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Race, Party, and American Voting Rights

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Abstract: There are few advanced democracies that simultaneously make voting as easy and as difficult as the US. This essay outlines some of the recent changes in voting rights and election law, with a particular attention to the causes and consequences of restrictive changes. I argue that both historically and today this pattern has been driven by strategic partisan calculation, which in the American context almost necessarily results in patterns of access and exclusion that fall sharply on lines of race, class, and civic status. The recent skirmishes in the “voting wars” are a continuation of this historical dynamic, enabled by the unique institutional context in which American elections take place, in which parties retain control over the parameters and administration of a highly fragmented electoral system. So long as this remains the case, and so long as there are relatively few institutions capable of checking the incentive to engage in partisan manipulation, the “voting wars” will continue and are likely even to intensify.

Introduction

The first law requiring American citizens to present state-certified identification in order to vote was passed in New York State in 1814, which mandated that African American voters provide legal documentation that they were free and not enslaved (Polgar 2011).¹ Like the wave of voter identification laws passed in recent years, the New York law emerged in a context of growing anxiety over demographic change, as gradual abolition of slavery in the state produced a growing class of free Black citizens. With the distinction civic status no longer rigidly attached to skin color, a possibility emerged that enslaved non-citizens might cast fraudulent votes. That at least was the stated rationale. Historical and

¹ To receive the certificate of freedom, “any Black or mulatto person” had to appear before a judge or other public official and prove that they were a free man, in which case a certificate would be filed, and voters would be required to bring this certificate to the polls. The costs of this process rested entirely on the prospective voter, and even with the certificate poll inspectors were entitled to challenge the free status of the voter.

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contemporary accounts, however, make clear that the law was less a response to public anxieties or fraudulent voting than it was a partisan effort by the state's Jeffersonian Republicans to limit voting among free African Americans, a reliably Federalist constituency.² It was also prelude to worse. A decade later, a Republican-controlled constitutional convention would severely limit Black voting rights in the state, part of a national trend against Black suffrage that accompanied the expansion of voting rights to White male citizens.

What was true in antebellum America is, to a certain degree, true today: there are few, if any, advanced democracies that simultaneously make it as easy and as difficult to vote, a pattern of access and closure that tends to fall along lines of civic status such as race and class.³ This is in part a legacy of America's tortured history with voting rights (Keyssar 2000), and for this reason recent changes restricting voting qualifications have been cast as "Jim Crow 2.0" or as the opening salvo in rolling back the victories of the Civil Rights era (Bentele and O'Brien 2013). The restrictive changes that have drawn attention in recent years are not equivalent to the disfranchisement of African Americans in the decades after the Revolution or in the decades after Reconstruction. But they do show both *continuities* and *differences* with past periods, as similar political processes occur in an institutional context that has changed in many, but not all, ways.

This essay examines the political causes and institutional context of contemporary voting rights politics, giving particular attention to the wave of restrictive changes passed since 2000. Most research on this topic has identified an increase in electoral competition in recent decades as an essential cause of these changes, a link with earlier periods that saw party competition result in racial disenfranchisement. There is also evidence, more mixed, that Republican support for recent changes is more likely in states or districts where Whites make up a relatively small or declining portion of the electorate, suggesting that while recent changes might have an electoral motivation it is one that is inflected by race (Bentele and O'Brien 2013; Hicks et al. 2014; McKee 2015).

2 Jeffersonian Republicans were not as virulently racists as Democratic partisans would be two decades later. They were, however, united by a common interest in winning elections in a competitive political environment. And despite repeated efforts to win the support of free Black voters, their national coalition with southern slavers – they were the party of Jefferson, who famously trolled racial liberals by questioning the unity of the human race – meant that this constituency remained disproportionately Federalist (Polgar 2011, p. 7).

3 Few other OECD countries, for instance, have as extensive a system of early voting or no-excuse-needed absentee balloting. At the same time, no other advanced democracy disfranchises convicted felons after they have completed their sentence. And while other countries do indeed have voter identification laws, few have laws that in practice are as restrictive as the most recent batch passed in American states (Schaffer and Wang 2009).

While scholars continue to debate the relative weight that should be assigned to each of these factors, in practice the distinction between a race-based and partisan motivation for restricting ballot access can present a false choice. For one, persistent biases in partisanship – with large majorities of African Americans and Latino voters supporting Democratic candidates and a majority of White voters supporting Republicans – mean that many restrictions will fall disproportionately along racial lines, regardless of the underlying motivation. There is also reason to believe that the persistence of racial stereotypes has helped create a context in which overblown claims of voter fraud gain broader resonance.

But it is also the case electoral competition and racial prejudice would not necessarily have led to the “voting wars,” to use Richard Hasen’s apt phrase (2012), were it not for the institutional context in which American elections take place. And this context has been historically shaped by both partisan interests as well as commitments to White supremacy, the contemporary legacy of which is an institutional arrangement that facilitates partisan restrictions of voting qualifications in ways that tend to fall along racial lines. The right to vote in the US has been fundamentally shaped by a pattern of institutional development that has regularly retained for the major political parties control over the parameters and administration of a highly fragmented system, with efforts to provide a greater role for the Federal government repeatedly defeated by southern Democrats concerned with maintaining both White supremacy and political office. As a result, competing logics of expansion or constriction have been layered atop each other, with different jurisdictions responsive to very different constituencies and interests. This has produced a pattern of generally inclusive laws and legal changes in some states, restrictive ones in others, and a sequence of expansive changes and restrictive reactions depending on shifts in local and national political conditions (Valelly 2015).

This developmental sequence has ensured that only the Courts, the Department of Justice, and the opposing state or national political parties can provide any measure of uniformity or check against the incentive to engage in electoral manipulation through restrictions on voting. The ability of these actors to undertake these tasks, however, is constrained, and a weakening commitment to an aggressive anti-discrimination and non-retrogression stance in the judiciary has led many to worry that what has been a key rights-protecting institution since the civil rights era is not only unwilling to perform this role but is giving its sanction to restrictive changes.⁴ It is this institutional context that makes it likely that the

⁴ See, for instance, the decisions in *Crawford v. Marion County* (2008), *Richardson v. Ramirez* (1974), and *Holder v. Shelby County* (2013). The standard of no retrogression is suggested in Section 2 of the Voting Rights Act, and was first used in this context by the Supreme Court in 1976 to evaluate whether a districting plan diluted minority voting strength.

“voting wars” will continue and intensify, as party-controlled state legislatures are freed to experiment in new restrictions while rival parties and other organizations mobilize in opposition.

