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Election Reform: Past, Present, and Future

by Richard L. Hasen*

Abstract: This Chapter considers what election “reform” is and why many Americans want it; who has successfully reformed election rules in the United States and how; the current Supreme Court’s role as a barrier to many progressive election reforms; and the future of election reform in a hyper-decentralized, polarized electoral system. Throughout American history, dissatisfaction with substantive policies and with political and economic inequality, including across race and gender, has fueled interest in changing political arrangements. Proposals for political change also prompt reactions by those opposing them. Some election reforms have already been enacted and implemented, while others have failed. Constitutional change is difficult given a cumbersome amendment process requiring supermajority support. Other reasons for failure include lack of sufficient popular support, self-interested legislative resistance to popular ideas and the absence of a direct democracy workaround, and language in the United States Constitution, at least as interpreted by the Supreme Court. In the current hyper-polarized political system, bipartisan cooperation on large-scale election reforms including constitutional amendments will be rare, and one-party supported statutory reforms or those passed through direct democracy will be more common. The biggest impediment to current progressive-oriented reform is the jurisprudence of the conservative Justices who make up a majority on the Supreme Court. It is harder to predict the success of election reforms in the longer term.

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I. What is Election “Reform” and Why Do Many Americans Want It?

Election reform ideas are plentiful in the contemporary United States, from taking redistricting power away from state legislatures and putting it into the hands of redistricting commissions, to abolishing the Electoral College used to choose American presidents, to changing the malapportionment or abolishing the United States Senate, to deregulating the campaign finance system.¹ Some election reforms have already been enacted and implemented, while others have failed. Reasons for failure include lack of sufficient popular support, self-interested legislative resistance to popular ideas and the absence of a direct democracy workaround, and language in the United States Constitution—at least as interpreted by the Supreme Court—barring reform or erecting a high hurdle.

This Chapter considers what election “reform” is and why many Americans want it; who has successfully reformed election rules in the United States and how; the current Supreme Court’s role as a barrier to many progressive or enfranchising election reforms; and the future of election reform in a hyper-decentralized, polarized electoral system.

¹ E.g., Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808 (2012) (redistricting commissions); JESSE WEGMAN, LET THE PEOPLE PICK THE PRESIDENT: THE CASE FOR ABOLISHING THE ELECTORAL COLLEGE (2020) (Electoral College); SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 162 (2006) (abolishing the Senate); BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM (2001) (deregulating campaign finance).

The term “election reform” has no set meaning. A good, broad “working definition of ‘reform’ is a proposed or actual change that at least some people claim will be for the better.”² In the election context, that definition encompasses changes that expand voting rights, such as allowing former felons to vote, and those contracting them, such as imposing onerous voter registration requirements. Election reform can be progressive or conservative, and any proposed change in election rules will find supporters claiming it will improve the system by making it fairer, more secure, less corrupt, or otherwise in the public interest.

An alternative definition limits “reform” to those changes that move only in a progressive or liberal direction, such as by increasing political equality, government transparency, or certain notions of election fairness. This latter definition lines up with some popular uses of the term “reform.” In popular parlance, “campaign finance reformers” tend to be people who support more limits on money in politics, and people who support deregulation are less likely to be called “reformers” even though they too wish to reform the current campaign finance system.³ This Chapter uses the broader definition of the term “reform,” as its scope covers the question of how election law changes, regardless of its valence. It concludes by considering the specific modern tension between progressive-oriented reform and the conservative Supreme Court majority.

Throughout American history, dissatisfaction with substantive policies and with political and economic inequality, including across race and gender, has fueled interest in changing political arrangements. Proposals for political change also prompt reactions by those opposing

² DANIEL HAYS LOWENSTEIN ET AL., *ELECTION LAW, CASES AND MATERIALS* 3 (7th ed. 2022).

³ Cf. SMITH, *supra* note 1, at x (“Few people like our current campaign finance laws. I certainly don’t, and in that respect, I am a full-throated ‘reformer.’ But ‘reform’ need not be limited to defending current regulation and calling for more. ‘Reform’ can also mean critically examining the effects of current regulation and calling for its repeal or revision.”).

them, including legislation that preserves the status quo or restores older power arrangements and also including resort to litigation to block or alter new reforms.

In early United States history, voting was confined in many areas to white, property-owning males, and public policy often reflected the interests of those who were able to exercise the franchise. It was not until after the Civil War, in the 1860s, that slavery was abolished in the American South and discrimination in voting on the basis of race was formally barred through the passage of the Fifteenth Amendment. Although the immediate period after the Civil War saw high rates of African-American voter registration and enfranchisement, the Redemption and the rise of Jim Crow in the American South meant that African-Americans were almost universally denied the vote until Congress passed the Voting Rights Act of 1965.⁴

Women did not gain the formal right to vote in many areas until Congress passed the Nineteenth Amendment in 1920. States implemented procedures ensuring enfranchisement of women much more quickly after passage of the Nineteenth Amendment than they did ensuring enfranchisement of African Americans after passage of the Fifteenth Amendment, as there was no organized official government resistance to women's enfranchisement following ratification of the Nineteenth Amendment.

Despite expansions of the franchise, including extension of the franchise to 18-to-21-year-olds through ratification of the Twenty-Sixth Amendment in 1971, the Constitution still contains no affirmative right to vote for President, and the Supreme Court confirmed as recently as 2000 that under Article II of the Constitution, state legislatures have the power to take away

⁴ For a general history of the right to vote in the United States, see ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (rev. ed. 2009). On the reconstruction amendments, see ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877* (2014). On formative period of Southern restrictions on African-American voting, see J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910* (1974).

the right of voters to vote for President in future elections.⁵ Voters did not have the right to directly elect Senators until passage of the Seventeenth Amendment in 1913.⁶ Those wishing for greater constitutional protection of voting rights have continued to agitate for change.

The decentralized nature of the U.S. election system, which divides power among federal, state, and local governments, means that access to voter registration and voting differs from state to state and sometimes even from county to county.⁷ In the face of polarized politics, state and local governments change election rules with some frequency, sometimes in the name of preventing fraud or promoting access, but often with at least a partial desire to obtain partisan advantage.⁸

The Supreme Court's one person, one vote decisions from the 1960s have required state and local governments electing representatives from districts to redraw their lines every ten years.⁹ Experience shows that lines can be drawn to give political parties certain advantages, or to make it harder for minority voters to elect representatives of their choice. Congress's passage of the Voting Rights Act of 1965 included a provision ("Section 5") that required states with a history of racial discrimination to get approval (or "preclearance") before making changes to redistricting and other voting rules.¹⁰ Amendments to the Voting Rights Act in 1982 (in "Section

⁵ *Bush v. Gore*, 531 U.S. 98, 104 (2000) ("History has now favored the voter, and in each of the several States the citizens themselves vote for Presidential electors. When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter. The State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors.").

