A New Kind of Voter Suppression
in Modern Elections

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I. INTRODUCTION

Democracy’s essential feature is the equal participation of all citizens in the electoral process to ensure that elected representatives respond to the will of the people. The Federalist Papers are clear that the Framers intended political power to reside in “the great body of [white male] people,” and not solely in the elites. ¹ Even though the Framers intent has been an ideal, throughout the history of the United

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¹ See, e.g., THE FEDERALIST No. 59 (Alexander Hamilton).
States, it has been less than the reality. Alexis de Tocqueville, who wrote enthusiastically about government policies in America that were unusually responsive to the will of the majority, was aware that women, slaves, and Native Americans could not participate as citizens.2

Much has changed since the 1830s, but voter suppression tactics have been a feature of U.S. elections for decades. When people think of voter suppression, they think of voter identification (“voter ID”) laws, onerous registration requirements, voter roll purges, or historic examples of minority-voter intimidation, for example, poll taxes and unfairly administered literacy requirements.3 The effectiveness of the suppression was due to the electoral authorities’ ability to exercise unrestrained choices about who could and could not vote.4 This led to blatant diminution of the vote of mostly African American citizens.5

2. See generally 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 394, 526–27 (Eduardo Nolla ed., James T. Schleifer trans. 2010) (“In the United States, except for slaves, servants, and the poor provided for by the towns, there is no one who is not a voter and who, as such, does not indirectly contribute to the law.”).


4. See id. (“[E]very jurisdiction was free to play fast and loose with the rules on everything from voter eligibility to whether or not to conduct recounts.”).

Modern-day forms of these direct voter suppression tactics still exist. The Brennan Center for Justice, discussing new voting restrictions in America, describes these suppression activities: “After the 2010 election, state lawmakers nationwide started introducing hundreds of harsh measures making it harder to vote. The new laws range from strict photo ID requirements [which were enabled due to the 2008 Supreme Court ruling in Crawford v. Marion County] to early voting cutbacks to registration restrictions.” It notes that such restrictions are in place in twenty-five states. The Brennan Center has also reported that last year, thirty-one state legislatures introduced ninety-nine bills designed to diminish voter access.

But it is not these voter suppression laws and tactics alone that prevent people from exercising their right to vote. The United States had one of the lowest turnouts in the 2016 presidential election of developed, democratic countries in the world. The blame for the lack of participation is often placed on the individual voter, with the claim that people are too lazy to vote, or they don’t take the time to research candidates or inform themselves of the issues because they have no interest in voting. But this suggestion that the individual voter is to blame for failing to vote covers up the real-life issues that have caused people to lose faith in the integrity of the voting process itself, which essentially encourages people to not participate in the electoral process. Placing the blame on the individual may be a strategic decision by those who:

[A]ren’t convinced it’s a problem that the voting population doesn’t resemble the American population. Some groups just aren’t that interested, they say. Trying to coax them to participate—tailoring our laws to the “political couch potatoes,” as Mitch McConnell, the Senate majority leader, once put it—would lead only to bloated

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7. *Id.*
voter rolls, likelier voter fraud and a more uninformed government, they warn.\textsuperscript{10}

Such views obfuscate the role that direct and indirect voter suppression plays in people’s voting decisions. And blaming the lazy voter makes the effort to equalize voter turnout across populations an unsolvable problem, which diminishes the political will to address it. But the reality is that social science, public polling, and federal court decisions indicate that there are underlying, pernicious factors that suppress people’s vote, particularly for the young, minorities, and lower income citizens. These factors should be considered to be “indirect” forms of voter suppression.

This new kind of voter suppression, while not as overt, has the same impact and purpose as historic direct voter suppression methods: to affect the voter’s desire and the ability to cast a ballot for the purpose of suppressing participation in the democratic electoral process. Any attempt to suppress a citizen’s right to vote—direct or indirect—is inconsistent with the ideals of our country. The one person one vote principle, which refers to the principle that one person’s voting power should be roughly equivalent to another person’s, is the basis for this belief.\textsuperscript{11} And the Supreme Court, in \textit{Terry v. Adams}, struck down a primary system that excluded African Americans, criticizing the state’s effort to deny citizens “an effective voice in the governmental affairs of their country, state, or community.”\textsuperscript{12}

Stanford University Political Science Professor Adam Bonica explained why citizen participation is vital: “Equalizing turnout across the population would be the single best thing we could do for our democracy, and probably for our country in the near term.”\textsuperscript{13} This Essay evaluates some of the recent efforts to purposely dissuade voters from voting. To remedy the problem, it is necessary to address all forms of voter suppression in the discussion of why people do not vote.