Reform and Reaction

As recently as 2008, scholars of election law could write that “the United States is in the midst of a reform era,” in which states and national actors were generally seen as working to expand access to the ballot and participation in elections (Gronke 2008, p. 423). In part spurred by national legislation, such as the “Motor Voter Act,” and in part reflecting local activism and national policy networks, states moved to facilitate registration, to establish and expand early voting, to relax requirements for absentee balloting, and in a few states to mandate that most voting be conducted by mail. Since 1997, 23 states have also substantially amended their felon disenfranchisement policies in order to expand voter access, either repealing lifetime disenfranchisement laws or more generally easing the restoration process (Porter 2010). After the mess of the 2000 election, the National Commission on Federal Election Reform, co-chaired by former presidents Jimmy Carter and Gerald Ford, issued a report encouraging further facilitating access to the ballot. Many of its proposals were subsequently adopted in the 2002 Help America Vote Act, hailed as the “first comprehensive federal law in our nation’s history on electoral administration.”⁵ The extent of these liberalizing reforms has varied considerably across states, both in adoption and implementation (Michener n.d.). Still, the basic thrust of reforms in the 1990s and early 2000s seemed to be toward expanding access, by making registration easier, by removing disqualifications, by providing more opportunities to cast a ballot, and by simplifying voting procedures.

No longer. Since 2008 there has been a coordinated push in the other direction, layering new restrictive requirements on top of existing procedures and rolling back some of the previous expansions. The changes that have garnered the most attention are voter identification laws, which require citizens

⁵ HAVA encouraged or required states to create a statewide voter registration list, rather than rely on a dizzying array of local lists, to provide for provisional ballots to voters whose names were not on the registration list, to ensure that all voting machines, which were to be upgraded with federal funds, met minimum standards for accessibility for the disabled and language minorities, as well as providing means for voters to ensure they voted correctly, and created the US Election Assistance Commission to disburse federal funds and collect information on best practices (Commission on Federal Election Reform 2005, p. 1).

to present some form of proof of identity in order to vote. Until recently, very few states required voters to present any such document in order to cast a ballot. The National Commission of Federal Election Reform in 2001, however, recommended states develop some system by which they could identify voters (2001, pp. 31–32).⁶ The next year, spurred by the defeat of statewide Republicans in Missouri in 2000, Republican Senator Kit Bond secured the inclusion in the Help America Vote Act of a requirement that first time voters who registered by mail produce identification the first time they voted in person (Minnite 2010; Hasen 2012, p. 47). Shortly after, several states passed voter identification laws that applied to most voters, first time or otherwise. Most of these were relatively liberal in their requirements, requesting identification but not requiring it and accepting a broad array of documents such as utility bills, banks statements, or addressed mail, and they were supported by the bipartisan recommendation of a new Commission on Federal Election Reform.⁷

This opened up, however, what was to be a sustained effort by Republican leaders to make a case for more aggressive anti-fraud measures, with Karl Rove and Republican leaders in competitive states pressing the U.S. Attorneys in the Department of Justice to bring voter fraud cases (Eggen and Goldstein 2007).⁸ Indiana and Georgia in 2005 adopted a new form of voter identification law, which required – rather than requested – presentation of a state-issued photo identification. The politically appointed chief of the Department of Justice’s Voting Rights

⁶ The National Commission on Federal Election Reform did not make a specific policy recommendation on the question of voter identification, but agreed that states should have some means of identifying voters. Some commissioners supported requiring those who were registering to vote and those seeking to cast a ballot “to provide some form of official identification.” Others noted that a small portion of the population does not have such identification, and that racial minority groups were worried about the possibility of voter intimidation or discrimination. Ultimately, the Commission decided to leave the question to the states (National Commission on Federal Election Reform 2001, pp. 31–32).

⁷ The National Commission on Federal Elections Reform was chaired by Gerald Ford and Jimmy Carter, while the Commission on Federal Election Reform was chaired by Jimmy Carter and James Baker III. The latter commission was accused of preparing a report based on a non-transparent process, with just two hearings and no public comment, and without consulting a “full range of recognized experts” (Brennan Center 2005).

⁸ The refusal of attorneys to do so, on the basis of there being no cases that could be successfully prosecuted, would eventually become an issue after several attorneys were fired (U.S. Department of Justice 2008). Voter identification laws were also promoted by conservative policy groups such as the American Legislative Exchange Council. A news analysis found that more than half of 62 voter identification bills introduced in 2011 and 2012 had been sponsored by members or conference attendees of ALEC. The Council’s model voter identification became a flash-point of controversy in 2011, when a campaign by civil rights organizations asked the Council’s corporate donors to pull their funding so long as the Council continued to promote voter ID laws.

Section shortly afterward allowed Georgia's controversial voter identification law to go forward, overruling a team of career lawyers who recommended blocking the program under Section 5 of the Voting Rights Act (Eggen 2005). Both states' laws were delayed until the Supreme Court ruled in favor of Indiana's law and a Court of Appeals ruled in favor of Georgia. Since then strict photo-ID laws have been passed in 11 states, although some of these were subsequently overturned by state or federal courts or weakened by the state legislature.⁹

These laws are expected to disproportionately impact minority, poor, and elderly voters, who are less likely to have the required documentation or will have greater difficulty in acquiring it (Barretto, Nuno, and Sanchez 2009; Vercellotti and Anderson 2009). Additionally, there is some evidence that identification requirements are selectively enforced, with minorities more frequently asked to provide documentation than Whites (Atkeson et al. 2010). Voter ID laws, however, are just one manifestation of a broader set of legal changes. States have also passed legislation curtailing early voting, reducing the number of polling booths, ending same-day voter registration, imposing a financial penalty on families of students who register to vote where they go to college, eliminating pre-registration of teenagers in high school, opening up polling precincts to partisan activists entitled to challenge a voter's qualifications, placing restrictions on organizations conducting registration drives, eliminating "wrong precinct" provisional ballots, and requiring proof of citizenship for new, but not already registered, voters. Governors and state officials have also enacted rules impeding the ability of ex-felons to restore their voting rights, rolling back some of the liberalizations adopted since 2000; limited early voting in urban but not rural areas, and embarked on purges of the registration rolls of suspected non-eligible persons using highly contested and often discriminatory processes.

Reference to the model voter ID law was pulled from the website, and the next year the Public Safety and Elections Task Force was disbanded. In a June 2009 issue of *Inside ALEC* a research assistant with the Task Force suggested how state legislators might draft the laws so as to avoid judicial challenge, including distributing free ID cards, ensuring that provisional ballots were available, aggressively advertising the new requirements, and ensuring that the cards were comprehensively distributed, especially to minorities and the elderly. Such measures would "not only broaden the appeal of photo ID laws, but also provide an additional layer of protection in the event of a court challenge" (Elzinga 2009; Magoc 2012).

9 The details of the laws vary considerably across states, but they can be generally classified according to (1) whether the identification is required or simply requested at the discretion of the poll worker; (2) whether it needs to be a photo identification or some other document showing the voter's name; (3) the list of acceptable documents; (4) and the alternatives available to someone if they are unable to present the ID when asked, such as signing an affidavit that acquiring the ID would be a burden, or casting a provisional ballot.