⁶ U.S. CONST. amend. XVII.

⁷ Richard L. Hasen, *Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic, and How to Treat and Cure Them*, 19 ELECTION L.J. 263 (2020).

⁸ For a qualified defense of partisan election administration, see Rebecca Green, *Adversarial Election Administration* [citation forthcoming]. For a critique, see RICHARD L. HASEN, *THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN* (2012); RICHARD L. HASEN, *ELECTION MELTDOWN: DIRTY TRICKS, DISTRUST, AND THE THREAT TO AMERICAN DEMOCRACY* (2020).

⁹ *Avery v. Midland Cnty.*, 390 U.S. 474 (1968); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

¹⁰ 52 U.S.C. § 10303.

2”) required all states and localities to assure more minority representation when redrawing district lines.¹¹ In 2013, the Supreme Court held that the preclearance regime was no longer constitutional,¹² and in 2022 the Supreme Court considered paring back Section 2’s protection of minority voters in redistricting.¹³

The lack of robust protection nationally for minority voting rights has led to continued calls for change, including passage of amendments to the Voting Rights Act that would restore some of the provisions that the Supreme Court has blocked or watered down.¹⁴

More generally, intense partisan competition and decentralization of election procedures and rules, coupled with great political, technological, and economic change, have created conditions whereby election reform proposals are popular, at least among those who are politically active in the United States. Among the reforms being actively pursued or discussed in the current period are: changes in rules for conducting political primaries to help elect more moderate candidates, such as adoption of “top four” primaries or use of ranked choice voting;¹⁵ replacing the electoral college with choosing the president through a national popular vote;¹⁶ and movement toward the use of commissions to draw legislative district lines.¹⁷ During this same period, states with Republican-dominated governments have imposed new restrictive voting rules, such as those limiting opportunities to vote by mail.¹⁸

¹¹ 52 U.S.C. § 10301.

¹² *Shelby Cnty v. Holder*, 570 U.S. 529 (2013).

¹³ *Singleton v. Merrill*, No. 21-cv-1291, No. 21-cv-1530, 2022 WL 265001 (N.D. Ala. Jan. 24, 2022), *stay granted, probable jurisdiction noted, cert. granted sub. nom. Merrill v. Milligan*, 142 S. Ct. 879 (2022).

¹⁴ John Lewis Voting Rights Advancement Act, S. 4263, 116th Cong. (2020).

¹⁵ Edward B. Foley, *Requiring Majority Winners for Congressional Elections: Harnessing Federalism to Combat Extremism*, 26 LEWIS & CLARK L. REV. 365 (2022).

¹⁶ JOHN R. KOZA, *EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE* (2013).

¹⁷ See Cain, *supra* note 1; [Lisa Manheim article on independent redistricting commissions in this volume](#).

¹⁸ *Voting Laws Roundup: May 2022*, BRENNAN CENTER FOR JUSTICE (May 26, 2022), <https://perma.cc/UW2B-CMHV?view-mode=server-side>.

II. Who Reforms and How?

Election reform in whatever direction is difficult in the United States. Changing the U.S. Constitution through the amendment process requires garnering the support of a supermajority of both houses of Congress and ratification by three-quarters of the states (or through a never-used procedure for a constitutional convention).¹⁹ The most recently adopted election-related constitutional amendment was the Twenty-Sixth, lowering the voting age to 18.²⁰

In the decades since that 1971 ratification, the United States has become more polarized and control of Congress and the Presidency has vacillated between the Democratic and the Republican parties. Securing enough support to overcome supermajority requirements for election-related constitutional amendments in the current political atmosphere is exceedingly difficult.

Without an easy ability to amend the Constitution, some election reform has come through federal statutory change. In addition to the already-mentioned Voting Rights Act of 1965, Congress in the last half century has passed two major sets of campaign finance reforms (FECA and BCRA), and two major election administration reforms (NVRA and HAVA), including one that greatly expanded voter registration opportunities for voters in federal elections. But as explained below, some congressional statutes have been blocked by Supreme Court interpretations of the Constitution, or watered down through chary interpretations of voting statutes.

¹⁹ U.S. CONST. art. V. For thoughts on the “here to there” problems with election reform proposals, see Heather K. Gerken, *Getting From Here to There in Redistricting Reform*, 5 DUKE J. CONST. L. & PUB. POL’Y 1 (2010).

²⁰ U.S. CONST. amend. XXVI.

Election reforms have appeared on the state and local level as well. Self-interest always figures into legislative decisions whether or not to support reform, and reforms such as those imposing term limits on legislators or stricter campaign finance contribution limits have more often come in states with ballot initiatives or other direct democracy devices allowing voters to circumvent legislative bodies in the passage of legislation.

Those wishing to change election laws in the United States have used five main levers over time: constitutional amendments, litigation-generated reform, congressional action, state and local legislative action, and direct democracy. This discussion considers when each of these levers have proven successful, and also the unintended consequences of election reform in a system of decentralized control over election rules.

A. Constitutional Amendments.

Amending the Constitution—the most difficult path toward making changes in voting rules—is probably the means of election reform with the greatest chance of securing real and lasting change. But even amendment does not guarantee immediate or full transformation. It took the Civil War to spur passage of the Fifteenth Amendment barring racial discrimination in voting; some defeated Southern states had to ratify the Amendment as a condition to their readmission into the Union after the Civil War.²¹ Southern states resisted the amendment for nearly a century after its 1870 ratification, regularly depriving African-American voters and others of the chance to register and vote until the 1965 passage of the Voting Rights Act led to federal enforcement.²²

²¹ KEYSSAR, *supra* note 4, at 82 (“Ratification of the [Fifteenth A]mendment was made a condition for readmission to the union for four southern states”).

²² KOUSSER, *supra* note 4.

Other election reforms passed via constitutional amendment had somewhat easier, but generally not easy, paths. Each depended upon specific political circumstances that normally stymie election reform through this arduous route.

