

# Some American Voters Are More Equal

## Election Law As an Arena of Partisan Strategy

*Lauren Schwartz and Johannes Thimm*

Although Donald Trump ultimately won the presidency, he has claimed that Hillary Clinton only won the popular vote because millions of people had voted illegally. For years, accusations of electoral fraud have been used to increase the bureaucratic requirements for potential voters. Most of these tactics, which affect some demographic groups more than others, are legal. Republicans and Democrats alike have attempted to shape electoral districts to their advantage, resulting in politically more homogenous districts, more radical candidates, and ever-larger biases in the translation of votes into mandates. On October 3rd, the United States Supreme Court heard arguments on whether to curb the redistricting powers of the parties. The battles over election laws could have a long-term effect on future congressional majorities.

The 2000 presidential election made clear that flaws in the state-administered election procedures could affect national outcomes. The race between George W. Bush and Al Gore was decided in Florida, where the results were close and a series of irregularities led to a contested outcome. The ballot design was confusing; voting machines malfunctioned, resulting in invalid ballots; and 12,000 legal voters were purged from the Florida voter registry, because their names matched those of convicted felons, who do not have the right to vote. Despite these problems, the U.S. Supreme Court ordered a halt to the recounts and declared Bush the winner of the election in Florida. With this ruling, Bush secured the majority in the U.S. Electoral College and won the presidency.

The election in Florida illustrated how important the technical details of elections are, especially in close contests. Yet, while some attempted to correct the flaws in the system, others began to exploit the expansive authority allocated to the state level for their partisan advantage. Even though there is very little evidence to support such claims, accusations of systematic voter fraud have become a central justification in the effort to make voter registration and casting a ballot more difficult.

### **The Myth of Voter Fraud**

The fact that Trump entered office without winning the popular vote is damaging to his populist brand. Aware that this weakens his mandate, Trump has claimed that Hil-

lary Clinton's three-million vote lead in the popular vote only came about because undocumented immigrants voted illegally for Clinton and the Democratic Party.

Acting upon this claim, Trump has established the Presidential Advisory Commission on Election Integrity. Previous committees under Republican and Democratic administrations have consistently failed to find evidence of systematic voter fraud. Trump's picks to fill the positions on the committee are a cause for concern. Vice President Mike Pence is the formal chairman of the committee, but the actual work of the committee is led by its deputy chairman, Kris Kobach – who is also the Kansas Secretary of State and a committed voter-fraud crusader. Kobach has been chasing the chimera of voter fraud for more than a decade and was previously a vocal advocate for the Interstate Voter Registration Crosscheck Program (IVRC Program) – a databank designed to cross-reference state voter registries for duplicate entries but that was beset with problems, resulting in the removal of thousands of legally registered voters from voter registries without their knowledge. Kobach has also raised concerns of a different nature when airing his fears about the future of “white America”.

Previous investigations into voter fraud have concentrated on the voter registries of individual states (since no centralized federal registry exists). Without automatic voter registration, the burden to register to vote is on the citizen, which leads to errors in the state registries: deceased voters are not removed from the registry; voters who have moved end up on multiple voter registries in different states (as several members of the Trump family have). That voter registries are not revised in a timely fashion is not inherently a problem. As long as nobody votes multiple times in different jurisdictions in a single election, or tries to impersonate deceased people at the ballot box, extra registrations in themselves are not evidence of voter fraud. Furthermore, this type of deceit is unlikely because there are high penalties for voter fraud, and indi-

vidual ballots usually have a minimal effect on the election result. There is hardly any evidence of such fraud.

However, voter registry purges have led to the removal of legitimate voters (as was the case in Florida in 2000), preventing eligible citizens from casting their ballots. Under the IVRC, duplicate voters were removed from registries simply because their names matched that of another voter in a different state, even though additional available information (such as social security numbers) could have clarified that the matching names belonged to different individuals. In some minority groups – Black, Latino, or Asian voters, for instance – cases of matching names are much more common. Republicans have exploited the disproportionate impact of these purges of voter registries to increase their chances of electoral victory.

### **New Hurdles at the Ballot Box**

Elections in the United States are administered by the individual states, within legal boundaries established by the federal government. The rules and procedures vary greatly. In states where one party holds the governorship and the majority in the legislature (single-party government), this party can change election laws with little input from the opposition party. Currently, Republicans control 26 state governments (as opposed to the Democrats' control of six state governments), and the Republican Party has been very effective in passing laws that give them an edge in close elections. They have also taken advantage of a recent ruling by the Supreme Court. In 2013, the Court overturned an important provision of the Voting Rights Act of 1965 in their ruling in the case *Shelby County v. Holder*. The Voting Rights Act was passed during the civil rights movement to prevent racial discrimination at the ballot box. One provision required states and jurisdictions with a history of racism (which were primarily concentrated in the South) to receive prior approval from the Justice Department for

any changes to election rules. The Court argued that this part of the Voting Rights Act was no longer necessary, since the situation in the southern states had changed since 1965. Without the provision in place, some states under Republican control have seized the opportunity to make the process of voter registration more cumbersome. After the partial repeal of the Voting Rights Act, it became easier to pass rule changes that impact demographic groups that tend to vote Democratic.

Some of this legislation has proven so blatantly discriminatory that it has been thrown out by other federal courts. The Federal 4th Circuit Court of Appeals overturned an election law in North Carolina that took effect immediately following the *Shelby* decision. The law eliminated election day voter registration and raised the requirements for voter identification – government-issued documents, such as those issued for federal food stamp assistance, were no longer acceptable at the polls. The 4th Circuit concluded that the law was targeting black voters with “almost surgical precision” and was therefore unconstitutional.

