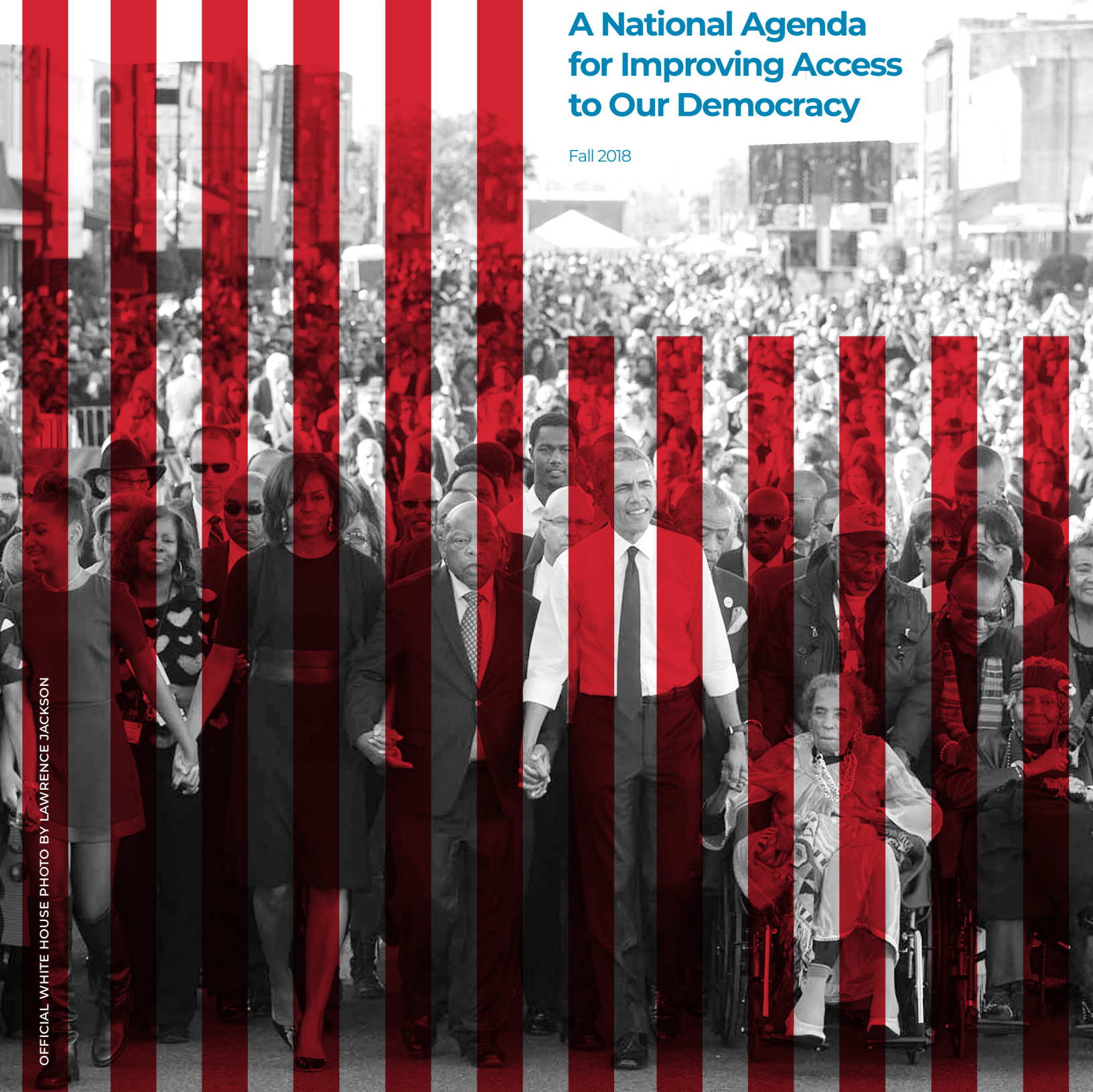


Protecting the Right to Vote:

A National Agenda
for Improving Access
to Our Democracy

Fall 2018



The New York Democratic Lawyers Council (NYDLC) is pleased to present *Protecting the Right to Vote: A National Agenda for Improving Access to our Democracy*, a series of policy memos that enunciates a civil rights-based vision for the future of U.S. elections that is ‘pro-voter’—one that lives up to the liberal democratic worldview that popular sovereignty and individual rights are indispensable prerequisites to the legitimacy of governmental authority. NYDLC is a diverse coalition of attorneys and voting rights advocates dedicated to fostering universal participation and trust in our elections. Since 2005, NYDLC volunteers have helped ensure that all eligible persons can register easily; vote conveniently, without intimidation; and have their votes counted accurately by transparent, reliable systems.

Why All Americans Must Prioritize Voting Rights

Millions of Americans have difficulty participating in our democracy, making those elected less representative of our interests and the resulting policies advanced less responsive to our needs. The lack of meaningful voter access is attributable to a combination of purposefully restrictive election laws along with antiquated registration and voting processes that have failed to keep pace with commercial, technological, and social conveniences. Too often, voting hurdles render due process a nullity, leading to the denial of the fundamental right to vote—a human right foundational to modern citizenship. In the aggregate these “lost votes” add up, resulting in widespread and sometimes systematic voter suppression. Americans who *can* vote still compete for influence in policymaking against limitless political spending.

In his 1963 Civil Rights Address, President Kennedy recalled that America “was founded on the principle that all men are created equal, and that the rights of every man are diminished when the rights of one man are threatened.” Today our right to vote is hardly secure. In 2018 alone, at least 24 states have introduced or carried over 70 bills to restrict access to registration or voting. These trends have accelerated since 2013 when a 5-4 majority of the Supreme Court gutted

the Voting Rights Act in *Shelby County v. Holder*. Opponents of voting rights are emboldened as the bipartisan consensus around universal citizen suffrage as a public good continues to fray.

In many cases, these laws *have the discriminatory impact* of making it harder to vote for people of color, the disabled, students, the elderly, working families, and those with lower incomes. In several disgraceful high-profile incidents (Texas (2017), North Carolina (2016), Pennsylvania (2012), Wisconsin (2011)), the public officials who drafted such laws have been found explicitly to have had *the corresponding discriminatory intent*.

Our democracy should endeavor to include more eligible voters in the process, not erect barriers that undermine American civil rights at home and give comfort to authoritarians abroad. And yet, America continues to be a place of contradictions. In a countervailing positive trend, over a dozen states have embraced reforms to modernize and streamline voter registration, a large majority of states now offer alternatives to voting from one location on a single day, activists in several states have prioritized fair redistricting, and Americans are increasingly recognizing the injustice perpetuated by blanket criminal disenfranchisement policies.

Unfortunately, demographic desperation and our polarized, zero-sum politics have supercharged the modern effort to roll back voting rights. The “federal” phase of this rollback has begun, as the Department of Justice’s Civil Rights Division is repurposed away from protecting Americans from restrictive and discriminatory voting laws, even as more and more courts jettison deference toward the legislators who craft them. Although the Trump Administration’s farcical *Commission on Election Integrity* has been disbanded, its proponents—a cadre of voter suppression usual suspects—continue to perpetuate the discredited pretext that voter fraud is rampant, necessitating severe voting restrictions.

Today the absence of uniform voting laws, due process norms, and the assault on voting rights renders the contours of the right to vote opaque and elastic, subject to local political manipulation as one crosses state and even county lines. In light of the inadequacies in our voting system and the vast disparities in how elections are administered nationwide, NYDLC believes that a baseline of protective and proactive pro-voter policies is a national imperative.

What’s Not Included here?

This norm-advancing exercise hardly exhausts the toolkit of public interest reforms that may help improve American democracy if embraced. Proposals left for a later day include rethinking primary processes and the role of political parties, ranked-choice voting methods, democratizing special elections, imposing term-limits, and professionalizing election boards. Moreover, the 2016 Election highlighted the need to secure electoral systems from intrusions and to accurately verify election results using methods that transcend partisanship. NYDLC members may generally support these proposals and readers are encouraged to consider them in the context of those included here, as they ripen for advocacy and further progressive development.

The Umbrella in the Rainstorm: Restoring Voting Rights Act Preclearance

The right to vote is a cornerstone of modern democracy, foundational and fundamental to our system of popular sovereignty. For nearly a century before the enactment of the Voting Rights Act of 1965 (“VRA”), many states and localities undermined the Fifteenth Amendment’s constitutional guarantee of the right to vote by employing pernicious Jim Crow legislation and tactics like poll taxes or literacy tests to suppress minority voting rights. Since the VRA was enacted, it has protected Americans from unjust and discriminatory efforts to limit the impact of expanded suffrage and render the franchise a right in name only. Despite the VRA’s success, in 2013 the Supreme Court’s Shelby County decision invalidated the VRA’s “preclearance” coverage formula. For nearly 50 years, this system had prevented states and localities with a clear history of discrimination from making it harder to vote without prior approval from the Justice Department. Freed from the inconvenience of federal oversight, Republican-controlled states unleashed a wave of restrictive voting laws. The Supreme Court, however, also provided a roadmap for curing the so-called defects in the law by updating the coverage formula. To restore pre-clearance protection and safeguard voting rights, it is left to Congress or the States to act.

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Modernizing American Democracy: Automatic Registration Gives Millions of Eligible Voters a Voice

The right to vote is a foundational premise of our democracy so it should be simple and convenient for every eligible citizen to participate in U.S. elections. But due to antiquated voter registration systems, more than one in four eligible voters remain unregistered and therefore unable to vote on Election Day. In most states, the voter registration process is error-prone and inefficient, with the burden placed on individuals to seek out, complete, and submit a voter registration form in compliance with strict, premature deadlines. Along the way, human error, poor policy, and partisan tactics combine to suppress countless otherwise-eligible voters. Many modern democracies have resolved this basic administrative challenge by making the voter registration process an automatic, government-led endeavor. In the U.S., over a dozen states have already embraced some form of Automatic Voter Registration (AVR), a policy that modernizes the registration process and better protects civil rights. By making voter registration of Americans a presumption instead of a harsh procedural obstacle, AVR makes voting more convenient, streamlines recordkeeping, and reduces the potential for foul play by maintaining accurate voter rolls, all while lowering costs.

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The Election Period: Providing a Sufficient Opportunity to Exercise the Franchise

Across America, antiquated election laws make it difficult for eligible voters to participate in our democratic process. Without meaningful opportunities to vote, the fundamental franchise rings hollow for millions of busy U.S. citizens. To make voting more convenient, these laws need to meet modern expectations and provide reasonable opportunities to cast a ballot. This requires a voter-centric overhaul of our elections. In the thirty-eight jurisdictions that have expanded voting beyond a single Election Day, this paradigm shift has already begun. During the Election Period, Election Day is recast as the final opportunity to cast a ballot, instead of the first and only opportunity. A convenient Election Period can be achieved with simple reforms like in-person early voting (including weekend and evening hours), universal absentee voting, and later voter-registration deadlines with flexibility to permit eligible voters to cure clerical issues while voting.

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Rethinking U.S. Election Administration: Barriers to In-Person Balloting Continue to Suppress the Vote

When U.S. voters attempt to cast their ballots in person, they confront a range of potential hurdles at the polling place that unnecessarily results, in the aggregate, in countless lost votes. Significant voter suppression can result from voter registration defects, confusion over where to vote, unduly long waiting times, and inadequate poll worker staffing or training. These hurdles infringe the rights of Americans seeking to participate in our democratic process, but in most cases, they can be alleviated by the adoption of modern policies and best practices. To improve election administration, NYDLC proposes several solutions: Adopt same-day registration; standardize the allocation of polling place resources; save ballots (or parts of ballots) whenever possible regardless of where they are cast; and, implement vote-centers with ballot printing to eliminate single-location voting limitations.

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Voting Rights and the Formerly Incarcerated: Unshackling Current Policies from a Legacy of Jim Crow

Widely recognized as indispensable to the legitimacy of modern societies, the right to vote is the most fundamental right bestowed upon Americans. Given the centrality of this liberty to political life, criminal disenfranchisement laws—the stripping of the right to vote as part of a penalty—took root in the United States as part of common law (“civil death”), expanding over time as a countervailing trend to the progressive expansion of the American electorate. Intertwined with the ugly proliferation of Jim Crow laws and their systematic marginalization of racial minorities, today 48 states maintain a criminal disenfranchisement policy. As a result, mass incarceration, disenfranchisement, and the hurdles to rights restoration exclude an estimated 6.1 Million Americans from the political process, the majority of whom have already completed their incarceration. States must reevaluate this serious punishment through a modern lens. One option is not to disenfranchise at all. But if states are to continue disenfranchising Americans, a uniform baseline of specific and proportional application and automatic rights restoration upon release would better serve the interests of justice and protect civil rights.

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Picking Their Own Voters: The Case for Fair and Independent Redistricting

One person, one vote. It’s a basic premise of our democracy but one that is routinely subordinated by the zero-sum gamesmanship that continues to plague American politics. Many tactics can stymie a community’s political power by undermining voting rights. But perhaps the most pernicious and sophisticated method is indirect—achieved by manipulating the redistricting process (the redrawing of legislative district lines) for political advantage. This practice, pejoratively called “gerrymandering”, entrenches political power by designing demographically “safe” districts that ensure a preordained electoral outcome. Gerrymandering manipulates the composition of Congress and legislatures for multiple election cycles by diluting or wasting the collective power of voters. A successful gerrymander tailors district lines in a way that distorts the will of the electorate, a sentiment then-President Obama articulated in his 2016 *State of the Union Address* when he called for an “end [to] the practice of drawing our congressional districts so that politicians can pick their voters and not the other way around.” To combat the detrimental effects of gerrymandering and better protect the rights of American voters, NYDLC supports the enactment of objective redistricting criteria, procedural transparency safeguards, and diverse, balanced, and truly independent redistricting commissions.

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The Umbrella in the Rainstorm: RESTORING VOTING RIGHTS ACT PRECLEARANCE

**A Multi-Part Project of the Legislative Affairs Committee
of the New York Democratic Lawyers Council (NYDLC)**

Produced by Executive Director Jarret Berg

Special thanks and gratitude to:

Ted Anastasiou, Lori Antonacci, Niechao Bai, Anthony Bailey, Sarah Baldwin, Anastasia Benedetto, Scott Budow, Steven Carbó, Melanie Carnsew, Tabitha Crosier, Kelvin Davis, Joel Dodge, Doug Dunham, Mady Edelstein, Amanda Goldman, David Goldman, Cory Hansen, Rebecca Hausner, Hal Hodes, Adrienne Jones, Matthew Jordan, Maithli Joshi, Leonard Kohen, Andrew Kirshenbaum, Jared Lacertosa, Abel McDonnell, Brenda McManus, Alexandra Megna, Samuel Meller, Claudine-Annick Murphy, Ed Murray, Sabrina Oudine, John Owens, Jr., Robert Rose, Nicole Samii, Carol Schrager, Russell Semmel, Adam Shpeen, William J. Steiner, Jesse Suchmann, Somil Trivedi, Jeff Wice, Ekow Yankah

The right to vote is a cornerstone of modern democracy, foundational and fundamental to our system of popular sovereignty. For nearly a century before the enactment of the Voting Rights Act of 1965 (“VRA”), many states and localities undermined the Fifteenth Amendment’s constitutional guarantee of the right to vote by employing pernicious Jim Crow legislation and tactics like poll taxes or literacy tests to suppress minority voting rights. Since the VRA was enacted, it has protected Americans from unjust and discriminatory efforts to limit the impact of expanded suffrage and render the franchise a right in name only. Despite the VRA’s success, in 2013 the Supreme Court’s *Shelby County* decision invalidated the VRA’s “preclearance” coverage formula. For nearly 50 years, this system had prevented states and localities with a clear history of discrimination from making it harder to vote without prior approval from the Justice Department. Freed from the inconvenience of federal oversight, Republican-controlled states unleashed a wave of restrictive voting laws. The Supreme Court, however, also provided a roadmap for curing the so-called defects in the law by updating the coverage formula. To restore pre-clearance protection and safeguard voting rights, it is left to Congress or the States to act.

In 2006, officials in Harris County, Texas, planned to cut the number of polling places for its 540,000 registered voters from 84 to 12. Among those remaining 12, it was proposed that the site with the smallest proportion of minorities would serve 6,500 voters, while the most predominant minority site (79.2% black and Hispanic) would have served over 67,000 voters.¹ But thankfully, Harris County could not make this drastic change on its own. Because of Texas’ history of discriminatory voting practices, the Voting Rights Act of 1965 (“VRA”) required any election-related changes to be approved by the United States Department of Justice (“DOJ”). The DOJ blocked Harris County’s plan from ever taking effect because county officials failed to prove that their plan wouldn’t make it more difficult for minorities to vote.²

Ten years later in Maricopa County, Arizona, primary election voters spent hours waiting in line to cast their ballots after county officials slashed the number of polling places from 200 to 60—a sharp cut that Maricopa County could only make because in 2013 an ideologically split Supreme Court in *Shelby County v. Holder* had gutted the VRA.³ Even though Arizona had a history of discrimination, election officials no longer had to clear rule changes prospectively with the DOJ. The last Maricopa County voter cast her ballot at 12:12 a.m. after five hours in line, declaring, “I’m here to exercise my right to vote.”⁴ *We will never know just how many perfectly eligible Arizona voters were unable or unwilling to wait five hours to cast a ballot in a primary.*

In Brooklyn, New York ahead of the 2016 Presidential Primary, 117,000 active voters were wrongfully purged from the rolls after the Board of Elections determined they had not voted in recent prior elections.⁵ This was compounded when the voter database did not sync properly for six months, leading affected voters to believe they were still registered.⁶ The illegal purge violated state and federal law and disproportionately affected Latino and Asian voters. Since Brooklyn was a covered jurisdiction under the VRA’s federal preclearance protection, this widespread purge of eligible voters could have been identified and prevented, maintaining voter roll accuracy without massively infringing civil rights.⁷ *We will never know just how many wrongfully purged New York voters would have cast a ballot in this highly publicized contest.*

What we do know is that these forms of systemic voter suppression illustrate how, without VRA protection, the fundamental right to vote is deeply vulnerable, leaving Americans at the mercy of local political machinations in covered jurisdictions for the first time in half a century.

Background of the Voting Rights Act and Preclearance

For nearly a century before the Voting Rights Act of 1965, many states and localities undermined the Fifteenth Amendment’s guarantee of the right to vote by employing insidious but facially neutral Jim Crow-era legislation like poll taxes, literacy tests, and registered voter vouchers that depressed black voter registration and turnout.⁸ The VRA outlawed many of these voter suppression tactics and granted the federal government the necessary tools to enforce the Fifteenth Amendment and truly guarantee the right to vote.⁹

Specifically, the VRA required states and localities with histories of discriminatory voting laws to bear the burden of demonstrating to the DOJ that proposed changes to their election laws did not impermissibly infringe upon the right to vote. This tool, known as “preclearance,” required these jurisdictions to receive federal approval before implementing changes to voting practices.¹⁰

Preclearance was a tremendous success. It blocked last-minute voter suppression laws that slow-moving litigation could not, and deterred countless other attempts to dilute minority votes.¹¹ Even those who would meddle with voting laws for partisan gain had no choice but to at least temper their efforts, to avoid having a pernicious proposal rejected outright by DOJ. Indeed, the VRA, and by extension the preclearance tool provided therein, was so unquestionably successful that Congresses of varying partisan makeups reauthorized the Act four times with overwhelming majorities, most recently in 2006 when it was reauthorized by the U.S. Senate 98-0.¹²

The VRA outlawed many voter suppression tactics and created tools to guarantee the right to vote.

The Supreme Court in *Shelby County* Invalidates the Preclearance Formula

In 2013, the Supreme Court dealt a damaging blow to the VRA by declaring its preclearance regime unconstitutional.¹³ Specifically, the Court invalidated Section 4(a) of the VRA, which contained the coverage formula that determined which states or localities were subject to preclearance. This rendered the Section 5 preclearance protections inoperative. The Court identified three constitutional defects with the VRA’s preclearance regime: (1) It burdened the right of the states to regulate elections; (2) It treated states unequally by subjecting some states to oversight but not others; and (3) Its coverage formula was based on outdated turnout and registration figures from 1972 that no longer reflected contemporary deficiencies.¹⁴

The *Shelby County* decision immediately *relieved* covered jurisdictions of their obligation to clear election law changes with the federal government. In response, several Republican-controlled states formerly covered by the VRA, including Texas, Alabama, Mississippi, and North Carolina, enacted new laws that had previously been (or are likely to have been) blocked by federal preclearance. For example,

retrogressive legislation in North Carolina shortened the time period available for voter registration and eliminated early voting on the last Sunday before Election Day—a traditionally popular day for African-American churches to hold “Souls to the Polls” get-out-the-vote drives.¹⁵ Federal courts have found on the record that many of these new laws were either racially discriminatory in effect, or were enacted with a discriminatory intent.¹⁶

Worse, restrictive voting laws also expanded to states like Wisconsin and Ohio that had not had the same history of racially motivated voter suppression.¹⁷ These new laws made it harder for minorities, students, lower-income Americans and other disadvantaged populations to vote.¹⁸

“Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”

—Justice Ginsberg, 2013



These kinds of second-generation voter suppression laws are now significantly harder to challenge. Without preclearance, individual voters bear the heavy burden of demonstrating that a law is discriminatory, rather than the governmental authorities that enacted such laws having to prove that new restrictions on voting are fair. The quick proliferation of these laws seems to have (unfortunately) proven Justice Ginsburg’s analogy correct that “[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”¹⁹ Despite the weakening of the VRA, discriminatory laws are still being challenged and blocked by federal courts,²⁰ but as noted, litigation is slow-moving and reactive—a non-ideal for proactively protecting civil rights.

