

# FOREWORD

## Foreword

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*Thurgood Marshall, the U.S. Supreme Court Justice whose work as a civil rights lawyer transformed twentieth-century American democracy, famously said, in a riff on a quote often attributed to Benjamin Franklin, “It’s a democracy, if we can keep it.” But Marshall went beyond Franklin’s cryptic warning about the fragility of our republic. In a 1978 speech at Howard University School of Law, Marshall—never at a loss for words or advice—described the critical element to protecting democracy: “[I]n order to keep it,” he explained, “you can’t stand still. You must move, and if you don’t move, they will run over you.”<sup>1</sup>*

In Marshall’s conception, a democracy—a healthy one—is not one that is static, but one that must be moved and expanded by the people. Marshall’s conception also presupposes that there are forces perpetually arrayed against democracy. It is only in the process of consistent, repeated, and intentional transformation that democracies can be strengthened and maintained. In this regard, every functioning democracy is in transition.

Marshall’s admonition is a sound one. Healthy democracies are by their nature dynamic and ever-changing. That is because the core features of a functioning democracy invite change by empowering its people with the means to reshape the boundaries of the democracy’s promises and responsibilities. Free and fair elections, an independent press, the opportunity to peaceably dissent without retaliatory violence from the state, a legal system that respects the rule of law—these are all tools by which the citizens in a democracy are equipped to expand, contract, and redefine its boundaries. With these tools in the hands of millions of citizens, change in a democracy is inevitable.

Despite the inherently ever-changing nature of our system, “Democracy in Transition” could not more accurately describe this particular moment in our country, and so this Symposium issue is aptly named. American democracy is indeed in dramatic transition. But the pressing question that most urgently confronts us is whether our democracy is transitioning *toward* or *away* from

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1. The Honorable Thurgood Marshall, Assoc. Just., Sup. Ct. of the U.S., Speech at Howard University School of Law (Nov. 18, 1978) (transcript available at <http://thurgoodmarshall.com/the-equality-speech/> [<https://perma.cc/CB4H-J8TN>]).

the principles, values, and practices that we have long associated with democracy.

For some, the answer is obvious. A little more than a year ago, a violent and planned attack on the U.S. Capitol in Washington, D.C. was launched in an effort to overturn the results of the 2020 presidential election.<sup>2</sup> The attack succeeded in delaying the official certification of the electoral results. Members of Congress and the Vice President of the United States ran for their lives, and staffers barricaded themselves in their bosses' offices while the marauders ransacked filing cabinets, smeared feces on walls, and stole laptops, papers, and even the lectern of the Speaker of the House.<sup>3</sup> Millions around the world watched the anarchy unfold for hours on television and on social media. Despite pleas from the Capitol Police, reinforcements from the National Guard were prevented, under still-curious circumstances, from offering immediate assistance and protection to the overwhelmed and injured local constabulary.<sup>4</sup> The electorally defeated president, who had for more than a month insisted—despite all evidence to the contrary—that the election had been “stolen,” and who had fired up the crowd and encouraged them to go to the Capitol hours earlier, resisted the entreaties of family members, leaders of his party, and conservative media hosts to address his followers and call off the attack.<sup>5</sup> Finally, over three hours after the attack began, the White House posted a video in which the President declared his “love” for the rioters and reiterated his belief that the election was stolen.<sup>6</sup>

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2. Remy Tumin & Jeremiah M. Bogert, Jr., *Evening Briefing Special Edition: A Pro-Trump Mob Storms the Capitol*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/2021/01/06/briefing/pro-trump-mob-storms-the-capitol.html?smid=url-share>.

