Chapter 5 - Voter Suppression

The right to vote is at the heart of every democratic institution and government. It is the literal tool of self-determination. Hostile and discriminatory efforts to undermine voting rights have been a fundamental feature of power and control from the earliest days of our nation's history. Voter suppression is the strategic effort to prevent people from voting, especially particular demographic groups. The aim is to prevent the ascension to power leadership that will prioritize or advance the causes reflected by the electorate. It is the most basic attack on representative democracy, the consent of the governed.

5.1 A Pattern of Discrimination

Voter Suppression tactics are presented as election security, including purges of voter rolls, voter ID laws, the reduction in polling places and drop boxes in targeted areas, felon disenfranchisement, burdensome signature matches, restrictions on vote-by-mail and permanent absentee ballot requests, voter registration limitations, and even providing water to voters waiting in lines to vote. Many of these efforts are racially targeted. Texas permits voters to use a handgun license to vote, but not a student ID from a state university. More than 80 percent of handgun licenses issued went to white Texans, while half of the students in the University of Texas system are racial or ethnic minorities.[183] Voter ID laws seem non-controversial as they apply to all people and have

[183] Theodore Johnson and Max Feldman, "The New Voter Suppression," *The Brennan Center for Justice*, January 16, 2020, https://www.brennancenter.org/our-work/research-reports/new-voter-suppression.

been sold as race-neutral, but when you peel back the data, voting-age citizens without current government-issued ID are predominantly Black, an astonishing 25 percent.[184]

When data showed that 64 percent of early voters in 2012 in North Carolina were Black, the state instituted new restrictions on early voting.[185] In 2017, Georgia enacted an "exact match" law mandating that voters' names on registration records must perfectly match their names on approved forms of identification. In the leadup to the 2018 election, approximately 80 percent of Georgia voters whose registrations were blocked by this law were people of color.[186] Alabama has a restrictive voter ID law that requires government-issued IDs, but not all government-issued IDs. 71 percent of public housing is occupied by the Black population. Alabama law disallowed public housing ID for voter ID eligibility.

Moreover, Alabama ranks 7th in the nation for the highest poverty rate and is 48th for public transportation. Cars are a luxury. Poor residents who don't have a car don't drive and therefore don't have driver's licenses. To get a driver's license, you must go to the DMV, and when there is limited public transportation, the collateral impact becomes clear. These laws strategically create roadblocks for people to get voting identification. Under the guise of preventing voter fraud, which has been proven time and again to be exceedingly rare and usually a result of confusing and burdensome regulations rather than intended deception, restrictive voter laws have proliferated. But this was not always the Republican strategy. In the 1980s in California, the Republican party saw easing voting

[184] Ibid.
[185] Ibid.
[186] Ibid.

access as a benefit and sent each party registrant in the state an application for an absentee ballot, with his or her name preprinted on the relevant lines. All the voters had to do was sign it and drop it in the mail.[187]

5.2 Supreme Court Volleys

In *United States v. Peters (1809)*, the Supreme Court found that the legislature of a State cannot annul the judgments nor determine the jurisdiction of the courts of the United States.[188] Justice Marshall said for a unanimous Court,

> If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery, and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. So fatal a result must be deprecated by all; and the people of Pennsylvania, not less than the citizens of every other state, must feel a deep interest in resisting principles so destructive of the Union and in averting consequences so fatal to themselves.

Many rights-related Supreme Court cases have been argued based on the Fourteenth Amendment due process protections, which "forbids the government to infringe… 'fundamental liberty' interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest,"[189] it declares that no state may deny any person "due process of law" or "equal protection of the laws." If an explicit right is not contained in the first eight Amendments, the Supreme Court

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[187] Jeffrey B. Abramson and Gary R. Orren, F. Christopher Arterton, *Electronic Commonwealth: The Impact of New Media Technologies on Democratic Politics* (New York: Basic Books, 1998) 50.
[188] *United States v. Peters*, 9 U.S. 5 Cranch 115 115 (1809), https://supreme.justia.com/cases/federal/us/9/115/
[189] Corey Brettschneider, "*Washington v. Glucksberg (1997)*," *Constitutional Law and American Democracy*, (New York: Wolters Kluwer, 2012), 1086.

examines it through unenumerated fundamental rights[190] and justifies a historical inquiry as to whether it is rooted in the "Nation's history and tradition." The Court often ignores prior cases' adoption of informed decision-making, considering the evidence of adverse outcomes stemming directly from limits of unenumerated protected rights. Using the originalist interpretation of the Constitution, the Court imposes its will in a vacuum ignoring the positive impacts and dismissing the adverse effects that result from a ruling. This approach is a favorite of legal conservatives because it narrowly limits how rights are evaluated to determine if they are fundamental or not. It is this methodology that allowed for Jim Crow laws after slavery was abolished, creating segregated schools, libraries, and housing. It is a self-perpetuating approach, to quote the majority opinion in *Obergefell v. Hodges (2015)*, "If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification, and new groups could not invoke rights once denied."