The resulting pattern of changes, both toward expanding and restricting access to the ballot, is shown in Figures 1 and 2.¹⁰ The top panel of Figure 1 counts the number of expansive changes made by states since 2004. The bottom panel

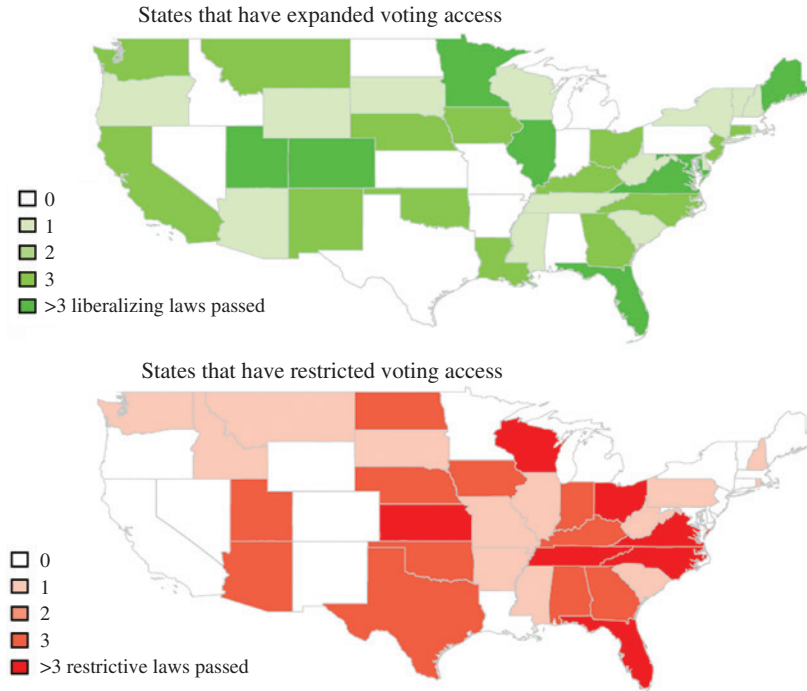


Figure 1: States that have Expanded or Restricted Voting Law.

¹⁰ The data was compiled from various sources, including Porter (2010), Bentele and O’Brien (2013), Biggers and Hanmer (2015), the National Conference of State Legislatures, and the Brennan Center. It does not include all changes in election law, most of which did not substantially expand or restrict ease of access. Restrictive changes include any statute or executive order that rolled back early voting, limited the role of outside groups in registration or tightened the requirements on the registration process, made it more difficult to restore the voting rights of convicted felons, required proof of citizenship of new voters, or imposed or tightened voter identification requirements. Liberalizing changes include any statute or executive order that established or expanded early voting, facilitated voter registration – through same day registration, online registration, or increased provision for registration at state offices – removed or weakened felon disfranchisement laws, or made it easier to have voting rights restored after completion of a sentence, liberalized absentee voting requirements, for example by no longer requiring an excuse or by creating a list of permanent absentee voters, or moved to an all-mail election. Judicial decisions that overturned restrictive changes are not considered to be liberalizations, although legislative action to loosen previously enacted restrictions are so considered.

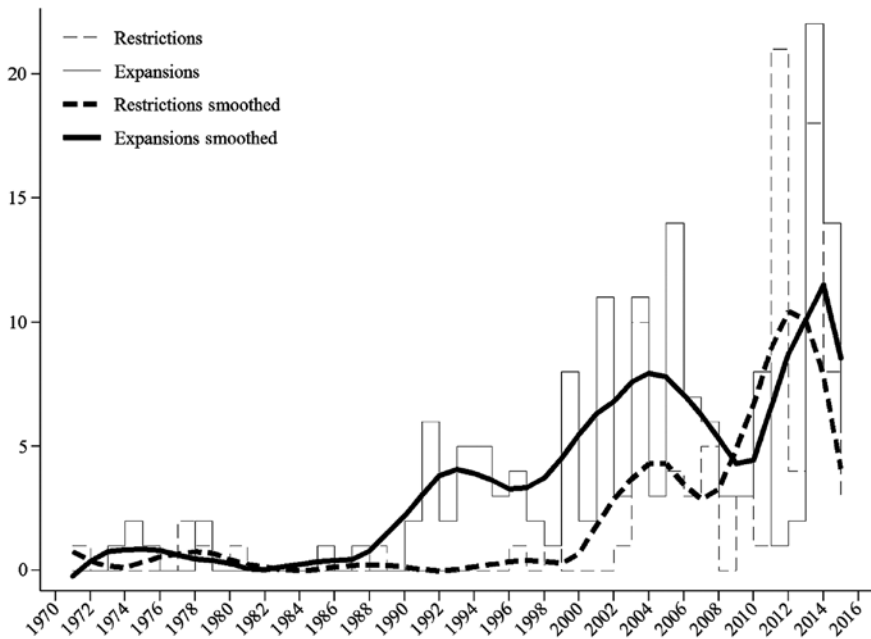


Figure 2: Trends in the Adoption of Restrictive and Expansive Voting Reforms.

of Figure 1 shows the same information, but for those states that have made restrictive changes. One thing that quickly becomes evident is that many states have made both restrictive and expansionary moves across this period, including Virginia, North Carolina, and Florida. In these cases, the pattern of expansion and restriction most resembles what political scientist Richard Valelly has identified as a “reactive sequence,” in which expansive changes prompt a backlash and an attempt to rollback these gains, which can in turn produce a renewed effort at expansion (2015). Other cases, such as Minnesota, have moved much more decisively in one direction over than the other, suggesting that the differential pattern is produced in part by the fragmentation of American institutions, producing different logics of expansion or constriction based on local political and social factors.¹¹

¹¹ Some of the cases that seem to be moving in one consistent direction, however, might also be a reaction to changes that predate these figures. Alabama’s consistent move in a constrictive direction, for instance, is plausibly part of a long term reaction to the enfranchisements of the civil rights era, one that was dampened and limited by the ability of the Department of Justice and Federal courts to block changes through Section 5 of the Voting Rights Act.

Figure 2 tracks the number of discrete restrictive and expansionary changes made per year, from the 1970s to the present. After a few decades of relatively little change, states began expanding access in the 1990s, a process that has continued even as more restrictive changes have become more prominent in the last decade. Still, the liberalizing period has not ended; rather, it has been joined by a parallel and reactive pattern of restrictions and roll backs.