The campaign finance system has engendered a lack of trust in governmental institutions and political campaigns’ fairness, resulting

\begin{itemize}
\item \textsuperscript{11} See Reynolds v. Sims, 377 U.S. 533, 558 (1964).
\item \textsuperscript{12} 345 U.S. 461, 466 (1953).
\item \textsuperscript{13} See Badger, supra note 10 (quoting Adam Bonica, a political scientist at Stanford).
\end{itemize}
in lower participation in the electoral process. Many people say that campaign finance laws and the campaign finance system have caused them to believe that their representatives are “bought and paid for by the wealthy” long before the elections. They think that special interests have captured the vote, and that “dark money,” non-profit “social welfare” organizations, which don’t disclose their donors, and Super PACs are manipulating the system.

Consequently, constituents have limited interaction with elected officials who prioritize fundraising and pandering to big donors, most of whom are not constituents.14 This adds to constituents believing that their voices are not being heard as much as those of the donors. Demonstrating constituents’ frustration and anger were federal lawmakers who attempted to eliminate the Affordable Care Act and considered tax code revisions yet were unwilling to engage and discuss with their constituents in Town Hall meetings or other public events.15

Distrust in the voting process has been exacerbated by local election official’s decisions making it more difficult to vote. Examples include the closing down of early voting locations without informing voters of the change and requiring voters to wait in long lines or travel long distances to get to the polls.16 Some polling places have been located far from a bus line, making it impossible for low-income voters to get to them.17 These actions cause distrust in the voting process it-


self. Additionally, the failure of some state and federal election authorities to disclose hacking incidents\(^\text{18}\) or to respond without taking affirmative steps to assure security of the voting machines\(^\text{19}\) has led to distrust in the systems themselves.

Recent United States Supreme Court decisions have played a significant role in causing distrust in the voting process.\(^\text{20}\) And recent cases supporting state election policies that work to the detriment of turnout have led to increased voter suppression in the 2018 election.\(^\text{21}\) Because of these judicial decisions’ impact, minority, young, and economically disadvantaged voters recognize that the federal government will offer little protection of their right to vote if they are confronted with direct voter suppression.

Additionally, of consequence to the lack of voter confidence are U.S. Supreme Court decisions striking down campaign finance protections that specifically do not acknowledge, as a constitutional basis of campaign finance contribution limitations, every citizen’s right to participate equally in civic life.

The deluge of targeted misinformation and false political propaganda online in the 2016 and 2018 elections, which came from not only foreign but also American sources, affected the way people voted and acted on political and highly charged social issues.\(^\text{22}\) These online communications were intended to sow dissention and anger, exploit partisan and racial divides among voters, and indirectly and directly work to suppress the vote for political reasons.


\(^{20}\) See infra Section III.A.


Political gerrymandering is seen as a form of voter manipulation but should also be understood as voter suppression. Voters in gerrymandered districts may be dissuaded from voting as they recognize that they have little to no influence on the election at all because they are of a different party than the majority in the district.\footnote{23}

These examples of the modern political process have caused voters to lose faith in the fairness and integrity of the electoral process. The United States has one of the lowest voter turnout rates in elections of developed, democratic countries in the world.\footnote{24} It should be the goal of our government and our elected officials to foster trust, to engage voters, and to increase the equality of the vote.

II. POLITICAL TRUST

Political trust is defined as “trust in government and confidence in political institutions.”\footnote{25} Democracy requires trust in government, but also “presupposes an active and vigilant citizenry with a healthy skepticism of government and a willingness, should the need arise, to suspend trust and assert control over government—at a minimum by replacing the government of the day.”\footnote{26}

It is widely recognized that political trust is necessary and relevant to a democracy. Trust in government represents how strongly people believe that the government works in their best interest; that they believe political and legal procedures and institutions will treat them fairly and comport with due process; and that they do not fear the actions or the future behavior of the government.


\footnote{24. See DeSilver, supra note 9.}

\footnote{25. See Russell J. Dalton, \textit{Political Trust in North America}, in HANDBOOK ON POLITICAL TRUST 375, 375 (2017).}

The United States has experienced a sharp decline in trust in the federal government since the early 1950s when the American National Election Study asked, “[Do you] trust the government to do what’s right?” In 1958, 73% of Americans said that they did trust the government to do what’s right. Even after Watergate, one of the biggest scandals in that era, 34% of Americans still trusted the government. In 2017, the percentage of Americans saying that they trust government to do what’s right hovered around 18%.