For 233 years, Republicans and Democrats have vacillated between viewing the fundamental role of the federal government in shaping a multiracial society and wanting to limit the power of the federal government to emancipate state rights. The rivalry between federal law and state law is an ongoing challenge. From the civil war era, Southern Democrats who wanted to protect slavery and exploit the numbers of enslaved people for political advantage to Republicans who advocated against slavery and expanded federal authority, a party realignment has taken place. The shift in political policy brought about by President Franklin Delano Roosevelt, and The New Deal

[190] *Dobbs v. Jackson Women's Health Organization, 597 U.S. ___ (2022)* majority opinion syllabus, 2.

resulted in Republicans adopting patriot and far-right rhetoric[191] and prioritizing limited government. At the same time, more substantial civil rights and federal protections became the primary initiatives for Democrats. Democratic presidents supported civil rights laws, resulting in an exodus of racists from the Democratic party.

Self-determination is fundamental to liberal democracy. Voting is the instrument of genuine self-determination. While voting was not mentioned in the Constitution even once, elections are mentioned in Article I, sections 2, 3, and 4, and voting is addressed in several subsequent Amendments. The right to vote was widely considered state law jurisdiction, which explains some of the reticence to deviate from that constitutional structure. During Reconstruction, Congress exercised its authority under the Election clause, which allowed Congress to regulate federal elections. The Guarantee clause forced southern states to pass constitutions and remake political systems, ensuring each state had the right to republican government.

The right to vote has been granted and rescinded from early in our history. In New Jersey, women were allowed to vote until 1807. Then a law was passed that disenfranchised both women and Blacks from voting and abolished the property requirement for voting. Naturally, the effect was advantageous to white men. For almost 100 years, women had no franchise until the Nineteenth Amendment was ratified.

Blacks had the right to vote at the time of the founding and generally lost that right in the 1820s. Voting rights were often tied to property ownership through 1850. Between 1850-1930 not all Americans were happy about the expansion of the franchise.

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[191] Stephen Vertigans, "Beyond the Fringe? Radicalization within the American Far-Right," *Totalitarian Movements and Political Religions*, no. 8 (2007): 641-659.

Those in power began to recognize the challenge to their authority through Amendments expanding voting rights. In 1870, the Fourteenth and Fifteenth amendments expanded voting rights and equality protections to Black voters, but their impact was blunted by procedural obstacles of Jim Crow state laws between 1870 and 1900. Disenfranchisement evolved into voter suppression through poll taxes, literacy tests, voter ID laws, etc. Poll taxes were not abolished until the Twenty-fourth Amendment in 1964.

The notorious *Dred Scott v. Sandford (1857)* decision was an infamous finding that a "negro" or a descendent of slaves could not be a citizen based on the Supreme Court's reading of Article III. It enshrined that Black people were considered part of commerce and the economy, not society. In 1787, the three-fifths compromise was the resolution of apportionment of legislative representation between Northern and Southern states, ensuring overrepresentation of the enslaved population in terms of Congress. Here, the states derived a political advantage from the existence of enslaved people yet still did not grant them any rights. President Abraham Lincoln's 1863 emancipation proclamation freed slaves in Confederate states. The civil war finally ended in May 1865, and thus began the Reconstruction era. Of the *Dred Scott* decision, Abraham Lincoln said,

> I think the authors of that notable instrument intended to include all men, but they did not intend to declare all men equal in all respects. They did not mean to say all were equal in color, size, intellect, moral developments, or social capacity. They defined with tolerable distinctness in what respects they did consider all men created equal — equal in 'certain inalienable rights, among which are life, liberty, and the pursuit of happiness.' This they said, and this they meant.

The United States was built on commerce, trade, and white supremacy, relying on slavery to grow the economy while aspiring to a more egalitarian society. But even after the Thirteenth Amendment abolished slavery in 1865, the struggle for equity in

representation continued. Efforts to subvert equality continued for nearly 100 years. Jim Crow laws marginalized Blacks by limiting jobs, the right to vote, and access to education and criminalizing anyone who assisted them. The justice system was stacked against them, populated with many former confederate soldiers working in law enforcement and judges in courts. Blacks were often sentenced to labor camps creating a workforce for white former slave owners to exploit. Despite strong liberal democratic tradition, America still clumsily pursued "liberty and justice for all."

President Andrew Jackson's Reconstruction policy required the Confederate states to maintain abolition, pay war debts to rejoin the Union, and swear loyalty to the United States. However, the southern states were still able to make laws limiting the right of Blacks to labor rights, making contracts, or owning property. There were no provisions for citizenship or suffrage, the goal was to maintain the Black population as a labor force. The *Dred Scott* decision denied citizenship to Blacks until the Civil Rights Act of 1866. The act established that all persons born in the United States, regardless of race, color, or "previous condition of slavery or involuntary servitude," were entitled to basic citizenship rights "in every state and territory in the United States."[192] The law further declared that all such individuals were entitled to specific rights:[193] to make and enforce contracts, to sue, be parties, and give evidence in court, to inherit, purchase, lease, sell, hold, and convey real and personal property, to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white

[192] "Civil Rights Act of 1866," Ballotpedia, Accessed August 11, 2022. https://ballotpedia.org/Civil_Rights_Act_of_1866.
[193] "A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774 – 1875," Library of Congress. Accessed August 6, 2022. https://memory.loc.gov/ammem/amlaw/lawhome.html.

citizens, and shall be subject to like punishment, pains, and penalties, and to none other.[194] The law also provided for the conviction and punishment of individuals who violated the law.[195] The act was an attempt to override state-sponsored discrimination.