Political scientists and legal scholars who have studied the question generally agree that recent restrictive changes are the result of partisan competition and racial demographics, with variations in research design resulting in different findings about the relative importance of each (Minnite 2010; Bentele and O'Brien 2013; Rocha and Matsubayashi 2014; Hicks et al. 2014; McKee 2015). As political competition has intensified in the last few decades, the incentive for partisan actors to manipulate the electoral process in their favor has increased as well.¹² The evidence that recent restrictions on the voting process are motivated by calculation of partisan advantage comes from a variety of sources, including journalistic accounts of the legislative process as well as statistical analyses of the adoption and support of restrictive legislation. Since 2008 support for increased restrictions, voter identification laws as well as other measures, has fallen almost entirely along party lines (McKee 2015). Very few Democratic legislators have voted for voter identification laws, especially the more strict form that have become increasingly prominent on the legislative agenda since 2008, and the few that have been passed by Democratic state legislatures have been generally much less onerous.¹³

While this pattern of support is suggestive, there is also compelling statistical evidence that restrictive voting laws are most likely to be introduced and passed in places that have seen an increase in political competition. In analyses of every restrictive bill introduced between 2006 and 2011, as well as every restrictive bill that was actually passed into law, Keith Bentele and Erin O'Brien find that "the emergence and passage of restrictive voter access legislation is unambiguously

12 The example of Florida in 2000, notes Richard Hasen, "served as a wake-up call," as the close election results and the protracted and at-times capricious process also underscored the degree to which even fairly minor changes could potentially change important electoral outcomes (2012, p. 5). The result was to reteach political operatives a lesson that has been learned time and again in American history, that there are clear "benefits [to] manipulating the rules, controlling election machinery, and litigating early and often" (2012, p. 5).

13 California (2006), North Carolina (2007), Maine (2007), New Mexico (2007), Arkansas (2009), West Virginia (2011), and Rhode Island (2011) passed restrictive measures while Democrats were in office. These were all fairly liberal measures. Rhode Island's photo identification requirement, for instance, accepts a very broad range of IDs and provides an affidavit alternative for voters without an ID.

a highly partisan affair, influenced by the intensity of electoral competition” (Bentele and O’Brien 2013, p. 1102). It is not only that Republicans provide almost all the support for these measures, in contrast to expansive changes that often enjoyed bipartisan support (Biggers and Hanmer 2015). They are also more likely to be passed in competitive states. Restrictive changes to election regulations, conclude William Hicks and co-authors, aim to bolster Republican party electoral strength by “marginally curtail[ing] the participation of voters typically aligned with the Democratic Party” (Hicks et al. 2014, p. 29; see also Rocha and Matsubayashi 2014).

This claim finds some additional support from Republicans who have talked openly about the electoral gains they believed would flow from these measures. “The Republican Party, the strategists, the consultants,” former Florida Republican Chairman Jim Greer told the *Palm Beach Post*, “firmly believe that early voting is bad for Republican Party candidates,” and that recent restrictions against this were “done for one reason and one reason only” (Palm Beach Post 2012). Conservative activist Phyllis Schlafly candidly notes that the reduction of early voting in North Carolina “is particularly important because early voting plays a major role in Obama’s ground game” (Schlafly 2013). As one Republican official from Texas has noted, it is an “article of faith” among Republicans that not only were Democratic vote totals inflated by fraud, but that voter identification laws “could cause enough of a *drop-off in legitimate Democratic voting* to add 3 percent to the Republican vote” (Hasen 2012, p. 44; Wang 2012, p. 79). “It all goes back to winning elections,” notes one longtime North Carolina Republican strategist (Rutenberg 2015).

The stated motivation for many of the restrictive changes has been the possibility of voter impersonation fraud. While there is very little evidence of voter fraud – that is, of ineligible voters casting ballots – there is considerable evidence of both fraud and administrative failures in the compilation of voter registration list.¹⁴ While most attention has been paid to voter identification laws, many states have imposed more stringent requirements on private registration drives, measures that could in theory be reasonably tailored to a recognized problem with

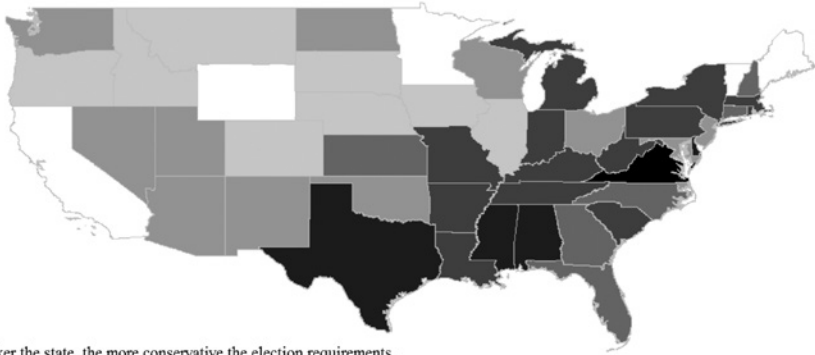
¹⁴ News reports of obviously fraudulent names and deceased persons being on the voter registration list, mostly the result of the lack of updating across jurisdictions, administrative backlogs, and the fact that American registration lists are primarily organized through private parties operating within state-set rules, potentially makes the possibility of voter fraud more plausible (Hasen 2012). It is one thing for an organizer who is implicitly evaluated on a quota of how many new voters they register to send in a fraudulent form (organization are mandated to send in all forms that they collect, to prevent dumping the registration forms of other parties). It is another for someone to actually show up and try and cast a fraudulent vote.

American elections.¹⁵ Registration fraud, however, has not been linked to voter fraud. Ironically, there has been very little curtailment of the opportunity to cast an absentee ballot, despite the fact that this is an area where fraud is both known to occur. Instead, there has been a remarkable expansion of absentee ballot opportunities in recent years. Unlike voter identification laws, which are widely recognized as likely to disproportionately impact poor, minority, and elderly voters, absentee voting has traditionally been more favorable to relatively more informed and partisan voters (Oliver 1996; Karp and Banducci 2001; Berinsky 2005; Gronke 2008).

Race is the other factor that most analyses point to as an important factor behind recent voting restrictions, although there is less consistent support for this than for partisanship. While some studies have found strong statistical evidence that the likelihood of passing restrictive legislation increases considerably depending on the size of a state's African American population and the rates of increase in turnout among this group, others have found that larger Black populations help restrain Republican governments from pursuing voting restrictions (Bentele and O'Brien 2013; Hicks et al. 2014, p. 12; Rocha and Matsubayashi 2014; McKee 2015). Recent years has seen race invoked much less frequently as an explicit reason for supporting restrictive changes than in previous decades, but race and racially-laden stereotypes have been offered as an explicit motivation by at least some legislators and activists, ranging from Ohio Republican Doug Pries's argument that "I really actually feel we shouldn't contort the voting process to accommodate the urban – read African-American – voter turnout machine" to conservative journalist Matthew Vadum's claim that "it is profoundly antisocial and un-American to empower the nonproductive segments of the population to destroy the country – which is precisely why Barack Obama zealously supports registering welfare recipients to vote" (Rowland 2012; Hasen 2012, pp. 44, 67; see also Mendez and Grose 2015).