Helpfully, the Court in *Shelby County* provided a roadmap for Congress to repair the VRA: “Congress—if it is to divide the States—must identify those jurisdictions to

be singled out on a *basis that makes sense in light of current conditions*. It cannot rely simply on the past.”²¹ To repair the VRA, Congress could: (a) treat all states equally, and/or (b) rationally select states for preclearance based on contemporary data.

Restoring Pre-Clearance to the Voting Rights Act

In response to *Shelby County*, members of Congress have introduced two bills to modernize the preclearance formula set forth in the VRA in accordance with the Court’s demand that “current burdens” justify “current needs.”

Voting Rights Amendment Act

The Voting Rights Amendment Act modernizes the preclearance formula to include any state with five voting rights violations in the past 15 years, including one statewide violation.²² This coverage formula would apply to four states: Georgia, Louisiana, Mississippi and Texas.²³ Further, an individual county in a non-covered state would be subject to preclearance if it had either three voting rights violations in the prior 15 years or one violation, plus a determination by the Department of Justice that minority voter turnout was “persistently extremely low.”²⁴

Voting Rights Advancement Act

The Voting Rights Advancement Act²⁵ also modernizes the preclearance formula, but extends the relevant time period for a preclearance determination. It requires federal preclearance for states with 15 voting violations over the past 25 years, or 10 violations if one was a statewide violation.²⁶ As a result, 13 states representing half of the U.S. population would initially be fully covered by the Advancement Act, including several states not previously covered such as California and New York.²⁷ Furthermore, an individual county in a non-covered state would be covered if it committed three or more voting violations in the previous 25 years.²⁸

Perhaps more importantly, the Advancement Act also requires jurisdictions *nationwide* to pre-clear certain voting changes that are particularly likely to impact minority voters, such as adding or subtracting elected seats, replacing localized elections with at-large contests, relocating polling places, and reducing voting materials prepared in languages other than English.²⁹ This provision sustains preclearance while addressing the equal sovereignty prong of the *Shelby County* majority’s ruling, making the Advancement Act a more comprehensive fix to the VRA.³⁰

If enacted, either of these proposals would breathe new life into the VRA and restore this important guarantor of the franchise. In the wake of *Shelby County*, it falls upon Congress or the states to ensure Americans can vote free from unlawfully discriminatory political manipulation.

State Action

Some states have also pursued alternative safeguards to protect minority voters. For example, local VRAs may be used to prevent minority vote dilution. In 2001,

California passed a statewide VRA that makes it easier for protected classes to bring a vote dilution claim under state law.³¹ Illinois passed its own statewide VRA in 2011 that allows voters in districts that have experienced prior vote dilution to challenge future redistricting plans.³² In Florida in 2010, voters passed two state Constitutional amendments governing legislative apportionment that prohibits impermissible vote dilution and the diminishment of a minority group's ability to elect a candidate of its choice.³³ In 2018, Washington enacted a state VRA that empowers cities, counties and school districts to abolish at-large voting that tends to disenfranchise minority voters by diluting their votes.³⁴

A New York proposal approved by the Democratic-controlled Assembly would require localities falling within a coverage formula to pre-clear voting changes with the state Attorney General.³⁵ Although a detached federal pre-clearance safeguard may be preferable for uniformity, states can take alternative measures like these to safeguard minority voting rights within their borders.

Preclearance blocked last-minute voter suppression laws that slow-moving litigation could not.

Conclusion

The right to vote is foundational and fundamental to American democracy, but for nearly a century before the enactment of the 1965 VRA, many states and localities employed pernicious legislation and procedural tactics to suppress the ability of minorities to achieve fair representation. In the decades prior to the 2013 *Shelby County* decision, VRA preclearance blocked voter suppression tactics that slow-moving litigation could not, and deterred countless other attempts to dilute minority votes. The VRA was overwhelmingly successful but without a valid coverage formula for federal pre-clearance, the protections it provides are severely curtailed. Since *Shelby County*, states with and without a history of discriminatory voting practices have moved ahead with measures that disproportionately restrict minority voting rights. To curb these tactics, Congress must repair the VRA by enacting a modern or universally applicable coverage formula that provides a detached and uniform federal preclearance system. In the interim, states can provide layers of due process to better protect minority voting rights.

Notes

- 1 [Letter from Wan J. Kim, Ass't Att'y General, to Renee Smith Byas](#) (May 5, 2006).
- 2 *Id.*
- 3 See Ari Berman, [There Were 5-Hour Lines to Vote in Arizona Because the Supreme Court Gutted the Voting Rights Act](#), THE NATION, Mar. 23, 2016.
- 4 See Mary Jo Pitzl, et al., [Long Lines, Too Few Polls Frustrate Metro Phoenix Primary Voters](#), AZ. CENTRAL, Mar. 23, 2016.
- 5 Vivian Yee, [Justice Dept. Seeks to Join Suit over 117,000 Purged Brooklyn Voters](#), N.Y. TIMES, Jan. 12, 2017.
- 6 *Id.* The Complaint alleged that, in fact, more than 4,100 of the flagged voters had voted at least once since 2008.
- 7 *Id.* Chris Fuchs, [Three Years After SCOTUS Case Weakened Voting Rights Act, Leaders Call for New Protections](#), NBC NEWS, June 27, 2016; Chris Fuchs, [New York City Board of Elections Settles Lawsuit over Voter Purge](#), NBC NEWS, Nov. 2, 2017.
- 8 Alan Greenblatt, [The Racial History of the 'Grandfather Clause'](#), NPR, Oct. 22, 2013; MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 141 (2004); Jim Rutenberg, [A Dream Undone: Inside the 50-Year Campaign to Roll Back the Voting Rights Act](#), N.Y. TIMES MAGAZINE, Aug. 2, 2015, at MM30.
- 9 The VRA banned literacy tests and other devices to suppress the vote. Voting Rights Act of 1965, 52 U.S.C. §10501; the Twenty-Fourth Amendment prohibits poll taxes. U.S. Const. amend. XXIV, §1.
- 10 Preclearance is codified at Section 5 of the VRA. 52 U.S.C. § 10101 et seq. Jurisdictions subject to preclearance are identified via a “coverage formula” in Section 4 based on their histories of voting rights infractions. Pursuant to the reauthorization by Congress of the VRA in 2006, the coverage formula required preclearance for any jurisdiction that had a voting “test or device” and less than 50% voter participation or registration. See U.S. DEPT OF JUSTICE, [Section 4 of the Voting Rights Act](#) (Dec. 21, 2017).
- 11 Theodore M. Shaw and Vishal Agraharkar, [50 Years Later, Voting Rights Act Under Unprecedented Assault](#), BRENNAN CTR. FOR JUSTICE (Aug. 2, 2015). See also House Report 109-478 at 21 (“Since 1982, the Department [of Justice] objected to more than 700 voting changes that have been determined to be discriminatory, preventing such changes from being enforced by covered jurisdictions.”).
- 12 Ari Berman, [Restoring the Voting Rights Act Now Has Bipartisan Support](#), THE NATION, Sept. 10, 2015.
- 13 *Shelby Cty., Ala. v. Holder*, 570 U.S. 529 (2013).
- 14 *Id.* at 542- 550.
- 15 Morgan Whitaker, [North Carolina Ushers in Restrictive Voting Laws](#), MSNBC, Aug. 12, 2013; Laura Finaldi, [Souls to the Polls' Sought in Only Sunday Voting Day](#), NEWS & OBSERVER, Oct. 26, 2014; Sarah Childress, [With Voting Rights Act Out, States Push Voter ID Laws](#), PBS: FRONTLINE, June 26, 2013.

- 16 Manny Fernandez, *Federal Judge Says Texas Voter ID Law Intentionally Discriminates*, N.Y. TIMES, Apr. 10, 2017; Matt Ford, *The Entirely Preventable Battles Raging Over Voting Rights*, THE ATLANTIC, Apr. 14, 2017.
- 17 *Block the Vote: A Journalist Discusses Voting Rights and Restrictions*, NPR (July 22, 2016); see Jordan Lebeau, *A State-by-State Guide to Voter Restriction Laws*, FORBES, Nov. 7, 2016.
- 18 Tomas Perez, *'Shelby County': One Year Later*, BRENNAN CTR., June 24, 2014.
- 19 *Shelby Cty., Ala.*, *supra* note 13, at 589 (Ginsburg, J., dissenting).
- 20 See *North Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016); *One Wisconsin Instit., Inc. v. Thomsen*, 198 F.Supp.3d 896 (W.D. Wis. 2016); *Evenwel v. Abbott*, 136 S.Ct. 1120 (2016); *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016).
- 21 *Shelby Cty., Ala.*, *supra* note 13, at 553 (2013) (Ginsburg, J., dissenting).
- 22 Voting Rights Amendment Act of 2017, H.R. 3239, 115th Cong. (2017-2018).
- 23 Ari Berman, *Congressional Democrats Introduce Ambitious New Bill to Restore the Voting Rights Act*, THE NATION, June 24, 2015.
- 24 The Amendment Act also amends Section 3(c) of the VRA to allow a federal court discretion to order a preclearance remedy if it finds that any section of the VRA has been violated. H.R. 3239, *supra* note 22, §3(b)(3)(C); see also Travis Crum, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 Yale L.J. 1992 (2010) (proposing increased enforcement under Section 3 in the event preclearance is declared unconstitutional). The violation may be based on a finding of discriminatory intent or result—an improvement over existing law, which only permits a preclearance remedy if there is intentional discrimination. However, the bill contains a carve-out precluding federal courts from ordering preclearance based on a finding that a state's photo identification law *resulted* in racial discrimination. Because 34 states have enacted photo identification requirements to vote, this could be a significant exception that undermines the government's ability to prevent discriminatory voting practices. NAT'L CONFERENCE OF STATE LEGISLATORS, *Voter Identification Requirements – Voter ID Laws*, May 15, 2018.
- 25 Voting Rights Advancement Act of 2017, H.R. 2978, 115th Cong. (2017-2018).
- 26 Ari Berman, *Congressional Democrats Introduce Ambitious New Bill to Restore the Voting Rights Act*, THE NATION, (June 24, 2015).
- 27 *Id.* The 13 states are: Alabama, Arkansas, Arizona, California, Florida, Georgia, Louisiana, Mississippi, New York, North Carolina, South Carolina, Texas, and Virginia. *Id.*
- 28 H.R. 2978, *supra* note 25 §4(b)(1)(B).
- 29 H.R. 2978, *supra* note 25 §4(A)(b).
- 30 The Advancement Act also amends Section 3(c) in a similar manner as the Amendment Act, but it does not contain a carve-out for photo identification laws. As a result, the judicial bail-in process contained in the Advancement Act applies to many states and jurisdictions that are deliberately beyond the reach of the Amendment Act. The Advancement Act also contains several other provisions that would improve voting protections, including: (1) expanding the Federal Observer Program to allow the Attorney

General to send federal observers to any place where he or she determines there is a substantial risk of racial discrimination during early voting or on Election Day; and, (2) mandating public notice for all voting changes that happen within 180 days of an election. *Compare* Voting Rights Amendment Act of 2017, H.R. 3239, 115th Cong. (2017-2018), *with* Voting Rights Advancement Act of 2017, H.R. 2978, 115th Cong. (2017-2018).

- 31 PAIGE EPSTEIN, ADDRESSING MINORITY VOTE DILUTION THROUGH STATE VOTING RIGHTS ACTS, UNIV. OF CHI. PUBLIC LAW & LEGAL THEORY WORKING PAPER NO. 474 9 (2014).
- 32 10 Ill. Comp. Stat. 120/5-5(a); *id.* at 17.
- 33 Fla. Const. art. III, § 20; Fla. Const. art. III, §21; Epstein, *supra* note 31, at 23.
- 34 Wash. Voting Rights Act, ch. 113, Laws of 2018, (2018). Mark Joseph Stern, *Democrats Defend Ballot*, SLATE (Apr. 3, 2018).
- 35 A5925. Assemb. Reg. Sess. 2017-2018. (N.Y. 2017). Covered jurisdictions are those that: (a) have a population of at least 10% of any racial, ethnic, or language minority; (b) have been the subject of court or enforcement action due to discriminatory voting practices within 10 years; or (c) were previously subject to preclearance under the VRA. *Id.*

Modernizing American Democracy:

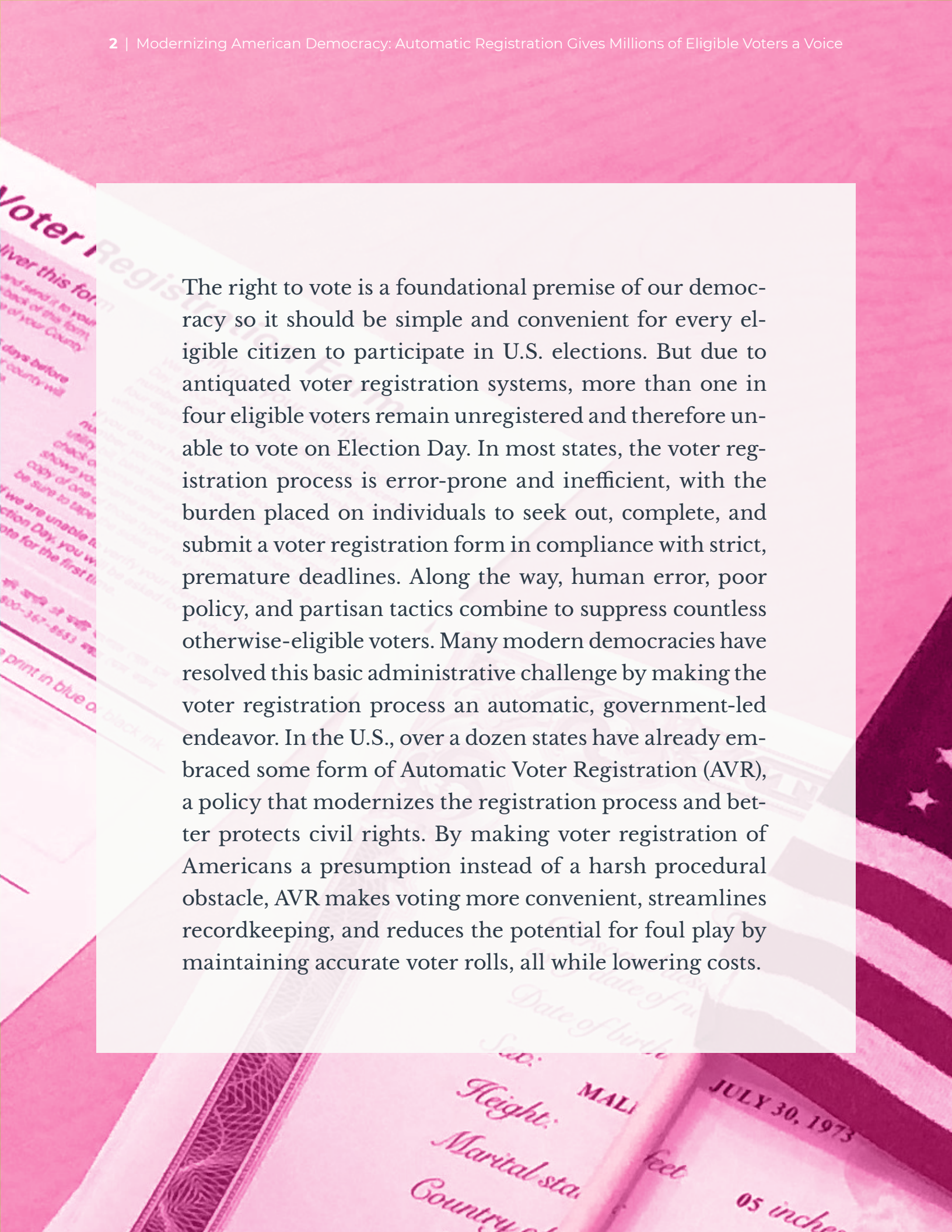
AUTOMATIC REGISTRATION GIVES MILLIONS OF ELIGIBLE VOTERS A VOICE

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Produced by Executive Director Jarret Berg

Special thanks and gratitude to:

Ted Anastasiou, Lori Antonacci, Niechao Bai, Anthony Bailey, Sarah Baldwin, Anastasia Benedetto, Scott Budow, Steven Carbó, Melanie Carnsew, Tabitha Crosier, Kelvin Davis, Joel Dodge, Doug Dunham, Mady Edelstein, Amanda Goldman, David Goldman, Cory Hansen, Rebecca Hausner, Hal Hodes, Adrienne Jones, Matthew Jordan, Maithli Joshi, Leonard Kohen, Andrew Kirshenbaum, Jared Lacertosa, Abel McDonnell, Brenda McManus, Alexandra Megna, Samuel Meller, Claudine-Annick Murphy, Ed Murray, Sabrina Oudine, John Owens, Jr., Robert Rose, Nicole Samii, Carol Schragger, Russell Semmel, Adam Shpeen, William J. Steiner, Jesse Suchmann, Somil Trivedi, Jeff Wice, Ekow Yankah



The right to vote is a foundational premise of our democracy so it should be simple and convenient for every eligible citizen to participate in U.S. elections. But due to antiquated voter registration systems, more than one in four eligible voters remain unregistered and therefore unable to vote on Election Day. In most states, the voter registration process is error-prone and inefficient, with the burden placed on individuals to seek out, complete, and submit a voter registration form in compliance with strict, premature deadlines. Along the way, human error, poor policy, and partisan tactics combine to suppress countless otherwise-eligible voters. Many modern democracies have resolved this basic administrative challenge by making the voter registration process an automatic, government-led endeavor. In the U.S., over a dozen states have already embraced some form of Automatic Voter Registration (AVR), a policy that modernizes the registration process and better protects civil rights. By making voter registration of Americans a presumption instead of a harsh procedural obstacle, AVR makes voting more convenient, streamlines recordkeeping, and reduces the potential for foul play by maintaining accurate voter rolls, all while lowering costs.

Every eligible American who wants to vote should be able to participate in our elections. That much is basically irrefutable, but year after year, far too many cannot. One major culprit is the hurdle created by our antiquated voter registration system.¹ Forty-nine states impose voter registration as a prerequisite to casting a ballot.² But due to antiquated voter registration systems, it is estimated that more than one in four eligible Americans remain unregistered.³

Moreover, U.S. voter rolls are crudely maintained and sloppy. In 2012 Pew estimated that one-in-eight registrations were significantly inaccurate or no longer valid.⁴ Because government imposes and designs the registration process, policy-makers are responsible for this mismanagement. To remedy this, the American voter registration system requires modernization.

In most states, the traditional voter registration process is onerous, error-prone and cost-inefficient. The burden is placed on Americans to actively “opt in” to our democracy by seeking out and submitting a registration form in compliance with strict, premature deadlines—typically *several weeks to thirty days* before an election. Americans must register to vote anew when they move between states and most states fail to maintain a voter’s registration as citizens move between counties.⁵ As a result, this flawed registration model leads to inaccurate and incomplete voter databases and, too often, suppressed rights on Election Day.

259,000 new voters were registered in California in the first 3 months of the AVR program.



Moreover, millions of voters remain unregistered because they are not aware of the process or its many pitfalls,⁶ or rather, because the registration process frequently fails to meet the reasonable commercial expectations modern Americans have about “signing up” to participate in events. Many who try to register never make it onto the rolls: some submit incomplete or illegible forms; others miss the deadline altogether or fall off the rolls after changing residences;⁷ others are ensnared by clerical errors made by overburdened or poorly trained election administrators. And sometimes, government inexplicably tramples over the rights of those they purport to serve.⁸

Additionally, since government generally takes a passive, almost agnostic posture toward voter registration, a “coalition of the willing” among private interests and civic-minded volunteers fills that void (with the expected shortfalls), conducting ad

hoc registration efforts and handling volumes of personal data. This uneven process lacks quality control, inviting errors by voters or bad decisions by those that carry and submit forms, which can be inadvertent or pernicious.⁹ Even voters who are duly registered may be subsequently classified as “inactive” or become purged from the registration rolls because a state uses flawed or blunt, poorly-tailored methods to confirm eligibility over time.¹⁰ Our policymakers mass purge—they do not mass register voters.