The Seventeenth Amendment, ratified in 1913, gave voters a right to vote directly for United States senators, overturning Article I's earlier provision giving state legislators the right to choose senators.²³ Direct election of senators was Progressive-era reform, proposed alongside other reforms such as a failed proposal to abolish the Electoral College.²⁴

At first blush, it is hard to see why state legislatures would ratify a proposed amendment taking away their power to be kingmakers (or at least senator-makers). David Schleicher plausibly theorized that in the run-up to the passage of the amendment, united national political parties had emerged, and voters began viewing their votes for state legislators as a proxies for choosing senators. This nationalization of state legislative elections meant that state legislators had less control of their own destinies. Legislator self-interest ironically supported divesting state legislatures of their power to choose United States senators. Business interests seeking to influence state legislators and legislative elections also had an incentive to decouple state legislative races from national races over which they had less leverage.²⁵

There were other factors as well. In states like Oregon, legislative candidates were required to state on the ballot whether they would abide by the results of a non-binding popular

²³ The Seventeenth Amendment changed the Senate selection mechanism contained in Article I, section 3 of the Constitution, reading: "The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote."

²⁴ David Schleicher, *The Seventeenth Amendment and Federalism in an Age of National Political Parties*, 65 HASTINGS L.J. 1043, 1058 (2014).

²⁵ *Id.* at 1062-81; see also Daniel Wirls, *Regionalism, Rotten Boroughs, Race, and Realignment: The Seventeenth Amendment and the Politics of Representation*, 13 STUD. AM. POL. DEV. 1 (1999) (positing that regional divisions rather than partisan politics helps explain support for passage of the Seventeenth Amendment); Todd J. Zywicki, *Beyond the Shield and Husk of History: The History of the Seventeenth Amendment and Its Implications for Current Reform Proposals*, 45 CLEV. ST. L. REV. 165 (1997) (offering a public choice theory based upon interest and business group pressure for passage of the amendment).

vote for U.S. Senator.²⁶ Further, as John Buenker argued, urban political machines, normal adversaries to Progressivists, had their own reasons for supporting ratification of the Seventeenth Amendment. Rural interests were overrepresented in state legislatures, and urban areas had a greater chance of influencing the choice of Senator through direct election than through indirectly electing the state legislature.²⁷

Passage of the Nineteenth Amendment followed a more difficult path and approval took much longer despite support among Progressives for women's enfranchisement. Efforts to bar discrimination in voting on the basis of gender dated back to the colonial period, but serious progress awaited the later part of the 1800s. After the Supreme Court ruled in the 1875 *Minor v. Happersett* case²⁸ that the Fourteenth Amendment's Equal Protection Clause did not guarantee equal voting rights for women, the battle accelerated to amend the Constitution to explicitly protect gender equality in voting. The women's suffrage movement engaged in coalitional politics to build support state-by-state; coalition building was complicated by concerns among southern states that enfranchising women would inadvertently lead to greater voting rights for African-Americans. Suffrage supporters fought to enshrine gender equality in state constitutions first, making an easier path for state legislative ratification of the Nineteenth Amendment after Congress approved it.²⁹

²⁶ Schleicher, *supra* note 24, at 1056.

²⁷ John D. Buenker, *The Urban Political Machine and the Seventeenth Amendment*, 56 J. AM. HIST. 305 (1969).

²⁸ 88 U.S. 162 (1874).

²⁹ For a summary of the literature on the path to passage of the Nineteenth Amendment, see Richard L. Hasen & Leah M. Litman, *Thin and Thick Conceptions of the Nineteenth Amendment Right to Vote and Congress's Power to Enforce It*, 108 GEO. L.J. 2 (19th Amendment Edition 2020). Among the most important historical accounts are ELLEN CAROL DUBOIS, *SUFFRAGE: WOMEN'S LONG BATTLE FOR THE VOTE* (2020); Reva B. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, 129 YALE L.J. F. 450, 456–62 (2020); Steve Kolbert, *The Nineteenth Amendment Enforcement Power (But First, Which One is the Nineteenth Amendment, Again?)*, 43 FLA. ST. U. L. REV. 507 (2016); Zornitsa Keremidchieva, *The Congressional Debates on the 19th Amendment: Jurisdictional Rhetoric and the Assemblage of the US Body Politic*, 99 Q.J. SPEECH 51 (2013); CORRINE M. MCCONNAUGHY, *THE WOMAN SUFFRAGE MOVEMENT IN AMERICA: A REASSESSMENT* (2013); ROSALYN TERBORGPENN, *AFRICAN AMERICAN WOMEN IN THE STRUGGLE FOR THE VOTE, 1850-1920* (1998); AILEEN S. KRADITOR, *THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT: 1890-1920* (W.W. Norton & Co.1981) (1965).

The next set of election reforms via constitutional amendment awaited the 1960s and the rise of the modern civil rights movement.³⁰ The Twenty-Third Amendment, which gave Washington, D.C. three electoral college votes, began in the Senate as a more ambitious proposal from moderate Republican Senator Kenneth Keating that would also have led to potential representation for District of Columbia residents in the House of Representatives. Senator Keating's proposal got paired with Senator Spessard Holland's proposal to ban the use of poll taxes in state elections. Both measures got folded into a piece of must-pass continuity of Congress legislation. When the measure passed the Senate and reached the House facing significant Southern Democrat opposition for its inclusion of the poll tax provision, Manny Celler, the chair of the House Judiciary Committee, stripped the proposal down to one only for D.C. representation in the Electoral College. The amendment passed by voice votes in both Houses of Congress, and states ratified the measure nine months later.³¹

The Twenty-Fourth Amendment, barring the use of poll taxes in federal elections, emerged as the civil rights movement was gaining steam and with only five Southern states still requiring some form of payment to be eligible to vote. The unlikely champion of the measure in the Senate was Senator Holland, a segregationist who long fought to repeal the poll tax as an objectionable wealth-related condition for voting. John Kowal and Wilfred Codrington III point out that although the poll tax was a measure primarily aimed at preventing African-Americans from voting, by the time Holland was advocating for an amendment, demographic change meant that poor whites were more likely to be disenfranchised by the tax than African-Americans.³²

³⁰ The account of the amendments from this period draws from Chapter 6 (pages 181-215) of JOHN F. KOWAL & WILFRED U. CODRINGTON III, *THE PEOPLE'S CONSTITUTION: 200 YEARS, 27 AMENDMENTS, AND THE PROMISE OF A MORE PERFECT UNION* (2021).

³¹ *Id.* at 185-87.

