The War on Voting Rights

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Introduction

The 2020 presidential election will be a showdown over the right to vote. The outcome will be determined by an electoral system under attack from both foreign and domestic sources. Russian efforts to manipulate the 2016 presidential election are being extensively investigated, but the domestic war on voting rights is less well understood. After more than a century of expanding the voting rights of previously disenfranchised groups, the American electoral system today is confronted by political and legal maneuvers to curtail the hard-won rights of these same groups, ostensibly in the name of combating fraud and regulating voting, but in fact in order to change the outcome of elections.

Attacks on the integrity of the electoral system are not new. Throughout the 19th and much of the 20th century dominant political forces suppressed voting by African Americans and other minorities, women, immigrants and young people. Manipulation of voting in the 20th century included racist suppression of African American votes, first by Democrats and later by Republicans, as well as vote-buying and gerrymandering by political bosses from both parties. These practices are blatant examples of the vulnerability of the electoral process to partisan manipulation and the necessity of reform to safeguard voting rights.

Today the integrity of the system is again under attack. Since 2008 the Republican Party, threatened by demographic and political changes, has conducted a campaign to diminish the votes of its opponents through a combination of strategic and widespread gerrymandering and voting regulation.

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At the Republican National Convention in 2012, Senator Lindsey Graham (R-SC) declared that “we’re losing the demographics race. We’re not generating enough angry white guys to stay in business for the long term.” More recently, Senate Majority Leader Mitch McConnell (R-Ky) denounced legislative proposals to increase voter turnout as a “Democrat power grab.” These comments are symptomatic of a multi-year Republican effort to suppress, deter or dilute future votes by parts of the coalition that elected President Barack Obama. The Republican voter suppression effort temporarily halted the modern trend toward expanded voting rights that resulted from centuries of struggle to achieve and protect universal suffrage for American citizens.

Voting expansion peaked in 2008. Obama was elected president that year by a coalition that included 15 million first-time voters, 11.5 percent of the total, comprising a larger proportion of minorities and younger citizens than reflected among returning voters. In 2008, African American voting participation increased by five percent and youth participation by two percent from the 2004 election, resulting in the highest participation by African American and 18-24 year-old voters in thirty years. In the 2012 presidential election, the African American turnout rate exceeded the white turnout rate for the first time since the U.S. Census Bureau began reporting voting participation by race. By 2016, however, turnout had fallen by 7.1 percent for African Americans from their participation peak in 2012 and 5.5 percent for 18-24 year old voters from their peak in 2008. From 2008 to 2016 the turnout of all racial minorities combined dropped by 5 percent.

What happened?

Many factors contributed to the 2016 falloff in voting participation by minorities and younger voters, including the identities of the candidates, but Republican efforts to halt the expansion of voting rights no doubt played a major role. These efforts employed

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7 “Historical Reported Voting Rates,” US Census Bureau
time-worn methods of partisan gerrymandering, regulatory restriction and political spending. Three key decisions by the Supreme Court during this period facilitated these efforts – decisions in which the Court declined to review gerrymandering,\(^9\) invalidated core provisions of the Voting Rights Act of 1965,\(^10\) and removed all restrictions on political funding.\(^11\)

The results of the Republican campaign to suppress or dilute voting have been far-reaching. After 2010, gerrymandering of congressional districts by Republican state legislatures affected the outcome of approximately 70 congressional elections;\(^12\) the removal of restrictions on political funding facilitated Republican spending of $30 million through independent political action committees to win control of state legislatures in six of the seven states in which the most extreme gerrymandering took place;\(^13\) and new voting regulations were imposed in 19 states with Republican governors and legislatures.\(^14\) Even in 2018, when Republicans lost their majority in the House of Representatives, continued gerrymandering in Michigan, North Carolina, Ohio and Wisconsin meant that Republicans lost control of only two of 58 congressional seats in those states.\(^15\)

New voting regulations such as the consolidation of polling places and the purging of voter rolls have fallen most heavily on minorities and younger voters. In 2008 and 2012 large majorities of these groups voted for President Obama\(^16\) and for Democratic congressional candidates.\(^17\) By the 2016 election, however, their participation rates had

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\(^17\) 2008: Obama voting results: African Americans 95%, Hispanics: 67%, Asian Americans: 62%; voters 18-29: 66%; Income under $15,000: 73%; $15,000-$29,000: 60%.
2008: Congressional voting results: African Americans: 89% for Democratic candidates, Hispanics: 60%, Asian Americans: 58%, voters 18-29: 55%, Income under $30,000: 57%.
dropped substantially.\textsuperscript{18} Regulations such as voter roll purging not only reduced voting participation but may have influenced the outcome of close races – for example, in Georgia in 2018.

The Republican campaign to suppress or dilute votes has corroded democracy, frustrated the popular will and stimulated polarization. Dubious electoral practices have been undertaken by both parties,\textsuperscript{19} but since 2008 the systematic campaign of voter suppression and gerrymandering has been carried out primarily by Republicans. Proponents of new voting restrictions, most prominently President Trump, have sought to justify these measures by making spurious claims of widespread voter fraud, despite multiple studies that have found no evidence to justify such claims.

While there is a long tradition of partisan voting manipulation in the United States, the current Republican effort to suppress the vote is uniquely dangerous. First, unlike previous local or regional efforts, the suppression campaign has been organized nationally with a strategic aim of affecting the outcome of presidential elections and the control of Congress. Second, the campaign has succeeded in weakening the protection of voting rights of previously excluded groups, breaking half a century of national consensus against racial discrimination in voting that began with the enactment of the Voting Rights Act in 1965. Third, the suppression effort has been indirectly boosted by recent decisions of the US Supreme Court, an institution that had previously played a leading role in opening the electoral process, not restricting it. And finally, the gerrymandering aspect of the campaign has been facilitated by new digital technologies that greatly enhance the precision, scope and impact of partisan efforts to manipulate the electoral process.

In response to the suppression campaign, a counter-movement has emerged that seeks to restore and expand voting rights. The voting restoration movement had major


Democrats in New Jersey tried to push through a new heavily gerrymandered map in December 2018, but their effort was opposed by the National Democratic Party and the proposal was dropped. (“Voting Issues and Gerrymanders are now Key Political Battlegrounds,” \textit{The New York Times}, January 2, 2019).

Republicans in Wisconsin and Michigan state legislatures used lame duck sessions following the 2018 elections to strip powers from newly elected Democratic governors. (“Voting Issues and Gerrymanders are now Key Political Battlegrounds,” \textit{The New York Times}, January 2, 2019).
successes at the state level in the 2018 mid-term elections. The gold standard of reform is automatic voter registration, which guarantees the right to vote for all citizens based on routine interaction with government agencies. Since 2010, 17 states and the District of Columbia have adopted automatic voter registration,\textsuperscript{20} comparable proposals are being considered in 14 other states,\textsuperscript{21} and voter restrictions have been rolled back in 11 states through litigation.\textsuperscript{22} An anti-gerrymandering effort is gathering momentum, spurred by ballot initiatives in the 2018 elections. Efforts to restrict campaign spending have made less progress, hampered by the 2010 Supreme Court decision invalidating spending restrictions as unconstitutional limitations on political speech.\textsuperscript{23}

The constitutional founders confined the right to vote to male property holders. Lofty sentiments about the importance of voting in a democracy rang hollow for nearly two centuries during a long and often bloody struggle to enfranchise African Americans, other minorities, women and younger citizens. The words of Alexander Hamilton foretold the battle that continues today to achieve full voting rights for all citizens: “A share in the sovereignty of the state, exercised by citizens voting in elections, is one of the most important rights of the subject, and in a Republic ought to stand foremost in the estimation of the law.”\textsuperscript{24}

Expanding the Right to Vote

Who gets to vote in the United States has been contested throughout American history.

There was no explicit right to vote in the original Constitution of 1789. Each state determined who was eligible to vote, and states limited the electorate to male white adult property owners. Two centuries of conflict over voting rights, above all the Civil War, resulted in constitutional amendments mandating that the right to vote could not be abridged on account of race, color or previous condition of servitude (1870), sex (1920), or age for citizens above 18 (1971). Property ownership as a condition of voting was progressively abolished by the states from 1792 to 1856.