A 2017 Gallup Poll revealed that confidence of Americans in most major institutions is low, but slightly better than previous years, for all institutions except small business and the military. Of little surprise, much of this increase in confidence appears to be partisan. Nonetheless, the report states, despite this increased confidence, Americans are still skeptical of most of the major institutions that make up U.S. society. “Major institutions have an average 35% ‘great deal/quite a lot’ confidence rating overall, and only three institutions garner a confidence rating above 50%.” Lack of confidence extends to the United States Supreme Court, the presidency, organized religion,


29. Id. (noting the moving average for public trust in government in March 1976).

30. Id. (noting the moving average for public trust in government in December 2017).


32. Id. (“The overall uptick in confidence this year is primarily the result of increased confidence among Republicans, paralleling the increased GOP optimism noted in economic confidence and satisfaction with the way things are going in the nation.”).

33. Id.

34. Id.
and Congress.\textsuperscript{35} Pew Research Center concluded, based on this abysmal lack of confidence, that it “speaks to the broader dissatisfaction Americans have with the state of the nation more generally.”\textsuperscript{36}

A recent survey conducted by The Atlantic and the Public Religion Research Institute described that “86 percent of [B]lack respondents and 74 percent of Hispanic respondents believe the country is headed in the wrong direction.”\textsuperscript{37} Another poll, mentioned in the same article, found that African Americans in the United States are facing levels of anxiety and fear that are unprecedented.\textsuperscript{38}

It is often said that the reason for the American people’s dissatisfaction and lack of trust is because people believe that the government is corrupt. The major reason for the lack of trust in government is not corruption, per se, according to Transparency International in its 2013 Global Corruption Barometer, but a problem of access and lack of accountability—the idea that our institutions are no longer beholden to the people but instead are solely responsive to special interest groups who are only looking out for themselves.\textsuperscript{39} Thus, in the United States today, citizens overwhelmingly believe that our government and institutions are no longer beholden to the people.

An oft-cited reason for the decline in trust and participation in voting is most Americans’ view that the government is run for special

\begin{itemize}
\item \textsuperscript{37} Newkirk, Voter Suppression Is Warping Democracy, supra note 5.
\item \textsuperscript{38} Id.
\end{itemize}
interests groups. Only 2 in 10 Americans believe that the government runs for the benefit of all Americans. Trust in the government is “dangerously low,” caused in large part by “the enormous and ever-growing role of money in our political campaigns—with corruption now outpacing even that of the Nixon era.” An Associated Press and NORC Center for Public Affairs Research poll taken in July 2017 showed that 75% of Americans feel voiceless and powerless in the United States, and agree that they “have too little influence in Washington, rare unanimity across political, economic, racial and geographical lines and including both those who approve and disapprove of President Donald Trump.” Eighty-two percent of the respondents said that the “wealthy people” have “too much . . . influence.”

The reason that government favors the wealthy is a consequence of our campaign finance system that enables vast sums of money to be contributed to campaigns by the few, as will be explained in the next part of this Essay.

III. CAMPAIGN FINANCE POLICY CAUSES PEOPLE TO STAY AWAY FROM THE POLLS

Most Americans want reform of the campaign finance system. Americans support campaign finance reform because of their concerns about money’s influence in politics. An indication of this concern’s resonance with voters is the degree to which money in politics became

40. PEW RES. CTR., THE PUBLIC, THE POLITICAL SYSTEM AND AMERICAN DEMOCRACY, supra note 35, at 72 (“A large majority of Americans (76%) say the government is run by a few big interests looking out for themselves . . . .”).

41. Id.


44. Id.

45. PEW RES. CTR., THE PUBLIC, THE POLITICAL SYSTEM AND AMERICAN DEMOCRACY, supra note 35, at 73 (“A wide majority of Americans continue to believe that there should be limits on the amount of money political candidates can spend on campaigns . . . .”).

46. See id.
a major political issue and narrative in the 2016 Presidential campaign. Every major presidential contender argued in favor of reform. Bernie Sanders and Donald Trump went further in a refrain that animated many voters, emphasizing that the system was “rigged” because money in politics has an outsized influence on public policy. In a September 2018 poll for NBC News and The Wall Street Journal, 77% of registered voters cited “[r]educing the influence of special interests and corruption in Washington” as either the single most or very important “issue facing the country.” Voters want to change the campaign finance system we have. A New York Times and CBS News poll in 2015 revealed that 85% of respondents, including majorities of Democrats, Republicans, and Independents, want to see our campaign finance system fundamentally changed or completely overhauled. A Pew Research poll from May 2018 found that 77% of Americans favor “limits on the amount of money individuals and [organizations] can spend on campaigns.” This included 71% of Republicans and Republican-leaning Independents.