3. See Kat Lonsdorf, Courtney Doring, Amy Isackson, Mary Louise Kelly & Ailsa Chang, *A Timeline of How the Jan. 6 Attack Unfolded — Including Who Said What and When*, NPR (June 9, 2022, 9:11 AM), <https://www.npr.org/2022/01/05/1069977469/a-timeline-of-how-the-jan-6-attack-unfolded-including-who-said-what-and-when> [<https://perma.cc/486R-R2YH>]. See, e.g., Carl Campanile & Yaron Steinbuch, *Rioters Left Feces, Urine in Hallways and Offices During Mobbing of US Capitol* N.Y. POST (Jan. 8, 2021, 12:18 PM), <https://nypost.com/2021/01/08/rioters-left-feces-urine-in-hallways-and-offices-during-mobbing-of-us-capitol/> [<https://perma.cc/5H76-MJSE>]; Rebecca Klapper, *Mother, Son Describe Helping Man Steal Laptop in Pelosi's Office During Capitol Riot*, NEWSWEEK (Oct. 4, 2021, 6:29 PM), <https://www.newsweek.com/he-scared-me-mother-son-describe-helping-man-steal-pelosis-laptop-during-insurrection-1635492> [<https://perma.cc/U4UH-CACX>]; Daniel Villarreal, *Documents Stolen from Capitol May Contain National Security Risks*, NEWSWEEK (Jan. 7, 2021, 6:18 PM), <https://www.newsweek.com/documents-stolen-capitol-may-contain-national-security-risks-1559854> [<https://perma.cc/3CB3-76KG>]; Phil Helsel, *Man Seen Carrying Speaker's Lectern at Jan. 6 Riot Pleads Guilty*, NBC NEWS (Nov. 22, 2021, 11:04 PM), <https://www.nbcnews.com/news/us-news/man-seen-carrying-speakers-lectern-jan-6-riot-pleads-guilty-rcna6420> [<https://perma.cc/SJW9-2R6T>].

4. Glenn Kessler, *The Jan. 6 Attack on the Capitol: A Guide to What We Now Know*, WASH. POST (Jan. 6, 2022, 3:00 AM), <https://www.washingtonpost.com/politics/2022/01/06/january-6-attack-capitol-guide-what-we-now-know/>.

5. See Lonsdorf et al., *supra* note 3.

6. White House, *President Trump Video Statement on Capitol Protesters*, C-SPAN (Jan. 6, 2021), <https://www.c-span.org/video/?507774-1/president-trump-claims-election-stolen-tells-protesters-leave-capitol> [<https://perma.cc/M8N5-CV6A>].

Worse, despite outrage in the first hours after the attack, Republican leaders in Congress refused to condemn the President's role in the days and weeks that followed. Nearly 150 Republicans voted against certifying the election. They opposed an impeachment motion against the President, and the party's leaders—as well as a majority of Republican voters—refused to publicly affirm the outcome of the election, and instead coalesced around the false narrative that President Biden is an illegitimate president.<sup>7</sup>

A year before, protests involving tens of thousands of Americans broke out in every state in the country after the video of the murder of George Floyd.<sup>8</sup> These protests were multiracial, overwhelmingly peaceful, bipartisan, and focused on the demand for an end to police violence against unarmed Black people.<sup>9</sup> But these protests were met in many cities with a violent response by law enforcement. The victims were children,<sup>10</sup> the elderly,<sup>11</sup> students,<sup>12</sup> members of the press,<sup>13</sup> and women<sup>14</sup> and men of all races.<sup>15</sup> The President himself, aided by the Attorney General, demanded in a remarkable call with state governors that

7. See Karen Yourish, Larry Buchanan & Denise Lu, *The 147 Republicans Who Voted to Overturn Election Results*, N.Y. TIMES (Jan. 7, 2021), <https://www.nytimes.com/interactive/2021/01/07/us/elections/electoral-college-biden-objectors.html>; Weiyi Cai, *A Step-by-Step Guide to the Second Impeachment of Donald J. Trump*, N.Y. TIMES (Feb. 13, 2021), <https://www.nytimes.com/interactive/2021/02/08/us/politics/trump-second-impeachment-timeline.html?smid=url-share>; *Majority of Republicans Still Believe the 2020 Election Was Stolen from Donald Trump*, IPSOS (Apr. 2, 2021), <https://www.ipsos.com/en-us/news-polls/majority-republicans-still-believe-2020-election-was-stolen-donald-trump>.

8. Audra D. S. Burch, Weiyi Cai, Gabriel Gianordoli, Morrigan McCarthy & Jugal K. Patel, *How Black Lives Matter Reached Every Corner of America*, N.Y. TIMES (June 13, 2020), <https://www.nytimes.com/interactive/2020/06/13/us/george-floyd-protests-cities-photos.html>.