AVR Modernization Removes Onerous Procedural Hurdles to Voting

To ensure accurate and more complete voter rolls and to modernize our voter registration system, the registration process should be state-led, include streamlined data management and paper reduction practices among government agencies, and list maintenance should be largely automatic and universal for all eligible voters. AVR makes two simple changes to voter registration: Eligible Americans who interact with government agencies are registered to vote unless they opt out; and, agencies submit registration data electronically to election officials.¹¹

Today, states have the technology to modernize voter registration in this way and over a dozen jurisdictions already are.¹² The early adopters include states large and small and the reform is effective in urban and rural settings.¹³

The policy has been to mass purge—rather than to mass register American voters.

A robust AVR program has the potential to make voter registration (and registration updates) seamless by integrating the process into routine government interactions like filing taxes, applying for or renewing drivers licenses, enrolling in public colleges, applying for a library card, obtaining federal and state public assistance, and submitting changes of address. To ensure comprehensiveness, AVR should also occur through public agencies or entities like departments of corrections, parks and recreation, housing authorities, health exchanges, and high schools.¹⁴ Federal authorities like the Post Office, Social Security Administration, Selective Service, and Internal Revenue Service also routinely collect the very information necessary to register voters.¹⁵ For formerly incarcerated Americans disenfranchised as part of a sentence, a state’s department of corrections is best placed to provide current eligibility data to the state election authority, which can streamline the rights restoration and registration processes upon release.¹⁶

Moreover, much of this data is already sharable across state agencies and between states. State election officials routinely access government databases to facilitate applications and update rolls.¹⁷ Under a robust AVR policy, all these entities serve as portals for registration, reducing barriers to participation caused by errors, omissions, and out-of-date records.¹⁸

A small but transformative principle of an effective AVR policy involves reversing a presumption against registration that is engrained in existing U.S. agency-assisted voter registration policy.¹⁹ The 1993 National Voter Registration Act (“NVRA” or “Motor Voter”) recognized: 1) the fundamental nature of the right to vote; 2) the duty of government “to promote the exercise of that right”; 3) the goal of “increase[ing] the number of eligible citizens who register to vote”; and 4) the across-the-board list maintenance and convenience benefits of co-locating voter registration within entities that collect the same information as they serve the public in other ways. However, the forms agencies use require Americans to affirmatively “opt-in” to voter registration, while customers and staff focus on other primary agency priorities.²⁰

By contrast, AVR embraces a behavioral science and civic design best practice that presumes eligible residents would prefer (as a clerical matter) to be registered before a harsh deadline—and then have the choice later whether or not to actually vote—rather than remain unregistered, and thereby prohibited from voting as is their right.²¹ Under AVR, Americans retain the freedom to opt out of registration when completing forms or to withdraw from the voter rolls, but the bizarre presumption against citizen access to civil rights is reversed. Election administrators then verify an applicant’s eligibility before registering the voter or updating an existing registration.²²

From a comparative perspective, Americans may be surprised to learn that AVR is already commonly practiced in democracies around world, where registration rates regularly exceed 90 percent. In Canada, the National Register of Electors, a permanent, continually updated database uses tax filings for voter registration (it includes over 93% of those eligible).²³ In Iraq, citizens benefited from an automatic voter registration policy from their first democratic election in 2005.²⁴ In that election, approximately 92% of Iraq’s eligible voters were registered to vote using food program ration lists.²⁵

Beginning in 2015, states began to adopt AVR, typically starting with their departments of motor vehicles.²⁶ Oregon, the first State to implement AVR, saw registration rates at the DMV quadruple.²⁷ In California, more than 259,000 people were newly registered to vote in the first three months of the program and 120,000 additional Californians updated their registration address. More than 100,000 young Californians have pre-registered and will be automatically enrolled when they turn 18 as part of a related reform.²⁸ Many states are considering similar measures.²⁹ The benefits of modernizing voter roll maintenance through AVR cut across party lines: Former President Obama has proposed that automatic registration should be “the new norm across America” and Democratic and Republican leaders have embraced AVR, placing it at the top of the national pro-voter agenda.³⁰

However, a more comprehensive and fair AVR policy extends beyond the DMV, since not every American has a drivers' license or interacts with the DMV regularly. For example, in addition to the DMV, eligible voters in Maryland who do not opt out will be automatically registered when they interact with state health exchanges or the Mobility Certification Office, which provides paratransit benefits for people with disabilities. Massachusetts will also register citizens who interact with the MassHealth program. Some states have authorized officials to expand AVR to additional agencies that collect information sufficient to make an eligibility determination.³¹

AVR Improves the Integrity of Voter Rolls While Reducing Clerical Participation Barriers

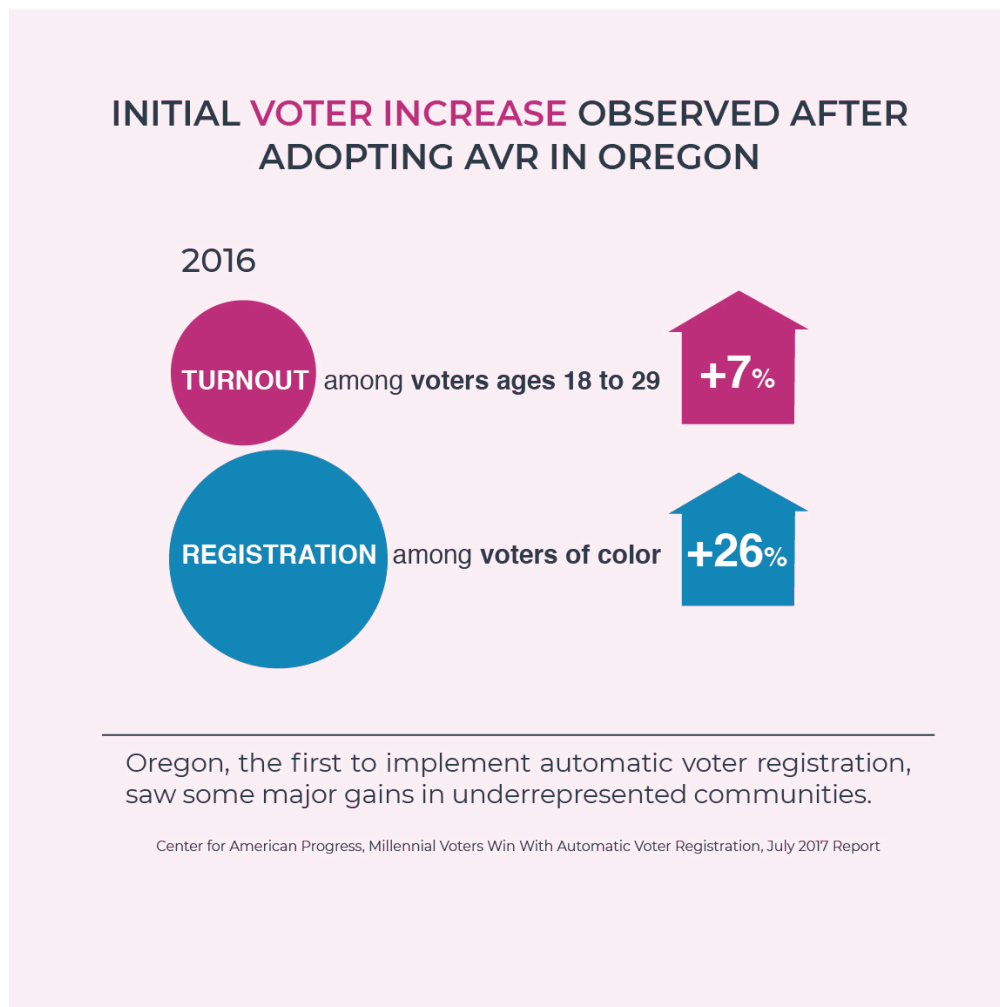
States with a robust AVR policy will have more accurate and comprehensive voter rolls than those that continue to rely on piecemeal, paper-based, candidate- or civic-group-led voter registration drives. Since most citizens interact with government at least once a year (*e.g.* filing tax returns³²) or every few years to update an address or renew a drivers' license,³³ voters have ongoing opportunities to register or update information as circumstances change (*e.g.* after a move). Toward that end, AVR helps resolve one of the vexing problems election administrators continue to face: How to responsibly maintain accurate records and administer a system that revolves around the home address of millions of highly-mobile Americans,³⁴ while maintaining and expanding fair access to the polls for all who are eligible to vote.³⁵

Election authorities that implement AVR will reduce registration errors by eliminating the crushing burden administrators face today of processing volumes of new, handwritten or paper applications in the run up to each election. This is not a subsidiary benefit either: Between the end of voter registration for the 2014 election and the 2016 election, more than 77.5 million registration applications were received in the states.³⁶ AVR can drastically reduce clerical errors that lead to infringed rights and the labor and overtime costs associated with processing so many applications at once.³⁷

Moreover, it is the government that imposes the registration step as a prerequisite to exercising fundamental rights and the government in each state that determines the particular formalities of the registration process. As a matter of basic procedural fairness and clerical efficiency, it follows that government should bear primary responsibility for conducting and promoting registration of citizens as widely as possible. Indeed a bipartisan Congress recognized this “duty of the Federal, State, and local governments to promote the exercise of that right” explicitly when it enacted the NVRA’s agency assisted voter registration policy in 1993.³⁸ Where registration discrepancies do still arise, AVR can drastically reduce the present volume of voters penalized for incomplete or untimely registrations or clerical errors, since many would be attributable to government action, and verifiable or curable thereby.

Finally, increasing the eligible-voter registration rate may result in greater voter turnout because it reduces the suppression impacts of a prerequisite hurdle to

participation. The experience in Oregon and California should encourage other states to adopt AVR. Ahead of the 2016 elections, AVR registered 272,000 new Oregonians. 98,000 of those who were newly registered voted in the November 2016 election. In particular, AVR improved participation by young people, minorities, and lower-income individuals, who comprise some of the most disengaged voters.³⁹



Conclusion

Enacting AVR across the U.S. has the potential to drastically modernize the American voter registration system. By reducing the harsh disqualifying impacts that our existing registration process currently plays in our society, AVR can eliminate a major clerical barrier to citizen participation in our democracy. Americans in both parties must agree to discard outdated systems and address the lack of procedural due process that systematically infringes upon the exercise of fundamental voting rights. Streamlining voter registration will also improve the accuracy and integrity of our voter rolls, and reduce administrative costs and systemic stress. For all of these reasons, NYDLC strongly supports the adoption of a robust Automatic Voter Registration policy.

Notes

- 1 THE PEW CHARITABLE TRUSTS, [INACCURATE, COSTLY, AND INEFFICIENT: EVIDENCE THAT AMERICA'S VOTER REGISTRATION SYSTEM NEEDS AN UPGRADE 2](#) (2012).
- 2 U.S. ELECTION ASSISTANCE COMM'N, [THE ELECTION ADMINISTRATION AND VOTING SURVEY: 2016 COMPREHENSIVE REPORT 6](#) (2016). North Dakota does not maintain a voter registration list. Instead, the state keeps a list of voters from the prior election. On Election Day, those not on the list can vote upon meeting the eligibility requirements. See N.D. CENT. CODE § 16.1-01-04.
- 3 NONPROFIT VOTE AND US ELECTIONS PROJECT, [AMERICA GOES TO THE POLLS 2016: A REPORT ON VOTER TURNOUT IN THE 2016 ELECTION 19](#) (2017).
- 4 THE PEW CHARITABLE TRUSTS, *supra* note 1, at 1.
- 5 Registration “portability”, i.e., maintaining a valid voter registration as a voter moves, is one aspect of a modern registration system. This result can also be achieved (as a curative measure) through same-day registration and voting. BRENNAN CTR. FOR JUSTICE, [VRM in the States: Portability](#), Feb. 3, 2017; ROCK THE VOTE, [Get Ready to Vote](#), (last visited Aug. 8, 2018); U.S. ELECTION ASSISTANCE COMM'N, [Resource For Voters](#), (last visited Aug. 8, 2018).
- 6 See Brad Plumer, [Why More Than 80 Million Americans Won't Vote on Election Day](#), VOX, Nov. 8, 2016; THE PEW CHARITABLE TRUSTS, *supra* note 1, at 7 (reporting that a quarter of American voters in 2008 mistakenly believed that changing their address with the post office automatically updated their voter registration; Michael Alvarez, Thad Hall and Morgan Llewellyn, [How Hard Can It Be: Do Citizens Think It Is Difficult to Register to Vote?](#), 18 STAN. L. & POL'Y REV. 382, 395 (2007).
- 7 BRENNAN CTR. FOR JUSTICE, [Modernize Voter Registration](#), Feb. 4, 2016; *supra* note 5; ADAM SKAGGS & JONATHAN BLITZER, BRENNAN CTR. FOR JUSTICE, [PERMANENT VOTER REGISTRATION 1](#) (2009) (“Political scientists conclude that Americans’ mobility plays a substantial role in our comparatively low voter turnout.”).
- 8 *E.g.*, Rachel Chason, [We Failed: Officials Explain Error that Could Have Affected 72,000 Maryland Voters](#), THE WASHINGTON POST, Jul. 12, 2018; Chris Fuchs, [New York City Board of Elections Settles Lawsuit Over Voter Purge](#), NBC NEWS, Nov. 2, 2017; Taylor Wofford, [Clerical Error Puts 500,000 Californians at Risk of not Voting in Primaries](#), NEWSWEEK, Apr.16, 2016.
- 9 See, *e.g.*, Michael Isikoff, [GOP Registration Worker Charged with Voter Fraud](#), NBC NEWS, Oct. 19, 2012 (discussing instances of foul play among paid partisan voter registration staffers in battleground states); ASSOCIATED PRESS, [Georgia Partisans Feud Over Voter Registration](#), TIFTON GAZETTE, Oct. 21, 2014 (delaying or blocking thousands of registration forms on the basis of incomplete or incorrect information); Steve Friess, [Acorn Charged in Voter Registration Fraud Case in Nevada](#), N.Y. TIMES, May 5, 2009 (discussing registration tactics that incentivize bad-faith conduct by paid canvassers).
- 10 *Husted v. A. Phillip Randolph Inst.*, 138 S. Ct 1833, 1853-58 (2018) (Breyer, J., dissenting) (explaining that Ohio’s ‘use-it-or-lose-it’ voter purge scheme unreasonably infringes upon the right to vote and violates the NVRA because, *inter alia*, the failure to vote in a single federal election which initially triggers the purge is a factor that the evidence clearly demonstrates “has no tendency to reveal accurately whether the registered voter has changed residences.”); In 2016, 38 states differentiated their registered voters as “active”

and “inactive” (the latter includes registered voters who—according to the board of elections—have failed to respond to a ‘confirmation of address’ notice sent via snail mail. Eligible voters who then fail to vote in two consecutive Federal general elections can be removed from the rolls. U.S. ELECTION ADMIN. COMM’N, *supra* note 2, at 6. Fuchs, *supra* note 8. Nora Kelly, [Voting Fumbles Hit New York](#), THE ATLANTIC, Apr. 21, 2016; MYRNA PEREZ, BRENNAN CTR. FOR JUSTICE, [VOTER PURGES](#) (2008); PROJECT VOTE, [MAINTAINING CURRENT AND ACCURATE VOTER LISTS](#) (2010); Ari Berman, [How the 2000 Election in Florida Led to a New Wave of Voter Disenfranchisement](#), THE NATION, Jul. 28, 2015.

- 11 BRENNAN CTR. FOR JUSTICE, [Automatic Voter Registration](#), July 24, 2018.
- 12 *Id.* Since 2015, Alaska, California, Colorado, District of Columbia, Georgia, Illinois, Maryland, Massachusetts, New Jersey, Oregon, Rhode Island, Vermont, Washington and West Virginia have approved forms of AVR. *Id.*
- 13 BRENNAN CTR. FOR JUSTICE, *supra* note 11. ROB GRIFFIN, PAUL GRONKE, TOVA WANG, AND LIZ KENNEDY, CTR. FOR AM. PROGRESS, [WHO VOTES WITH AUTOMATIC VOTER REGISTRATION?](#) (Jun. 7, 2017) [hereinafter “CTR. FOR AM. PROGRESS”]; see, e.g., Matt Ford, [Automatic Voting Comes to Vermont](#), THE ATLANTIC, April. 28, 2016.
- 14 BRENNAN CTR. FOR JUSTICE, [THE CASE FOR AUTOMATIC VOTER REGISTRATION 6](#) (2016).
- 15 See, e.g., United States Individual Income Tax Return; SELECTIVE SERVICE SYSTEM, [DRIVER’S LICENSE LEGISLATION](#) (last visited Aug. 9, 2018) (noting that the Selective Service collects individual records from the DMV in forty states that could also be used to automatically register voters).
- 16 See NYDLC, [VOTING RIGHTS AND THE FORMERLY INCARCERATED: UNSHACKLING CURRENT POLICIES FROM A LEGACY OF JIM CROW](#), *in* PROTECTING THE RIGHT TO VOTE: A NATIONAL AGENDA FOR IMPROVING ACCESS TO OUR DEMOCRACY (2018).
- 17 See, e.g., CONN. GEN. STAT. § 9-19k (a) and (b) (2014) (granting Secretary of State authority to cross-reference voter information against any state agency’s database, federal database, or voter registration database of another state, to verify voter information); OHIO REV. CODE ANN. § 3503.15 (granting secretary of state authority to enter into agreements to share data to maintain statewide voter registration database); MINN. STAT. § 201.13(3) (granting secretary of state authority to use U.S. Postal Service (“USPS”) change of address data to update voter lists); Samuel Derheimer & Julia Brothers, [2 More States Offer Online Voter Registration](#), PEW CHARITABLE TRUSTS, [2 More States Offer Online Voter Registration](#), Sept. 1, 2015 (“Like Hawaii’s website, Pennsylvania’s online registration portal links to the state’s Department of Transportation (PennDOT) to capture the applicant’s electronic signature.”). See generally PEW CHARITABLE TRUSTS, [ISSUE BRIEF, ONLINE VOTER REGISTRATION: TRENDS IN DEVELOPMENT AND IMPLEMENTATION 7](#) (2015). Twenty-five states already check voter registration lists with data from other states and several national lists. [ELECTRONIC REGISTRATION INFO](#). CTR. (last visited Aug. 15, 2018); NAT’L CONFERENCE OF STATE LEGISLATURES, [Voter List Accuracy](#), July 26, 2018.
- 18 BRENNAN CTR. FOR JUSTICE, [THE CASE FOR AUTOMATIC VOTER REGISTRATION](#), *supra* note 14, at 1, 9-11.
- 19 See BRENNAN CTR. FOR JUSTICE, [THE CASE FOR AUTOMATIC VOTER REGISTRATION](#), *supra* note 14, at 1, 6-7.
- 20 National Voter Registration Act of 1993, 52 U.S.C. §§ 20501 and 20504.