47. See Daniel Hensel, New Poll Shows Money in Politics Is a Top Voting Concern, ISSUE ONE (June 29, 2016), https://www.issueone.org/new-poll-shows-money-in-politics-is-a-top-voting-concern/ (“Americans believe reducing the influence of money in politics is one of the top five most important issues facing the country ahead of the November [2016] elections . . . .”).


51. See id.


53. Id.
Yet younger, less educated voters were skeptical about the practicality of voting as a mechanism to influence government policy. Another survey by Pew, in 2016, determined that “[h]alf of this group thinks that their vote doesn’t really affect how the government runs things.”54 In addition, poor Americans are less likely to even register to vote because they mistrust the government.55 They believe the government is not concerned with their interests and “[m]ost importantly, they think their vote doesn’t really count.”56

The unfortunate reality is that this suspicion is valid. In their book, Democracy in America, Professors Benjamin Page and Martin Gilens conclude that since most citizens are ill-informed about detailed political facts, they are vulnerable to false information that distorts voting decisions.57 This gives unequal power in politics to the wealthy, corporations, and interest groups that have millions of dollars at stake in policy decisions.58 Based on an extensive review of federal laws, regulations, and policies, Page and Gilens determined that business corporations and wealthy individuals affect the making of federal government policy while the average American voter has little or no influence.59

Nobel Prize winning economist Joseph Stiglitz reiterates this truth, correlating the influence of money in politics with severe economic inequality. He writes:

Political scientists have documented the ways in which money influences politics in certain political systems,


56. Kasperkevic, supra note 55.


58. See id. at 90–149.

59. Id. at 63–89.
converting higher economic equality into greater political inequality. Political inequality, in its turn, gives rise to more economic inequality as the rich use their political power to shape the rules of the game in ways that favor them—for instance, by softening antitrust laws and weakening unions. Using mathematical models, economists such as myself have shown that this two-way feedback loop between money and regulations leads to at least two stable points. If an economy starts out with lower inequality, the political system generates rules that sustain it, leading to one equilibrium situation. The American system is the other equilibrium—and will continue to be unless there is a democratic political awakening.

... 

There is no magic bullet to remedy a problem as deep-rooted as America’s inequality. Its origins are largely political, so it is hard to imagine meaningful change without a concerted effort to take money out of politics—through, for instance, campaign finance reform.60

It is widely agreed that higher trust in government is associated with higher voter turnout.61 Low trust in government is a challenge to the effectiveness of a representative democracy because our democracy assumes that citizens will take an active role in political life. As Justice Brandeis said, “the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.”62 Yet the policies and laws of the campaign finance system itself have permitted and even encouraged inequality in our political system and the resulting impact

on the suppression of the vote. Spencer Overton explains the importance of democratic participation and describes the four primary functions that widespread participation serves:

First, it exposes decision makers to a variety of ideas and viewpoints, which ensure fully informed decisions. Second, it enhances the legitimacy of government decisions, which increases the likelihood that citizens will voluntarily comply with such decisions. Third, widespread participation allows government resources to be redistributed and priorities altered to reflect evolving problems and needs. Fourth, participation furthers the self-fulfillment and self-definition of individual citizens who play a role in shaping the decisions that affect their lives. 63

A. Pivotal Supreme Court Decisions

The laws that regulate the financing of political campaigns are intended to minimize the influence of money and to provide full disclosure of contributions and expenditures. The rationale is to promote the consideration of citizens’ views in policymaking; provide information to voters about candidates and issues so that they can make informed decisions; and enable the public to root out corruption. 64 Campaign finance laws, regulations, and the Federal Election Commission (“FEC”)—the administrative, regulatory, and enforcement agency—were intended to assure a fair playing field in elections and the integrity of the electoral process. 65 Yet because of the decision by the United States Supreme Court in Buckley v. Valeo, which allowed unlimited amounts of money to be spent through independent expenditures in

64. See id. at 81–85.
election campaigns, the ability and desire of the very wealthy to contribute large amounts of money in political campaigns increased.