9. See, e.g., *Sen. Mitt Romney Joins Black Lives Matter Protest in DC*, ASSOCIATED PRESS (June 7, 2020), <https://apnews.com/article/mitt-romney-american-protests-us-news-ut-state-wire-detroit-758fce0f2ff0be377ef11ad2708b92a1> [https://perma.cc/QN6F-PTWH].

10. See, e.g., Chris Riotta, *Jahmel Leach: Family Says Black Teenage Boy Was Tased and Beaten by NYPD During George Floyd Protests*, INDEPENDENT (June 11, 2020, 6:16 PM), <https://www.independent.co.uk/news/world/americas/jahmel-leach-tased-beaten-george-floyd-protests-nypd-a9561561.html> [https://perma.cc/TJT7-WFZU]; *Austin Approves \$2.95M Settlement for Teen Injured by Police*, ASSOCIATED PRESS (Mar. 3, 2022), <https://apnews.com/article/police-austin-texas-george-floyd-36e2ea33c7d4174b7e6d20ac2e020067> [https://perma.cc/D4R2-8LH2].

11. See, e.g., Tim Stelloh, Rima Abdelkader & Caitlin Fichtel, *Buffalo Police Officers Suspended After Video Shows Them Shoving 75-Year-Old at Protest*, NBC NEWS (June 4, 2020, 11:04 PM), <https://www.nbcnews.com/news/us-news/man-who-appears-be-pushed-police-buffalo-protest-stable-condition-n1225451> [https://perma.cc/Z2SQ-UZT6].

12. See, e.g., Janet Oravetz, *Student Injured During George Floyd Protest Sues Denver Police*, 9NEWS (Oct. 22, 2020, 1:46 PM), <https://www.9news.com/article/news/local/protests/protester-sues-dpd-may-protests/73-0b97bcdb-8e2a-4454-b370-ebbea3164575>.

13. See, e.g., Tim Knauss, *Syracuse Police Officer Shoves News Photographer to the Ground During Protest*, SYRACUSE.COM (June 1, 2020, 5:46 PM), <https://www.syracuse.com/news/2020/06/syracuse-police-officer-shoves-news-photographer-to-the-ground-during-protest-video.html> [https://perma.cc/9QPJ-BS52]; Paul Farhi & Elahe Izadi, *'The Norms Have Broken Down': Shock as Journalists Are Arrested, Injured by Police While Trying to Cover the Story*, WASH. POST (May 31, 2020, 5:35 PM), [https://www.washingtonpost.com/lifestyle/media/journalists-at-several-protests-were-injured-arrested-by-police-while-trying-to-cover-the-story/2020/05/31/bfbc322a-a342-11ea-b619-3f9133bbb482\\_story.html](https://www.washingtonpost.com/lifestyle/media/journalists-at-several-protests-were-injured-arrested-by-police-while-trying-to-cover-the-story/2020/05/31/bfbc322a-a342-11ea-b619-3f9133bbb482_story.html).

14. See, e.g., Janelle Griffith, *NYPD Officer Seen in Video Shoving Woman to Ground Is Charged with Assault*, NBC NEWS (June 9, 2020, 10:55 AM), <https://www.nbcnews.com/news/us-news/nypd-officer-seen-video-pushing-woman-ground-charged-assault-n1228236> [https://perma.cc/7YXZ-VJB3].

protesters be arrested and charged harshly.<sup>16</sup> Shockingly, the President and Attorney General allowed the violent clearing of peaceful protesters in Washington, D.C. so that the President could take a photo holding a Bible outside a church.<sup>17</sup>

The responses to these protests—the largely peaceful civil rights protests against racial injustice and the violent attack on the Capitol to overturn the results of the presidential election—demonstrate how even the core democratic act of peaceful protest has been weaponized by political leaders willing to either deploy or withhold the power of the state to identify and incentivize those citizens and causes deemed worthy of collective public demonstration.

