

ILLIBERAL DEMOCRACY: THE TOXIC MIX OF FAKE NEWS, HYPERPOLARIZATION, AND PARTISAN ELECTION ADMINISTRATION

BY ANTHONY J. GAUGHAN*

INTRODUCTION

The 2016 presidential election shook American democracy to its foundations. In an unprecedented development, the CIA and FBI concluded that the Russian government hacked and leaked Democratic Party emails in an effort to help Donald Trump win the election.¹ Trump himself fueled further controversy during the campaign when he alleged that the Democrats had rigged the election against him and predicted that massive voter fraud would occur on Election Day.² Still more controversy came in the days after the election when Jill Stein, the defeated Green Party candidate for president, demanded a recount, suggesting without evidence that

Copyright © 2017 Anthony J. Gaughan.

* Professor of Law, Drake University Law School; J.D. Harvard University, 2005; Ph.D. (history) University of Wisconsin-Madison, 2002; M.A. Louisiana State University, 1996; B.A. University of Minnesota, 1993. The author would like to thank Priya Khangura, Joshua Douglas, Brent Ferguson, Keith Miller, Mark Kende, David Friedman, Miguel Schor, Darrell Miller, Atiba Ellis, Allison Riggs, Jordan Glassberg, Courtney Magnus, Kevin Zhao, Geoffrey Wright, and Wenbo Zhang. All errors of fact and interpretation are my responsibility alone.

1. Adam Entous & Ellen Nakashima, *FBI in agreement with CIA that Russia aimed to help Trump win White House*, WASH. POST (Dec. 16, 2016), https://www.washingtonpost.com/politics/clinton-blames-putins-personal-grudge-against-her-for-election-interference/2016/12/16/12f36250-c3be-11e6-8422-eac61c0ef74d_story.html?utm_term=.3a70e9145dd9.

2. Jenna Johnson, *Donald Trump says the election is 'rigged.' Here's what his supporters think that means*, WASH. POST (Oct. 18, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/10/18/donald-trump-says-the-election-is-rigged-heres-what-his-supporters-think-that-means/?utm_term=.bd4025454328; Mahita Gajanan, *Donald Trump Claims Election Will Be Rigged at Polling Sites*, TIME (Oct. 17, 2016), <http://time.com/4532679/donald-trump-election-rigged/>; Jon Greenberg, *Fact-checking the integrity of the vote in 2016*, POLITIFACT (Dec. 17, 2016), <http://www.politifact.com/truth-o-meter/article/2016/dec/17/fact-checking-claims-voter-fraud-2016>.

Russia may have hacked voting machines on Trump's behalf.³ Most remarkable of all, President-elect Trump responded to his Electoral College victory by claiming without evidence that he lost the popular vote because of millions of illegal votes cast for his Democratic opponent, Hillary Clinton.⁴

The stunning turn of events and the unprecedented controversy that surrounded the election had a profound impact on public opinion. A majority of Americans now question the integrity of the nation's election system.⁵ Accordingly, this article contends that we have entered into a dangerous new chapter in the nation's history that not only threatens public confidence in election fairness but potentially could even undermine the long-term health of the nation's democracy. In an era of widespread false allegations of election fraud, historic levels of hyperpolarization, and intensifying partisanship in election administration, the basic voting rights that Americans take for granted face serious threats on multiple fronts.

For the moment at least, the situation is not as bleak as it appears. The good news is that the public's lack of trust in the integrity of American elections is not justified. Despite the widespread belief that voter fraud is pervasive, the reality is that America's democratic institutions still compare favorably to those of other nations. President Trump's claims of widespread voter fraud had no factual basis, as post-election investigations repeatedly demonstrated.⁶ Moreover, recent

3. Amanda Holpuch & Jon Swaine, *Jill Stein requests Wisconsin recount, alleging hackers filed bogus absentee ballots*, GUARDIAN (Nov. 25, 2016), <https://www.theguardian.com/us-news/2016/nov/25/jill-stein-election-recount-clinton-trump-michigan-pennsylvania-wisconsin>; David E. Sanger, *U.S. Officials Defend Integrity of Vote, Despite Hacking Fears*, N.Y. TIMES (Nov. 25, 2016), <https://www.nytimes.com/2016/11/25/us/politics/hacking-russia-election-fears-barack-obama-donald-trump.html>.

4. Andrew Restuccia, *Trump's baseless assertions of voter fraud called 'stunning'*, POLITICO (Nov. 27, 2016), <http://www.politico.com/story/2016/11/trump-illegal-voting-clinton-231860>; Michael D. Shear & Maggie Haberman, *Trump Claims, With No Evidence, That 'Millions of People' Voted Illegally*, N.Y. TIMES (Nov. 27, 2016), <https://www.nytimes.com/2016/11/27/us/politics/trump-adviser-steps-up-searing-attack-on-romney.html>.

5. Giovanni Russonello, *Voters Fear Their Ballot Won't Count, Poll Shows*, N.Y. TIMES (Oct. 25, 2016), <https://www.nytimes.com/2016/10/26/us/politics/voter-fraud-poll.html>; The Economist/YouGov Poll (Dec. 17–20, 2016), https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/ljv2ohxmzj/econTabReport.pdf; Kathy Frankovic, *Belief in conspiracies largely depends on political identity*, YOUNGOV (Dec. 27, 2016), <https://today.yougov.com/news/2016/12/27/belief-conspiracies-largely-depends-political-iden>.

6. See David Cottrell, Michael C. Herron & Sean Westwood, *We checked Trump's allegations of voter fraud. We found no evidence at all*, WASH. POST (Dec. 2, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/12/02/we-checked-trumps-allegations-of-voter-fraud-we-found-no-evidence-at-all/?utm_term=.1a79491491d6 (“[A]n extensive study of voter fraud in the 2016 election . . . found no evidence that could support anything like

academic studies give the United States high marks for having honest elections characterized by robust levels of freedom of speech.⁷ The integrity of the American election system is undergirded by the state and federal judiciaries, which have a federal constitutional mandate to block racial and gender discrimination in voting and to maintain equal protection under the law for all voters. Thus, although not without its faults, the United States still stands among the leading liberal democracies in the world.

Ironically, however, the unjustified fear of voter fraud has itself become a threat to America's democratic principles. This article identifies three toxic developments that if left unchecked threaten the future of voting rights in America. The first is the rise of fake news. As the traditional news media has lost its gate-keeper status and as the internet has facilitated the rapid spread of misinformation, false allegations of voting fraud dominate news cycles. The pervasive nature of the claims has triggered a precipitous decline in public confidence in election integrity, even though there is no factual basis to justify the public's fear of widespread fraud. The second is the phenomenon of hyperpolarization. The partisan divide has reached such historic levels that Republicans and Democrats increasingly view the opposing party as a threat to the nation's well-being. Hyperpolarization makes partisans more inclined to attempt to limit the political influence of opposing voters, a development that is particularly dangerous in the United States because of the third toxic feature of contemporary politics: partisan control of election administration. Unusual among

Trump's accusations."); Nate Cohn, 'Serious Voter Fraud' in California and Elsewhere? *Um, No*, N.Y. TIMES (Nov. 28, 2016), <https://www.nytimes.com/2016/11/28/upshot/serious-voter-fraud-um-no.html>; Nate Cohn, *Trump's Claim of Millions of Illegal Votes? There's Simply No Evidence*, N.Y. TIMES (Nov. 28, 2016), https://www.nytimes.com/2016/11/28/upshot/serious-voter-fraud-um-no.html?_r=0; Abby Phillip & Mike DeBonis, *Without evidence, Trump tells lawmakers 3 million to 5 million illegal ballots cost him the popular vote*, WASH. POST (Jan. 23, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/01/23/at-white-house-trump-tells-congressional-leaders-3-5-million-illegal-ballots-cost-him-the-popular-vote/?utm_term=.617a28b56c01&wpisrc=nl_politics&wpmm=1; Nicholas Fandos, *Trump Won't Back Down From His Voting Fraud Lie. Here Are the Facts*, N.Y. TIMES (Jan. 24, 2017), <https://www.nytimes.com/2017/01/24/us/politics/unauthorized-immigrant-voting-trump-lie.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region®ion=top-news&WT.nav=top-news>.

7. Claire Cain Miller & Kevin Quealy, *Democracy in America*, N.Y. TIMES (Feb. 23, 2017), https://www.nytimes.com/2017/02/23/upshot/democracy-in-america-how-is-it-doing.html?rref=collection%2Fbyline%2Fkevin-quealy&action=click&contentCollection=undefined®ion=stream&module=stream_unit&version=latest&contentPlacement=1&pgtype=collection; *Results from the Bright Line Watch U.S. Democracy Survey*, BRIGHT LINE WATCH, <http://brightlinewatch.org/?p=167>.

major democracies, the United States entrusts the majority party with responsibility for administering elections and setting voting rules. In recent years, partisans have become increasingly aggressive in adopting election laws that benefit one party at the expense of the other. The real scandal of American politics is not illegal vote-rigging or voter fraud but rather the extent to which partisans are legally permitted to manipulate election rules for political advantage.

The United States thus stands at a uniquely dangerous moment in its history. Public figures on all ends of the ideological spectrum are rightfully warning of the danger to American democracy. Fareed Zakaria has observed that the United States risks becoming an “illiberal democracy,”⁸ a term that describes the global phenomenon of democratically-elected governments “routinely ignoring constitutional limits on their power and depriving their citizens of basic rights.”⁹ Zakaria is not alone in seeing a rising threat to America’s liberal democratic norms. Many leading conservative intellectuals, such as Bret Stephens¹⁰ and David Brooks,¹¹ have also sounded the alarm that democratic institutions are in jeopardy. Former Bush presidential speechwriter David Frum has warned that the Trump Administration may usher in a form of populist autocracy by subverting “the institutions of democracy and the rule of law.”¹² Republican elected officials have also expressed deep concern. Senator Lindsay Graham

8. Fareed Zakaria, *America’s democracy has become illiberal*, WASH. POST (Dec. 29, 2016), https://www.washingtonpost.com/opinions/america-is-becoming-a-land-of-less-liberty/2016/12/29/2a91744c-ce09-11e6-a747-d03044780a02_story.html?utm_term=.638c57ec08f3.

9. FAREED ZAKARIA, *THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD* 17 (2007).

10. See Bret Stephens, *Don’t Dismiss President Trump’s Attacks on the Media as Mere Stupidity*, TIME (Feb. 21, 2017), <http://time.com/4675860/donald-trump-fake-news-attacks> (“The most painful aspect of this has been to watch people I previously considered thoughtful and principled conservatives give themselves over to a species of illiberal politics from which I once thought they were immune.”); see also Robert Kraychik, *Bret Stephens: ‘I’m Gonna Vote for Clinton’*, DAILY WIRE (Oct. 26, 2016), <http://www.dailywire.com/news/10233/bret-stephens-im-gonna-vote-hillary-clinton-robert-kraychik#> (reporting that on FOX News Stephens “repeatedly described Donald Trump as ‘a threat to the Republic’”); Bret Stephens, *My Former Republican Party*, WALL ST. J. (Oct. 25, 2016), <https://www.wsj.com/articles/my-former-republican-party-1477353852>.

11. David Brooks, *The Republican Fausts*, N.Y. TIMES (Jan. 31, 2017), <https://www.nytimes.com/2017/01/31/opinion/the-republican-fausts.html?rref=collection%2Fcolumn%2F david-brooks>; see also David Brooks, *How Should One Resist the Trump Administration*, N.Y. TIMES (Feb. 14, 2017), https://www.nytimes.com/2017/02/14/opinion/how-should-one-resist-the-trump-administration.html?_r=0 (“It is hard to imagine America turning into full fascism, but it is possible to see it sliding into the sort of ‘repressive kleptocracy.’ . . . In such a regime, democratic rights are slowly eroded.”).

12. David Frum, *How to Build an Autocracy*, THE ATLANTIC (Mar. 2017), <https://www.theatlantic.com/magazine/archive/2017/03/how-to-build-an-autocracy/513872/>.

declared that Trump's false claim of widespread voter fraud "shakes confidence in our democracy."¹³ He urged the president to stop "making accusations against our electoral system without justification."¹⁴

The risk that America may evolve into an illiberal democracy is particularly high in light of the ongoing battle over voter registration restrictions and other laws that limit access to voting.¹⁵ In the name of safeguarding election integrity, legislatures across the country have adopted new voting laws that many courts and scholars have concluded made it harder for poor and minority voters to participate in the democratic process.¹⁶ While reasonable minds may disagree over the merits of strict voter identification laws, the fact that such laws are implemented by partisan officials in an atmosphere of hyperpolarization makes the potential for voter suppression very real indeed. All signs suggest the battle over voting laws will only intensify in the years ahead. At least 27 states are considering controversial new restrictions on voter registration and voting access in 2017.¹⁷ As the president himself promotes baseless fears of massive voter fraud,¹⁸ the risk is rising that partisans will be emboldened to further escalate the polarized political environment by purging voter registration rolls in the name of promoting election integrity.¹⁹ A more restrictive approach

13. Manu Raju & Tom LoBianco, *Graham blasts Trump after latest voter fraud claim*, CNN (Jan. 24, 2017), <http://www.cnn.com/2017/01/24/politics/lindsey-graham-trump-illegal-votes>.

14. *Id.*

15. Zoltan L. Hajnal, Nazita Lajevardi & Lindsay Nielson, *Do voter identification laws suppress minority voting? Yes. We did the research*, WASH. POST (Feb. 15, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/15/do-voter-identification-laws-suppress-minority-voting-yes-we-did-the-research/?utm_term=.6df6a6e544c5.

16. See, e.g., Atiba R. Ellis, *The Cost of the Vote: Poll Taxes, Voter Identification Laws, and the Price of Democracy*, 86 DENV. U. L. REV. 1023, 1035 (2009) ("Political science research suggests that such costs, as represented by registration requirements and photo identification requirements, in and of themselves form a barrier to political participation for those who are socioeconomically disadvantaged"); N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016) ("[T]he legislature requested data on the use, by race, of a number of voting practices. Upon receipt of the race data, the General Assembly enacted legislation that restricted voting and registration in five different ways, all of which disproportionately affected African Americans."); Sari Horwitz, *Getting a photo ID so you can vote is easy. Unless you're poor, black, Latino or elderly*, WASH. POST (May 23, 2016), https://www.washingtonpost.com/politics/courts_law/getting-a-photo-id-so-you-can-vote-is-easy-unless-youre-poor-black-latino-or-elderly/2016/05/23/8d5474ec-20f0-11e6-8690-f14ca9de2972_story.html?utm_term=.8a1bb41d1ef4.

17. BRENNAN CTR. FOR JUST., VOTING LAWS ROUNDUP 2017, (Feb. 27, 2017), <https://www.brennancenter.org/analysis/voting-laws-roundup-2017>.

18. Michael D. Shear & Peter Baker, *After His Claim of Voter Fraud, Trump Vows "Major Investigation"*, N.Y. TIMES (Jan. 25, 2017), <https://www.nytimes.com/2017/01/25/us/politics/trump-voting-fraud-false-claim-investigation.html>.

19. See Kimberly Strawbridge Robinson, *Voter ID Laws Are So Last (Election) Season*,

to voter qualifications could also be on the horizon. President Trump has advocated ending birthright citizenship,²⁰ a measure that would have enormous potential to disenfranchise large numbers of people. Finally, a new round of redistricting looms in 2020. The parties are already jockeying for control of the redistricting process and the opportunity to promote partisan gerrymandering through the next decade.²¹ The rise of big data has given both parties a powerful new tool for drawing district lines that dilute votes cast for the opposition party.²² All of these developments make clear that the voting wars are escalating.²³ As Americans increasingly view election stakes in apocalyptic terms, as false allegations of election fraud spread like wildfire, and as partisan officials control election rules, America's democratic institutions face their most serious domestic challenge since the enactment of the Voting Rights Act in 1965.

This article concludes by proposing three steps to defend and preserve the vitality of America's liberal democratic norms. The first is nationwide adoption of non-partisan administration of state and federal elections. Peer nations such as Canada long ago embraced non-partisan election administration as a sensible and necessary measure to ensure that all parties and voters are treated fairly in the election process. Unfortunately, however, the likelihood of such a reform being adopted in the United States is virtually non-existent, at least for the

BLOOMBERG BNA (Jan. 6, 2017), <https://www.bna.com/voter-id-laws-n73014449451/>; see also Mark Joseph Stern, *Donald Trump's Vote Fraud Investigation Will Finish What the GOP Started*, SLATE (Jan. 25, 2017), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/01/donald_trump_s_vote_fraud_investigation_will_finish_what_the_gop_started.html (noting that Trump's voter fraud investigation "will primarily serve as pretext for an assault on voting rights at both the state and federal level").

20. Max Ehrenfreund, *Understanding Trump's plan to end citizenship for undocumented immigrants' kids*, WASH POST (Aug. 17, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/08/17/understanding-trumps-plan-to-end-citizenship-for-undocumented-immigrants-kids/?utm_term=.1cd8f2f7c147.

21. Edward-Isaac Dovere, *Obama, Holder to lead post-Trump redistricting campaign*, POLITICO (Oct. 17, 2016), <http://www.politico.com/story/2016/10/obama-holder-redistricting-gerrymandering-229868>.

22. David Daley, *The House the GOP Built: How Republicans Used Soft Money, Big Data, and High-Tech Mapping to Take Control of Congress and Increase Partisanship*, N.Y. MAG. (Apr. 24, 2016), <http://nymag.com/daily/intelligencer/2016/04/gops-house-seats-are-safe-heres-why.html>; see also 2012 REDMAP Summary Report, THE REDISTRICTING MAJORITY PROJECT (Jan. 4, 2013), <http://www.redistrictingmajorityproject.com/>.

23. On the concept of the "voting wars," see RICHARD L. HASEN, THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN xii (2012). Hasen warns that "[p]artisans on both sides now buy into the rhetoric of electoral unfairness" as social media outlets "allow pernicious messages to be amplified, repeated, and distorted in an echo-chamber of like-minded voters." *Id.*

next few years. Amid hyperpolarization, majority parties in the state legislatures are extremely unlikely to unilaterally relinquish the political advantages that come with control of election administration. As a result, the reality is that non-partisan election administration is years and perhaps even decades away.

Accordingly, the second step is the most realistic and important in the short and medium term: judicial intervention. Historically the state and federal judiciaries have generally taken a deferential approach to legislative control of election administration. But the Supreme Court itself has recognized the constitutional threat posed by partisan control of election administration. In a famous footnote to the 1938 *United States v. Carolene Products* case,²⁴ the Supreme Court suggested that voting rules that insulate incumbent parties from political competition or target minority voters should be closely scrutinized by the courts.²⁵ In this dangerous political era, courts should take an aggressive posture to defend voting rights from toxic partisanship. Recent rulings suggest that the federal circuit courts of appeal increasingly recognize that partisan-inspired voting restrictions threaten to disenfranchise voters. Reason exists, therefore, for cautious optimism that more state and federal courts will see the need for judicial intervention to protect voting rights and democratic institutions.

The third and final step involves a new tool—the bipartisan supermajority principle—that will further assist courts in policing hyper-partisanship in election administration. As recent scholarship has made clear, there are a variety of constitutional grounds that courts may invoke to prevent partisan control of election administration from resulting in diminished competition and voter suppression.²⁶ In building on that scholarship, this article concludes by proposing that courts should view any new law that burdens voting rights as presumptively invalid if not adopted by a bipartisan supermajority of the legislature.

24. 304 U.S. 144 (1938).

25. *Id.* at 152 n.4.

26. See, e.g., Ellis, *supra* note 16, at 1067 (“Rather than a balancing test that defaults to the interests of the state, the test should be structured to require the state to demonstrate that the means it has adopted in its voter identification laws represent a significant interest in preventing voter fraud coupled with a showing that the conditional costs—direct and indirect—to the voter are minimized in the scheme the government is implementing.”); Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 138–39 (2012) (“Flipping the normal federal framework and imposing a presumption of invalidity to laws that add voter qualifications is justified because state constitutions already support this analytical move.”).

The bottom line is that hyperpolarization, partisan election administration, and unfounded fears of election fraud must not be allowed to subvert America's liberal democratic norms. Whatever mechanism that the courts ultimately choose to adopt, the long-term health of our democratic institutions depends on preventing partisan political operators from curtailing voting rights, undermining political competition, and eroding the pluralistic principles of modern American democracy.²⁷

I. THE TOXIC MIX

The notion is deeply rooted in America that the story of democracy is one of linear progress.²⁸ Writing in the 1830s, Alexis de Tocqueville observed that the inevitable march of American history was one in which the “forces of democracy are strengthened.”²⁹ But the 2016 election put optimistic faith in the resilience of American democracy to a searing test. The vicious, ugly and disheartening election was plagued by false allegations of voter fraud, extreme partisanship, efforts to rollback voting rights, and widespread paranoia that the election's outcome was rigged. This toxic combination has produced a stunning and dangerous decline in public confidence in the integrity of the American election system.

A. Fake News

As the 2016 campaign demonstrated, American political campaigns unfold within a news media environment that is vastly more fragmented than ever before. In the 1970s, print and broadcast journalism was highly concentrated in a handful of major national news outlets, such as CBS News, *Time* magazine, and newspapers such as the *Wall Street Journal* and the *New York Times*.³⁰ A far different news world prevails today. Traditional news journalism has shrunk dramatically both in terms of consumers and profitability. For example, average daily newspaper readership has fallen to 50-year lows,³¹ 20,000

27. On this issue, see generally Richard L. Hasen, *Foxes, Henhouses, and Commissions: Assessing the Nonpartisan Model in Election Administration, Redistricting, and Campaign Finance*, 3 U.C. IRVINE L. REV. 467 (2013).

28. ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* xxi (2009).

29. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 28 (1990).

30. HERBERT J. GANS, *DECIDING WHAT'S NEWS: A STUDY OF CBS EVENING NEWS, NBC NIGHTLY NEWS, NEWSWEEK, AND TIME* xi–xii (2004).

31. PHILIP MEYER, *THE VANISHING NEWSPAPER: SAVING JOURNALISM IN THE INFORMATION AGE* 1–2 (2d ed. 2009).

newspaper workers have been laid off since the 1990s,³² and the financial value of the newspaper industry has contracted precipitously.³³ Broadcast television news has not fared any better. A 2016 study by Oxford University found that television news audiences are shrinking just as fast as newspaper readership, especially among younger viewers.³⁴ In a sign of the potentially bleak future of television news, the average age of Fox News viewers has risen to 67 and the average age of CNN viewers is now almost 62.³⁵ In contrast, social media and online sites have benefited from the decline of the traditional news media. Facebook, a social media website, is now a news source for 44 percent of Americans.³⁶ As advertising revenue has steadily shrunk for newspapers like the *New York Times*, Facebook saw its advertising revenue increase by nearly 60%.³⁷

There are many positive features of the democratization of information. In the pre-internet age, traditional news media outlets—such as the *Wall Street Journal* or CBS News—served as gatekeepers of national news information. The print and broadcast media’s monopoly on access to information limited the public’s ability to decide for itself what was newsworthy. Conservatives also often complained that gatekeeper institutions such as CBS News improperly injected a liberal editorial slant on ostensibly neutral news reports.³⁸ The rise of the internet has ended the monopoly exercised by the traditional news media and in the process it has made more information available to more people than ever before.³⁹ The range of news sources on the

32. Michael Barthel, *Newspapers: Fact Sheet*, PEW RES. CTR. (June 15, 2016), <http://www.journalism.org/2016/06/15/newspapers-fact-sheet>.

33. Amy Mitchell & Katerina Eva Matsa, *The declining value of U.S. newspapers*, PEW RES. CTR. (May 22, 2015), <http://www.pewresearch.org/fact-tank/2015/05/22/the-declining-value-of-u-s-newspapers>.

34. Peter Preston, *TV news faces a threat familiar to newspapers*, THE ATLANTIC (Apr. 17, 2016), <https://www.theatlantic.com/business/archive/2016/11/the-print-apocalypse-and-how-to-survive-it/506429>.

35. *Id.*

36. Jeffrey Gottfried & Elisa Shearer, *News Use Across Social Media Platforms 2016*, PEW RES. CTR. (May 26, 2016), <http://www.journalism.org/2016/05/26/news-use-across-social-media-platforms-2016/>; Mike Isaac, *Facebook, in Cross Hairs After Election, Is Said to Question Its Influence*, N.Y. TIMES (Nov. 12, 2016), https://www.nytimes.com/2016/11/14/technology/facebook-is-said-to-question-its-influence-in-election.html?_r=0.

37. Derek Thompson, *The Print Apocalypse and How to Survive It*, THE ATLANTIC (Nov. 3, 2016), <https://www.theatlantic.com/business/archive/2016/11/the-print-apocalypse-and-how-to-survive-it/506429>.

38. *See generally* BERNARD GOLDBERG, *BIAS: A CBS INSIDER EXPOSES HOW THE MEDIA DISTORTS THE NEWS* (2002).

39. JACK FULLER, *WHAT IS HAPPENING TO THE NEWS: THE INFORMATION EXPLOSION AND THE CRISIS IN JOURNALISM* ix, 2–3 (2010).

internet covers all ends of the ideological spectrum from Breitbart to the Huffington Post. The democratization of news has even extended to journalistic activities. The internet has empowered ordinary Americans to create their own news platforms and disseminate information for free on the internet.⁴⁰

But one consequence of media fragmentation has been the rise of “fake news,” a phenomenon that became a defining feature of the 2016 election.⁴¹ Although partisans might describe any news report they do not like as “fake news,”⁴² the term generally refers to baseless allegations republished in the guise of a genuine news story.⁴³ The internet has played a key role in the rise of fake news. Academic studies have found that people often have difficulty distinguishing fact from fiction on the internet, which makes it the ideal forum for disseminating misinformation.⁴⁴ The 2016 election confirmed such findings, as a bewildering array of fabricated election stories received extraordinarily wide circulation.⁴⁵ Stories ranged from claims that Pope Francis endorsed Donald Trump to allegations that Hillary Clinton sold weapons to the terrorist group ISIS.⁴⁶ By a 4 to 1 margin, most “fake news” stories targeted Clinton’s campaign.⁴⁷

40. Jessica Clark & Tracy Van Slyke, *How Journalists Must Operate in a New Networked Media Environment*, in WILL THE LAST REPORTER PLEASE TURN OUT THE LIGHTS: THE COLLAPSE OF JOURNALISM AND WHAT CAN BE DONE TO FIX IT 239–40 (Robert W. McChesney and Victor Pickard eds. 2011).

41. Angie Drobnic Holan, *2016 Lie of the Year: Fake News*, POLITIFACT (Dec. 13, 2016), <http://www.politifact.com/truth-o-meter/article/2016/dec/13/2016-lie-year-fake-news/>; Elizabeth Dvoskin, Caitlin Dewey & Craig Timberg, *Why Facebook and Google are struggling to purge fake news*, WASH. POST (Nov. 15, 2016), https://www.washingtonpost.com/business/economy/why-facebook-and-google-are-struggling-to-purge-fake-news/2016/11/15/85022897-f765-422e-9f53-c720d1f20071_story.html?tid=a_inl&utm_term=.28e91b07d94c.

42. Jeremy W. Peters, *Wielding Claims of ‘Fake News,’ Conservatives Take Aim at Mainstream Media*, N.Y. TIMES, (Dec. 25, 2016), <https://www.nytimes.com/2016/12/25/us/politics/fake-news-claims-conservatives-mainstream-media-.html>.

43. Elle Hunt, *What is fake news? How to spot it and what you can do to stop it*, GUARDIAN (Dec. 16, 2017), <https://www.theguardian.com/media/2016/dec/18/what-is-fake-news-pizzagate>.

44. See Jean-Bruno Renard, *Negatory Rumors: From the Denial of Reality to Conspiracy Theory*, in RUMOR MILLS: THE SOCIAL IMPACT OF RUMOR AND LEGEND 236 (Gary Alan Fine et al., eds., 2005) (“[T]he Internet tends to make it difficult to distinguish between true information and false rumor, reality and fiction.”).

45. Andrew Higgins, Mike McIntire & Gabriel J.X. Dance, *Inside a Fake News Sausage Factory: ‘This Is All About Income,’* N.Y. TIMES (Nov. 25, 2016), <https://www.nytimes.com/2016/11/25/world/europe/fake-news-donald-trump-hillary-clinton-georgia.html>.

46. Hannah Ritchie, *Read all about it: The biggest fake news stories of 2016*, CNBC (Dec. 30, 2016), <http://www.cnn.com/2016/12/30/read-all-about-it-the-biggest-fake-news-stories-of-2016.html>.