*Buckley* struck down parts of the Federal Election Campaign Act (as amended in 1974) that had imposed limits on various kinds of expenditures by or on behalf of candidates for federal office. *Buckley* was the seminal campaign finance case that set the basic framework for constitutionally permissible regulation of political campaigns in the United States, until today. The Court in *Buckley* incorporated the concept of electoral integrity into its view that “corruption and appearance of corruption” is the rationale for government limitations of campaign finance contributions. The Court said, regarding the appearance of corruption as a justification for campaign finance laws, that it would cause the public to have more confidence in government, which will have a benefit of increasing voting. The Court wrote, “[o]f almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.” But devastatingly, the Court held that the Federal Election Campaign Act’s goal of greater and equal participation sought to “restrict[] the voices of people and interest groups who have money to spend” and “mute the voices of affluent persons” and is consequently unconstitutional. Because the Court saw either equal speech or an even electoral playing field as a basis for campaign fi-

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70. *Id.* at 33.
71. *Id.* at 27.
72. *Id.* at 17, 25, 35.
nance laws, it set the stage for unlimited campaign expenditures, enabling the wealthy to have greater freedom of “speech” and an unprecedented ability to influence public debate.

The Supreme Court’s decision in Citizens United v. Federal Election Commission expanded the Buckley decision to find, despite the lack of any evidence provided to the Court to support the conclusion, that corporate and union independent expenditures could not be the cause of corruption. The Buckley Court concluded that any restriction on such expenditures was unconstitutional. In the absence of evidence, the Court determined that independent expenditures of money in political campaigns could not, by their very nature, corrupt. The rationale for this was that since campaign contributions would not be given directly to the candidate, but instead would be expended by an independent committee without coordinating with the candidate, the political expenditures could not corrupt the candidate.

Immediately after the Citizens United decision, in March 2010, the U.S. Court of Appeals for the D.C. Circuit decided SpeechNOW.org v. Federal Election Commission. The court struck down the federal contribution limits to “independent expenditure groups,” finding that the Supreme Court’s analysis in Citizens United required it to “conclude that the government has no anti-corruption interest in limiting contributions to an independent expenditure group.” This opened the avenue for individuals, corporations, and unions to give unlimited amounts of money to independent expenditure only committees, which are today commonly known as Super PACs. Super PACs account for more expenditures in campaigns than those spent by the individual candidates.

74. Buckley, 424 U.S. at 51.
75. Id. at 46–47.
76. Id. at 47.
78. Id. at 695.
The Court’s view of corruption as a basis for campaign finance limits, though, did not extend to the case of *American Tradition Partnership, Inc. v. Bullock*, which summarily reversed without oral argument a Montana Supreme Court decision that had upheld a state campaign finance law relating to corporate contributions. Even though Montana provided extensive evidence of historical corruption in the state due to corporate control of politics and argued that Montana’s campaign finance law was enacted in the early 1900s to combat this corruption, the Supreme Court nevertheless reversed the Montana court. If the Court had considered *American Tradition Partnership*, it would have needed to revisit the *Citizens United* decision, because Montana prohibited corporate contributions and expenditures. The Court affirmed that *Citizens United* was applicable to states and local governments. Though *Citizens United* was based on the premise that such expenditures could not be corrupting, the historical experience in Montana gave reason to doubt that conclusion. Justices Ginsburg and Breyer released a statement urging the Court to reconsider the decision, and “to consider whether, in light of the huge sums currently deployed to buy a candidate’s allegiance, *Citizens United* should continue to hold sway.” The Justices asked the Court to pay attention to the empirical evidence of corruption caused by the new, unlimited spending, an issue.

81. *Id.* at 516–17; see *W. Tradition P’ship, Inc. v. Att’y Gen. of Mont.*, 271 P.3d 1, 8–11 (Mont. 2011).
82. *W. Tradition P’ship, Inc.*, 271 P.3d at 3 (discussing the Montana law that prohibited corporate contributions).
that was never considered, but downplayed, by the Justices in *Citizens United*. But none of this was sufficient to sway the Court’s decision.