\textsuperscript{21} Ibid.
The right to vote is rooted in the Fifteenth and Fourteenth Amendments, adopted after the Civil War. The Fifteenth Amendment is explicit: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." The key words are "denied or abridged" – a restriction on the right to vote holds the same weight as a denial of the right. The Fourteenth Amendment provides that any state denying adult male citizens the right to vote "at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State or the members of the legislature thereof" shall lose congressional representation.25

The Constitution gives states the authority to administer and regulate voting, subject to federal constitutional requirements. Congress and the federal courts have the power to review state voting regulations under requirements of the Constitution and to impose national standards through legislation or judicial review. The Voting Rights Act of 1965, a major achievement of the Civil Rights Movement, is a prime example of the power of Congress to impose national standards to uphold the constitutional protection of voting rights.

The long-term trend of expanding voting rights reflects the struggles of tens of millions of disenfranchised African Americans and other racial minorities to overcome massive discrimination in order to participate in the democratic process. Even after the 14th and 15th amendments, African Americans were severely restricted from voting in many states through racially targeted measures such as poll taxes, literacy tests, “good character” provisions and “grandfather” clauses, as well as direct violence to prevent them from voting.26 In 1880, voter turnout for African Americans in the South was 61%. By 1912, voter suppression measures had decreased African American turnout in the South to just 2%. It was not until almost a century later that African American voter

25 The Supreme Court in its 5-4 decision in Bush v. Gore, 531 U.S. 104 (2000), interpreted the 14th amendment’s voting rights provision as follows: “The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College.” This interpretation is at odds with the 15th amendment’s explicit recognition of the right to vote, without reference to presidential electors. Even if a state can claim its own method for choosing electors, my Fletcher School colleague Michael Glennon has observed that Bush v. Gore is inconsistent with federal voting rights: “Although Florida vested the right to vote for presidential electors in the people of Florida, the Court seems to be hinting not-so-subtly that the legislature could have reclaimed that right ‘at any time’ – even after the people have voted.” Michael Glennon, “Nine Ways to Avoid a Train Wreck: How Title 3 Should be Amended,” 23 Cardozo Law Review 4, 1162 (2002).
turnout recovered from Jim Crow-era suppression tactics enough to match Reconstruction levels of voter participation.  

A recent impact of expanded voting rights was the surge of new minority voters in the 2008 presidential election. In 2008, approximately 15 million votes were cast by first-time voters, 11.5 percent of the total. These new voters were younger and more likely to be minorities than returning voters.  

60 percent of the new voters in 2008 were between the ages of 18 and 24, and 40 percent were minorities. 65 percent of eligible African Americans voted, 50 percent of eligible Hispanic Americans and 48 percent of eligible Asian Americans. This represented a substantial increase from 2004 when voting participation involved just 60 percent of eligible African Americans, 47 percent of eligible Hispanics, and 44 percent of eligible Asians. The expanded participation of minorities and younger voters in 2008 was a fatal blow to the electoral prospect of the Republican presidential candidate, who failed to attract their votes.

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Fear of Demographic Change

Fear of demographic change, intensified by the surge in minority and youth voting in 2008, motivated efforts by Republican officials to reverse the trend of expanding voting rights by using the tools of regulatory suppression. A campaign to raise new barriers to voting participation was initiated by Republicans whose political strength was challenged by the increase in minority and new voters in the 2008 elections. Some Republican leaders spoke candidly about how changes in the demographics of the electorate were becoming a growing threat their party. Senator Lindsey Graham (R-S.C.) observed at the 2012 Republican Convention: “The demographics race we’re losing badly. We’re not generating enough angry white guys to stay in business for the long term.”

In 2013 Republican Party Chairman Reince Priebus commented that “by the year 2050 we’ll be a majority-minority country; in both 2008 and 2012 President Obama won a combined 80 percent of the votes of all minority groups.”

The non-Hispanic white population in the United States is aging, and younger generations are increasingly more diverse.

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U.S. Census Bureau statistics show that non-minorities are growing far more slowly than racial and ethnic minorities as a percentage of the overall population. Non-Hispanic whites are the only population group projected to decline over the next forty years, down 8.2 percent, while mixed race groups are projected to increase by 225.5 percent, Asians by 128.1 percent, Hispanics by 114.8 percent, and African Americans by 42 percent. As Priebus noted, the non-Hispanic white population will no longer be a majority by 2044, and the U.S. will be a pluralist nation without any racial or ethnic group constituting a majority.

Since 2013, there have been more births of minority than non-minority babies in the United States. These demographic trends have fueled fears among some non-minority voters that their status and privilege are under threat, making the preservation of white identity a potent political issue.

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33 Ibid.
37 Ibid.
Demographic trends in the US also show that by 2019 Millennials born between 1981 and 1996 will outnumber Baby Boomers born between 1947 and 1964 as the largest living adult generation. In 2016, Millennials already comprised 27% of the voting age population, just behind Baby Boomers at 31%.

**Diluting Votes by Gerrymandering**

The most effective way to dilute the votes cast for one’s opponents is through legislative gerrymandering. This technique involves “the drawing of boundaries of electoral districts in a way that gives one party an unfair advantage over its rivals.” Gerrymandering makes it possible for the party that controls the drawing of district boundaries to receive a minority of votes in a future election but still gain a majority of legislative seats, and turns redistricting into a partisan weapon to use against political opponents. The term comes from Massachusetts Governor Elbridge Gerry’s 1812 redrawing of state senatorial districts in a way that grouped Federalist Party votes in a few districts in order to give disproportionate representation to the Democratic Republican Party.

Constitutional law requires that congressional districts be drawn to contain approximately the same numbers of people. This requirement stems from the principle of “one person one vote” set forth by the Supreme Court in a series of decisions implementing the constitutional right to vote. To comply with the equality standard, states must review and redraw their districts at least every ten years, following a decennial census, in response to changes in their population.

These requirements do not mandate any particular method of drawing districts, and the Supreme Court has so far rejected challenges to partisan line-drawing as “non-

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justiciable”. As a result, districts can be created to favor the legislative majority that draws the lines, bunching voters likely to vote for the opposing party into a few districts where their votes are diluted or wasted and spreading the line-drawing party’s voters across more districts to ensure their legislative majority. Gerrymandered districts often have contorted lines that wind through states with no rational geographic or municipal boundaries beyond those indicated by their partisan electoral advantages.

A wave of partisan gerrymandering after 2010 enabled Republicans, who by then controlled 58 state legislative chambers, to capture 54 percent of US congressional seats in 2012 while winning only 49 percent of the national congressional vote. Democrats also engaged in gerrymandering in one state, Maryland, during this period, but since 2010 the practice has been carried out extensively, systematically and almost exclusively by Republicans.

How has this been done?

In 2004, a plurality of the Supreme Court declared that “political gerrymandering claims are nonjusticiable,” leaving state legislatures free to gerrymander without fear of judicial intervention. After the 2008 presidential election, Republicans focused strategic attention on state and local politics. Anticipating demographic changes in the 2010

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43 See, e.g. Vieth v. Jubelirer, 541 U.S. 267 (2004). Justice Anthony Kennedy in a separate opinion left the door open for future challenges to partisan gerrymandering on First Amendment grounds, but joined the plurality holding that no constitutional violation had been proved in this case.

44 Statistics were drawn from the Cook Political Report’s 2012 election analysis.

45 Although recent cases of gerrymandering have primarily involved Republicans, Democrats too have gerrymandered. For example, Democrats redrew the congressional map in Maryland after the 2010 census to favor Democratic candidates. A federal court rejected the map and ordered it to be redrawn before the 2020 election.