- 21 BRENNAN CTR. FOR JUSTICE, THE CASE FOR AUTOMATIC VOTER REGISTRATION, *supra* note 14. Sam Wang, [How Behavioral Science Could Get More Americans to Vote](#), WASH. POST, June 15, 2016.
- 22 Safeguards are included to protect privacy, to protect vulnerable populations like domestic violence victims, and to prevent those who are ineligible from being registered inadvertently. CAL. ELEC. CODE §§ 2263 (d) and (f), 2264, and 2267; see CALIFORNIA SECRETARY OF STATE, [Nearly 800K Voter Registration Transactions Completed Since April Launch of California Motor Voter](#), July 25, 2018; Mary Plummer, [California Hopes Reducing Voters' Paperwork Will Expand Voter Rolls](#), 89.3 KPCC, Apr. 19, 2018; Chris Nichols, [No, California Didn't Pass a Law Allowing Undocumented Immigrants To Register to Vote](#), POLITIFACT, Jan. 25, 2018.
- 23 For example, Austria, Germany, France, Belgium, and Canada use government-run databases to develop voter lists. Howard Steven Friedman, [American Voter Turnout Lower than Other Wealthy Countries](#), HUFFINGTON POST, July 10 2013. Great Britain conducts a nationwide canvass to register voters. JENNIFER S. ROSENBERG & MARGARET CHEN, BRENNAN CTR. FOR JUSTICE, [EXPANDING DEMOCRACY: VOTER REGISTRATION AROUND THE WORLD 15-18](#) (2009).
- 24 INTERNATIONAL FOUNDATION FOR ELECTORAL SYSTEMS, [ELECTIONS IN IRAQ: 2018 COUNCIL OF REPRESENTATIVES ELECTIONS FAQ 7](#) (2018); Heather K. Gerken, [Make It Easy: The Case For Automatic Registration](#), 28 DEMOCRACY: A JOURNAL OF IDEAS (spring 2013); Timothy Williams, [The Ballot: Inside Iraq's Voting Booth](#), N.Y. TIMES, Jan 13, 2009.
- 25 THE CHRISTIAN SCIENCE MONITOR, [How Iraq's Election Will Work](#), Jan. 28, 2005; UNITED NATIONS, [Iraq Electoral Fact Sheet](#) (last visited Aug. 16, 2018); see BRENNAN CTR. FOR JUSTICE, THE CASE FOR AUTOMATIC VOTER REGISTRATION, *supra* note 14, at 9.
- 26 See *supra* notes 11-14 and accompanying text.
- 27 BRENNAN CTR. FOR JUSTICE, *supra* note 11.
- 28 BRENNAN CTR. FOR JUSTICE, [New Numbers from California Highlight Benefits of Automatically Registering Voters](#), July 25, 2018. At the time of enactment, an estimated 6.6 million eligible Californians were not registered to vote. Patrick McGreevy, [Gov. Brown Approves Automatic Voter Registration for Californians](#), L.A. TIMES, Oct. 10, 2015; Antonia Blumberg, [More Than 100,000 California Teenagers are Now Preregistered to Vote](#), HUFFINGTON POST, Apr. 6, 2018.
- 29 BRENNAN CTR. FOR JUSTICE, *supra* note 11.
- 30 Press Release, OFFICE OF THE PRESS SECRETARY, THE WHITE HOUSE, [Remarks by the President in Address to the Illinois General Assembly](#), Feb. 10, 2016; Russell Berman, [A Tipping Point for Automatic Voter Registration?](#), THE ATLANTIC, Feb. 29, 2016; see, e.g., Press Release, OFFICE OF THE GOVERNOR, [Built to Lead: Governor Cuomo's 2016 State of the State and Budget Address](#), Jan. 13, 2016 (“Voter registration should be a presumption, not a hurdle. Let’s flip the paradigm and automatically enroll voters when they get a driver’s license.”); Nick Visser, [Republican Gov. Signs Automatic Voter Registration Bill Into Law In Massachusetts](#), HUFFINGTON POST, Aug. 10, 2018; Sophia Tareen, [Illinois Governor Signs Automatic Voter Registration Law](#), BLOOMBERG.COM, Aug. 28, 2017 (Rauner: “This is good bipartisan legislation . . . We as a people need to do everything we can to knock down barriers, remove hurdles for all those who are eligible to vote”); Jonathan Mattise, [West Virginia May Become 3rd Automatic Voter Signup State](#), CUMBERLAND TIMES-NEWS, Mar.

- 22, 2016 (“If managed properly, automatic registration is a great benefit to our citizens and will encourage more people to go to the polls,” said [GOP] Senate President Bill Cole.”).
- 31 MD SB1048, 438th Gen. Assemb., Reg. Sess. (Md. 2018); H. 4320 190th Gen. Ct. (Mass. 2018); J.B. Wogan, [Automatic Voter Registration Goes Beyond the DMV](#), GOVERNING, Apr. 17, 2018; BRENNAN CTR. FOR JUSTICE, [Policy Differences of Automatic Voter Registration](#), Jul. 24, 2018.
- 32 In 2005, roughly 84% of Canadian tax filers opted to register or update voter registrations this way and in 2017 more than 93.2% of all eligible electors were included in the National Register of Electors. ELECTIONS CAN., [Description of the National Register of Electors](#), (last visited Aug. 11, 2018); ELECTIONS CAN., [COMPLETING THE CYCLE OF ELECTORAL REFORMS: RECOMMENDATIONS FROM THE CHIEF ELECTORAL OFFICER OF CAN. ON THE 38TH GEN. ELECTION 47](#) (2005).
- 33 OFFICE OF HWY. POLICY INFO., FED. HWY. ADMIN., [HWY STATISTICS 2014, tbl.DL 20](#) (Sept. 2015) (noting that roughly 83% of the driving-age population have a driver license).
- 34 PEW CTR. ON THE STATES, [supra](#) note 1 at 3, 4, 6–8; PRESIDENTIAL COMM’N ON ELECTION ADMIN., [THE AMERICAN VOTING EXPERIENCE: REP. AND RECOMMENDATIONS OF THE PRESIDENTIAL COMM’N ON ELECTION ADMIN. 61](#) (Jan. 2014).
- 35 CTR. FOR AM. PROGRESS, [supra](#) note 13 at 1, 23, 25-26.
- 36 U.S. ELECTION ADMIN. COMM’N, [supra](#) note 2, at i.
- 37 BRENNAN CTR. FOR JUSTICE, [THE CASE FOR AUTOMATIC VOTER REGISTRATION](#), [supra](#) note 14, at 6-7, 11.
- 38 *See supra* note 20 and accompanying text.
- 39 CTR. FOR AM. PROGRESS, [supra](#) note 13 at 1, 25-26; *see supra* notes 26-28 and accompanying text.

The Election Period:

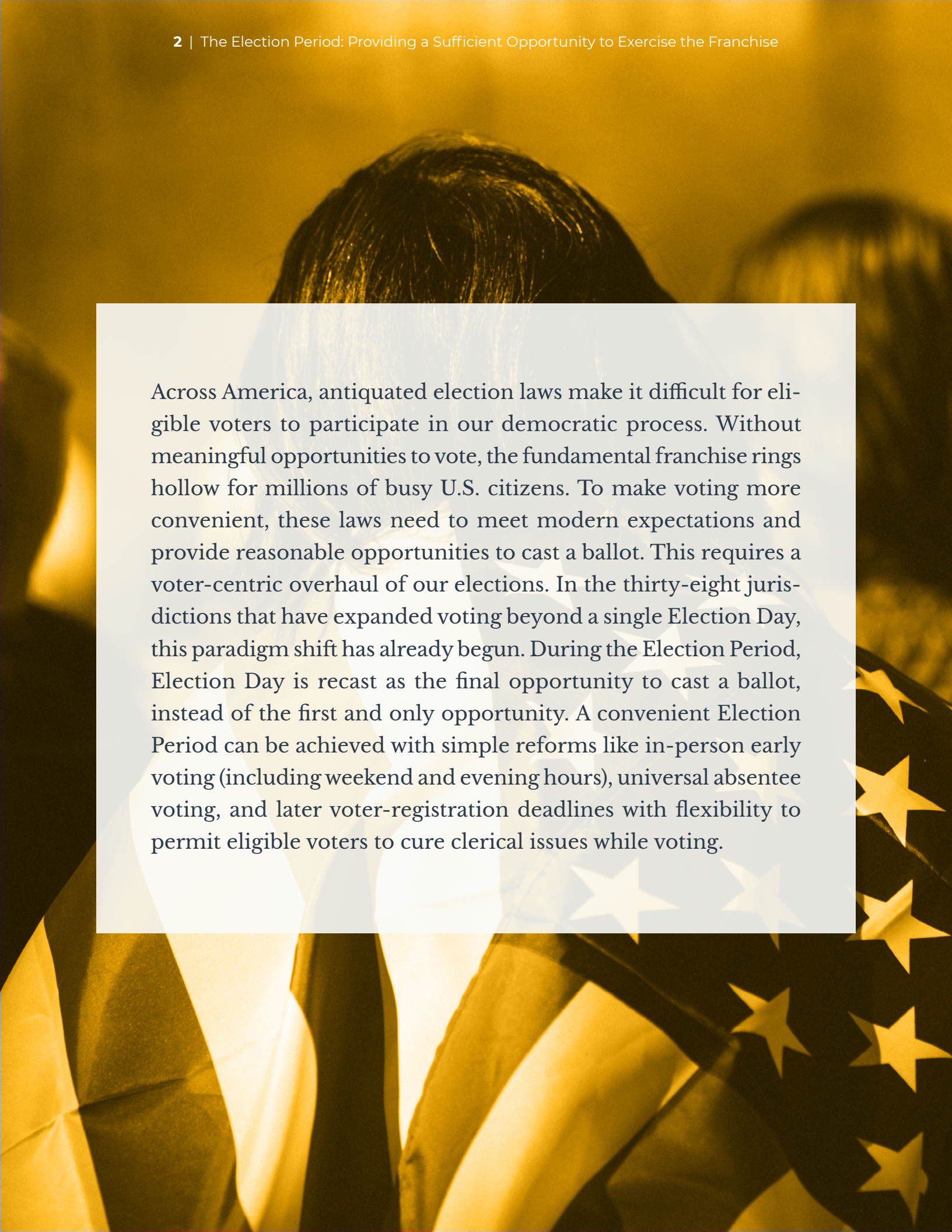
PROVIDING A SUFFICIENT OPPORTUNITY TO EXERCISE THE FRANCHISE

**A Multi-Part Project of the Legislative Affairs Committee
of the New York Democratic Lawyers Council (NYDLC)**

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Across America, antiquated election laws make it difficult for eligible voters to participate in our democratic process. Without meaningful opportunities to vote, the fundamental franchise rings hollow for millions of busy U.S. citizens. To make voting more convenient, these laws need to meet modern expectations and provide reasonable opportunities to cast a ballot. This requires a voter-centric overhaul of our elections. In the thirty-eight jurisdictions that have expanded voting beyond a single Election Day, this paradigm shift has already begun. During the Election Period, Election Day is recast as the final opportunity to cast a ballot, instead of the first and only opportunity. A convenient Election Period can be achieved with simple reforms like in-person early voting (including weekend and evening hours), universal absentee voting, and later voter-registration deadlines with flexibility to permit eligible voters to cure clerical issues while voting.

Although voting is a fundamental right, across America, antiquated election laws make it difficult for eligible voters to participate in our democratic process. These barriers can undermine the right itself, since a right is only as real as the opportunity one has to exercise it. Without real opportunities to vote that meet the needs and expectations of modern American life, this foundational right rings hollow for millions of eligible voters. The creation of a reasonable Election Period recasts Election Day as the final opportunity to cast a ballot, instead of a voter's first and only opportunity. The due process and administrative benefits are easy to recognize.

Consider: What if state law required that to get a drivers license, all drivers must go in-person only to the DMV closest to their home on a single day each year? How much strain would this place on DMV administration? How many who wanted to drive would be stymied—foregoing the inconvenience of long lines or the stress of curing clerical errors? How many who, having been fully eligible to drive the year prior, would depart without a license, told their only option was to return the following year?

Thankfully, we would never license our drivers this way because ensuring societal access to a drivers license is too important. Astoundingly, these conditions more accurately resemble the (undue) process states impose for Americans to vote. Lest we forget, driving is a privilege and drivers may visit any of the DMV branches which are open year-round, while voting is a core civil right. In many ways, our society construes the right to vote narrowly, restricting fair access.

Meanwhile, technology continues to make commercial interactions easier than ever, shaping American expectations of convenience. One-click transactions that can be completed from anywhere at any time are now the norm, displacing antiquated point-of-sale options. To improve access and reduce hurdles to participation, we must modernize our voting process. Effective civic engagement requires flexible voting options that meet people's everyday needs. Without this, the time constraints of work, school, elder- or child-care obligations will continue to artificially suppress voter turnout. Today, even the most voter-friendly states fail to keep pace with technological advances that meet voter expectations.¹

What is needed is a reimagining of how elections are conducted in America from a “pro-voter” perspective and the development of modern norms that provide procedural due process. Lawmakers must recognize that the right to vote requires active government involvement—not passive acquiescence—for its intended realization, and provide fair opportunities for its exercise. This change is underway. In 2016, 41.3% of the U.S. population voted during the weeks before Election Day as over 47 million voters cast absentee ballots by mail or voted early in person.²

A modern, voter-centric Election Period includes features designed to maximize voter convenience and participation. It could include several days of in-person voting at popular locations with evening and weekend options; an ample time-frame for all voters to cast an absentee ballot by mail or securely online; and later registration cut-off deadlines with a simple and fast, flexible process that allows otherwise-eligible voters to cure clerical issues and vote.

Since citizen participation in our democracy is a public good, an Election Period should include well-publicized public and private civic engagement programs, education, and outreach to draw in average Americans, who tend to “tune in” during the final weeks of a campaign. When political participation is made more convenient, it improves the civic experience and strengthens American democracy by making electoral outcomes more representative.

The single Election Day imposes unnecessary burdens on voters and election administration.

In-Person Early Voting

Thirty-seven states and Washington, D.C. allow some method of in-person early voting.³ Early voting makes it easier for all eligible voters regardless of party to exercise their rights by providing a more reasonable timeframe to do so. In 2016, over 23 million people voted “early” in person.⁴ In 2012 nearly a third of all voters cast their ballot “early,” before Election Day—18.5 million of whom did so in person.⁵ There is no inherent party advantage to early voting.⁶ As with any new system, the competitive advantage goes to the contender with the strongest ground game that can best adjust their field tactics to meet the rules of the contest.

By contrast, the traditional single-day Election Day imposes burdens on voters and their family members, employers, and the election administration system itself. These include choosing between voting and other pressing obligations, long wait times, disorderly and chaotic single-day polling places, and a generally unpleasant experience.⁷ The combined effect suppresses turnout among those eligible; it then results in a volume of ‘lost votes’ among those attempting to vote.

A single Election Day also creates unnecessary security vulnerabilities and invites disruption. With only one day for the bulk of balloting, outcomes are vulnerable to distortions like inclement weather or displacement from natural disasters, or man-made disruptions like false fire alarms, other voter suppression tactics or intimidation schemes, and terror-type threats.⁸

On the contrary, a several-day timeframe for voting provides systemic and logistical benefits. An extended voting period allows administrators the time to identify and correct “the small glitches that can lead to more major errors during the

increased pressure of Election Day.”⁹ It would also allow for a low-volume “soft opening”, so staff can identify problems and ramp up to full capacity. In the meantime, voters have some options regarding when and where to vote. The post-2012 bipartisan Presidential Commission on Election Administration reported that “[e]lection officials from both parties testified to the importance of early voting in alleviating the congestion and other potential problems of a single Election Day.”¹⁰

Finally, the contours of the Election Period need not be one-size fits all. Instead, the days and hours of operation should be statutorily flexible, tailored to the differing needs of different communities. To protect due process, lawmakers should provide minimum standards for evening and weekend voting and a fair and transparent method for designating voting locations.

Given the well-established benefits and popularity of early voting, all jurisdictions should provide this option as part of a reasonable Election Period that includes evenings and weekends.

Expanding Absentee Voting and Vote-by-Mail

Providing convenient alternatives to in-person voting is an important part of ensuring fair access to the franchise. Convenience voting could be made available via any medium that can be made secure. Expanding a universal vote-by-mail option to all who are eligible helps more voters avoid the logistical hurdles that exist by requiring voters to appear in-person at a fixed location during limited hours on a set day.¹² In a survey of citizens unable to vote in the 2014 midterm elections, *two-thirds* provided explanations related to a lack of time, such as school or work conflicts.¹³

A modern, voter-centric Election Period is designed to maximize convenience and participation.

Absentee voting methods vary from state to state. Presently, 27 states and Washington D.C. permit absentee voting for any reason, while twenty states restrict absentee voting to “good cause,” which is often based on narrow statutory criteria.¹⁴ This latter approach is poor policy because it subjectively and arbitrarily validates certain justifications for a voter’s inability to appear in-person to vote, is incapable of being evenly enforced, and is ripe for manipulation.

Expanding absentee voting could provide significant administrative benefits. For example, allowing and encouraging more eligible voters to vote by mail reduces congestion at poll sites, which require labor-intensive tabling and processing while people wait. Remote voting, in many cases, is also much more convenient and palatable for the elderly, disabled, those with dependent-care responsibilities or for whom transportation is unavailable, and those who are otherwise busy with work, school, or travel.¹⁵ Many voters are unable to stand in lines for long periods, or merely want to avoid crowds or times when poll sites are chaotic.

For states expanding absentee voting, modern safeguards like those used for tracking packages are encouraged to empower voters to check that ballots are not “lost in the system.”¹⁶

We need to reimagine American elections from a “pro-voter” perspective that provides due process.

Moving Registration Deadlines Forward and Allowing Clerical Corrections

At their core, voter registration requirements exist for the legitimate purpose of ensuring the orderly and fair administration of elections. Recalling the fundamental rights at stake however, these clerical rules should not prevent large volumes of otherwise-eligible Americans from casting a ballot. But far too often, registration is a harshly applied procedural hurdle that prevents Americans with clerical registration defects from participating in our democracy.

To ensure a truly effective voter-centric Election Period, voter registration should be kept open as long as possible, including during the Election Period itself. In most states, eligible unregistered voters who “tune in” to contests during the weeks immediately prior to an election are blocked from participating because they have missed the deadline to register.¹⁷ Yet this is exactly the timeframe when news coverage, debates, and campaign outreach is at its height.

By allowing the registration window to overlap with part of the Election Period, eligible voters who encounter registration-related obstacles will be able, in most cases, to cure clerical errors and cast a ballot before it is too late. Before it was repealed in Ohio, this sort of grace period was dubbed “Golden Week” for the rights-preserving benefits it provided, including the potential to save thousands

of lost votes.¹⁸ Laws that permit same-day registration during the Election Period provide an “election day correction” failsafe designed to alleviate these hurdles.¹⁹

Improve Voter Notification and Education

Many voter notification materials are complex and difficult for voters to comprehend.²⁰ To reduce voter participation barriers and encourage turnout, voters must be aware of upcoming elections and prerequisites to participate. Unfortunately, civic design experts report that American voters have difficulty obtaining basic information like voter eligibility and registration rules, how to vote by mail, and where to vote in person.²¹ Poll site changes and missing registration records are a common and recurring source of problems on Election Day.

Since it is our government that imposes registration and balloting restrictions and administers elections, our government officials have a duty to ensure that eligible voters have a reasonable opportunity to participate in them. Accordingly, voters should be informed of key dates and changes to voting locations through modern communication, including online. In doing so, policymakers should adhere to design best practices that balance simplicity and comprehensiveness; utilize “plain language” guidelines; make materials available in common languages; and, undertake usability testing to ensure new material is clear.²²

Conclusion

For too many Americans, the right to vote rings hollow due to a lack of convenient opportunities for its exercise. A robust Election Period weaves together many of the policies discussed above to provide alternatives to in-person voting on a single day. To varying degrees states and voters continue to embrace these reforms, with 41 percent of all general election 2016 votes cast during the period before Election Day.

By eliminating logistical barriers to balloting, American elections will be fairer and our resulting democracy more inclusive. An Election Period also greatly reduces the pressure placed on the administration process at any one time, improving the civic experience and greatly reducing systemic stress and the disruptive capacity of the small, cascading problems that plague our elections today.