47. Craig Silverman, *This Analysis Shows How Viral Fake Election News Stories Outperformed Real News on Facebook*, BUZZFEED (Nov. 16, 2016), https://www.buzzfeed.com/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook?utm_term=.

One of the leading examples was a fake news story that spun a conspiracy theory out of the tragic murder of a young Democratic National Committee staffer named Seth Rich.⁴⁸ Although police believed that Rich was the victim of a random robbery attempt,⁴⁹ a website alleged that a Democratic hit team killed the staffer to prevent him from testifying against Hillary Clinton in the FBI investigation of Clinton's State Department email system.⁵⁰ The internet site Wikileaks picked up the baseless conspiracy theory, spreading it further,⁵¹ which in turn led the traditional news media to report on the allegations against Clinton. Although mainstream news outlets described the conspiracy theory as "wild Internet speculation"⁵² and "another round of Clinton conspiracy theories,"⁵³ such reporting gave the false allegations even wider circulation.

In a normal election, the significance of fake news might be downplayed as an unimportant sideshow. After all, American politics have a long history of baseless and defamatory allegations.⁵⁴ But four things made the influence of fake news in the 2016 election different and more dangerous than previous incarnations of politically-motivated misinformation and scurrilous allegations. First, fake news spread at an alarmingly fast rate in 2016.⁵⁵ The internet's

uunR5eGnX#.oqOZvdxj1.

48. Manuel Roig-Franzia, *Seth Rich wasn't just another D.C. murder victim. He was a meme in the weirdest presidential election of our times*, WASH. POST (Jan. 18, 2017), https://www.washingtonpost.com/lifestyle/style/seth-rich-wasnt-just-another-dc-murder-victim-he-was-a-meme-in-the-weirdest-presidential-election-of-our-times/2017/01/18/ee8e27f8-dcc0-11e6-918c-99ede3c8cafa_story.html?utm_term=.398de8324749.

49. Max Kutner, *Seth Rich's Death: Why a GOP Lobbyist Will Pay \$100,000 to Learn Who Killed the DNC Staffer*, NEWSWEEK (Sept. 16, 2016), <http://www.newsweek.com/gop-lobbyist-reward-seth-rich-dnc-499653>; Roig-Franzia, *supra* note 48.

50. Kim LaCapria, *Seth Rich Homicide: A conspiracy site latched on to the tragic murder of young DNC staffer Seth Rich to spread false information about his killing*, SNOPE (Aug. 10, 2016), <http://www.snopes.com/seth-conrad-rich/>.

51. Jeremy Stahl, *WikiLeaks Is Fanning a Conspiracy Theory That Hillary Murdered a DNC Staffer*, SLATE (Aug. 9, 2016), http://www.slate.com/blogs/the_slatest/2016/08/09/wikileaks_is_fanning_a_conspiracy_theory_that_hillary_murdered_a_dnc_staffer.html.

52. See, e.g., Joseph Morton, *WikiLeaks Offers \$20,000 Reward For Help Finding Omaha Native Seth Rich's Killer*, OMAHA WORLD-HERALD (Aug. 11, 2016), http://www.omaha.com/news/crime/wikileaks-offers-reward-for-help-finding-omaha-native-seth-rich/article_cfb287bc-5e98-11e6-ae0c-8b471b8cbfbb.html.

53. Jeff Stein, *Seth Rich: Inside the Killing of the DNC Staffer*, NEWSWEEK (Aug. 20, 2016), <http://www.newsweek.com/seth-rich-murder-dnc-hack-julian-assange-hillary-clinton-donald-trump-492084>.

54. See, e.g., Adrienne LaFrance, *How the Fake News Crisis of 1896 Explains Trump*, THE ATLANTIC (Jan. 19, 2017), <https://www.theatlantic.com/technology/archive/2017/01/the-fake-news-crisis-120-years-ago/513710/>.

55. Sapna Maheshwari, *How Fake News Goes Viral: A Case Study*, N.Y. TIMES (Nov. 20,

democratization of the dissemination of information has facilitated the spread of fake news like never before. A study by BuzzFeed concluded that in the final three months of the 2016 campaign, the twenty most popular fake election stories on Facebook reached more than 8.7 million readers, whereas the twenty most popular real election news stories on Facebook only reached 7.3 million readers.⁵⁶ Critics pointed out that the BuzzFeed analysis underestimated the number of real news stories on Facebook because the analysis did not include stories from Reuters, the Associated Press and small newspapers.⁵⁷ But in any case it is clear that fake news stories reached a massive audience that rivalled real news during the 2016 election.⁵⁸ Facebook and Google both took the problem so seriously that after the election they announced plans to combat the spread of fake news on their websites.⁵⁹ Their response reflected the undeniable fact that Facebook, Google, and other websites facilitated the dissemination of news—fake and real alike—to a degree impossible in previous eras.

Second, the public has proven to be remarkably gullible when it comes to fake news circulated on the internet. A new study by Stanford University found that even young people, who tend to be more technologically sophisticated than older Americans,⁶⁰ are “easily duped” by fake news stories.⁶¹ The public’s inability to distinguish truth from fact is particularly troubling for democracies, since the quality of self-government depends on voters making informed choices. Thus, in summarizing their findings, the authors of the Stanford study warned, “we worry that democracy is threatened by the ease at which disinformation about civic issues is allowed to spread and flourish.”⁶²

2016), <https://www.nytimes.com/2016/11/20/business/media/how-fake-news-spreads.html>.

56. Silverman, *supra* note 47.

57. Paul Crookston, *Report on Scourge of Fake News Turns Out to Be Faked*, NAT’L REV. (Nov. 17, 2016), <http://www.nationalreview.com/article/442291/buzzfeed-facebook-fake-news-study-methodology-questioned>.

58. Ahiza Garcia & Justin Lear, *5 Stunning Fake News Stories That Reached Millions*, CNN (Nov. 2, 2016), <http://money.cnn.com/2016/11/02/media/fake-news-stories/>.

59. Nick Wingfield, Mike Isaac & Katie Benner, *Google and Facebook Take Aim at Fake News Sites*, N.Y. TIMES (Nov. 14, 2016), <https://www.nytimes.com/2016/11/15/technology/google-will-ban-websites-that-host-fake-news-from-using-its-ad-service.html>.

60. Patricia Reaney, *Teens More Resilient, Tech Savvy Than Older Millennials: Study*, REUTERS (June 19, 2013), <http://www.reuters.com/article/us-millennials-poll-idUSBRE9511J420130619>.

61. Brooke Donald, *Stanford Researchers Find Students Have Trouble Judging the Credibility of Information Online*, STAN. NEWS CTR. (Nov. 22, 2016), <https://ed.stanford.edu/news/stanford-researchers-find-students-have-trouble-judging-credibility-information-online>.

62. STAN. HIST. EDUC. GROUP, EVALUATING INFORMATION: THE CORNERSTONE OF

A post-election survey confirmed the Stanford researchers' warnings. A December 2016 Pew Research Center poll found that eighty-eight percent of Americans believe that fake news has caused some confusion over basic facts and sixty-four percent believe it has caused great confusion.⁶³ The public's confusion undermines the notion of commonly agreed upon objective facts⁶⁴ and exacerbates the natural human tendency toward confirmation bias, whereby we selectively choose facts that support our pre-existing biases.⁶⁵ Confirmation bias thus reinforces political polarization, as Republicans and Democrats seek out information, including fake news, which reinforces their political worldview.⁶⁶ Acknowledging the problem, Facebook founder Mark Zuckerberg expressed regret that fake news on Facebook had increased political polarization.⁶⁷

Third, fabricated news reports did more than just cast false aspersions on the candidates. During the 2016 campaign, fake news stories spread baseless fears about the integrity of the election results.⁶⁸ For example, six weeks before Election Day, a Republican legislative aide in Maryland named Cameron Harris created a fake internet newspaper in order to circulate a completely fabricated story that Ohio

CIVIC ONLINE REASONING 5 (2016), <https://sheg.stanford.edu/upload/V3LessonPlans/Executive%20Summary%2011.21.16.pdf>.

63. Michael Barthel, Amy Mitchell & Jesse Holcomb, *Many Americans Believe Fake News Is Sowing Confusion*, PEW RES. CTR. (Dec. 15, 2016), <http://www.journalism.org/2016/12/15/many-americans-believe-fake-news-is-sowing-confusion/>.

64. See Sabrina Tavernise, *As Fake News Spreads Lies, More Readers Shrug at the Truth*, N.Y. TIMES (Dec. 6, 2016), <https://www.nytimes.com/2016/12/06/us/fake-news-partisan-republican-democrat.html> ("Fake news, and the proliferation of raw opinion that passes for news, is creating confusion, punching holes in what is true, causing a kind of fun-house effect that leaves the reader doubting everything, including real news.").

65. See Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. OF GEN. PSYCHOL. 175, 176 (1998) ("People may treat evidence in a biased way when they are motivated by the desire to defend beliefs that they wish to maintain.").

66. See Adam J. Berinsky, *Rumors and Health Care Reform: Experiments in Political Misinformation*, 47 BRIT. J. POL. SCI. 241, 245 (2015) ("Surveys show that Democrats and Republicans (and liberals and conservatives) approach the same rumor in very different ways. More generally, research has found that people are more likely to accept rumors that are consistent with their pre-existing attitudes.").

67. Andrew V. Pestano, *Mark Zuckerberg: Fake News Creates Polarization in Beliefs*, UPI (Feb. 17, 2017), http://www.upi.com/Top_News/US/2017/02/17/Facebooks-Mark-Zuckerberg-Fake-news-creates-polarization-in-beliefs/6871487342178.

68. Jim Rutenberg, *Media's Next Challenge: Overcoming the Threat of Fake News*, N.Y. TIMES (Nov. 6, 2016), <https://www.nytimes.com/2016/11/07/business/media/medias-next-challenge-overcoming-the-threat-of-fake-news.html>; Katie Rogers & Jonah Engel Bromwich, *The Hoaxes, Fake News and Misinformation We Saw on Election Day*, N.Y. TIMES (Nov. 8, 2016), <https://www.nytimes.com/2016/11/09/us/politics/debunk-fake-news-election-day.html?action=click&contentCollection=Technology&module=RelatedCoverage®ion=EndOfArticle&pgty=pe=article>.

Democrats had been caught in a criminal conspiracy to commit election fraud.⁶⁹ Under the headline “BREAKING: ‘Tens of thousands’ of fraudulent Clinton votes found in Ohio warehouse,” the Republican aide’s fake news story alleged that “the Clinton campaign’s likely goal was to slip the fake ballot boxes in with the real ballot boxes when they went to official election judges on November 8th.”⁷⁰ The fake news story even included a picture of a man standing behind dozens of ballot boxes, which the story falsely claimed showed the Ohio “electrical worker” who discovered the boxes.⁷¹ In fact, the picture actually showed a British campaign worker during an election in the United Kingdom.⁷² Nevertheless, the fake news story was so widely disseminated that more than 6 million people shared the story on the internet and Ohio election authorities found themselves forced to launch an investigation into the allegations.⁷³ Although Ohio authorities debunked the story,⁷⁴ the damage had already been done. Even Harris himself later expressed surprise that so many people believed the fake news story: “At first it kind of shocked me — the response I was getting. How easily people would believe it. It was almost like a sociological experiment.”⁷⁵ The *New York Times* called it a “fake news masterpiece.”⁷⁶ The circulation of fake news stories about voter fraud was so pervasive that in his final days in the White House, President Barack Obama made a point of publicly condemning allegations of election fraud as “fake news” that “has constantly been disproved.”⁷⁷

Fourth, the spread of fake news was not limited to shadowy internet sites. The winner of the 2016 presidential election himself played a key

69. Scott Shane, *From Headline to Photograph, a Fake News Masterpiece*, N.Y. TIMES (Jan. 18, 2017), https://www.nytimes.com/2017/01/18/us/fake-news-hillary-clinton-cameron-harris.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=b-lede-package-region®ion=top-news&WT.nav=top-news&_r=1; Ovetta Wiggins, *Aide to Md. Lawmaker fabricated article on fraudulent votes for Clinton*, WASH. POST (Jan. 18, 2017), https://www.washingtonpost.com/local/md-politics/aide-to-md-lawmaker-fabricated-article-on-hillary-clinton-rigging-the-election/2017/01/18/5219bd0c-ddd7-11e6-acdf-14da832ae861_story.html?hpid=hp_hp-more-top-stories_mdlawmaker943pm%3Ahomepage%2Fstory&utm_term=.a89d0fca178d.

70. Shane, *supra* note 69.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. Tal Kopan, *Obama calls voter fraud fears ‘fake news,’* CNN (Jan. 18, 2017), <http://www.cnn.com/2017/01/18/politics/obama-voter-fraud-fake-news/>.

role in spreading false allegations of voting fraud. Throughout the campaign, and even after his victory, Donald Trump impugned the integrity of the electoral process. For example, when he lagged in the polls in mid-October,⁷⁸ Trump claimed without evidence that the election was “rigged” against him⁷⁹ “at many polling places”⁸⁰ by “large scale voter fraud happening on and before [E]lection [D]ay.”⁸¹ Even more remarkable were allegations that Trump made after the election. When the states’ certified election results revealed that Hillary Clinton had won the popular vote by nearly 3 million votes,⁸² Trump baselessly claimed that “millions” of people had voted illegally for Clinton.⁸³ On Twitter he declared, “In addition to winning the Electoral College in a landslide, I won the popular vote if you deduct the millions of people who voted illegally.”⁸⁴ In a subsequent Tweet he wrote, “Serious voter fraud in Virginia, New Hampshire and California — so why isn’t the media reporting on this? Serious bias — big problem!”⁸⁵ Without offering evidence, Trump later told congressional Republicans that three to five million illegal votes were cast against him in the election, a figure that conveniently exceeded Clinton’s popular vote margin of victory.⁸⁶

Trump’s allegations of voter fraud and vote-rigging were completely baseless.⁸⁷ A post-election investigation by the Washington

78. *US election 2016: Trump says election ‘rigged at polling places,’* BBC (Oct. 17, 2016), <http://www.bbc.com/news/election-us-2016-37673797>.

79. Johnson, *supra* note 2.

80. Gajanan, *supra* note 2.

81. Greenberg, *supra* note 2.

82. David Wasserman, *2016 Popular Vote Tracker*, COOK POL. REP. (Jan. 3, 2017), <http://cookpolitical.com/story/10174>.

83. Restuccia, *supra* note 4; Michael D. Shear & Maggie Haberman, *Trump Claims, With No Evidence, That ‘Millions of People’ Voted Illegally*, N.Y. TIMES (Nov. 27, 2016), <https://www.nytimes.com/2016/11/27/us/politics/trump-adviser-steps-up-searing-attack-on-romney.html>.

84. Glenn Kessler, *Donald Trump’s bogus claim that millions of people voted illegally for Hillary Clinton*, WASH. POST (Nov. 27, 2016), https://www.washingtonpost.com/news/fact-checker/wp/2016/11/27/trumps-bogus-claim-that-millions-of-people-voted-illegally-for-hillary-clinton/?utm_term=.69eaa1b078f7.

85. Victor Morton, *Donald Trump Alleges ‘Serious Voter Fraud’ in Virginia, New Hampshire, California*, WASH. TIMES (Nov. 27, 2016), <http://www.washingtontimes.com/news/2016/nov/27/donald-trump-alleges-serious-voter-fraud-virginia>.

86. Phillip & DeBonis, *supra* note 6; Michael D. Shear & Emmarie Huetteman, *Trump Repeats Lie About Popular Vote in Meeting With Lawmakers*, N.Y. TIMES (Jan. 23, 2017), https://www.nytimes.com/2017/01/23/us/politics/donald-trump-congress-democrats.html?emc=edit_na_20170123&nl=breaking-news&nid=69180613&ref=headline&r=0; Fandos, *supra* note 6.

87. See Cottrell, Herron & Westwood, *supra* note 6 (“An extensive study of voter fraud in the 2016 election . . . found no evidence that could support anything like Trump’s accusations.”);

Post found only four confirmed cases of voter fraud in the entire 2016 election.⁸⁸ Likewise, Dartmouth College researchers conducted a comprehensive study of the 2016 election and found no evidence to support Trump’s allegations.⁸⁹ Even leading Republicans, such as House Speaker Paul Ryan and Senator Lindsay Graham, admitted that “no evidence” had been found to support Trump’s allegations.⁹⁰ Jon Husted, the Republican Secretary of State of Ohio, responded to Trump’s voter fraud claims by observing that while it was “[e]asy to vote” in American elections, it was “hard to cheat.”⁹¹ As Husted explained, voter fraud “is rare and when it happens, we hold people accountable.”⁹² Similarly, the National Association of Secretaries of State, an organization whose membership is made up primarily of Republicans,⁹³ announced that it was “not aware of any evidence that supports the voter fraud claims made by President Trump.”⁹⁴ Most remarkable of all, during the 2016 recount in Michigan, Trump’s own

Cohn, *Um, No*, *supra* note 6; Danielle Kurtzleben, *Here Are The Problems With the Trump Team’s Voter Fraud Evidence*, NPR (Nov. 28, 2016), <http://www.npr.org/2016/11/28/503628803/here-are-the-problems-with-the-trump-teams-voter-fraud-evidence>; Greenberg, *supra* note 2; Cohn, *Simply No Evidence*, *supra* note 6; Phillip & DeBonis, *supra* note 6; Fandos, *supra* note 6.

88. Phillip Bump, *There Have Been Just Four Documented Cases of Voter Fraud in the 2016 Election*, WASH. POST, (Dec. 1, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/12/01/0-000002-percent-of-all-the-ballots-cast-in-the-2016-election-were-fraudulent/?utm_term=.15bac4b66806.

89. Cottrell, Herron & Westwood, *supra* note 6; David Cottrell, Michael C. Herron & Sean Westwood, *Evaluating Donald Trump’s Allegations of Voter Fraud in the 2016 Presidential Election* (Dec. 2, 2016), <http://www.dartmouth.edu/~voterfraud>.

90. Rebecca Savransky, *Trump to Ask For ‘Major Investigation Into Voter Fraud,’* HILL (Jan. 25, 2017), <http://thehill.com/homenews/administration/316006-trump-to-ask-for-major-investigation-into-voter-fraud>; Jennifer Calfas, *Graham to Trump: Stop Alleging Voter Fraud*, HILL (Jan. 24, 2017), <http://thehill.com/blogs/blog-briefing-room/news/315832-graham-to-trump-stop-lying-about-voter-fraud>.

91. Sari Horwitz & Jenna Johnson, *Voting Rights Advocates Fear Trump’s Unfounded Fraud Claims Will Lead to More Restrictive Laws*, WASH. POST (Jan. 25, 2017), https://www.washingtonpost.com/world/national-security/voting-rights-advocates-fear-trumps-unfounded-fraud-claims-will-lead-to-more-restrictive-laws/2017/01/25/fcadba36-e320-11e6-a547-5fb9411d332c_story.html?utm_term=.9d44e3ad29d5.

92. *Ohio Secretary of State Investigation Found Non-Citizens Registered to Vote, Cast Illegal Ballots*, WCMH (Feb. 27, 2017), <http://wdtn.com/2017/02/27/ohio-secretary-of-state-investigation-found-non-citizens-registered-to-vote-cast-illegal-ballots/>.

93. Phillip Bump, *28 Things to Remember About Trump’s ‘Investigation Into Voter Fraud,’* WASH. POST (Jan. 25, 2017), https://www.washingtonpost.com/news/politics/wp/2017/01/25/28-things-to-remember-about-trumps-investigation-into-voter-fraud/?utm_term=.d4c08db4c8a2.

94. Mark Berman, *While Trump Promises Voter Fraud Probe, Election Officials Say They Don’t Know ‘Of Any Evidence’ Backing His Claims*, WASH. POST (Jan. 25, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/01/24/state-election-officials-we-dont-know-of-any-evidence-backing-trumps-voter-fraud-claims/?utm_term=.54ed8aa07124.

legal team admitted that “all available evidence suggests that the 2016 general election was not tainted by fraud or mistake.”⁹⁵

Trump was not the only presidential candidate to question the integrity of the election with false claims. On the other end of the political spectrum, Green Party candidate Jill Stein filed for recounts in Pennsylvania, Wisconsin, and Michigan on the basis of her unfounded allegation that “we have a voting system which has been proven to basically be wide open to hackers”⁹⁶ She further asserted without proof that hackers might have submitted fraudulent absentee ballots.⁹⁷ To be sure, Stein’s demand for a recount came in the context of extraordinary foreign involvement in the presidential campaign. In the summer of 2016, Wikileaks disclosed Clinton campaign emails that the Russian government had hacked from Democratic National Committee computer systems.⁹⁸ An investigation by the FBI and CIA concluded that the Russian government had hacked the emails in order to embarrass the Democrats and facilitate Trump’s victory in the presidential election.⁹⁹

Crucially, however, Stein had no evidence that Russia or anyone else tampered with the nation’s voting machines.¹⁰⁰ Although court orders ended the recounts in Michigan and Pennsylvania before they could be completed,¹⁰¹ Wisconsin’s recount confirmed Trump’s victory

95. Philip Bump, *Reminder: In an Anti-Recount Filing, Trump’s Lawyers Said the Election Was ‘Not Tainted By Fraud or Mistake,’* WASH. POST (Jan. 25, 2017), https://www.washingtonpost.com/news/the-fix/wp/2016/12/05/in-an-anti-recount-filing-trumps-lawyers-say-the-election-was-not-tainted-by-fraud-or-mistake/?utm_term=.4bb075fcd91e.

96. Sanger, *supra* note 3.

97. Amanda Holpuch & Jon Swaine, *Jill Stein Requests Wisconsin Recount, Alleging Hackers Filed Bogus Absentee Ballots*, GUARDIAN (Nov. 25, 2016), <https://www.theguardian.com/us-news/2016/nov/25/jill-stein-election-recount-clinton-trump-michigan-pennsylvania-wisconsin>.

98. David E. Sanger, *Obama Strikes Back at Russia for Election Hacking*, N.Y. TIMES (Dec. 29, 2016), <https://www.nytimes.com/2016/12/29/us/politics/russia-election-hacking-sanctions.html>.

99. Adam Entous & Ellen Nakashima, *FBI in Agreement with CIA That Russia Aimed to Help Trump Win White House*, WASH. POST (Dec. 16, 2016), https://www.washingtonpost.com/politics/clinton-blames-putins-personal-grudge-against-her-for-election-interference/2016/12/16/12f36250-c3be-11e6-8422-eac61c0ef74d_story.html?utm_term=.3a70e9145dd9.

100. Carl Bialik & Rob Arthur, *Demographics, Not Hacking, Explain The Election Results*, FIVETHIRTYEIGHT (Nov. 23, 2016), <https://fivethirtyeight.com/features/demographics-not-hacking-explain-the-election-results/>.

101. Steve Eder, *Stein Ends Recount Bid, but Says It Revealed Flaws in Voting System*, N.Y. TIMES (Dec. 13, 2016), <https://www.nytimes.com/2016/12/13/us/stein-ends-recount-bid-but-says-it-revealed-flaws-in-voting-system.html>; Monica Davey, *Federal Judge Clears Way to End Michigan Recount*, N.Y. TIMES (Dec. 7, 2016), <https://www.nytimes.com/2016/12/07/us/politics/michigan-recount-jill-stein.html>.

in the state¹⁰² and turned up no evidence that hackers had compromised the state's voting systems.¹⁰³ Most important of all, an examination of voting systems by the FBI and the Department of Homeland Security found no evidence whatsoever that hackers had tampered with voting machines in the 2016 election.¹⁰⁴ Nevertheless, because a presidential candidate demanded a recount on the basis of her false allegations of election fraud, traditional news outlets¹⁰⁵ ended up reporting on the baseless speculation that the election system was rigged by Russia.¹⁰⁶

The ease with which fake news, misinformation, and false allegations spread like wildfire is now a disturbing hallmark of modern politics. Vice President Al Gore once celebrated the internet as the "information superhighway,"¹⁰⁷ but instead of becoming a powerful instrument for the dissemination of facts, the internet has confused and misled Americans as much as it has informed them. The implications for election administration and American democracy are deeply troubling. In the internet age, even an election with no evidence of improprieties or significant tabulation errors can be inundated with false claims of voter fraud.

But fake news is only one of the toxic elements of contemporary American politics. Hyperpolarization constitutes the second poisonous development as America's internal political divisions have taken on epidemic proportions.

102. Michael Finnegan, *Final Wisconsin Recount Tally Strengthens Trump's Victory*, L.A. TIMES (Dec. 12, 2016), <http://www.latimes.com/nation/politics/trailguide/la-na-trailguide-updates-final-wisconsin-recount-tally-1481584948-htmlstory.html>.

103. Jason Stein, *Recount Confirms Trump's Victory in Wisconsin*, MILWAUKEE J. SENTINEL (Dec. 12, 2016), <http://www.jsonline.com/story/news/politics/elections/2016/12/12/recount-drawing-close-wisconsin/95328294/>; Alex Hern, *US Recounts Find No Evidence of Hacking in Trump Win But Reveal Vulnerabilities*, GUARDIAN (Dec. 28, 2016), <https://www.theguardian.com/us-news/2016/dec/28/election-recount-hacking-voting-machines>.

104. Katie Bo Williams, *FBI, DHS Release Report on Russia Hacking*, HILL (Dec. 29, 2016), <http://thehill.com/policy/national-security/312132-fbi-dhs-release-report-on-russia-hacking>.

105. Gabriel Sherman, *Experts Urge Clinton Campaign to Challenge Election Results in 3 Swing States*, N.Y. MAG. (Nov. 22, 2016), <http://nymag.com/daily/intelligencer/2016/11/activists-urge-hillary-clinton-to-challenge-election-results.html>.

106. Paul Musgrave, *If You're Even Asking if Russia Hacked The Election, Russia Got What it Wanted*, WASH. POST (Nov. 28, 2016), https://www.washingtonpost.com/posteverything/wp/2016/11/28/whether-or-not-russians-hacked-the-election-they-messed-with-our-democracy/?utm_term=.f087480531f3.

107. See Glenn Kessler, *A Cautionary Tale for Politicians: Al Gore and the 'Invention' of the Internet*, WASH. POST (Nov. 4, 2013), https://www.washingtonpost.com/news/fact-checker/wp/2013/11/04/a-cautionary-tale-for-politicians-al-gore-and-the-invention-of-the-internet/?utm_term=.8ddbe9e5f985 (observing that Gore "popularized the term 'the Information Superhighway'").

B. *Hyperpolarization*

Even in the best of times, rampant charges of election fraud would shake confidence in American democracy. But these are far from the best of times in American politics. The 2016 election played out against the backdrop of years of intensifying political polarization as Republicans and Democrats increasingly see each other as a threat to the country.

The term “polarization” refers to intense partisan conflict that replaces traditional norms of civil discourse and bipartisan agreement with bitterly hostile political rhetoric and straight party-line voting.¹⁰⁸ When polarization occurs, the political center shrinks as both parties move toward their ideological extremes.¹⁰⁹ In a polarized political system, ideological differences between the two parties are stark and the opportunities for compromise and consensus are sharply constricted if not eliminated altogether.¹¹⁰

Polarization has occurred in cycles throughout American history. The first major episode of political polarization occurred in the 1790s as the new nation divided between the urban-centered Federalists of Alexander Hamilton and the agrarian-focused Democratic-Republicans of Thomas Jefferson.¹¹¹ In the 1860s the United States experienced the most devastating episode of political polarization in its history. The national divide over slavery culminated in the secession of 11 southern states, which in turn led to the Civil War.¹¹² The war ended in Union victory, but at the cost of more than 600,000 American lives.¹¹³ On a far less destructive scale, episodes of polarization would continue to plague the country in the late nineteenth and early twentieth centuries until a fragile political consensus took root during the era of the Second World War and early Cold War.¹¹⁴ The mid-century political

108. On the concept of polarization, see Nathaniel Persily, *Introduction, in SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA* 4–14 (Nathaniel Persily, ed., 2015).

109. *Id.* at 4–5.

110. *Id.* at 4–10.

111. JOHN FERLING, *JEFFERSON AND HAMILTON: THE RIVALRY THAT FORGED A NATION* (2014).

112. See DAVID M. POTTER, *THE IMPENDING CRISIS, 1848-1861* 449 (1976) (“[T]he sectional conflict had neutralized their many affinities, causing antislavery men to depreciate the value of a Union which was flawed by slavery, and causing men in the slaveholding states to give the defense of the slave system such a high priority that they could no longer offer loyalty to a Union which seemed to threaten that system.”).

113. See JAMES MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 854 (1988) (“More than 620,000 soldiers lost their lives in four years of conflict.”).