There was another attempt, this time by some Democrats in New Jersey following the 2018 midterm elections, to launch a gerrymandering effort in the state legislature. However, opposition from New Jersey’s Democratic governor Phil Murphy and progressive activists have thus far been able to fend off this attempt.


census that were likely to favor Democrats, the GOP financed a systematic effort to gain control of governorships and state legislatures and then redraw congressional districts so that the party could dilute Democratic votes and capture additional congressional seats.\textsuperscript{47}

A Supreme Court decision in 2010 removed all restrictions on independent campaign funding by political action committees.\textsuperscript{48} This enabled the Republican State Leadership Committee, a political committee backed by large corporations and major individual donors, to develop an audacious plan to pour $30 million into states where reapportionment would take place in order to win legislative majorities.\textsuperscript{49} This political operation, dubbed “REDMAP” (Redistricting Majority Project), was never a secret. Republican Strategist Karl Rove outlined the plan in comments to the Wall Street Journal. In a March 2010 article, Rove declared that “Republican strategists are focused on 107 seats in 16 states. Winning these seats would give them control of drawing district lines for nearly 190 congressional seats.”\textsuperscript{50}

Unrestricted political funding combined with advancements in computer technology made it possible for Republican governors and state legislatures to refine and perfect gerrymandering far beyond earlier efforts.\textsuperscript{51} In the first stage of the REDMAP strategy, Republicans won control of the state legislatures in 10 of the 15 states that would be redrawing their state legislative maps after the 2010 census. In the second stage, Republican legislators used sophisticated software such as Maptitude (mapping software developed for businesses to analyze demographic and geographic data) to cluster Democratic voters into a handful of districts in order to dilute their votes and increase the number of districts with Republican majorities.\textsuperscript{52} Looking back on the results, Republican strategist Ed Gillespie proclaimed that “we were very successful. And there was no doubt in 2010 we put a focus on state legislatures that would have a significant impact in the redistricting process. I think it was a smart plan. No secret about it. . . I'm proud of the work that we did there, and I'm proud of the work that state


\textsuperscript{51} Ibid.

legislatures are doing. You know, we have, I think, now 58 of the 99 state legislative chambers in Republican hands.\textsuperscript{53}

The effects of gerrymandering on the 2012 elections were striking. In seven key states (Michigan, North Carolina, Pennsylvania, Wisconsin, Virginia, Ohio and Florida) where Republican-controlled legislatures redrew the districts, Republican candidates received 16.7 million votes and won 73 seats, while Democratic candidates received 16.4 million votes and won only 34 seats. In the absence of extreme gerrymandering, it is estimated that Democrats would have won this number of seats with only 14.7 million votes. Based on this estimate, gerrymandering caused 1.7 million votes cast for Democratic candidates (16.4 million minus 14.7 million) to be effectively wasted by packing Democratic voters into certain districts.\textsuperscript{54}

The impact of gerrymandering on the composition of state congressional delegations was dramatic.


\textsuperscript{54} Sam Wang, “The Great Gerrymander of 2012.”
In Pennsylvania, Republicans cast 83,000 fewer votes for House candidates than Democrats in 2012, but gerrymandering resulted in a 13-to-5 Republican majority in the congressional delegation. In Michigan, Republicans cast 240,000 fewer votes for House candidates than Democrats but sent a 9-5 Republican majority to Congress.\(^5\)
In North Carolina, a state with more registered Democrats than Republicans, Democrats lost three congressional seats after a newly gerrymandered map was produced in 2011, resulting in a 9 to 4 Republican majority in the 2012 election. The 2011 map was declared unconstitutional because it was racially discriminatory and was redrawn in 2016 as an explicitly partisan gerrymander. This contributed to the election of a 10 to 3

57 Daily Kos.
Republican majority in 2016. A Republican member of the North Carolina state assembly was publicly candid about the goal: “I propose that we draw the maps to give a partisan advantage to ten Republicans and three Democrats, because I do not believe it’s possible to draw a map with eleven Republicans and only two Democrats.”

The effects of earlier gerrymandering carried over to the 2018 elections. Although the Republicans lost their majority in the House of Representatives, “in states where gerrymandered lines were still in effect – Maryland, Michigan, North Carolina and Wisconsin – incumbent political parties lost control of only two of 58 seats, or 3%. By contrast, Pennsylvania, where gerrymandered districts were overturned by a decision of the Pennsylvania Supreme Court, four of the eighteen seats, or 22%. flipped party, Where gerrymandering was still in effect, it nearly froze representation, even in the face of the biggest wave of voter sentiment in decades.”

In Ohio, Democrats won 48 percent of the popular vote in 2018, up from 43 percent in 2016. However, despite this increased share of the vote, they received only four of the state’s sixteen seats in the House of Representatives– the same four seats they had

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62 Daily Kos.
held since 2012. As experts have noted, “The gerrymander was drafted with large enough margins that even the five-point shift toward the Democrats failed to push a single Republican district into the blue, leaving the 12–4 seat split intact.”

The upcoming 2020 census will lay the groundwork for future legislative redistricting decisions and the possibility of further gerrymandering. A directive by Commerce Secretary Wilbur Ross to include a citizenship question in the census was struck down by a federal court because it would discourage noncitizens from responding to the census, thereby undermining the constitutional mandate to count every person. The decision is on appeal to the Supreme Court, and the stakes are high. As the New York Times reported, “Total population figures will be used to reapportion seats in the House of Representatives in 2021, so the contours of the Congress, the Electoral College and thousands of state and local political districts could be affected. Because noncitizens tend to live in places that disproportionately vote Democratic, undercounting them in the census would be likely to shift federal spending and political power to Republican areas.”

New State Voting Regulations

Beyond gerrymandering, the voter suppression campaign has focused on enactment of new state-level voting regulations. Since 2010, new regulations have been imposed in nineteen states with Republican-majority legislatures at the time of their enactment. These states are: Alabama, Arizona, Arkansas, Florida, Georgia, Indiana, Iowa, Kansas, Missouri, Montana, New Hampshire, North Carolina, North Dakota, Ohio, South Carolina, South Dakota, Tennessee, Texas, and Wisconsin.

Voting restrictions can have a disproportionate impact on voting by minorities, the poor and foreign-born citizens. For example, stricter identification requirements make it

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65 Ibid.
harder for people without acceptable photo identification or stable addresses to vote.\textsuperscript{68} A pattern of closing polling places in rural and mostly minority areas means that people have to travel longer distances to get to their polling place, a barrier for voters with limited access to transportation. Other new state policies, such as Georgia’s purging of voters whose registration information is not an “exact match” to the information on their state ID, have been found to have a disproportionate impact on minority voters.\textsuperscript{69}

Six states that enacted new voting regulations after 2010 showed significant drops in voter turnout between 2010 and 2016.\textsuperscript{70} While decreases in turnout can be attributed to multiple factors, the new restrictions were a major factor. In Wisconsin, a study estimated that 16,800 people in two counties may not have voted in the 2016 election because they did not have the photo ID required by a new law enacted by the Republican-majority state legislature in 2011. A survey of registered non-voters in two counties showed that black and low-income non-voters were more likely than white and high-income non-voters to state that the reason they did not vote was Wisconsin’s new photo ID law.\textsuperscript{71}

\textsuperscript{68} For example, a 2017 North Dakota law requiring voters to show a form of identification that includes a residential address, made it difficult for many Native Americans living on reservations to vote since many did not have residential street addresses.


Another study conducted by researchers at the University of California San Diego concluded that strict photo identification laws can disproportionately affect the turnout of minorities and foreign-born citizens.\(^72\) The strongest impact was on foreign-born citizens, whom the study found were 12.7 percent less likely to vote in general elections and 3.6 percent less likely to vote in primaries in states with strict photo ID laws. In a finding that has been disputed by other studies, the UCSD study estimated that Democratic turnout dropped by an estimated seven to eight percent in general elections when strict photo identification laws are in place. The predicted drop in turnout for Republicans was four to five percent.

The disproportionate impact of new voting regulations on racial minorities has been exacerbated by the withdrawal of federal safeguards of minority voting rights. In 2013 the Supreme Court struck down as unconstitutional the formula of the 1965 Voting Rights Act used by the federal government to determine whether state voting restrictions have a racially discriminatory impact.\(^73\) In its majority opinion, the Court held that “the Voting Rights Act employed extraordinary measures to address an extraordinary problem, [but] the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions.”\(^74\) The increased vulnerability of minority voters to new restrictions following the Shelby decision has been greatest in areas with a history of racial discrimination that were previously required to submit proposed voting law changes to the Justice Department for review.

The impact of Shelby has made voting by minorities more difficult in some areas previously covered by the Voting Rights Act. A study concluded that between 2013 and 2016, counties in areas that had previously required federal “pre-clearance” because of a record of racial discrimination drastically reduced the numbers of polling places. In 165 of 381 counties examined, a total of 868 polling places were removed.\(^75\) Arizona closed 212 polling places between 2012 and 2016, more than any other state, including a 63% reduction in Cochise County, 50% in Graham County, and 48% in Gila County -- counties with substantial minority populations.\(^76\)

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\(^{73}\) *Shelby County v. Holder*, 570 U.S. 529 (2013).

\(^{74}\) Ibid.


Voter Fraud: A Red Herring

Proponents of stricter voting laws claim restrictions are necessary to prevent voter fraud.

Although state laws vary, voter fraud is generally defined as “the intentional corruption of the electoral process by voters.” Voter fraud usually takes one of three forms: impersonation, double voting, or ineligible voting.