³² *Id.* at 192 ("By 1942, due to demographic changes, for every *three* African Americans the poll tax kept from the ballot, *five* white Americans were also disenfranchised.").

The measure repealing poll taxes nonetheless faced severe opposition from Southern Democrats, who saw it as an attack on white supremacy, and it took some parliamentary maneuvering to get the measure out of Congress in 1962.³³

Civil rights groups viewed the proposed poll tax amendment as a diversion from more sweeping voting rights and civil rights protections and did not support it. As Bruce Ackerman and Jennifer Nou explained, “the National Association for the Advancement of Colored People (NAACP) opposed the Twenty-Fourth Amendment precisely because it threatened to condemn further civil rights initiatives to the tender mercies of a minority veto by the states under Article Five of the Constitution, which requires ratification by three-fourths of the states.”³⁴

Once Congress approved the measure, ratification in the states took seventeen months, and only two Southern states, Florida and Tennessee, were among the ratifying states.³⁵ Two years after the 1964 ratification, the Supreme Court in *Harper v. Virginia State Board of Elections*³⁶ held that the Equal Protection Clause of the Fourteenth Amendment barred poll taxes in state elections as well.

The Twenty-Sixth Amendment, extending the franchise to 18-to-21-year-olds, passed during the Vietnam War when 18-year-old males were being drafted into military service. Many conservatives and liberals had long united behind a franchise extension to young soldiers in an appeal to patriotism and military service, supporting those putting their lives and safety at risk while fighting for the United States as disenfranchised adults. But progress on an amendment had stalled.³⁷

³³ *Id.* at 192-197.

³⁴ Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 NW. U. L. REV. 63, 67 (2009); *See also* MICHAEL WALDMAN, *THE FIGHT TO VOTE* 160-63 (2016).

³⁵ KOWAL & CODRINGTON, *supra* note 30, at 195.

³⁶ 383 U.S. 663 (1966).

³⁷ KOWAL & CODRINGTON, *supra* note 30, at 207-12.

Congress extended voting rights to age 18 by statute in a section of a 1970 amendment to the Voting Rights Act. But the Supreme Court ruled in *Oregon v. Mitchell*³⁸ that the age extension was unconstitutional as applied to state elections. This created great confusion about how the upcoming 1972 elections were going to be conducted, with 18-to-21-year-olds having only the ability to vote in federal, but not state, elections. Congress quickly passed the Twenty-Sixth Amendment, and a supermajority of states ratified it in four months (with some states ratifying on the same day Congress voted), the fastest ratification in United States history.³⁹

The conditions that allowed passage of the Seventeenth, Nineteenth, Twenty-Third, Twenty-Fourth, and Twenty-Sixth Amendments seem unlikely to replicate themselves for other election reforms in the near-to-medium term in the United States. Close and intense partisan competition have spilled over into disputes over voting and enfranchisement itself, all but eliminating the conditions for the kind of bipartisan approval necessary to run through the supermajority requirements for constitutional amendment. Today, given the reputation of the District of Columbia as a solid Democratic area, it is extremely hard to imagine a proposal such as the Twenty-Third Amendment giving the territory electoral college representation gaining any significant Republican support.

Current efforts to use the amendment process for election reform have stalled. Efforts to repeal the Seventeenth Amendment, supported by some conservative luminaries, including Rick Perry and Antonin Scalia in the early 2010s, quickly petered out without even getting a congressional hearing.⁴⁰ Conservative states more recently have pushed for a constitutional

³⁸ 400 U.S. 112 (1970).

³⁹ KOWAL & CODRINGTON, *supra* note 30, at 212-15.

⁴⁰ Schleicher, *supra* note 24, at 1044-45.

convention as allowed under the Constitution's Article V.⁴¹ But even if enough states agreed to a convention, the same supermajority requirements would be unlikely to lead to passage of election reforms that divided the country by party or region.

Sustained efforts to pass a constitutional amendment abolishing the Electoral College have been subsumed to an end-run effort to get enough states to enter into an agreement, or compact, to pledge their electoral college votes to the winner of the national popular vote.⁴² If enough states enter into the compact to make it effective, its constitutionality would face an uncertain future before the Supreme Court.⁴³

Perhaps one of the most significant potential election reforms, abolition of the Senate, would face more than just formidable political hurdles. Article V of the Constitution provides that in considering amendments to the Constitution, "no state, without its consent, shall be deprived of its equal suffrage in the Senate."⁴⁴ Thus, despite objection to the composition of the Senate on grounds that it unfairly gives each state two Senators regardless of population, rendering smaller states much more powerful relative to larger states, the path to reform of Senate representation is especially difficult.⁴⁵

B. Litigation-Generated Reform.

⁴¹ Nicholas Riccardi, *Conservative Push to Alter Constitution Focuses on Primaries*, ASSOCIATED PRESS (Aug. 12, 2022), <https://apnews.com/article/2022-midterm-elections-campaigns-presidential-south-dakota-constitutions-3de00d1fb9748dcffc2e3875375a36f1>.

⁴² KOZA, *supra* note 16.

⁴³ Derek T. Muller, *The Compact Clause and the National Popular Vote Interstate Compact*, 6 ELECTION L.J. 372 (2007).

⁴⁴ U.S. CONST. art. V.

⁴⁵ See Note, *Pack the Union: A Proposal to Admit New States for the Purpose of Amending the Constitution to Ensure Equal Representation*, 133 HARV. L. REV. 1049, 1061 (2020) (suggesting transfer of Senate's power to get around Senate Entrenchment Clause); Richard Albert, *Amending Constitutional Amendment Rules*, 13 INT'L J. CONST. L. 655, 662-63 (2015) (arguing that the Equal Suffrage Clause is susceptible to "double amendment").

In the face of difficult—and in these polarized times, nearly insurmountable—conditions for amending the Constitution to reform election rules, it is unsurprising that election reform advocates have turned to other paths. One such path is constitutional litigation.