The effort to determine whether contemporary restrictions are motivated more by party or race is understandable, but it ultimately poses a false choice. For one, recent changes in voting qualifications need to be understood as changing an institutional arrangement that has already been profoundly shaped by *both* party and race. Figure 3 shows a summary measure of how inclusive or restrictive a state's electoral requirements were in 2015, based on whether it allows for same

¹⁵ This is not to say that the restrictions on registration have been calibrated to balance voter inclusion and anti-fraud measures. Many of these restrictions effectively obstruct the voter registration drives that are more common among poor, working class, and minority voters. Indeed, the League of Women Voters has effectively given up on registering new voters in Florida due to the state's new requirements.



The darker the state, the more conservative the election requirements.

Figure 3: Inclusiveness of Voting Law, 2015.

day registration; the length of early voting, if any; the ability to cast either an absentee or mail-in ballot; whether voter identification is required, and if so, the severity of the requirement; and the severity of any felon disenfranchisement law.¹⁶ While far from a perfect measure, it provides a rough summary of how liberal or conservative the electoral laws are across different states.

A regression analysis of this state-level variation, shown in Table 1, suggests much of the variation is well-explained by the African American proportion of the population and by the degree to which a state's politics was historically organized

Table 1: OLS Regression of State Electoral Liberalism.

	Estimate of Liberalism of Voting Requirements
Black Population	−0.0730*** (0.0196)
Traditional Party Organization (TPO)	−0.382** (0.114)
Black Population × TPO	0.0208** (0.00736)
Midwest	0.400 (0.289)
West	0.367 (0.302)
South	0.0757 (0.364)
Battleground States	0.188 (0.240)
“Blue States”	0.344 (0.232)
Constant	0.666 (0.386)
<i>N</i>	50
Adj. R-Squared	0.4994

Standard errors in parentheses.

* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$.

¹⁶ It shows a one-dimensional latent variable estimated on a matrix of these factors.

around “party machines.”¹⁷ States with proportionally larger African American populations are likely to see more restrictive voting laws, largely a legacy of the Jim Crow regime of voter suppression in southern states. States that once had strong party machines – that is, where highly institutionalized political parties historically played a key role in organizing state politics – are likewise more likely to have restrictive voting laws, perhaps reflecting the fact that during the period of the secret ballot party machines may have often preferred voter demobilization over mobilization as an electoral strategy (Cox and Kousser 1981; Schaffer 2008, pp. 116–24). The positive coefficient on the interaction term is the result of states without party machines but with larger African American populations being more likely to have restrictive legislation. The takeaway here is that despite the passage of the Voting Rights Act and the general decline in party machines, the overall restrictiveness of American voting law remains closely related to patterns of both race and party (see also Hill and Leighley 1999). The result is that new restrictions in Alabama are layered atop an electoral regime that is already restrictive in a way that similar changes in Kansas are not.

While Table 1 focused on the independent effect of race and party, it is the intersection of these factors that makes evaluating which is more important an especially difficult and perhaps intractable question. The voting rights of racial minorities, in the American context, is difficult if not impossible to separate from calculations of partisan advantage (Hasen 2014, p. 60; Kousser forthcoming, 1974; Valelly 2004; Malone 2008; Bateman 2013). Partisan manipulation can shade into “keeping down the Black vote,” and it can be difficult if not impossible to determine where the one motivation begins and the other ends (Piven, Minnite, and Groarke 2009).

For one, the fact that partisan divisions in the electorate fall roughly along racial lines, with Democrats winning upward of 90 percent of African American votes, 60–70 percent of Latino votes, and around 40 percent of White votes, means that many restrictions on voter access are likely to disproportionately impact racial minorities, regardless of their motivation.¹⁸ But racial prejudice can also provide a context in which electorally motivated strategies of partisan voter restriction are more broadly acceptable than they might otherwise have been, a pattern apparent in earlier periods of voting restrictions which continues today (Minnite 2010; Bateman 2013). The very plausibility of voter fraud in spite of overwhelming evidence to the contrary relies in part on racial stereotypes, and possibly on the reduced social trust that political scientists find to be an accompaniment

¹⁷ The measure used is David Mayhew’s “traditional party organization” score (Mayhew 1986).

¹⁸ This is a consequential point, given that existing jurisprudence provides plaintiffs with grounds for contesting racially-motivated changes but not partisan ones (Hasen 2014).

of heterogeneity in America.¹⁹ African Americans, argues Lorraine Minnite, are “marginalized subjects within the political culture whose presence alone stands in as the evidence of the alleged fraud” (2010, p. 87; see also Behrens, Uggen and Manza 2003). Research by David Wilson, Paul Brewer, and Phoebe Rosenbluth provides individual level support to this argument, finding that opinions on voter identification shift noticeably if a respondent is primed with an image of a Black or White American voting (2014). Persistent and often implicit racial bias, even when not the motivation for restrictive changes, provides a context in which such changes might be easier.

And just as persistent racial stereotypes and animus can broaden support for restrictive legislation, political parties seeking to secure such legislation for their own purposes can provide a vehicle for organizing racial animosity into politics, at times intensifying and giving it broader ideological and cultural significance. It was the Democratic party, for example, that helped define American citizenship in explicitly racist terms for most of the antebellum era and it was the Democratic parties of the South that carried out the disenfranchisements of the 1890s, and both instances reflected a mutually reinforcing desire to maintain White supremacy as well as partisan ascendancy (Kousser 1974; Bateman 2013).²⁰ The contemporary Republican strategy of seeking electoral advantage through restrictive legislation has similarly given voice to persistent racial stereotypes and animosity, even if these were not the only or primary motivation for the legislation. As one North Carolina Republican bragged, the state’s new voter identification law “is going to kick the Democrats in the butt” and that if it also keeps from the polls “a bunch of lazy Blacks that wants the government to give them everything – so be it” (Hasen 2014, p. 69).

The result has been a recurring pattern of voter restrictions, at times amounting to outright suppression, as well as voter mobilizations, both calibrated to achieve partisan goals but at the same time reaffirming or contesting patterns of racial exclusion.²¹ The most recent battles of the “voting wars” are just the latest

19 There is a considerable literature on the role of racial context on public support for different public policies, with scholars demonstrating an important effect of living in a jurisdiction with a large number of racial minorities leading to support for more conservative across a range of issue areas (Key 1949; Glaser 1994; Oliver and Mendelberg 2000; Rocha and Espino 2009; Hopkins 2010). For evidence of heterogeneity leading to reduced social trust, see Putnam (2007). Scholars continue to debate the reasons for this association.