President Trump has repeatedly claimed, without evidence, that widespread voter fraud was committed by his opponents in the 2016 election, asserting that “there were three to five million illegal votes cast in the 2016 election.” On Nov. 27, 2016, the President tweeted: “In addition to winning the Electoral College in a landslide, I won the popular vote if you deduct the millions of people who voted illegally.” On January 25, 2017, Trump tweeted: “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!” The White House produced no evidence to support these claims, which seemed in retrospect to have been intended to encourage regulation to suppress voting, not combat fraud.

Claims of widespread voter fraud have been made without evidence by other Republican officials as well. Kris Kobach, former Secretary of State of Kansas, has been outspoken in his crusade against voter fraud – for example, citing unlawful felon voting in Minnesota and claiming without evidence that “fraudulent votes tipped the election for (former Senator Al) Franken.” In 2005, the U.S. Senate Republican Policy Committee stated in a report that “voter fraud continues to plague our nation’s federal

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elections, diluting and canceling out the lawful votes of the vast majority of Americans. The report contained no credible evidence to back up the claim.

Studies have failed to demonstrate the existence of widespread voter fraud. The Heritage Foundation, a conservative think tank, has compiled a nationwide database of charges of voter fraud over 36 years (from 1982 to 2018). During this period 1,019 charges resulted in criminal convictions, an average of just 28 convictions nationally per year. In 2018, 34 convictions were recorded for voter fraud: nine of ineligible voting (non-citizen or felony voting), seven cases of ballot petition fraud (forging signatures on ballot petitions filed to get certain issues on ballots), six of false registrations (voting under a registration using a fake name or claiming residence where a voter does not really live), five of duplicate voting, three of fraudulent use of absentee ballots (requesting absentee ballots and voting in the name of another person), three of intimidation of voters by election board members, and one case of illegal assistance at the polls (filling out another person’s ballot for them without their consent). The only states with more than two voter fraud convictions were Illinois (12), Texas (8), Pennsylvania (4) and New Hampshire (3).

In 2002, the Justice Department established the Ballot Access and Voting Integrity Initiative to prosecute voter fraud. From 2002 to 2006, just 86 people across the country were convicted with ballot fraud offenses.

In short, voter fraud convictions were an infinitesimal part of the overall vote, which in 2018 was more than 110 million votes cast nationwide.

In February 2017 President Trump established the Presidential Advisory Commission on Election Integrity to investigate voter fraud in the 2016 election. The Commission found no evidence of widespread voter fraud and was cancelled in January 2018 after it became the target of eight lawsuits accusing it of violating federal laws. Documents

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released from the lawsuits (including e-mails and PowerPoint presentations from the two meetings held by the panel) contained no evidence of widespread voter fraud.\[8889\]

A 2017 study published in the *Electoral Studies Journal* examined President Trump’s accusations of widespread voter fraud by looking closely at three states where Trump claimed such fraud took place: New Hampshire, Virginia, and California. The study found “little evidence consistent with widespread and systematic fraud,” “no evidence of problems in the vein raised by Donald Trump”, and “no suspicious patterns in result timing” that would imply a “rigged” election.\[90\] The study’s results were “consistent with various state-level investigations conducted in the initial months of 2017, all of which have failed to find any evidence of widespread voter fraud in the 2016 General Election.”\[91\]

In an earlier preliminary study by the *New York Times*, 26 states and the District of Columbia reported no credible allegations of voter fraud in the 2016 election, and eight states reported only one credible allegation. The highest numbers of credible allegations were very low: Tennessee (40 allegations out of 4.3 million votes cast in the primary and general elections) and Georgia (25 allegations out of 4.1 million votes cast in the primary and general elections). There was no evidence of widespread fraud.\[92\]

A 2014 study published in the *Electoral Law Journal* looked for evidence of voter impersonation, the type of fraud targeted by strict voter ID laws and later cited as a basis for President Trump’s short-lived Advisory Commission. The study found few reports of impersonation and concluded that “the proportion of the population reporting voter impersonation is indistinguishable from that reporting abduction by extraterrestrials.”\[93\]

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88 “What's remarkable about the documents is what's not in there, and what's not in there is any substantiated evidence of voter misconduct at any scale. In fact, one of the troubling things about the documents that we saw was that before we were even really meeting, commission staff were working on a framework of a report. And several sections of report talk about voter fraud, and those sections are completely blank. They didn’t insert any information whatsoever. So that's why we've been saying that, even though the idea was to investigate voter fraud, it is pretty clear that the purpose of the commission was to actually affirm and validate the president’s claims whether or not we had any evidence of any such voter misconduct.” (Matthew Dunlap, “Member of Disbanded Trump Voter Fraud Commission Speaks Out,” NPR, August 4, 2018, https://www.npr.org/2018/08/04/635668304/member-of-disbanded-trump-voter-fraud-commission-speaks-out.)

89 Website of Maine Secretary of State Matthew Dunlap, http://paceidocs.sosonline.org/.


91 Cottrell, Herron, and Westwood, 138.


Preventing fraud has long been used to justify voter suppression. For example, in 1981 in Alabama, a “re-identification” bill was passed, with the claimed justification of preventing fraud, which purged voting rolls in three mostly African American counties and required purged voters to go to the courthouse to “re-identify” themselves to re-register. This resulted in a 43% decline in African American registration in these counties.\(^{94}\)

In 1986 a “ballot integrity” program was launched by the Republican National Committee (RNC) in Louisiana, Indiana and Missouri without legislative authority under a claim that dead or fictional people were casting ballots. State party officials sent mail to registered voters in heavily Democratic areas in the three states with a return address of the Ballot Integrity Group Inc, a Chicago company hired by the RNC. The Ballot Integrity Group turned over the returned letters to election officials to encourage them to purge voters from election rolls, using the returned letters as evidence that voters no longer resided at their listed addresses.\(^{95}\) Democrats filed a lawsuit, which turned up a memo that described the program’s goal: “I would guess that this program will eliminate at least 60-80,000 folks from the rolls,” one GOP operative wrote. “If it’s a close race, which I’m assuming it is, this could keep the black vote down considerably.”\(^{96}\)

**Toolbox of Voting Regulations**

Voter suppression efforts have employed a wide range of tools to regulate voting. The toolbox includes stricter identification requirements, proof of citizenship, restrictions on voter registration and voter registration drives, bans on voting by convicted felons, purges of voter rolls, limitations on early and absentee voting, and consolidation of polling places.

**Identification Laws:**\(^{97}\) Some form of identification is required by 35 states as a reasonable safeguard against voter fraud. The requirement usually allows a range of

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\(^{94}\) Anderson, *One Person, No Vote*, 29.


acceptable documents such as a driver’s license or other state issued ID card, a military or Veterans’ Affairs card, or a tribal ID. In some cases, voters without an acceptable ID can sign an affidavit of identity or in some other way vouch for their identity to be allowed to vote. However, a number of states have enacted new stricter ID requirements since 2010 that eliminate the affidavit-of-identity option for voters and further restrict the types of ID accepted at polling places. States with new stricter ID requirements enacted since 2010 include Kansas (2011), Mississippi (2011), North Carolina (2018), North Dakota (2017), Tennessee (2011), and Virginia (2012). These laws require voters to show a specified form of identification. In Tennessee, for example, the only acceptable forms of identification permitted by the 2011 law are state-issued IDs such as a driver’s license or gun permit, US passports, or military IDs. Student IDs and non-photo IDs are not accepted. North Dakota’s 2017 ID law requires a form of ID that includes a residential address. This has threatened to suppress the vote of the 20,000 Native Americans who live on reservations in North Dakota, since an estimated 5,000 do not have conventional addresses. The address requirement was upheld by the Supreme Court in 2018. Some states have enacted new identification requirements since 2010 giving discretion to local officials and poll workers to determine the voting eligibility of voters with inadequate identification documents. States with new discretionary requirements enacted since 2010 include Alabama (2011), Arkansas (2018), Iowa (2017), Missouri (2016), New Hampshire (2018), North Dakota (2017), Rhode Island (2011), South Carolina (2011), Texas (2017) and Wisconsin (2012). Laws in these states require voters to show ID and allow poll workers the discretion to vouch for or turn away voters without the specified identification, or to accept an affidavit of identity.

