ Both he and then Vice Presidential candidate, Mike Pence, called for their supporters to monitor polls and challenge

93. For an analysis of how President Trump uses rhetorical strategies to persuade, see generally Cathren Page, *An "Astonishingly Excellent" Solution to Super-Fake Narratives*, 58 WASHBURN L.J. 673 (2019). In particular, Page notes that Trump's rhetoric has "identified his audience's wants, spread his message far and wide, and persuaded pre-primed voters . . ." *Id.* at 693. These strategies are symmetrical to the memetic account I offer here.

94. Trip Gabriel, *Donald Trump's Call to Monitor Polls Raises Fears of Intimidation*, N.Y. TIMES (Oct. 18, 2016), <https://www.nytimes.com/2016/10/19/us/politics/donald-trump-voting-election-rigging.html> (quoting Trump as saying "Voter fraud is all too common, and then they criticize us for saying that").

95. See Steven A. Holmes, *Reality Check: Trump's claims of 'large scale' voter fraud*, CNN (Oct. 18, 2016, 11:29 A.M.), <http://www.cnn.com/2016/10/18/politics/reality-check-voter-fraud-donald-trump/index.html>.

voters they suspect.⁹⁶ And in the final debate, apparently because of his belief that the election was going to be rigged, Trump said he would keep us in suspense about whether he would accept the result of this election.⁹⁷

After winning office, President Trump argued on Twitter in November 2016 that if one deducts the votes of millions who voted illegally, he did not lose the popular vote.⁹⁸ He even went on as president-elect to announce “[real] voter fraud” in Virginia, New Hampshire, and California (with no evidence).⁹⁹ Once in office, he established a Commission on Election Integrity, whose apparent purpose was to substantiate his claims regarding voting fraud. As he believes, “illegal voters,” particularly voters without citizenship and residency status, are the voters who have distorted his election outcome and are otherwise threatening the political process.¹⁰⁰

The Commission, led by Vice President Mike Pence and then-Kansas Secretary of State Kris Kobach, was initially established to uncover evidence to support claims of widespread voter fraud in light of the 2016 Presidential election.¹⁰¹ Despite the Commission’s attempts to gather sensitive voter data from states, it received pushback over concerns

96. See Jonathan Easley, *Pence urges Trump supporters to monitor polling places for fraud*, THE HILL (Oct. 17, 2016), <http://thehill.com/blogs/ballot-box/presidential-races/301371-pence-urges-trump-supporters-to-monitor-polling-places>.

97. See Karen Tumulty and Philip Rucker, *At third debate, Trump won't commit to accepting election results if he loses*, WASH. POST (Oct. 19, 2016), https://www.washingtonpost.com/politics/trump-wont-commit-to-accepting-election-results-if-he-loses/2016/10/19/9c9672e6-9609-11e6-bc79-af1cd3d2984b_story.html?utm_term=.59104e7e9411.

98. Donald J. Trump (@realDonaldTrump), posted on Nov. 27, 2016, at 3:30 PM, TWITTER, https://twitter.com/realDonaldTrump/status/802972944532209664?ref_src=twsrc%5Etfw (last visited Nov. 27, 2016).

99. Donald J. Trump (@realDonaldTrump), posted on Nov. 27, 2016, at 7:31 PM, TWITTER, https://twitter.com/realDonaldTrump/status/803033642545115140?ref_src=twsrc%5Etfw (last visited Nov. 27, 2016).

100. Donald J. Trump (@realDonaldTrump), posted on Jan. 25, 2017, at 7:10 and 7:13 AM, TWITTER, <https://twitter.com/realdonaldtrump/status/824227824903090176?lang=en>; <https://twitter.com/realdonaldtrump/status/824228768227217408?lang=en> (last visited Jan. 25, 2017) (“I will be asking for a major investigation into VOTER FRAUD, including those registered to vote in two states, those who are illegal and . . . even, those registered to vote who are dead (and many for a long time). Depending on results, we will strengthen up voting procedures!”).