President Jackson vetoed the act, but Congress overruled the veto and approved the law by a supermajority vote. The act ensured "all persons born in the United States," except for American Indians, were "hereby declared to be citizens of the United States." The legislation granted all citizens the “full and equal benefit of all laws and proceedings for the security of person and property.” While the act granted citizenship, it did not grant the right to vote. To Radical Republicans, who believed the federal government had a role in shaping a multiracial society in the postwar South, the measure seemed the next logical step after the ratification of the Thirteenth Amendment abolishing slavery.[196] This began the long conflict among the Republican and Democratic parties and between the legislative, executive, and judicial branches over civil rights concerning state laws.

The right to vote was expanded to include Black men by the Fifteenth Amendment in 1869. In 1870, Congress acted again, providing civil and legal protections to former slaves, aimed at preventing states from disenfranchising voters by passing the Enforcement Act.[197] The Second Force Act became law in February 1871, placed the administration of national elections under the control of the federal government, and

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[194] Ibid.
[195] Ibid.
[196] “The Civil Rights Bill of 1866,” United States House of Representatives. Accessed August 12, 2022. https://history.house.gov/HistoricalHighlight/Detail/35384?current_search_qs=%3Fsubject%3DCivil%2BRights%26PreviousSearch%3D%26CurrentPage%3D1%26SortOrder%3DDate.
[197] “The Enforcement Acts of 1870 and 1971,” United States Senate. Accessed August 12, 2022. https://www.senate.gov/artandhistory/history/common/generic/EnforcementActs.htm.

empowered federal judges and United States marshals to supervise local polling places.[198] *United States v. Reese (1879)* was a historic case brought by a Black voter who had been refused qualification to vote based on his failure to pay a poll tax. Chief Justice Morrison Waite authored the majority 8-1 opinion saying that the Fifteenth Amendment "does not confer the right of suffrage upon anyone" but "prevents the States, or the United States, however, from giving preference…to one citizen of the United States over another on account of race, color, or previous condition of servitude."[199] The act provided the right, not the punishment for violation of the right. The Court determined that the law was valid as it applied to all citizens.

Furthermore, it said that the Enforcement Act of 1970 lacked limiting language to qualify as "appropriate legislation" under the Enforcement Clause of the Fifteenth Amendment. The Fifteenth Amendment confers authority to impose penalties for every wrongful refusal to receive the vote of a qualified elector at State elections; the Enforcement Act interferes with this practice and prescribes rules not provided by the laws of the States.[200] The decision found that the act was in part unconstitutional due to not being tailored to qualify as "appropriate legislation." It allowed Tennessee to continue to refuse Blacks the right to vote. Chief Justice Waite was also well known for upholding the right of states to deny women the right to vote. In 1896, Louisiana adopted "grandfather" clause laws reducing the rights of formerly enslaved Black people and their descendants from voting. This law decreased Black voter participation from 44.8 percent

[198] Ibid.
[199] "United States v. Reese Et. al," Cornell Law School Legal Information Institute, Accessed August 13, 2022. https://www.law.cornell.edu/supremecourt/text/92/214.
[200] Ibid.

to 4 percent within four years. Mississippi, South Carolina, Virginia, and Alabama followed Louisiana and adopted the grandfather clauses of their own.[201]

Guinn v. United States (1915) offered the Court another opportunity to address the Fifteenth Amendment protections, this time in conflict with the Oklahoma Voter Registration Act of 1910. When Oklahoma joined the Union in 1907, its constitution allowed all men to vote, regardless of race. In 1910 it introduced a "grandfather clause" through an amendment to the state constitution. This clause provided an exemption to literacy requirements for direct lineal descendants of citizens who had been legally able to vote on or before January 1, 1866. In other words, anyone whose father or grandfather was white.[202] The United States prosecuted election officials for imposing unreasonable literacy tests or denying literacy tests to black Oklahomans to deny voting rights. The case was combined with a similar Maryland case, *Meyers v. Anderson (1915).* The decision affirmed the convictions of the election officials and struck down the "grandfather" clause. Chief Justice Edward Douglass White wrote for the unanimous Court, saying, "the grandfather clauses in the Maryland and Oklahoma constitutions to be repugnant to the Fifteenth Amendment and therefore null and void." He said that although it was neutral on its face, the effect of the grandfather clause was to evade the voting rights protection that the Fifteenth Amendment provided. While this ruling was widely viewed as a victory for voting rights, Oklahoma passed a new law almost immediately requiring "[a]ll persons, except those who voted in 1914, who were qualified

[201] "Voting Rights Act," American Civil Liberties Union. Accessed August 13, 2022. https://www.aclu.org/issues/voting-rights/voting-rights-act/history-voting-rights-act.
[202] "The Grandfather Clause in Oklahoma in 1910," National Archives. Accessed August 13, 2022. http://recordsofrights.org/events/78/the-grandfather-clause-in-oklahoma.

to vote in 1916 but who failed to register between April 30 and May 11, 1916, with some exceptions for sick and absent persons who were given an additional brief period to register, would be perpetually disenfranchised." Because the *Guinn* ruling only struck down the grandfather clause, poll taxes and literacy tests continued to be used to disenfranchise voters, both poor white and Black. The decision perfectly described the difficulty in adjudicating these state laws, "The establishment of a literacy test for exercising the suffrage is an exercise by the State of a lawful power vested in it, not subject to the supervision of the Federal courts." States continued to defy civil rights efforts.