These cases were followed a few years later by another Supreme Court decision in *McCutcheon v. Federal Election Commission*, which further expanded the ability of the very wealthy to have influence in elections. Shaun McCutcheon, a businessman from Alabama, wanted to give unlimited amounts of money to candidates, but the law required that individuals could only donate a certain total amount in a certain period of time (in 2013–14 that total was $123,200 to candidates, national party committees, and some other political committees). The rationale for the law was that not having such aggregate limits would increase the size of joint fundraising committees, which bring various political committees together to support a candidate. The Supreme Court ruled in favor of McCutcheon, saying that there was no evidence to support the fear that such joint fundraising committees would be corrupting. The plurality dismissed the District Court’s hypothetical about a donor giving a big check to a fundraising committee whose members could then transfer their legally limited contributions to the same individual candidate. The plurality believed that this would not only be illegal but unlikely to occur. A wealthy donor may now contribute an unlimited amount to PACs, candidates, and party committees combined. In recent elections, the proliferation of the use of joint

87. *Id.* at 194–95.
88. See *id.* at 214–15.
91. *Id.* at 214–17.
92. *Id.* at 215–16.
fundraising committees has permitted a great deal of money to be spent by a few individuals on behalf of candidates.\footnote{See id.}

Since \textit{Buckley v. Valeo}, the Supreme Court, when evaluating limits on money in politics, has indicated that the only justification for such campaign finance contribution limitation laws, not including disclosure, is whether the regulation is necessary to combat corruption or the appearance of corruption.\footnote{See \textit{McCutcheon}, 572 U.S. 185; Am. Tradition P’ship, Inc. v. Bullock, 567 U.S. 516 (2012); \textit{Citizens United v. Fed. Election Comm’n}, 558 U.S. 310 (2010); \textit{Buckley v. Valeo}, 424 U.S. 1 (1976).} The Court in \textit{Buckley} specifically referred to confidence in government and the impact of unlimited contributions on representative government: “Congress could legitimately conclude that the avoidance of the appearance of improper influence ‘is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.’”\footnote{\textit{Buckley}, 424 U.S. at 27 (citation omitted).} So, the appearance of corruption as a basis for limitations of contributions to candidates and others was clearly the law until it was narrowed in \textit{Citizens United}.

In \textit{McCutcheon}, Chief Justice Roberts defined corruption to only mean “quid pro quo” exchanges of money for official action.\footnote{\textit{McCutcheon}, 572 U.S. at 192.} The appearance of corruption was eliminated as a basis for campaign finance limitation, with Chief Justice Roberts writing that other government interests are not legitimate reasons for limiting the use of contributions of large sums of money.\footnote{See id. at 206–07.} In response, Justice Breyer wrote in dissent that “[t]aken together with \textit{Citizens United} . . . today’s decision eviscerates our Nation’s campaign finance laws, leaving a remnant incapable of dealing with the grave problems of democratic legitimacy that those laws were intended to resolve.”\footnote{\textit{Id.} at 233 (Breyer, J., dissenting).} The one person, one vote cases in the 1960s understood and affirmed the concept that political equality is a fundamental right.\footnote{See \textit{Harper v. Va. Bd. of Elections}, 383 U.S. 663 (1966) (discussing poll taxes and making clear that equality is an important constitutional value which could not be contingent on financial resources); \textit{Reynolds v. Sims}, 377 U.S. 533 (1964); \textit{Baker v. Carr}, 369 U.S. 186 (1962); see also Adam Lioz, \textit{Breaking the Vicious Cycle}:}
the rise of inequality in our electoral process through the campaign finance system.

Thus, the Supreme Court only recognizes the governmental interest in combating quid pro quo corruption as the justification to place limitations on the freedom of “speech” right to give money to campaigns.\footnote{How the Supreme Court Helped Create the Inequality Era and Why a New Jurisprudence Must Lead Us Out, 43 SETON HALL L. REV. 1227 (2013).} Buckley had previously rejected a compelling interest in promoting political equality by attempting to level the playing field in campaigns between wealthy donors and regular Americans.\footnote{McCutcheon, 572 U.S. at 192.} The \textit{Buckley} Court’s view that “the concept that government may restrict the speech of some . . . to enhance the relative voice of others is wholly foreign to the First Amendment,” is the view of the Court to this day.\footnote{Id. at 48–49.} This concept has been carried to great lengths, best exemplified by the case of \textit{Arizona Free Enterprise Club’s Freedom Club v. Bennett}.\footnote{Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett, 564 U.S. 721 (2011).} The Supreme Court decided that there was no compelling interest to justify the process in the public campaign finance matching program in Arizona.\footnote{Id. at 753.} The matching program provided additional funds to publicly funded candidates when the opposing candidate’s campaign money, which was funded by private contributions or independent expenditures, exceeded the money that was allocated to the publicly funded candidate.\footnote{Id. at 727–28.} The holding was that wealthy candidates’ free speech right to raise more money is constitutionally protected, while the publicly funded candidate’s interest in a fair playing field is not.\footnote{Id. at 753.}