Notes

- 1 While many facets of modern life have moved online, secure electronic voting proves a uniquely challenging phenomenon. See David Pogue, [When Will We Be Able to Vote Online?](#), THE SCIENTIFIC AMERICAN (Feb. 1, 2016); Emily Parker, [The 21st-Century Way to Vote](#), CNN (July 26, 2018).
- 2 U.S. ELECTION ASSISTANCE COMMISSION, THE ELECTION ADMINISTRATION AND VOTING SURVEY: 2016 COMPREHENSIVE REPORT I, 3 (2017); U.S. ELECTION PROJECT, [2016 November General Election Early Voting](#) (last visited Aug. 7, 2018).
- 3 NAT'L CONFERENCE OF STATE LEGISLATURES, [Absentee and Early Voting](#) (Aug. 17, 2017), [Hereinafter NCSL].
- 4 U.S. ELECTION PROJECT, *supra* note 2.
- 5 Nathaniel Persily et al., PRESIDENTIAL COMMISSION ON ELECTION ADMINISTRATION, [THE AMERICAN VOTING EXPERIENCE: REPORT AND RECOMMENDATIONS OF THE PRESIDENTIAL COMMISSION ON ELECTION ADMINISTRATION 54](#) (2014), [hereinafter PCEA 2014 REPORT].
- 6 Danielle Kurtzleben, [5 Questions About Early Voting, Answered](#), NPR (Oct. 28, 2016).
- 7 DIANA KASDAN, BRENNAN CTR. FOR JUSTICE, [Early Voting: What Works 5-7](#) (2013).
- 8 See e.g., Hannah Hunsinger, [Female Student Pulled Fire Alarm on Election Day](#), RAPID CITY JOURNAL (Nov. 11, 2016); Thomas Kaplan, [Using Hurricane Sandy as a Lesson for Future Elections](#), N.Y. TIMES (Nov. 12, 2013), at A28. See [Live updates: Voting issues reported at polling places on Election Day](#), CBS NEWS, Nov. 8, 2016, for several typical Election Day incidents.
- 9 KASDAN, *supra* note 7, at 6.
- 10 PCEA 2014 REPORT, *supra* note 5 at 54-55. BRENNAN CTR. FOR JUSTICE, [Expand Early Voting, Feb. 4, 2016](#), (last visited Aug. 8, 2018).
- 11 PAUL GRONKE, ET AL., ANNU. REV. POLIT. SCI., CONVENIENCE VOTING 438, 441 (2008).
- 12 N.Y.C. BAR ASS'N., [COMM. ON ELECTION LAW, INSTITUTING NO-EXCUSE ABSENTEE VOTING IN NEW YORK 6-8](#) (2010).
- 13 PEW RESEARCH CTR., [LITTLE ENTHUSIASM, FAMILIAR DIVISIONS AFTER THE GOP'S BIG MIDTERM VICTORY 21](#) (2014); Christopher Ingraham, [A Ton of People Didn't Vote Because They Couldn't Get Time Off From Work](#), WASH. POST (Nov. 12, 2014).
- 14 NCSL, *supra* note 3; HEALTH OF STATE DEMOCRACIES, CTR. FOR AM. PROGRESS ACTION FUND, [Availability of No-Fault Absentee Voting](#), (last visited Aug. 7, 2018). Colorado, Oregon, and Washington feature all-mail voting systems. NCSL, *supra* note 3.
- 15 See David Roberts, [The Simple Voting Reform that Works Whenever Tried](#), vox, May 24, 2018; David Roberts, [Voting By Mail Is Fair, Safe, and Easy. Why Don't More States Use it?](#), vox (May 27, 2017).
- 16 "County election websites should enable voters to verify that their absentee ballot request was received, that their ballot was mailed out, and then later that it was received and counted (and if not counted, the reason why)." PCEA 2014 REPORT, *supra* note 5, at 58. Coloradans can track absentee ballots online. Colo. Rev. Stat. Ann. § 1-7.5-207.

- 17 See [NONPROFIT VOTE, Voter Registration Deadlines](#), (last visited Aug. 7, 2018). Fifteen states and Washington D.C. offer same-day voter registration. BRENNAN CTR. FOR JUSTICE, [VRM in the States: Election Day Correction](#) (Feb. 3, 2017); NAT'L CONFERENCE OF STATE LEGISLATURES, [Same Day Voter Registration](#) (Oct. 12, 2017).
- 18 See David Graham, [Ohio's 'Golden Week' of Early Voting Is Dead, Again](#), THE ATLANTIC, Aug. 23, 2016.
- 19 BRENNAN CTR. FOR JUSTICE, *supra* note 17. NYDLC, [RETHINKING U.S. ELECTION ADMINISTRATION: BARRIERS TO IN-PERSON BALLOTING CONTINUE TO SUPPRESS THE VOTE 1-3](#), *in* PROTECTING THE RIGHT TO VOTE: A NATIONAL AGENDA FOR IMPROVING ACCESS TO OUR DEMOCRACY (2018).
- 20 PCEA 2014 REPORT, *supra* note 5, at 54.
- 21 WHITNEY QUESENBERRY & DANA CHISNELL, CTR. FOR CIVIC DESIGN, [HOW VOTERS GET INFORMATION: VIEWS FROM EXPERTS IN VOTER EDUCATION AND OUTREACH ON BARRIERS AND CHALLENGES 5-7](#) (2014).
- 22 See *generally* DANA CHISNELL, CTR. FOR CIVIC DESIGN, [FIELD GUIDES TO ENSURING VOTER INTENT: VOLS. 05-07](#) (2d ed. 2014).

Rethinking U.S. Election Administration:


BARRIERS TO IN-PERSON BALLOTING CONTINUE TO SUPPRESS THE VOTE

A Multi-Part Project of the Legislative Affairs Committee
of the New York Democratic Lawyers Council (NYDLC)

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Special thanks and gratitude to:

Ted Anastasiou, Lori Antonacci, Niechao Bai, Anthony Bailey, Sarah Baldwin, Anastasia Benedetto, Scott Budow, Steven Carbó, Melanie Carnsew, Tabitha Crosier, Kelvin Davis, Joel Dodge, Doug Dunham, Mady Edelstein, Amanda Goldman, David Goldman, Cory Hansen, Rebecca Hausner, Hal Hodes, Adrienne Jones, Matthew Jordan, Maithli Joshi, Leonard Kohen, Andrew Kirshenbaum, Jared Lacertosa, Abel McDonnell, Brenda McManus, Alexandra Megna, Samuel Meller, Claudine-Annick Murphy, Ed Murray, Sabrina Oudine, John Owens, Jr., Robert Rose, Nicole Samii, Carol Schragger, Russell Semmel, Adam Shpeen, William J. Steiner, Jesse Suchmann, Somil Trivedi, Jeff Wice, Ekow Yankah

A photograph of a city street with tall buildings and American flags, overlaid with a semi-transparent white box containing text. The scene is captured in a monochromatic greenish-yellow hue. In the foreground, two people are walking across the street. The background shows a wide street with double yellow lines, and several American flags are visible on poles along the sidewalks. Tall buildings line the street, creating a sense of depth and urban environment.

When U.S. voters attempt to cast their ballots in person, they confront a range of potential hurdles at the polling place that unnecessarily results, in the aggregate, in countless lost votes. Significant voter suppression can result from voter registration defects, confusion over where to vote, unduly long waiting times, and inadequate poll worker staffing or training. These hurdles infringe the rights of Americans seeking to participate in our democratic process, but in most cases, they can be alleviated by the adoption of modern policies and best practices. To improve election administration, NYDLC proposes several solutions: Adopt same-day registration; standardize the allocation of polling place resources; save ballots (or parts of ballots) whenever possible regardless of where they are cast; and, implement vote-centers with ballot printing to eliminate single-location voting limitations.

Barriers to In-Person Voting at Polling Places

B When U.S. voters attempt to cast their ballots in person, they confront a range of potential hurdles at the polling place that unnecessarily results, in the aggregate, in countless lost votes.

Many states retain election-related practices that impose significant barriers to political participation, including onerous registration requirements, inconveniently timed elections or polling locations, and restrictive identification rules. However, even after citizens overcome these disincentives, they often face a series of administration hurdles that can prevent them from voting. Too frequently, eligible voters who attempt to turn out for an election are blocked from participating and fail to cast a ballot at all. Other times, voters may only vote provisionally, subjecting their vote to heightened scrutiny and reducing the likelihood that it will be counted. These barriers give rise to a poor civic experience that perpetuates dismal U.S. voter turnout rates, which rank amongst the lowest across developed countries.¹ When eligible voters attempt to vote and, for whatever reason are unable to do so, their vote is “lost”. These lost votes add up.

Below, NYDLC outlines several policy proposals aimed at alleviating administration issues voters encounter at the polls. Implementing these measures as part of comprehensive election modernization will improve U.S. elections, making it more convenient for busy citizens to exercise their rights, and in turn, save legitimate lost votes and enhance the voting experience.

In 2012, 2014, and 2016, voter turnout was the highest in states that implemented SDR.

Breaking Down Barriers to Balloting

Adopt Same-Day Registration (“SDR”)

Too often, otherwise-eligible voters arrive at a polling place to discover, for one reason or another, that they are not registered to vote or that there is a defect with their registration that cannot be cured because a deadline has passed. Before an election is imminent, most American voters, even those who follow political developments closely, do not spend time navigating procedural election rules or

deadlines. However, many states still require voters to be registered several weeks in advance of an election in order to participate, long before many voters may have “tuned in” to a contest.² In 2018, the average voter registration deadline in states without same-day registration options is more than three weeks (about 23 days) before Election Day.³

Allowing citizens to register to vote in person during early voting or on Election Day removes the artificial barrier to participation presented by registration cut-offs.⁴ Currently, 18 states and Washington D.C. have adopted some form of same-day voter registration and balloting.⁵

It is easy to see how prevailing expectations about modern commercial transactions could lead many eligible voters to believe that they can “sign up” to vote at the time of voting and that clerical errors should easily be curable on the spot. In commercial transactions, businesses have a profit motive to make participation easy so they do not lose customers. It is time our Boards of Election provide the American voters they serve with comparable participation convenience.

When registration is extended to Election Day, it creates a fail-safe that permits eligible voters to quickly correct registration defects and clerical errors, or update addresses after a move. The reform eliminates harsh registration cutoffs, reducing administrative costs associated with provisional ballots and the need for on-the-fly, discretionary poll-worker registration determinations that can interfere with the rights of otherwise-eligible voters.⁶

The U.S. is an increasingly mobile society. During the 2008 and 2010 election years, approximately one in eight Americans moved, and they tended to be younger and lower-income individuals.⁷ When registered voters move—even within the same state—in most cases their voter registration does not transfer, resulting in inaccurate voter rolls and the need to re-register.⁸ As a result, in 2012 nearly 24 million voter registrations were invalid or “significantly inaccurate.”⁹

SDR protects voting rights by allowing otherwise-eligible voters to remedy a registration defect and cast a ballot before the polls close. The benefits of SDR accrue to all voters but are especially felt by young and lower-income voters, who move frequently, and voters of color.¹⁰

In 2012, more than
5 million voters waited
over an hour to vote



The availability of SDR decreases the volume of provisional ballots needed during an election. Presently, when a voter's information cannot be verified on Election Day in a non-SDR state, the voter typically may only vote by provisional ballot, which may not be counted. SDR allows these voters to complete a fresh registration and vote by regular ballot. Provisional ballot use decreased significantly in Iowa and North Carolina after those states implemented SDR.¹¹

It is not surprising that SDR correlates with voter turnout. In the 2012, 2014, and 2016 elections, voter turnout was the highest in states that implemented SDR.¹²

Standardize the Allocation of Poll Site Resources to Reduce Long Lines

Voters who arrive at their polling place may also be discouraged from voting due to long lines or excessive wait time. While there are a number of reasons why long lines form, they are often the result of inadequate resources, which may be a misallocation of resources within a jurisdiction. In 2012, more than 5 million voters waited over an hour to vote while another 5 million waited half an hour to an hour to vote.¹³ During the 2016 Presidential election, hour-long lines were reported during early voting and on Election Day across the U.S. in battleground and non-battleground states, large and small states, those with restrictive voting laws and those without.¹⁴ However, battlegrounds like North Carolina and Ohio were plagued with some of more egregious wait times.¹⁵

There is no modern justification for rejecting an entire ballot merely because it was cast in the wrong location.

In March 2016, this problem was dramatically on display during the Arizona presidential primary as voters reported waiting up to five hours to cast their ballots.¹⁶ Maricopa County, the state's most populous, cut the number of polling places by over 70% from 2012, leaving only one polling place for every 108,000 residents in the majority-minority city of Phoenix.¹⁷

Long lines pose an inconvenience to all in-person voters, especially those with inflexible work or family obligations. Lines are a significant source of "lost votes" that hinder and may deter all but the most determined voters who encounter a long wait.¹⁸ Given competing priorities, any obstacle to fast, seamless voting is likely to negatively impact turnout.

Excessive lines may disproportionately impact voters of color. A study across three 2012 states where voters faced some of the longest lines found that Americans in

precincts with larger minority populations tended to experience longer waits. The study generally found these precincts were allocated fewer resources, which can exacerbate long lines at the polls.¹⁹ The under-allocation of resources is a subtle but effective form of voter suppression, whether intentional or not. One strategy to combat this is to restore federal pre-clearance under the Voting Rights Act or enact state-level safeguards to prevent suspicious resource allocation changes.²⁰

The adequate and fair allocation of election resources is indispensable to guaranteeing access to the right to vote. Maintaining objective and appropriate resource allocation standards would safeguard due process so voters have a reasonable opportunity to participate in our democracy.

Save Ballots (or Parts of Ballots) Whenever Possible, Regardless of Where Cast

Traditionally, voters may only cast a ballot at a single specific poll site on a single day. In nearly half the states, if a registered voter casts a ballot anywhere else, the entire ballot is fully rejected.²¹ Why? There is no modern justification for rejecting an entire ballot merely because it was cast in the wrong precinct, polling place, or even the wrong county.²²

The decision to spoil and discount an entire ballot due to where it was cast, even if part or all of the ballot contains valid votes, is a policy choice that construes the fundamental right to vote as narrowly as possible. Federal law begins to address this ‘full-rejection’ problem by allowing voters to cast provisional ballots at any polling site where they believe they may vote,²³ but also grants states great discretion as to whether or not to actually count those provisional votes.

According to NCSL, administrators in 26 states reject provisional ballots fully if they are cast in the wrong precinct, while 19 states and Washington D.C. count ballots partially.²⁴ For example, in Washington, Maryland, and Oregon, provisional ballots cast in the wrong precinct are counted (“saved”) to the extent the voter is eligible to vote the contests included on the provisional ballot. If a Washingtonian is registered in another county, the ballot must be forwarded to the appropriate jurisdiction.²⁵ These “ballot saving” rules better respect and safeguard voting rights.

The volume of lost votes attributable to wrong-location voting is significant (25% of all provisional ballots discounted in 2012 were spoiled for this reason)²⁶ and is compounded by the fact that districts and polling places may change between elections.²⁷ The impact is felt acutely in areas with large minority populations and cities where chaotic multiple-precinct polls are more prevalent.²⁸ In 2016, some officials even prohibited poll workers from warning voters that ballots would not count unless they were cast elsewhere.²⁹

Given the civil rights at stake and the centrality of voting to the legitimacy of our democracy, states and policymakers have an obligation to discard harsh, unduly bureaucratic outcomes in favor of feasible pro-voter safeguards like ballot-saving. Since ballots do vary by geography, officials *may* need to discount the most local contests for a voter who turns out at an unassigned polling place, but why should that disqualify a vote for President, Governor, or U.S. Senator when

these candidates appear on every ballot in the state? Within a city, county, or house district, the same ballot saving policy can apply to mayoral, countywide, or congressional races.

Moreover, the need for ballot saving is particularly compelling as a matter of procedural fairness, when a provisional ballot is cast due to poll worker error (i.e. where a poll worker misdirects a voter or where a polling place change is the source of confusion).

As states modernize elections and society embraces technologies that increasingly render physical presence irrelevant, the historical practice of restricting in-person voting to a single, residency-based voting assignment is increasingly anachronistic. States should embrace flexible pro-voter policies that count as many contests on ballots cast by legitimate voters as possible. Alternatively, states could eliminate residency-based voting and adopt a “vote centers” model.

Implementing Election Day Vote Centers and On-Demand Ballots

A significant election modernization overhaul states can embrace is the shift toward vote centers and “on-demand” ballot printing. These reforms improve access to civil rights by providing busy voters with multiple voting-location alternatives, instead of limiting voting to a single site assigned to a voter’s residence. Some voters may find it more convenient to vote near work or school, at a mall or shopping center, or in proximity to a voter’s child- or elder- care obligations.

To address the need for ballot variations based on a locality’s down-ballot contests, the challenge of stocking vote centers with multiple ballots can be obviated by equipping them with printers—a reform known as “ballot on demand”. Vote centers can be more cost effective because they require less staff, fewer machines at fewer locations, and reduce the need for provisional ballots.³⁰ Ballot-on-demand is more prevalent in states with early voting centers,³¹ but it has the transformative potential to improve Election Day as well.

Conclusion

When Americans attempt to navigate our present in-person voting process, they confront a range of potential burdens that result in thousands of lost votes each election. To improve voter access and safeguard the fundamental right to vote, NYDLC calls on states to adopt same-day registration; standardize resource allocation to polling places; enact ballot-saving mechanisms; and, implement a vote-center model with ballot-on-demand printing.

Notes

- 1 In 2016, nearly 56% of the U.S. voting-aged population cast votes for President while South Korea saw nearly 78% vote in 2017. Drew Desilver, [U.S. Trails Most Developed Countries in Voter Turnout](#), PEW RESEARCH CTR. (May 21, 2018).
- 2 See HEADCOUNT, [Registration Deadlines & Election Dates](#), (last visited Jul. 10, 2018); DEMOS & PROJECT VOTE, [Same-Day Registration 1-2](#) (2014).
- 3 For a chart of all voter registration deadlines see VOTE.ORG, [Voter Registration Deadlines](#) (Jan. 13, 2018).
- 4 DEMOS & PROJECT VOTE, [Same-Day Registration 1-2](#) (2014); NAT'L CONFERENCE OF STATE LEGISLATURES, [Election Day Registration: FAQ](#) (2013), [hereinafter NCSL].
- 5 The following states permit SDR: California, Colorado, Connecticut, District of Columbia, Hawaii, Iowa, Illinois, Idaho, Montana, Minnesota, Maine, New Hampshire, Utah, Vermont, Washington, Wisconsin, Wyoming. NCSL, [Same Day Registration](#) (Mar. 28, 2018). SDR may be offered on Election Day, during an early voting period, or both. 15 states and Washington D.C. allow voters to register and vote on Election Day itself (known as "EDR"). *Id.*
- 6 See DEMOS & PROJECT VOTE, *supra* note 4, at 2-3; Brian McWalters, [The Responsible Way to Increase Voter Access: Same Day Registration](#), PROJECT VOTE (Apr. 13, 2017).
- 7 See THE PEW CTR. ON THE STATES, [Inaccurate, Costly, and Inefficient 2](#) (2012); DEMOS & PROJECT VOTE, *supra* note 4, at 3 ("[O]ver 36 million people in America moved between 2011 and 2012, and nearly half of those moving had low-incomes. Young adults of all income levels also move more frequently...").
- 8 J. MIJIN CHA AND LIZ KENNEDY, [Millions to the Polls: Practical Policies to Fulfill the Freedom to Vote for All Americans, Permanent & Portable Voter Registration](#), DEMOS 2-3 (2014). Delaware, Hawaii, Oregon, and Texas permit voters who have moved in state to update their registration when voting, and cast a regular ballot. Florida, Maryland, Ohio, Utah and Washington D.C. will count provisional ballots from voters who have moved counties. *Id.*
- 9 THE PEW CTR. ON THE STATES, [Inaccurate, Costly, and Inefficient 1](#) (2012), [hereinafter PEW].
- 10 DEMOS & PROJECT VOTE, [Same-Day Registration 3](#) (2014). In North Carolina, African-Americans made up 20% of the voting population but 36% of SDR voters in 2008. This rose to 41% in 2012. *Id.*
- 11 Laura Rokoff and Emma Stokking, [Small Investments, High Yields: A Cost Study of Same Day Registration in Iowa and North Carolina](#), DEMOS 4-5 (Feb. 2012). In Iowa, about 10,000 fewer provisional ballots were used during 2008 than in 2004, before the enactment of SDR. In North Carolina, 23,000 fewer provisional ballots were cast in 2008 than in 2004. *Id.*
- 12 In 2012, average voter turnout was more than 10% higher in SDR states than in other states and four of the top five voter turnout states had implemented SDR. DEMOS & PROJECT VOTE, *supra* note 4, at 1-2; Sean Sullivan, [The States with the Highest and Lowest Turnout in 2012, in 2 charts](#), WASH. POST, Mar. 12, 2013. In 2014, voter turnout was 12% higher in SDR states than others and seven of the top ten turnout states permitted SDR. NONPROFIT VOTE, [AMERICA GOES TO THE POLLS 2014: A REPORT ON VOTER TURNOUT IN THE 2014 MIDTERM](#)

- [ELECTION 7, 11, 20](#) (2015). In 2016, voter turnout in SDR states remained 7% higher on average than other states and the six highest-ranking turnout states all offered SDR. They are Minnesota, Maine, New Hampshire, Colorado, Wisconsin and Iowa. [NONPROFIT VOTE, AMERICA GOES TO THE POLLS 2016: A REPORT ON VOTER TURNOUT IN THE 2016 ELECTION 10-11](#) (2017).
- 13 [PRES. COMM. ON ELECTION ADMIN, THE AMERICAN VOTING EXPERIENCE: REPORT AND RECOMMENDATIONS OF THE PRESIDENTIAL COMMISSION ON ELECTION ADMINISTRATION 13-14, 38-39](#) (Jan. 2014)
- 14 Hour-long wait times were reported at polling places in states including Arizona, California, Florida, Georgia, Massachusetts, New Jersey, New York, North Carolina and Ohio. [Voting Problems Present in 2016, but Further Study Needed to Determine Impact](#). BRENNAN CTR. FOR JUSTICE (Nov. 14, 2016).
- 15 For example, Charlotte, North Carolina had three to four hour waits to vote on the last day of early voting and a Cincinnati early voting site reported a half-mile long line. Jonathan Lowe, [Last Day of Early Voting Brings Long Lines to NC Polls](#), SPECTRUM NEWS CHARLOTTE, Nov. 5, 2016; Libby Nelson, [There Are 4,000 People in a Half-Mile Voting Line in Cincinnati Today](#), vox, Nov. 6, 2016.
- 16 Ari Berman, [There Were 5-Hour Lines to Vote in Arizona Because the Supreme Court Gutted the Voting Rights Act](#), THE NATION (Mar. 23, 2016).
- 17 Fernanda Santos, [Angry Arizona Voters Demand: Why Such Long Lines at Polling Sites?](#), N.Y. TIMES, A13 (Mar. 24, 2016). “Previously, Maricopa County would have needed to receive federal approval for reducing the number of polling sites, . . . under Section 5 of the Voting Rights Act.” Berman, *supra* note 16.
- 18 Emily Badger, [Why Long Voting Lines Could Have Long Term Consequences](#), N.Y. TIMES: THE UPSHOT (Nov. 8, 2016).
- 19 CHRISTOPHER FAMIGHETTI, AMANDA MELILLO, & MYRNA PÉREZ, [ELECTION DAY LONG LINES: RESOURCE ALLOCATION 3](#) (2014). This study analyzed election administration in Florida, Maryland, and South Carolina. In all three states, longer lines could be explained, at least in part, by fewer machines or poll workers. *Id.*
- 20 Berman, *supra* note 16; see, e.g., N.Y. Legis. Assemb. A5925. Reg. Sess. 2017-2018 (2018).
- 21 JON SHERMAN, FAIR ELECTIONS LEGAL NETWORK, [SAVING VOTES: AN EASY FIX TO THE PROBLEM OF WASTING PROVISIONAL BALLOTS CAST OUT OF PRECINCT 1, 4](#) (2014), (last visited Aug. 7, 2018).
- 22 *Id.*
- 23 The Help America Vote Act (HAVA) created a provisional voting safeguard in states that do not allow voters to register on Election Day: A voter who believes he or she is eligible to vote must be offered a provisional ballot if their name does not appear on the rolls. See SHERMAN, *supra* note 21, at 1.
- 24 NCSL, [Provisional Ballots](#), (June 19, 2015).
- 25 Wash. Admin. Code §§ 434-262-032(4), -032(5); Md. Code Ann., Elec. Law § 11-303(e); Or. Rev. Stat. Ann. § 254.408(6). U.S. ELECTION ASSISTANCE COMMISSION, [2014 Statutory Overview](#) (Jan. 2015) 36-37.