114. See WENDY L. WALL, *INVENTING THE AMERICAN WAY: THE POLITICS OF CONSENSUS FROM THE NEW DEAL TO THE CIVIL RIGHTS MOVEMENT* 8–9 (2008) (“The war against the Axis

consensus resulted from the fact that the parties accepted ideological diversity within their ranks, as the Republican Party included a strong liberal-progressive wing and the Democratic Party included a strong southern-conservative wing.¹¹⁵

Today, however, American politics are experiencing an extraordinarily intense period of polarization, the most extreme in more than 100 years.¹¹⁶ The trend toward hyperpolarization began in the 1970s and steadily intensified in the years that followed.¹¹⁷ The trend toward hyperpolarization closely tracked the growing ideological homogeneity of the two major parties, as liberals congregated in the Democratic Party and conservatives congregated in the Republican Party.¹¹⁸ Some studies have found that Republicans have moved more sharply to the right than Democrats have to the left,¹¹⁹ but a 2015 study found that polarization “appears uniform across parties.”¹²⁰ In any case, the ideological resorting of the parties has given rise to wide policy differences on issues such as abortion, health care, foreign policy, and taxes.¹²¹ The center of the political spectrum has contracted accordingly,

powers brought the federal government into the act of promoting national cohesion and produced an infrastructure of institutions devoted to publicly defining for Americans their common ground. It also forced groups on both ends of the political spectrum to curtail the vitriolic rhetoric they had sometimes used during the 1930s.”).

115. See, e.g., MATTHEW LEVENDUSKY, *THE PARTISAN SORT: HOW LIBERALS BECAME DEMOCRATS AND CONSERVATIVES BECAME REPUBLICANS* 2 (2009) (“In the 1950s and 1960s, Democratic and Republican elites were relatively heterogeneous, with a liberal ‘Rockefeller Republican’ wing and a cadre of conservative southern Democrats.”).

116. See Persily, *supra* note 108, at 14 (observing that “the U.S. political system is more polarized than at any time in the past century”).

117. KEITH T. POOLE & HOWARD ROSENTHAL, *IDEOLOGY & CONGRESS* 106 (2d ed. 2007); William A. Galston & Pietro S. Nivola, *Delineating the Problem, in RED AND BLUE NATION?: CHARACTERISTICS AND CAUSES OF AMERICA’S POLARIZED POLITICS* 20 (William A. Galston and Pietro S. Nivola, eds., 2006); Nolan McCarthy, *What We Know and Don’t Know About Our Polarized Politics*, WASH. POST (Jan. 8, 2014), https://www.washingtonpost.com/news/monkey-cage/wp/2014/01/08/what-we-know-and-dont-know-about-our-polarized-politics/?utm_term=.d59b951c63db.

118. See generally Alan I. Abramowitz & Kyle L. Saunders, *Ideological Realignment in the U.S. Electorate*, 60 J. POL. 634 (1998).

119. See McCarthy, *supra* note 117 (“Despite the widespread belief that both parties have moved to the extremes, the movement of the Republican Party to the right accounts for most of the divergence between the two parties.”); Norm Ornstein, *Yes, Polarization Is Asymmetric—and Conservatives Are Worse*, THE ATLANTIC (June 19, 2014), <http://www.theatlantic.com/politics/archive/2014/06/yes-polarization-is-asymmetric-and-conservatives-are-worse/373044/>.

120. See Shanto Iyengar & Sean J. Westwood, *Fear and Loathing across Party Lines: New Evidence on Group Polarization*, 59 AM. J. POL. SCI. 690, 705 (July 2015), <https://pcl.stanford.edu/research/2015/iyengar-ajps-group-polarization.pdf> (finding that “polarization scores (both explicit and implicit) for partisans on the left and right were generally indistinguishable”).

121. Carroll Doherty & Samantha Smith, *5 Facts About Republicans and National Security*,

leaving little room for political compromise or even dialogue across ideological lines.¹²² The parties are so ideologically divided that Congressional voting patterns are more polarized than at any time since the Civil War and Reconstruction era.¹²³ Further complicating matters is the internal fragmentation of the two parties, which has reduced the power of party leaders to find common ground and bridge party divides.¹²⁴ The closely-contested nature of recent elections has only intensified polarization levels, as the outcome of a single election can result in dramatic changes in domestic and foreign policy depending on which party prevails.¹²⁵

Polarization even extends to disagreement over basic facts. As Carl Cannon has observed, “excess partisanship literally inhibits Americans from processing information that challenges their biases.”¹²⁶ A 2010 study by Adam Berinsky underscored the political ramifications of fake news when it found that partisan biases make Democrats and Republicans particularly receptive to misinformation that reinforces their preexisting beliefs.¹²⁷ For example, Republicans opposed to

PEW RES. CTR. (Dec. 15, 2015), <http://www.pewresearch.org/fact-tank/2015/12/15/5-facts-about-republicans-and-national-security/>; see also Jeff Stonecash, *The Two Key Factors Behind Our Polarized Politics*, in POLITICAL POLARIZATION IN AMERICAN POLITICS 72 (Daniel J. Hopkins and John Sides, eds., 2015) (“The result is a fundamental difference between liberals and conservatives regarding how much government should help people.”); Hannah Fingerhut, *On Abortion, Persistent Divides Between – and Within – the Two Parties*, PEW RES. CTR. (Apr. 8, 2016), <http://www.pewresearch.org/fact-tank/2016/04/08/on-abortion-persistent-divides-between-and-within-the-two-parties-2/>.

122. See generally ALAN I. ABRAMOWITZ, *THE DISAPPEARING CENTER: ENGAGED CITIZENS, POLARIZATION, AND AMERICAN DEMOCRACY* (2010); Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 273, 276 (2011) (warning that “our era’s hyperpolarized politics primarily reflect deep historical and structural transformations in American democracy”).

123. Christopher Hare & Keith T. Poole, *The Polarization of Contemporary American Politics*, 46 POLITY 411 (2014). See also Christopher Hare, Keith T. Poole, & Howard Rosenthal, *Polarization in Congress Has Risen Sharply. Where is it Going Next?* WASH. POST (Feb. 13, 2014), https://www.washingtonpost.com/news/monkey-cage/wp/2014/02/13/polarization-in-congress-has-risen-sharply-where-is-it-going-next/?utm_term=.d2052da99638.

124. On fragmentation, see Richard H. Pildes, *Focus on Political Fragmentation, Not Polarization*, in SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA 150–51 (Nathaniel Persily, ed., 2015).

125. Francis Lee, *American Politics is More Competitive Than Ever. That’s Making Partisanship Worse*, WASH. POST (Jan. 9, 2014), https://www.washingtonpost.com/news/monkey-cage/wp/2014/01/09/american-politics-is-more-competitive-than-ever-thats-making-partisanship-worse/?utm_term=.cab6fb45095.

126. Carl Cannon, *Polarization Runs Deep, Even by Yesterday’s Standards*, in RED AND BLUE NATION?: CHARACTERISTICS AND CAUSES OF AMERICA’S POLARIZED POLITICS 170 (William A. Galston and Pietro S. Nivola, eds., 2006).

127. See Berinsky, *supra* note 66, at 245 (“Surveys show that Democrats and Republicans (and liberals and conservatives) approach the same rumor in very different ways. More generally,

environmental regulation consistently get basic facts wrong about climate change when surveyed.¹²⁸ Even objective evidence fails to change the minds of those determined to view facts in a subjectively partisan light. For example, after President Trump's inauguration ceremony, 15 percent of his supporters insisted that Trump's inaugural drew the largest crowd ever, even after being confronted with photographic evidence that the 2009 Obama inauguration attracted a much larger crowd of onlookers.¹²⁹ But it is not just Republicans who wear partisan blinders. Democrats also show similar biases.¹³⁰ Studies have found that Republicans and Democrats alike tend to ignore news stories that challenge their pre-existing beliefs and blindly accept stories that reinforce their partisan prejudices, even if the information is false.¹³¹ Hence, fake news and political polarization go hand-in-hand.¹³²

Hyperpolarization is particularly alarming at a time when partisan affiliation correlates strongly with race. The United States is a multiracial democracy but the two parties increasingly reflect different Americas. In 2016 Clinton carried African Americans by a margin of 88 percent to 8 percent, and she carried Latinos and Asian Americans by a margin of 65 percent to 29 percent.¹³³ Trump, in contrast, carried whites by a margin of 58 percent to 37 percent.¹³⁴ The 2016 election was consistent with long-term trends whereby the Republican Party has become increasingly white and rural and the Democratic Party has become increasingly diverse and urban.¹³⁵ The racial realignment of the

research has found that people are more likely to accept rumors that are consistent with their pre-existing attitudes.”).

128. Jennifer Hochschild & Katherine Levine Einstein, *‘It Isn’t What We Don’t Know that Gives Us Trouble, It’s What We Know that Ain’t So’: Misinformation and Democratic Politics*, 45 BRIT. J. POL. SCI. 467, 470–71 (2014).

129. Brian Schaffner & Samantha Luks, *This is what Trump voters said when asked to compare his inaugural crowd with Obama’s*, WASH. POST (Jan. 25, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/01/25/we-asked-people-which-inauguration-crowd-was-bigger-heres-what-they-said/?utm_term=.52b5795b0c90.

130. Brendan Nyhan, *Why More Democrats Are Now Embracing Conspiracy Theories*, N.Y. TIMES (Feb. 15, 2017), <https://www.nytimes.com/2017/02/15/upshot/why-more-democrats-are-now-embracing-conspiracy-theories.html>.

131. Amanda Taub, *The Real Story About Fake News Is Partisanship*, N.Y. TIMES (Jan. 11, 2017), <https://www.nytimes.com/2017/01/11/upshot/the-real-story-about-fake-news-is-partisanship.html>.

132. Nyhan, *supra* note 130.

133. *Election 2016: Exit Polls*, N.Y. TIMES (Nov. 8, 2012), https://www.nytimes.com/interactive/2016/11/08/us/politics/election-exit-polls.html?_r=0.

134. *Id.*

135. Frank Newport, *Democrats Racially Diverse; Republicans Mostly White*, GALLUP (Jan. 8, 2013), <http://www.gallup.com/poll/160373/democrats-racially-diverse-republicans-mostly-white>

two parties dates to the 1960s and 1970s when a backlash against the Civil Rights Movement led white southerners to move from the Democratic Party to the Republican Party.¹³⁶ Conversely, African Americans shifted their political allegiances from Republicans to Democrats,¹³⁷ and today Latino and Asian American voters also predominantly affiliate with the Democratic Party.¹³⁸ The disturbing conclusion is that with the two parties divided by race,¹³⁹ hyperpolarization threatens to intensify racial antagonism. Indeed, it is probably not a coincidence that the rise in political polarization closely parallels recent surveys that find Americans increasingly view race relations as bad and getting worse.¹⁴⁰

The risk that hyperpolarization will intensify racial divisions is amplified by historic levels of partisan antipathy. Republicans and Democrats have come to profoundly dislike one another. A 2012 study in *Public Opinion Quarterly* of survey data from 1960 to 2010 found an 8-fold increase in the percentage of Republicans and Democrats who said they would be “displeased” if their son or daughter married a member of a different political party.¹⁴¹ Other recent surveys have also recorded unprecedented levels of partisan antipathy not just among party elites but also among ordinary Americans.¹⁴² A 2014 Pew

.aspx.

136. A full analysis of the reasons behind the racial realignment of the two parties goes far beyond the scope of this article, but the scholarly literature on the subject is deep and rich. See, e.g., EARL BLACK & MERLE BLACK, *THE RISE OF SOUTHERN REPUBLICANS* (2003); KARI FREDERICKSON, *THE DIXIECRAT REVOLT AND THE END OF THE SOLID SOUTH, 1932-1968* (2003); DAN T. CARTER, *THE POLITICS OF RAGE: GEORGE WALLACE, THE ORIGINS OF THE NEW CONSERVATISM, AND THE TRANSFORMATION OF AMERICAN POLITICS* (2d ed. 2000).

137. JULES WITCOVER, *PARTY OF THE PEOPLE: A HISTORY OF THE DEMOCRATS* (2003); LEWIS L. GOULD, *THE REPUBLICANS: A HISTORY OF THE GRAND OLD PARTY* 340–41 (2014).

138. See David L. Leal, *Latino Public Opinion: Does It Exist?*, in *LATINO POLITICS: IDENTITY, MOBILIZATION, AND REPRESENTATION* 41 (Rodolfo Espino et al., eds., 2007) (“Latinos also uniquely support the Democratic Party and Democratic politicians.”).

139. Paul Taylor, *The Demographic Trends Shaping American Politics in 2016 and Beyond*, PEW RES. CTR. (Jan. 27, 2016), <http://www.pewresearch.org/fact-tank/2016/01/27/the-demographic-trends-shaping-american-politics-in-2016-and-beyond/>.

140. Krissah Thompson & Scott Clement, *Poll: Majority of Americans Think Race Relations Are Getting Worse*, WASH. POST (July 16, 2016), https://www.washingtonpost.com/national/more-than-6-in-10-adults-say-us-race-relations-are-generally-bad-poll-indicates/2016/07/16/66548936-4aa8-11e6-90a8-fb84201e0645_story.html?utm_term=.beddc9ed29b4; Giovanni Russonello, *Race Relations Are at Lowest Point in Obama Presidency, Poll Finds*, N.Y. TIMES (July 13, 2016), <https://www.nytimes.com/2016/07/14/us/most-americans-hold-grim-view-of-race-relations-poll-finds.html>.

141. Shanto Iyengar, Gaurav Sood & Yphtach Lelkes, *Affect, Not Ideology: A Social Identity Perspective on Polarization*, 76 *PUB. OPINION Q.* 405, 417–19 (2012).

142. *Political Polarization in the American Public: Section 2: Growing Partisan Antipathy*, PEW RES. CTR. (June 12, 2014), <http://www.people-press.org/2014/06/12/political-polarization-in->

Research Center analysis of public opinion data concluded that “the level of antipathy that members of each party feel toward the opposing party has surged over the past two decades. Not only do greater numbers of those in both parties have negative views of the other side, those negative views are increasingly intense.”¹⁴³ A 2015 study by Shanto Iyengar and Sean Westwood found that partisan hostility promotes biases that are even stronger than racial discrimination.¹⁴⁴

Polarization has become so intense and so pervasive it undermines the ties that bind the nation together. The country is self-sorting into a collection of like-minded partisan enclaves, where the idea of ideological diversity is viewed with disdain and hostility.¹⁴⁵ For example, demographic studies have found that Republican voters increasingly choose to live among fellow Republicans in low population density areas and Democratic voters increasingly choose to live among fellow Democrats in high population density areas.¹⁴⁶ The 2016 election highlighted the extraordinary extent to which Republicans and Democrats have separated themselves geographically. Over 60 percent of Americans live in “landslide” counties that voted for either Clinton or Trump by at least 20 percentage points.¹⁴⁷ In contrast, in 1992 only 38 percent of Americans lived in a county that the Republican or Democratic presidential candidate carried by 20 points or more.¹⁴⁸ The disturbing conclusion is that the United States is evolving into two distinct countries—a racially-diverse Democratic Party concentrated in

the-american-public/.

143. *Id.*

144. See Iyengar & Westwood, *supra* note 120, at 703 (“Compared with the most salient social divide in American society—race—partisanship elicits more extreme evaluations and behavioral responses to ingroups and outgroups.”).

145. See Nate Cohn, *Polarization Is Dividing American Society, Not Just Politics*, N.Y. TIMES (June 12, 2014), https://www.nytimes.com/2014/06/12/upshot/polarization-is-dividing-american-society-not-just-politics.html?_r=0 (describing social science research that finds that “[l]iberals and conservatives prefer to associate with and live near their fellow partisans”); *Political Polarization in the American Public*, *supra* note 142. See also BILL BISHOP, THE BIG SORT: WHY CLUSTERING OF LIKE-MINDED AMERICANS IS TEARING US APART 39 (2009) (“Today we seek our own kind in like-minded churches, like-minded neighborhoods, and like-minded sources of news and entertainment. . . . [L]ike-minded homogeneous groups squelch dissent, grow more extreme in their thinking, and ignore evidence that their positions are wrong.”).

146. See, e.g., Wendy K. Tam Cho, James G. Gimpel & Iris S. Hui, *Voter Migration and the Geographic Sorting of the American Electorate*, 103 ANNALS ASS’N AM. GEOGRAPHERS 856, 866 (2013) (describing that “Republican migrants show a preference for moving to areas that are even more Republican” and “Democrats display a similar preference for their own”).

147. Gregor Aisch, Adam Pearce & Karen Yourish, *The Divide Between Red and Blue America Grew Even Deeper in 2016*, N.Y. TIMES (Nov. 10, 2016), <https://www.nytimes.com/interactive/2016/11/10/us/politics/red-blue-divide-grew-stronger-in-2016.html>.

148. *Id.*

the cities and a heavily-white Republican Party concentrated in rural areas, small towns, and exurbs.¹⁴⁹ Moreover, the two countries despise and distrust each other, as the partisan antipathy surveys reveal.

The geographical and social separation of Democrats and Republicans bodes ominously for the future unity of the nation and the vitality of its democratic institutions. In the hyperpolarized political environment that prevails today, partisans view election stakes as existential in nature. According to a Pew Research Center study, 36% of Republicans view Democratic policies as a “threat to the nation’s well-being” and 27% of Democrats express the same dark view of Republicans.¹⁵⁰ The study also found that 43 percent of Republicans and 38 percent of Democrats have a “very unfavorable” view of the other party.¹⁵¹ Amid such a hyperpolarized political system, the defeated party views the winning side as illegitimate and unworthy of governing.¹⁵² In such a poisonous political atmosphere, partisans are incentivized to go outside the normal conventions of politics to block the other party from governing effectively.¹⁵³ The government shutdown in 2013¹⁵⁴ and the Senate’s refusal in 2016 to even grant a hearing to Merrick Garland, President Obama’s Supreme Court

149. Clayton Nall, *The Political Consequences of Spatial Policies: How Interstate Highways Facilitated Geographic Polarization*, 77 J. POL. 394 (2015); Emily Badger, Quoctrung Bui & Adam Pearce, *The Election Highlighted a Growing Rural-Urban Split*, N.Y. TIMES (Nov. 11, 2016), <https://www.nytimes.com/2016/11/12/upshot/this-election-highlighted-a-growing-rural-urban-split.html>; Emily Badger & Quoctrung Bui, *Why Republicans Don’t Even Try to Win Cities Anymore*, N.Y. TIMES (Nov. 2, 2016), https://www.nytimes.com/2016/11/03/upshot/why-republicans-dont-even-try-to-win-cities-anymore.html?_r=0.

150. Carroll Doherty, *Which Party is More to Blame For Political Polarization? It Depends on the Measure*, PEW RES. CTR. (June 17, 2014), <http://www.pewresearch.org/fact-tank/2014/06/17/which-party-is-more-to-blame-for-political-polarization-it-depends-on-the-measure/>.

151. *Political Polarization in the American Public*, *supra* note 142.

152. See Iyengar & Westwood, *supra* note 120, at 705 (“The level of animosity across party lines also implies a reduced willingness to treat the actions of partisan opponents as legitimate.”); Abby Philip, *Trump-Lewis Feud Could Be Harbinger of New Round of Hyper-Partisanship*, WASH. POST (Jan. 14, 2017), https://www.washingtonpost.com/politics/trump-lewis-feud-could-be-harbinger-of-new-round-of-hyper-partisanship/2017/01/14/f72db5a2-da8d-11e6-9a36-1d296534b31e_story.html?utm_term=.5f8d8ac1f135.

153. See Ilya Somin, *Three issues I Changed My Mind About in 2016*, WASH. POST (Dec. 31, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/31/three-issues-i-changed-my-mind-about-in-2016/?utm_term=.6404652a5117 (“The more polarized we are, the greater the partisan bias, and the greater the tendency to reject anything associated with the opposition. Polarization also makes voters and political activists more willing to tolerate bad behavior by their own party and its leaders.”).

154. Molly Ball, *Republicans Shut Down the Government for Nothing*, THE ATLANTIC (Oct. 16, 2013), <https://www.theatlantic.com/politics/archive/2013/10/republicans-shut-down-the-government-for-nothing/280611/>.

nominee,¹⁵⁵ are just two of many recent examples of the increasing willingness of partisans to break with institutional precedent and engage in systematic obstructionism.¹⁵⁶ The departure from historical norms of political accommodation and compromise has set off a cycle of escalation, whereby both parties engage in ever more extreme tactics to stymie the opposing party.¹⁵⁷ The result is a profoundly dysfunctional government and a toxic political atmosphere.

From the vantage point of election administration, the crucial point is hyperpolarization makes partisans far more willing to engage in anti-democratic measures. After all, if the stakes are nothing less than the well-being of the nation, merely voicing disagreement with the opposing party is not enough. Self-serving patriotic justifications may thus inspire partisans to seek ways to make it harder for the other side to get its vote out. Unfortunately, the long-standing American practice of partisan election administration gives partisans the opportunity to do precisely that.

C. Partisan Election Administration

Hyperpolarization and unfounded fears of systemic voting fraud pose a threat to any democracy, but they are particularly dangerous in the United States. Most western democracies place control of election administration in the hands of neutral, non-partisan officials.¹⁵⁸ But not

155. Robin Bradley Kar & Jason Mazzone, *The Garland Affair: What History and the Constitution Really Say about President Obama's Powers to Appoint a Replacement for Justice Scalia*, 91 N.Y.U. L. REV. ONLINE 53, 53 (2016); Adam Liptak, *Study Calls Snub of Obama's Supreme Court Pick Unprecedented*, N.Y. TIMES (June 13, 2016), <https://www.nytimes.com/2016/06/14/us/politics/obama-supreme-court-merrick-garland.html>.

156. See Michael J. Barber & Nolan McCarty, *Causes and Consequences of Polarization*, in SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA 51 (Nathaniel Persily ed., 2015) (“The negotiation failures resulting from polarization have done much to undermine governance in the United States by leading to gridlock and lower quality legislation and by harming the functioning of the executive and judicial branches.”).

157. The federal court nomination process is a preeminent example. See Russell Wheeler, *Judicial Nominations and Confirmations: Fact and Fiction*, BROOKINGS INST. (Dec. 30, 2013), <https://www.brookings.edu/blog/fixgov/2013/12/30/judicial-nominations-and-confirmations-fact-and-fiction/> (“[T]he process is now so broken that both parties might see it in their self-interest to consider a three-branch, truly bi-partisan commission to suggest fixes that the president and senate in place in 2017 might consider.”); SARAH A. BINDER AND FORREST MALTZMAN, *ADVICE AND DISSENT: THE STRUGGLE TO SHAPE THE FEDERAL JUDICIARY* 103 (2009) (“Intense ideological disagreement coupled with the rising importance of a closely balanced federal bench has brought combatants in the wars of advice and consent to new tactics and new crises as the two parties struggle to shape the future of the courts.”).

158. See Thomas E. Mann, *Redistricting Reform: What is Desirable? Possible?*, in PARTY LINES: COMPETITION, PARTISANSHIP, AND CONGRESSIONAL REDISTRICTING 93 (Thomas E. Mann & Bruce E. Cain eds., 2005) (“The United States is clearly an outlier in the democratic

the United States. Unusual among leading democracies, the United States entrusts the administration of elections to partisan political operators.¹⁵⁹ Consequently, for all of the controversy over allegations of voter fraud and other forms of illegal election activity, the real scandal of American politics is what is *legal*.

The American practice of partisan election administration manifests itself in two ways. The first is in the selection of election officials. In 33 of the 50 states, the chief election officer is a partisan politician.¹⁶⁰ And in many of the remaining states the governor chooses the chief election officer, an appointment method that only thinly veils the political nature of the selection process.¹⁶¹ Often holding the office of Secretary of State, the chief election officer is extremely important in both federal and state election administration.¹⁶²

The Florida election controversy in 2000 demonstrated how partisan control of the Secretary of State's office can influence election outcomes. In the extremely close 2000 presidential election between Texas Governor George Bush and Vice President Al Gore, the Electoral College outcome turned on the results in the state of Florida.¹⁶³ Bush led Gore by only a few hundred votes in Florida after state election officials conducted a machine recount.¹⁶⁴ In the days following the machine recount, the critical question was whether Florida law permitted a statewide hand recount before the secretary of state, Katherine Harris, certified the election results.¹⁶⁵ Harris was a

world when it comes to the role that politicians play in shaping the rules that affect their electoral future.”).

159. See Daniel P. Tokaji, *The Future of Election Reform: From Rules to Institutions*, 28 *YALE L. & POL'Y REV.* 125, 127 (2009) (“The United States also is unusual, though not unique, in vesting responsibility in officials who are affiliated with political parties.”).

160. MICHAEL R. DIMINO, SR., BRADLEY A. SMITH & MICHAEL E. SOLIMINE, *UNDERSTANDING ELECTION LAW AND VOTING RIGHTS* 215 (2017).

161. See Tokaji, *supra* note 159, at 132 (“Other states have appointment processes, but, in many of those states, the chief election official is appointed by the state's governor (who, of course, is elected through a partisan process).”).

162. See Jocelyn Friedrichs Benson, *Democracy and The Secretary: The Crucial Role of State Election Administrators in Promoting Accuracy and Access to Democracy*, 27 *ST. LOUIS U. PUB. L. REV.* 343, 343–44 (2008) (“While there are several entities and actors that each interact to shape, enforce, and execute election law and policy, none plays a role that is as crucial as the individual or group of individuals who are charged with overseeing the administration of all elections in the state.”); *id.* at 346 (“[I]t is the Secretary of State who plays the pivotal role in properly administering and overseeing elections to ensure that these dual values of accuracy and access are promoted, enforced, and attained.”).

163. KEYSSAR, *supra* note 28, at 258.

164. EDWARD B. FOLEY, *BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES* 286 (2016).

165. *Id.* at 286–87.

Republican elected official who headed Bush's campaign committee in Florida, and thus had an obvious conflict of interest.¹⁶⁶ Rather than recuse herself, however, she openly consulted with Bush's lawyers and embraced their argument that Florida law did not provide for a manual recount before certification of the election results.¹⁶⁷ By refusing to direct a pre-certification manual recount, she succeeded in delaying the proceedings to such an extent that the United States Supreme Court ultimately determined that Florida lacked sufficient time to complete the recount, a decision that effectively handed the election to Bush.¹⁶⁸ The revelation that Harris had hired a private company to conduct a purge of alleged felons from Florida's voting rolls using lists of questionable accuracy further deepened Democratic bitterness over Harris's relentlessly partisan approach to the 2000 election.¹⁶⁹ The haphazard and nakedly partisan procedure removed from the voting lists many qualified voters, most of whom appeared to be Democrats.¹⁷⁰

It is important to note that Harris's interpretation of Florida law during the *Bush v. Gore* controversy was not without legal merit. The state law governing the recount procedures was ambiguous, and Harris's contention that it did not require a pre-certification statewide manual recount had a plausible textual basis in the pertinent statutes.¹⁷¹ Moreover, while the pre-election voting purge likely disenfranchised qualified Democratic voters, it is also true that a post-election investigation by the Miami Herald indicated that thousands of

166. See RICHARD L. HASEN, *THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN* 21 (2013) (“[W]hile supervising Florida’s 2000 election, Harris also served as the cochair of the Bush for President election committee in Florida.”).

167. FOLEY, *supra* note 164, at 287; HASEN, *supra* note 166, at 22–28.

168. See *Bush v. Gore*, 531 U.S. 98, 110 (2000) (holding that “it is evident that any recount seeking to meet the December 12 date will be unconstitutional” and thus reversing the Florida Supreme Court order directing the recount to proceed).

169. See KEYSSAR, *supra* note 28, at 260 (“Subsequent investigation revealed that Republican officials in Florida, anticipating a closely contested election and presuming that most ex-felons—as members of minority groups—were likely to vote Democratic, had purchased lists of convicted felons from private corporations . . . [T]he lists of felons were of uncertain accuracy and did not contain social security numbers or other reliable identifiers.”); HASEN, *supra* note 166, at 29 (“Florida hired an outside company, DBT Online, at a cost of several million dollars to manage the voter rolls and purge ineligible felons from those rolls.”).

170. See KEYSSAR, *supra* note 28, at 260 (noting that the purged voters “were likely to vote Democratic” and concluding that “Florida’s broad felon-exclusion laws, thus, had permitted partisan state officials in the pursuit of political advantage to deny people their right to vote”); HASEN, *supra* note 166, at 28 (“The purge was done badly: at least two thousand eligible voters were removed from the rolls.”); *id.* at 29 (“Harris’s office was at least reckless in how it let a private company conduct the purge.”).