In addition, misinformation is now a systemic threat to national cohesion and to the adoption of informed public policy. Aided by the speed and curated targeting of online platforms, social media has become a vehicle for the quick dissemination of lies, conspiracy theories, and political and racial division. Not even the COVID-19 global pandemic has been able to unite Americans around common-sense approaches to overcoming this massive health crisis. Instead, fear of vaccines and even the wearing of protective face masks have become attached to longstanding racial divisions, opposition to public education, and partisan politics, resulting in the loss of over one million lives in our country, and untold numbers of individuals suffering from the effects of COVID-19 infection.

Nationwide, hate crimes against racial minorities have risen dramatically over the past five years.<sup>18</sup> A movement stoked by false and misleading racial tropes has taken off around the country outlawing the teaching of history or contemporary content about racism, gender equality, and other subjects that legislators and school board officials fear will cause feelings of “guilt” or “discomfort.”<sup>19</sup> The recently elected governor of Virginia proposed setting up a “hotline” so that people—presumably students and parents—can report on teachers who raise forbidden subjects in the classroom.<sup>20</sup>

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15. See *Shot in the Head: Crowd-Control Weapons Have Caused at Least 115 Head Injuries Across the United States During Protests Following the Killing of George Floyd*, PHYSICIANS FOR HUM. RTS. (Sept. 14, 2020), <https://storymaps.arcgis.com/stories/29cbf2e87b914dbaabdec2f3d350839e>.

16. Alana Wise, *Trump Calls Governors Weak, Urging Them to ‘Dominate’ to Quell Violence*, NPR (June 1, 2020, 1:58 PM), <https://www.npr.org/2020/06/01/867063007/trump-calls-governors-weak-and-urges-them-to-dominate-violent-protesters> [<https://perma.cc/HY2E-URDB>].

17. See Katie Benner, *Barr Defends Trump’s Photo Op as ‘Entirely Appropriate,’* N.Y. TIMES (June 4, 2020), <https://www.nytimes.com/2020/06/04/us/politics/william-barr-protests.html?smid=url-share>.

18. Christina Carrega & Priya Krishnakumar, *Hate Crime Reports in US Surge to the Highest Level in 12 Years, FBI Says*, CNN (Oct. 26, 2021, 2:05 PM) <https://www.cnn.com/2021/08/30/us/fbi-report-hate-crimes-rose-2020/index.html> [<https://perma.cc/QZ8J-7SY6>].

19. See Bobby Caina Calvan, *Florida Bans ‘Critical Race Theory’ from its Classrooms*, ASSOCIATED PRESS (June 10, 2021) <https://apnews.com/article/florida-race-and-ethnicity-government-and-politics-education-74d0af6c52c0009ec3fa3ee9955b0a8d> [<https://perma.cc/3NUE-2642>].

20. Omar Abdel-Baqui & Jennifer Calfas, *New Virginia Hotline Lets Parents Report ‘Divisive Teaching Practices,’* WALL ST. J. (Jan. 26, 2022, 5:27 PM), <https://www.wsj.com/articles/new-virginia-hotline-lets-parents-report-divisive-teaching-practices-11643236044>.

And in a backlash to the 2020 election—which saw the highest voter turnout for any presidential election in our history—laws making it harder to vote have been proposed or enacted in dozens of states. Laws making it possible for the political party in control of state legislatures to determine the outcome of elections are taking hold.<sup>21</sup> Even more alarmingly, election officials around the country are facing violent threats for their refusal to acquiesce to the lie that President Trump won the 2020 election.<sup>22</sup> Scores of election officials have already resigned, choosing to leave their nonpartisan election administration work rather than continue to imperil their families.<sup>23</sup> Congress, empowered through multiple constitutional provisions to protect our election system, is politically deadlocked for the foreseeable future.

Public opinion polls suggest that tens of millions of Americans and hundreds of members of our Congress are agnostic about whether our country upholds what, until recently, had been unanimously embraced norms and principles of our democracy. A third of Americans approve of violence against the government.<sup>24</sup> Many Americans are no longer wedded to the rule of law.<sup>25</sup>

These and other phenomena have convinced many that America is transitioning *away from*, rather than *toward*, greater democracy. It is hard to argue otherwise. But, ironically, the current democratic crisis (and I do believe we are in the midst of one) carries with it unique opportunities to strengthen and expand our democracy. It may be that only in this moment, when those democratic practices and agreements we took for granted are imperiled, can we begin to think deeply and dynamically about how we strengthen the foundations of our democracy to protect it against the vulnerabilities that have been so dramatically laid bare.

