

The Disenfranchised Among Us

Vote Suppression Tactics that Burden, Marginalize & Exclude

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“A share in the sovereignty of the state, exercised by citizens voting in elections, is one of the most important rights of the subject, and in a Republic ought to stand foremost in the estimation of the law.”

Alexander Hamilton, April 1784¹

Introduction

This is the year in which we celebrate the passage and ratification of the 19th Amendment giving women the right to vote. The celebration is tempered by the fact that a variety of mechanisms, limitations and restrictions continue to be imposed by several state legislatures to keep many U.S. citizens from exercising their right to vote.

Whether as poll taxes in the form of statutory fees, burdens on the right of young voters to register to vote and to have full access to the election process, prison records that bar felons from voting after they have served their time, voter purges that place a disproportionate burden on minority voters, and address limitations

¹Alexander Hamilton, Second Letter from Phocion, April 1784, Founders Online, National Archives, <https://founders.archives.gov/documents.Hamilton/01-03-02-0347>

imposed by state and local governments upon Native American citizens residing on Reservations where their only address is a post office box, qualified legal voters are often barred from exercising this fundamental right.

Many citizens otherwise entitled to vote in U.S. elections face barriers and restrictions upon their fundamental right to vote. In this segment of the program we will explore the implications of continuing to employ those restrictions upon the fundamental right to self-determination.

Our focus will include vote suppression tactics used to the detriment of Native American voters and millennial voters. In this context we will address the steady and highly effective partisan efforts that have been used in recent years to bring expansion of minority voting rights to a grinding halt, enhanced by state level deployment of voting regulations and restrictions that have a decided impact on voter turnout.

Marginalization of Eligible Voters: Native Americans and Young Voters

In every election held in this country, there are thousands upon thousands of eligible voters who do not vote. The reasons center on inadequate information, barriers in the registration process, voter apathy, and suppression that comes in many flavors. Following the Supreme Court's effective immobilization of Section 5 preclearance in its 2013 *Shelby County v. Holder* decision², it was easier for states, particularly those with a history of discriminatory voting laws, to craft legislation that burdened the ability of Americans to exercise their right to vote and negatively impacted many aspects of voter turnout, mobilization, participation and access to the electoral process.

The targeted voters include college students as well as discreet minorities that have been marginalized from every critical stage of the electoral process.

² 570 US 529 (2013)

As we consider vote suppression tactics that have been used to the detriment of Native American voters as well as Millennials, we will factor into the discussion recent state court decisions that may point to a constitutional foundation for challenges to partisan gerrymandering.

Expansion and Contraction of the Electoral Franchise

How did we get to this point? Let's start with the electoral system, the integrity of which hinges on the right to vote. That right is under attack from several sources.

Domestic sources

On the domestic front, many states have rolled back hard-fought gains in minority electoral participation. They did so through voter purges that were given the green light in the 2018 decision in *Husted*³.

They did so through reduced early voting opportunities, reduced voter registration times, increased barriers in the form of stringent voter identification requirements and “exact match” requirements.⁴

They did so through decreased levels of competitiveness resulting from extreme partisan gerrymandering grounded on “safe seats” for elected officials, a practice now removed from federal jurisdiction of Article III courts.

And they did so through minority voter suppression tactics and redistricting practices imposed on minority voters with almost surgical precision.⁵

³ *Husted v. A. Philip Randolph Institute*, 138 S. Ct. 1833 (2018)

⁴ *Georgia Coalition for People's Agenda, Inc. v. Kemp*, 347 F. Supp. 3d 1251 (N.D. Ga. 2018)(detailed overview of Georgia's “exact match” process)

⁵ *N.C. State Conf. of NAACP v. McCrory*, 831 F. 3d 204, 214-15 (4th Cir. 2016) (“In response to claims that intentional racial discrimination animated its action, the State offered only meager justifications. Although the new provisions target African Americans with almost surgical precision, they constitute inapt remedies for the problems assertedly justifying them and, in fact, impose cures for problems that did not exist.”)