A 1923 Texas state law delegated authority to the parties to create their own internal rules for voting in a general election. The Texas Democratic Party limited its membership to white citizens in what became known as "white primaries." By 1940, only 3 percent of Blacks were eligible to vote. In *Smith v. Allwright (1944)*, the Supreme Court said that the Texas law violated the Equal Protection Clause of the Fourteenth Amendment by allowing discrimination to be practiced, and the Texas law was unconstitutional. The case was brought in 1944; this discrimination was allowed to go on for 21 years before it was overturned. 21 years of lawmaking that virtually ignored the Black population.

In 1954, the United States Supreme Court ruled in *Brown v. Board of Education* that the "separate but equal" doctrine created in *Plessy v. Ferguson (1896)* was unconstitutional because it was discriminatory in violation of the Equal Protection Clause of the Fourteenth Amendment. Though this case was not about voting rights, it was about equality and relied on the same Equal Protection Clause that many voting rights cases

rely on. The Court's job in such cases is to look at the world as it exists and ask whether such a right is, in fact, being abridged and, if it is, to consider what reasons might be adduced in support of the deprivation without regard to what actually occasioned it.[203] The real point was that a group of persons was being frozen out of the decision-making process for an insufficiently compelling reason.[204] The Equal Protection Clause requires that discrimination must be rationally explainable. Defenses work too well. They can be readily pushed to the point of justifying governmental systems that we would recognize as inconsistent with the plan of our Constitution.[205]

The *Brown* ruling kicked off the momentum that led to the civil rights movement. After World War I, there was a shift in political policy brought about by President Franklin Delano Roosevelt and The New Deal; the mid-20th century brought a realignment resulting in the adaptation of patriot and far-right rhetoric within the republican party.[206] John F. Kennedy advocated civil rights policies, and Lyndon B Johnson continued his legacy; Democratic presidents supported civil rights laws, resulting in an exodus of racists from the Democratic party. Republicans publicly mainstreamed white grievance politics.

In 1964, Congress passed the Civil Rights Act, the Voting Rights Act, and the Fair Housing Act. Democracy, social progress, and this legislation helped the United States repel racist and misogynistic influences. The Voting Rights Act was reauthorized

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[203] John Ely Hart, "Democracy and Distrust," in *Constitutional Law and American Democracy*, (New York: Wolters Kluwer, 2012), 1215.
[204] Ibid.
[205] Ibid.
[206] Stephen Vertigans, "Beyond the Fringe? Radicalization within the American Far-Right," *Totalitarian Movements and Political Religions*, no. 8 (2007): 641-659.

in 1970 by President Nixon. In 1972, two Black congresspeople were elected from the South for the first time since Reconstruction, one from Texas and one from Georgia. President Gerald Ford reauthorized the Act again in 1975, and President Ronald Reagan reauthorized it for 25 years in 1982. In 2006, President George W. Bush extended Section 5 of the Act for another 25 years; this extension received overwhelming bipartisan congressional support. But in 2011, Texas passed SB14, one of the most restrictive voter ID laws. Since the lawsuit was filed in September 2013, a federal district court has twice found that the Texas legislature passed the voter ID law with discriminatory intent, and the Fifth Circuit Court of Appeals has affirmed that the law had a discriminatory effect on Black and Latino voters.[207] In 2017, in response to the lawsuit, the Texas legislature revised the voter ID law.[208] Experts estimated that more than 600,000 registered Texas voters – and many more unregistered but eligible voters – did not have an ID approved under the law.[209] Texas filed a federal lawsuit seeking preclearance to enforce SB 14; in August 2012, the U.S. District Court for the District of Columbia rejected the law, ruling that Texas was unable to prove that the law would not discriminate against Black and Latino voters.[210]

The 2013 Supreme Court decision in *Shelby v. Holder* changed all that. The Supreme Court held that it is unconstitutional to use the coverage formula in Section 4(b) of the Voting Rights Act to determine which jurisdictions are subject to the preclearance

[207] "Texas v. Steen (consolidated with Veasley v. Abbott)," Brennan Center for Justice. Accessed August 12, 2022. https://www.brennancenter.org/our-work/court-cases/texas-naacp-v-steen-consolidated-veasey-v-abbott.
[208] Ibid.
[209] Ibid.
[210] Ibid.

requirement of Section 5 of the Voting Rights Act. The Supreme Court did not rule on the constitutionality of Section 5 itself. The effect of the Shelby County decision is that the jurisdictions identified by the coverage formula in Section 4(b) no longer need to seek preclearance for the new voting changes unless they are covered by a separate court order entered under Section 3(c) of the Voting Rights Act.[211]

This ruling eliminated the requirement to receive preclearance and unleashed a torrent of restrictive voting laws mentioned earlier; Texas announced that it would implement SB 14 immediately. In the majority opinion, Justice Clarence Thomas wrote that Section 5 was unconstitutional in addition to Section 4. He said that the blatant discrimination that the Section worked to prohibit no longer existed. Given that, Congress could not justify burdening the States with the requirement. In her dissent, Justice Ruth Bader Ginsburg argued that the legislative history and text of the amendment offered adequate authority for Congress to impose the requirements on the States. Though she conceded the authority is not unlimited, it does provide narrow, targeted legislative objectives and that the data Congress gathered supported the need to continue the requirement. The decision sent a shockwave through the nation. Immediately Texas, North Carolina, Mississippi, Florida, South Dakota, Virginia, Indiana, and Ohio enacted restrictive voting laws.