These cases taken together have had an immense impact on the amount and means of spending money in political campaigns. In the 2018 midterm elections, over $5 billion was spent in the campaigns for Congress.\footnote{See Christine Mai-Duc & Jazmine Ulloa, \textit{Election Spending Has Surpassed $5.2 Billion, Making It the Most Expensive Midterm in U.S. History}, L.A. TIMES (Nov.} Much of the money that is spent is by supposedly inde-
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Pendent 501(c)(4) social welfare organizations, (c)(6) business organizations, or even limited liability companies and Super PACs that are actually closely aligned with the candidates.\(^\text{109}\) So the Court’s premise for the “independence” and “impossibility of corruption” of such arrangements is at the very least questionable.\(^\text{110}\) This apparent stretching of campaign finance laws’ purposes has created much concern in the public about the fairness of the process.

What has become the norm in elections is that only a small percentage of the voting population actually contributes to the candidates, which has had an impact on the willingness of the public to vote. “More than three-fourths of the $1 billion raised from high-dollar donors in [the 2016] election [came] from very wealthy individuals.”\(^\text{111}\) This includes 90 billionaires with Super PAC contributions totaling $562 million.\(^\text{112}\)

Robert E. Mutch, a campaign finance historian, responding to the fact that candidates and parties are now dependent on billionaires to support their efforts, said, “[t]he big donor is not just a donor who gives to politicians and parties. The big donor has become a political actor in his own right.”\(^\text{113}\) The problem, though, is not the amount of

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112. Blumenthal, Super PAC Mega-Donors Expand Election Influence with Record $1 Billion in Contributions, supra note 109.

113. Michelle Ye Hee Lee, Eleven Donors Have Plowed $1 Billion Into Super PACs Since They Were Created, WASH. POST (Oct. 26, 2018), https://www.washingtonpost.com/politics(eleven-donors-plowed-1-billion-into-super-pacs-since-
money spent in campaigns, but instead the fact that only a few individuals have economic power in an election. This impacts the less wealthy’s desire to vote or to participate in political activity at all.114

B. Dark Money

Aside from depressing the vote due to the copious amounts of money spent or contributed to organizations, which comes from only a small slice of the American public, the lack of transparency of the contributions’ amounts or source also impacts the desire of people to vote. Wealthy donors pay for political communications. Many want to be influential political actors, but do not want to be identified. They know that if they contribute to certain types of organizations or committees that don’t disclose their donors, they can hide their identities from the public. This money is called “Dark Money."115 It has been said that the only ones in the dark are the American public, that the candidates all know who is providing the large campaign contributions to the committees.116 Or in the latest gambit to avoid disclosing a donor’s identity, the contributors promise the money, but Super PACs don’t accept it until late in the campaign.117 Due to FEC reporting requirements, they then do not have to file their disclosures prior to the election. This end run on the disclosure laws is another loophole that allows dark money donors to deprive the public of information about who is trying to influence the vote. When donors are anonymous, there is no one accountable for spreading deliberately false and inflammatory assertions. The tenor and falsity of such campaign advertisements disgusts


many people. Their anger at the plethora of such advertisements that contain no information about who actually paid for the advertisements impacts the decision of many to vote.

Another ramification of “Dark Money” was that foreign donors to political ads in the 2016 and the 2018 elections illegally made campaign contributions, attempting to influence the election; yet because of the lack of disclosure, it was impossible for the public to be informed of those sources. Clearly illegal contributions influencing the election leads to further distrust in the process. Disclosure in campaign finance law is inextricably related to civic engagement and voting. In Buckley, the Court said that “the ability of the citizenry to make informed choices among candidates for office is essential,” because “the identities of those who are elected will inevitably shape the course we follow as a nation.” Even in Citizens United, the majority upheld disclosure as it enables the public “to make informed decisions and give proper weight to different speakers and messages.” However, when dark money is funneled through groups who do not have to disclose their donors, or when the public understands that big donors are using loopholes to deprive them of their right to know, it is inevitable that many people will feel that their voices are crowded out, resulting in lower voter turnout.