Proof of citizenship for registration has been required by some states since 2010. The Supreme Court ruled in 2013 that proof of citizenship cannot be required for voters registering with a federal registration form. States requiring proof of citizenship, therefore, can do so for people registering to vote in state and local, but not federal, elections. States with new proof-of-citizenship restrictions enacted since 2009 include Georgia (2009), Kansas (2010), Alabama (2011) and Arizona (2018). Kansas passed a proof of citizenship law in 2011, but it was struck down by a federal judge in 2018 based

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on the 2013 Supreme Court ruling and a pre-existing state ‘universal registration’ law. Alabama and Georgia have passed proof of citizenship laws, but these have not been implemented because of the complications of establishing a bifurcated registration system following the Supreme Court ruling. Arizona enforces a proof of citizenship law for voters registering with the state registration form to vote in state and local elections.

Restrictions on voter registration drives have been enacted by four states since 2010: Florida (2011), Illinois (2011), Iowa (2017), Texas (2011). The Texas law requires anyone conducting a voter registration drive to undergo training to become a volunteer deputy registrar. According to the Secretary of State’s instructions: “upon satisfactorily completing training and examination, if required, the voter registrar [of your county] will appoint you as a volunteer deputy registrar.” Florida and Iowa impose short, strict deadlines (2 days in Florida and 7 days in Iowa) for groups registering voters to officially submit registration forms. Illinois limits the period individuals have to turn in their voter registration forms (2 business days through mail and 7 days through personal delivery).

Training programs are required for community registration groups in Colorado, Illinois, New Mexico and Texas. There are deadlines for returning new registrations, and penalties for late returns, in Florida (48 hours), California (3 days), Delaware (5 days), Maryland (5 days), New Mexico (2 days), Oregon (5 days), Texas (5 days), Washington (5 days), Iowa (7 days). Florida passed a law in 2011 that required groups registering voters to turn in registration forms within 48 hours. After the law was put into place, organizations such as the League of Women Voters and Rock the Vote stopped voter

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registration drives in Florida and voter registration declined significantly. In 2012, a federal judge blocked the provisions of the law requiring the 48-hour turn around, calling them “harsh and impractical.”

Prohibition of voting by persons with a felony conviction is a longstanding limitation on the right to vote, notwithstanding the Fifteenth Amendment’s prohibition against denying or abridging the right to vote “on account of a previous condition of servitude,” which some commentators argue should make denial of the right to vote for ex-felons unconstitutional.

Since 2010 three states have adopted new restrictions on voting by persons with felony convictions: Florida (2011), Iowa (2011), South Dakota (2012). Until 2018, Florida had the highest number of people barred from voting due to a felony conviction (approximately 1.4 million). In 2011, Republican Governor Rick Scott implemented a multi-year waiting period before ex-felons could be considered on a case-by-case basis for clemency and reinstatement of voting rights. In November 2018, however, Florida adopted a ballot initiative restoring voting rights to ex-felons, except for those convicted of murder and sex offenses. In Iowa, following a 2005 gubernatorial executive order, felons’ voting rights were reinstated after completion of probation or parole. In 2011 this was reversed, and since 2011 ex-felons’ recovery of voting rights is determined on a case-by-case basis that requires fulfillment of certain prerequisites such as paying back court costs. In South Dakota, prior to 2012 people convicted of felonies lost their right to vote only while incarcerated, but since 2012 they have also lost their right to vote while on probation or parole. In Kentucky, as in Iowa, felons lose their right to vote indefinitely unless granted a governor’s pardon.

In 10 states, felons lose their right to vote while on parole or probation and for some additional period after that. Restoration of voting rights depends on the nature of the

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107 Lizette Alvarez, “Judge to Block Changes in Florida Voter Registration.”
crime. In 22 states, felons lose their right to vote while incarcerated and on parole or probation, but automatically regain the right to vote after that period. In 14 states and the District of Columbia, felons lose their right to vote while incarcerated but regain it as soon as they are released even if on parole or probation. In Maine and Vermont, felons retain their right to vote even while incarcerated.\footnote{113}

Voter roll purges are removals of registered voters from voting rolls. The stated goal of purges is to keep rolls up to date by removing voters who have died or moved away. However, states have improperly removed eligible voters by adopting purging policies that make it difficult for those wrongfully purged to be reinstated. Four states have implemented sweeping new voter roll purges since the 2016 election: Georgia, Indiana, Nevada, Wisconsin.

Purges can have a disproportionate effect on minority voters, as shown by the case of Georgia. Georgia’s “exact match” registration law requires voters’ personal information on their registration form exactly to match the information on their ID and Social Security cards. In a 2017 lawsuit challenging the “exact match” formula as discriminatory against minorities and low-income voters, a court order was issued requiring former Georgia Secretary of State (now Governor) Brian Kemp not to cancel voter registrations flagged by the system, but to label them as “pending,” allowing flagged voters to cast provisional ballots. In October 2018 an Associated Press investigation found that 53,000 registrations were listed as “pending” by the office of the Secretary of State, 70% of which were from African American voters.\footnote{114} Kemp refused calls to step down as Secretary of State and hand over election oversight to another state official during the campaign.\footnote{115} Ten days before the election, a federal district judge issued an injunction blocking election officials from throwing out absentee ballots that did not meet “exact match” requirements and rejecting Kemp’s request to stay the injunction.\footnote{116}

Researchers at Princeton University found widespread likely inaccuracies in the ‘exact match’ system used by Georgia. Based on a probabilistic analysis, 30% of eligible voters were not cleared by the ‘exact match’ algorithm, pointing to methodological flaws in using ‘exact match’ as a basis for voter roll purges. Furthermore, the study found that minority voters were disproportionately affected by ‘exact match’: “match rates using

exact matching are nine and six percentage points lower for black and Hispanic voters, respectively, than for white voters.”\textsuperscript{117} During the campaign, a hotline set up by Democratic gubernatorial candidate Stacey Abrams to report problems voters faced at the polls received more than 40,000 calls. A lawsuit filed on October 27, 2018 in the U.S. District Court in Georgia alleged widespread disenfranchisement of African American voters due to “exact match” requirements.\textsuperscript{118}

**New restrictions on early voting** have been imposed by seven states since 2010: Florida (2011), Georgia (2010), Iowa (2017), Nebraska (2013), Ohio (2014), Tennessee (2011) and West Virginia (2011). The restrictions shorten the period allowed to vote early. In Nebraska, for example, the state legislature reduced the early voting period from 35 to 30 days. Ohio eliminated “Golden Week,” the week in which voters could register and vote at the same time. Some states have also placed new restrictions on mail-in and absentee voting, including Arizona (2016), Iowa (2017) and Ohio (2014). Arizona made it illegal to turn in another voter’s completed mail-in ballot with his or her permission, and Ohio passed a law that prohibits county election boards from sending unsolicited absentee ballot applications.\textsuperscript{119}

**The closing of polling places**, purportedly to cut costs, has been carried out by several states since 2010. Voters whose precinct polling place has been closed are reassigned to another precinct, often further from where they live. This discourages voter turnout. As noted earlier, recent polling place consolidation in Arizona has disproportionately affected Hispanic voters, while recent closures in Georgia have disproportionately affected African American voters.\textsuperscript{120} In a particularly blatant example of voter suppression, Dodge City, Kansas (population 27,000), informed voters less than six weeks before the 2018 election that the city’s only polling place would be moved to a new location six miles outside of downtown, and one mile from the closest bus stop. Dodge City’s population is 59% Hispanic. A lawsuit filed by the ACLU on


behalf of several Dodge City voters asserted that the lack of additional polling places in more central locations would suppress Hispanic voters.\footnote{121}

**Restrictions on student voting** are implicitly imposed by domicile requirements. Two states have enacted new domicile requirements since 2010: Wisconsin (2012) and New Hampshire (2018). New Hampshire requires voters to show that they are “domiciled” in the state in order to register, a requirement that impacts college students financially and deters them from voting, according to opponents.\footnote{122} Proof of domicile must be shown by “a New Hampshire driver’s license, a New Hampshire vehicle registration, an armed services identification, or other photo identification issued by the United States government.”\footnote{123}

In a 1972 Supreme Court ruling striking down a year-long residency requirement in Tennessee, the maximum residency period that a state can require to register to vote was set at 30 days. The Court held that “[t]he durational residence requirements (longer than 30 days) are violative of the Equal Protection Clause of the Fourteenth Amendment, as they are not necessary to further a compelling state interest.”\footnote{124} Today, 26 states have durational residency requirements from between 10 and 30 days, while 24 states do not have such requirements.\footnote{125}

**Elimination of same-day voter registration** is another tool to restrict voting. Ohio eliminated same-day voting registration in 2014. Fifteen states and DC currently allow voters to register on Election Day. In the remaining states, voter registration deadlines vary from 8 to 30 days before an election.\footnote{126}

Unrestricted Campaign Spending

The removal of legal restrictions on campaign spending has a far-reaching effect on voting rights. Unrestricted campaign spending impacts the right to vote by increasing the influence of wealthy donors and the interest groups and corporations with which they are affiliated, thereby severely diluting the influence of non-major-contributor voters. Unrestricted campaign finance also facilitates the use of major contributions to capture state legislatures and gerrymander congressional districts, as demonstrated by the Republican REDMAP strategy discussed above.