The new conservative Supreme Court supermajority appears to again be a willing partner to these efforts, discarding the standard for determining if a vote restricting law is unconstitutional based on its impact rather than its intent. Several polestar Supreme Court

[211] "The Shelby County Decision," The United States Department of Justice, Updated November 29, 2021. Accessed August 11, 2022. https://www.justice.gov/crt/shelby-county-decision.

cases have eroded voting rights protections and allowed for the surgical implementation of discrimination in elections claiming states' rights under the veil of judicial supremacy. Though tempered by cases that strategically advanced rights, critical decisions in several Supreme Court cases have often compromised voting rights rather than reinforcing them. Supreme Court decisions allowing a wide berth for the interpretation of unenumerated rights by the state and the power of Congress to make laws representative of public values create tension that has been weaponized for retention of power. The fight over dominance on the Supreme Court is one of the most powerful and explosive venues for political gamesmanship.

The gulf between the spirit of the Constitution and the letter of the Constitution provides infinite opportunities to make and remake the laws of our nation. The vestiges of tradition that accompany lifetime Supreme Court appointments and reject the evolution of public values fail to act as a control on faction and instead act as a nullifying agent to progress. Supreme Courts have long recognized the conflict between state and federal laws. That conflict, coupled with the deeply entrenched power structure of race, is at the heart of all voter suppression efforts and explains the ongoing power struggle over voting rights.

5.3 Political Gamesmanship

In 2014, the House of Representatives passed the Voting Rights Amendment Act, but Senate Majority leader Mitch McConnell refused to bring it for a vote in the Senate. After voting to support the Voting Rights Act reauthorization in 2006, Mitch McConnell decided that voting protections are not a federal issue saying, "This is not a federal issue.

It oughta be left to the states. There's nothing broken around the country."[212] He knew he had captured the Court. As of 2016, North Carolina, North Dakota, Texas, and Kansas have been subject to state and federal court rulings requiring them to remove discriminatory voter restrictions. The John Lewis Voting Rights Act would have restored Section 2 of the Voting Rights Act in addition to other election security measures. It passed in the House in 2021 along pure party lines, all Democrats voted in favor of it, and all Republicans voted against it, but it failed to receive enough votes to invoke cloture in the Senate.

In 2017, after refusing to hold a hearing for Barack Obama's Supreme Court nominee Merrick Garland for nearly a year, Mitch McConnell lowered the threshold for Supreme Court nominee approval in the Senate from 60 to 51, pushing through Neil Gorsuch. Just three years later, in 2020, McConnell would push through nominee Amy Coney Barrett, nominated just 35 days before the Presidential election while early voting had already begun, mere weeks after the passing of Ruth Bader Ginsburg. This hyper-partisan, norm-breaking, hypocritical political power play solidified the 6-3 conservative majority on the Supreme Court and completely undermined the political institution of the Supreme Court.

The endless unfounded drumbeat of voter fraud and a stolen election have propelled so many anti-democratic laws it bears remarkable comparison to the Jim Crow efforts to disenfranchise black voters in the wake of the Fourteenth Amendment.

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[212] Ryan Grim, "Mitch McConnell lays down radical marker on voting rights: This is not a federal issue," *The Intercept*, June 23, 2021. Accessed August 12, 2022. https://theintercept.com/2021/06/23/mitch-mcconnell-voting-rights-protection-federal/.

Renewed gerrymandering of voting districts proliferated after the Supreme Court eviscerated Section Two of the Voting Rights Act in 2013. The anti-democratic weapons of choice are aimed at the ballot box, resulting in a severely compromised democracy that is out of sync with the people's will. Voter suppression is not new; it has been used creatively to consolidate power within specific groups for political gain for centuries, but the playing field is not only in the realm of voter suppression. Even when voters turn out and cast their votes, legislatures have taken norm-breaking action to change the outcome.

In 2016, the North Carolina legislature stripped power from Democratic Governor-elect Roy Copper after his loss to Republican incumbent Pat McCrory and before Cooper's swearing-in. One law subjected the governor's cabinet appointments to approval by the state senate and stripped the governor's ability to appoint members to the influential University of North Carolina board of trustees, among other measures.[213] The other law gave Republicans and Democrats equal control over North Carolina's state and county elections boards, changing a 1901 law that allowed the governor to pick a majority of the elections boards' members.[214]

In 2021, Democratic Kentucky Governor Andy Beshear faced a hostile Republican-controlled state legislature who passed laws to take away the Governor's emergency powers and replace a process that allowed the governor to appoint someone to fill a Senate seat and require the Governor to choosing from a three-name list, which is to be provided by party leaders from the same party as the senator who formerly held the