Gender equality advocates had unsuccessfully argued in *Minor* that the Equal Protection Clause of the Fourteenth Amendment prohibited gender discrimination in voting. Similar efforts have failed over time, including arguing that the Clause bars voting discrimination against felons.⁴⁶

During a single period in U.S. history, the mid-twentieth century period of the Warren Court, the Supreme Court read constitutional provisions to significantly change voting rules. During that period, the Court held that federal, state, and local district-based elections must be conducted in accordance with the one person, one vote standard;⁴⁷ that poll taxes as used in state elections were unconstitutional;⁴⁸ that discriminating in voting other than based on citizenship, residency, adulthood, or felon status triggered “strict scrutiny” and was likely unconstitutional;⁴⁹ and that long durational residency requirements for voting were illegal.⁵⁰

One should neither understate the importance of these Warren Court-driven election reforms nor ignore how aberrational they have been in the history of the United States Supreme Court. The Equal Protection Clause is a general provision in the Constitution that is vague enough to mean different things about voting rights and elections in the hands of different Supreme Court Justices.⁵¹ Given the current composition of the Supreme Court, as described

⁴⁶ *Richardson v. Ramirez*, 418 U.S. 24 (1974).

⁴⁷ *See supra* note 9.

⁴⁸ *See supra* note 36.

⁴⁹ *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969).

⁵⁰ *Dunn v. Blumstein*, 405 U.S. 330, 348 (1972) (striking down Tennessee’s one-year state, and three-month county, registration residency requirement, and suggesting a 30-day requirement could be constitutionally required); cf. *Marston v. Lewis*, 410 U.S. 679 (1973) (upholding Arizona’s 50-day durational registration residency requirement).

⁵¹ *See generally* RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* (2003).

below, it is at least as likely that one or more of these precedents would be reversed than that the Supreme Court would find new election rights or protections in the Equal Protection Clause or elsewhere in the Constitution.

State constitutional law provides another potential pathway to election reform. Virtually every state constitution contains some provision protecting voting rights. In recent years some state supreme courts have relied upon such provisions to hold, for example, that partisan gerrymandering violates the state constitution.⁵² These rulings are somewhat less stable than federal constitutional rulings, given the ease with which some state constitutional provisions may be reversed, and given the fact that many state supreme court justices are chosen through partisan elections, raising the possibility of reversing these rulings following a partisan shift in the composition of the state judiciary.

C. Congressional Action.

All the voting-related amendments in the Constitution provide for Congress to enforce the provisions “by appropriate legislation.”⁵³ Other provisions of the Constitution give Congress other powers to change election rules, most notably Article I, Section 4,⁵⁴ giving Congress the power to set rules for conducting congressional elections that displace state rules for doing so.

Unsurprisingly, given the relatively easier path to passing legislation by statute than amending the Constitution, significant election reform efforts have come via federal statute. Among the most important election-related provisions passed by Congress is the Voting Rights Act of 1965,⁵⁵ and its many amendments (most notably, the 1982 amendments which gave teeth

⁵² E.g., *Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022), cert. granted *sub. nom* *Moore v. Harper*, 142 S. Ct. 1089 (2022); *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018). See generally Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89 (2014).

⁵³ U.S. CONST. amend. XV, § 2; *id.*, amend. XIX, § 2; *id.*, amend. XXIII, § 2; *id.*, amend. XXIV, § 2; *id.*, amend. XXVI, § 2.

⁵⁴ *Id.*, art. I, § 4.

⁵⁵ 52 U.S.C. 10301 et. seq.

to Section 2 of the Act.)⁵⁶ Congress has also acted to impose limitations on money in federal campaigns and transparency and disclosure rules in a few significant laws, most notably the 1974 amendments to the Federal Election Campaign Act⁵⁷ and the Bipartisan Campaign Reform Act of 2002⁵⁸ (more commonly known as the “McCain-Feingold” law for its two leading Senate sponsors). Congress also passed two significant election administration laws, the National Voter Registration Act of 1993⁵⁹ and the Help America Vote Act of 2002.⁶⁰

What best explains the passage of these significant pieces of legislation? The original passage of the Voting Rights Act was the result of decades of struggle to assure fair voting conditions for African-Americans, who had faced the Jim Crow South and an essential blockade against voter registration and voting in many states. President Lyndon Johnson used his bully pulpit as President to push through the legislation, over the opposition of many fellow Democrats from the South.⁶¹ Further amendments to the Voting Rights Act came on a bipartisan basis, until the Voting Rights Act was seen as benefitting Democratic interests, leading to Republican opposition to the latest efforts to amend the Act and strengthen minority voting rights.⁶²

Other pieces of legislation came in the face of government scandal or crisis. The 1974 FECA amendments came in the wake of Watergate-related corruption revelations during the

⁵⁶ 52 U.S.C. 10301.

⁵⁷ Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974).

⁵⁸ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002).

⁵⁹ National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 (1993).

⁶⁰ Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1706 (2002).

⁶¹ KEYSSAR, *supra* note 4, at 206-15.

⁶² Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 IOWA L. REV. 1389 (2015); Pamela S. Karlan, *Lessons Learned: Voting Rights and the Bush Administration*, 4 DUKE J. CONST. L. & PUB. POL’Y 17 (2009); J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965-2007*, 86 TEX. L. REV. 667 (2008); Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 200 (2007); Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517 (2002).

Nixon era;⁶³ BCRA passed following a series of campaign finance scandals including those involving the energy firm Enron.⁶⁴ The Help America Vote Act came after the 2000 U.S. presidential election that culminated in the Supreme Court's controversial decision in *Bush v. Gore*, which revealed, among other things, that American voting technology and its voting rules needed to be updated so that U.S. elections could be fairer and more accurate.⁶⁵

Partisan gridlock in Washington made the passage of election rules on a bipartisan basis more difficult in the 2020s. [Update here on the fate of bills to fix the Electoral Count Act, which at this moment has some bipartisan support in the Senate following another electoral crisis.⁶⁶]

Most bills Democrats introduced to increase campaign finance transparency, update the Voting Rights Act, or limit partisan gerrymandering in congressional elections garner little to no Republican support. Similarly, Republican election bills get no to little Democratic support.

Absent crises such as concern over election subversion that emerged during the 2020 elections, it is hard to see the current era as being conducive to large election law bills receiving sufficient bipartisan support to overcome a Senate filibuster requiring the effective support of 60 Senators. Some on the left have pushed for an exception to the filibuster for election-related legislation, so far without sufficient support.⁶⁷

D. State and Local Legislative Action.

⁶³ Richard L. Hasen, *The Nine Lives of Buckley v. Valeo*, in *FIRST AMENDMENT STORIES* (Richard W. Garnett & Andrew Koppelman eds., 2010) (reprinted in revised form in *ELECTION LAW STORIES* (Joshua Douglas & Eugene Mazo eds., 2016)).