In 2010, the Supreme Court invalidated all restrictions on spending in political campaigns, holding that funding restrictions are inconsistent with the constitutional protections of free speech under the First Amendment.\(^\text{127}\) The decision opened the floodgates of campaign finance and disproportionately enhanced the political influence of wealthy donors at the expense of average voters. The ruling overturned a ban on independent campaign expenditures by corporations and unions, giving them license to spend without restriction on advertisements and other campaign materials for individual candidates.\(^\text{128}\) The Court upheld existing campaign spending disclosure laws on the theory that “transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”\(^\text{129}\) However, disclosure laws exempt two major categories of expenditures — those made by business associations and social welfare organizations\(^\text{130}\) — from having to disclose their donors, thereby providing a major loophole for secret political expenditures and running counter to the Court’s transparency theory.

The decision in *Citizens United* led to the creation of super PACs. These new political funding organizations collect major donations from wealthy individuals and corporations, which they use to fund campaign advertising, usually negative.\(^\text{131}\) The decision


\(^{130}\) See sections 501(c)(4) and 501 (c)(6) of the Internal Revenue Code.

\(^{131}\) The ruling in *Citizens United* resulted in *SpeechNow.org v. FEC*, authorizing unlimited contributions by Super PACs. The lower court case used the Citizens United case as precedent when it held that limits on contributions to groups that make independent expenditures are unconstitutional.
invalidated a century of laws enacted to protect elections from influence by corporate and union funding.\textsuperscript{132}

Following the decision in \textit{Citizens United}, the 2012 presidential election year saw a significant increase in independent expenditures, with greater increases in the 2016 presidential election year, and comparable but lower increases in the 2014 and 2018 mid-term election years.\textsuperscript{133}

According to the Center for Responsive Politics, a nonpartisan think tank researching the effects of money in politics, in the 2016 presidential and congressional elections, one out of every five dollars of campaign spending came from independent committees and Super PACs with access to unrestricted funding sources. The top 20 disclosed individual donors gave a total of more than $500 million to political organizations, as did the top 20 disclosed organizational donors, such as the Bloomberg LP and Las Vegas Sands.\textsuperscript{135} The total campaign contributions from the wealthiest one tenth of one percent of the population increased from $1.6 billion in 2012 to $2.3 billion in 2016, an increase of 45%. Most of this increase consisted of contributions to outside funding groups.\textsuperscript{136}

Even within the top 0.01 percent of the population, campaign donations – and thus,

\begin{itemize}
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political influence – are increasingly concentrated in a handful of individuals: In 2012, the 50 largest individual donors made up 19 percent of the top 0.01 percent's contributions; in 2016, the 50 largest donors made up nearly 30 percent. By contrast, contributions by small donors (individuals giving $200 or less in an election cycle) fell by 3.4% from 2012 to 2016.  

Restoring the Right to Vote

Although a wide variety of gerrymandered districts and voting restrictions have been implemented since 2010, grassroots legislative efforts and federal court challenges have pushed back against voter suppression and succeeded in enacting new voting reform laws, especially in the 2018 mid-term elections, and striking down some restrictions through litigation. These state-level reforms include anti-gerrymandering measures, automatic voter registration, same-day voter registration, pre-registration, online registration, vote-at-home, no-excuse absentee voting, ex-felon voting rights restoration and early voting. In January 2019 legislation was introduced by Democrats in Congress seeking to incorporate many of these reforms at the federal level.  

137 Ibid.

138 H.R. 1 (116th Congress).
Anti-gerrymandering reforms were adopted by six states in 2018. Colorado passed two ballot initiatives to create independent 12-member commissions responsible for approving district maps for congressional districts and for state legislative districts based on rational geographic and municipal boundaries.\(^{139}\) Michigan established an independent redistricting commission with the power to draw congressional and legislative districts.\(^{140}\) Missouri passed a ballot initiative to make changes in the redistricting process, the state lobbying laws and state campaign finance limits. The redistricting reform created the position of non-partisan state demographer responsible for drawing state legislative districts. In a nod to political reality, the proposed redistricting map would then be reviewed by existing redistricting commissions comprised of state legislators.\(^{141}\) Utah created a seven-member independent redistricting commission to draft maps for state legislative and congressional districts.\(^{142}\) In reaction to dramatic gerrymandering in Ohio, Ohio voters approved a constitutional amendment designed to force both parties to compromise on the districting map by requiring any new map to be approved by three-fifths of the state legislature, including at least half of the minority party members.\(^{143}\) Finally, the Pennsylvania Supreme Court reviewed the Pennsylvania congressional district map under the state constitution and redrew the map to make it more competitive.\(^{144}\)

**Automatic Voter Registration (AVR)**\(^{145}\) is one of the most effective ways that states can increase voter participation. By automatically registering eligible voters when they interact with government agencies, AVR streamlines the voter registration process and removes barriers to registration. Since 2013, 18 states and the District of Columbia have implemented Automatic Voter Registration (AVR). These include New Mexico (2013), Oregon and California (2015), West Virginia, Vermont, Georgia, DC, [139](https://ballotpedia.org/Colorado_Amendment_Z,_Independent_Commission_for_State_Legislative_Redistricting_Amendment_(2018)).

[140](https://ballotpedia.org/Michigan_Proposal_2,_Independent_Commission_Redistricting_Initiative_(2018)).

[141](https://ballotpedia.org/Missouri_Amendment_1,_Lobbying,_Campaign_Finance,_and_Redistricting_Initiative_(2018)).

[142](https://ballotpedia.org/Utah_Proposition_4,_Independent_Advisory_Commission_on_Redistricting_Initiative_(2018)).

[143](https://ballotpedia.org/Redistricting_in_Ohio).


[145](https://www.brennancenter.org/analysis/history-avr-implementation-dates).
Connecticut and Alaska (2016), Colorado, Illinois and Rhode Island (2017), and Maryland, Massachusetts, New Jersey, Washington, Michigan and Nevada (2018). This makes voter registration “opt-out” instead of “opt-in”—eligible citizens who interact with government agencies for any reason are automatically registered to vote or have their existing registration information updated, unless they affirmatively decline.\(^\text{146}\)

**Restoration of voting rights for ex-felons.** Since 2010 six states have taken major steps to restore the voting rights of former felons. In a sweeping reform in 2018 Florida voters passed a ballot initiative restoring voting rights to approximately 1.4 million citizens with felony convictions after they complete their sentences, including prison, parole, and probation (excluding convictions for murder or sex offenses).\(^\text{147}\) In 2016 Virginia Governor Terry McAuliffe announced that he would restore voting rights for ex-felons with completed sentences on an individual basis every month after the Virginia Supreme Court struck down his earlier executive order that provided blanket voting rights restoration to ex-felons with completed sentences. To date, Virginia has restored voting rights to over 170,000 people with felony convictions.\(^\text{148}\) In 2016 Maryland restored voting rights of 40,000 ex-felons by legislation (immediate restoration after prison release).\(^\text{149}\) In 2017 Wyoming eased the process for ex-felons who had been convicted of non-violent crimes to restore voting rights after completing probation and other requirements mandated by their sentence.\(^\text{150}\) In 2013 Delaware passed a constitutional amendment to expand opportunities for ex-felons to regain their voting rights. In 2018 New York Governor Andrew Cuomo announced a plan to restore voting rights to 35,000 New Yorkers on parole.\(^\text{151}\)

**Online voter registration.** Over the last decade the registration process has been simplified in many states through legislative or administrative action permitting voters to register online. 36 states and the District of Columbia have authorized online


\(^{150}\) Ruth Kimata, “As of this month former Wyoming felons will have the right to vote,” *KGWN*, July 21, 2017, https://www.kgwn.tv/content/news/Former-Wyoming-felons-will-have-the-right-to-vote--435839693.html.

registration since 2010: Colorado, Indiana, Louisiana, Oregon and Utah in 2010; New York in 2011; California, Maryland, Nevada and South Carolina in 2012; Illinois, Minnesota and Virginia in 2013; Connecticut, Delaware, Georgia, Illinois and Missouri in 2014; Alaska, DC, Hawaii, Massachusetts, Nebraska, Pennsylvania, Vermont and West Virginia in 2015; Alabama, Iowa, Kentucky and New Mexico; Florida, Idaho, Ohio, Rhode Island, Tennessee and Wisconsin in 2017; and Oklahoma in 2018.