101. Chris Cillizza, *Donald Trump warns people to beware of non-existent voter fraud*, CNN.COM (Oct. 22, 2018 4:37 PM ET) <https://www.cnn.com/2018/10/22/politics/donald-trump-voter-fraud/index.html> (last visited Oct. 22, 2018) (analyzing Trump’s trajectory of making voter fraud claims).

about how the information would be used.¹⁰² Ultimately, the Commission was criticized for failing to report any substantial evidence that voter fraud was prevalent in the 2016 election.¹⁰³ By January 2018, the White House dissolved the Commission.¹⁰⁴

Even after being unable to provide any basis for his claims, President Trump has continued to push the meme of voter fraud forward. Trump alleged in a recent interview with “Meet the Press” that the state of California had admitted to having “a million’ illegal votes in the 2016 presidential election.”¹⁰⁵ The President was referring to a settlement that the state had reached with conservative group Judicial Watch, which did not contain any mention of voter fraud or illegal voting by the state.¹⁰⁶ And during the 2018 midterm elections, he again pushed the voter fraud meme.¹⁰⁷

What Trump has done repeatedly is to use the meme of voter fraud to impugn elections and voters in this country. His rhetoric is Internet trolling at its best, but the consequence may be to once again distort policy, endanger political minorities, and imperil democracy in the ways I have outlined above. To believe that millions of certain voters are illegitimate simply because someone says so is to trade in an ideology of exclusion. America did this for the majority of its history with the effect of excluding women, African Americans, and naturalized immigrants in favor of property-holding white men. Court decisions, constitutional amendments, and the Voting Rights Act of 1965 democratized voting and made clear that just because of one’s identity, one was not a fraudulent voter.

If history teaches us anything, it is that his rhetoric will serve as an excuse to vilify the people he deems his enemies and the institutions designed to serve all the people. This rhetoric will continue to paint a target on his political opponents generally (since apparently all the alleged illegitimate votes were cast by his opponents). The rhetoric will reinforce the racist, sexist ideology of exclusion, thus compounding the

102. *See id.*

103. *Id.*

104. *Id.*

105. *See* Chris Nichols, *Pants on Fire: Trump’s latest California voter fraud claim as baseless as past allegations*, POLITIFACT (June 24, 2019), <https://www.politifact.com/california/statements/2019/jun/24/donald-trump/pants-fire-trumps-latest-california-voter-fraud-cl/>.

106. *Id.*

107. Cillizza, *supra* note 101 (“And now, just 15 days before the midterm election, Trump again raises the specter of widespread voter fraud— without providing a single shred of evidence of its existence. Because, of course, that evidence simply doesn’t exist.”).

doubt minority voters and others who have suffered historical disenfranchisement suffer.

His claim of voter fraud in the millions also suggests that election structures that validate and tabulate our elections have no legitimacy. This suggests that thousands of election officers across this country either were duped or were in on the scheme. And this rhetoric demeans the already-imperiled Voting Rights Act and other laws that make our elections democratic. Why support the Voting Rights Act and other inclusivity promoting measures if they allegedly lead to polluted election results? In these ways, the meme of voter fraud as propounded by President Trump correlates with the ideology of the vicious voter discussed in this study.

V. THE EPISTEMIC CRISIS OF AMERICAN DEMOCRACY

Probably most important, the existence of the meme of voter fraud creates a crisis for all those invested in the project of electoral democracy. The core question posed by the pattern described in this Article—that propaganda tantamount to a meme has been a substitute basis for facts for reshaping the right to vote—is what ought to be the basis of knowledge for our understanding of democracy. This Article has sought to account for how the meme of voter fraud, as a way of knowing what threats do (or do not) exist for the democracy. The meme has been a pretext for heightening the regulation of the exercise of the franchise. While neutral appearing on its face, the rhetorical use of the meme has targeted the most vulnerable to exclusion in American society—the poor and people of color in particular. The meme-inspired policies have prompted the use of the Voting Rights Act as a backstop to prevent such discrimination with mixed results. These influences seem to have created outcomes that have arguably promoted democratic injustice.