20 The flip side to this is that it was also a political party that helped redefine the racial terms of American citizenship in a more egalitarian direction during and after the Civil War.

21 Voter suppression can range from the outright disenfranchisement of certain constituencies on the basis of ascriptive characteristics (racial or religious disenfranchisements), through disenfranchisements based on technically achievable but practically impossible requirements (high

iteration of this dynamic. The organizations we rely on to make democracy work have an incentive to manipulate the rules to their own advantage, at times producing racialized voter restrictions but also counter-movements toward increasing access. These conflicting tendencies can make it difficult to provide a single characterization of contemporary voting politics: recent years, for example, have seen turnout rates among African Americans that are higher than at almost any point in American history, at the same time as they have seen coordinated restrictions on voter access that are likely to disproportionately burden minority voters.

Observers might hope that these forces will balance out, or that the inclusions might be more durable. Whether this ends up being the case, however, will depend to a large degree on our political institutions (Valelly 2004). The contemporary institutional context of American elections, however, gives reason for both optimism and alarm. While it is undoubtedly true that there are greater institutional supports for voting rights today than in earlier periods, some of these supports have been removed while the institutional arrangement of American elections continues to facilitate partisan manipulation of voting qualifications and procedures. The motive for political parties to win in competitive elections is a central feature of democratic government, and achieving this by strategic suppression of the opposing party's voters is likely to be a persistent – if not always constant – means for achieving this goal. The *opportunity* to do, however, is in large part a function of how our electoral institutions have developed, a process that continues to reflect competing commitments to both White supremacy and an expanded democracy.

The Political Development of American Elections

The key features of how America conducts its elections are (1) its extraordinary fragmentation, with the 50 states setting the rules – many of which are contradictory or duplicative – within the parameters set by federal law and the state and US Constitutions, which are then interpreted and implemented by

property qualifications or poll tax offices that would not accept payment from some persons), to achievable but often impractical qualifications (attainment of a license or voter identification), to changes in procedures that do not disqualify anyone from voting but that make it less likely that people will be able to do so successfully (curtailing voting opportunities or “dirty tricks” in which voters are led to the wrong polling place). See Wang (2012) for examples of contemporary voter suppression tactics that range the gamut from the statutory to the illegal. What makes it voter suppression is less the extent or form than it is the intent: an effort to suppress the number of voters who are able to make it to the polls, cast a ballot, and have that ballot counted.

local election boards, often staffed by undertrained volunteers and under the changing guidance of state officials; (2) the fact that the procedures are set and the process administered or supervised by partisan officials, or in the case of registrations, with private and often party-aligned organizations playing a key role.²² Both features contribute to the pattern of voter suppression and voter expansion characteristic of American politics, and in both its fragmentation and party involvement the US is a clear outlier among other advanced democracies.²³ In America there are only a few, fragmented institutions that can check partisan manipulation of election rules and procedures, while party actors with a potential incentive to engage in such manipulation are given considerable opportunity in doing so.²⁴

This unique arrangement, which goes sharply against what is widely considered best practice by scholars of elections (Hyde and Pallister 2015), is in part the result of the sequence of American political development and the ability of pivotal actors to foreclose reform at key moments. Democracy and mass political parties came early to the US, well before there existed a federal state capable of regulating elections on a national scale and before even the states had begun developing the basic architecture that is now essential for regulating fraud and ensuring access (Skowronek 1982; James 2012). As a result, the political parties built themselves into the process: legislatures dominated by partisan actors have consistently secured to themselves the right to redefine the minutiae of election law, including districting decisions, location of polling booths, voting hours, absentee ballot procedures, and registration requirements, while the parties took on the responsibility of administering what in many other countries became clearly state functions. Consequently, for much of American history there existed few checks on electoral manipulation other than whatever local accommodations could be worked out between the parties, or the constraints

22 At one extreme is Michigan, whose state, federal, local and school elections are supervised by the Secretary of State but also by 1699 separate county and local election officials. Few states have established the type of elections board staffed by non-partisan employees that are common in other countries. Rather, elections continue to be run out of either the secretary of state's office (usually elected and associated with a political party) or by local officials, many of whom are also elected.

23 Hasen, for instance, notes that "The United States is unique among mature democracies in using local, partisan officials to run national elections," and that "other modern democracies, such as Australia, Canada, and the UK, put nonpartisan officials in charge of their elections. That's not the norm in the United States" (2012, pp. 7, 21).

24 This is true both of local officials, although most evidence suggests that the major problem here is a lack of training and resources; but more importantly, it is true of state legislators and the elected officials in the executive branch.

imposed by a rural society where most residents would be known to the poll workers.²⁵

Subsequent developments have not, for the most part, dislodged parties of their role in the process. Rather, new actors and institutions, often with carefully delimited authority, have been added to the process with little change to the fact that the stakeholders continued set the rules. This fact, which stands in marked contrast to the political development of other countries that developed early competitive electoral systems, cannot be understood without reference to the disproportionate influence wielded by White southerners in Congress and by opponents of racial egalitarianism in the Supreme Court. Consider, for example, the first effort to establish a national role in state and federal elections. When the Republican party after the Civil War moved to create a form of national supervision for state and federal elections they were constrained by their need to appease their own local partisans, but also by a Supreme Court that was unwilling to accept Federal supervision of state elections as having been authorized by the 15th Amendment. Accordingly, Republicans layered atop of the existing state and county-run election systems a new set of institutions, effectively keeping in place local procedures but adding a new set of federal officials – the deputy marshals – who would supervise the process to ensure that it met a new set of federal criteria.²⁶

The Federal Elections laws of the late 19th century were not just limited in scope, but were highly limited in their spatial application. Those that survived the early years of Reconstruction applied primarily in large cities, where federal supervisors could be requested by a relatively small number of citizens. This reflected the fact that the party could not risk provoking the animosity of local officials in rural areas and because this arrangement allowed for an intense supervision of what were often Democratic strongholds, ensuring that new immigrants would be especially subject to denials of the right to vote.²⁷ Wherever they

²⁵ Contrast this with England, where the registration system established in 1832 helped create mass parties. Over the course of the 19th and 20th centuries, the political parties that had grown up around the registration system were gradually pushed parties outside the process, and the state took on an affirmative role for registering voters while ensuring that the conduct of elections would be administered by non-partisan state bureaucrats working in conjunction with non-partisan local officials.

²⁶ During this period, many Republicans insisted that Article 1 Section 4 of the Constitution provided Congress with the authority to fully control federal elections.

²⁷ The Republican laws were themselves a move to simultaneously suppress voting among Democratic-leaning immigrant communities in northern cities and protect the voting rights of African Americans in the South. CITE.

did apply, however, they provoked the opposition of local election officials and Democratic legislators who resented what they termed a denial of “home rule.”