[213] Alison Thoet, "North Carolina's legislature tried to strip power from the new governor. Will other states do the same?" PBS, February 3, 2017.
[214] Ibid

seat. [215] Beshear had vetoed the bills, but Republican supermajorities in the state House and Senate voted to overrule Beshear's vetoes aimed at limiting emergency powers, gather size restrictions, school mask mandates to remove the ability of the governor and secretary of state to alter the "manner" of an election during a state of emergency.[216]

Political scientist Andrew Reynolds from the University of North Carolina, Chapel Hill, and his colleague Jørgan Elklit designed a formula that measures how free and fair elections are. The system is now run by the Election Integrity Project out of Harvard University. This formula sought to lay out a framework that is a more comprehensive and meaningful way to identify patterns of success and failure in the fairness of elections within a single country over time and be able to spotlight the weak areas of election administration that a government might reasonably focus its subsequent quality improvement efforts on.[217] Their latest dataset found that electoral integrity in the United States of America is ranked 15th of the 29 countries in the Americas and is the lowest-ranked liberal democracy.[218] The main areas of weakness in the USA are the drawing of the electoral boundaries, the results process, campaign finance, and voter registration.[219]

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[215] Alexandra Hutzler, "Kentucky's GOP Legislature Ends Dem Governor's Power to Choose Anyone for Senate Vacancies," *Newsweek*, March 30, 2021, https://www.newsweek.com/kentuckys-gop-legislature-ends-dem-governors-power-choose-anyone-senate-vacancies-1579827.
[216] Joshua Douglas, "Democracy is under attack, but now it's not in Washington, it's in Kentucky's Capitol," *Courier Journal*, January 11, 2021.
[217] Jørgen Elklit & Andrew Reynolds, A framework for the systematic study of election quality, *Democratization*, 12:2, (2005), 147-162, DOI: 10.1080/13510340500069204
[218] Holly Ann Garnett, Toby S. James, Madison MacGregor, Electoral Integrity Global Report 2019 – 2021, May 2022, https://electoralintegrityproject.substack.com/p/pei-80-data-and-report-release.
[219] Ibid.

Despite these challenges, voter turnout in the last ten years has steadily increased from 60.2 percent in 2016 to 66.7 percent in 2020. Even mid-term years saw an uptick, from 36.7 percent in 2014 to 50.3 percent in 2018.[220] In 2022, the early voting numbers look on par with and possibly expected to exceed 2018. This is good news for studies that suggest increased polarization can negatively affect voter turnout. Despite the intention of voter suppression on specific categories of voters, the current environment certainly has inspired participation.

The independence of the judiciary generally held against the electoral challenges faced in 2020, but not without significant concerns looking forward. Separately from the voter suppression efforts of state legislatures, the current conservative Supreme Court supermajority has demonstrated a willingness to rescind rights and dramatically depart from long-honored *stare decisis*. This session, the Supreme Court is scheduled to hear a case that would irretrievably change the landscape of American Democracy as it is presently known; independent state legislature theory would allow state legislatures authority to gerrymander congressional districts, pass voter suppression laws, limit voter registration to retain power rather than adjusting on issues to appeal to a broader audience and select the Electors without compliance with federal election laws. Sixty-one percent of American adults believe that states drawing legislative districts that intentionally favor one political party – gerrymandering – is a major problem.[221]

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[220] "Voter turnout in United States Elections," Ballotpedia, Accessed October 25, 2022, https://ballotpedia.org/Voter_turnout_in_United_States_elections#cite_note-1.

[221] "Few think our democracy is working well these days," AP-NORC Center for Public Affairs Research, October 2022, https://apnorc.org/projects/few-think-our-democracy-is-working-well-these-days/.

Allegations that widespread voter fraud is threatening the integrity of American elections and American democracy itself have intensified since the disputed 2000 presidential election.[222] The candidate with the most votes lost, and the Supreme Court decided the winner.[223] It reached new heights in 2020 during the primary and general elections due to the COVID-19 pandemic. There were nationwide efforts to expand mail-in voting made by Governors and Secretaries of State, and exceptions made for the slowed postal service delivery of ballots. These were countered by state-legislature-led efforts to block the expansion of voting rights, claiming that elections were being stolen by illegal immigrants and unscrupulous voter registration activists and vote buyers, used to persuade the public that voter malfeasance is of greater concern than structural inequities in how votes are gathered and tallied, justifying ever tighter restrictions on access to the polls.[224] Several cases made their way up to the Supreme Court, some protected the expanded access, some denied it, and the net result was hundreds of thousands of voters nationwide who were disenfranchised through no fault of their own.

Restrictive voting laws were revisited in *Brnovich v DNC (2021)* to resolve an Arizona policy that nullified votes cast out of designated precincts and a law that criminalized the collection and delivery of another person's ballot. The newly conservative-dominated Supreme Court ruled that the policy and the law did not violate Section 2 of the Voting Rights Act as it was not designed to discriminate against Arizona's Native American, Hispanic, and Black citizens, and its relative discriminatory

[222] Lorraine C. Minnite, *The Myth of Voter Fraud*, (Ithaca: Cornell University Press, 2011) https://doi.org/10.7591/9780801459061.
[223] Ibid.
[224] Ibid.

impact was “small in absolute terms.” Justice Elena Kagan wrote for the dissent that the Supreme Court ‘has treated no statute worse” than the Voting Rights Act.