The Triple Whammy

The expansion of voting rights in this Land of the Free hit a ceiling by the time of the 2016 Presidential Election, with perceptible drops in voter participation and turnout by minority and younger voters. This did not take place in a vacuum. It happened in the context of unleashed political funding with *Citizens United*⁶, sharp curtailment of the Voting Rights Act's core protections that took place with *Shelby County*⁷, and last term's abdication of federal justiciability over partisan gerrymandering in *Rucho*⁸ and *Lamone*⁹. These three decisions may fairly be seen as a triple whammy that accelerated the level, impact and scope of vote suppression. But it's more complicated than that.

Foreign sources

While some may consider vote suppression as American as apple pie, the clouds have gathered, and it is now clear that vote suppression has also come from foreign sources as documented in great detail in the Moeller Report.¹⁰ The Congressional response in particular and the political reaction in general was not much more than a collective shrug and "so what?" reflected in the Attorney General's tailored summary of the report weeks before it reached the public.

The oxygen that fed the fires of vote suppression may well have come in part from a growing awareness of demographic changes that will ultimately transform

⁶ *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010)

⁷ *Shelby County v. Holder*, 570 U.S. 529 (2013)

⁸ *Rucho v. Common Cause*, 139 S. Ct. 2484, 204 L. Ed. 2d 931, 588 U.S. ____ (2019) ("Excessive partisanship in districting leads to results that reasonably seem unjust. But the fact that such gerrymandering is 'incompatible with democratic principles' does not mean that the solution lies with the Federal judiciary." 139 S. Ct. at 2506.)

⁹ *Lamone v. Benisek*, 588 U.S. ____ (2019)

¹⁰ *Report On The Investigation Into Russian Interference In The 2016 Presidential Election*, Special Counsel Robert S. Mueller, III, <https://www.justice.gov/storage/report.pdf>

the face of American voters. Just consider for a moment South Carolina Senator Lindsey Graham's lament during the 2012 Republican National Convention:

“[W]e're losing the demographics race. We're not generating enough angry white guys to stay in business for the long term.”¹¹

Could it be that the uptick in the white supremacist movement was a consequence of white fears of being outnumbered?

Could it even be that these fears were a substantial factor that triggered the “Unite the Right” rally in Charlottesville, Virginia on August 11, 2017, leading to the violent death of Heather Heyer and injuries to 28 others?

Very Fine Young Cannibals II

Lest we forget, do not overlook the outpouring of empathy from our President as he minimized the role of neo-Nazis and white supremacists at this rally, when he remarked on August 15, 2017 in the lobby of Trump Tower:

“I think there is blame on both sides. ... You also had people that were very fine people on both sides.”¹²

Disenfranchisement of Native American Voters

North Dakota's voter ID law enacted in 2013 was considered one of the most restrictive in the nation. Adopted shortly after *Shelby County* gutted the Section 5

¹¹ J. Shattuck, A. Huang & E. Thoreson-Green, *The War on Voting Rights*, at 3, citing an August 29, 2012 Washington Post article by Rosalind Helderma and Jon Cohen, “As Republican Convention Emphasizes Diversity, Racial Incidents Intrude,” accessible online at https://www.washingtonpost.com/politics/2012/08/29/b9023a52-f1ec-11e1-892d-bc92fee603a7_story.html

¹² Full text: Trump's comments on white supremacists, 'alt-left' in Charlottesville By POLITICO STAFF 08/15/2017 04:48 PM EDT Updated 08/15/2017 06:16 PM EDT, accessible online at <https://www.politico.com/story/2017/08/15/full-text-trump-comments-white-supremacists-alt-left-transcript-241662>

preclearance mechanism under the Voting Rights Act, the North Dakota law required voters to present a specific form of identification at the polls before receiving a ballot.