There is plenty of evidence that this is so. First, in response to the excesses described above, over eighty million voters turned out to elect a new President. This was the largest ever participation by voters in a presidential election. And it

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21. See, e.g., S.B. 202, 156th Gen. Assemb., Reg. Sess. (Ga. 2021) (enacted) (requiring that the chair of the State Election Board be appointed by a majority vote of the Senate or House of Representatives of the General Assembly).

22. BRENNAN CTR. FOR JUST. & BIPARTISAN POL'Y CTR., ELECTION OFFICIALS UNDER ATTACK: HOW TO PROTECT ADMINISTRATORS AND SAFEGUARD DEMOCRACY (June 16, 2021), <https://www.brennancenter.org/our-work/policy-solutions/election-officials-under-attack> [<https://perma.cc/H7HZ-QRFJ>].

23. Michael Wines, *After a Nightmare Year, Election Officials Are Quitting*, N.Y. TIMES, (July 2, 2021), <https://www.nytimes.com/2021/07/02/us/politics/2020-election-voting-officials.html>.

24. Martin Pengelly, *One in Three Americans Say Violence Against Government Justified—Poll*, GUARDIAN (Jan. 2, 2022, 8:10 PM), <https://www.theguardian.com/us-news/2022/jan/02/one-three-americans-violence-government-justified-poll> [<https://perma.cc/5EY7-N7K6>].

25. Austin Sarat, *Americans Aren't as Attached to Democracy as You Might Think*, GUARDIAN (Feb. 11, 2017, 9:39 EST), <https://www.theguardian.com/commentisfree/2017/feb/11/americans-arent-attached-democracy-rule-law> [<https://perma.cc/3CD8-9JS3>].

occurred during a global pandemic that, by the November general election, had killed a quarter of a million Americans.<sup>26</sup>

Second, we see a willingness to debate the strength of longstanding structural features of our democracy. Calls for an expansion of the Supreme Court, for example, led to the creation of a Presidential Commission on the Supreme Court, assigned to study the leading scholarly and practical theories driving arguments for and against expansion, and to identify other ways of strengthening the Court as an institution. An extended Senate debate about whether to change the rules that have long governed legislative voting and debate took center stage and split the Senate largely along party lines. In the aftermath of the killing of George Floyd and worldwide protests against police violence and discrimination, grassroots groups abandoned a focus on reforming long-established law enforcement power and policing practices and turned toward fundamentally “reimagining” public safety. Calls to revisit the Electoral College, to amend the Electoral Count Act, to abolish or transform the filibuster, to dramatically expand voter access, to add Washington, D.C. and Puerto Rico as states, to cancel student debt, to support childcare and free early education—these are all measures that have moved from the exclusive platform of the progressive left to policies advanced by mainstream politicians.

Social media has accelerated and deepened distrust, division, and misinformation. Yet, it has also amplified the long-excluded voices of victims of sexual assault, allowed for the viral sharing of devastating digital proof of police violence and of racial discrimination in real time, and democratized important conversations about politics, art, and law.

This moment may be one in which the United States transitions *away* from democracy. But it is simultaneously a potential moment of radical transition *toward* greater democracy.

The essays in this symposium issue offer important insights into the project of strengthening democracy. It is fitting that this issue is anchored by two essays about the unique contributions, insight, and brilliance of the late Supreme Court Justice Ruth Bader Ginsburg. Her life story, her work as a women’s rights lawyer and academic, and her tenure as a Supreme Court Justice correspond with one of the most transformative eras of progression in American democracy. Ginsburg was not merely a beneficiary of the democratic transformation that made her life possible—she was among the most consequential actors shaping the course of American democracy in the second half of the twentieth century.