⁶⁴ *McConnell v. Fed. Election Comm'n*, 251 F. Supp. 2d 176, 513-14 (2003) (op. of Kollar-Kotelly, J.) (statement of government expert: "The public has long questioned the motivations of, and responded with distrust toward labor unions, corporations, special interests more generally, and the government itself. The public is especially troubled and animated by these problems when they become blatantly visible in widely publicized incidents and scandals such as those involving Enron and the large soft money donations to the Democratic Party and the roles played by the Clinton Administration, President Bill Clinton, and Vice President Al Gore.").

⁶⁵ Leonard M. Shambon, *Implementing the Help America Vote Act*, 3 *ELECTION L.J.* 424 (2004).

⁶⁶ To be updated.

⁶⁷ Jonathan Weisman, *Manchin Vows to Block Democratic Voting Rights Bill and Preserve Filibuster*, *N.Y. TIMES* (Jun. 6, 2021, updated Jun. 7, 2021), <https://www.nytimes.com/2021/06/06/us/politics/joe-manchin-op-ed.html>.

State and local authorities have great control over voting and election rules. Congress has greater power in the Constitution to regulate federal elections compared to state and local elections, and even there it has left much to state and local legislation. Further, the Constitution expressly allows states to set qualifications for voting and it gives state legislatures the power to set the “manner” for choosing presidential electors.⁶⁸

In the current polarized era, states and localities have passed numerous election laws, governing issues such as the requirement to show certain forms of photographic identification before voting or registering to vote, setting the conditions for voting by mail or at home, imposing limits on contributions to candidates for office, and more broadly determining the district lines for electing legislators (subject to constitutional and federal statutory requirements).

Unsurprisingly in this polarized era, we have seen the emergence of “red state” and “blue state” election laws. Based upon the questionable assumption that making it easier to votes helps Democrats get elected and making it harder to vote helps Republicans, the country has witnessed a spate of Republican state legislatures enact laws making voter registration and voting more difficult, such as by restricting vote by mail or requiring strict voter identification.⁶⁹ Democratic states have moved in the other direction, with states such as California passing laws making voting easier, such as through the passage of so-called “automatic” voter registration laws that register eligible voters who use government services such as the motor vehicles department, unless the voter opts out.⁷⁰ California also passed its own version of the Voting Rights Act,

⁶⁸ U.S. CONST. art. I, §§ 2, 4; art. II. On the breadth of Congress’s power under the Elections Clause, see FRANITA TOLSON, *IN CONGRESS WE TRUST?: ENFORCING VOTING RIGHTS FROM THE FOUNDING TO THE JIM CROW ERA* (forthcoming 2023); Nicholas O. Stephanopoulos, *The Sweep of the Electoral Power*, 36 CONST. COMMENT. 1 (2021).

⁶⁹ BRENNAN CENTER, *supra* note 18.

⁷⁰ Patrick McGreevy, *Gov. Brown Approves Automatic Voter Registration for Californians*, L.A. TIMES (Oct. 10, 2015), <https://www.latimes.com/local/political/la-me-pc-gov-brown-on-motor-voter-bill-20150917-story.html>.

which requires jurisdictions that elect members of a legislative body at large to move to legislative districts in the face of evidence of racially polarized voting.⁷¹

It is unsurprising that changes in election laws come more frequently on the state level rather than the federal level. States are more likely to have unified government, making passage of election laws (and for that matter many other laws) along party lines possible.⁷² Couple that with the self-interest that is involved in passing election-related legislation, and it is easy to see why there has been an explosion in one-party election legislation, followed by litigation, in recent years.

D. Direct Democracy.

Self-interest also explains why state and local legislators are unlikely to pass certain election reforms. A good example is term limits, a law that directly affects legislators' future employment prospects. Other laws that may go against legislative self-interest include certain campaign finance laws that impose low dollar limits on contributions to legislators, raising the time and effort that legislators must spend on fundraising. Legislators also care deeply about the legislative districts they are in, and legislators typically do not want a different entity to take over their power to draw district lines. Voters in states such as Arizona, California, and Michigan have established by initiative commissions to draw district lines.

Direct democracy provides a viable alternative for passing election reforms that state legislators may object to on self-interest or other grounds. In those states and localities that allow direct democracy, voters may propose election reforms via ballot initiative. In California, for

⁷¹ CAL. ELEC. CODE § 14025 et seq.

⁷² Daniel R. Biggers & Michael J. Hanmer, *Understanding the Adoption of Voter Identification Laws in the American States*, 45 AM. POL. RSCH. 560, 563-66 (2017).

example, voters may propose either statutes or state constitutional amendments by initiative; either needs only a majority vote for passage.⁷³

States also allow for referendums to overturn election laws that voters may find objectionable. California voters had approved a voter initiated constitutional amendment to establish a redistricting commission to draw legislative districts. Opponents of the plan drawn by the commission after the 2010 census subjected the state senate plan to a referendum vote. Voters approved the Commission's plan by a wide margin.⁷⁴

Not every state has a direct democracy workaround for election reform, but in those states that do, legislatures will sometimes have incentives to pass election reforms directly to forestall voter initiatives that legislators believe are worse. John Matsusaka finds states that allow voters to pass voter initiatives pass more laws supported by voters compared to those states that do not do so, considering both legislation passed by legislatures and that passed via initiative.⁷⁵

The tactic of initiative proponents compromising with the legislature may backfire on proponents. One recent example is a legislative deal in Ohio to create a redistricting commission bound to follow certain standards to avoid partisan gerrymandering. The legislature agreed to the deal to forestall a voter initiative on the same subject that would have cut the legislature out of the process. Once the commission was created, Republican commissioners stonewalled and even

⁷³ CAL. CONST. art. II, § 8(a).

⁷⁴ California Secretary of State Debra Bowen, Statement of Vote, Nov. 6, 2012, General Election, at 13 <https://elections.cdn.sos.ca.gov/sov/2012-general/sov-complete.pdf> (Proposition 40 received nearly 72% of an affirmative vote), <https://perma.cc/6D2Z-8AJY>; Ballotpedia, *California Proposition 40, State Senate Redistricting Plan Referendum (2012)*, [https://ballotpedia.org/California_Proposition_40,_State_Senate_Redistricting_Plan_Referendum_\(2012\)](https://ballotpedia.org/California_Proposition_40,_State_Senate_Redistricting_Plan_Referendum_(2012)), <https://perma.cc/WEA5-Z8SS?view-mode=server-side>.