Concerning Texas, the Federal 5th Circuit Court of Appeals – one of the most conservative federal courts in the country – threw out another voter ID law passed after the *Shelby* decision. The court ruled that the burden placed on the voter to exercise their right to vote was too severe. However, revised voter ID laws have subsequently been upheld by this court and others, and the mixed reception of these laws makes it unclear how well the judiciary will be able to keep ahead of future developments.

### **The Importance of the Census**

Every 10 years – next time in 2020 – the Census Bureau of the Department of Commerce conducts a census of the United States population using an extensive questionnaire. The data serves many purposes, from the allocation of federal funding per state, to the number of mandates for each

state in the House of Representatives. The entire population of each state is to be counted, regardless of citizenship or immigration status.

Yet the hardline stance of the Trump administration towards illegal immigrants could affect their inclusion in the census count. Illegal immigrants residing in the United States might decline to participate in the census out of fear of attracting the attention of federal authorities. Although the Census Bureau does not cooperate with Immigration and Customs Enforcement, people without legal immigration status could refuse to interact with the government if they have reason to fear arrest or deportation. There are already reports of immigrants without papers or status who forgo access to social services such as food stamps – to which they are entitled, regardless of their immigration or residential status – precisely due to this fear. If large numbers of illegal immigrants decline to participate in the census, this could impact the appropriation of representatives and result in rural districts becoming even more overrepresented.

### **Gerrymandering**

Another purpose of the census is to serve as a base for the redrawing of electoral districts. Following the “one person – one vote” principle, each electoral district is to contain approximately the same number of people so that each representative sent to the state or federal government represents the same number of people. The redistricting process is, like election laws, the responsibility of each state, and the processes and procedures vary from state to state. In 13 states, there is only one electoral district, or the districts are drawn by independent, non-partisan committees or the courts. In the remaining states, the state governments have control over the redistricting process, which means that the resulting district maps are often influenced by party politics. It has long been accepted that the party in power could use redistricting as an instru-

ment to increase its own political success in future elections. This partisan manipulation of districts – called “gerrymandering” – is possible because of the majority voting system and the “winner takes all” principle. A district is won with a simple majority, so the losing minority of votes – as well as the winning majority of votes exceeding the minimum necessary percentage to win – are effectively “wasted”. This allows for two potential strategies to enhance the possibility of an electoral win: “packing” as many voters of an opposition party in high concentration in as few districts as possible (thus leaving the majority of other districts to secure a victory for the dominant party); and “cracking”, distributing voters of the opposite party widely across districts (to prevent a majority, and thus an electoral win, in any district).

Technology and the advent of big data mining have allowed party strategists to turn gerrymandering into an ever more precise art. Using data collected through various means, including social networks, it is possible to identify the political preferences of voters with increasing accuracy and to create computer models of “optimized” electoral districts.

Following landslide victories in the 2010 midterm elections, the Republicans have dominated redistricting this decade, determining the districts for 40 per cent of the House of Representatives (compared to the Democrats’ control of 10 per cent of House districts). According to an investigation conducted by the Brennan Center for Justice, the Republicans won between 4 and 37 additional seats, respectively, in each of the 2012, 2014, and 2016 elections because of biased electoral maps. Without this advantage, the Democrats might have won control of the House of Representatives in 2012 as well as in 2016. Because the current electoral maps continue to aid Republicans, it is not clear if the Democrats can win the majority in Congress in the 2018 midterms, despite their current lead in the polls. Gerrymandering secures Republican control over state governments. That helps in future re-

districting efforts, which, in turn, influence successive elections.

### **A New Ruling on Redistricting?**

So far, the courts have usually only intervened when gerrymandering has led to racial discrimination. However, the partisan bias of electoral maps has reached a level that might lead the Supreme Court to reconsider. In 2012, the Republicans in Wisconsin won 49 per cent of the ballots cast, but 61 per cent of the seats in the Wisconsin State House. In *Gill v. Whitford*, the Supreme Court is set to decide whether partisan gerrymandering in the Wisconsin case is unconstitutional. It is the first time in 13 years that the Supreme Court has agreed to hear a case about partisan gerrymandering, and the decision is anxiously awaited.

In addition to the increasing sophistication of gerrymandering, the introduction of a new method of measuring partisan bias contributed to the Supreme Court’s decision to hear the *Whitford* case. In 2015, Nicholas Stephanopoulos and Eric McGhee introduced the “efficiency gap”. It provides an indicator for excessive partisan gerrymandering by measuring how many votes were “wasted”. Even accounting for the fact that some wasted votes are inevitable, the metric of the efficiency gap establishes a statistical threshold for excessive bias, and an indication of partisan gerrymandering. Stephanopoulos and McGhee propose that any surplus of two or more seats for the House of Representatives or a surplus of eight or more seats in state legislature elections would be unconstitutional. Whatever the Supreme Court decides, the Democratic Party has realized how relevant elections at the local and state level are on future redistricting. Expect both the voting and the redistricting procedures to be the subject of further political conflicts.

© Stiftung Wissenschaft und Politik, 2017  
All rights reserved

These Comments reflect the authors’ views.

**SWP**  
Stiftung Wissenschaft und Politik  
German Institute for International and Security Affairs

Ludwigkirchplatz 3–4  
10719 Berlin  
Telephone +49 30 880 07-0  
Fax +49 30 880 07-100  
www.swp-berlin.org  
swp@swp-berlin.org

ISSN 1861-1761

Translation by Lauren Schwartz  
and Johannes Thimm

(English version of  
SWP-Aktuell 64/2017)