- 26 Jessica Huseman, [*Stand up and Be Counted—Maybe*](#), PROPUBLICA: ELECTIONLAND (OCT. 13, 2016, 1:00 PM) ; JOSHUA FIELD, CHARLES POSNER, & ANNA CHU, UNCOUNTED VOTES, CTR. FOR AMERICAN PROGRESS, [*THE RACIALLY DISCRIMINATORY EFFECTS OF PROVISIONAL BALLOTS 5*](#) (Oct. 2014). In 2008 in Ohio, 14,000 of 40,000 provisional ballots rejected were simply cast in the wrong precinct. Sarah Childress, [*Voting Battles in Key Swing States: A Cheat Sheet*](#), PBS, Aug. 13, 2012. See also Editorial, [*The Long Recount*](#), N.Y. TIMES (Jan. 31, 2005); *Panio v. Sunderland*, 4 N.Y.3d 123 (2005).
- 27 JON SHERMAN, ACLU, [*PROVISIONAL BALLOT COUNTING LAWS AND WRONG PRECINCT REJECTIONS 1, 9-10*](#).
- 28 *Id.* at 9-10; see FIELD, ET. AL, *supra* note 26, at 5, 7; New York “saves” a wrong-precinct provisional only if cast in the correct poll site. N.Y. Elec. Code 9-209(2)(a)(iii).
- 29 Huseman, *supra* note 26.
- 30 PEW, [*Use of Vote Centers on the Rise Nationwide*](#), (Jan. 15, 2015).
- 31 NCSL, [*Elections Technology Toolkit: Voting Machines and Beyond*](#) (March 2016); [*Ballot-On-Demand Voting Process Implemented in Sacramento County*](#), LEAGUE OF WOMEN VOTERS OF CAL., (May 21, 2010).

Voting Rights and the Formerly Incarcerated:

UNSHACKLING CURRENT POLICIES FROM A LEGACY OF JIM CROW

**A Multi-Part Project of the Legislative Affairs Committee
of the New York Democratic Lawyers Council (NYDLC)**

Produced by Executive Director Jarret Berg

Special thanks and gratitude to:

Ted Anastasiou, Lori Antonacci, Niechao Bai, Anthony Bailey, Sarah Baldwin, Anastasia Benedetto, Scott Budow, Steven Carbó, Melanie Carnsew, Tabitha Crosier, Kelvin Davis, Joel Dodge, Doug Dunham, Mady Edelstein, Amanda Goldman, David Goldman, Cory Hansen, Rebecca Hausner, Hal Hodes, Adrienne Jones, Matthew Jordan, Maithli Joshi, Leonard Kohen, Andrew Kirshenbaum, Jared Lacertosa, Abel McDonnell, Brenda McManus, Alexandra Megna, Samuel Meller, Claudine-Annick Murphy, Ed Murray, Sabrina Oudine, John Owens, Jr., Robert Rose, Nicole Samii, Carol Schrager, Russell Semmel, Adam Shpeen, William J. Steiner, Jesse Suchmann, Somil Trivedi, Jeff Wice, Ekow Yankah

Widely recognized as indispensable to the legitimacy of modern societies, the right to vote is the most fundamental right bestowed upon Americans. Given the centrality of this liberty to political life, criminal disenfranchisement laws—the stripping of the right to vote as part of a penalty—took root in the United States as part of common law (“civil death”), expanding over time as a countervailing trend to the progressive expansion of the American electorate. Intertwined with the ugly proliferation of Jim Crow laws and their systematic marginalization of racial minorities, today 48 states maintain a criminal disenfranchisement policy. As a result, mass incarceration, disenfranchisement, and the hurdles to rights restoration exclude an estimated 6.1 Million Americans from the political process, the majority of whom have already completed their incarceration. States must reevaluate this serious punishment through a modern lens. One option is not to disenfranchise at all. But if states are to continue disenfranchising Americans, a uniform baseline of specific and proportional application and automatic rights restoration upon release would better serve the interests of justice and protect civil rights.

Each election, as Americans decide who to vote for, who not to vote for, or whether to vote at all, 6.1 Million other Americans are prohibited from participating in the democratic process altogether—their fundamental right to vote having been stripped by criminal disenfranchisement laws that remain on the books in 48 states. With less than 5 percent of the world’s population, America houses 25 percent of its incarcerated population, imprisoning more people than any other nation on earth.¹

Across the U.S., criminal disenfranchisement policies vary significantly. The rights deprivation may be imposed during: 1) prison only, 2) prison and parole, 3) prison, parole and probation, or 4) prison, parole, probation, and post-sentence (with further extreme variations).² Only two states, Vermont and Maine, do not disenfranchise incarcerated Americans.³ State policies are wildly inconsistent and arbitrary—Americans convicted for first-degree murder are always permitted to vote in Maine, but those who complete their sentence for possession of one ounce of marijuana are likely to be permanently prohibited from voting in Florida.⁴

Departing from the practice of many other modern democracies that do not disenfranchise convicted citizens or do so only under selective circumstances,⁵ American blanket-disenfranchisement policies typically bear little relationship to the nature or gravity of the underlying offenses, and appear to contravene U.S. obligations under international law.⁶



More than 50% of those disenfranchised have completed their incarceration.

Similarly, the process for voting-rights restoration for Americans who have been disenfranchised due to conviction differs dramatically from state to state and is just as erratic.⁷ Restoration policy ranges from automatic restoration upon completion of incarceration (thirteen states and Washington D.C.), to permanently disenfranchising nearly all citizens convicted of a felony by prohibiting restoration entirely, absent rare approval after a hearing by high-level state leaders.

In Florida, a disenfranchisement outlier in scale and severity,⁸ the lack of due process is inimical to civil rights—individuals must wait five years after completion of their sentence, parole, and probation before applying to a clemency board headed by the Governor. 1.5 Million Floridians are disenfranchised by this law, which in 2018 was ruled unconstitutional by a federal judge.⁹ The Court found that

restoration decisions are made “without any constraints, guidelines, or standards,” and are tainted by racial, political, and religious bias, making rights restoration “arbitrary” and exceedingly slow. In the seven years prior to 2018, less than 3,000 citizens were granted restoration and there is a 10,000-person petition backlog.¹⁰ Several states also require debts like court fees or restitution to be satisfied in full before rights restoration, an added financial barrier for citizens with low-income who have already served their time.¹¹

This wide-ranging state practice not only leads to undesirable symbolic and elastic geographical impacts on the right to vote; the lack of uniformity leads to confusion among the formerly incarcerated, the public, and even government officials, amplifying the consequences of outdated laws in the places they still exist and ingraining the associated stigma in our popular culture.¹²

Possession of one ounce of marijuana could permanently prohibit one from voting in Florida.



From the standpoint of pursuing criminal justice policies that lead to successful reintegration and reductions in recidivism, disenfranchisement laws appear to undermine those goals, impeding the ability of formerly incarcerated Americans to fully participate in civil society and denying them a stake in decisions that shape the future of their community. Counterproductively, the behavior that society strives to encourage—a commitment to the broader social and political collective—is directly undercut by these blanket laws.¹³

Suspect Historical Origins and Harmful Modern Consequences

Criminal disenfranchisement laws are not new. They are rooted in American and common law history, intertwined with the proliferation of Jim Crow laws and their deleterious, purposeful, and systematic marginalization of racial minorities. The effect of these laws (putting aside the intent) was to hinder the civil rights progress enjoyed by African Americans during the post-bellum American Reconstruction period.¹⁴ Almost in lockstep with the passage of the Fifteenth Amendment, the number of states with criminal disenfranchisement laws dramatically increased.¹⁵ Put in historical context, disenfranchisement was part and parcel of the system of poll taxes, grandfather clauses, literacy tests, and other tactics designed to limit political power.¹⁶

In the decades since most of these tactics became illegal, the racially disparate impact of disenfranchisement laws were further magnified by the criminal justice policies pursued during the American “war on drugs”.¹⁷ From 1980 to 2009, the percentage of people incarcerated for drug offenses increased 1100% from approximately 40,000 to 500,000 persons and has been the main driver of new prison admissions.¹⁸ Although drug use and sales rates are similar across racial and ethnic lines, Blacks and Latinos are far more likely to be criminalized (“stopped, searched, arrested, convicted, harshly sentenced and saddled with a lifelong criminal record”) for this conduct. There are also significant disparities in sentencing—blacks face greater odds of incarceration and will serve 20% longer federal sentences than whites convicted of similar crimes.¹⁹ Scholars like Michele Alexander argue that “[n]othing has contributed more to the systematic mass incarceration of people of color in the United States than the War on Drugs.”²⁰

The result is that in 2016, one in 13 voting-age African Americans were denied the right to vote because of disenfranchisement laws. 20 percent of voting-age African Americans in Kentucky, Tennessee, and Virginia are disenfranchised and 23 states disenfranchise at least 5 percent of voting-age African Americans. More than 50% of those disenfranchised have completed their incarceration.²¹ In light of the disproportionate racial impact of U.S. criminal justice policies, today, no less than in America’s infamous past, disenfranchisement (and the hurdles imposed to rights restoration) have the effect of omitting millions of Americans from the political process.

Protecting Core Civil Rights By Reforming Disenfranchisement Laws

Today, disenfranchisement in the U.S. remains a punishment that is stigmatizing, marginalizing, and can last forever. In light of the historical origins and racially disparate impact of these policies, states that maintain them have a compelling imperative to reevaluate this punishment through a modern lens, and assess any perceived benefits against the severe rights deprivation they perpetuate. Since election law and criminal law are largely the purview of states, the states have primacy to reform them, notwithstanding the basic Constitutional rights at stake.

In recent years, as awareness about disenfranchisement and the damaging inequalities of the American criminal justice system have increased, some states have taken steps to reform harsh sentencing guidelines and disenfranchisement policies.²² In 2018, New York Governor Andrew Cuomo used executive authority to issue conditional pardons for rights restoration to at least 24,086 citizens on parole with a commitment to continue doing so on a rolling basis.²³ In Florida, a 2018 grassroots campaign *Second Chances Florida* is working to overturn the draconian policy by ballot referendum.²⁴ In 2016, Virginia Governor McAuliffe battled with the state GOP to restore voting rights by Executive Order to 168,000 citizens who had completed incarceration and supervised release,²⁵ while Maryland modernized its law to automatically restore the franchise upon sentence completion.²⁶

However, even if some states are reforming disenfranchisement laws, it is still undesirable to have widely variable elasticity when it comes to defining the con-

tours of fundamental American civil rights. As a matter of uniformity, predictability, rationality, proportionality, and basic fairness in the administration of justice (all familiar precepts of U.S. criminal law), and of course to protect the significant civil rights at stake, Congress should set a clear “floor” to guarantee voting rights and equal protection of those who pass through the criminal justice system.²⁷

To best protect civil rights, one option is not to disenfranchise at all, as is the policy in two states and several other liberal democracies.²⁸ But if states are to continue disenfranchising American citizens in various ways for the foreseeable future, the role of Congress in setting a uniform civil rights baseline for disenfranchisement and restoration becomes even more important. Such a safeguard would provide that Americans who have completed their incarceration (i.e. *served their time*) must be permitted to speedily have their civil rights restored without undue hindrance, cost, or extraordinary process, so they may vote, at least, in federal elections.

One strong proposal carried by Representative Nadler and Senator Cardin, *The Democracy Restoration Act* (“DRA”), would restore voting rights in federal elections to an estimated 4.7 million disenfranchised Americans who have already served their time and are living in the community, but are still denied the franchise. The law would ensure voting rights for probationers and include notice provisions for persons leaving prison, sentenced to probation, or convicted of misdemeanors.²⁹

But Congress should go further, codifying modern civil rights norms discussed above like Article 25 of the ICCPR, which already binds the U.S. A pro-voter framework is discernable, such that:

1. Laws excluding the formerly incarcerated from voting for life (or imposing procedural hurdles tantamount to a lifetime ban) are unreasonable and disproportionate;
2. Laws depriving all convicted persons of the right to vote while in prison, on parole, or probation without bearing any relationship to the nature of the underlying offense—i.e. “blanket disenfranchisement laws”—are indiscriminate and thereby disproportionate;
3. Criminal disenfranchisement is reasonable where it is imposed by law or at the discretion of a sentencing judge for a specified time in connection with a particular offense, like those with a nexus to elections, public corruption, abuses of power, or treason.³⁰

Procedurally, rights restoration and voter registration should be a single step. The ideal process is automatic—compatible with popular voting modernization reforms like Automatic Voter Registration (“AVR”)—so that restoration and registration occurs during release and re-entry.³¹ This streamlines administration, reduces costs and paperwork, and eliminates arbitrary and unjust barriers to the free and fair exercise of basic civil rights. In the short term, states that have not (yet) modernized their voting via a robust AVR policy should implement a proactive voting-rights education, registration, and access component to their intake and re-entry procedures.

A criminal justice system designed to respect voting rights while maintaining disenfranchisement policies would: 1) Notify persons of their (ongoing) voter eligibility status at the time of arraignment or incarceration, and again after conviction or sentencing; 2) Provide a straightforward path during release and reentry to rights restoration, voter registration, and access to all relevant basic voting information and forms; and 3) Assist such persons, including language minorities, with completing and submitting forms.³²

In a free and democratic society, blanket rights deprivation is never the norm—it must be treated as the exceptional, extraordinary sanction that it is.

Conclusion

As Congress and the states slowly embrace the aforementioned proposals as part of criminal justice reform, Americans who interact with our penal system will have a more holistic opportunity to successfully reenter their communities with the basic dignity that comes with being included (literally “counted”) as part of our collective. Whether an American stands accused, properly convicted, or has already served their time for a past offense, such a person is still an American. In a free and democratic society, blanket rights deprivation is never the norm—it must be treated as the exceptional, extraordinary sanction that it is. If the practice of stripping voting rights from citizens is to continue in America, it should have a clear nexus with the underlying offense, be sparingly applied, and limited in scope so that those who have returned to their communities can have a chance to reintegrate and pursue a meaningful future.

All states should reexamine the perceived societal benefits of disenfranchisement through a modern lens. The resulting policy should be a conscious one, rather than one arising from inertia or antiquated (and racially suspect) legacies. When in doubt, a just and democratic society must always err on the side of protecting and advancing individual rights.

Notes

- 1 CHRISTOPHER UGGEN, RYAN LARSON, AND SARAH SHANNON, [THE SENTENCING PROJECT, 6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT, 2016](#) (Oct. 6, 2016); DRUG POLICY ALLIANCE, [FACT SHEET: THE DRUG WAR, MASS INCARCERATION AND RACE 1](#) (Jan. 2018).
- 2 Ali Rickart, [Disenfranchisement: A Comparative Look at the Right of the Prisoner to Vote](#), IUS GENTIUM (Feb. 6, 2015); JEAN CHUNG, [THE SENTENCING PROJECT, FELON DISENFRANCHISEMENT: A PRIMER](#), (Jan. 2017). ACLU, [Felony Disenfranchise Laws \(Map\)](#), (last visited Aug. 9, 2018).
- 3 Persons incarcerated in Vermont and Maine may vote absentee and remain properly registered in the district in which they lived prior to incarceration. PROCON, [State Felon Voting Laws](#) (Apr. 23, 2018); However, each state's constitution permits disenfranchisement for election-related bribery. Vt. Const. CH II, § 55; Me. Const. art. IX, § 13.
- 4 MICHAEL WALDMAN, [THE FIGHT TO VOTE 176](#) (2016).
- 5 Countries that do not disenfranchise convicted citizens include Canada, Austria, Denmark, Finland, Ireland, Israel, Latvia, Lithuania, Norway, Spain, South Africa, Sweden and Switzerland. Countries that selectively disenfranchise include Germany (in rare court-directed instances), Iceland (if prison term exceeds four years), Australia, France, Greece, Italy, Malta, and Portugal. Bulgaria, Hungary, Russia, Armenia, Czech Republic, Estonia, and Romania ban felons from voting *only* during incarceration. After the United Kingdom's "blanket" disenfranchisement law (limited to incarcerated convicts) was found to be illegal by the European Court of Human Rights in 2005, the UK enacted minor reforms as a partial compromise in 2017. Rickart, *supra* note 2; Owen Bowcott, [Council of Europe Accepts UK Compromise on Prisoner Voting Rights](#), THE GUARDIAN, Dec. 7, 2017; BBC NEWS, [Q&A: UK Prisoners' Right to Vote](#) (Jan. 20, 2011). Under the jurisprudence of the European Court of Human Rights: "[P]risoners in general continue to enjoy all the fundamental rights and freedoms guaranteed...save for the right to liberty...Any restrictions on these other rights must be justified...Nor is there any place..., where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for automatic disenfranchisement based purely on what might offend public opinion. This standard of tolerance does not prevent a democratic society from taking steps to protect itself...[The Convention] does not therefore exclude that restrictions on electoral rights could be imposed on an individual who has, for example, seriously abused a public position or whose conduct threatened to undermine the rule of law or democratic foundations...The severe measure of disenfranchisement must not, however, be resorted to lightly and the principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned." EUROPEAN COURT OF HUMAN RIGHTS PRESS UNIT, [FACT SHEET: PRISONERS' RIGHT TO VOTE 1](#) (Jul. 2017), (quoting *Hirst (n° 2) v. United Kingdom*, Grand Chamber judgment of 6 October 2005, §§ 58-61 and 69-71).
- 6 As a party to the *International Covenant on Civil and Political Rights* (ICCPR), the U.S. has accepted its provisions as the law of the land. ICCPR Article 25 guarantees every citizen the "right and the opportunity...without unreasonable restrictions" to vote. *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (ratified by the U.S. June 8, 1992). Restrictions can only be based on grounds that are "objective

and reasonable” and, with respect to criminal disenfranchisement, “the period of such suspension should be proportionate to the offence and the sentence.” General Comment Adopted by the Human Rights Committee under Article 40, Paragraph 4, of the ICCPR, CCPR/C/21/Rev.1/Add.7, August 27, 1996, Annex V (1); see also Karl Josef Partsch, *Freedom of Conscience and Expression, and Political Freedoms*, in Louis Henkin, ed., *THE INT’L BILL OF RIGHTS: THE INT’L COVENANT ON CIVIL AND POLITICAL RIGHTS* (1981). From these sources, a pro-voter framework for evaluating disenfranchisement laws is discernable. See *id.*; *infra*, text accompanying note 29.