171. FOLEY, *supra* note 164, at 286–93.

ineligible voters cast ballots in the election,¹⁷² which showed that the voting rolls did indeed need to be updated. But the problem lay in the fact that undeniable conflicts of interest tainted every decision that Harris made.¹⁷³ She did not get the benefit of the doubt because she gave every indication that she had already made up her mind to rule in favor of Bush. Democrats had every right to question the secretary of state's fairness and objectivity when Harris herself appeared to embrace the role of a fiercely partisan Republican.

The Florida 2000 deadlock thus exemplified the undeniable reality that partisan officials will never possess the credibility of non-partisan election administrators. As Martha Kropf and David Kimball observed in their comprehensive 2012 study of American election administration practices, "partisan election officials can put their thumb on the scale of administration to help their political party. This should be troubling to anyone interested in fair elections."¹⁷⁴ Unfortunately the trend is toward more partisanship in election administration rather than less. For example, in 2016 the Wisconsin legislature abolished the state's nonpartisan Government Accountability Board, which experts had hailed as a model for the nation,¹⁷⁵ and replaced it with a state election commission controlled by partisan appointees.¹⁷⁶

The second way in which partisanship in election administration manifests itself is in the state legislatures' adoption of voting rules that benefit one party at the expense of another. The problem stems from the United States Constitution itself, which entrusts the legislative branch with responsibility for election administration. Article I, Section 4 states:

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 . . .¹⁷⁷

172. HASEN, *supra* note 166, at 31.

173. FOLEY, *supra* note 164, at 287.

174. MARTHA KROPF & DAVID C. KIMBALL, *HELPING AMERICA VOTE: THE LIMITS OF ELECTION REFORM* 114 (2012).

175. See, e.g., Daniel P. Tokaji, *America's Top Model: The Wisconsin Government Accountability Board*, 3 U.C. IRVINE L. REV. 575, 607 (2013) ("The GAB thus serves as a worthy model for the remaining forty-nine states, all of which still have partisan or bipartisan chief election authorities . . .").

176. Scott Bauer, *Wisconsin GAB in Final Days as State's Elections Authority*, MILWAUKEE-WIS. J. SENTINEL (June 26, 2016), <http://archive.jsonline.com/news/statepolitics/wisconsin-gab-in-final-days-as-states-elections-authority-b99751280z1-384455051.html>.

177. U.S. CONST. art I, § 4.

Although partisans might cite the Constitution as the strongest defense of politically-motivated election administration, the historical record clearly indicates that the Constitution’s framers did not grasp the partisan implications of what they had done in Article I, Section 4. At the time of the Constitution, parties in a modern sense did not even exist yet.¹⁷⁸ In addition the Constitution’s framers expressed a deep hostility to partisan factionalism.¹⁷⁹ As James Madison warned in Federalist No. 10, when factionalism divides a polity, “the public good is disregarded” and public policy “is too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.”¹⁸⁰ Likewise, in his farewell address, President Washington condemned the “baneful effects of the spirit of party,” which he viewed as the “worst enemy” of democracy.¹⁸¹ He warned that “[t]he alternate domination of one faction over another, sharpened by the spirit of revenge natural to party dissension” would lead to “horrid enormities” and “a frightful despotism.”¹⁸² The framers thus structured the Constitution with the intent of impeding the rise of political parties.¹⁸³

Contrary to the framers’ intentions, however, the Constitution did not prevent the rise of large and powerful factions in American politics.¹⁸⁴ Political parties gradually took shape in the early national period,¹⁸⁵ which meant that Article I’s assignment of election rules to legislatures had sweeping ramifications far beyond what the framers envisioned. Legislative control of election rules allowed majority

178. See BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* 17 (2005) (“Nothing resembling the modern party system had yet emerged as an historical reality.”).

179. See *id.* at 17 (“[The Founders] equated parties with factions, which they saw as evils.”).

180. THE FEDERALIST NO. 10, at 41–42 (James Madison) (Mary Carolyn Waldrep & Jim Miller eds., 2014).

181. George Washington, Farewell Address (Sept. 17, 1796), reprinted in *SPEECHES OF THE AMERICAN PRESIDENTS* 17, 21 (Janet Podell & Steven Anzovin eds., 2d ed. 2001).

182. *Id.*

183. See Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 713 (1998) (citation omitted) (“[T]he constitutional structure was specifically intended to preclude the rise of political parties, which were considered the quintessential form of ‘faction.’”).

184. See THE FEDERALIST NO. 10, *supra* note 180, at 84 (stating that the Constitution was designed to ensure that “[t]he influence of factious leaders may kindle a flame within their particular States but will be unable to spread a general conflagration through the other States”).

185. See JOHN F. HOADLEY, *ORIGINS OF AMERICAN POLITICAL PARTIES: 1789-1803* 7 (2015) (“The period from 1789 to 1803 witnessed dramatic events that can only be adequately described as a process of party development, a process that was remarkable for its swift appearance during an era when the idea of parties was greatly feared.”).

parties in the state legislatures to draft laws with the implicit goal of denying their political opponents access to the ballot box. Jim Crow segregation is a case in point. In the late nineteenth and early twentieth centuries, the southern Democratic Party adopted a series of disenfranchising laws—including poll taxes, grandfather clauses, and literacy tests—designed to deny the right to vote to African Americans, who were politically aligned with the Republican Party.¹⁸⁶ The voting restrictions were highly effective at severely curtailing black suffrage rights. For example, the number of registered African American voters in Louisiana fell from 130,000 in 1896 to 1,342 by 1904.¹⁸⁷ Not until the adoption of the Voting Rights Act in 1965, which invalidated racially discriminatory voting laws, would African American registration rates in the South begin to rival rates among whites.¹⁸⁸ For example, between 1965 and 2004, African American registration rates in Mississippi rose from 6.7% to 72.3%.¹⁸⁹ By closely scrutinizing and policing the voting rules that emanated from partisan southern legislatures, the VRA proved highly effective at creating a truly biracial democracy in the South.¹⁹⁰ As Chief Justice Roberts acknowledged in *Shelby County v. Holder*, the VRA was “immensely successful at redressing racial discrimination and integrating the voting process” in the South.¹⁹¹

But in recent years, the parties have once again been aggressive in utilizing their control of election administration. Partisan redistricting is the most obvious example.¹⁹² Article I, Section 2 of the United States Constitution provides that congressional districts must be redrawn every 10 years,¹⁹³ and the states follow the same pattern for legislative districts. Since the earliest days of the American republic, the parties

186. KEYSSAR, *supra* note 28, at 66–69, 84–93.

187. *Id.* at 91.

188. *Id.* at 212.

189. *See Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2626 (2013).

190. *See id.* at 2625 (citation omitted) (“Nearly 50 years later, things have changed dramatically [V]oter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.”).

191. *Id.* at 2626.

192. *See, e.g.,* Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1661–62 (1993) (“[P]arties in power can enhance their electoral opportunities by displacing incumbents of the other party from their established constituents, thus denying the displaced incumbents the benefits obtained from name recognition, past delivery of constituent services, and prior social investment in the district.”); ROYCE CROCKER, CONG. RES. SERV., R42831, CONGRESSIONAL REDISTRICTING: AN OVERVIEW 5 (2012) (“By concentrating more like-minded voters into fewer districts with super-majorities, . . . the group of like-minded voters will be able to elect fewer of their preferred candidates.”).

193. U.S. CONST. art. I, § 2, cl. 3.

have drawn district lines in a manner that maximizes the votes of the incumbent party.¹⁹⁴ The term “gerrymander”—which refers to politically-motivated redistricting—originated with Massachusetts Governor Elbridge Gerry, a skilled practitioner of partisan redistricting in the early 1800s.¹⁹⁵ Gerrymandering is deeply unpopular with the public. A 2013 Harris Poll found that only 2% of Americans support the idea of state legislatures drawing their own district lines and 50% support the use of independent commissions.¹⁹⁶ Popular opposition to gerrymandering is understandable. After all, what sense does it make to allow partisans to choose their own districts? The central idea of democracy is that the voters choose their leaders, not the other way around.¹⁹⁷ But when partisans control the redistricting process, incumbent legislators choose the voters who are assigned to their districts.

Despite its undemocratic nature, gerrymandering is an entrenched feature of most American elections. Only a handful of states use independent commissions to draw district lines and one state—Iowa—assigns redistricting responsibility to a nonpartisan legislative bureau.¹⁹⁸ In 43 of the 50 states, the legislature controls the redistricting process.¹⁹⁹ Although the Supreme Court has held that political gerrymandering may give rise to equal protection claims under the Fourteenth Amendment,²⁰⁰ the court has not yet agreed on a judicially manageable standard for adjudicating partisan gerrymandering claims.²⁰¹ Consequently, partisan redistricting remains the law of the

194. See *Vieth v. Jubelirer*, 541 U.S. 267, 274 (2004) (plurality opinion) (noting that politically-motivated redistricting could be dated as far back as colonial Pennsylvania in the early 1700s).

195. See MARK E. RUSH, DOES REDISTRICTING MAKE A DIFFERENCE? 2 (1993) (“The term *gerrymander* was first used in 1812 when the Democratic-Republican (i.e., Jeffersonian) majority of the Massachusetts legislature split Essex County in order to dilute the strength of the Federalists.”).

196. *Americans Across Party Lines Oppose Common Gerrymandering Practices*, HARRIS POLL (Nov. 7, 2013), http://www.theharrispoll.com/politics/Americans_Across_Party_Lines_Oppose_Common_Gerrymandering_Practices.html.

197. See *How to Rig an Election*, THE ECONOMIST (Apr. 25, 2002), <http://www.economist.com/node/1099030> (“In a normal democracy, voters choose their representatives. In America, it is rapidly becoming the other way around . . .”).

198. CROCKER, *supra* note 192, at 16–18.

199. *Id.* at 16.

200. *Davis v. Bandemer*, 478 U.S. 109, 143 (1986) (“[W]e hold that political gerrymandering cases are properly justiciable under the Equal Protection Clause.”).

201. See *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (plurality opinion) (“[N]o judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged.”).

land in the great majority of states and is employed by both parties. Moreover, sophisticated data mining methods have made gerrymandering more potent than ever.²⁰²

Besides gerrymandering, partisan elected officials also dictate the rules that govern voting procedures. Such power may seem mundane, but it has enormous practical significance. In both federal and state elections, partisan officials set voter registration requirements, maintain and purge voter rolls, and select polling sites and hours of operation.²⁰³ Everything that goes into voting is thus controlled by political operators who have a vested interest in the outcome of the election.

The Trump Administration has made clear that it intends to make full use of partisan control of election administration. After taking office in January 2017, President Trump established a presidential commission for a “major investigation” of voter fraud,²⁰⁴ expressed skepticism about early voting,²⁰⁵ and pledged a “full evaluation of voting rolls.”²⁰⁶ Following the administration’s lead, legislatures in twenty-seven states are considering new voting restrictions in 2017.²⁰⁷ For example, in Iowa, the Republican-controlled legislature announced

202. See Daley, *supra* note 22 (explaining that the Republican Party “was also able to take advantage of massive new amounts of public data drawn from social media that allowed them to pinpoint likely voters with more accuracy than ever before, and advances in mapping technology that made it possible to redraw districts precisely around the location of those voters”); 2012 REDMAP Summary Report, *supra* note 22.

203. BRENNAN CTR. FOR JUST., NEW VOTING RESTRICTIONS IN PLACE FOR 2016 PRESIDENTIAL ELECTION (Sept. 12, 2016), <http://www.brennancenter.org/voting-restrictions-first-time-2016>; Strawbridge Robinson, *supra* note 19.

204. Alan Yuhas, *Pence to Head Commission Investigating Baseless Voter Fraud Claim, Trump Says*, GUARDIAN (Feb. 5, 2017), <https://www.theguardian.com/us-news/2017/feb/05/donald-trump-mike-pence-commission-voter-fraud>; Rebecca Savransky, *Trump to Ask for ‘Major Investigation into Voter Fraud,’* HILL (Jan. 25, 2017), <http://thehill.com/homenews/administration/316006-trump-to-ask-for-major-investigation-into-voter-fraud>; Josh Gerstein, *Trump’s Call for Election-fraud Probe Fraught with Peril*, POLITICO (Jan. 25, 2017), <http://www.politico.com/story/2017/01/trump-voter-fraud-234183>.

205. Ben Kamisar, *Trump Questions Merits of Early Voting*, HILL (Dec. 9, 2016), <http://thehill.com/homenews/administration/309738-trump-questions-merits-of-early-voting>.

206. Mike DeBonis, *In Private Meeting, Pence Vows ‘Full Evaluation of Voting Rolls’ over Claims of Fraud*, WASH. POST (Jan. 27, 2017), https://www.washingtonpost.com/powerpost/in-private-meeting-pence-vows-full-evaluation-of-voting-rolls-over-claims-of-voting-fraud/2017/01/27/1c1fa1de-e49a-11e6-a547-5fb9411d332c_story.html?utm_term=.14f42954b55d&wpisrc=al_alert-COMBO-politics%252Bnation; Jenna Johnson & David Nakamura, *Trump to Sign Executive Order Related to Voter Fraud*, WASH. POST (Jan. 26, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/01/26/trump-to-sign-executive-order-related-to-voter-fraud/?utm_term=.ae1f30e6a3b3&wpisrc=nl_politics-pm&wpmm=1; Ben Jacobs & Sam Levin, *Mike Pence: Trump Administration Planning ‘Full Evaluation’ of Voter Fraud*, GUARDIAN (Jan. 27, 2017), <https://www.theguardian.com/us-news/2017/jan/26/trump-administration-voter-fraud-investigation-mike-pence>.

207. VOTING LAWS ROUNDUP 2017, *supra* note 17.

plans to adopt a new voter ID law even though the state's top election official has declared that voter fraud is not a problem in Iowa.²⁰⁸ In addition, Republican secretaries of state across the country have indicated that they will engage in a major review of voting rolls to purge ineligible voters in preparation for the 2018 election.²⁰⁹ Meanwhile, former President Barack Obama and former Attorney General Eric Holder have announced that they will campaign to help Democrats control the redistricting process following the 2020 Census.²¹⁰ The battle for control of election administration is thus certain to escalate in the years ahead.

To date, the Supreme Court has consistently upheld partisan control of election administration, even in highly controversial contexts. For example, in *Crawford v. Marion County*,²¹¹ the Court upheld Indiana's strict photo identification law on grounds that the state's legitimate interest in protecting election integrity remained valid despite the fact that "partisan considerations may have played a significant role in the decision to enact" the law.²¹² And in the 2013 *Shelby County* case, the Supreme Court struck down the VRA's preclearance formula,²¹³ clearing the way for partisan legislatures in the South and other previously covered jurisdictions to reassert their control over voting rules.

Partisan control of election administration is thus a long-standing and deeply entrenched problem in American history, one with its origins in the Constitution itself and one that has gone largely unchallenged by the Supreme Court. But in the toxic atmosphere of contemporary politics, partisan control of election administration is more dangerous than ever. In a time of hyperpolarization and pervasive

208. Rod Boshart, *Iowa Secretary of State Pate Refutes Claims of Rigged Election: Calls Iowa's System Fair, Honest*, CEDAR RAPIDS GAZETTE, (Oct. 17, 2016), <http://www.thegazette.com/subject/news/government/elections/iowa-secretary-of-state-pate-refutes-claims-of-rigged-election-20161017>; David Weigel, *Despite Few Reports of Election Fraud, Iowa GOP Moving Ahead on Voter ID Law*, WASH. POST (Jan. 6, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/01/06/despite-few-reports-of-election-fraud-iowa-gop-moving-ahead-on-voter-id/?utm_term=.d70eedb7ecfc&wpisrc=nl_politics-pm&wpmm=1.

209. Robinson, *supra* note 203.

210. Edward-Isaac Dove, *Obama, Holder to Lead Post-Trump Redistricting Campaign*, POLITICO (Oct. 17, 2016), <http://www.politico.com/story/2016/10/obama-holder-redistricting-gerrymandering-229868>.

211. 553 U.S. 181 (2008).

212. *Id.* at 203.

213. See *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2631 (2013) ("The formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance.").

fears of voter fraud, the anti-democratic risk posed by partisan election administration is all too real.

II. THE ANTI-DEMOCRATIC CONSEQUENCES

The 2016 election made clear that American democracy is in trouble. Historic levels of hyperpolarization are undermining democratic norms and encouraging partisans to view their opponents as a threat to the nation. Meanwhile, declining public confidence in election fairness coupled with partisan manipulation of the system is building momentum for stricter voting regulations, which in turn heightens the threat of voter disenfranchisement. The result is America runs the risk of becoming an illiberal democracy, one in which the incumbent party uses its control of election administration to disenfranchise just enough supporters of the opposition party to keep the incumbent party in power indefinitely.

A. *Eroded Public Confidence in Election Integrity*

Historically, one of the great stabilizing features of American democracy is the fact that losing presidential candidates have a long tradition of accepting defeat gracefully. The 1960 election is a prime example. When John Kennedy defeated Richard Nixon in the exceptionally close presidential election that year, Nixon suspected that Kennedy may have owed his narrow victory to election fraud in Illinois and Texas.²¹⁴ Nixon's suspicion may have had at least some basis in fact. Scholars who have examined the historical record have concluded that Kennedy supporters may indeed have stuffed ballot boxes in Illinois and Texas.²¹⁵ Nevertheless, keenly aware of the fact that he was unlikely to prove definitively that fraud cost him the election, Nixon declined to challenge Kennedy's victory.²¹⁶ As Nixon later explained, "A presidential recount would require up to half a year, during which time the legitimacy of Kennedy's election would be in question. . . . I could not subject the country to such a situation."²¹⁷ Nixon's display of statesmanship spared the nation a divisive and destructive dispute over the 1960 election results.

Similarly, when the Supreme Court ordered an end to the Florida recount in the 2000 election, Al Gore accepted defeat and issued a

214. RICHARD MILHOUS NIXON, RN: THE MEMOIRS OF RICHARD NIXON 224 (1978).

215. FOLEY, *supra* note 164, at 218–24.

216. STEPHEN E. AMBROSE, NIXON: THE EDUCATION OF A POLITICIAN 606 (1987).

217. NIXON, *supra* note 214, at 224.

strong endorsement of the democratic process.²¹⁸ Gore urged his fellow Democrats to accept the Court’s decision in order to reaffirm America’s democratic institutions.²¹⁹ As Gore explained in a nationally-televised concession speech, it was critically necessary for Democrats to accept the legitimacy of Bush’s victory “for the sake of our unity as a people and the strength of our democracy.”²²⁰

But the tradition of candidates honoring democratic norms ended in dramatic fashion in 2016 when the winner of the presidential election falsely claimed to be a victim of massive voter fraud.²²¹ Although late night comedians ridiculed Trump for the absurd nature of his claims,²²² the president’s allegations dealt an extremely serious blow to public confidence in America’s democratic institutions. As the *Washington Post* observed, Trump’s false allegation of widespread voter fraud “spread like a virus” across the country.²²³ Despite the fact that he offered no evidence, Trump’s supporters believed his allegation that the Democrats attempted to rig the election against him.²²⁴ A December 2016 Economist/YouGov poll found that a staggering 62 percent of Trump voters believed that millions of illegal votes were cast during the election.²²⁵ The Economist/YouGov poll was consistent with polling taken during the fall campaign when Trump began his attacks on the integrity of the election system. A September 2016 Washington Post-

218. See FOLEY, *supra* note 164, at 279–305; HASEN, *supra* note 166, at 11–40 (describing the Bush-Gore Florida deadlock).

219. Richard L. Berke & Katharine Q. Seelye, *The 43rd President: The Vice President; Bush Pledges To Be President For ‘One Nation,’ Not One Party; Gore, Conceding, Urges Unity*, N.Y. TIMES (Dec. 14, 2000), <http://www.nytimes.com/2000/12/14/us/43rd-president-vice-president-bush-pledges-be-president-for-one-nation-not-one.html>.

220. *Id.*

221. See *supra* Section I.A.

222. E.g., Kristine Phillips, *Colbert Mocks Bannon, Miller, Other Trump Aides: ‘It’s a Rough Time for the Stephen Community,’* WASH. POST (Feb. 18, 2017), https://www.washingtonpost.com/news/arts-and-entertainment/wp/2017/02/18/colbert-mocks-bannon-miller-other-trump-aides-its-a-rough-time-for-the-stephen-community/?utm_term=.1e88f0acf49e; Megan McCluskey, *Watch Seth Meyers Slam Trump Advisor Stephen Miller’s ‘Deranged’ Voter Fraud Claims*, TIME (Feb. 14, 2017), <http://time.com/4670443/seth-meyers-stephen-miller-voter-fraud/>.

223. Jenna Johnson, *The Tale of a Trump Falsehood: How His Voter Fraud Claim Spread Like a Virus*, WASH. POST (Jan. 31, 2017), https://www.washingtonpost.com/politics/the-tale-of-a-trump-falsehood-how-his-voter-fraud-claim-spread-like-a-virus/2017/01/30/47081e32-e4ed-11e6-ba11-63c4b4fb5a63_story.html?hpid=hp_hp-top-table-low_falseweek-7a%3Ahomepage%2Fstory&utm_term=.c10c24886368.

224. Kait Richmond & Tatianna Amatruda, *Why Trump Supporters Stand by Debunked Claim*, CNN (Dec. 2, 2016), <http://www.cnn.com/2016/12/01/politics/donald-trump-supporters-check-in-camerota-new-day-cnntv/>.

225. The Economist/YouGov Poll, *supra* note 5, at 61; Kathy Frankovic, *Belief in Conspiracies Largely Depends on Political Identity*, YOUTOV (Dec. 27, 2016), <https://today.yougov.com/news/2016/12/27/belief-conspiracies-largely-depends-political-iden/>.

ABC News poll found that 46 percent of Americans, and 69 percent of Trump voters, believed that voter fraud occurs often.²²⁶ Likewise, an October 2016 Politico/Morning Consult poll found that 73 percent of Republicans believed that Democrats might steal the election from Trump through voter fraud.²²⁷ Trump's Electoral College victory did not allay his supporters' concerns. A December 2016 Washington Post poll found that half of all Republicans believed that Trump actually won the popular vote²²⁸ despite the official certified results to the contrary.²²⁹

It was not just Trump supporters who expressed doubts about the integrity of the election results. Jill Stein's allegations and public confusion over the nature of the Russian intervention in the election—which the FBI concluded involved hacking of DNC emails, not hacking of voting tallies—undermined Democratic voters' confidence in the integrity of the 2016 election. In December 2016, the Economist/YouGov poll found that 50 percent of Clinton voters believed that the Russian government manipulated voting tallies to rig the election in favor of Trump.²³⁰ A post-election poll also found that one-third of Clinton supporters viewed Trump's victory as “illegitimate.”²³¹ Irrespective of party, therefore, doubts about the integrity of the election system are broad, deep, and growing. For example, an October 2016 PRRI poll found that a large majority of

226. Washington Post-ABC News Poll (Sept. 5–8, 2016), [https://www.washingtonpost.com/page/2010-2019/WashingtonPost/2016/09/15/National-Politics/Polling/question_17201.xml?uuid=kmJFjnszEeaAZMHdyKckuw; Emily Guskin & Scott Clement, Poll: Nearly Half of Americans Say Voter Fraud Occurs Often, WASH. POST \(Sept. 15, 2016\), https://www.washingtonpost.com/news/the-fix/wp/2016/09/15/poll-nearly-half-of-americans-say-voter-fraud-occurs-often/?utm_term=.cadf5479eeec](https://www.washingtonpost.com/page/2010-2019/WashingtonPost/2016/09/15/National-Politics/Polling/question_17201.xml?uuid=kmJFjnszEeaAZMHdyKckuw; Emily Guskin & Scott Clement, Poll: Nearly Half of Americans Say Voter Fraud Occurs Often, WASH. POST (Sept. 15, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/09/15/poll-nearly-half-of-americans-say-voter-fraud-occurs-often/?utm_term=.cadf5479eeec).

227. Jake Sherman & Steven Shepard, *Poll: 41 Percent of Voters Say Election Could be 'Stolen' from Trump*, POLITICO (Oct. 17, 2016), <http://www.politico.com/story/2016/10/poll-41-percent-of-voters-say-the-election-could-be-stolen-from-trump-229871>. A September 2016 poll found that almost 50 percent of Americans believe that voter fraud occurs routinely. See Guskin & Clement, *supra* note 226.

228. Rachael Revesz, *Half of Republicans Incorrectly Believe Donald Trump Won the Popular Vote, Poll Shows*, INDEPENDENT (Dec. 18, 2016), <http://www.independent.co.uk/news/world/americas/donald-trump-online-poll-half-republicans-believe-candidate-won-popular-vote-conspiracy-theories-a7482966.html>.

229. *AP Fact Check: How do Trump's Voter Fraud Allegations Hold Up?*, PBS NEWSHOUR: THE RUNDOWN (Nov. 29, 2016), <http://www.pbs.org/newshour/rundown/ap-fact-check-trumps-voter-fraud-allegations-hold/>.

230. The Economist/YouGov Poll, *supra* note 5, at 62; Frankovic, *supra* note 225.

231. Washington Post-ABC News Poll, *supra* note 226.

231. Scott Clement, *One-third of Clinton Supporters Say Trump Election is Not Legitimate, Poll Finds*, WASH. POST (Nov. 13, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/11/13/one-third-of-clinton-supporters-say-trump-election-is-not-legitimate-poll-finds/?utm_term=.36d3ddc04661.

Americans feared that America's democratic process has been compromised, with 41 percent fearing voter suppression and 37 percent fearing voter fraud.²³²

The 2016 poll results were deeply disturbing. The legitimacy and stability of democratic government depends on the public's confidence that votes are tabulated honestly and accurately.²³³ But the latest survey results indicate that the public has lost faith in election integrity, a profoundly disquieting development that raises fundamental questions about the future of American democracy. As the Commission on Federal Election Reform has warned, "Democracy is endangered when people believe that their votes do not matter or are not counted correctly."²³⁴

In an era of hyperpolarization and short attention spans brought on by 24-hour news cycles, it is easy to underestimate the corrosive effects of false allegations that the election system is rigged. After all, the sad reality is Americans have grown accustomed to extremely harsh political rhetoric. Even the United States Senate, a traditional paragon of decorum, has seen a precipitous decline in civility among its members.²³⁵ The loss of civility and decency in public discourse extends beyond the political world and reflects a broader coarsening of American culture. A nationwide survey in 2014 found that over 90 percent of Americans believe that incivility in America is a problem and over 60 percent believe that it has risen to "crisis levels."²³⁶ Thus, when the president makes false claims that his opponents have perpetrated massive voter fraud, one might be inclined to rationalize the significance of such remarks as just another example of the harsh and hyperbolic culture of early twenty-first century America.

232. Russonello, *supra* note 5.

233. Lonna Rae Atkeson, *Voter Confidence in 2010: Local, State, and National Factors*, in *ELECTION ADMINISTRATION IN THE UNITED STATES: THE STATE OF REFORM AFTER BUSH V. GORE* 102, 103 (R. Michael Alvarez & Bernard Grofman eds., 2014).

234. COMM'N ON FED. ELECTION REFORM, *BUILDING CONFIDENCE IN U.S. ELECTIONS* 1 (Sept. 2005), <https://www.eac.gov/assets/1/AssetManager/Exhibit%20M.pdf>.

235. On the decline in civility in the Senate during her decades in Washington, see the recent speech by Maine Senator Susan Collins at the University of Maine, Senator Susan Collins, *Keynote Address on Hyperpartisanship in Wash. at the Univ. of Me.* (Apr. 3, 2015), <https://www.collins.senate.gov/newsroom/senator-collins-addresses-hyperpartisanship-washington-delivers-keynote-lecture-university>.

236. WEBER SHANDWICK, *CIVILITY IN AMERICA* 2014 3 (2014), <http://www.webershandwick.com/uploads/news/files/civility-in-america-2014.pdf>.

But minimizing false claims of election fraud would be a mistake, particularly when it is the president who has played a key role in propagating the baseless allegations. Trump's claims regarding the "rigged" 2016 election represent a stunning departure from historical and democratic norms. His cynical and reckless tactics suggest the nation has crossed a line in which anything now goes in political discourse. If even the president feels no obligation to exercise caution and restraint when discussing the integrity of America's democratic institutions, who else will? The president's lack of self-control in his public comments about the election system is particularly alarming at a time when the internet is already facilitating the rapid spread of fake news and when hyperpolarization is promoting dangerous levels of animosity between Republicans and Democrats.