That identification had to provide the voter's current residential street address. Many of the 31,000 Native Americans who reside in North Dakota live in rural areas where the U.S. Postal Service does not deliver and where residential addresses are not required and not available. Mail is typically sent and received by a Post Office Box, which does not qualify as a residential street address under the North Dakota voter ID law. There's the rub.

Following a successful challenge in District Court based on Equal Protection and VRA Section 2 grounds, the Eighth Circuit upheld the law in *Brakebill v. Jaeger*.¹³ Despite the disproportionate impact of the North Dakota law on Native Americans, and despite the disenfranchisement of thousands of North Dakotans, the Eighth Circuit concluded that the disproportionate burdens the law placed on the right to vote by many Native Americans did not justify the lower court's statewide injunction against the North Dakota Secretary of State prohibiting enforcement of the law.

The 2018 mid-term elections were held under the restrictive voter ID law, and one of the casualties was incumbent Senator Heidi Heitkamp. A moderate Democrat fighting for reelection in a largely Republican state where many of her supporters abandoned her after she voted against the Senate confirmation of Justice Brett Kavanaugh to the U.S. Supreme Court, Heitkamp had been elected to office in 2012 at a time when Native Americans formed a critical part of her base.

While Native Americans made up 5% of North Dakota's population, many of those voters in 2018 were impacted by the North Dakota voter ID law. Despite a rapid, large-scale collective action by tribal leaders and community organizers to mobilize voters on the eve of the 2018 midterm elections, the effort was not enough,

¹³ 932 F. 3d 671 (8th Cir. 2019).

and thousands of Native Americans remained disenfranchised while the restrictive North Dakota voter ID law was allowed to remain in effect.¹⁴

Native American Voting Rights Act

The unique barriers faced by Native Americans were targeted in proposed legislation, The Native American Voting Rights Act of 2015, under which a preclearance regime similar to Section 5 of the Voting Rights Act would have been created and under which changes in voter registration sites, early voting locations, and election-day polling stations on reservations would have required consultation with tribes on the location of these sites, and most forms of tribal identification would have to be accepted for voter ID purposes.

Following the 2018 introduction of a new version of the Native American Voting Rights Act, a Native American Voting Rights Task Force was to be created in order to bolster Native voter registration, education and election participation efforts in tribal communities. The bill was reintroduced in March 2019 as H.R. 1694 (116 Cong.) with 91 co-sponsors and have moved to committee as the Native American Voting Rights Act of 2019.

Political Equality and Fair Access

The time has long since passed to ensure political equality for Native American voters and fair access to the ballot box for these U.S. citizens who have faced many obstacles and roadblocks that burden their right to vote.

Vote Suppression Tactics Facing Backlash?

As the 2020 election approaches, vote suppression efforts and tactics may be facing a growing backlash across the nation. The 2018 midterm elections led to the

¹⁴ H. Stambaugh, *America's Quiet Legacy of Native American Voter Disenfranchisement: Prospects for Change in North Dakota after Brakebill v. Jaeger*, 69 Amer. Univ. L. Rev. 295, 322-23 (2019).

election of 42 women to Congress, including 22 people of color, and the first two Native American women, Sharice Davids (D – Kansas) and Debra Haaland (D – N.M.). This was the most diverse freshman class in Congressional history.

The backlash extended to many other states.

In Florida, the electorate voted to re-enfranchise 1.4 million former felons.

In Kansas, outspoken Secretary of State Kris Kobach lost the governor's race, despite cries of voter fraud and promotion of vote suppression tactics that were the backbone of the ill-fated Election Integrity Commission.

In Maryland, the electorate approved a constitutional amendment allowing election-day registration.

In Nevada, voters passed an automatic voter registration law through the DMV.

In Michigan, the state legislature enacted election-day registration and no-reason absentee voting.

In Colorado and Michigan, the state legislatures created independent redistricting commissions that will be responsible for redistricting instead of the legislature.