- 7 Erika Wood and Rachel Bloom, [De Facto Disenfranchisement](#), BRENNAN CTR. FOR JUSTICE & ACLU (2008).
- 8 Erika Wood, [Florida: An Outlier in Denying Voting Rights](#), BRENNAN CTR. FOR JUSTICE (2016).
- 9 *Hand v. Scott*, No. 4:17cv128-MW/CAS, 2018 WL 1508874, at *8 (N.D. Fla. Mar. 27, 2018), *stay granted pending appeal*, 888 F.3d 1206 (11th Cir. Apr. 25, 2018) (No. 18-11388-G) (holding Florida’s policy violates the First Amendment and the Fourteenth Amendment Equal Protection Clause).
- 10 *Id.*; Derek Hawkins, [Florida’s Ban on Ex-Felons Voting Is Unconstitutional and Biased, Federal Judge Rules](#), WASHINGTON POST, Feb. 2, 2018; NONPROFITVOTE.ORG, [Voting as an Ex-Offender](#), (last visited Jul. 12, 2018). In 2018, a broad grassroots movement is working to change the policy by ballot amendment. [Voting Restoration Amendment, 2018 Florida Constitutional Amendment Petition](#); Sam Levine, [Florida Takes Big Step Toward Expanding Voting Rights to Over 1.5 Million People](#), HUFFINGTON POST, Jan. 23, 2018. See *infra* note 24 and accompanying text.
- 11 MARC MEREDITH AND MICHAEL MORSE, *THE POLITICS OF THE RESTORATION OF EX-FELON VOTING RIGHTS: THE CASE OF IOWA*, QUARTERLY JOURNAL OF POLITICAL SCIENCE 7 (2014). For example, Arkansas only restores voting rights after one provides proof to the county clerk that all applicable court costs, fines, parole or probation fees have been paid. Tennessee demands payment of all outstanding child support for voting rights restoration. *Id.*
- 12 Wood and Bloom, *supra* note 7; see, e.g. 2 Chainz, [2 Chainz Joins Respect My Vote! Campaign](#), RESPECT MY VOTE! (May 1, 2012).
- 13 GUY PADRAIC HAMILTON-SMITH AND MATT VOGEL, *THE VOICE OF VOICELESSNESS: THE IMPACT OF FELONY DISENFRANCHISEMENT ON RECIDIVISM*, BERKELEY LA RAZA LAW JOURNAL, VOL. 2, ART. 3 407-432 (2012). Research has found that individuals who exercised their right to vote were half as likely to re-offend as their counterparts who did not. N.Y. CIVIL LIBERTIES UNION, [Felony Disfranchisement: A Widespread Problem](#) (last visited Aug. 7, 2018).
- 14 WALDMAN, *supra* note 4, at 176-177; Erika Wood, Garima Malhotra, Charles Ogletree, & Liza Budnitz, [Jim Crow in New York](#), BRENNAN CTR. FOR JUSTICE (Feb. 2010); GEORGE PILLSBURY AND JULIAN JOHANNESSEN, *NON-PROFIT VOTE, AMERICA GOES TO THE POLLS 2014: A REPORT ON VOTER TURNOUT IN THE 2014 MIDTERM ELECTION 25* (Mar. 2015); Brent Staples, [The Racist Origins of Felon Disenfranchisement](#), N.Y. TIMES, Nov. 18, 2014.
- 15 ANGELA BEHRENS, CHRISTOPHER UGGEN, & JEFF MANZA, *BALLOT MANIPULATION AND THE ‘MENACE OF NEGRO DOMINATION’: RACIAL THREAT AND FELON DISENFRANCHISEMENT IN THE UNITED STATES, 1850–2002*, AMERICAN JOURNAL OF SOCIOLOGY 109, no. 3 559-605 (2003).
- 16 WALDMAN, *supra* note 4, at 176-177; Staples, *supra* note 14.

- 17 MARC MAUER, THE SENTENCING PROJECT, [THE CHANGING RACIAL DYNAMICS OF THE WAR ON DRUGS](#) (Apr. 2009), (citing data on state prison populations from the annual prison reports of the Bureau of Justice Statistics).
- 18 *Id.* In 2016 an estimated 6.1 million people were disenfranchised due to a felony conviction. The increase has been dramatic—An estimated 1.17 million people were disenfranchised in 1976, 3.34 million in 1996, and 5.85 million in 2010. UGGEN, LARSON, AND SHANNON, *supra* note 1, at 3.
- 19 DRUG POLICY ALLIANCE, *supra* note 1; AMERICAN CIVIL LIBERTIES UNION, [HEARING ON REPORTS OF RACISM IN THE JUSTICE SYSTEM OF THE UNITED STATES, SUBMITTED TO THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, RACIAL DISPARITIES IN SENTENCING 1](#) (Oct. 2014).
- 20 MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 60 (The New Press, 2d ed. 2012).
- 21 UGGEN, LARSON, AND SHANNON, *supra* note 1, at 3.
- 22 For example, Nevada simplified a complicated selective disenfranchisement law (2017); Maryland repealed lifetime disenfranchisement (2007) and restored voting rights to probationers and parolees (2016); Delaware repealed a five-year waiting period for most offenses (2013); Washington eliminated a pre-restoration requirement that people pay all fees, fines, and restitution (2009). BRENNAN CTR. FOR JUSTICE, [Criminal Disenfranchisement Laws Across the United States](#) (Apr. 18, 2018); CHUNG, *supra* note 2.
- 23 Press Release, OFFICE OF THE GOVERNOR, [Governor Cuomo Issues First Group of Conditional Pardons Restoring the Right to Vote to New Yorkers on Parole](#), May 22, 2018.
- 24 The Voting Restoration Amendment would restore voting rights of Floridians with non-violent felony convictions who have completed their sentences (including parole and probation) except those convicted of murder and sexual assault). Florida Voting Restoration Amendment, *supra* note 10 and accompanying text.
- 25 Editorial Board, [Virginia Makes Every Voter Count](#), N.Y. TIMES, Nov. 17, 2017; BRENNAN CTR. FOR JUSTICE, [Voting Rights Restoration Efforts in Virginia](#) (Apr. 20, 2018).
- 26 BRENNAN CTR., *supra* note 22.
- 27 See Democracy Restoration Act, *infra* note 29 and accompanying text
- 28 See *supra* notes 3, 5-6 and accompanying text.
- 29 Democracy Restoration Act of 2018, H.R. 6612, 115th Cong. (2017-2018); Democracy Restoration Act of 2017, S. 1588, 115th Cong. (2017-2018).
- 30 See *supra* notes 3, 5-6 and accompanying text.
- 31 See NYDLC, [MODERNIZING AMERICA DEMOCRACY: AUTOMATIC REGISTRATION GIVES MILLIONS OF ELIGIBLE VOTERS A VOICE](#), *in* PROTECTING THE RIGHT TO VOTE: A NATIONAL AGENDA FOR IMPROVING ACCESS TO OUR DEMOCRACY (2018). A robust AVR policy would extend to state entities like the Department of Corrections.
- 32 Language assistance should be provided at least to the extent required by Section 203 of the Voting Rights Act. 52 U.S.C.A. § 10503.

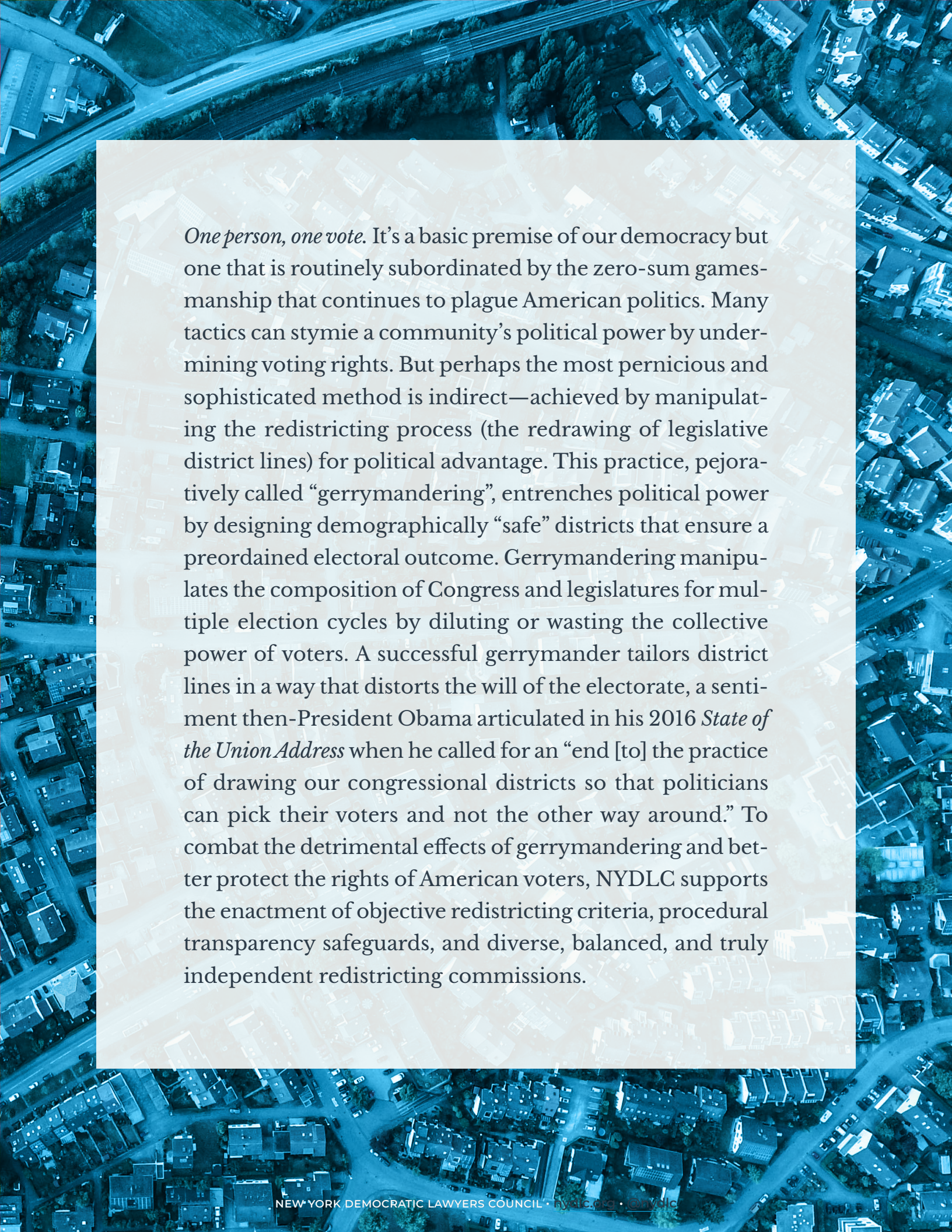
Picking Their Own Voters: THE CASE FOR FAIR AND INDEPENDENT REDISTRICTING

**A Multi-Part Project of the Legislative Affairs Committee
of the New York Democratic Lawyers Council (NYDLC)**

Produced by Executive Director Jarret Berg

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An aerial photograph of a residential neighborhood, showing houses, streets, and greenery. A semi-transparent white rectangular box is overlaid on the center of the image, containing text. The text discusses the concept of 'one person, one vote' and the practice of gerrymandering, specifically mentioning the NYDLC's support for objective redistricting criteria.

One person, one vote. It's a basic premise of our democracy but one that is routinely subordinated by the zero-sum gamesmanship that continues to plague American politics. Many tactics can stymie a community's political power by undermining voting rights. But perhaps the most pernicious and sophisticated method is indirect—achieved by manipulating the redistricting process (the redrawing of legislative district lines) for political advantage. This practice, pejoratively called “gerrymandering”, entrenches political power by designing demographically “safe” districts that ensure a preordained electoral outcome. Gerrymandering manipulates the composition of Congress and legislatures for multiple election cycles by diluting or wasting the collective power of voters. A successful gerrymander tailors district lines in a way that distorts the will of the electorate, a sentiment then-President Obama articulated in his 2016 *State of the Union Address* when he called for an “end [to] the practice of drawing our congressional districts so that politicians can pick their voters and not the other way around.” To combat the detrimental effects of gerrymandering and better protect the rights of American voters, NYDLC supports the enactment of objective redistricting criteria, procedural transparency safeguards, and diverse, balanced, and truly independent redistricting commissions.

O *ne person, one vote.* It's a basic premise of our democracy but one that is routinely subordinated by the zero-sum gamesmanship that continues to plague American politics.

Today an artificial gulf exists between the popular will of American voters and fair representation in our legislative chambers because of pernicious redistricting tactics employed after the 2010 Midterm elections. For example, in Wisconsin, President Obama carried the 2012 battleground by seven points, and state legislative Democratic candidates received 51.4% of the vote statewide, but Republicans won 60 of 99 seats in the Statehouse. Similarly in Pennsylvania, after the GOP redrew district lines in 2011 (and before courts intervened), Republicans continued to win 13 out of 18 Congressional districts, despite Pennsylvania having voted for Barack Obama in 2012 by over 5 percent and favoring Donald Trump in 2016 by less than 1%. Likewise, despite Michigan Democratic candidates winning the most votes in 2012 and 2014, Republicans took the majority of House seats and retained control of the full legislature. Nationally in 2012, Democratic congressional candidates won 1.4 million more votes than their Republican opponents, but Republicans managed to win a staggering 33 more House seats.¹

The current representational disparity was engineered primarily by an aggressive GOP Redistricting Majority Project (“REDMAP”) that impacted states like Michigan, North Carolina, Pennsylvania and Wisconsin, and netted the GOP an estimated 22 additional House seats they would not have had otherwise. Although the strategy has been around since the early days of the republic, “Gerrymandering,” the anti-democratic practice of manipulating district lines to preordain preferred political outcomes, can dramatically diminish fair representation with increasing mathematical precision.²

Without strong safeguards, redistricting by elected officials has fallen prey to an inherent conflict of interest.

How did we get here? Every ten years, the U.S. census measures population growth or loss amongst the fifty states.³ This data is used to *apportion* the number of Congressional representatives each state's voters are entitled to elect and is also used to redraw congressional, state, and local legislative district lines to reflect population shifts and changing community demographics.⁴ Under the U.S. Constitution, the method by which states redraw their lines is left to each state, with few guidelines.⁵

The most commonly used redistricting method in the U.S. (by thirty-seven states) is the redrawing of congressional and state legislative districts by the members of a state’s legislature. Proposed maps are typically enacted like ordinary legislation.⁶ When the process is abused for partisan or personal gain, gerrymandering can entrench incumbents, punish party dissidents or benefit favored candidates, make a district unwinnable for one party, and dilute the voting power of communities unfriendly to the map-drawers.⁷ Intentionally distorting the lines can alter a district’s ideological composition by adding or removing towns or entire cities, while genuine considerations like maintaining geographic compactness or community cohesiveness and ensuring fair representation become secondary to partisan advantage.⁸ Without strong safeguards, this system falls prey to an inherent conflict of interest as partisan officials or appointees redraw the districts that they or their colleagues will occupy and represent for years.⁹

Moreover, disproportionate representation is only one of the pernicious effects. When most candidates for elected office need only to appeal to narrow constituencies and face little incentive to compromise to win or retain their legislative seat, gridlock grows and stifles the democratic process.¹⁰ Over the last two decades, the U.S. House of Representatives has moved further from fair representation and legislative compromise as the number of swing districts—where a candidate must appeal to a wider and mixed ideological array of voters to win—has fallen from over 164 districts in 1997 to about 72 in 2016—a 56 percent decline.¹¹

The most recent round of redistricting following the 2010 census was replete with examples of state legislatures drawing congressional districts to maximize partisan advantage.¹² This continues to perniciously impact the composition of Congress and many state legislatures by ensuring one-party dominance and stifling the actual will of the electorate. President Obama articulated this in his 2016 State of the Union Address when he called for an “end [to] the practice of drawing our congressional districts so that politicians can pick their voters and not the other way around.”¹³

Laboratories of Democracy? Redistricting and Gerrymandering in the States

The practice of pernicious district-line manipulation by American elected officials is as old as America itself.¹⁴ But today, computer models increasingly allow partisan mapmakers to manipulate districts with such mathematical precision that it assures partisan control in all but extreme circumstances.¹⁵ Gerrymandering is also uniquely American—many longstanding democracies employ neutral redistricting processes designed to avoid the conflict of interest discussed above and, unsurprisingly, subsequent protracted litigation is rare.¹⁶

However, under partisan redistricting regimes that lack objective criteria, lines drawn by the majority party can be designed to *crack* apart existing neighborhoods of minority voters (or where race is a strong indicator of party, voters of the minority party) into separate voting districts, diluting their political power. An opposite tactic is used to *pack* minority voters together inefficiently by over-concentrating them into as few districts as possible. In either case, the

primary motivating factor for drawing the lines is a pernicious one—frustrating the ability of cohesive sub-groups to influence elections, achieve fair representation in our democracy, and have their interests included as part of the resulting political agenda.¹⁷ In several recent high-profile instances discussed below, courts have intervened to block (or have attempted to block) some of the most abusive gerrymanders.

Virginia’s entire Congressional district plan was struck down in 2016 after a federal district court found that the Republican-drawn map illegally diluted minority voting-power by packing black voters into overwhelmingly Democratic districts.¹⁸ With respect to Virginia’s legislative districts, in 2017 the Supreme Court held that an unconstitutional racial gerrymander could be demonstrated through direct and circumstantial evidence even if the district complied with traditional redistricting principles. On remand, the district court ruled that eleven challenged state legislative districts were racially gerrymandered.¹⁹

In North Carolina in 2017, the Supreme Court held that two challenged Congressional districts were illegal racial gerrymanders, ruling race was used as the predominate factor in drawing district lines for the purpose of diluting minority voting power. North Carolina was required to redraw their congressional map and GOP lawmakers announced publicly that maintaining a 10-3 Republican advantage would be a primary goal of the new plan, even including it as official redistricting criteria. In 2018 a three-judge federal panel twice struck down the remedial plan as an illegal *partisan* gerrymander, finding violations of the First and Fourteenth Amendments and Article I of the U.S. Constitution.²⁰



The post-2010 redistricting was replete with examples of districts drawn to maximize partisan advantage.

In Wisconsin, a federal court struck down the 2011 GOP-drawn state-legislative plan as an unconstitutional *partisan* gerrymander before the Supreme Court ultimately found lack of standing in 2018. The underlying decision was the first time a federal court has been willing to adopt a standard to adjudicate whether excessive partisan (as oppose to racial) bias predominated in the redistricting process.²¹ The court relied upon the “efficiency gap” in determining excessive partisanship, a mathematical model that measures the difference between the parties’ respective *wasted* votes in an election, divided by the total votes cast.²²

In January 2018, the Supreme Court of Pennsylvania struck down a congressional redistricting plan as an unconstitutional partisan gerrymander that violated particular provisions of the state constitution, identifying a viable (but limited) alternative for combatting these abuses via state level safeguards.²³

For several reasons, normative recognition that it is illegitimate to use party affiliation as a predominant factor in drawing district lines would be a positive bipartisan development. Moreover, given that race has become an increasingly accurate predictor of party affiliation in America, the practice can circumvent the existing prohibition on racial gerrymandering and be nearly as impactful. Challenges to other redistricting schemes are currently being litigated.²⁴

Requiring objective and fair criteria, diverse representation, and a transparent process helps root out tactics that undermine voting rights.