Consequently, we have reached a disturbing turning point. Confidence in the nation's democratic institutions was once a central theme of American history. In an 1862 address, Abraham Lincoln described American democracy as "the last best hope of earth."²³⁷ In 1917 Woodrow Wilson declared that America would help make the world "safe for democracy."²³⁸ And in 2001 President George W. Bush proclaimed, "Ours is the greatest democracy in the world."²³⁹ But today the public doubts whether we even have an honest and functional democracy. If the voters lose faith in their democratic institutions, they may well lose faith in the concept of democracy itself.

Public cynicism about election integrity is dangerous for another reason. The United States is not a nation founded on a common racial, ethnic, or religious identity. It is founded instead on the pluralistic principles of liberal democracy, which include a shared national commitment to the rule of law and the democratic process. Public confidence in the vitality and integrity of our democratic institutions is one of the key ties that bind Americans of diverse backgrounds together.

The public's loss of faith in the integrity of the election system thus strikes at the heart of both American democracy and Americans'

237. *Annual Message to Congress (Dec. 1, 1862)*, in 5 THE COLLECTED WORKS OF ABRAHAM LINCOLN 537 (Roy P. Basler ed., 1983).

238. *Address to a Joint Session of Congress (April 2, 1917)*, in 41 THE PAPERS OF WOODROW WILSON 525 (Arthur S. Link ed., 1983).

239. Interview with George W. Bush, with AM. SOC'Y OF NEWSPAPER EDS. (Apr. 5, 2001), in AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=45678&st=greatest+democracy&st1=>.

shared sense of national identity. It also potentially sets the stage for a significant new effort to erode voting rights under the pretext of restoring election integrity.

B. Abridged Voting Rights

To understand the controversy over voting rights, it is crucial to understand the current political landscape. A razor's edge separates the two major parties. In the 2016 election Donald Trump won the Electoral College by 304 votes to 227 for Hillary Clinton.²⁴⁰ But Clinton won the popular vote by nearly 3 million votes, and Trump's Electoral College victory was contingent upon his narrow victories in Michigan, Wisconsin, and Pennsylvania.²⁴¹ Trump's margins in each state were exceedingly close: a 10,000 vote margin in Michigan out of 4.8 million votes cast (a 0.2% victory margin), a 22,000 vote margin in Wisconsin out of 3 million votes cast (a 0.7 % victory margin), and a 44,000 vote margin in Pennsylvania (a 0.7% victory margin) out of 6.1 million votes cast. Thus, out of 136 million ballots cast in the presidential election overall, the outcome was decided by 76,000 votes in just three states.²⁴² Congressional elections are similarly divided. In the 2016 House elections, Republicans won the popular vote by 1.3 million votes out of 128 million cast,²⁴³ a margin of only 1%.

In a nation where victory margins are so narrow, the temptation to use election administration to promote a small but significant difference in election outcomes is powerful. In recent years, two areas of election law in particular have become flashpoints of political controversy. The first is the redistricting process; the second is the adoption of strict voter identification requirements and other laws that place new burdens on the effort to vote.

The Supreme Court has acknowledged that partisan gerrymandering threatens the constitutional rights of voters under the Fourteenth Amendment.²⁴⁴ The reason is because politically-motivated redistricting dilutes the voting strength of the party out of power. In

240. Kiersten Schmidt & Wilson Andrews, *A Historic Number of Electors Defected, and Most Were Supposed to Vote for Clinton*, N.Y. TIMES (Dec. 19, 2016), https://www.nytimes.com/interactive/2016/12/19/us/elections/electoral-college-results.html?_r=0.

241. Wasserman, *supra* note 82.

242. *Id.*

243. *Id.*

244. See *Davis v. Bandemer*, 478 U.S. 109, 143 (1986) (“[W]e hold that political gerrymandering cases are properly justiciable under the Equal Protection Clause.”).

Reynolds v. Sims,²⁴⁵ the Supreme Court observed that “the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”²⁴⁶ For example, the incumbent party may draw district lines to pack a single district with the minority party’s voters, thus leading to many wasted votes, or it may spread the minority party’s voters thinly across many districts, minimizing their voting power on election day. Accordingly, the Supreme Court has acknowledged that partisan gerrymanders “are incompatible with democratic principles.”²⁴⁷

The constitutional implications of gerrymandering are most obvious in the context of race.²⁴⁸ The Supreme Court has made clear that redistricting practices that dilute the votes of minority voters are impermissible.²⁴⁹ In the March 2017 case of *Bethune-Hill v. Virginia State Board of Elections*,²⁵⁰ the Supreme Court reaffirmed that the “Equal Protection Clause prohibits a State, without sufficient justification, from ‘separat[ing] its citizens into different voting districts on the basis of race.’”²⁵¹ The Court further noted that “even when a reapportionment plan respects traditional principles” of redistricting—such as compactness and contiguity—it may still violate the equal protection clause if racial considerations were the state’s predominant motivation in drawing the lines.²⁵² *Bethune-Hill* reinforces the Supreme Court’s commitment to scrutinizing and policing instances of racial gerrymandering.

245. 377 U.S. 533 (1964).

246. *Id.* at 555.

247. *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (plurality opinion); *id.* at 316 (Kennedy, J., concurring in judgment).

248. On the dilution of the votes of minority voters, see Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663 (2001). Gerken explains that in a racial polarized electorate, “[a] state could take advantage of this type of voting pattern by drawing district lines that give whites a majority in a disproportionate share of districts, thus ensuring that minority voters are unable to elect a candidate of their choice. Section 2 protects minority voters from this type of injury, which we call ‘vote dilution,’ by requiring states to draw district lines that offer racial minorities a fair chance to elect their candidates of choice.” *Id.* at 1666.

249. See *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986) (“The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.”); see also *Shaw v. Reno*, 509 U.S. 630, 658 (1993) (holding that a state may not “segregate voters into separate voting districts because of their race” absent “sufficient justification”); *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (“[A State] may not separate its citizens into different voting districts on the basis of race.”).

250. No. 15-680, 2017 WL 774194 (Mar. 1, 2017).

251. *Id.* at *7 (alteration in original) (quoting *Miller*, 515 U.S. at 911).

252. *Id.* at *8.

However, the Supreme Court has not yet agreed on a standard for adjudicating partisan gerrymandering cases.²⁵³ In the 2004 case of *Vieth v. Jubelirer*, a plurality of justices warned that if the courts adjudicated partisan gerrymandering cases without agreed upon objective redistricting standards, judges would find themselves cast “forth upon a sea of imponderables” and forced “to make determinations that not even election experts can agree upon.”²⁵⁴ The plurality thus concluded that the Constitution does not provide “a judicially enforceable limit on the political considerations that the States and Congress may take into account when districting.”²⁵⁵

The Supreme Court’s inability to ascertain a judicially-manageable redistricting standard has permitted partisan gerrymandering to continue unabated across the country. Although the extent to which gerrymandering actually affects election outcomes is hotly debated by scholars,²⁵⁶ it is telling that the elected officials who do the line-drawing clearly assume that it does matter. Recent elections support that assumption. For example, because Republicans won sweeping victories in state legislative races across the country in 2010, they were able to draw district lines for four times as many House seats as were Democratic-controlled legislatures.²⁵⁷ The Republican gerrymandering following the 2010 Census was so successful that in 2012 Republicans won a 33-seat House majority despite losing the popular vote

253. See *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (plurality opinion) (“[N]o judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged.”).

254. *Id.* at 290.

255. *Id.* at 305.

256. See Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 624 (2002) (“[T]his pattern of incumbent entrenchment has gotten worse as the computer technology for more exquisite gerrymandering has improved and political parties have ever more brazenly pursued incumbent protection.”); Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 654 (2002) (“In reality, there has been steady and significant turnover both in Congress and in state legislatures—a quite healthy level of ‘ritual cleansing’ despite bipartisan gerrymanders.”); David Lublin & Michael P. McDonald, *Is It Time to Draw the Line?: The Impact of Redistricting on Competition in State House Elections*, 5 ELECTION L.J. 144, 157 (2006) (“[P]artisan gerrymanders sometimes fail However, these are exceptions to an overall pattern indicating that partisan gerrymandering more often has a dampening effect on competition.”); Thomas E. Mann, *Polarizing the House of Representatives: How Much Does Gerrymandering Matter?*, in RED AND BLUE NATION?: CHARACTERISTICS AND CAUSES OF AMERICA’S POLARIZED POLITICS 263, 268–69 (Pietro S. Nivola & David W. Brady eds., 2006).

257. Anthony J. Gaughan, *To End Gerrymandering: The Canadian Model for Reforming the Congressional Redistricting Process in the United States*, 41 CAP. U. L. REV. 999, 1034 (2013); see NAT’L CONF. OF ST. LEGISLATORS, REPUBLICANS EXCEED EXPECTATIONS IN 2010 STATE LEGISLATIVE ELECTIONS (Nov. 3, 2010), <http://www.ncsl.org/press-room/republicans-exceed-expectations-in-2010.aspx>.

nationwide in House elections by nearly 1.4 million votes.²⁵⁸ The 2016 House elections demonstrated that the 2011 redistricting continues to benefit Republican candidates. The Republicans' narrow 1% margin in the popular vote in 2016 translated to a landslide congressional victory as the Republicans carried 241 House seats to 194 for the Democrats.²⁵⁹ In other words, thanks to partisan gerrymandering, winning 49% of the vote translated to over 55% of the seats. Thus, while scholars may be uncertain as to the precise extent to which gerrymandering impacts congressional and legislative races, experienced politicians have made no secret of their conviction that it is a critical tool for gaining partisan advantage on election day. As Samuel Issacharoff and Richard Pildes have explained, "procedural [election] rules affect politicians directly, and politicians have particular expertise in the ways these rules affect their interests."²⁶⁰

Technological developments suggest that partisan gerrymandering will become even more effective in future redistricting cycles. The growing sophistication of big data analytics gives legislatures extraordinary detail regarding the likely partisan voting patterns of particular neighborhoods.²⁶¹ Moreover, computer-assisted line drawing enables the party that controls redistricting a degree of precision unimaginable in previous eras.²⁶² It is with good reason therefore that former President Barack Obama and former Attorney General Eric Holder have identified breaking the Republican hold over political

258. Sam Wang, *The Great Gerrymander of 2012*, N.Y. TIMES, (Feb. 2, 2013), http://www.nytimes.com/2013/02/03/opinion/sunday/the-great-gerrymander-of-2012.html?pagewanted=all&_r=0.

259. See Donna Cassata, *5 Things to Know about the Incoming Republican Congress*, PBS NEWSHOUR: THE RUNDOWN (Jan. 2, 2017), <http://www.pbs.org/newshour/rundown/congress-ushers-new-era-republican-rule/>.

260. Issacharoff & Pildes, *supra* note 183, at 709.

261. See Daley, *supra* note 22.

262. See Robert Draper, *The League of Dangerous Mapmakers*, THE ATLANTIC (Oct. 2012) ("This ritual carving and paring of the United States into 435 sovereign units, known as redistricting, was intended by the Framers solely to keep democracy's electoral scales balanced. Instead, redistricting today has become the most insidious practice in American politics—a way . . . for our elected leaders to entrench themselves in 435 impregnable garrisons from which they can maintain political power while avoiding demographic realities."); Julian E. Zelizer, *The power that gerrymandering has brought to Republicans*, WASH. POST (June 17, 2016), <https://www.theatlantic.com/magazine/archive/2012/10/the-league-of/309084/> ("Using sophisticated software such as Maptitude, GOP operatives crafted favorable districts filled with conservative white voters, based on the kind of data available to corporations. The book is brimming with fascinating portraits of wunderkinds who integrated micro-targeting, computer mapmaking and gerrymandering.").

redistricting as essential to making House elections competitive again.²⁶³

But the anti-democratic consequences of partisan gerrymandering pale in comparison to the threat posed by partisan control of voting regulations. Gerrymandering may dilute votes, but it does not deny access to voting. Partisan control of voting qualifications and election day procedures, however, poses a significant risk of disenfranchisement. The leading example is the battle over strict voter identification laws. In the aftermath of the *Bush v. Gore* election controversy in 2000, a federal commission led by former President Jimmy Carter and former Secretary of State James Baker proposed a series of election reforms, including a proposal to require voters to show photo identification.²⁶⁴ Shortly thereafter, Republican legislatures across the country adopted new voter ID laws that they described as necessary to modernize the election system, prevent fraud, and safeguard voter confidence in the election system's integrity.²⁶⁵ Georgia and Indiana set the pattern when they adopted strict voter ID laws that required voters to produce a government-approved form of photographic identification.²⁶⁶

Critics, however, argue that strict photo identification laws disenfranchise poor and minority voters.²⁶⁷ The debate over voter ID laws has set off one of the most acrimonious disputes in the modern history of American election law. As Daniel Tokaji has observed, "With heated allegations of voter suppression coming from one side and equally heated allegations of voter fraud from the other, it has become difficult even to discuss the most important election administration questions of the day civilly--much less to run elections in a manner that engenders public confidence."²⁶⁸

263. Alexander Burns & Jonathan Martin, *Eric Holder to Lead Democrats' Attack on Republican Gerrymandering*, N.Y. TIMES (Jan. 11, 2017), <https://www.nytimes.com/2017/01/11/us/eric-holder-to-lead-democrats-attack-on-republican-gerrymandering.html>.

264. COMM'N ON FED. ELECTION REFORM, *supra* note 234, at 69, 93. For the full history of Voter ID laws, see Joshua A. Douglas, *Crawford v. Marion County Election Board*, in ELECTION LAW STORIES 457–73, 498–504 (Joshua A. Douglas & Eugene D. Mazo eds., 2016).

265. HASEN, *supra* note 166, at 43; *see also, e.g.*, *Crawford v. Marion Cty. Bd. of Elections*, 553 U.S. 181, 191 (2008) (describing the motivations behind Indiana's voter ID law).

266. NAT'L CONF. OF ST. LEGISLATORS, HISTORY OF VOTER ID (Apr. 18, 2016), <http://www.ncsl.org/research/elections-and-campaigns/voter-id-history.aspx>.

267. KEYSAR, *supra* note 28, at 277 ("Poor and minority communities seemed to be particular targets of suppression efforts since their members (especially African Americans) were regarded as overwhelmingly likely to vote Democratic.").

268. Tokaji, *supra* note 175, at 576–77.

The critical question is whether voter identification laws and other election rules changes are necessary to preserve election integrity. It is undeniably true that a haphazard system characterizes election administration practices across the country. The American election system is extremely decentralized and many states rely on outdated registration and voting machine technologies.²⁶⁹ Despite the fact that computers have been a mainstay of accounting practices in the private sector for decades, voter records across the country are still maintained in paper form.²⁷⁰ The paper-based registration system is susceptible to error as well as difficult to update and maintain.²⁷¹ Republicans thus point to voter ID laws as an additional safeguard at a time when election administrators across the country rely on outdated technologies. Republicans also point out that voter ID laws are highly popular with the public. A recent Gallup Poll found that 80 percent of Americans—including a large majority of both parties—support voter ID laws.²⁷² Irrespective of party, the public clearly views voter ID laws as an important measure for maintaining election integrity.

But is the public right? Are strict voter identification laws necessary? The overwhelming weight of the evidence is that the answer is no.²⁷³ Time and again, allegations of widespread fraud have been disproved by academic studies, government investigations, and court cases.²⁷⁴ For example, in the most comprehensive study ever undertaken, Justin Levitt found only 31 credible incidents of potential

269. PEW CTR. ON THE STATES, *INACCURATE, COSTLY, AND INEFFICIENT: EVIDENCE THAT AMERICA'S VOTER REGISTRATION SYSTEM NEEDS AN UPGRADE 1* (Feb. 2012), http://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2012/pewupgradingvoterregistrationpdf.pdf.

270. *Id.* at 2, 3.

271. *Id.* at 3.

272. Justin McCarthy, *Four in Five Americans Support Voter ID Laws, Early Voting*, GALLUP (Aug. 22, 2016), <http://www.gallup.com/poll/194741/four-five-americans-support-voter-laws-early-voting.aspx>.

273. *See, e.g.*, Justin Levitt, *Election Deform: The Pursuit of Unwarranted Electoral Regulation*, 11 *ELECTION L.J.* 97 (2012).

274. *See, e.g.*, BRENNAN CTR. FOR JUST., *DEBUNKING THE VOTER FRAUD MYTH* (Jan. 25, 2017), <http://www.brennancenter.org/analysis/debunking-voter-fraud-myth>; Nate Cohn, *Illegal Voting Claims, and Why They Don't Hold Up*, N.Y. TIMES (Jan. 26, 2017), <https://www.nytimes.com/2017/01/26/upshot/illegal-voting-claims-and-why-they-dont-hold-up.html>; U.S. GOV'T ACCOUNTABILITY OFF., *ELECTIONS: ISSUES RELATED TO STATE VOTER IDENTIFICATION LAWS 64–74* (Sep. 2014), <http://www.gao.gov/assets/670/665966.pdf>; Philip Bump, *Here's How Rare In-person Voter Fraud is*, WASH. POST (Aug. 3, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/08/03/heres-how-rare-in-person-voter-fraud-is/?utm_term=.e79bf00a5c83; Alan Blinder, *Questions and Answers on Voter Fraud*, N.Y. TIMES (Aug. 5, 2016), <https://www.nytimes.com/2016/08/05/us/voter-id-laws-donald-trump.html>.

voter fraud out of one billion ballots cast between 2000 and 2014.²⁷⁵ Likewise, a News21 study at Arizona State University found only 10 cases of in-person voter fraud out of 146 million registered voters²⁷⁶ and 491 cases of absentee mail-in ballot fraud.²⁷⁷ A five year investigation by President George W. Bush’s administration in the early 2000s turned up no evidence of widespread voter fraud in federal elections.²⁷⁸ And in 2016 the Fifth Circuit observed that there were only two convictions for in-person voter fraud out of twenty million ballots cast in Texas elections in the ten years before the state adopted its photo ID law.²⁷⁹

The simple reality is in-person voter fraud makes little sense. The person who commits it faces enormous risks and receives minimal benefits. A single vote is unlikely to change an election result, particularly in a federal or statewide election in which hundreds of thousands or millions of votes are cast. Individuals have little incentive to cast a fraudulent ballot when their vote is highly unlikely to change an election outcome.²⁸⁰ Conversely, the criminal consequences of engaging in election fraud are severe. Voter fraud is a felony punishable by years behind bars. For example, in February 2017 a Texas court sentenced a Mexican national to eight years in prison for voting illegally in the 2012 and 2014 elections.²⁸¹ The disincentives to in-person voter fraud thus far outweigh any rational benefits that one would derive from committing the crime.

275. Justin Levitt, *A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents out of One Billion Ballots Cast*, WASH. POST (Aug. 6, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/?utm_term=.f8cb1950f0c0; see also LORRAINE C. MINNITE, *THE MYTH OF VOTER FRAUD* (2010); JUSTIN LEVITT, BRENNAN CTR. FOR JUST., *THE TRUTH ABOUT VOTER FRAUD*, (2007), <http://www.brennancenter.org/sites/default/files/legacy/The%20Truth%20About%20Voter%20Fraud.pdf>.

276. Sami Edge & Sean Holstege, *No, Voter Fraud Actually isn’t a Persistent Problem*, WASH. POST (Sept. 1, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/09/01/voter-fraud-is-not-a-persistent-problem/?utm_term=.e87d2dacbc40; Hope Yen, *In-person Voting Fraud is Rare, doesn’t Affect Elections*, PBS NEWSHOUR: THE RUNDOWN (Aug. 20, 2016), <http://www.pbs.org/newshour/runtdown/person-voting-fraud-rare-doesnt-affect-elections/>.

277. See *Election Fraud in America*, NEWS21 (Aug. 12, 2012), <http://votingrights.news21.com/interactive/election-fraud-database/> (“The nation has 2,068 cases of alleged election fraud since 2000. . . . The most prevalent fraud was Absentee Ballot Fraud at 24 percent (491 cases).”).

278. Eric Lipton & Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. TIMES (Apr. 12, 2007), <http://www.nytimes.com/2007/04/12/washington/12fraud.html>.

279. *Veasey v. Abbott*, 830 F.3d 216, 238 (5th Cir. 2016).

280. See, e.g., Levitt, *supra* note 275 (“[F]raud by individual voters is a singularly foolish and ineffective way to attempt to win an election.”).

281. Michael Wines, *Illegal Voting Gets Texas Woman 8 Years in Prison, and Certain Deportation*, N.Y. TIMES (Feb. 10, 2017), https://www.nytimes.com/2017/02/10/us/illegal-voting-gets-texas-woman-8-years-in-prison-and-certain-deportation.html?_r=0.

But even if voter ID laws don't prevent fraud, do they really harm minority voters, and if so, to what extent? A tremendous amount of scholarship has attempted to answer that question. The results are bitterly contested and no consensus has yet emerged. Some studies have found no correlation between voter ID laws and minority turnout,²⁸² whereas other studies have found that voter ID laws do have a discernible suppressing effect on turnout that disproportionately affects minorities.²⁸³ For example, an investigation by the Government Accountability Office revealed that the adoption of voter ID laws in Kansas and Tennessee drove down turnout in those states by 122,000 votes in the 2012 election.²⁸⁴ The turnout decline primarily consisted of fewer younger voters, new voters, and African American voters.²⁸⁵

A new study using an unusually large and comprehensive data set provides the most persuasive evidence that voter ID laws depress

282. See, e.g., Rene Rocha & Tetsuya Matsubayashi, *The Politics of Race and Voter ID Laws in the States: The Return of Jim Crow?*, 67 POL. RES. Q. 666, 676 (2014) (finding that “the effect of photo ID regulation does not vary by race or ethnicity”); M.V. Hood & Charles S. Bullock, *Much ado about nothing? An empirical assessment of the Georgia voter identification statute*, 12 ST. POL. & POL'Y Q. 394, 409 (2012) (“[A]lthough the law does slightly depress overall turnout, this effect does not disproportionately affect racial or ethnic minority groups.”).

283. See, e.g., Reid Wilson, *Report: Voter ID Laws Reduce Turnout More Among African American and Younger Voters*, WASH. POST (Oct. 9, 2014), https://www.washingtonpost.com/blogs/govbeat/wp/2014/10/09/report-voter-id-laws-reduce-turnout-more-among-african-american-and-younger-voters/?utm_term=.287883782326 (“Laws requiring voters to show identification when they cast a ballot have a greater impact on African Americans and younger voters than on other racial and age groups, according to a new analysis.”); Janelle Bouie, *Ahead of Trial, Pennsylvania Admits There is no Voter Fraud Problem*, WASH. POST (July 24, 2012), https://www.washingtonpost.com/blogs/plum-line/post/pennsylvania-admits-it-no-voter-fraud-problem/2012/07/24/gJQAHNvt6W_blog.html?utm_term=.30805f9b7b3a; Bump, *supra* note 93; Matt Barreto, Stephen Nuño & Gabriel Sanchez, *The Disproportionate Impact of Voter-ID Requirements on the Electorate—New Evidence from Indiana*, 42 PS: POL. SCI. & POL. 111, 113–14 (2009); Timothy Vercellotti & David Anderson, *Voter-Identification Requirements and the Learning Curve*, 42 PS: POL. SCI. & POL. 117 (2009).

284. Philip Bump, *Voter ID Laws in Kansas and Tennessee Dropped 2012 Turnout by over 100,000 Votes*, WASH. POST (Oct. 9, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/10/09/gao-voter-id-laws-in-kansas-and-tennessee-dropped-2012-turnout-by-over-100000-votes/?utm_term=.4bf4359e3a7b (“Turnout dropped at least 1.9 percentage points in Kansas and 2.2 percentage points in Tennessee thanks to the laws. By our calculations, that’s 122,000 fewer votes.”); see also U.S. GOV'T ACCOUNTABILITY OFF., ELECTIONS: ISSUES RELATED TO STATE VOTER IDENTIFICATION LAWS 2 (Sept. 2014), <http://www.gao.gov/assets/670/665966.pdf> [hereinafter GAO ACCOUNTABILITY REPORT] (finding a 1.9 percent and 2.2 percent drop in Kansas and Tennessee respectively).

285. Bump, *supra* note 284 (“Young people, black people, and newly registered voters were the groups that were more likely to see bigger drops in turnout.”); see also GAO ACCOUNTABILITY REPORT, *supra* note 284 (“We estimate that turnout was reduced among African-American registrants by 3.7 percentage points more than among Whites in Kansas and 1.5 percentage points more than among Whites in Tennessee.”).

minority turnout.²⁸⁶ In an examination of elections in all 50 states during the years 2006 to 2014, Zoltan Hajnal, Nazita Lajevardi, and Lindsay Nielson found “substantial drops in minority turnout in strict voter ID states and no real changes in white turnout.”²⁸⁷ In general elections, the study found a 7.1% decline in Latino turnout and a 5.4% decline in Asian American turnout in strict voter ID states.²⁸⁸ Interestingly, the study suggested that strict voter ID laws had no discernible impact on African American or white turnout rates in general elections.²⁸⁹

The difference between black turnout rates and those of other minority groups during the 2006-14 period may be explained by the special circumstances of the 2008 and 2012 elections. Both elections saw African American turnout exceed white turnout for the first time in history, including in southern states that had adopted strict Voter ID laws.²⁹⁰ Barack Obama, the nation’s first black president, was on the top of the Democratic ticket in 2008 and 2012, which undoubtedly increased turnout among African American voters. Moreover, Jotaka Eaddy, director of voting rights for the NAACP, cited a backlash against voter identification laws as a contributing factor in inspiring higher levels of black turnout.²⁹¹ In fact, a study of the 2012 election found that turnout *increased* after voters were informed of strict new voter ID laws.²⁹² It seems reasonable to surmise that the presence of Barack Obama, the nation’s first African American president, combined with a backlash against voter ID laws likely explains the paradoxical 2012 results.²⁹³

286. Zoltan Hajnal, Nazita Lajevardi & Lindsay Nielson, *Voter Identification Laws and the Suppression of Minority Votes*, 79 J. POL. 363, 368 (2017).

287. *Id.*

288. *Id.*

289. *See id.* (“For blacks, the gap is negligible in general elections but a full 4.6 percentage points in primaries.”).

290. Rachel Weiner, *Black Voters Turned out at Higher Rate than White Voters in 2012 and 2008*, WASH. POST (Apr. 29, 2013), https://www.washingtonpost.com/news/the-fix/wp/2013/04/29/black-turnout-was-higher-than-white-turnout-in-2012-and-2008/?utm_term=.5df8973d13ed; *see also* Anthony J. Gaughan, *Has the South Changed? Shelby County and the Expansion of the Voter ID Battlefield*, 19 TEX. J. C.L. & C.R. 109, 130–34 (2013).

291. Gaughan, *supra* note 290, at 135–36.

292. *See* Jack Citrin, Donald Green & Morris Levy, *The Effects of Voter ID Notification on Voter Turnout: Results from a Large-scale Field Experiment*, 13 ELECTION L.J. 228, 235 (2014) (“Turnout in the Warning condition was . . . approximately one percentage point higher than in the control group, which runs counter to the conjecture that warnings about the need for proper identification demobilize voters.”).

293. Gaughan, *supra* note 290, at 134–36.

But a backlash can only be sustained for so long, and it is no defense of restrictive voting regulations that they may occasionally provoke a countervailing reaction that diminishes their effects. As Josh Chafetz has argued, “even if the backlash thesis is correct—and the evidence for it, thus far, is only anecdotal and circumstantial—it serves to reinforce, rather than undermine, the partisan valence of the initial decision to implement voting restrictions.”²⁹⁴

Moreover, it is undeniable that African American turnout declined across the nation in 2016. Overall, turnout among whites went up, but African American turnout fell by somewhere between 5 and 10 percent.²⁹⁵ In North Carolina the African American share of the electorate fell from 23% in 2012 to just under 21% in 2016.²⁹⁶ Although preliminary numbers indicate that Latino turnout increased overall from 10% of the electorate in 2012 to 11% in 2016,²⁹⁷ it is entirely possible the turnout increase would have been even higher without the deterrent effect of restrictive voting laws. The 11% Latino share of the 2016 electorate is still far below their 17% share of the United States population overall,²⁹⁸ a data point that supports the findings of the Hajnal-Lajevardi-Nielson study that voter ID laws depress Latino turnout.

But even if we assume that restrictive voting laws only have a modest impact on turnout, why do the Republicans invest so much effort in them? The answer lies in the razor thin margin of American elections. Even laws that have only a modest dampening impact on voter turnout can have a decisive impact on election results. As Richard Hasen has explained, “The best argument against voter identification laws is not that they will have a large effect—they most likely won’t—but that such laws are unnecessary to prevent voter fraud, and in a

294. See Josh Chafetz, *Governing and Deciding Who Governs*, 2015 U. CHI. LEGAL F. 73, 104–05 n.169 (2015) (further noting that “the backlash, if it exists, is against precisely that valence”).