Yet, surveys also show that there is a substantial number of people who believe in the need for heightened regulation of political participation because of the belief in this threat.¹⁰⁸ Presumably, such

108. A Gallup poll from 2016 shows that 80% of Americans support laws that require all voters to provide photo identification at their voting places. See Justin McCarthy, *Four in Five Americans Support Voter ID Laws, Early Voting*, GALLUP, <https://news.gallup.com/poll/194741/four-five-americans-support-voter-laws-early-voting.aspx> (last visited Aug. 22, 2016). The study went further to examine the general concern that participants had regarding the problem of voter fraud. Of the total participants, “[m]ore than a third view it as a major problem (36%), while nearly as many view it as either a minor problem (32%) or not a problem at all (29%).” *Id.* Moreover, “[a] majority of Republicans (52%) perceive voter fraud as a major problem, which is reflected in the policy stances of many GOP state governors. By contrast, just 26% of Democrats expect ineligible persons voting to be a major problem this year.” *Id.* While this study

beliefs held by the majority ought to be the basis of creating policy in a democratic republic. Yet, these issues are put in tension with those of racial discrimination as the recent history of voter identification litigation illustrates. Thus, the larger question becomes whether there is a concern around majoritarian abuse of the minority exists due to the use of the meme of voter fraud as a basis for deliberating policy.

And if such a basis is acceptable, then this poses serious concerns about how we are to understand the world in relation to implementing the right to vote in a democratic republic. The basis of equality that lies at the heart of the right to vote can thus become susceptible to propaganda when a meme can persuade us that what is not real is real.

This is a serious risk and always has been; throughout American history, citizens and their governments have believed or disbelieved that people of color, the poor, and immigrants are worthy of the franchise. Yet the Internet age, in which memes are not merely concepts or rhetorical devices, but instead are currency of communication and tools of propaganda, accelerates and exacerbates the problem of the belief in exclusion.¹⁰⁹ Indeed, the emergence of memes as persuasive devices and the existence of technology of deepfakes (as well as its use by operatives both foreign and domestic) makes urgent this question of how do we know the facts on which we base our choices about the democratic process.¹¹⁰

The Internet age puts our ability to know up for grabs, and through the meme of voter fraud and other memes that enable and encourage old biases like racism and inequality, the ability for propaganda to fool us and to persuade us of what is not true can actually imperil American democracy.¹¹¹

The solution to this problem will, arguably, be the long-term project of the twenty-first century. Scholars argue that the solution is to rely on data-driven decision-making devices when it comes to making choices

would suggest that the partisan thesis may dominate who is and is not susceptible to the meme of voter fraud, the sheer fact that political rhetoric seems to serve the mediating function of determining the acceptability of the right to vote should give us pause.

109. See generally BENKLER ET AL, *supra* note 9.

110. Grace Shao, *Fake videos could be the next big problem in the 2020 elections*, CNBC.COM (Oct. 15, 2019 9:40 AM EDT), <https://www.cnbc.com/2019/10/15/deepfakes-could-be-problem-for-the-2020-election.html> (last visited Oct. 15, 2019) (deepfake technology, which can be used to impersonate a politician, or anyone, may serve as a tool of propaganda for the 2020 election).

111. For example, among the controversies exposed in the ongoing scandal concerning Russian interference in U.S. elections is the fact that the propaganda plan specifically sought to exploit American divisions around race in the election disinformation campaign. See Darin Johnson, *Russian Election Interference and Race-Baiting*, 9 COLUM. J. RACE & L. 191 (2019).

about the right to vote. As I did in my prior work, I reiterate that solution now. Actual fraud—which this Article does not deny exists—ought to be the basis for augmenting election integrity policies, not suppositions of fraud.

But this larger question of how do we know what facts ought to determine our election integrity policies, an epistemology (or theory of knowledge) relevant to democratic governance, as it were, should also concern us. Such a theory ought to be grounded in facts that have an objective reality and guided by a heuristic that seeks to avoid unjust outcomes. It ought to eschew “alternative facts” driven by partisan preferences (or tribal epistemologies, as a commentator observed).¹¹² Of course, in the past, where information was more effectively mediated by news organizations and where shared knowledge was far less democratized, such issues would not have been a question. But in the era of the Meme of Voter Fraud, where illegal voters who do not exist can be claimed and then serve as a basis for shaping policy, this question of how we know ought to concern us for the time to come.

112. See David Roberts, *Donald Trump and the rise of tribal epistemology*, VOX.COM (May 19, 2017 9:58 am EDT), <https://www.vox.com/policy-and-politics/2017/3/22/14762030/donald-trump-tribal-epistemology>.