If elected officials in many jurisdictions are likely to retain substantial control over redistricting for the foreseeable future, New York City offers a transparent process for drawing maps.²⁵ Under the City Charter, commissioners are mandated to draw maps based on ranked criteria that includes fair and effective representation of VRA-protected racial and language minority groups; keeping neighborhoods with historical ties together; ensuring compact and contiguous districts; and barring districts from being split for partisan gain. Although the Mayor and City Council appoint all commissioners, appointment rules mandate fair geographic, racial, and partisan representation, prohibit removal without cause and a hearing, and prohibit interested actors like city employees, lobbyists, elected officials, and political party officers from serving.²⁶

However, absent such safeguards, studies reveal that a fair redistricting process is historically far more likely to be achieved by removing the line-drawing power from the unfettered influence of elected officials. Several states are now using commissions to draw district lines or use commission recommendations to guide the legislature's redistricting process.²⁷ Some have seen independent commissions established directly by the voters via ballot referendum.²⁸ Polling in other states suggest strong support for independent commissions across the typical ideological divide.²⁹

The authority, jurisdiction, and composition of redistricting commission schemes vary greatly. Some commissions are not actually independent due to explicit or subtle remaining political influence over commissioner selection, nor does the mere establishment of a commission (or merely providing it with independence without adequate guidelines or diversity) serve as a panacea to all redistricting issues.³⁰

In states that employ redistricting commissions, it is reasonable to expect that a commission's proposed final map would be binding, absent extraordinary circumstances. However, several "redistricting commission states" still allow their legislature or other elected officials to maintain control over commission members or the approval process, undermining true independence and entrenching partisan influence. Illustrating the absence (and desirability) of a set of uniform redistricting and commission-composition best practices or guidelines, six states have established "advisory commissions" that issue non-binding recommendations to state legislatures.³¹

On the other hand, states like California and Arizona have independent commissions designed to limit the power and influence of elected officials.³² Under this approach, commission appointees may be drawn from public applicants, reserved for non-office holders, or the structure may provide parties with equal numbers of strikes they may use to eliminate potential commissioners from contention.³³ One model for an independent commission supported by good-government advocates proposes that a state's courts create a pool of potential commissioners comprised of retired judges.³⁴ Some states ban commissioners from running for office in districts they draw for several years, to prevent self-dealing.³⁵

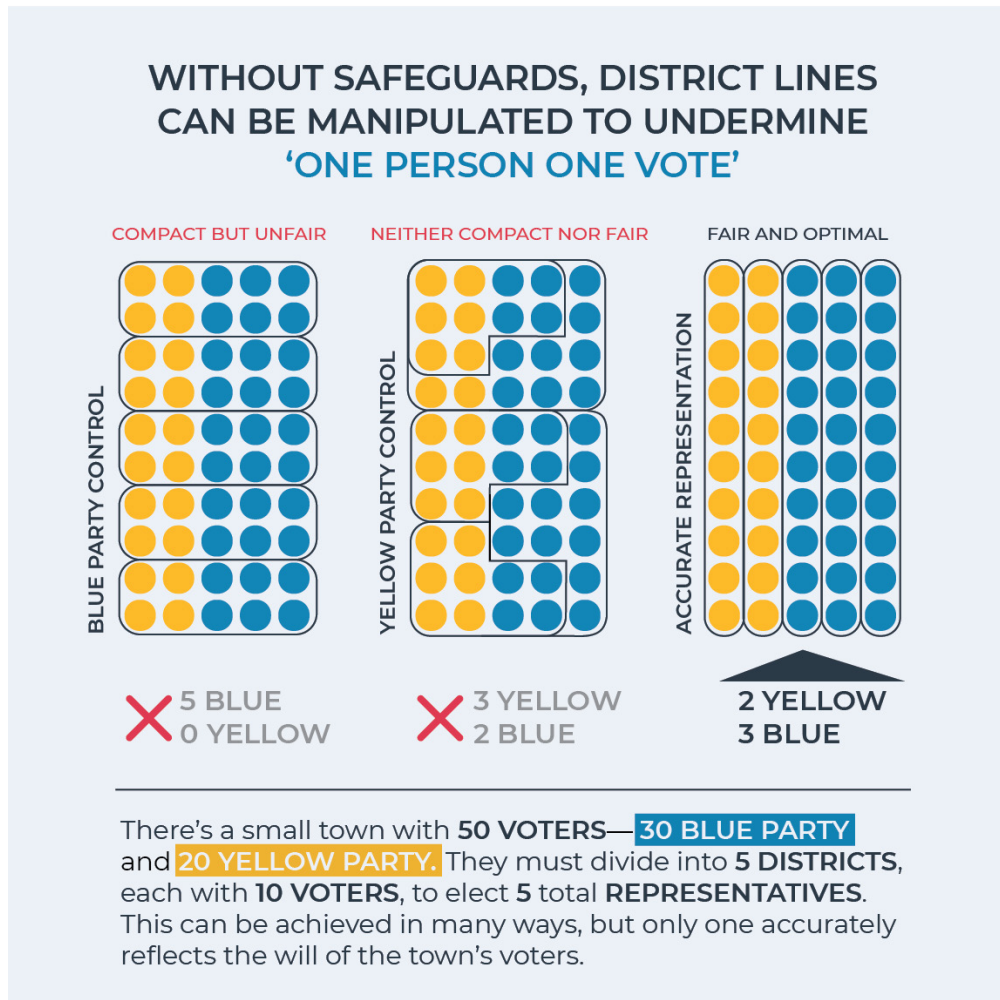
Truly independent commissions eliminate the conflict of interest inherent in having elected officials or interested appointees craft district boundaries for themselves, their colleagues, and their opponents in the minority party. Requiring objective and fair criteria, diverse representation, and a transparent process helps eliminate the pernicious tactics discussed above that undermine voting rights.³⁶

Objective and Fair Redistricting Criteria and a Transparent Process

Regardless of which collective ultimately draws the lines (and regardless of the party in power), a fair redistricting process should ensure the consideration of good-faith criteria and objective principles like preserving district *cohesiveness* (keeping communities of interest together), maintaining district *contiguity* and *compactness* (following existing political, municipal, or geographic boundaries), and improving electoral *competitiveness*.³⁷ Good government organizations like FairVote have articulated a preference for criteria that focus on producing representative and competitive districts.³⁸

While it is possible to conceive of a redistricting plan that meets these guidelines but fails to deliver absolute fairness in representation, prioritizing public-interest factors helps protect redistricting from zero-sum politics, making the process

more objective and accountable. To achieve this, a commission's mandate should explicitly require balancing fair and relevant line-drawing factors like preserving county, city or identifiable community boundaries and maximizing representation of sub-groups and local ideologies. FairVote and the Center for American Progress (CAP) recommend public consultation via hearings to allow residents, advocates, and legislators to provide input.³⁹ In Michigan, a 2018 ballot initiative for fair redistricting proposes creating an independent redistricting commission that uses similar public-interest factors as FairVote and CAP but ranks them in order of priority to give guidelines when two factors conflict during the map drawing process.⁴⁰



A transparent map-drawing process helps foster objectivity, accountability, and legitimacy. Submitting maps for hearings and public comment encourages civic engagement and will make the resulting plan more responsive to community concerns. The benefits of truly independent redistricting include more responsive representation, safeguarding minority and out-group voting power, and a political system that incentivizes consensus-building and broad-based

moderation instead of polarization.⁴¹ Advocates propose an amendment-free legislative approval process, wherein the legislature could approve the plan or send it back to the commission for revision, citing specific objections, furthering transparency.⁴²

In a win for proponents, the Supreme Court upheld the constitutionality of independent redistricting commissions in a 5-4 opinion in 2015.⁴³ Writing for the majority, Justice Ginsburg identified the “fundamental premise that all political power flows from the people,” and “the core principle of republican government...that the voters should choose their representatives, not the other way around.”⁴⁴ This narrow decision permitting dispassionate redistricting by independent commissions illustrates that curbing the power of politicians to manipulate district lines will not be an easy nationwide reform to implement, but is constitutionally viable.

Conclusion

In the aftermath of an aggressive and pernicious GOP redistricting strategy that resulted in an unprecedented flurry of post-2010 gerrymandering litigation and invalid maps, fair-minded policymakers, judges, and attentive voters recognize that America’s *one person, one vote* ideal must be strengthened and further developed to be actualized. Without a course-correction that includes modern, pro-democratic redistricting norms and fairness safeguards, the advent of powerful technology will magnify the existing representational disparities in the next redistricting cycle by employing tools that disenfranchise communities with even greater surgical precision.

As the public becomes more aware of these tactics and their deleterious impacts, the calls for impartial redistricting will only grow louder. While there may not be a universally agreed upon approach that renders perfect outcomes in all contexts, imposing objective criteria helps advance the primary goal of redistricting and the premise of our democracy—to ensure that elected officials reflect the interests and makeup of the diverse communities they represent by recalibrating districts as populations and demographics shift over time. Without these safeguards, the public interest is marginalized *de jure*, if not *de facto*.

History has shown that allowing elected officials to control redistricting without adequate safeguards creates an irresistible temptation to manipulate the process and serves as just another voter suppression end-run (albeit more subtle and sophisticated). To strengthen our democracy and better protect the rights of American voters, NYDLC supports the enactment of objective redistricting criteria, procedural transparency safeguards, and diverse, balanced, and truly independent redistricting commissions.

Notes

- 1 Michael Li and Laura Royden, Op-Ed, [America's Warped Elections](#), N.Y. TIMES, Mar. 25, 2018; Ari Berman, [How the GOP Rig Elections](#), ROLLING STONE, Jan. 24, 2018; David S. Cohen, [Pennsylvania Court Rejects Congressional Gerrymandering](#), ROLLING STONE, Jan. 23, 2018; LIZ KENNEDY, BILLY CORRIHER, AND DANIELLE ROOT, [REDISTRICTING AND REPRESENTATION](#) ¶¶ 3, 9-11, 13-15 CTR. FOR AM. PROGRESS, Dec. 5, 2016, [hereinafter "CTR. FOR AM. PROGRESS"].
- 2 Vann R. Newkirk II, [How Redistricting Became a Technological Arms Race](#), THE ATLANTIC, Oct. 28, 2017; Jordan Ellenberg, [How Computers Turned Gerrymandering into a Science](#), N.Y. TIMES, Oct. 6, 2017; BRENNAN CTR. FOR JUSTICE, [7 Things to Know About Redistricting](#) (Oct. 28, 2013); CTR. FOR AM. PROGRESS, *supra* note 1, at ¶ 15; see CAMPAIGN LEGAL CTR., [MAKE DEMOCRACY COUNT: ENDING PARTISAN GERRYMANDERING](#) 6 (2016). The practice in America dates at least to 1788 in Virginia prior to the Constitution taking effect. Emily Barasch, [The Twisted History of Gerrymandering in American Politics](#), THE ATLANTIC, Sept. 19, 2012.
- 3 A decennial (once-per-decade) census is required by the Constitution. The last U.S. census occurred in 2010. The next census will occur in the year 2020. See U.S. CONST. Art. I § 2.
- 4 The number of representatives each state sends to Congress varies from a high of 53 (California) to single-district, low-population states allotted one representative, such as Alaska, Wyoming and Vermont. 2010 census data established district lines for Congressional elections until 2022, at which point data from the 2020 census will be used to draw new lines.
- 5 See U.S. CONST. Art. I, §§ 2 and 4, Amends. XIV and XXVI. In the 1960s SCOTUS began to review redistricting cases and developed the one person, one vote equality principle. See generally *Baker v. Carr*, 369 U.S. 186 (1962); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Avery v. Midland County*, 390 U.S. 474 (1968).
- 6 Justin Levitt, [Who Draws the Lines?](#), ALL ABOUT REDISTRICTING, LOYOLA LAW SCHOOL, (last visited Aug. 30, 2018), (Typically, enactment requires "a majority vote in each legislative chamber, subject to a veto by the Governor. Connecticut and Maine both require supermajorities, of two-thirds in each house."); BRENNAN CTR. FOR JUSTICE, [Who Draws the Maps? Legislative and Congressional Redistricting](#) (June 1, 2018).
- 7 FAIRVOTE, [Gerrymandering](#), (last visited Aug. 30, 2018); for a demonstration of how easily district boundaries can be manipulated for partisan advantage see Aaron Bycoffe, Ella Koeze, David Wasserman and Julia Wolfe, [The Atlas of Redistricting](#), FIVETHIRTYEIGHT: THE GERRYMANDERING PROJECT (Jan. 25, 2018).
- 8 See generally SAMUEL ISSACHAROFF, PAMELA S. KARLAN, AND RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 757 (Foundation 3d ed. 2007) ("The strategy of partisan gerrymandering includes wasting as many votes of the other side's partisans as possible by concentrating those voters into a few districts").
- 9 Ryan Snow, [Legislative Control Over Redistricting as Conflicts of Interest: Addressing the Problem of Partisan Gerrymandering Using State Conflicts of Interest Law](#), 165 U. PA. L. REV. ONLINE 147, 155-58 (2017); see CAMPAIGN LEGAL CTR., *supra*, note 2, at 4-6.
- 10 Marian Currinder, [Does Gerrymandering Cause Gridlock in Congress?](#), LEGBRANCH.COM (Feb. 1, 2018).
- 11 DAVID WASSERMAN AND ALLY FLINN, [INTRODUCING THE COOK POLITICAL REPORT PARTISAN VOTER INDEX](#), COOK POLITICAL REPORT (2017).

- 12 CTR. FOR AM. PROGRESS, *supra* note 1, at ¶¶ 19-30. See Christopher Ingram, [America's Most Gerrymandered Congressional Districts](#), WASH. POST, May 15, 2014. Recent districts with irregular, non-compact shapes have been nicknamed 'the praying mantis', 'Goofy kicking Donald Duck', and 'the upside-down elephant'. *Id.*
- 13 President Barack Obama, [Transcript of Obama's 2016 State of the Union Address](#), N.Y. TIMES, Jan. 12, 2016.
- 14 Barasch, *supra* note 2. The term was coined in 1812 to describe a politically motivated redistricting plan proposed by Massachusetts Governor Elbridge Gerry. Barasch, *supra* note 2.
- 15 Newkirk II, *supra* note 2; Ellenberg, *supra* note 2.
- 16 Bernard Grofman and German Feierherd, [The U.S. Could Be Free of Gerrymandering. Here's How Other Countries Do Redistricting](#), WASH. POST, Aug. 7, 2017.
- 17 Roger Parloff, [Packing and Cracking: The Supreme Court Takes Up Partisan Gerrymandering](#), YAHOO NEWS, Oct. 2, 2017. See Levitt, *supra* note 6 at [Why does it matter?](#), and [Ideas for Reform](#).
- 18 *Personhuballah v. Alcorn*, 155 F.Supp.3d 552 (E.D. Va. 2016).
- 19 *Bethune-Hill v. Va. State Bd. Of Elections*, 137 S. Ct. 788 (2017); BRENNAN CTR. FOR JUSTICE, [Bethune-Hill v. Virginia Board of Elections](#), Jul. 6, 2018.
- 20 *Cooper v. Harris*, 137 S. Ct. 1455 (2017). Press Release, [Common Cause Prevails in Partisan Gerrymandering Lawsuit](#), COMMON CAUSE, Aug. 27, 2018.
- 21 BRENNAN CTR. FOR JUSTICE, *Gill v. Whitford*, Aug. 15, 2018. For the lower court opinion see *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016).
- 22 See *Whitford*, 218 F. Supp. 3d at 898 (W.D. Wis. 2016). Supporters of the efficiency gap argue the model is ideal for measuring partisan gerrymandering because it quantifies packing and cracking in a district, measures a party's undeserved seat share and can be calculated in any election. Nicholas Stephanopoulos, [Here's How We Can End Gerrymandering Once and for All](#), NEW REPUBLIC, July 2, 2014 ("Wasted votes are ballots that don't contribute to victory for candidates, and they come in two forms: lost votes cast for candidates who are defeated, and surplus votes cast for winning candidates but in excess of what they needed to prevail.") Critics argue that a congressional map can score high for bias one year and then look dramatically less partisan after a second election; see Emily Bazelon, [The New Front in the Gerrymandering Wars: Democracy vs. Math](#), N.Y. TIMES MAG., Aug. 29, 2017, at MM48.
- 23 *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018). SCOTUS declined to intervene. Adam Liptak, [Justices Won't Block Pennsylvania Gerrymandering Decision](#), N.Y. TIMES, Feb. 5, 2018.
- 24 Michael Li, Thomas Wolf, Alexis Farmer, [The State of Redistricting Litigation](#), BRENNAN CTR. FOR JUSTICE, Aug. 27, 2018.
- 25 Jeffrey Wice, Letter to the Editor, [Redistricting Plans](#), N.Y. TIMES, Feb. 11, 2018.
- 26 N.Y. CITY CHARTER, ch. 2-A §§ 50-52 (2004); BRENNAN CTR. FOR JUSTICE, [Redistricting in New York City](#) (Jun. 5, 2012).

- 27 See CTR. FOR AM. PROGRESS, *supra* note 1, at ¶¶ 1-3, 31-34; Levitt, *supra* note 6, at [Why does it matter?](#), and [Ideas for Reform](#), NAT'L. CONFERENCE OF STATE LEGISLATURES, [Redistricting Commissions: State Legislative Plans](#) (Jan. 25, 2018). In states like Arizona, voters overrode the legislative redistricting power by establishing independent commissions via ballot referendum. See *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S.Ct. 2652 (2015). As of 2018, eight states use redistricting commissions to draw congressional and state legislative district lines (Alaska, Arizona, California, Hawaii, Idaho, Montana, New Jersey, and Washington). While Montana and Alaska send only one representative to Congress, their commissions are used for state legislative district drawing. Five states, Arkansas, Colorado, Missouri, Pennsylvania, and Ohio use commissions to draw state legislative lines, but not congressional districts. BRENNAN CTR. FOR JUSTICE, *supra* note 6.
- 28 See, e.g., Jess Bravin, [Supreme Court Upholds Arizona Voting Districts Drawn by Independent Panel](#), WALL STREET JOURNAL, Apr. 20, 2016; CALIFORNIA CITIZENS REDISTRICTING COMM'N, [What is the Voters First Act](#), (last visited Aug. 29, 2018).
- 29 In Utah, a poll showed commissions are supported by 65% of voters, including 49% of Republicans, 88% of Democrats and 77% of independent voters. Bryan Schott, [Most Utahns Want Redistricting Done by Independent Commission](#), UTAHPOLICY.COM, July 29, 2015; In Maryland, 73% of voters favored independent commissions, including 68% of Democrats, 78% of Republicans, and 83% of independents. Len Lazarick, [Voters support independent redistricting commission, poll finds](#), MARYLANDREPORTER.COM, Oct. 17, 2013.
- 30 Levitt, *supra* note 6 at [Ideas for Reform](#); See NAT'L. CONFERENCE OF STATE LEGISLATURES, *supra* note 27. Sam Gringlas, [Success of Independent Redistricting Boards a Work in Progress](#), NBC NEWS, July 28, 2015; Nate Cohn, [Liberals Shouldn't Assume Redistricting Verdict Will Help Them](#), N.Y. TIMES, June 29, 2015. For example, Ohio's commission is partially comprised of elected officials including the governor, state auditor, and secretary of state, along with persons appointed by the party leaders of the state legislature. OHIO CONST. Art. XI § 01.
- 31 These states include Iowa, Maine, Ohio, New York, Rhode Island, and Vermont. Levitt, *supra* note 6.
- 32 NAT'L. CONFERENCE OF STATE LEGISLATURES, [Redistricting Commissions: State Legislative Plans](#) (Jan. 25, 2018).
- 33 CAL. CITIZENS REDISTRICTING COMM'N., [Background on Commission](#) (last visited Aug. 28, 2018); ARIZ. INDEP. REDISTRICTING COMM'N., [Frequently Asked Questions](#), (last visited Aug. 28, 2018).
- 34 FAIRVOTE, [Model State Redistricting Reform Criteria](#) (last visited Aug. 28, 2018).
- 35 Alaska, Arizona, California, Idaho, Montana, and Washington impose this restriction on commissioners. California and Arizona restrict legislative staff from serving on redistricting commissions while California, Idaho and Washington restrict lobbyists from serving. Levitt, *supra* note 6. Arizona bans redistricting commissioners from holding public office during a commissioner's term of office and for three years after, ARIZ. CONST. Art. IV, Pt. 2 § 1, cl. 13, while California prevents commission members from holding federal, state, or local public office for a period of 10 years, or from taking a public appointment or staff position for 5 years from the date of appointment. CAL. CONST. Art. XXI, §2, cl. 6.

- 36 Levitt, *supra* note 6 at *Ideas for Reform*. For an overview of proposed good-faith public-interest factors see VOTERS NOT POLITICIANS, MICHIGAN INDEPENDENT CITIZENS REDISTRICTING COMMISSION: HOW ARE THE MAPS DRAWN? PART III, (last visited Aug. 29, 2018); CTR. FOR AM. PROGRESS, *supra* note 1, at ¶¶ 3, 30-34.
- 37 FAIRVOTE, *supra* note 34; see Levitt, *supra* note 6, at *Why does it matter?*, and *Ideas for Reform*; CTR. FOR AM. PROGRESS, *supra* note 1, at ¶¶ 38-41.
- 38 FAIRVOTE, *supra* note 34.
- 39 FAIRVOTE, *supra* note 34; CTR. FOR AM. PROGRESS, *supra* note 1, at ¶¶ 42-43.
- 40 *Voters Not Politicians* recommends redistricting commissions prioritize eight factors in drawing new districts. *VOTERS NOT POLITICIANS*, *supra* note 36.
- 41 See FAIRVOTE, *supra* note 34; CTR. FOR AM. PROGRESS, *supra* note 1, at ¶¶ 1, 2, 8, 42-43.
- 42 FAIRVOTE, *supra* note 34.
- 43 See *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S.Ct. 2652 (2015). The Republican-led Arizona legislature sued to block independent redistricting enacted by ballot initiative, arguing that the new commission violated the U.S. Constitution's "Elections Clause" which reads "The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations." U.S. CONST. Art I., § 4, cl. 1.
- 44 *Ariz.* at 2652.