295. Nate Cohn, *How the Obama Coalition Crumbled, Leaving an Opening for Trump*, N.Y. TIMES (Dec. 23, 2016), <https://www.nytimes.com/2016/12/23/upshot/how-the-obama-coalition-crumbled-leaving-an-opening-for-trump.html>.

296. *Id.*

297. JENS MANUEL KROGSTAD & MARK HUGO LOPEZ, PEW RES. CTR., HILLARY CLINTON WON LATINO VOTE BUT FELL BELOW 2012 SUPPORT FOR OBAMA (2016), <http://www.pewresearch.org/fact-tank/2016/11/29/hillary-clinton-wins-latino-vote-but-falls-below-2012-support-for-obama/>.

298. JENS MANUEL KROGSTAD & MARK HUGO LOPEZ, PEW RES. CTR., HISPANIC POPULATION REACHES RECORD 55 MILLION, BUT GROWTH HAS COOLED (2015), <http://www.pewresearch.org/fact-tank/2015/06/25/u-s-hispanic-population-growth-surge-cools/>.

razor-thin election, we cannot dismiss the partisan ramifications of disenfranchising even a small number of voters for no good reason.”²⁹⁹

Even if the effects of voter identification laws and other voting restrictions are modest, there is disturbing evidence that the intent is discriminatory.³⁰⁰ Many academic studies have concluded that the new voting restrictions represent a Republican strategy to mitigate the political influence of minority voters aligned with the Democratic Party.³⁰¹ A new study by the political scientists Daniel Biggers and Michael Hanmer found that photo ID laws were mostly likely to be adopted in red states with large minority populations and in which Republicans had recently won control of both the legislature and the governor’s office.³⁰² A 2013 study by Keith Bentele and Erin O’Brien concluded that “the Republican Party has engaged in strategic demobilization efforts” with the result being that “the US, is actually changing voting procedures in a racialized and restraining fashion in the modern era—‘de-democratization’ along racial lines.”³⁰³ Likewise, citing the move to adopt photo ID laws in southern states, Nicholas O.

299. HASEN, *supra* note 166, at 88.

300. See Jason Kander, *There’s a Reason Trump Keeps Lying about Voter Fraud*, WASH. POST (Jan. 27, 2017), https://www.washingtonpost.com/opinions/theres-a-reason-trump-keeps-lying-about-voter-fraud/2017/01/27/8396adb4-e3ee-11e6-a453-19ec4b3d09ba_story.html?hpid=hp_no-name_opinion-card-c%3Ahomepage%2Fstory&utm_term=.b5565b97f6bb (“Today, it’s not that some GOP strategists don’t want black people, for example, to vote because they’re black — it’s just that they don’t want them to vote because they don’t usually vote for Republicans.”).

301. See William D. Hicks, Seth C. McKee, Mitchell D. Sellers & Daniel A. Smith, *A Principle or a Strategy? Voter Identification Laws and Partisan Competition in the American States*, 68 POL. RES. Q. 18 (2014). As the study’s authors explain:

[T]he Republican Party has proved incapable of expanding its appeal among the much faster growing minority electorate—which just so happens to exhibit notably lower turnout rates vis-à-vis the stagnant non-Hispanic white electorate that is more supportive of Republican candidates. Faced with this reality, the GOP appears to have opted for coalition maintenance instead of coalition expansion . . . by embracing several restrictive voting reforms whose true purpose is to marginally curtail the participation of voters typically aligned with the Democratic Party.

Id. at 29. See also Chafetz, *supra* note 294, at 104 (“Given the partisan makeup of the state governments that created these impositions on the right to vote, it should be no surprise that these provisions are most likely to affect groups that tend to vote Democratic.”); MINNITE, *supra* note 275, at 89 (stating that the “proliferation of unsupported fraud allegations” served to “veil a political strategy for winning elections by tamping down turnout among socially subordinate groups”); Joshua A. Douglas, *(Mis)Trusting States to Run Elections*, 92 WASH U. L. REV. 553, 556 (2015) (“[S]tates have increasingly enacted stricter election regulations, supposedly in the name of ‘election integrity,’ but more likely to gain partisan advantage for the ruling party.”).

302. Daniel R. Biggers & Michael J. Hanmer, *Understanding the Adoption of Voter Identification Laws in the American States*, 45 AMER. POL. RES. (forthcoming 2017), <http://journals.sagepub.com/doi/pdf/10.1177/1532673X16687266>.

303. Keith G. Bentele & Erin E. O’Brien, *Jim Crow 2.0? Why States Consider and Adopt Restrictive Voter Access Policies*, 11 PERSP. ON POL. 1088, 1089, 1090 (2013).

Stephanopoulos has observed, “Republicans’ political incentives point unambiguously toward the enactment of additional franchise restrictions.”³⁰⁴ The numbers would certainly seem to support such conclusions. For example, it is a striking fact that in the primarily Republican-controlled jurisdictions covered by the Voting Rights Act’s preclearance formula prior to the 2013 *Shelby County* decision, there were 868 fewer polling places in 2016 than 2012, with the impact felt most heavily in minority voting precincts.³⁰⁵

It is not just academic studies that find a partisan motive at work in the new voting restrictions. The federal courts have increasingly described the Republicans’ primary goal as to disenfranchise enough Democratic-supporting minority voters to tip a close election in the Republicans favor. For example, in July 2016, a federal judge concluded that the Wisconsin legislature’s restriction of in-person absentee voting was intended “to suppress the reliably Democratic vote of Milwaukee’s African Americans.”³⁰⁶ Similarly, the Fourth Circuit pointedly noted that the election law changes adopted by the Republican-controlled North Carolina legislature “target African Americans with almost surgical precision.”³⁰⁷

North Carolina provides a disturbing case study of partisan efforts to make it harder for minorities to vote.³⁰⁸ The day after the Supreme Court’s 2013 decision in *Shelby County v. Holder*, which struck down the VRA’s preclearance formula, the Republican-controlled North Carolina legislature announced its plan to implement sweeping election law changes.³⁰⁹ Before adopting the new law, the Republican

304. Nicholas O. Stephanopoulos, *The South After Shelby County*, 2013 SUP. CT. REV. 55, 60 (2013).

305. THE LEADERSHIP CONF. EDUC. FUND, THE GREAT POLL CLOSURE 4 (2016), <http://civilrightsdocs.info/pdf/reports/2016/poll-closure-report-web.pdf>; see also Dana Milbank, *The Election Really Was Rigged*, WASH. POST (Nov. 29, 2016), https://www.washingtonpost.com/opinions/the-election-really-was-rigged/2016/11/29/c2ed58d8-b666-11e6-a677-b608fbb3aaf6_story.html?tid=a_inl&utm_term=.594e8a7b3862 (describing increased incentive to suppress a growing minority vote).

306. *One Wis. Inst. v. Thomsen*, No. 15-cv-324-jdp, 2016 WL 4059222, at *3 (W.D. Wis. July 29, 2016).

307. *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 241 (4th Cir. 2016).

308. See Richard L. Hasen, *Race or Party?: How Courts Should Think About Republican Efforts to Make It Harder to Vote in North Carolina and Elsewhere*, 127 HARV. L. REV. F. 58, 63 (2014) (“Judged through a partisan lens then, North Carolina’s law is just the latest Republican attempt to skew the electorate at least moderately to gain electoral advantage.”).

309. See *N.C. State Conference*, 831 F.3d at 214 (observing that “on the day after the Supreme Court issued *Shelby County v. Holder*, . . . eliminating preclearance obligations, a leader of the party that newly dominated the legislature (and the party that rarely enjoyed African American support) announced an intention to enact what he characterized as an ‘omnibus’ election law”).

legislature studied the voting practices of African Americans and then adopted five different restrictions on voting and registration that uniquely impacted black Democrats, including a photo ID requirement, a ban on same day registration, and a truncated early voting period.³¹⁰ When a challenge to the law came before the Fourth Circuit in 2016, the federal appellate court concluded, “The only clear factor linking these various ‘reforms’ is their impact on African American voters. The record thus makes obvious that the ‘problem’ the majority in the General Assembly sought to remedy was emerging support for the minority party. Identifying and restricting the ways African Americans vote was an easy and effective way to do so.”³¹¹ The 4th Circuit struck down key provisions of the law, finding that the Republican legislature acted with discriminatory intent in violation of the Voting Rights Act.³¹² But Republican-controlled local election boards found alternative means to make voting harder for Democrats, such as cutting the number of early voting hours and locating early voting polling places in locations far removed from African Americans and college students, two core constituencies of the state’s Democratic Party.³¹³

Most remarkable of all, a senior Republican official in North Carolina frankly admitted the Republicans’ partisan motivations in adopting the new voting rules. After the Fourth Circuit’s ruling, Dallas Woodhouse, the executive director of the North Carolina Republican Party, emailed his fellow Republicans and urged them to “call your republican election board members and remind them that as partisan republican appointees they have [sic] duty to consider republican

310. *Id.* at 216–17; *see also id.* at 214 (“[T]he legislature requested data on the use, by race, of a number of voting practices. Upon receipt of the race data, the General Assembly enacted legislation that restricted voting and registration in five different ways, all of which disproportionately affected African Americans.”).

311. *Id.* at 238.

312. *Id.* at 215.

313. *See, e.g.,* Michael Wines, *Critics Say North Carolina Is Curbing Black Vote. Again.*, N.Y. TIMES (Aug. 30, 2016), <https://www.nytimes.com/2016/08/31/us/politics/election-rules-north-carolina.html> (“In a county where Democrats outnumber Republicans by better than two to one, and four in 10 voters are black, the election plan limits voting to a single weekend day, and on weekdays demands that residents, including those who are poor and do not own cars, make long trips to cast a ballot.”); Jeremy W. Peters, Richard Fausset & Michael Wines, *Black Turnout Soft in Early Voting, Boding Ill for Hillary Clinton*, N.Y. TIMES (Nov. 1, 2016), <https://www.nytimes.com/2016/11/02/us/politics/black-turnout-falls-in-early-voting-boding-ill-for-hillary-clinton.html> (“In North Carolina, where a federal appeals court accused Republicans of an ‘almost surgical’ assault on black turnout and Republican-run election boards curtailed early-voting sites, black turnout is down 16 percent.”); Jim Morrill, *Mecklenburg Elections Board Cuts Hours for Early Voting*, CHARLOTTE OBSERVER (Aug. 15, 2016), <http://www.charlotteobserver.com/news/politics-government/election/article95843437.html>.

points of view and that we support them as they ensure our elections are secure.”³¹⁴ He later defended the state’s restrictive laws on unabashedly partisan grounds. “Does anybody think that Democrats did not select early voting sites and set hours to advantage their voters over Republicans?” he asked.³¹⁵ “We are just attempting to rebalance the scales.”³¹⁶ Most remarkable of all, the North Carolina Republican Party issued a press release celebrating the decline in African American turnout and the increase in “Caucasian voters” in the 2016 election.³¹⁷

Regardless of the precise number of voters affected by the manipulation of election administration rules, the larger point is it is unhealthy for any democracy to allow incumbent parties to target voters of the opposition party through voting restrictions. The contrast between America’s approach to voting rights and that of other nations, such as Australia, is striking. Healthy democracies take steps to encourage all eligible voters to participate in elections. In Australia, for example, voting is mandatory and turnout rates routinely approach 100%.³¹⁸ But in the United States, where voting rights are hotly contested and the administrative burdens imposed on voters are rising, participation rates are comparatively low. The turnout rate for the presidential election was only 59% in 2016, which is typical for recent elections.³¹⁹ The unfortunate reality is in our current closely-divided political environment, where elections are often decided by a small margin and where a modest suppressing effect on turnout can be the difference between winning and losing, Americans partisans have a strong political incentive to discourage their opponents from showing up to vote. Consequently, while in countries like Australia election law is used to require all eligible voters to participate in elections, in the United States election law is used to make it harder for eligible voters to exercise their right to vote. The stark difference in approaches

314. E-mail from Dallas Woodhouse, Exec. Dir. of the N.C. Republican Party to N.C. Republicans (Aug. 17, 2016), <http://www.wral.com/full-email-sent-by-dallas-woodhouse/15938449/>.

315. Wines, *supra* note 313.

316. *Id.*

317. Emily Bazelon, *The Supreme Court Ruled That Voting Restrictions Were a Bygone Problem. Early Voting Results Suggest Otherwise.*, N.Y. TIMES MAG. (Nov. 7, 2016), <https://www.nytimes.com/2016/11/07/magazine/the-supreme-court-ruled-that-voting-restrictions-were-a-bygone-problem-early-voting-results-suggest-otherwise.html>.

318. Tim Evans, *Compulsory Voting in Australia*, AUSTRALIAN ELECTORAL COMMISSION (Jan. 16, 2006), http://www.aec.gov.au/About_Aec/Publications/voting/files/compulsory-voting.pdf.

319. *2016 November General Election Turnout Rates*, U.S. ELECTIONS PROJECT, <http://www.electproject.org/2016g>.

underscores the relative fragility of voting rights in the United States as compared to other western nations like Australia.

Ultimately, however, the greatest threat to voting rights in the United States stems not from the battle over voter identification laws, but rather in the brewing battle over voter registration lists.³²⁰ There is no doubt that the voter registration rolls are inaccurate and outdated. A 2012 Pew Center on the States study found that the states' voter registration lists include 24 million invalid or inaccurate registrations.³²¹ The reasons for the invalid and inaccurate registrations included voters who had had changed addresses, moved out of state, or died.³²² The problem lies in the state-based, paper-dependent American registration system, which is far less accurate and efficient than the centralized online voter registration system used in countries like Canada.³²³

Although the need to modernize the voter registration lists is clear, there is significant danger that partisan election officials could manipulate the registration process to disenfranchise voters on a scale far beyond strict photo identification laws. Even when done for benign purposes, the purging of voter registrations inherently involves huge numbers of voters. For example, in 2014 the states removed 14.8 million voters from voter registration lists on a variety of grounds, such as the voter's death or the fact that the voter had moved out of the state or district.³²⁴ But control of voter registration lists could be weaponized by partisans to conduct an overly broad purge of the lists. For the moment at least, the National Voter Registration Act (the "NVRA") requires states to provide fair notice before cancelling voter registrations.³²⁵ But the NVRA is merely a statute, which means to the extent it exceeds the Constitutional requirements of due process and equal protection, the

320. See, e.g., Strawbridge Robinson, *supra* note 19; Mark Joseph Stern, *Donald Trump's Vote Fraud Investigation Will Finish What the GOP Started*, SLATE (Jan. 25, 2017), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/01/donald_trump_s_vote_fraud_investigation_will_finish_what_the_gop_started.html (stating that Trump's voter fraud investigation "will primarily serve as pretext for an assault on voting rights at both the state and federal level").

321. PEW CTR. ON THE STATES, *supra* note 269, at 1.

322. *Id.* at 1–2.

323. Mackenzie Weinger, *Report: 1.8 million dead registered to vote*, POLITICO (Feb. 14, 2012), <http://www.politico.com/story/2012/02/report-18m-dead-registered-to-vote-072830>.

324. U.S. ELECTION ASSISTANCE COMM'N, THE 2014 EAC ELECTION ADMINISTRATION AND VOTING SURVEY COMPREHENSIVE REPORT: A REPORT TO THE 114TH CONGRESS 3 (June 30, 2015), https://www.eac.gov/assets/1/Page/2014_EAC_EAVS_Comprehensive_Report_508_Compliant.pdf.

325. 52 U.S.C. § 20507(d)(1)(B)(i).

NVRA could be amended to give states greater latitude to cancel voter registrations with less notice than is currently required. Such a change in the notice requirements could lead to a significant degree of voter disenfranchisement in states without same day registration. Only 14 states and the District of Columbia currently offer same-day registration.³²⁶ In the 36 states without same-day registration, voters who are wrongfully purged from registration lists might not discover the mistake until election day, at which point it would be too late to correct the error.

The Trump Administration's pledge to conduct a "full evaluation of voting rolls" is thus chilling.³²⁷ President Trump has made clear that purging the voting rolls will be a focus of his administration.³²⁸ The importance of the issue to Trump was reflected in his announcement that Vice President Mike Pence will lead the administration's "major investigation" of voter registration lists and state election administration policies.³²⁹ In an interview with FOX News, President Trump declared: "We can be babies, but you take a look at the registration, you have illegals, you have dead people, you have this, it's really a bad situation, it's really bad."³³⁰ He further explained that the

326. NAT'L CONF. OF STATE LEGISLATORS, SAME DAY VOTER REGISTRATION (Jan. 11, 2017), <http://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx>.

327. See, e.g., Mike DeBonis & Sari Horwitz, *In private meeting, Pence vows 'full evaluation of voting rolls' over claims of fraud*, WASH. POST (Jan. 27, 2017), https://www.washingtonpost.com/powerpost/in-private-meeting-pence-vows-full-evaluation-of-voting-rolls-over-claims-of-voting-fraud/2017/01/27/1c1fa1de-e49a-11e6-a547-5fb9411d332c_story.html?utm_term=.14f42954b55d&wpisrc=al_alert-COMBO-politics%252Bnation; Ben Jacobs & Sam Levin, *Mike Pence: Trump administration planning 'full evaluation' of voter fraud*, GUARDIAN (Jan. 27, 2017), <https://www.theguardian.com/us-news/2017/jan/26/trump-administration-voter-fraud-investigati-on-mike-pence>; Jenna Johnson & David Nakamura, *Trump to sign executive order related to voter fraud*, WASH. POST (Jan. 26, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/01/26/trump-to-sign-executive-order-related-to-voter-fraud/?utm_term=.ae1f30e6a3b3&wpisrc=nl_politics-pm&wpmm=1.

328. See Reena Flores, *Trump taps Mike Pence to lead panel investigating mass voter fraud*, CBS NEWS (Feb. 5, 2017), <http://www.cbsnews.com/news/trump-taps-mike-pence-to-lead-panel-investigating-mass-voter-fraud/> ("When you look at the registration and you see dead people that have voted, when you see people that are registered in two states, that have voted in two states, when you see other things, when you see illegal people that are not citizens and they are on the registration roles – look, Bill, we can be babies, but you take a look at the registration, you have illegals, you have dead people you have this, it's really a bad situation, it's really bad.").

329. See, e.g., Josh Gerstein, *Trump's call for election-fraud probe fraught with peril*, POLITICO (Jan. 25, 2017), <http://www.politico.com/story/2017/01/trump-voter-fraud-234183>; Rebecca Savransky, *Trump to ask for 'major investigation into voter fraud'*, HILL (Jan. 25, 2017), <http://thehill.com/homenews/administration/316006-trump-to-ask-for-major-investigation-into-voter-fraud>; Alan Yuhas, *Pence to head commission investigating baseless voter fraud claim, Trump says*, GUARDIAN (Feb. 5, 2017), <https://www.theguardian.com/us-news/2017/feb/05/donald-trump-mike-pence-commission-voter-fraud>.

330. Yuhas, *supra* note 329.

Pence Commission would scrutinize voting registration records across the country “very, very carefully.”³³¹ Trump has already gone on the record to express his skepticism of the value of early voting,³³² an apparent signal to Republican election officials to curtail the practice that minority voters disproportionately rely on. But a politically-motivated purge of voting rolls would represent a dramatic and destabilizing escalation of the voting wars. Although the ultimate scope of the Pence Commission remains unclear, its potential for engaging in political mischief is enormous.³³³ The Republican majorities in the House and Senate give the Trump Administration a potential opportunity to amend the NVRA to water down the act’s notice provisions. And even within the framework of the NVRA’s current protections, partisans may be emboldened by the Pence Commission to only offer the most minimal notice of cancelled registrations.

If democratic norms regarding the maintenance of voting registration lists break down, and partisans use their control over registration to systematically disenfranchise eligible voters, the ramifications for American democracy would be severe. Escalation and retaliation would be inevitable. Indeed, registration purges could be done by Democrats as easily as Republicans. Hyperpolarization has already led both parties to see the partisan battle in existential terms.³³⁴ Democratic leaders have described Trump as an “illegitimate president”³³⁵ and recent polls find that many Democrats see Trump as a bigger threat to the nation than terrorism, unemployment, or racism.³³⁶ In such a bitter and confrontational political atmosphere,

331. *Id.*

332. Ben Kamisar, *Trump questions merits of early voting*, HILL (Dec. 9, 2016), <http://thehill.com/homenews/administration/309738-trump-questions-merits-of-early-voting>.

333. See Bob Bauer, *The Pence Commission on Voting Fraud*, MORE SOFT MONEY HARD LAW (Feb. 8, 2017), <http://www.moresoftmoneyhardlaw.com/2017/02/pence-commission-voting-fraud/> (“President Trump’s arrangement for an inquiry into election voting fraud is fatally compromised by political self-interest.”).

334. See, e.g., Bob Bauer, *Political Reform in an Era of “Existential Politics,”* MORE SOFT MONEY HARD LAW (Feb. 28, 2017), <http://www.moresoftmoneyhardlaw.com/2017/02/political-reform-era-existential-politics/>; Richard Pildes, *When Politics Becomes Existential*, ELECTION LAW BLOG (Feb. 26, 2017), <https://electionlawblog.org/?p=91331>.

335. Aaron Blake, *John Lewis says Donald Trump isn’t a legitimate president, and Trump hits back hard*, WASH. POST (Jan. 13, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/01/13/john-lewis-doesnt-think-donald-trump-is-a-legitimate-president/?utm_term=.136177b53249.

336. PEW RES. CTR., ON EVE OF INAUGURATION, AMERICANS EXPECT NATION’S DEEP POLITICAL DIVISIONS TO PERSIST (2017), <http://www.people-press.org/2017/01/19/on-eve-of-inauguration-americans-expect-nations-deep-political-divisions-to-persist/#health-care-economy-racism-among-top-national-problems>.

Democrats may be just as inclined as Republicans to attempt to disenfranchise the opposing party's base voters. Moreover, the self-sorting of the country geographically makes it just as easy to identify likely Republican voters as it is to identify likely Democratic voters, since the Republican base is now primarily made up of rural³³⁷ and blue-collar whites.³³⁸ The geographically concentrated nature of the two parties would permit Democratic-controlled legislatures to target likely Republican voters just as North Carolina Republicans targeted African American voters in 2016.³³⁹ The risk posed by partisan manipulation of voting rolls is thus quite high and deeply disconcerting.

But the danger is not limited to voting rights. The voting wars present an even broader threat to America's democratic institutions as a whole.

C. *Undermined Democratic Institutions*

Partisan-inspired voting restrictions may make the difference in close elections, but do they really represent a long-term threat to America's democratic institutions? There are troubling trend-lines that suggest the answer is yes. As Fareed Zakaria recently warned in the wake of President Trump's voter fraud allegations, the United States is in danger of becoming an "illiberal democracy,"³⁴⁰ a nation that holds elections but systematically violates the political and civil rights of those who oppose the party in power.³⁴¹ For at least the past decade, surveys have consistently found that Americans view their political system with a profound and rising degree of negativity.³⁴² In a 2007 book on the subject, Zakaria observed that "if current trends continue, democracy will undoubtedly face a crisis of legitimacy, which could prove crippling."³⁴³ Hyperpolarization has made the situation significantly worse today. New research by the political scientists

337. Lazaro Gamio, *Urban and rural America are becoming increasingly polarized*, WASH. POST (Nov. 17, 2016), <https://www.washingtonpost.com/graphics/politics/2016-election/urban-rural-vote-swing>.

338. See, e.g., Cohn, *supra* note 295; Jim Tankersley, *How Trump won: The revenge of working-class whites*, WASH. POST (Nov. 9, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/11/09/how-trump-won-the-revenge-of-working-class-whites/?utm_term=.e127a5d60ab.

339. See, e.g., Bazelon, *supra* note 317; Michael Wines, *supra* note 313.

340. Zakaria, *supra* note 8.

341. Dani Rodrik & Sharun Mukand, *Why Illiberal Democracies Are on the Rise*, WORLD POST (May 17, 2016), http://www.huffingtonpost.com/dani-rodrik/illiberal-democracies-on-the-rise_b_7302374.html.

342. See ZAKARIA, *supra* note 9, at 24–25 ("Americans have a lower regard for their political system than ever before.").

343. *Id.* at 255.

Roberto Stefan Foa and Yascha Mounk suggests that the risk of America evolving into an illiberal democracy is much higher than is generally understood. In a study published in the *Journal of Democracy* in January 2017, they found that Americans are increasingly disenchanted with liberal democratic norms.³⁴⁴ According to Foa and Mounk, Americans and citizens of other western democracies “are growing more disaffected with established political parties, representative institutions, and minority rights.”³⁴⁵ They are even “increasingly open to authoritarian interpretations of democracy.”³⁴⁶

Donald Trump epitomizes the rejection of liberal democratic norms, such as respect for the rule of law and minority voting rights. To a degree without precedent in American history,³⁴⁷ he has challenged the integrity and legitimacy of the federal judiciary, the branch of government best positioned to adjudicate election law disputes in a neutral and objective fashion.³⁴⁸ For example, during the 2016 campaign Trump claimed that the federal judge presiding over Trump’s civil fraud trial was biased against him because the judge, who was born in Indiana, was of Mexican-American heritage.³⁴⁹ Republican House Speaker Paul Ryan condemned Trump’s attack on the judge as “the textbook definition of a racist comment.”³⁵⁰ But Trump has not backed down from his challenge to the federal judiciary’s independence. After a federal court enjoined the Trump administration’s effort to ban refugees from seven Muslim countries, President Trump condemned the federal judge, describing him as a “so-called judge” and accusing

344. Roberto Stefan Foa & Yascha Mounk, *The Signs of Deconsolidation*, 28 J. OF DEMOCRACY 5, 5 (2017).

345. *Id.* at 6.

346. *Id.*

347. Jeffrey Rosen, *Not Even Andrew Jackson Went as Far as Trump in Attacking the Courts*, THE ATLANTIC (Feb. 9, 2017), <https://www.theatlantic.com/politics/archive/2017/02/a-historical-precedent-for-trumps-attack-on-judges/516144>.

348. See, e.g., Peter Baker, *Trump Clashes Early With Courts, Portending Years of Legal Battles*, N.Y. TIMES (Feb. 5, 2017), <https://www.nytimes.com/2017/02/05/us/politics/donald-trump-mike-pence-travel-ban-judge.html>; Thomas Fuller, *‘So-Called’ Judge Criticized by Trump Is Known as a Mainstream Republican*, N.Y. TIMES (Feb. 4, 2017), <https://www.nytimes.com/2017/02/04/us/james-robart-judge-trump-ban-seattle.html>.

349. See, e.g., Jose A. DelReal & Katie Zezima, *Trump’s personal, racially tinged attacks on federal judge alarm legal experts*, WASH. POST (June 1, 2016), https://www.washingtonpost.com/politics/2016/06/01/437ccea6-280b-11e6-a3c40724e8e24f3f_story.html?utm_term=.47281a62dcd3; Hanna Trudo, *Trump escalates attack on ‘Mexican’ judge*, POLITICO (June 2, 2016), <http://www.politico.com/story/2016/06/donald-trump-judge-gonzalo-curiel-223849>.

350. Jennifer Steinhauer, Jonathan Martin & David M. Herszenhorn, *Paul Ryan Calls Donald Trump’s Attack on Judge ‘Racist,’ but Still Backs Him*, N.Y. TIMES (June 7, 2016), https://www.nytimes.com/2016/06/08/us/politics/paul-ryan-donald-trump-gonzalo-curiel.html?_r=0.

the judge of taking “law enforcement away from our country.”³⁵¹ Trump’s pattern of impeaching the integrity of the judges who rule against him encourages his supporters to question the legitimacy of all government institutions, which is a profoundly dangerous development for any democracy.

Even more disturbing, Trump has stoked fear of minorities among his supporters by falsely claiming that illegal immigrants are voting in American elections by the millions. In the process, Trump has fostered an environment in which his supporters openly advocate disenfranchising whole categories of American voters. For example, Trump supporter and conservative columnist Ann Coulter has insinuated that voting rights should be limited to only those citizens who have four American-born grandparents.³⁵² On the eve of the 2016 election she tweeted, “If only people with at least four grandparents born in America were voting, Trump would win in a fifty state landslide.”³⁵³ Ironically, Trump’s mother was born in Scotland and his paternal grandfather was born in Germany, which would render him ineligible to exercise suffrage rights under Coulter’s proposal.³⁵⁴ But the larger point was that some of Trump’s most prominent and influential supporters openly question whether all Americans deserve the right to participate in American democracy.