From the early 1870s onward, many Republicans wanted to establish a more comprehensive system of Federal supervision and regulation, and in 1890 a Federal Elections bill was proposed, which would have established a nationwide system of election supervision and was defended as necessary to establish the principle of national control over national elections. Elections would still be organized by the states, but congressional contests could be supervised by Federal officials and the Federal government would establish a set of regulations to be followed. The fight over the Lodge Bill was a pivotal moment in American history, the final effort of Republican egalitarians to ensure that the 15th Amendment was enforced. But after what amounted to a year-long filibuster by southern Democrats committed to White supremacy, the Republican suffered among the largest electoral losses in American history and shortly after were forced to abandon the bill, and with it the cause of Black suffrage and an active role for the federal government in national elections (Valelly 2004).²⁸ A few years later, almost all of the remaining Federal election laws were repealed by Democratic majorities in Congress, an offering by the northern wing of the party to the South.

With a Federal role in supervising and regulating elections off the table, the electoral systems of each state continued to develop in accordance with local circumstances, sometimes in ways that encouraged a relatively non-partisan process with inclusive regulations (especially in the West) but just as often in ways that fostered continued party control and electorally motivated voter suppression. As is true today, the Gilded Age and Progressive era were times of heightened political competition, with substantial public anxiety over the changing racial composition of the electorate. The most common responses of state reformers were the adoption of the secret ballot and the creation of registration lists, both of which were understood as being likely to reduce turnout both by decreasing fraud but also by turning away legitimate voters unable to read or who had not been registered.²⁹ But while some states passed legislation that was carefully calibrated to ensure that the burden of proof rested on the voters, others passed legislation that effectively disfranchised illiterate voters. Unsurprisingly, where parties were

²⁸ The filibuster against the Federal Elections bill is often treated as having occurred in January 1891. In reality, the Democratic party had delayed almost every single piece of legislation since the Congress had convened in December 1889, agreeing to advance major items only once the Republicans accepted to delay considering the Elections bill.

²⁹ While there were some local variations, in general Republicans were preoccupied by voter fraud while Democrats, outside the South, believed that this was part of a concerted effort to deny the vote to legitimate voters, most of them immigrant.

strong when the new election rules were being written, parties continued to have a disproportionate role in their administration, while in states with large Black or immigrant populations, the new “individualized, self-initiated voter registration” systems were intentionally designed to “explicit effort to keep former slaves and new European immigrants from voting” (Waldman 2013, p. 11).

Only with the success of the civil rights movement was a system of national supervision and regulation put in place that could check some of the more extreme forms of disfranchisement and voter suppression. But again, pivotal actors in both parties insisted that any substantial grant of authority given to federal courts or the Department of Justice should not interfere with their own local prerogatives. Instead, the triggering formula of Section 4(b) of the Voting Rights Act covered primarily southern states, and the authority granted to the federal government was largely reactive. Since the civil rights movement both the Federal government – through the Department of Justice – and the Federal courts have been intricately involved in supervising and constraining states from engaging in restrictive practices, and the courts in particular have forced some degree of uniformity by overturning the poll tax and limiting the ability of states to exclude on the basis of extensive residency requirements.³⁰ Many of the more restrictive restrictions that were passed in 2011 or 2012 were either blocked by the Courts or the Department of Justice, or were put on hold until they could be more carefully reviewed for possible violations of state constitutions.³¹

Still, while most advanced democracies have established administrative agencies empowered to organize elections and set election rules, within broadly defined parameters – “prevent fraud while ensuring no legitimate voter is disfranchised” – American state legislatures continue to intervene in election law on a regular basis, interventions that have very often been motivated by partisan calculation. American elections continue, for the most part, to be administered by partisan officials, and there has been little support in Congress for having either the Federal government take on a more active role in registering voters

30 Since the Court’s decision in *Dunn v. Blumstein* [405 US 330 (1972)] state residency requirements have generally been set at around 30 days, although some states have dropped these completely. In earlier decades, the length of time required to be a resident for voting purposes ranged from 3 months to 2 years.

31 These institutions can themselves be subject to partisan pressure, as the preclearance of Georgia’s voter identification law should remind us, and the persons who staff the agencies or the judiciary are by no means immune from broader shifts in legal and political thought over the proper role for the Federal government in protecting voting rights. As with ideological polarization more generally, political parties can help define and raise to prominence legal theories that validate weighing state discretion in determining election procedures more heavily than protecting voting rights.

and ensuring access or in encouraging states to establish independent electoral agencies that would take over most of the responsibilities for administering elections and setting procedures on early voting, absentee ballots, acceptable forms of identification, and the use of affidavits and provisional ballots. In fact, even the US Electoral Assistance Commission, established by HAVA in 2002 and tasked mainly with distributing money with fairly little in the way of oversight, has been opposed by local election officials as “a threat to their autonomy” (Hasen 2012, p. 7).

Going Forward

The impact of recent restrictions has been modest, partly because remaining legal constraints have resulted in the modification of some laws but also because of an ongoing counter-movement that has simultaneously expanded access in some states while more intensely mobilizing some of the voters that were expected to be disproportionately burdened by these restrictions. Despite predictions that voter ID would “allow Governor Romney to win the state of Pennsylvania” or that it would amount to a mass disenfranchisement of minority voters, the extent of a decline in turnout resulting from these laws remains empirically uncertain (Cooper 2011; Weiser and Norden 2011; Warner 2012; Weinger 2012).³² Some early statistical analyses of the impact of voter identification laws were unable to distinguish any impact at all, while more recent analyses suggest that the more severe voter identification laws passed since 2008 may have reduced turnout by 2 to 3 percent overall, distributed (unevenly) across Democratic, Republican, minority, and non-minority voters (de Alth 2009; Barretto, Nuno, and Sanchez 2009; Alvarez, Bailey, and Katz 2008).³³ While this is much smaller than opponents of the laws had feared, it nonetheless amounts to a clear restriction of the ability of individual voters to cast a ballot.³⁴

³² The Brennan Center, for instance, in 2011 published a widely reported study that concluded recent restrictions “could make it significantly harder for more than five million eligible voters to cast ballots in 2012.”

³³ The differences across studies, as Erikson and Minnite have noted, reflect the fact that the “complexity of electoral laws and voting behavior together with the likely marginal effect of photo ID rules makes statistical outcomes quite sensitive to research designs” (Lott 2006; Erikson and Minnite 2009, p. 85; Mycoff, Wagner, and Wilson 2009).

³⁴ As Rick Hasen notes, while “it is hard to quantify just how many people are deterred from voting because of strict voter-ID laws... that’s not the point. A focus on aggregate numbers puts the emphasis in the wrong place, away from *individual* voters’ rights and dignity and away from the naked partisan efforts to discourage those voters” (2016).