In his 1957 essay, Robert Dahl argues that the Supreme Court is an active participant in the ruling national coalitions which dominate American politics rather than acting as the protector of fundamental rights.[225] History suggests that Supreme Court’s rulings do not typically support other political branches. The assumption that the “lawmaking majority” is a reasonable surrogate for the “national majority” is an oversimplified view and not reflective of history. Particularly considering the great lengths that the last decade of rulings has demonstrated to protect discriminatorily and disenfranchising practices in the face of legislative efforts to correct them. Racial gerrymanders and erosion of voting rights protections have compromised election results, often creating a majority in Congress that represents only a minority of voters. Donald Trump’s election in 2016 was a function of his narrow victory margins in three states that gave him an electoral vote majority despite losing the popular vote.[226] These efforts to manipulate the electoral outcomes further entrench discriminatory practices and consolidate power creating imbalance and unfair representation in government.

5.4 Imbalance of Power

[225] Jonathan D. Casper, “The Supreme Court and National Policy Making,” *The American Political Science Review* 70, no. 1 (1976): 50–63. https://doi.org/10.2307/1960323.
[226] Philip Bump, “The minoritarian third of the Supreme Court,” *The Washington Post*, December 2, 2021. Accessed August 12, 2022. https://www.washingtonpost.com/politics/2021/12/02/minoritarian-third-supreme-court/.

Twice in the last twenty years, the Democratic presidential candidate received more votes but lost the election.[227] Samuel Alito and John Roberts were nominated by George W. Bush, who lost the popular vote in 2000 but won it in 2004. Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett were all appointed by Donald Trump, who lost the popular vote in 2016 and were confirmed by a Senate vote representing only 47, 44, and 48 percent of the population, respectively.[228] Neil Gorsuch's nomination was confirmed by a Republican majority that had received only 45 percent of the votes won by senators.[229] Although Clarence Thomas was nominated by a president who won his seat handily, the Senate that approved his appointment represented a minority of the popular will and a minority of the population.[230] Three of the nine justices will have been appointed by a president who earned 3 million fewer votes than his opponent and confirmed by a Senate majority that represents 15 million fewer Americans than the "minority."[231]

Based on 2019 U.S. Census population data, these justices were also confirmed by Republican Senators, who represent 41.5 million fewer people in the country than Democrats do. By 2040, if population trends continue, 70 percent of Americans will be

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[227] Marla Liasson, "Democrats Increasingly Say American Democracy is sliding into Minoritarian Rule," *NPR*, June 9, 2021, Accessed August 13, 2022. https://www.npr.org/2021/06/09/1002593823/how-Democratic-is-american-democracy-key-pillars-face-stress-tests.
[228] Philip Bump, "The minoritarian third of the Supreme Court," *The Washington Post*, December 2, 2021. Accessed August 12, 2022. https://www.washingtonpost.com/politics/2021/12/02/minoritarian-third-supreme-court/.
[229] Ibid.
[230] Ibid.
[231] "Tyranny of the Minority," Jeffrey Billman, October 2, 2020, Accessed November 2, 2022, https://jeffreybillman.com/tyranny-of-the-minority/.

represented by just 30 senators and 30 percent of Americans by 70 senators.[232] Since 1992, Republicans have won the presidential popular vote just once, yet, on account of the Electoral College, they've held the White House for 12 of 28 years. In the U.S. Senate, the fact that Wyoming gets the same number of seats as California, a state with 70 times its population, redounds to conservatives' benefit. In recent U.S. House elections, Republicans have won more seats than their share of the national vote. [233] The disparities created by these counter-majoritarian institutions have convinced the national media that the country is center-right.[234] As the GOP became more and more like what one former Republican congressional staffer described as an "apocalyptic cult" ignoring scientists, engaging in conspiracy theories, and catering to extremists,[235] it also grew "dismissive of the legitimacy of its political opposition."[236]

The *Shelby* and *Brnovich* majority decisions were made by justices who represented the interests of fewer than half of the population and were appointed by Presidents who lost the popular vote. This is the outcome of long-term voter suppression efforts and serves to continue minority rule, a self-fulfilling prophecy. A handful of recent cases make clear that the Supreme Court rulings serve the conservative agenda, but they are out of step with the people. Over 61 percent of the public favor keeping abortion

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[232] Marla Liasson, "Democrats Increasingly Say American Democracy is sliding into Minoritarian Rule," *NPR*, June 9, 2021. Accessed August 13, 2022. https://www.npr.org/2021/06/09/1002593823/how-Democratic-is-american-democracy-key-pillars-face-stress-tests.
[233] "Tyranny of the Minority," Jeffrey Billman, October 2, 2020, Accessed November 2, 2022, https://jeffreybillman.com/tyranny-of-the-minority/.
[234] Ibid.
[235] Ibid.
[236] Thomas E. Mann and Norman Ornstein, *It's Even Worse Than It Looks,* (New York: Basic Books, 2016)

legal, and [237] 53 percent favor stricter gun control measures.[238] Currently, only 25 percent of the population has confidence in the Supreme Court.[239] 84 percent of adults say that Supreme Court justices should not bring their own political views into how they decide cases, 44 percent say justices nominated by Democratic presidents are doing at least a good job at being politically neutral – but just 12 percent say this about justices appointed by Republican presidents.[240]