It is not just Trump’s most vitriolic supporters who propose disenfranchising whole classes of Americans. President Trump himself has called for an end to birthright citizenship, a measure that potentially could disenfranchise a huge number of Americans.³⁵⁵ Over twenty million American adults and sixteen million American children

351. See, e.g., Thomas Fuller, ‘So-Called’ Judge Criticized by Trump Is Known as a Mainstream Republican, N.Y. TIMES (Feb. 4, 2017), <https://www.nytimes.com/2017/02/04/us/james-robart-judge-trump-ban-seattle.html>; Amy B. Wang, Trump lashes out at ‘so-called judge’ who temporarily blocked travel ban, WASH. POST, (Feb. 4, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/02/04/trump-lashes-out-at-federal-judge-who-temporarily-blocked-travel-ban/?utm_term=.148fe988e02b.

352. Cleve Wootson, Ann Coulter’s ‘grandparent’ argument would exclude Trump from voting, WASH. POST (Nov. 8, 2016), https://www.washingtonpost.com/politics/2016/live-updates/general-election/real-time-updates-on-the-2016-election-voting-and-race-results/ann-coulter-grandparent-argument-would-exclude-trump-from-voting/?utm_term=.d8ad4b6c745f.

353. Philip Bump, Dear Ann Coulter: Just say you only want white people to vote, WASH. POST (Nov. 8, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/11/08/dear-ann-coulter-just-say-you-only-want-white-people-to-vote/?tid=sm_tw&utm_term=.fa4a10bf800d.

354. *Id.*

355. Max Ehrenfreund, Understanding Trump’s plan to end citizenship for undocumented immigrants’ kids, WASH. POST (Aug. 17, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/08/17/understanding-trumps-plan-to-end-citizenship-for-undocumented-immigrants-kids/?utm_term=.1cd8f2f7c147.

have at least one foreign-born parent³⁵⁶ and the numbers are growing.³⁵⁷ In addition, about 4.5 million American children have at least one undocumented immigrant parent.³⁵⁸ The idea of stripping citizenship rights from children born to unauthorized immigrants dates to the very beginning of Trump's presidential campaign. In his campaign announcement address in 2015, he declared his opposition to the automatic award of citizenship to children born in the United States.³⁵⁹ Many scholars believe that Trump's position contradicts the Fourteenth Amendment, which provides that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."³⁶⁰ It would thus likely take more than unilateral action by the president to end birthright citizenship. But notwithstanding the constitutional hurdles that Trump's proposal may face, the simple fact that he would like to see an end to birthright citizenship is highly revealing. It reflects his broader agenda to reduce the number of Americans allowed to participate in democratic self-government.

Trump's voter fraud crusade also risks politicizing the Justice Department. The last time a president used the Justice Department to launch a voter fraud investigation the results undermined the credibility of the nation's top law enforcement officials.³⁶¹ In 2002 the Bush Administration's nationwide investigation into allegations of voter fraud ultimately led to only 86 convictions for election-related crimes out of hundreds of millions of votes cast.³⁶² Five years Attorney

356. PEW RES. CTR., *SECOND-GENERATION AMERICANS: A PORTRAIT OF THE ADULT CHILDREN OF IMMIGRANTS* (2013), <http://www.pewsocialtrends.org/2013/02/07/second-generation-americans>.

357. D'VERA COHN, PEW RES. CTR. *FUTURE IMMIGRATION WILL CHANGE THE FACE OF AMERICA BY 2065* (2015), <http://www.pewresearch.org/fact-tank/2015/10/05/future-immigration-will-change-the-face-of-america-by-2065>.

358. Philip Bump, *How many American children are 'birthright' citizens born to illegal immigrants?*, WASH. POST (Aug. 20, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/08/20/how-many-children-born-to-undocumented-immigrants-are-there-in-the-us/?utm_term=.05105c4b102a.

359. Tal Kopan, *Birthright citizenship: Can Donald Trump change the Constitution?*, CNN (Aug. 18, 2015), <http://www.cnn.com/2015/08/18/politics/birthright-citizenship-trump-constitution>.

360. U.S. CONST. amend. XIV, § 1.

361. Michael Waldman, *Voting Fraud Inquiry? The Investigators Got Burned Last Time*, N.Y. TIMES (Jan. 26, 2017), https://www.nytimes.com/2017/01/26/opinion/voting-fraud-inquiry-the-investigators-got-burned-last-time.html?_r=0.

362. See, e.g., ADAM GITLIN & WENDY R. WEISER, BRENNAN CTR. FOR JUST., *THE JUSTICE DEPARTMENT'S VOTER FRAUD SCANDAL: LESSONS*, 3 (Jan. 6, 2017), https://www.brennancenter.org/sites/default/files/publications/Justice_Department_Voter_Fraud_Scandal_Lessons.pdf; Prepared Remarks of Attorney General John Ashcroft Voting Integrity Symposium, (Oct. 8,

General Alberto Gonzales was forced to resign when evidence came to light that the Bush Administration may have fired 3 U.S. Attorneys for refusing to bring politically-motivated voter fraud cases.³⁶³ A 2008 report by the Inspector General concluded that the Justice “Department’s removal of the U.S. Attorneys and the controversy it created severely damaged the credibility of the Department and raised doubts about the integrity of Department prosecutive decisions.”³⁶⁴ Now Trump wants to launch a new voter fraud investigation, only this time it will be headed by the vice president.³⁶⁵ If the Bush experience is any guide, Trump’s voter fraud investigation poses a serious threat to the independence and impartiality of the Justice Department.

If Trump were a defeated candidate, his irresponsible statements about systemic voter fraud could be written off as sour grapes and their effects would be lessened with the passage of time. But Trump is launching his attacks from the White House. He holds the most powerful office in the American system of government, which means his false claims of voting fraud generate nationwide attention and build apprehension among his supporters that minority voters represent a threat to democracy. As the highly respected Washington Post journalist Dan Balz has recently warned, “Trump is now striking at the foundation of a democratic society.” Trump’s claim that millions voted illegally in 2016, Balz notes, “is either a deliberate attempt to undermine faith in the democratic process, an exhortation to those who favor new restrictions on access to the ballot box or the worrisome trait of someone with immense power willing to make wild statements without any credible evidence.”³⁶⁶ Similarly, Michael Waldman of the Brennan Center for Justice has observed of Trump’s voter fraud claims, “The president of the United States is peddling conspiracy theories that undermine our democracy for political gain.”³⁶⁷ Even Republican Senator Lindsay Graham of South Carolina has warned that Trump’s

2002), <https://www.justice.gov/archive/ag/speeches/2002/100802ballotintegrity.htm>.

363. GITLIN & WEISER, *supra* note 362 at 1, 3–5.

364. OFF. OF THE INSPECTOR GEN. & OFF. OF PROF’L RESP., U.S. DEP’T OF JUST., AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006 358 (2008), <https://oig.justice.gov/special/s0809a/final.pdf>.

365. Alan Yuhas, *Pence to head commission investigating baseless voter fraud claim, Trump says*, GUARDIAN (Feb. 5, 2017), <https://www.theguardian.com/us-news/2017/feb/05/donald-trump-mike-pence-commission-voter-fraud>.

366. Dan Balz, *Trump’s voter fraud claims undermine the democratic process and his presidency*, WASH. POST (Jan. 25, 2017), https://www.washingtonpost.com/politics/trumps-voter-fraud-claims-undermine-the-voting-system-and-his-presidency/2017/01/24/a71d58ee-e288-11e6-a453-19ec4b3d09ba_story.html?utm_term=.1e106029896c&wpisrc=nl_daily202&wpm=1.

367. Waldman, *supra* note 361.

reckless claims of voter fraud undermined public “faith in our democracy.”³⁶⁸

The situation is already quite disturbing but it could get far worse. In the event of a national crisis before the 2018 or 2020 elections—such as a war or a major terrorist attack—Trump has given every indication that his crisis-time leadership will be well outside America’s historical norms. During the Civil War and the world wars America continued to hold elections. But there is no guarantee that Trump would honor those traditions. He has thus far shown a stunning lack of regard for America’s democratic institutions. It is therefore all too conceivable that Trump might attempt to cancel or postpone a wartime election on national security grounds. It is also within the realm of possibility that Trump might attempt to direct Republican election administrators to remove from the voting rolls anyone suspected of “disloyalty” to the government. In short, anything seems possible under President Trump, a man who has lavished praised on Vladimir Putin, Russia’s authoritarian ruler.³⁶⁹

Most worrisome of all, the concentration of power in the presidency gives Trump immense capacity to threaten America’s democratic institutions. In the 1970s Arthur Schlesinger Jr. warned that the constitutional limitations on the presidency had gradually given way to an “imperial presidency” with virtually unlimited power over foreign affairs.³⁷⁰ In recent years the powers of the presidency have expanded even further. In 2010 Bruce Ackerman warned that the powers concentrated in the presidency could “make it into a vehicle for demagogic populism and lawlessness in the century ahead.”³⁷¹ Trump’s

368. Jennifer Calfas, *Graham to Trump: Stop alleging voter fraud*, HILL (Jan. 24, 2017), <http://thehill.com/blogs/blog-briefing-room/news/315832-graham-to-trump-stop-lying-about-voter-fraud>.

369. Trump’s long history of admiring, praising and defending Putin is too long to list here, but some representative samples include Jeremy Diamond, *Donald Trump lavishes praise on ‘leader’ Putin*, CNN (Dec. 18, 2015), <http://www.cnn.com/2015/12/18/politics/donald-trump-praises-defends-vladimir-putin>; John Harwood, *Donald Trump’s Admiration of Putin’s Ruthless Use of Power*, N.Y. TIMES (Sept. 13, 2016), <https://www.nytimes.com/2016/09/14/us/politics/donald-trump-vladimir-putin.html>; Louis Nelson, *Trump tweets praise of Putin: ‘I always knew he was very smart!’*, POLITICO (Dec. 30, 2016), <http://www.politico.com/story/2016/12/donald-trump-praises-vladimir-putin-tweet-233072>; Sophie Tatum, *Trump defends Putin: ‘You think our country’s so innocent?’*, CNN (Feb. 6, 2017), <http://www.cnn.com/2017/02/04/politics/donald-trump-vladimir-putin>.

370. See ARTHUR SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* viii (1973) (“The constitutional Presidency . . . has become the imperial Presidency.”).

371. BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 4 (2010).

campaign rhetoric as well as his conduct in office make Ackerman's warning disturbingly prophetic.

The United States may be one of the world's oldest democracies, but the institutions that undergird American democracy face an extraordinary challenge in the twenty-first century. The national mood is volatile and intensely polarized along partisan and racial lines. The president of the United States is falsely spreading fear that the election system is rigged. Public confidence has fallen sharply in the integrity of the election system and even in the liberal democratic values that the system is founded upon. There is simply no precedent in modern American history for the uniquely dangerous situation the nation currently finds itself in. The long-term ramifications for the nation's democratic institutions are unknowable, but the risk that the nation will evolve into an illiberal democracy is all too clear.

III. STEPS TO DEFEND AND PRESERVE AMERICAN DEMOCRACY

Democratic values form the bedrock foundation of modern American society. But amid the toxic political atmosphere of early twenty-first century America, the principles that sustain American democracy are in jeopardy. At a minimum, therefore, three steps are critically necessary to defend voting rights and preserve America's democratic institutions at this dangerous moment in our history.

A. *Nonpartisan Election Administration*

An election is only fair if it is administered in a neutral, unbiased way. Accordingly, in an ideal world, all aspects of federal and state election administration would be placed in the hands of nonpartisan officials who are accountable to courts, not legislatures. As Daniel Tokaji has argued, "[t]he most important institutional reform is the development of state election management bodies that are insulated from partisan politics."³⁷² Amid intense hyperpolarization, the long-standing practice of partisan election administration is neither wise nor sensible. It is simply unrealistic to expect partisan elected officials to serve as unbiased referees in the hotly contested atmosphere of contemporary American politics. Richard Hasen put it well when he observed that "the people running our elections should not have a vested interest in their outcome."³⁷³ The public agrees. Surveys have

372. Tokaji, *supra* note 159, at 144.

373. Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election*

found that at least 66% of Americans want non-partisan officials to administer elections.³⁷⁴ Ironically, therefore, in this era of hyperpolarization, the principle of non-partisan election administration is one of the few public policy issues that elicits a broad consensus of bipartisan support.

There are no shortages of models that the federal and state governments could look to for guidance. Australia and Canada both offer examples of major western democracies that rely on nonpartisan administration of national and local elections.³⁷⁵ Their experience makes clear that nonpartisan election administration is both achievable and desirable. The common theme is they both rely on independent electoral commissions,³⁷⁶ which takes politicians completely out of the business of running elections.

As America's neighbor and close ally, Canada provides the most instructive foreign example. Under Canadian law, all federal and provincial redistricting (which Canadians call "redistribution") is done by independent commissions.³⁷⁷ At the federal level, responsibility for the administration of Parliamentary elections is assigned to the Chief Electoral Officer, an independent, non-partisan government office appointed by unanimous consent of the House of Commons.³⁷⁸ Canada's commitment to nonpartisan election administration is so deep that Canadian law prohibits the Chief Electoral Officer from voting in federal elections.³⁷⁹ The Chief Electoral Officer oversees Elections Canada, which administers federal elections, and the CEO makes a post-election report to Parliament of recommendations for the improvement of election administration nationwide.³⁸⁰ Canada also has a federally-maintained national voter list, the National Register of Electors, which is computerized and fully integrated with other government agencies to ensure its accuracy.³⁸¹ In addition, each of

Administration to Avoid Electoral Meltdown, 62 WASH. & LEE L. REV. 937, 974 (2005).

374. Tokaji, *supra* note 159, at 132.

375. ELECTIONS CANADA, COMPARATIVE ASSESSMENT OF CENTRAL ELECTORAL AGENCIES (2014), <http://www.elections.ca/content.aspx?section=res&dir=rec/tech/comp&document=p4&lang=e>.

376. Tokaji, *supra* note 159, at 138.

377. Gaughan, *supra* note 257, at 1049–56.

378. Jean-Pierre Kingsley, *The Administration of Canada's Independent, Non-Partisan Approach*, 3 ELECTION L.J. 406, 406 (2004).

379. *Id.*

380. *Id.* at 408.

381. *Id.* at 408–09.

Canada's 10 provinces have a chief provincial electoral officer of their own.³⁸²

Canada's reliance on nonpartisan election administration correlates with far higher voter registration levels than those found in the United States. Whereas only 76% of eligible American citizens are registered to vote, 93% of eligible Canadian citizens are registered to vote.³⁸³ Furthermore, Canada's independent restricting commissions ensure that Parliamentary districts—known as ridings—have lines drawn in a non-partisan fashion to promote political competition. As the Canadian political scientist John Courtney has explained, the adoption of independent election commissions is “one of the democratic advances of the last half-century in Canadian political institutions” and they are “widely seen as fair, nonpartisan, and independent bodies.”³⁸⁴

There are a few models closer to home as well, although on a much more modest and limited scale. Iowa's nonpartisan redistricting process is a case in point. Iowa state law provides that “[n]o district shall be drawn for the purpose of favoring a political party, incumbent legislator or member of Congress, or other person or group, or for the purpose of augmenting or diluting the voting strength of a language or racial minority group.”³⁸⁵ To that end, Iowa has established the Legislative Services Agency, a non-partisan agency tasked with drawing Iowa's legislative and congressional district lines in a neutral, non-partisan manner.³⁸⁶ A handful of other states have adopted independent commissions for redistricting, including Arizona and California.³⁸⁷ Importantly, however, Arizona, California, and Iowa only use nonpartisan approaches for redistricting. Other features of election administration in those states remain under partisan control.

Nonpartisan redistricting such as is practiced in Iowa is a good start, but the principles of nonpartisanship must be extended to all aspects of election administration. Scholars have offered a number of promising

382. See, e.g., GREG ESSENSA, ELECTIONS ONTARIO STRATEGIC PLAN, 2013-2017 2-3 (2014), [http://www.elections.on.ca/content/dam/NGW/sitecontent/2014/reports/Strategic%20Plan%20\(2013-2017\).pdf](http://www.elections.on.ca/content/dam/NGW/sitecontent/2014/reports/Strategic%20Plan%20(2013-2017).pdf).

383. PEW CTR. ON THE STATES, *supra* note 269, at 2, 3, 8.

384. JOHN C. COURTNEY, ELECTIONS 71 (2004).

385. IOWA CODE § 42.4(5).

386. ED COOK, LEGIS. SERVS. AGENCY, LEGISLATIVE GUIDE TO REDISTRICTING IN IOWA 2, 20 (2007), <https://www.legis.iowa.gov/docs/Central/Guides/redist.pdf>.

387. ROYCE CROCKER, CONG. RES. SERV., R42831, CONGRESSIONAL REDISTRICTING: AN OVERVIEW 17-18 (2012).

options to do precisely that. For example, Edward Foley has proposed creating a system of separate electoral powers modeled on the Constitution's separation of substantive government powers.³⁸⁸ In separating electoral from substantive government powers, Foley recommends creating three specialized electoral institutions: an electoral assembly, an electoral executive, and an electoral judiciary.³⁸⁹ In a similar vein, Christopher Elmendorf has argued for the use of a permanent advisory committee empowered to draft legislation and submit bills for approval by the legislature or by the people through a popular referendum.³⁹⁰ Richard Hasen has advocated for the creation of chief electoral officers in the states on the model of the Canadian and Australian systems.³⁹¹ As a further safeguard against partisanship, Hasen has recommended that the chief electoral officers be appointed by the respective state governors and confirmed by a supermajority of the respective state legislatures, thus insuring that both parties have a role in the selection of a truly nonpartisan chief electoral officer.³⁹² And Heather Gerken has proposed the systematic ranking of the quality of state election administration in order to create public pressure on states that perform poorly.³⁹³

As a matter of law and policy, all of those proposals have great merit. Although the Constitution assigns responsibility for election law administration to legislative bodies, there is no constitutional barrier that prevents Congress and the state legislatures from investing nonpartisan agencies with the authority to administer elections. In fact, the Elections Clause of the U.S. Constitution gives Congress the power to regulate the terms of federal elections, including requiring that the states adopt nonpartisan administration of federal elections.³⁹⁴ The Elections Clause states that:

388. Edward B. Foley, *The Separation of Electoral Powers*, 74 MONT. L. REV. 139, 140 (2013).

389. *Id.* at 147.

390. See Christopher S. Elmendorf, *Representation Reinforcement Through Advisory Commissions: The Case of Election Law*, 80 N.Y.U. L. REV. 1366, 1371 (2005) (“I argue that a permanent advisory commission, authorized to place its concerns on the legislature’s agenda or a referendum ballot, and positioned to compete with legislators for the voters’ trust, could substantially impede political insiders’ efforts to hamstring would-be challengers.”).

391. Hasen, *supra* note 373, at 983.

392. *Id.* at 984.

393. See HEATHER K. GERKEN, *THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT* 5 (2009) (“[W]e should create a Democracy Index that ranks states and localities based on election performance. . . . The Index would tell voters not only whether things are working in their own state, but how their state compares to its neighbors.”).

394. See *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2253–54 (2013); see also *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2670 (2015).

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, except as to the places of choosing Senators.³⁹⁵

The Supreme Court has interpreted the clause as giving Congress sweeping authority over the conduct of federal elections. As the Court recently reiterated, “The power of Congress over the ‘Times, Places and Manner’ of congressional elections ‘is paramount, and may be exercised at any time, and to any extent which it deems expedient.’”³⁹⁶ If Congress wanted to take action to promote nonpartisan election administration, it has the unquestioned constitutional authority to do so, at least with regard to federal elections.

Nevertheless, despite public support for the idea, the adoption of nonpartisan election administration is simply not on the horizon. Since the late eighteenth century, incumbent politicians have zealously exercised their power over election administration to gain political advantage over the party out of power. Support for reform is thus chronically confined to whichever party is the minority party at a given moment. It is a classic Catch 22 situation: the only party that has an incentive to see nonpartisan election administration adopted is the party out of power, but the very fact that it is the minority party makes it powerless to effect change. Moreover, the minority party immediately loses interest in reforming the system the moment it becomes the majority party.

The decentralized nature of the American election system poses additional obstacles to reform. Although the Elections Clause gives Congress plenary authority over federal elections, Congress has chosen to delegate election administration to the states. Consequently, the United States has a deeply decentralized election system in which the states and local governments have a commanding role in the administration of both federal and state elections.³⁹⁷ America’s long-standing commitment to federalism, which dates back to the

395. U.S. CONST. art I, § 4.

396. *Inter Tribal Council*, 133 S. Ct. at 2253–54.

397. See Nathaniel Persily, “Celebrating” the Tenth Anniversary of the 2000 Election Controversy: What the World Can Learn from the Recent History of Election Dysfunction in the United States, 44 IND. L. REV. 85, 85 (2010) (“The first glaring institutional feature evident to even the most casual observer of the U.S. electoral system is the extreme decentralization of administrative responsibilities and policymaking.”); Justin Weinstein-Tull, *Election Law Federalism*, 114 MICH. L. REV. 747, 752–53 (2016).

Constitution itself, is not something that will be easily dislodged.³⁹⁸ A shift to non-partisan administration will likely require that individual states take action on their own to embrace principles of neutrality in election administration. Thus, as Edward Foley has argued, the first step in achieving structural reform of the American political system is to take a long-term view.³⁹⁹ He advocates the creation of a bipartisan commission to propose constitutional reforms that take effect decades after the current generation of politicians have retired.⁴⁰⁰ As Foley explains, “It might seem frustrating to have to wait fifty years to implement a reform that people today, if they set aside self-interest, would recognize as benefiting the public. But the basic point is that without the mechanism of long-term implementation delay, the reform will not be adopted at all. Waiting fifty years, then, is better than never.”⁴⁰¹ Indeed, the unfortunate reality is that it will take years and quite possibly decades to accomplish the goal of nonpartisan election administration on a nationwide basis.

Accordingly, in the short and medium term, the integrity and fairness of American election administration depends on the courts. Now more than ever, the state and federal court systems operate as the last line of defense for democratic principles and voting rights in this poisonous political era.

B. *Carolene Products Inspired Courts*

The Supreme Court has long recognized the danger posed to democracy by self-interested legislators controlling the election administration process. In the famous footnote four of *Carolene Products*, the Supreme Court suggested that “more exacting judicial scrutiny” may be appropriate when legislatures insulate incumbents from the political process and where “discrete and insular minorities” are discriminated against.⁴⁰² The state and federal courts hearing voting rights cases today must take particular heed of such warnings amid the

398. See Kropf & Kimball, *supra* note 174, at 109–10 (“Federal legislation to say all the states must have a non-partisan chief election officer who appoints all the officials is counter to the political culture of federalism in our country.”).

399. Edward B. Foley, *The Posterity Project: Developing a Method for Long-Term Political Reform*, OKLA. L. REV. 1, 4 (2013) (“The only possible solution is to shift gears and adopt a long-term perspective.”).

400. See *id.* (proposing the creation of a “new Posterity Project designed to develop a series of specific amendments to the United States Constitution”).

401. *Id.*

402. *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938).

dangerous excesses of extreme partisanship and widespread false allegations of election fraud.

The independent nature of the judiciary makes its role in policing election administration disputes absolutely indispensable. Although both the state and federal judiciaries serve as a bulwark for protecting constitutional freedoms, the federal courts in particular have a special responsibility to defend the integrity of the democratic system from partisan attacks.⁴⁰³ Endowed with lifetime appointments, federal judges possess unique freedom from political pressure. Although the Senate may block judicial appointments, as underscored by the battle over the Merrick Garland nomination,⁴⁰⁴ once confirmed a federal judge is not beholden to the good graces of any political party or elected official. Thus, while both state and federal courts are crucial to defending voting rights, federal judges have the strongest and most independent basis for doing so.

Until recently, however, both the state and federal courts have usually taken a highly deferential approach to state legislatures in election administration cases.⁴⁰⁵ The federal constitution expressly assigns to the legislative branch control over election administration, which naturally gives a presumption of legitimacy to new election laws that are not facially discriminatory. Moreover, as Nathaniel Persily has pointed out, “most of the classic barriers to participation have been replaced with complicated and subtle strategies dedicated to maintaining incumbent parties and officeholders in their current positions of power.”⁴⁰⁶ As a result, the courts have often taken a passive approach even in the context of highly controversial voter ID cases.⁴⁰⁷

403. See Tokaji, *supra* note 159, at 129 (“Federal courts, as the institution most independent of partisan politics, should play an essential role in policing the administration of elections for the foreseeable future.”).

404. Paul Kane, *As the Gorsuch nomination proceeds, this man is taking credit: Mitch McConnell*, WASH. POST (Feb. 18, 2017), https://www.washingtonpost.com/powerpost/as-the-gorsuch-nomination-proceeds-this-man-is-taking-credit-mitch-mcconnell/2017/02/18/a9d66a46-f5eb-11e6-b9c9-e83fce42fb61_story.html?utm_term=.302a2d2e98f7.

405. See Joshua A. Douglas, *(Mis)Trusting States to Run Election*, 92 WASH. U. L. REV. 553, 602 (2015) (“Current Supreme Court doctrine defers too readily to states to administer elections.”).

406. NATHANIEL PERSILY, *THE PLACE OF COMPETITION IN AMERICAN ELECTION LAW*, IN *THE MARKETPLACE OF DEMOCRACY: ELECTORAL COMPETITION AND AMERICAN POLITICS* 171 (Michael P. McDonald and John Samples, eds., 2006).

407. See Joshua A. Douglas, *Is The Right To Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL’Y 143, 145 (2008) (“[O]ur legal system has not always given an individual’s right to vote the same venerated status as it has given many other important rights.”).

For example, in *Crawford v. Marion County*⁴⁰⁸ the Supreme Court upheld Indiana’s photo ID law because it appeared to be a “neutral, nondiscriminatory regulation of voting procedure” and the court feared that striking the law down would frustrate “the intent of the elected representatives of the people.”⁴⁰⁹ In *Crawford* the Supreme Court emphasized that “if a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators.”⁴¹⁰

But there is now strong reason to conclude the Court was wrong when it assumed that the wave of election “integrity” measures adopted by partisan legislatures are justified by legitimate public policy concerns and are non-discriminatory and neutral in application. As discussed above, in the 9 years since *Crawford* was decided, academic studies, government investigations, and court cases have developed overwhelming evidence that indicates that in-person voter fraud is not a serious threat to election integrity.⁴¹¹ Moreover, both academic studies and a growing number of lower federal courts have concluded that the real purpose of voter identification laws and other election “reforms” is to depress minority turnout.⁴¹² In light of the increasing evidence of the malignant motives of at least some election integrity measures, combined with the complete lack of evidence of widespread voter fraud, the courts as a whole are unwise to continue to defer to the states when it comes to laws that impose new voting restrictions.

Courts must also break with precedent by taking a more proactive role during election campaigns. Historically there has been a long-standing judicial reluctance to intervene in election law disputes late in political campaigns.⁴¹³ In *Purcell v. Gonzalez*,⁴¹⁴ the Supreme Court expressed the concern that “[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls” particularly during the period shortly before an election.⁴¹⁵ The Supreme Court has

408. 553 U.S. 181 (2008).

409. *Id.* at 203.

410. *Id.* at 204.

411. See discussion *supra* Part II.B.

412. *Id.*

413. See Richard L. Hasen, *Reining in the Purcell Principle*, 43 FLA. ST. U. L. REV. 427, 428 (2015) (defining the Purcell principle as “the idea that courts should not issue orders which change election rules in the period just before the election”).

414. 549 U.S. 1 (2006).

415. *Id.* at 4–5.

thus discouraged judges from issuing rulings that change or suspend voting laws late in election campaign seasons. Without question, the *Purcell* principle makes sense in a stable, non-polarized electoral context in which partisan actors abide by traditional norms of democratic conduct. But we no longer live in such an age. The escalating voting wars have emboldened partisans to ram through legislatures on party-line votes new laws that run a high risk of voter disenfranchisement. Moreover, the Supreme Court's invalidation of the VRA's preclearance formula means that many disputes over section 2 of the VRA will be adjudicated after elections are held, when the damage is already done.⁴¹⁶ Accordingly, it is a mistake for courts to blindly apply the *Purcell* principle when a rapidly expanding number of new election laws threaten voting rights.⁴¹⁷

To be sure, the basic logic of the *Purcell* principle has obvious merit in certain categories of cases, such as where the legal dispute involves ballot design or ballot access. In such cases there must be a reasonable cut-off point barring further judicial intervention in order to allow election authorities to print ballots in a timely fashion. This is particularly important at a time when early and absentee voters now make up 35% of all ballots cast.⁴¹⁸ Accordingly, applying the *Purcell* principle in such cases to the period that stretches from the printing of early and absentee ballots through Election Day is a reasonable middle ground. It allows courts time to resolve complex voting rights cases while still giving election authorities sufficient time to print ballots and prepare polling places. But when the ballot itself is not at issue, courts should remain prepared to intervene until virtually the moment early and absentee voting begins.

