

WHITELASH

If postmortems of the 2016 U.S. presidential election tell us anything, it's that many voters discriminate on the basis of race, which raises an important question: In a society that outlaws racial discrimination in employment, housing, and jury selections, should voters be permitted to racially discriminate in selecting a candidate for public office? In *Whitelash*, Terry Smith argues that such racialized decision-making is unlawful and that remedies exist to deter this reactionary behavior. Using evidence of race-based voting in the 2016 presidential election, Smith deploys legal analogies to demonstrate how courts can both decipher when groups of voters have been impermissibly influenced by race, and impose appropriate remedies. This groundbreaking work should be read by anyone interested in how the legal system can re-direct American democracy away from the ongoing electoral scourge that many fear 2016 portended.

Terry Smith has spent more than 25 years teaching at national law schools, most recently as a Distinguished Research Professor. His legal scholarship has been cited by federal courts, and he is the author of the book *Barack Obama, Post-Racialism, and the New Politics of Triangulation* (2012).

Whitelash

UNMASKING WHITE GRIEVANCE AT THE
BALLOT BOX

TERRY SMITH



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Lincoln Pettaway is a lifelong mentor who taught me the most important lesson of my life: no one can control your destiny unless you allow them. Thanks for being the consummate teacher, Mr. Pettaway.

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Preface

Even as a lawyer and legal scholar, I have written this book for non-lawyers because its concerns are far too important to be limited to a boutique audience. We all have a role in rooting out racial discrimination in the democratic process, and that role begins by being cognizant of how and why we vote the way we do. When I began this project in 2017, my ambitions were admittedly more constrained than they ultimately turned out to be. Yet the more I witnessed American democracy being buffeted by foreign influence, a petulant and incurious president, a compromised Supreme Court, and the sheer inability of the nation's ossifying institutions to instill trust, the more driven I became to reach for a solution to what undergirds most of the ongoing tumult: voters' distrust of each other. More specifically, the 2016 presidential contest demonstrated that a significant segment of American voters harbors racial stereotypes of their fellow Americans and carries these preconceptions into the ballot box. When a candidate such as Donald Trump legitimates these stereotypes with jeremiads against Latino immigrants and Muslims, a political process already characterized by racially polarized voting becomes even more tainted. But Trump's 2016 campaign and his continuation of its provocative themes during his presidency are simply part of a historical continuum of whitelash, albeit one on which Trump excels for the sheer blatancy of his demagoguery. The question, though, is how much more of this cycle of whitelash can American democracy bear without unhinging?

Although I am a political progressive, even conservatives who embrace "colorblindness"—the idea of race neutrality in all situations—should also embrace the central premise of this book: voters have no right to vote for or against a candidate based on their racial stereotypes of the candidate's supporters or their racial stereotypes of the beneficiaries of the candidate's

policies. Yet it is not enough to simply declare such decision-making improper. It is, in fact, illegal. Americans may conceive of the act of voting for one candidate versus another as a personal choice; the law, however, views it as an action of the state. Voters' choices are thus subject to legal limitations, the most important of which is the prohibition against racial discrimination embodied in the Equal Protection Clause of the Fourteenth Amendment. The remedies that courts may impose upon finding an equal protection violation are broad in scope and possess the potential to deter voter whitelash or, at the very least, to blunt its effects. The containment of voter whitelash, in turn, offers transformative potential to American democracy at a time when it is ailing and when its participants are becoming increasingly heterogeneous.

Indeed, it is perhaps more accurate to say that American democracy is ailing because of the threat of its increasing heterogeneity. The prospect of more nonwhite voters—or simply greater numbers of all voters—exercising more power in the political process has not been greeted with uniform enthusiasm. Consider, for instance, Senate Majority Leader Mitch McConnell's reaction to a proposal to make election day a federal holiday, which would likely increase voter turnout. McConnell deemed the proposal a Democratic “power grab,”¹ reflecting the basic premise of Republicans that when it comes to voter participation, less is more.

Consider also the response of former Maine governor Paul LePage to a proposal to bypass the Electoral College, which concentrates disproportionate power in smaller, rural states and has twice in this young century deprived a plurality of voters of their preferred candidate for president. LePage was shockingly impolitic in his assessment of a plan in which states would allocate their electoral votes based on the national popular vote: “Actually what would happen if they do what they say they're gonna do is white people will not have anything to say. It's only going to be the minorities that would elect. It would be California, Texas, Florida.”²

McConnell's and LePage's views lay bare an uncomfortable truth that animates this book: antiquated and often contrived electoral structures like Tuesday voting and the Electoral College are the conduits by which voters who violate their legal obligation not to discriminate on the basis of race at the ballot box gain control of American democracy. The 2016 presidential contest starkly illustrates this convergence of malevolent intent and anti-democratic structures. The judicial remedies I propose in this book, however, would make the ballot box a far less welcoming terrain for racial discrimination.

My goals for readers of this book are simple. If I succeed in provoking readers to think about the obligations that attend the right to vote, then this book has accomplished a central mission. Beyond this, I expect that readers will come away with an accessible vocabulary for discussing race in our democracy—one that steers the conversation to evidence and facts rather than polemics. Most importantly, though, I hope the reader will enjoy what follows.

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