Same-day registration. Beginning in 2010, ten states and the District of Columbia have reformed the registration process to allow registration on the same day as voting: DC (2010); California and Connecticut (2012); Colorado and Maryland (2013); Hawaii (2014); Illinois and Vermont (2015); Utah, Washington and Michigan (2018).


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158. “Absentee and Early Voting.”
Pre-registration. In order to encourage youth voting, six states since 2013 have adopted procedures allowing 16- and 17-year-old citizens to pre-register so that they are immediately eligible to vote when they turn 18: Colorado (2013); California, Louisiana and Massachusetts (2014); Utah (2017); and Washington (2018). This brings the number of states allowing preregistration at age 16 to thirteen.\textsuperscript{160}

Campaign finance reform. In 2018, five states passed ballot initiatives to reform their laws on campaign finance. In Missouri, Amendment 1, passed in 2018, regulates campaign funding and lobbying activities by lowering campaign contribution limits to state legislature candidates, banning lobbyist gifts worth more than five dollars and requiring an elected official to wait two years after stepping down from office to become a professional lobbyist. In North Dakota, a 2018 ballot initiative established an ethics commission, banned foreign political contributions, and required campaign finance information to be made public. In Arizona, an initiative “prohibits candidates from using their public financing accounts to give funds to political parties or tax-exempt 501(a) organizations that are allowed to engage in activities to influence candidate elections.”\textsuperscript{161} In Massachusetts, an initiative established a citizens commission to prepare a report describing the state of existing state laws governing campaign finance and recommending if and how Massachusetts can regulate corporate political spending. In South Dakota, Measure 24 “bans individuals, PACs and other entities that are outside of the state from making contributions to ballot committees, which are groups that receive money to either support or oppose a ballot initiative.”\textsuperscript{162}

Ranked choice voting.\textsuperscript{163} In ranked choice voting, voters rank candidates instead of voting for only one person. If no single candidate wins a majority in the first round of voting, the candidate with the fewest votes is eliminated and their votes redistributed to the second-choice candidate on their ballot. This is repeated until one candidate has a majority. Ranked choice voting facilitates the election of a consensus candidate while at the same time allowing voters to express their preferences by voting for third party candidates without worrying about “throwing away” their votes. Maine became the first state to institute ranked choice voting after approving it in ballot measures in 2016 and


2018. In the 2018 election, Maine’s 2nd Congressional District was decided by ranked choice voting. Democrat Jared Golden defeated Republican Bruce Poliquin after a ranked choice tabulation, even though Poliquin won more votes in the first round. Poliquin refused to concede the election, declaring: “It is now officially clear I won the constitutional ‘one-person, one-vote’ first choice election on Election Day that has been used in Maine for more than one hundred years. We will proceed with our constitutional concerns about the rank vote algorithm.”

Litigation has been successfully used to push back against state legislative and administrative efforts to restrict voting rights. Major court victories were recorded in six states in 2018. In Arizona, a settlement was reached on a lawsuit challenging the state’s requirement that voters show documentary proof of citizenship. While the state will continue to require proof of citizenship to vote in state and local elections, it agreed to ease the process by automatically searching state records for documentation of citizenship for any voter who registers using either the state or federal form. In Florida, a federal district court stopped the Secretary of State from eliminating early voting on college campuses. In Indiana, a federal district court blocked the state from implementing a voter purge law that would have used the unreliable “cross-check” program to eliminate voters from voting rolls. In Iowa, a county district court blocked some provisions of a law limiting early and absentee voting, stating that it “substantially and directly interferes with Iowans’ constitutional rights to vote.” In Kansas, a federal district court struck down a documentary proof of citizenship law estimated to have blocked more than 35,000 voters from registering. Finally, in Michigan, a federal district court overturned a ban on straight-ticket voting after determining that it had been passed with the intent to discriminate against African Americans.

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167 In its opinion, “the Court finds that eliminating the Democratic Party’s success with straight-ticket voters—success especially driven by African-Americans residing in communities with high voting age African-American populations—was a motivating consideration in the Michigan Legislature’s enactment of PA 268. The goal of ending the Democratic Party’s success with straight-ticket voters, therefore, was achieved at the expense of African-Americans’ access to the ballot. The historical background of PA 268 suggests that the Michigan Legislature harbored a discriminatory intent or purpose. The overwhelming majority of African American voters in Michigan staunchly support the Democratic Party...What is more, in 2016, in communities where African-Americans constituted 40% or more of the voting-age population, 94.8% of straight-ticket votes were for the Democratic Party...Michigan legislators recognized these facts in passing PA 268 and were not just motivated by policy concerns in enacting the law.” (Wendy Weiser and Max Feldman, “The State of Voting 2018,” Brennan Center for Justice,
Earlier successful litigation is summarized in the following chart:\(^{168}\)

<table>
<thead>
<tr>
<th>State</th>
<th>Year of Key Ruling</th>
<th>Law Blocked/Mitigated</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Alabama, Georgia, Kansas</strong></td>
<td>2016</td>
<td>Documentary proof of citizenship for registration</td>
<td>Blocked for use on federal voter registration form.</td>
</tr>
<tr>
<td><strong>Georgia</strong></td>
<td>2016</td>
<td>&quot;No match, no vote&quot; purge practice</td>
<td>State agreed to suspend the practice before a hearing was held. New 'no match, no vote' bill subsequently enacted in 2017.</td>
</tr>
<tr>
<td><strong>Kansas</strong></td>
<td>2014, 2016</td>
<td>Documentary proof of citizenship for registration</td>
<td>Documentation requirement for the DMV voter registration form, the state voter registration form (challenged in state court), and the federal registration form all blocked.</td>
</tr>
<tr>
<td><strong>North Carolina</strong></td>
<td>2016</td>
<td>Single legislative package of restrictions: strict voter ID; cutbacks to early voting; elimination of same-day registration, preregistration, and out-of-precinct voting</td>
<td>Struck down</td>
</tr>
<tr>
<td><strong>Texas</strong></td>
<td>2012, 2016</td>
<td>Strict voter ID</td>
<td>Struck down, both before and after the Shelby ruling. Legislature subsequently passed an amended voter ID law in 2017.</td>
</tr>
<tr>
<td><strong>Wisconsin</strong></td>
<td>2016</td>
<td>Strict voter ID; early voting, residency, absentee ballot distribution, and student voting restrictions</td>
<td>Process for obtaining free voter ID modified and restrictions on use of certain types of ID struck down. Other challenged restrictions struck down.</td>
</tr>
<tr>
<td><strong>Arizona</strong></td>
<td>2013, 2014</td>
<td>Documentary proof of citizenship for registration</td>
<td>Blocked for state and federal voter registration form</td>
</tr>
<tr>
<td><strong>Pennsylvania</strong></td>
<td>2014</td>
<td>Strict voter ID</td>
<td>Struck down by state court</td>
</tr>
<tr>
<td><strong>Florida</strong></td>
<td>2006, 2007, 2008, 2012</td>
<td>Cutbacks to early voting; restrictions on voter registration drives; restrictions on processing voter registration forms</td>
<td>Cutbacks to early voting; restrictions on voter registration drives; restrictions on registration drives and form, and processing blocked.</td>
</tr>
<tr>
<td><strong>South Carolina</strong></td>
<td>2012</td>
<td>Voter ID</td>
<td>Blocked for 2012 election, and most harmful effects mitigated for future elections</td>
</tr>
<tr>
<td><strong>Georgia</strong></td>
<td>2005, 2006</td>
<td>Strict voter ID</td>
<td>Blocked for 2006 elections by state and federal courts, but an amended version of the law was subsequently upheld</td>
</tr>
<tr>
<td><strong>Missouri</strong></td>
<td>2006</td>
<td>Strict voter ID</td>
<td>Struck down by state court</td>
</tr>
<tr>
<td><strong>Ohio</strong></td>
<td>2006</td>
<td>Documentary proof of citizenship for naturalized citizens at the polls</td>
<td>Struck down</td>
</tr>
</tbody>
</table>

https://www.brennancenter.org/sites/default/files/publications/2018_06_StateOfVoting_v5%20%281%29.pdf.)
Policy Recommendations

1. Eliminate burdensome voting restrictions.
2. Prevent partisan gerrymandering.
4. Regulate campaign finance.

Eliminate Burdensome Voting Restrictions: (information drawn from the War on Voting Rights report)

- **Eliminate or simplify voter ID laws:** Voter ID laws are not necessary for preventing fraud. Currently, 15 states do not require voter identification and none of these states have experienced widespread voter fraud.\(^{169}\) If states do not want to remove ID requirements altogether, however, they should standardize issuance of state ID cards to ensure that all eligible voters have an acceptable form of ID. For example, states could issue a state ID card to all residents when they turn 18.