One possible reason for the relatively small impact compared to expectations is that attention to voting restrictions may have spurred a compensatory backlash: civic groups with strong roots in minority communities, including civil rights organizations as well as local Democratic parties, have organized around the issue of voter restrictions, potentially leading to increased engagement and turnout in recent elections. Paradoxically, many of those communities where restrictions might be expected to have the largest impact were also among those with an “institutional capacity to help compensate for tougher barriers to participation” (Leighley 2001; Rocha and Espino 2010; Whitby 2013; Rocha and Matsubayashi 2014, p. 669). This might help explain why, in one study, poor Whites were the most likely to experience a decline in turnout as a result of a restrictive voter identification law (Hood and Bullock 2012), and should lead researchers to more closely examine the organizational ability of different communities to overcome the imposed burdens.

The major exception to the finding of modest effect is felon disenfranchisement, a policy that directly excludes a considerable number of adults – disproportionately but not primarily African American – from voting. This is also an area where the judiciary has left states relatively unconstrained by Federal statutory and constitutional requirements. Estimates of the percent of the voting age population disenfranchised by felon laws range from 0.25% for Massachusetts to 10% for Florida, while the rate for African American of voting age are much higher, reaching 18% in Tennessee, 20% in Virginia, 22% in Kentucky, and 23% in Florida.³⁵ As Richard Valelly has noted, the staggering rates of felon disenfranchisement are primarily the result of policy drift, in which a set of policies that impacted relatively few people during a period of low incarceration becoming much more onerous in a period of mass incarceration (2015). The level of disenfranchisement was less a product of design than an unexpected result of old disfranchising laws intersecting with a radically changed carceral environment.

But it is not entirely the product of drift. Many of the disfranchising laws were passed with the explicit intent of reducing the Black share of the voting population during the late nineteenth century. And after several years in which many states made it easier for former felons to have their voting rights

³⁵ These numbers are extraordinary, but they also point to the problems of using turnout as a measure of disenfranchisement: using a fairly generous set of estimates of ex-felon turnout, Uggen and Manza (2012) identified only seven national elections since 1960 that would have changed had felon disenfranchisement laws not been in place. Low turnout rates among poor voters and large electoral districts mean that the removal of a large segment of population has little impact on electoral results, even as it results in a potential electorate that is much smaller, richer, and whiter.

restored, this trend may now be showing signs of reversing. Governors Rick Scott (R-FL), Terry Branstad (R-IA), and Matt Bevin (R-KY), for example, have each reversed prior executive orders that would have facilitated voting rights restoration.³⁶

Among African Americans the aggregate impact of recent restrictions has largely been overwhelmed by steadily increasing turnout, driven in part a long-term secular trend (File 2013), by increased engagement with presidential elections during the Obama years, and by targeted counter-mobilization efforts.³⁷ This is not “Jim Crow 2.0.” But efforts to reduce Democratic turnout through restrictive changes to election law and procedures are likely to continue and intensify, and the most recent batch of voter identification laws is already an escalation from those that were passed in the early 2000s. So too will the other side of this double movement, the effort to expand voting access and participation rates. But there is no reason to expect that these movements will balance each other out, nor any reason to confidently expect things will break in one direction or the other.

This, then, raises perhaps the most important question: is the recent recurrence of restrictions prelude to worse, the way that the New York State’s identification law was in 1814? Richard Valelly lays out two sets of conditions under which voting rights expansions can be substantially rolled back: (1) when there has been insufficient investment in a party apparatus committed to enfranchisement, and (2) when existing jurisprudence does not provide adequate support for voting rights or for authorizing the protection of these rights by political institutions.³⁸

There is little question that the jurisprudence that has sustained some degree of Federal supervision over voting rights has been seriously hampered in recent years by the Supreme Court’s decision to overturn of Section 4(b) of the Voting Rights Act, which “threatens to end the most interventionist egalitarian power given to the federal government in the twentieth century” (King and Smith 2015),

36 The politics of felon disfranchisement are also difficult to understand without understanding the role played by racial inequality and racial animosity. “If it’s Blacks losing the right to vote,” argued one supporter of disfranchising ex-felons for an additional 15 years, “then they have to quit committing crimes” (Behrens, Uggem, and Manza 2003, p. 572).

37 The effect on other groups remains to be seen.

38 Party-building, argues Valelly, is necessary to ensure that there is a capable and extensive organization with a fundamental commitment to sustaining enfranchisement, while jurisprudence-building is needed to provide the appropriate tools for intervening in case of attempted exclusions (2004).

and to authorize strict voter identification laws in *Crawford v. Marion County* (2008).³⁹ But there is also no question that the party-building that accompanied and followed the civil rights revolution has persisted. The civil rights revolution never rested on jurisprudence alone, and African Americans and other racial minorities are perhaps more central to the Democratic coalition today than they have ever been. As a result, we can expect that moves toward restriction will be met with stiff opposition, that state electoral shifts will lead to legislative reversals, and that there will be a renewal of efforts to guarantee voting rights through national legislation.

The “voting wars,” then, will continue in an institutional context that is both similar to and substantially different from that which characterized earlier periods. The way in which we organize elections continues to ensure that the motive to manipulate voting qualifications and procedures for partisan advantage is supplemented by the opportunity to do so. At the same time, there are myriad groups invested in opposing restrictive changes and championing further expansions, institutions and organizations that are much stronger today than they were a century ago.⁴⁰ Ultimately, the question of whether restrictive legislation will be rolled back, or whether new procedures that expand access to the ballot will be layered atop existing procedures, or whether local organizations will be able to ensure that restrictions do not in practice impede access over the long-term is going to be answered through politics. While understanding the history of American voting rights might be key to understanding the present, it is not, hopefully, a guide to the future.

³⁹ The decision in *Shelby County*, as well as the decision by political appointees in the Bush-era Department of Justice to approve Georgia’s voter identification law, might also reflect a gradual shift away from what had once been a fairly bipartisan commitment to protecting voting rights by generally treating restrictive measures with suspicion. While this trend might map on to political party, it is rooted in a rationale about the appropriate balance between voting rights and state interests that might have broader appeal. The decision in *Richardson v. Ramirez* [418 US 24 (1974)] holding that felon disenfranchisement did not require a compelling state interest, in this light, can be seen as an early move in this direction, as might normally liberal Justice John Paul Stevens’ decision to uphold Indiana’s voter identification law in *Crawford v. Marion County Election Board* [553 US 181 (2008)].

⁴⁰ Civil rights and other civil society organizations are likely to continue to bring attention to the issue of voting restrictions and organize in opposition to these; the Democratic party is invested in minority voting rights to a degree perhaps unparalleled in American history; there is a potentially rich, albeit contested and receding, body of state and Federal jurisprudence enabling voting rights’ protections; and the Department of Justice continues to employ a cadre of professional lawyers who have dedicated their careers to the cause of civil rights.

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