⁷⁵ JOHN G. MATSUSAKA, FOR THE MANY OR THE FEW: THE INITIATIVE, PUBLIC POLICY, AND AMERICAN DEMOCRACY (2004); see also JOHN G. MATSUSAKA, LET THE PEOPLE RULE: HOW DIRECT DEMOCRACY CAN MEET THE POPULIST CHALLENGE (2020).

ignored rulings of the state supreme court in allowing a partisan gerrymander of legislative seats to go forward.⁷⁶

F. Election Reform, Decentralization, and Unintended Consequences.

One consequence of a decentralized system for running elections and reforming election rules is that different actors may sometimes act at cross purposes or act in ways that create unintended consequences.

For example, in passing the 1974 FECA amendments, Congress established a system for the financing of elections that both limited how much individuals and entities could contribute to candidates and others for office as well as how much money could be spent on campaigns. One purpose of the law, among others, was to limit the “skyrocketing” costs of campaigns.⁷⁷ The Supreme Court’s 1976 decision in *Buckley v. Valeo*⁷⁸ held that the campaign contribution limits were constitutional but the spending limits were not. This holding made it harder for candidates raising money in \$1,000 increments to compete against wealthy self-financed candidates and opened the door to large spending by wealthy individuals supporting or opposing candidates for office, a system very different from the one that Congress had created in its statute.

A similar dynamic occurred with the passage of the 2002 McCain-Feingold law. The law limited both how much money candidates could contribute to political parties and also limited spending by outside groups such as corporations and labor unions. The Supreme Court upheld both limits in a 2003 decision, *McConnell v. Federal Election Commission*,⁷⁹ but later reversed course just on the outside group spending in *Citizens United v. Federal Election Commission*⁸⁰

⁷⁶ Ned Foley, *A Case Study in the Failure of Democracy in America*, ELECTION L. BLOG (May 28, 2022, 6:11 am), <https://electionlawblog.org/?p=129567>, <https://perma.cc/93NM-F64H?view-mode=server-side>.

⁷⁷ Hasen, *supra* note 63, at 299.

⁷⁸ 424 U.S. 1 (1976).

⁷⁹ 540 U.S. 93 (2003).

⁸⁰ 558 U.S. 310 (2010).

seven years later. The combination of the rulings hobbled the ability of political parties to raise funds from wealthy individuals, but freed outside spending, a result that has weakened the more responsible political parties, to the detriment of American democracy according to some analysts.⁸¹

To take another example, in the wake of the Covid pandemic, some counties made it easier for voters to vote during the 2020 elections. In Harris County, Texas, for example, voters in the Houston area had the opportunity to vote early at 24-hour drive-in voting centers across the county. The county's moves to make voting easier in a Democratic-leaning area did not sit well with the Republican-majority Texas legislature, and in legislation following the 2020 elections, new laws barred this form of voting.⁸²

Decentralization and churn over election reform creates great instability in election rules and has led to a marked increase in the amount of election legislation. Kansas and Arizona, for example, enacted laws requiring documentary proof of citizenship (such as a birth certificate or a naturalization certificate) in order for voters to be able to vote. Litigation over the requirement took years, but the courts eventually held that the National Voter Registration Act of 1993 barred the requirement, and that it unconstitutionally violated the voting rights of Kansans, 30,000 of whom were blocked from registering while the provision was in place.⁸³

Undaunted, the state of Arizona passed a new law requiring similar proof to be applied only in presidential elections. The reason for singling out presidential elections was the potentially greater power given in Article II for state legislatures to set rules for presidential

⁸¹ RAYMOND J. LA RAJA & BRIAN F. SCHAFFNER, CAMPAIGN FINANCE AND POLITICAL POLARIZATION: WHEN PURISTS PREVAIL (2015).

⁸² Alexa Ura, *Gov. Greg Abbott Signs Texas Voting Bill into Law, Overcoming Democratic Quorum Breaks*, TEX. TRIBUNE (Sept. 7, 2021), <https://www.texastribune.org/2021/09/01/texas-voting-bill-greg-abbott/>.

⁸³ *Fish v. Kobach*, 309 F. Supp. 3d 1048 (D. Kan. 2018), *aff'd sub nom. Fish v. Schwab*, 957 F.3d 1105 (10th Cir. 2020), *cert. denied*, 141 S. Ct. 965 (2020); *Arizona v. Inter Tribal Council*, 570 U.S. 1 (2013).

elections than the power given in Article I, section 4 to set rules for congressional elections. And thus began a new round of litigation in the courts.⁸⁴

III. The Current Supreme Court as a Barrier to Some Progressive or Enfranchising Reforms

The beginning of this Chapter noted that the term election “reform” could apply to either progressive or conservative reforms. This Part examines the subset of reforms favored by modern progressives, and how the modern Supreme Court has served as a roadblock to much reform and likely will stymie many reforms going forward, making much election reform unconstitutional or more difficult to implement.

Roughly speaking, modern progressives favor limits on money in politics, greater transparency in campaign spending, broader support of voting rights, limits on partisan gerrymandering, and strong judicial oversight over partisan-backed election administration laws and rules that may make voting or voter registration more difficult. Many also support abolition of the Electoral College. And roughly speaking, conservatives on the United States Supreme Court favor jurisprudential positions that make the progressive election reform agenda much more difficult to implement.

In the campaign finance area for example, the Supreme Court has struck down on First Amendment grounds or narrowed every campaign finance limitation it has considered since Justice O’Connor left the Court in 2006, aside from a summary affirmance (that is, an affirmance without issuing its own opinion) in a lower court case upholding limits on foreign spending in

⁸⁴ Derek Muller, *Arizona’s New Proof of Citizenship Law Treats Presidential and Congressional Voters Differently, A Constitutional Distinction in Federal Power Over Elections*, ELECTION L. BLOG (Mar. 31, 2022, 12:10 pm), <https://electionlawblog.org/?p=128519>, <https://perma.cc/DBT6-J8GJ?view-mode=server-side>.