In North Carolina, the nerve center for gerrymandering, Republicans lost their majority in the state legislature.

In Virginia, the state legislature voted in early 2019 for a constitutional amendment that would create a non-partisan redistricting commission, subject to approval by the legislature a second time and then by voters in November 2020, with the constitutional amendment as approved by the voters to govern the redistricting that will follow the 2020 census. Concerns have now arisen over the fact that if redistricting maps drawn by the non-partisan commission do not win legislative approval, the state Supreme Court, on which a majority of the current

justices were chosen by Republicans, would decide the legislative and congressional district lines.¹⁵

Disenfranchisement of Millennial Voters

A detailed analysis of tactics used to suppress the ever-strengthening Millennial voting voice and power is set forth in one of the 21 chapters of the recently published *America Votes! Challenges to Modern Election Law and Voting Rights* (ABA 4th ed. 2020). The chapter is entitled *Millennials and Electoral Access in 2018-2020* by Lauren E. Ward and Benjamin E. Griffith. Their chapter provides an overview of recent case law and statutory authority from North Carolina, Tennessee, Michigan, and New Hampshire, regarding Millennial voter suppression tactics such as limits on early voting¹⁶, student voter identification and registration limitations¹⁷, and what are arguably the equivalent of student poll taxes.¹⁸

¹⁵ Laura Vozzella, *Some Virginia Democrats want to Hit the Brakes on Nonpartisan Redistricting Plan*, The Washington Post, Dec. 30, 2019, accessible online at (https://www.washingtonpost.com/local/virginia-politics/some-virginia-democrats-want-to-hit-the-brakes-on-nonpartisan-redistricting-plan/2019/12/29/6fd97e38-2279-11ea-bed5-880264cc91a9_story.html)

¹⁶ *League of Women Voters of Florida v. Detzner*, 314 F. Supp. 3d 1205, 1224 (N.D. Fla. 2018) (injunctive relief barring infringement upon young voters' right to vote justified because "throwing up roadblocks in front of young voters does not remotely serve the public interest.")

¹⁷ *N.C. State Conf. of NAACP v. McCrory*, 831 F. 3d 204 (4th Cir. 2016) (discriminatory intent found in 14th and 26th Amendment challenge to voter ID requirements).

¹⁸ *Casey v. Gardner*, 219 D. N.H. (D. N.H.2019) (https://scholar.google.com/scholar?hl=en&as_sdt=4%2C152&q=Casey+v+Gardner+New+Hampshire&oq= (certifying questions of state law to N.H. Supreme Court in challenge by young voters to state's statutory definitions of "resident" and "residence" alleged to have been intended by the state legislature to burden the right to vote by making voter registration an effective declaration of residency that triggers obligations and fees for drivers and vehicle owners under state Motor Vehicle Code, in violation of 1st, 14th, 24th and 26th Amendments).

The chapter concludes with the observation that legislators, particularly during their campaigns and work on electoral reform, are becoming painfully aware of the fact that the Millennial generation has reached voting age:

“As one of the most technologically aware generations in the U.S., its political participation, voter turnout, and voter registration rates are poised to bring about a sea of change in the political system. Coupled with increased social media political activism and distrust of that political system, Millennials may be the generation that helps bring about a major shift in the political climate of a polarized nation. Legislatures standing in the way of this wave have faced and will continue to face fierce fights from Millennials, as obstruction of their voting rights does not sit well with this diverse and ever-growing generation.” *Id.* at 65.

State Constitutional Bars to Partisan Gerrymandering

Despite the U.S. Supreme Court’s recognition that partisan gerrymandering - drawing an electoral district to subordinate adherents of one political party and entrench a rival party in power – is incompatible with democratic principles,¹⁹ the Court in a 5-4 decision at the end of the last term held that partisan gerrymandering claims are nonjusticiable in federal courts.