There are hopeful signs that the judiciary recognizes the deepening threat to democratic government and the need to intervene even relatively late in campaigns. During the 2016 election campaign season, the Fourth Circuit, the Fifth Circuit, and the Tenth Circuit all blocked voting laws adopted by Republican legislatures. For example, in *Fish v.*

416. On Section 2 of the VRA, see Stephanopoulos, *supra* note 304. As he explained, “[t]he burden of proof is on the plaintiff under Section 2 but on the jurisdiction under Section 5. The default is that a challenged policy goes into effect under Section 2 but that it does not under Section 5.” *Id.* at 57.

417. See Hasen, *supra* note 413, at 428–29.

418. DREW DESILVER & ABIGAIL GEIGER, PEW RES. CTR., FOR MANY AMERICANS, ELECTION DAY IS ALREADY HERE (2016), <http://www.pewresearch.org/fact-tank/2016/10/21/for-many-americans-election-day-is-already-here/>.

Kobach,⁴¹⁹ the Tenth Circuit enjoined a Kansas law requiring voter registration applicants to produce documentary proof of American citizenship.⁴²⁰ In holding that the National Voter Registration Act preempted the Kansas law, the court observed that the NVRA reflected “Congress’s determination that the public interest in the widespread exercise of the franchise trumps the narrower interest of ensuring that not a single noncitizen votes (or an insubstantial number of them).”⁴²¹ The Tenth Circuit also pointedly noted that “exceedingly few noncitizens have been shown to have voted compared to the number of Kansans who stand to lose the right to vote in the coming elections.”⁴²²

The Fifth Circuit also acted to enjoin a discriminatory voting law before the 2016 election. In *Veasey v. Abbott*,⁴²³ the federal appellate court ruled that Texas’s voter ID law violated Section 2 of the Voting Rights Act.⁴²⁴ The Fifth Circuit was particularly impressed by the trial court’s finding that the voter ID law imposed special burdens on the poor, who were less likely to have the type of photo ID required by the law, and by the trial court’s additional finding that minorities constituted a disproportionately large share of Texans living in poverty.⁴²⁵ The Fifth Circuit thus affirmed the trial court’s finding that the Texas statute “acted in concert with current and historical conditions of discrimination to diminish African Americans’ and Hispanics’ ability to participate in the political process.”⁴²⁶ Also in 2016, as discussed above, the Fourth Circuit struck down portions of North Carolina’s sweeping new election law on grounds that it was motivated by discriminatory racial intent in violation of the Voting Rights Act.⁴²⁷

Moreover, just six weeks before the presidential election, the Sixth Circuit reversed the state of Ohio’s purge of its voter registration lists.

419. 840 F.3d 710 (10th Cir. 2016).

420. *Id.* at 717.

421. *Id.* at 756.

422. *Id.*

423. 830 F.3d 216 (5th Cir. 2016).

424. *Id.* at 265.

425. *Id.* at 264.

426. *Id.*

427. See *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 238 (4th Cir. 2016) (“The record thus makes obvious that the ‘problem’ the majority in the General Assembly sought to remedy was emerging support for the minority party. Identifying and restricting the ways African Americans vote was an easy and effective way to do so. We therefore must conclude that race constituted a but-for cause of SL 2013–381, in violation of the Constitutional and statutory prohibitions on intentional discrimination.”).

In *A. Philip Randolph Institute v. Husted*,⁴²⁸ a group of plaintiff’s challenged the Ohio Secretary of State’s purge of hundreds of thousands of voters from the state’s voting rolls on the sole grounds that the voters had not voted in the previous six years.⁴²⁹ The state defended the purge on the grounds that it had mailed notices of the pending purge to affected voters.⁴³⁰ The Sixth Circuit held that the purge violated the NVRA because a voter’s failure to vote in recent elections was not a sufficient basis on its own terms to assume that the voter had changed residences.⁴³¹

There are even signs that the Supreme Court itself may be ready to embrace a standard for adjudicating partisan gerrymandering cases. In November 2016, a 3-judge federal panel in Wisconsin struck down the state legislature’s redistricting map on grounds that it was an unconstitutional partisan gerrymander.⁴³² The court based its reasoning on an “efficiency gap” measurement⁴³³ developed by Nicholas Stephanopoulos and Eric McGhee.⁴³⁴ The “efficiency gap” measures how many wasted votes—i.e. votes for losing candidates or votes for winning candidates in excess of the bare minimum needed to win—that a redistricting map results in for each party.⁴³⁵ Under this approach, if

428. 838 F.3d 699 (6th Cir. 2016).

429. See *id.* at 703 (“[U]nder the Supplemental Process, a voter is purged from the rolls after six years of inactivity—even if he or she did not move and otherwise remains eligible to vote.”); see also Kimberly Strawbridge Robinson, *Hundreds of Thousands of Ohio Voters Restored to Rolls*, BLOOMBERG BNA (Sept. 28, 2016), <https://www.bna.com/hundreds-thousands-ohio-n57982077690>.

430. See *A. Philip Randolph Inst.*, 838 F.3d at 703 (“[V]oters sent a confirmation notice are removed from the rolls if they subsequently fail to vote for four years and fail to either respond to the notice or re-register.”); *id.* at 711 (“[T]he Secretary reiterates that the Supplemental Process incorporates subsection (d)’s requirement that the voter must fail to respond to a confirmation notice before that voter can be removed from the rolls.”).

431. *Id.* at 712.

432. *Whitford v. Gill*, No. 15-cv-421-bbc, 2016 WL 6837229, at *71 (W.D. Wis. Nov. 21, 2016).

433. See *id.* at *9 (“They therefore urge the court to adopt a new measure for assessing the discriminatory effect of political gerrymanders—the efficiency gap (or ‘EG’). ‘The efficiency gap is the difference between the parties’ respective wasted votes in an election, divided by the total number of votes cast.’”).

434. See Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 834 (2015) (“We dub our new measure the ‘efficiency gap.’ It represents the difference between the parties’ respective wasted votes in an election—where a vote is wasted if it is cast (1) for a losing candidate, or (2) for a winning candidate but in excess of what she needed to prevail.”).

435. See *id.* at 834 (The efficiency gap “represents the difference between the parties’ respective wasted votes in an election—where a vote is wasted if it is cast (1) for a losing candidate, or (2) for a winning candidate but in excess of what she needed to prevail. Large numbers of votes commonly are cast for losing candidates as a result of the time-honored gerrymandering technique of ‘cracking.’ Likewise, excessive votes often are cast for winning candidates thanks to the equally age-old mechanism of ‘packing.’ The efficiency gap essentially aggregates all of a

the minority party consistently has significantly more wasted votes than the majority party, it serves as strong evidence of an unconstitutional gerrymander, absent a legitimate justification for the difference. Relying on the efficiency gap measurement, the Wisconsin court held that the legislature's redistricting plan was indeed an unconstitutional gerrymander because it systematically diluted the voting strength of Democratic voters without a constitutionally valid reason for doing so.⁴³⁶ Wisconsin has appealed the court's ruling to the Supreme Court, which means that potentially partisan gerrymandering's days could be numbered.⁴³⁷

The recent intervention of federal courts across the country to block laws that undermine the right to vote is encouraging. The rulings indicate that the courts increasingly recognize that partisan changes to voting rights must be scrutinized with great skepticism by the judiciary. The 2016 rulings are also heartening for another reason. The judges who wrote the opinions were appointed by both Republican and Democratic presidents. Judge Diana Gribbon Motz, the Fourth Circuit judge who wrote the opinion in *McCrory*, was appointed by Bill Clinton,⁴³⁸ whereas Jerome Holmes,⁴³⁹ the Tenth Circuit judge who wrote the opinion in *Fish v. Kobach*, and Catharina Haynes, the Fifth Circuit judge who wrote the opinion in *Veasey v. Abbott*,⁴⁴⁰ were both appointed by George W. Bush. To be sure, the judges in those circuits did not unanimously agree on the issues before them and some conservative judges filed strong dissents.⁴⁴¹ But the political and ideological diversity of the judges in each circuit majority is grounds for at least cautious optimism. It demonstrates that the effort to preserve voting rights and defend our democratic institutions is not an issue that

district plan's cracking and packing choices into a single, tidy number.").

436. See *Whitford*, 2016 WL 6837229, at *1 ("We find that Act 43 was intended to burden the representational rights of Democratic voters throughout the decennial period by impeding their ability to translate their votes into legislative seats. Moreover, as demonstrated by the results of the 2012 and 2014 elections, among other evidence, we conclude that Act 43 has had its intended effect. Finally, we find that the discriminatory effect is not explained by the political geography of Wisconsin nor is it justified by a legitimate state interest. Consequently, Act 43 constitutes an unconstitutional political gerrymander.").

437. BRENNAN CTR. FOR JUST. *WHITFORD V. GILL* (Feb. 27, 2017), <https://www.brennan-center.org/legal-work/whitford-v-gill>.

438. See *Judge Diana Gribbon Motz*, 4th Cir. <http://www.ca4.uscourts.gov/judges/judges-of-the-court/judge-diana-gribbon-motz>.

439. See *Judge Jerome A. Holmes*, 10th Cir. <https://www.ca10.uscourts.gov/judges/judge-jerome-holmes>.

440. See *Judge Catharina Haynes*, Fed. Judicial Ctr. <http://www.fjc.gov/servlet/nGetInfo?jid=3169&cid=999&ctype=na&instat=na>.

441. See, e.g., *Veasey v. Abbott*, 830 F.3d 216, 322 (5th Cir. 2016) (Clement, J., dissenting).

must inevitably divide liberals and conservatives. Voting rights and fair elections are cornerstone principles of democracy that should attract support from all ends of the ideological spectrum.

C. The Bipartisan Supermajority Principle

As the Supreme Court's struggle to identify a standard for adjudicating partisan gerrymandering cases demonstrates, the courts do not have the authority to invalidate new election laws merely on policy grounds. They must have a constitutional or statutory basis to do so and they must have judicially manageable standards for adjudicating the dispute.

Consequently, one of the major stumbling blocks the courts have faced over the years in defending voting rights is the complicated constitutional basis of the right to vote. A unique feature of American democracy is that the fundamental right to vote is primarily vested in state law, not federal law.⁴⁴² The Constitution bars racial and gender discrimination in voting and requires that due process and equal protection under law be afforded to all qualified voters.⁴⁴³ But the states, not the federal government, determine voter qualifications.⁴⁴⁴ As the Supreme Court recently emphasized, "the Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them"⁴⁴⁵

The modest textual basis of federal voting rights has left the full parameters of the constitutional protections afforded to voters unclear and highly contested. Accordingly, scholars have played a key role in proposing various constitutional rationales for courts to invoke. Some have developed individual theories of the right to vote.⁴⁴⁶ Richard Hasen, for example, contends that the courts should focus on defending "certain core rights" of equality under the law for all voters.⁴⁴⁷ Atiba

442. See Douglas, *supra* note 26, at 93 ("In fact, unlike virtually every state constitution, the U.S. Constitution does not actually confer the right to vote on anyone. Instead, the right to vote stems from the general language of the Fourteenth Amendment's Equal Protection Clause and the negative mandates on who the government may not disenfranchise.").

443. See U.S. CONST. amends. XIV, XV, XIX, XXVI.

444. See, e.g., *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2258 (2013) ("[T]he Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them."); *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964).

445. *Inter Tribal Council*, 133 S. Ct. at 2258.

446. See, e.g., RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* 139, 154 (2003); Ellis, *supra* note 16, at 1036 (warning of the "use of economic restraints to effectively increase the cost of voting to the voter").

447. Hasen, *supra* note 446, at 154.

Ellis has warned that the costs associated with voting can effectively disenfranchise voters based on their socioeconomic status.⁴⁴⁸ He argues that courts should prevent such disenfranchisement by “formulating a uniform right to vote which is not bound by socioeconomic biases or the whims of a potentially tyrannical majority.”⁴⁴⁹ Others have articulated a structural theory of voting rights that emphasizes preserving democratic institutions and political competition.⁴⁵⁰ For example, Richard Pildes has contended that “familiar models of individual rights and equality are inadequate to address constitutional harms presented by the problem of political self-entrenchment.”⁴⁵¹ He recommends that courts focus on the constitutional obligation “to design recount processes, and perhaps voting or democratic processes more generally, that sufficiently cabin the risk of partisan, self-interested manipulation.”⁴⁵² Building on both the individual rights and structuralist approaches, Guy-Uriel Charles contends that courts may “use an individual rights framework to confront the structural pathologies of the electoral process.”⁴⁵³ Franita Tolson has called for a focus on the constitutional text, pointing to the Voter Qualifications Clause of the federal constitution as a powerful safeguard for voting rights in federal elections.⁴⁵⁴ She argues that the clause offers courts a basis to “apply heightened scrutiny to all regulations governing the right to vote” and thereby “strike down restrictive regulations that are not supported by empirical evidence, or that do not directly respond to a problem in the state’s electoral system.”⁴⁵⁵

The state constitutions also provide a potentially powerful ally for judges to turn to in defending voting rights. Although the federal constitution does not confer an express right to vote, 49 of the 50 state

448. Ellis, *supra* note 16, at 1067.

449. *Id.*

450. See Pamela S. Karlan & Daryl J. Levinson, *Why Voting is Different*, 84 CAL. L. REV. 1201, 1219 (1996) (“The relevant equal protection concern in this context, therefore, is not the protection of an empty individual right to be free from racial classification, but rather the collective right, recognized in *Hunter v. Erickson*, of groups of voters who affiliate along racial lines to participate in the political process on an equal footing with voters who choose to affiliate based on other shared characteristics.”).

451. Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 41 (2004).

452. *Id.* at 49.

453. Guy-Uriel Charles, *Judging the Law of Politics*, 103 MICH. L. REV. 1099, 1102 (2005).

454. Franita Tolson, *Protecting Political Participation Through the Voter Qualifications Clause of Article I*, 56 B.C. L. REV. 159, 161–62 (2015).

455. *Id.* at 162.

constitutions expressly do so.⁴⁵⁶ Crucially, the state constitutions define voting rights as mandatory, which means that in almost every state the fundamental right of the state's citizens to vote takes precedence over the legislature's control of election regulation.⁴⁵⁷ Joshua Douglas has made a compelling case that the state constitutions therefore provide a strong legal foundation for courts to defend voting rights in an era of partisan manipulation of election laws. Citing the state constitutions' express guarantee of the fundamental right to vote, Douglas has proposed reversing the long-standing *Burdick* test, whereby the ultimate burden rests with plaintiffs to prove that an election law infringes on voting rights.⁴⁵⁸ The *Burdick* test is a hard one for plaintiffs to meet because, as Douglas explains, "[a] court following *Burdick* will reverse the presumption of validity and hold the state to a higher threshold only if the court finds that the law imposes a severe burden."⁴⁵⁹ Since most voter identification laws affect a relatively small percentage of the population, it is difficult for plaintiffs to show that the laws are severely burdensome. Douglas, however, proposes using the state constitutional guarantees as justification for flipping the framework to put the heavier burden on the government to justify the laws.⁴⁶⁰ He argues that laws adding voter qualifications should be presumptively invalid as a matter of state constitutional law unless the state overcomes "that presumption with direct evidence showing that the law is consistent with the state constitution's specific conferral of legislative power to regulate elections."⁴⁶¹ Douglas's proposal is one that federal and state courts would be wise to adopt.

Whatever constitutional theories the courts choose to adopt, the bottom line is partisan advocates of new restrictions on voting rights do

456. See Douglas, *supra* note 26, at 91 ("Virtually every state constitution confers the right to vote to its citizens in explicit terms.").

457. See *id.* at 136 ("State constitutions thus grant the right to vote in mandatory terms and only secondarily delegate legislative control to regulate some aspects of the election process.").

458. *Id.* at 138. See *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)) ("A court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'").

459. See Douglas, *supra* note 26, at 138.

460. See *id.* at 138-39 ("Flipping the normal federal framework and imposing a presumption of invalidity to laws that add voter qualifications is justified because state constitutions already support this analytical move.").

461. *Id.* at 139.

not deserve the benefit of the doubt. Judges must be much more skeptical of partisan election authorities' claims that "election integrity" necessitates strict voting regulations.⁴⁶² The courts should scrutinize such claims closely and should not defer to state legislatures when obvious partisan motivations lie behind the adoption of such laws.⁴⁶³ As John Hart Ely observed, courts should intervene to address "malfunctioning" political processes where the incumbents are "choking off the channels of political change to ensure that they will stay in and the outs will stay out" or are "systematically disadvantaging some minority . . . and thereby denying the minority the protection afforded to other groups by a representative system."⁴⁶⁴ The federal courts have adopted such an approach in the context of campaign finance law. For example, the Supreme Court has struck down excessively low contribution limits which threatened to undermine democratic accountability.⁴⁶⁵ As the Supreme Court explained in the 2006 case of *Randall v. Sorrell*, extremely low contribution limits "harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability."⁴⁶⁶ The justices should take a similarly skeptical approach to nakedly partisan election laws that burden voting rights.

In hyperpolarized America, the fact is neither party can be trusted on its own to do the right thing when it comes to administering state and federal elections. Accordingly, in evaluating election law changes that put additional burdens on voting rights, the courts should take into consideration whether the new law elicited broad bipartisan support or was instead adopted by a party-line vote. If courts embrace the idea of reversing the *Burdick* test, a bipartisan supermajority principle could serve as one criterion for assessing whether the state has met its burden in overcoming the presumption of invalidity. The principle is simple and easy to apply. Under it, a state could support its argument that an election law change is necessary by showing that the law received support from a bipartisan supermajority of two-thirds of the legislature.

462. Douglas, *supra* note 301, at 556.

463. *Id.* at 555–56.

464. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 103 (1980).

465. See *Randall v. Sorrell*, 548 U.S. 230, 262 (2006) (striking down Vermont's low contribution limits on grounds that they "burden First Amendment interests in a manner that is disproportionate to the public purposes they were enacted to advance").

466. *Id.* at 232.

Under the bipartisan supermajority principle, at least one-third of the members of the minority party must vote in favor of the voting law change. Embracing the supermajority principle for voting laws would help courts assess whether a partisan motive is the real force behind an election “integrity” measure.

The bipartisan element is crucial to the supermajority criterion. In an America sharply divided into red and blue, a simple supermajority principle will not be effective in every state. For example, a two-thirds majority rule would not prevent deeply red states like Alabama—where Republicans hold large majorities—and deeply blue states like Massachusetts—where Democrats hold large majorities—from enacting voting laws in a party-line vote. Republicans currently hold a 72 to 33 seat majority in the Alabama House of Representatives and a 26 to 8 seat majority in the Alabama State Senate.⁴⁶⁷ Democrats currently hold a 125 to 35 seat majority in the Massachusetts House of Representatives and a 34 to 6 seat majority in the Massachusetts State Senate.⁴⁶⁸ Such large margins make it possible for the majority party to achieve supermajorities in support of legislation even if not a single member of the minority party supports the law. Thus, by requiring that supermajorities cross partisan lines, the risk of a party-line supermajority vote is eliminated.

In an ideal world, party leaders would adopt the bipartisan supermajority rule out of a sense of patriotic devotion to America’s democratic institutions. But that is obviously not a sensibility that is broadly shared in American politics today. In an age of hyperpolarization, party leaders and rank-and-file party members view bipartisanship as an act of political heresy. Thus, for the time being at least, the only hope for bipartisanship in election administration is if the courts require it.

There are limits to the bipartisan supermajority principle. The courts should not require that every election law change receive the support of a bipartisan supermajority. The United States is founded on a principle of majority rule, not supermajority rule, and courts should be sensitive to that fact. But even the Constitution itself requires

467. See *Alabama’s 2014 Elections*, BALLOTPEdia https://ballotpedia.org/Alabama_elections_2014; *Alabama House of Representatives elections, 2014*, BALLOTPEdia https://ballotpedia.org/Alabama_State_Senate_elections_2014.

468. See *Massachusetts House of Representatives*, BALLOTPEdia https://ballotpedia.org/Massachusetts_House_of_Representatives; *Massachusetts State Senate*, BALLOTPEdia, https://ballotpedia.org/Massachusetts_State_Senate.

supermajorities in certain cases, such as to override a presidential veto,⁴⁶⁹ to ratify a treaty,⁴⁷⁰ to convict on impeachment,⁴⁷¹ or to amend the Constitution itself.⁴⁷² Voting rights are so central to a healthy democracy that they merit special safeguards as well. Courts will thus need to be both creative and cautious in crafting the constitutional basis for a bipartisan supermajority principle in voting rights cases. History shows that the courts absolutely have the capacity to develop narrowly focused election law doctrines that protect Constitutional rights and democratic principles. In the 1960s the Supreme Court developed the “One Person, One Vote” doctrine to require equal population in legislative and congressional redistricting.⁴⁷³ The moment has come for similar judicial creativity, precision, and boldness in this hyperpolarized political era. At a time when the political parties increasingly view each other as a threat to the nation’s well-being, aggressive judicial intervention to defend voting rights is appropriate and necessary.

If at some future date the two parties manage to pull themselves out of the mutually destructive cycle of hyperpolarization, it would be possible for Republicans and Democrats to find common ground in election administration. There are sensible good government reforms that can and should be undertaken in bipartisan fashion to ensure the security of the election process. One area of election administration that badly needs bipartisan attention is America’s outdated voter registration system. As discussed above, a 2012 study by the Pew Center found 24 million outdated or inaccurate voter registration records.⁴⁷⁴ In contrast to Canada, which relies on a nationwide electronic registration system, most American states still rely on costly, inefficient, and error prone paper registration processes.⁴⁷⁵ In 2014 the bipartisan Presidential Commission on Election Administration proposed a series of reforms to the election administration system, including the creation

469. U.S. CONST. art. I, § 7.

470. *Id.* art. II, § 2.

471. *Id.* art. I, § 3.

472. *Id.* art. V.

473. *See, e.g.,* Gray v. Sanders, 372 U.S. 368, 381 (1963) (“The conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.”); *see also* Wesberry v. Sanders, 376 U.S. 1, 13 (1964) (“The debates at the Convention make at least one fact abundantly clear: that when the delegates agreed that the House should represent ‘people’ they intended that in allocating Congressmen the number assigned to each State should be determined solely by the number of the State’s inhabitants.”).

474. PEW CTR. ON THE STATES, *supra* note 269, at 1.

475. *Id.* at 2, 3.

of a national online voter registration database and the modernization of the states' voting technology.⁴⁷⁶ A bipartisan commitment to allocating sufficient funds to modernize and standardize the voter registration system and voting rolls along the lines proposed by the Presidential Commission is a reasonable reform to expect from Congress and the state legislatures.

Even voter ID laws could one day achieve a bipartisan consensus if drafted in an inclusive way. The nationwide issuance of free government-issued photo IDs would be a sensible measure for improving election security without disenfranchising voters. One of the most promising proposals is to add photos to Social Security cards.⁴⁷⁷ Every American already receives a Social Security card for free from the government.⁴⁷⁸ Adding a photograph to the card would thus enable virtually every American, regardless of socio-economic status, to possess a government-issued photo ID. The Social Security card photo would satisfy the election security goals of proponents of voter ID laws while alleviating the concerns of opponents of such laws that the poor will be disenfranchised by a lack of access to a government-issued photo ID. Whatever form of government issued identification is required, it is essential that the government provide the necessary forms of identification for free to the poor and infirm, including supporting documents such as birth certificates. It is also long overdue for the state governments to automatically register all qualified voters. As the Brennan Center for Justice has argued, automatic voter registration “boosts registration rates, cleans up the rolls, makes voting more convenient, and reduces the potential for voter fraud, all while lowering costs.”⁴⁷⁹

476. PRESIDENTIAL COMM'N ON ELECTION ADMIN., THE AMERICAN VOTING EXPERIENCE: REPORT AND RECOMMENDATIONS OF THE PRESIDENTIAL COMMISSION ON ELECTION ADMINISTRATION 3–4 (2014) <https://www.supportthevoter.gov/files/2014/01/Amer-Voting-Exper-final-draft-01-09-14-508.pdf>.

477. Juliet Eilperin & Karen Tumulty, *Democrats embrace adding photos to Social Security cards*, WASH. POST (Apr. 10, 2014), https://www.washingtonpost.com/politics/democrats-embrace-adding-photos-to-social-security-cards/2014/04/10/cffe55a-c0cc-11e3-b574-f8748871856a_story.html?utm_term=.d8274dcf2f9a; Juliet Eilperin, *Trump meets with Martin Luther King III on Monday to discuss voting rights*, WASH. POST (Jan. 16, 2017), https://www.washingtonpost.com/news/powerpost/wp/2017/01/16/trump-to-meet-with-martin-luther-king-iii-on-monday-to-discuss-voting-rights/?utm_term=.e6665024e73a.

478. SOC. SECURITY ADMIN., NEW OR REPLACEMENT SOCIAL SECURITY NUMBER AND CARD, <https://www.ssa.gov/ssnumber>; Carolyn Puckett, *The Story of the Social Security Number*, 69 SOC. SECURITY BULL. 55 (2009), <https://www.ssa.gov/policy/docs/ssb/v69n2/ssb-v69n2.pdf>.

479. BRENNAN CTR. FOR JUST., AUTOMATIC VOTER REGISTRATION (2017), <https://www.brennancenter.org/analysis/automatic-voter-registration>.

In a non-polarized political climate in which traditional democratic norms prevail, many other sensible election law reforms would be attainable. Indeed, there is no doubt that genuine efforts to protect election integrity are valid and important. As the Supreme Court has emphasized, “A State indisputably has a compelling interest in preserving the integrity of its election process.”⁴⁸⁰ But voting rights are equally important. In *Purcell v. Gonzalez*,⁴⁸¹ the Court explained that election administration involves a balance between “the State’s compelling interest in preventing voter fraud” and eligible citizens’ “strong interest in exercising the ‘fundamental political right’ to vote.”⁴⁸² Congress and the state legislatures can strike the right balance between those competing interests, but only if they act in a bipartisan fashion.

CONCLUSION

The United States is not an illiberal democracy yet, but the warning signs are clear. In this time of extreme polarization, partisans are incentivized to break with democratic norms and adopt tactics that undermine voting rights and destabilize democratic institutions. The inevitable result is a cycle of escalation. The United States is already in the early stages of that cycle, and judicial intervention is now required before partisan escalation reaches the point of no return.

Accordingly, in this perilous era, the state and federal courts must embrace a renewed commitment to defending America’s democratic institutions in general, and voting rights in particular, from partisan attacks. The time for judicial passivity in voting rights is over. As the Supreme Court explained in *Wesberry v. Sanders*,⁴⁸³ “[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.”⁴⁸⁴ Above all, structural changes are necessary to preserve and maintain America’s democratic institutions for the long run. The success of any democracy depends on establishing clear rules that are administered in a fair and transparent way. Democracy is about more than just winners and losers—it is about institutions that fairly administer elections to

480. *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989).

481. 549 U.S. 1 (2006).

482. *Id.* at 4.

483. 376 U.S. 1 (1964).

484. *Id.* at 17.

ensure that the voters' will is heard.⁴⁸⁵ As James Madison once observed, "no man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity."⁴⁸⁶

Madison's principle of neutrality must guide us in election administration today. The historical record makes it starkly apparent that partisan control of the election administration process is a threat to the long-term vitality of American democracy. Left unchecked, partisans will always craft election rules to favor their party and disadvantage their opponents. The threat is particularly dangerous at a time of hyperpolarization. Accordingly, Americans must build structural safeguards into our election system to guard against the machinations of partisan extremism. As George Washington explained in his Farewell Address, "the common and continual mischiefs of the spirit of party are sufficient to make it the interest and duty of a wise people to discourage and restrain it."⁴⁸⁷ The fate of American democracy depends on whether we heed Washington's advice.

485. See Issacharoff & Pildes, *supra* note 183, at 644 ("The democratic politics we experience is not an autonomous realm of parties, public opinion, and elections, but a product of specific institutional structures and legal rules.").

486. THE FEDERALIST NO. 10, at 79 (James Madison) (Mary Carolyn Waldrep & Jim Miller eds., 2014).

487. George Washington, Farewell Address (Sept. 17, 1796), *reprinted in* SPEECHES OF THE AMERICAN PRESIDENTS 17, 21 (Janet Podell & Steven Anzovin eds., 2d ed. 2001).