U.S. elections.⁸⁵ The Court struck down numerous parts of BCRA and the 1974 FECA amendments, along with announcing new standards that make it more difficult to uphold state and local campaign contribution limits.⁸⁶ The Court has also hinted at closer scrutiny of laws that require disclosure of campaign finance information.⁸⁷

The Court's record on the Voting Rights Act also has been hostile. In 2013, the Supreme Court struck down the formula used to determine which states and localities would be subject to the preclearance standards of Section 5, the rule that required these jurisdictions to demonstrate that their proposed voting changes would not make minority voters worse off before they could be implemented.⁸⁸ The Court imposed a state-sympathetic reading of Section 2 of the Voting Rights Act as applied to challenges to voting laws, such as voter identification laws, that make it harder for minority voters to register and to vote.⁸⁹ Its interpretation was at odds with the text of the Voting Rights Act, its legislative history, and earlier Court interpretations of Section 2. It has applied a similarly chary interpretation of Section 2 in the context of redistricting, requiring among other things that courts presume that legislatures act in good faith when they pass election laws.⁹⁰

The Court has read the Equal Protection Clause in a way that makes it very difficult to bring constitutional challenges to laws that restrict voting or voter registration, requiring voters challenging such laws to provide great evidence of the law's burden while allowing states to

⁸⁵ *Bluman v. Fed. Election Comm'n*, 565 U.S. 1104 (2012) (mem.) (affirming 800 F. Supp. 2d 281 (D.D.C. 2011) (three-judge court)).

⁸⁶ E.g. *Thompson v. Hebdon*, 140 S. Ct. 348 (2019); *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185 (2014); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *Davis v. Fed. Election Comm'n*, 554 U.S. 724 (2008); *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007).

⁸⁷ *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021).

⁸⁸ *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013).

⁸⁹ *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021).

⁹⁰ *Abbott v. Perez*, 138 S. Ct. 2305 (2018) [to be updated with *Milligan* case].

advance unproven interests, such as those in preventing voter fraud or promoting voter confidence even when there is very weak evidence the laws accomplish such goals.⁹¹

The Court has shut the door to arguments that the Equal Protection Clause or the First Amendment bars the practice of partisan gerrymandering, ruling that this issue is a non-justiciable political question.⁹² And it stands ready, under the so-called “independent state legislature” theory, to limit the ability of state courts to apply state constitutions to bar legislatures from engaging in partisan gerrymandering of congressional districts. Depending upon the scope of the ruling in the upcoming case, *Moore v. Harper*,⁹³ the Court could also limit the ability of voters acting through direct democracy to impose requirements for redistricting commissions or open primaries as applied to congressional elections.

Some of the conservatives on the Court have even hinted that the one person, one vote precedents of the Warren Court could be overturned. Although the Court was unanimous in a 2016 case that states are not required to draw legislative districts with equal numbers of citizens, as opposed to persons, Justices Clarence Thomas and Samuel Alito left open the potential to hold that states need not even comply with requirements to draw equally populated districts (whatever the denominator).⁹⁴

The Supreme Court’s conservatism corresponds to the transformation of the Court in the 2020s. Before that time, some of the liberals on the Court had been appointed by Republican Presidents and some of the conservatives by Democrats. Today, Republican-appointed Justices

⁹¹ *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

⁹² *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

⁹³ *Moore v. Harper*, 142 S. Ct. 2901 (2022) (granting cert. petition).

⁹⁴ *Evenwel v. Abbott*, 578 U.S. 54, 75 (2016) (Thomas, J., concurring in the judgment); *id.* at 92 (Alito, J., concurring in the judgment).

are all conservative and Democratic-appointed Justices are all liberal, creating a 6-3 conservative majority on the Supreme Court.⁹⁵

Given these conditions, which are likely to remain constant for some years absent unexpected departures by Justices from the Supreme Court, it is fair to say that the greatest short- to medium-term impediment to progressive election reform is the Court itself. By reading Congressional power over voting rights narrowly and the First Amendment broadly, by engaging in constitutional and statutory interpretation that favors restrictive state laws over voting rights, and by creating judge-made anti-voting doctrines such as the *Purcell* Principle that allow states to impose illegal election rules in the period close enough to an election,⁹⁶ the Court has limited the ability of federal, state, and local governments to enact progressive election reform, and stymied the ability of voting rights plaintiffs to challenge conservative reforms.

IV. The Future of Reform

The short-term future of election reform is uncertain. A hyperdecentralized election system, within a polarized polity, before a Supreme Court hostile to progressive election reforms means that the only safe prediction is that there will continue to be high litigation rates. Partisan competition fuels a desire to change the rules of the game, and in moments of unified party control of federal, state, or local governments, single-party-supported election reform is the norm. Moments of crisis can support moments of bipartisan cooperation on reform, but those moments are rare and harder to harness for legislation in an era of hyperpartisanship.

⁹⁵ Richard L. Hasen, *Polarization and the Judiciary*, 22 ANN. REV. POL. SCI. 261 (2019); see also Anthony J. Gaughan, *The Influence of Partisanship on Supreme Court Election Law Rulings*, 36 NOTRE DAME J. L., ETHICS & PUB. POL'Y (forthcoming 2022).

⁹⁶ Wilfred U. Codrington, III, *Purcell in Pandemic*, 96 N.Y.U. L. REV 941 (2021); Richard L. Hasen, *Reining in the Purcell Principle*, 43 FLA. ST. U. L. REV. 427 (2016).

Constitutional amendments on election-related issues seem unlikely to garner supermajority support in the near to medium term. Amounts of litigation over election rules continue to set records.⁹⁷

In those states that have devices of direct democracy, voters are likely to continue to push for election reforms, from term limits supported by conservatives to campaign finance limits supported by liberals, to redistricting commissions that may garner bipartisan support. When such laws pass, or are proposed, state legislatures may react to them to defeat or weaken them, and opponents may resort to judicial arguments whose success may depend upon the ideological orientation of the judges deciding the case.

In the longer term, predicting the valence and speed of election reform in the United States is impossible. Few at the time of the Founding would have imagined equal voting rights for women or people of color. Those who passed the Fifteenth Amendment could not have known that it would take a century for Congress to pass effective legislation to assure equal voting rights.

Technological change has increased the potential for the spread of election-related disinformation, fueling restrictive election reform efforts in states that bear little resemblance to the problems that states actually experience.⁹⁸ Demographic, political, and economic changes create conditions for greater uncertainty, and internal and external attempts to manipulate or subvert election results as witnessed in the 2016 and 2020 elections may provoke new crises which threaten democracy. If we are lucky, these crises will spark moments of bipartisan

⁹⁷ Richard L. Hasen, *Research Note: Record Election Litigation Rates in the 2020 Election: An Aberration or a Sign of Things to Come?*, 21 ELECTION L.J. 150 (2022).

⁹⁸ RICHARD L. HASEN, CHEAP SPEECH: HOW DISINFORMATION POISONS OUR POLITICS, AND HOW TO CURE IT (2022).

consensus to protect core values of American democracy: equal voting, in fair elections, for all eligible voters.

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