By withdrawing federal courts from any role in policing partisan gerrymandering, the Court left it to state courts under their own unique state constitutional provisions to identify, develop and apply manageable judicial standards in the resolution of partisan gerrymandering claims.

¹⁹ *Rucho*, slip op. at 30, accessible at https://www.supremecourt.gov/opinions/18pdf/18-422_9o11.pdf.

LWV v. Commonwealth of Pennsylvania

The Commonwealth of Pennsylvania through its Supreme Court recently relied upon its “free and equal elections” clause contained in the state constitution to find a manageable and legally workable standard for arriving at a principled means of adjudicating partisan gerrymandering claims.²⁰ In so doing, the Pennsylvania Supreme Court gave the “free and equal elections” clause the broadest interpretation to govern all aspects of the election process and provide citizens an equally effective power to select the representatives of their choice and the means to bar dilution of the people’s power to do so.

The Pennsylvania Supreme Court’s analysis encompassed the plain language of the free and equal elections clause, its history, the occasion for the provision, and the circumstances under which it was adopted, the case law interpreting the clause and consideration of the court’s interpretation of the clause. The Pennsylvania Supreme Court’s partisan gerrymandering decision was based solidly upon the Pennsylvania Constitution and was thus protected from review by the U.S. Supreme Court and from vacature by that Court. This was a bold and innovative use of a state constitution that can be replicate in other states with similar constitutional provisions, as has now been done in North Carolina.

Common Cause v. Lewis

In a case brought in a state court in North Carolina²¹, the unanimous three-judge Superior Court panel found that the plaintiffs had been adversely affected by partisan gerrymandering and that the Republican Party had divided counties in ways that made no systematic sense. The state court found in the North Carolina constitution a provision of fairness when assessing whether an electoral district had

²⁰ *League of Women Voters v. Commonwealth of Pennsylvania*, 178 A. 3d 737 (Pa. Jan. 22, 2018).

²¹ *Common Cause v. Lewis*, General Court of Justice, Superior Court Division, 18 CVS 014001, State of North Carolina, Wake County (September 3, 2019).

suffered from partisan manipulation leading to dilution and atrophy of Democratic votes.

Fifty States and Fifty Fields of Play

G. Michael Parsons, Acting Assistant Professor at NYU School of Law and an Adjunct Fellow at FairVote, has provided a helpful analysis of state constitutional provisions that include equal protection clauses and provisions protecting free expression and association, as well as provisions that explicitly prohibit electoral districts that unduly favor or disfavor political parties or incumbents.²² In a majority of the state constitutions, moreover, Parsons has identified provisions that require elections to be free, free and equal, free and fair, or free and open, and notes that these may be interpreted to provide broader protections to voting rights than those accorded under the Equal Protection Clause of the 14th Amendment and the First Amendment of the United States Constitution. As Parson notes, in light of the potentially broader electoral rights protected by such state constitutional provisions, voters may be able to use these provisions to challenge partisan gerrymanders.

Still other states provide in their constitutions for redistricting criteria to be followed by the state legislatures when drawing redistricting plans, usually as a check on partisan gerrymandering. In this context, plaintiffs may be able to invoke such provisions as meaningful constraints on the most egregious forms of partisan gerrymandering. *Id.*

Conclusion

Vote suppression may indeed be as American as Apple Pie, but if left unchecked, it has the potential of undermining the very foundation of our

²² G. Michael Parsons, *Partisan Gerrymandering Under Federal and State Law*, contained in *America Votes! Challenges to Modern Election Law and Voting Rights* (ABA 4th ed. 2020).

democracy. As Americans careen toward the 2020 election in the most hyper-partisan environment ever seen in the history of this grand experiment in Democracy, let us heed the warning of Benjamin Franklin at the close of the 1787 Constitutional Convention as he left Independence Hall on the final day of deliberations. When asked by a delegate just what kind of government was called for in the new constitution, a Republic or a Monarchy, Franklin’s reply was “A Republic, if you can keep it.”

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