The work of strengthening democracy requires more than high-minded ideals and principles. A strong measure of pragmatism is critical. Accurately assessing entry

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26. Domenico Montanaro, *President-Elect Joe Biden Hits 80 Million Votes in Year of Record Turnout*, NPR (Nov. 25, 2020, 9:06 AM), <https://www.npr.org/2020/11/25/937248659/president-elect-biden-hits-80-million-votes-in-year-of-record-turnout> [<https://perma.cc/YK5S-NYQN>].

points for transformation is a primary and critical start. Is legislation through Congress a likely avenue for change? Is strategic litigation of the kind practiced by Justice Ginsburg in her days as a women's rights lawyer, and before her by Justice Marshall, the more potentially successful avenue? Or is activism and state-based advocacy that builds consensus the preferred approach? In her Article *Justice Ginsburg's Cautious Legacy for the Equal Rights Amendment*, Professor Julie Suk provides a window into the changing legal, political, and social reality that, over decades, ultimately convinced Justice Ginsburg to embrace a pragmatic position on how best to move the Equal Rights Amendment to constitutional ratification.<sup>27</sup>

As a Justice on the Supreme Court, Ginsburg continued to deploy her mixture of progressive vision, steely determination, and pragmatism. Amy Marshak, one among the legion of the Justice's devoted former clerks, movingly recalls that the Justice worked assiduously to convince her colleagues to join her view of cases.<sup>28</sup> But when those efforts failed, Ginsburg was sanguine, recognizing the value of a carefully written dissent as a majority opinion for the future.

Schools of constitutional interpretation are the ultimate "insider baseball" of our legal system. They matter to academics and to some judges—especially Supreme Court Justices. Schools of constitutional interpretation are often regarded as little more than window dressing for conservative or liberal political beliefs about the reach of the Constitution's protections. At their best, interpretative schools of constitutional interpretation reflect the search for coherence in constitutional decisionmaking—an effort to identify a framework that can support a consistent application of law. In this regard, they reflect a fundamentally democratic impulse—a search for equity, predictability, and a common set of expectations in constitutional decisionmaking. As Professors Tobia, Nourse, and Slocum observe, textualism has become the current Court's "lingua franca." Rather than critique or endorse the integrity of textualism as an interpretative tool, in *Progressive Textualism*, they imagine a textualist approach to statutory and constitutional interpretation that can be embraced by progressive legal thinkers.<sup>29</sup>

Two years after the largest civil rights protests our country has ever seen following the murder of George Floyd by a Minneapolis police officer, Yuvraj Joshi invites us to consider the costs of peace, and the law's role in embracing a

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27. See Julie C. Suk, *Justice Ginsburg's Cautious Legacy for the Equal Rights Amendment*, 110 GEO. L.J. 1391 (2022).

28. See Amy Marshak, *In Memoriam for Justice Ruth Bader Ginsburg*, 110 GEO. L.J. 1265 (2022).

29. See Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Progressive Textualism*, 110 GEO. L.J. 1437 (2022).

conception of peace that embraces order and status quo politics at the expense of the kind of disruptive justice that expands and strengthens democracy.<sup>30</sup>

Some of the most transformational moments in American democracy have occurred when the electorate has been dramatically expanded. The passage of the Nineteenth Amendment in 1920 added nearly twenty-nine million potential voters—women—to the electorate.<sup>31</sup> The Voting Rights Act of 1965 added over 79,000 Black voters to the voting rolls of thirty-two counties in states covered by the Act; by the end of 1967, more than half a million new Black voters had been registered in the seven covered states.<sup>32</sup> And the Twenty-Sixth Amendment allowing eighteen-year-olds to vote saw twenty-five million young adults become new age-eligible voters across the country.<sup>33</sup> Calls to dramatically further expand the electorate and power of disenfranchised Americans by granting statehood to Puerto Rico and the District of Columbia have the potential to once again dramatically shape the electorate and political power for decades to come. The case for D.C. statehood has generated considerable political focus and scholarship and is the subject of a bill in Congress. Arguments in support of and against statehood for D.C. have focused on the question of whether the constitution—particularly Article I, Section 8 of the Constitution<sup>34</sup>—forbids the use of the territory of the District of Columbia for the creation of a state. But Professors Jessica Bulman-Pozen and Olatunde Johnson argue something quite different. Rather than focus their argument on whether the Constitution forbids statehood for the territory that is the District of Columbia, they contend that the Constitution—in particular the Fourteenth Amendment’s Birthright Citizenship and Equal Protection clauses—*compels* statehood for the District to ensure the full enfranchisement of its residents.<sup>35</sup>

Democracies can die. Although it had become an article of faith that the United States is too stable, too wealthy, too globally well-established as a constitutional democracy to fail, the past decade has offered sobering evidence of gaps and cracks in the foundations of our democracy that are warning signs of structural failure. A compelling student Note in this issue explores the high-speed

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30. See Yuvraj Joshi, *Racial Justice and Peace*, 110 GEO. L.J. 1325 (2022).