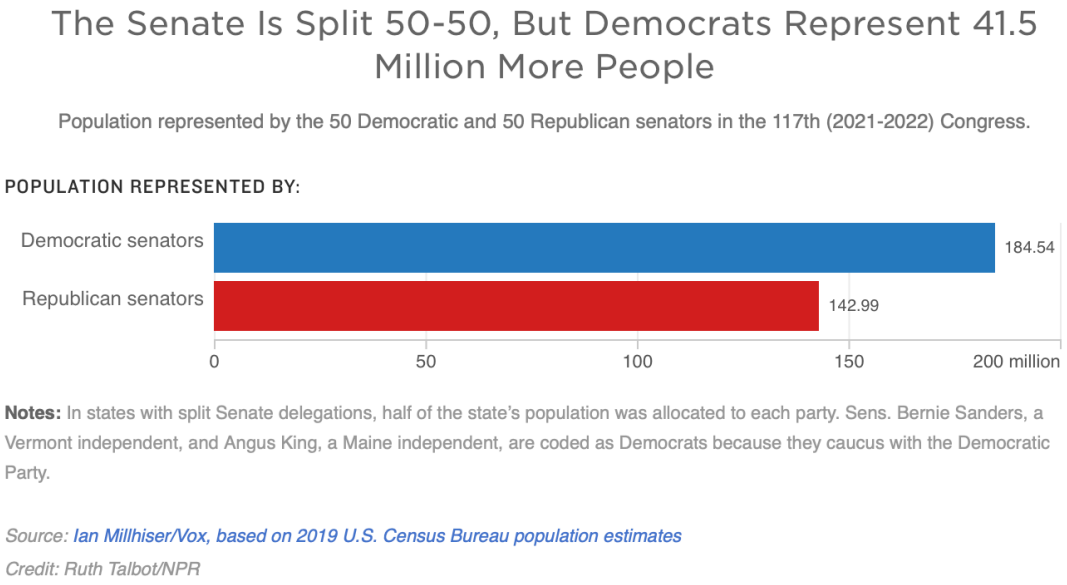

Figure 6 Senate Representation Milhiser, "America's Anti-Democratic Senate by the numbers," Vox, November 6, 2020, https://www.vox.com/2020/11/6/21550979/senate-malapportionment-20-million-Democrats-republicans-supreme-court)

[237] "Public Opinion on Abortion," Pew Research Center, May 17, 2022. Accessed August 13, 2022. https://www.pewresearch.org/religion/fact-sheet/public-opinion-on-abortion/.
[238] "Key Facts About Americans. And Guns," Pew Research Center, September 13, 2021. Accessed August 13, 2022. https://www.pewresearch.org/fact-tank/2021/09/13/key-facts-about-americans-and-guns/.
[239] "Public's Views of Supreme Court Turned More Negative Before News of Breyer's Retirement," Pew Research Center, February 2, 2022. Accessed August 13, 2022. https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx.
[240] Ibid.

Judges should seek to identify principles latent in the Constitution as a whole.[241] The notion that liberalistic views of self-determination and equality placed within the concept of ordered liberty are somehow to be restrained and adjudicated using only the standard that existed 241 years ago and ignoring the advances in social and civil rights, advances won over the last 57 years, is an abomination.

Trump-appointed judges have heard numerous matters over the years and decided them with apparent independence, not the least of which was the 60+ election fraud allegations that were each dispatched swiftly to the detriment of the former President's argument. This bodes well for the nation. Yet, other extremely polarizing decisions, particularly those on the docket of the Supreme Court, may deliver the heavily partisan outcomes the GOP has worked so hard for decades to secure. The result of the three monumentally controversial appointments made by Trump with an assist from Mitch McConnell and his norm-busting withholding of Obama's Supreme Court appointment stands to further the freefall of public confidence in the Court. The *Dobbs v. Jackson Women's Health (2022)* decision proved a pivotal factor in the 2022 midterm election.

The Supreme Court is determinative of federal law and policy and is not the vanguard of fundamental rights as many people imagine it to be. The electorate must be clear-eyed about the dangers of maintaining the status quo, mindful of the increasingly inverted ratio of representation to population, and willing to use the tools to combat the deeply entrenched inequality that has been codified in the system. The Supreme Court's record is not promising in favor of protecting rights. Instead, it seeks to enshrine the

[241] Ronald Dworkin, "Freedom's Law: The Moral Reading of the American Constitution: Roe in Danger," in *Constitutional Law and American Democracy*, (New York: Wolters Kluwer, 2012), 1007.

limits of a document that captured the conflict of inequality while aspiring to more. The national spirit has lost sight of the radical nature of the American experiment. It has never been about failure to grow; it has always been about unabashed optimism and courage. But the fear of redefining American Democracy in terms that capture the audacity of liberty is hindering the fulfillment of the founders, used as a defense to maintain the entrenched power structure. The survival of our Republic governed by consent hangs in the balance. Once lost, the fundamental right to vote is unlikely to be recovered.