- **Expand early and absentee voting options and same-day registration:** 37 states and the District of Columbia have already implemented early voting and all-purpose absentee voting, which allows any voter to request an absentee ballot for any reason. States that have not already done so should adopt all-purpose absentee voting and expand early voting periods to at least two weeks before an election. States can also ease access to voting by allowing voters to register at the polls on Election Day, a practice currently in place in ten states and the District of Columbia.

- **Prevent voter roll purges:** States should enact legislation to prevent the automatic purging of voters from state voter rolls. Removing a voter from the rolls should require a transparent procedure and specific evidence showing that the voter is ineligible, and an opportunity for the voter to contest the evidence and proposed removal.

- **Ensure equitable access to polling places:** Polling places should be set up so as to minimize distance traveled and wait times, with special attention to minority communities that have been denied access to polling places in the past.

- **Reinstate voting rights for individuals with felony convictions:** Florida voters approved a ballot measure in 2018 to restore voting rights to ex-felons who have completed their sentences, re-enfranchising 1.4 million voters. The twelve

remaining states that deny the voting rights of people with felony convictions for some period after completing their sentences should follow Florida’s lead.

Prevent Partisan Gerrymandering:

- States should establish independent redistricting commissions to determine the boundaries of congressional districts. Several models have been tried in different states in recent years.
- While there is no single best model, the Brennan Center for Justice, through interviews with more than 100 people involved in state redistricting, has identified a set of best practices to ensure that redistricting commissions remain impartial and effective, including the following:\textsuperscript{170}
  - Select commission members from a pool of citizen applicants. The selection process should be initiated with an element of random selection followed by the screening out of prospective members with conflicts of interest and assessment of their fitness for the task.
  - Include enough members on the commission to represent geographic and demographic diversity of the state (the Brennan Center recommends 9-15 members).
  - The commission should establish clear rules and priorities for redistricting before beginning the map-drawing process, maximizing transparency surrounding process and results. The commission should hold public hearings on the proposed redistricting map before finalizing it.
  - The criteria commissions should consider when drawing a map should include equality of district populations, protection against minority vote dilution, avoidance of racial gerrymandering and partisan gerrymandering, geographical contiguity and compactness, and considerations of fairness and competitiveness, among others.\textsuperscript{171}
  - The final map should be approved through a consensus mechanism that incentivizes compromise. For example, the commission could require that a map receive a certain number of votes of approval from each major political bloc represented in the commission.


Restore the Voting Rights Act:

- **Restore the federal “pre-clearance” requirement:** In 2013, the Supreme Court struck down the Voting Rights Act of 1965, arguing that “the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions.” As our report has shown, these conditions still prevail, and the requirements of the Voting Rights Act, including federal government oversight of jurisdictions with a recent or previous history of racial discrimination, need to be reestablished.

- **Expand the Act to cover jurisdictions with a history of voter suppression:** A new voting rights act should include federal government oversight of jurisdictions with a recent or previous history of proven voter suppression. These jurisdictions should not be permitted to change their electoral regulations without federal government approval.

Regulate Campaign Finance:

- **Strengthen disclosure requirements:** Federal legislation should be enacted to require campaigns, super PACs, PACs, and other groups involved in elections to post their donors and the amounts they donate on their websites in a timely manner. The law should require business associations and social welfare organizations to disclose their donor information.

- **Strengthen regulation on unlimited spending:** Based on new evidence of the disproportionate influence of major donors on the electoral process resulting in the denial of First Amendment rights of non-donor voters, the Supreme Court should reverse its ruling in *Citizens United v. FEC* that campaign finance regulation is barred by the First Amendment and that corporations and unions can donate to campaigns.

- **Regulate at the state level:** Following the example of South Dakota, states should ban the funding of ballot initiatives by donors from outside the state. Like Massachusetts, states should establish citizens commissions to examine existing state laws on campaign finance and recommend how to regulate corporate political spending.

- **Strengthen enforcement of the federal ban on coordinating political campaigns with PACs/Super PACs:** Increase federal and state oversight of campaigns to ensure that there is no coordination between campaigns and outside groups in terms of personnel, information, finance, etc.
Conclusion

The electoral system is at the core of American democracy. Elections are the institutional forum for determining who will represent the will of the people in governing the country and must provide a fair and transparent process for safeguarding the voting rights of all citizens and counting their votes equally.

The electoral system is vulnerable to partisan manipulation. Attacks on the integrity of the system often come from former majority parties that perceive political or demographic changes as threats to sustaining their electoral dominance. These attacks are aimed at suppressing votes cast for opponents in order to counter the electoral consequences of threatening changes. The best-known example is the massive campaign carried out for more than a century after the Civil War and Reconstruction by Southern Democrats to disenfranchise African Americans. In response, a long and bloody struggle to restore the integrity of the system culminated in the enactment of the Voting Rights Act of 1965, key protections of which were surprisingly struck down by the Supreme Court in 2013 as “no longer necessary.”

Today the integrity of the system is again under attack. The Republican Party, feeling threatened by demographic and political changes, has carried out a state-level campaign since 2008 to diminish the votes of its opponents through a combination of gerrymandering and restrictive voting regulations. This campaign has been facilitated by Supreme Court decisions invalidating protections of the Voting Rights Act, declining to review allegations of partisan gerrymandering and striking down all restrictions on independent campaign spending. The impact of the voter suppression campaign on individual races is difficult to assess, but there is clear evidence that gerrymandering facilitated sustained Republican control of the House of Representatives until 2018, and that new voting restrictions likely suppressed the Democratic vote in several states in the 2018 elections.

If allowed to continue, the suppression campaign could legitimize voter suppression as an instrument of electoral control. As Stanford Law professor Nathan Persily has observed, “we’ve reached a situation in which the fight over the rules and who gets to vote is seen as a legitimate part of electoral competition.”

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campaign has triggered a response that may serve to restore the institutional integrity of the electoral process by stimulating greater voting participation, new efforts to remove politics from the redistricting process and legislation to regulate political finance. Some of these reforms were enacted by ballot initiative at the state level in the 2018 elections, and legislation has been filed in Congress to restore the protections of the Voting Rights Act by increasing Justice Department oversight in states with a history of voter suppression.174

Protection of the right to vote should be the highest obligation of the law: As Alexander Hamilton observed five years before the Constitution was drafted, “A share in the sovereignty of the state, exercised by citizens voting in elections, is one of the most important rights of the subject, and in a Republic ought to stand foremost in the estimation of the law.”175 Hamilton’s observation reflected the philosophy and spirit of the Declaration of Independence, which proclaimed “the right of Representation in the Legislature [to be] a right inestimable to the people and formidable to tyrants only.”176 Today, there is a new war on voting rights, but resistance to voter suppression is growing, as demonstrated by a recent wave of reforms. But the reforms must be expanded if they are to succeed in restoring the right to vote as the unassailable core of American democracy.

174 HR 1, the For the People Act, was the first bill introduced by newly elected Democrats in the House of Representatives in January 2019. In addition to several measures intended to regulate campaign finance and unethical behavior by politicians, the bill proposes to ease voting registration, restore voting rights to felons, curb voter roll purges, and reinstate key anti-discrimination provisions of the Voting Rights Act. (“House Democrats Introduce Anti-Corruption Bill as their First Act,” NPR, Jan. 5, 2019, https://www.npr.org/2019/01/05/682286587/house-democrats-introduce-anti-corruption-bill-as-symbolic-first-act.)
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