31. See 3 BUREAU OF THE CENSUS, U.S. DEP’T OF COM., POPULATION 1920, COMPOSITION AND CHARACTERISTICS OF THE POPULATION BY STATES (1922), <https://www2.census.gov/library/publications/decennial/1920/volume-3/41084484v3ch01.pdf> [<https://perma.cc/G9MY-CTZ7>].

32. BERNARD GROFMAN, LISA HANDLEY & RICHARD G. NIEMI, MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 22 (1992).

33. BUREAU OF THE CENSUS, U.S. DEP’T OF COM., CURRENT POPULATION REPORTS, POPULATION CHARACTERISTICS: CHARACTERISTICS OF NEW VOTERS: 1972 (1971), <https://www.census.gov/content/dam/Census/library/publications/1971/demo/p20-230.pdf> [<https://perma.cc/XW7H-TQJF>].

34. U.S. CONST. art. I, § 8, cl. 17 (“The Congress shall have Power . . . To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States . . .”).

35. See Jessica Bulman-Pozen & Olatunde C.A. Johnson, *Federalism and Equal Citizenship: The Constitutional Case for D.C. Statehood*, 110 GEO. L.J. 1269 (2022).

unraveling of another established constitutional democracy, Venezuela, as a cautionary tale for the United States.<sup>36</sup> Ironically, the author finds that the similarities in the constitutional frameworks of both countries left Venezuela and leaves the United States vulnerable to the excesses and overreach of an empowered President. Reforms at both the federal and state level will be necessary, the piece argues, to protect the United States against the fate that has befallen Venezuela.

A final student Note in this issue presents an empirically based analysis of how federal judges appointed by Republican and Democratic Presidents differ sharply in their grants of compassionate release to incarcerated individuals.<sup>37</sup> Compassionate release for those held in federal prison for drug crimes became more robust after the passage of the First Step Act in 2018, and even more so after the COVID-19 pandemic created a potentially catastrophic health crisis in the nation's prisons and jails. The research in the Note, presented in the context of our broader conversations about judicial appointments, diversity, and political power, invites us to an honest and consequential conversation about how ideology shapes the exercise of discretionary power by federal judges.

To many seasoned observers, American democracy is indeed at the brink. But at the same time, there is an equally compelling argument that there is the possibility that something more positive is in the cards. The threats to democracy may well have woken the sleeping giant and convinced millions of Americans—many who have been inattentive and disengaged from active participation in civic life—that something more is required if we are to preserve democracy in this country.

At the end of Justice Marshall's speech, he urgently pressed his caution against democratic complacency. "Be aware of that myth," he said, "that everything is going to be all right. Don't give in. I add that, because it seems to me, that what we need to do today is to refocus. Back in the 30's and 40's, we could go no place but to court," Marshall explained. But by the time of Marshall's speech in 1978, he believed that politics had become a viable avenue for change as well. Marshall encouraged us to use both "our legal arm" and "our political arm." "And don't listen to this myth that it can be solved by either or that it has already been solved," Marshall warned. "Take it from me, it has not been solved."<sup>38</sup>

As we round the second decade of the twenty-first century, there may now be fertile soil for the kind of bold ideas and dynamic energy that Thurgood Marshall's democratic project brought to the twentieth century. In this regard, "Democracy in Transition" is a statement of possibility for our future.

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36. See Jesus A. Rodriguez, Note, *The Paper-Thin Constitutions: Paths to Authoritarianism in the United States and Venezuela*, 110 GEO. L.J. 1519 (2022).

37. See Victoria Finkle, Note, *How Compassionate?: Political Appointments & District Court Judge Responses to Compassionate Release During COVID-19*, 110 GEO. L.J. 1495 (2022).

38. Marshall, *supra* note 1.