C. FEC Deadlock

Adding to the distrust that citizens have in the integrity of the electoral process, the FEC fails to perform its mission of providing disclosure in campaigns and penalizing major violations of the law.123 Enacted by Congress after the Watergate scandal, with the significant role of enforcing campaign finance law and promulgating regulations to assure those laws are followed, the FEC is notoriously deadlocked.124 Due to overt partisanship, the FEC has failed in the last five years to investigate significant complaints, many of which involve requiring disclosure in campaigns.125 Because the major campaigns and political actors know that the FEC will not enforce the law, there is a resulting willingness to blatantly flout the law or stretch the law to keep the donors secret. The political committees understand that any violation will at most result in a minor administrative fine, which is acceptable as the cost of doing business.126 Because the law is more often enforced for routine reporting violations against small, local committees participating in federal elections, the major violations, such as not disclosing contributions’ sources, not disclosing expenditures by groups expending large amounts of money in campaigns, or purposefully setting up LLCs to hide campaign contributions, are not penalized. Naturally, this results in a lack of trust in the process and fairness of the government agency charged with enforcement.

In February 2017, prior to my departure from the FEC, my office produced a report entitled Dysfunction and Deadlock: The Enforcement Crisis at the Federal Election Commission Reveals the Unlikelihood of Draining the Swamp.127 Analyzing all the enforcement

127. Dysfunction and Deadlock, supra note 125.
actions from 2006 through 2016, the report determined that in that time period there was a dramatic increase in dismissals of flagrant violations, significantly lower penalties were imposed, and major cases languished for many years without any resolution.\textsuperscript{128} Because the FEC has six Commissioners, no more than three of any political party, and four votes are required to take most actions,\textsuperscript{129} if all three Commissioners of one party always vote as a bloc, they can ensure that nothing can be done.\textsuperscript{130} Cases that deadlock 3-3 are dismissed and no action will be taken.\textsuperscript{131}

This investigation found that in 2006, the Commission deadlocked in 2.9\% of substantive votes.\textsuperscript{132} Examples of substantive votes would be a decision to find a “Reason to Believe” (also known as RTB) that a complaint states a basis for a violation of the law; or to authorize an investigation, accept a settlement agreement negotiated by the Office of General Counsel (“conciliation agreement”); or to take no further action, and dismiss a case.\textsuperscript{133} Non-substantive votes would be to close the file, send letters to the parties regarding the file closing, and voting to approve the minutes.\textsuperscript{134} In contrast to 2006, in 2016, the Commission deadlocked in 30\% of the substantive votes.\textsuperscript{135} Additionally, fines imposed fell dramatically from 2006 until 2016.\textsuperscript{136} In 2006, $5.5 million was imposed in fines, while in 2016, only $595,425 was imposed.\textsuperscript{137} This is despite the fact that campaigns and outside groups

\textsuperscript{128} Id. at 1–2.
\textsuperscript{130} Dysfunction and Deadlock, supra note 125, at 1.
\textsuperscript{132} Dysfunction and Deadlock, supra note 125, at 1.
\textsuperscript{133} Id. at 6.
\textsuperscript{134} See id. at 8–9.
\textsuperscript{135} Id. at 1, 8.
\textsuperscript{136} Id. at 2.
\textsuperscript{137} Id.
were spending increasingly large sums of money and receiving significantly greater contributions.\textsuperscript{138} From 2010 until 2017, over $800 million in federal campaign spending came from undisclosed sources.\textsuperscript{139}

The FEC was so deadlocked that there was, and continues to be, an inability to enact regulations that reflect the current state of the law and would address serious issues affecting our democracy. Despite \textit{Citizens United} and its strong upholding of disclosure requirements, the bloc has failed to even write any regulations that require and enforce such disclosures. There have also been no regulations written to address the statutorily illegal use of foreign money in campaigns, even though my former colleague, Ellen Weintraub, has consistently introduced potential regulations to address the issue.\textsuperscript{140} And the FEC’s inability to even agree on regulations requiring disclaimers on social media political advertisements has enabled interested parties, like Russia, to purchase such advertisements on various internet platforms, seriously undermining the 2016 and 2018 elections.\textsuperscript{141} Such regulations would be consistent with existing campaign finance laws and regulations and would clarify their applicability. Even that basic role of the FEC as a regulatory agency has not been fulfilled.

Consequently, voters overwhelmingly fear that there is corruption in our government. In a poll and report conducted by the Center for American Progress, 61\% of voters believe that increased transpar-

\begin{itemize}
\item \textsuperscript{138} See Lichtblau, \textit{supra} note 126.
\item \textsuperscript{139} \textit{Dysfunction and Deadlock}, \textit{supra} note 125, at 2.
ency and campaign finance reforms would reduce corruption and improve government. Because of a lack of transparency and the concern that corruption is now prevalent in this country, the impact of the government agency not enforcing the laws designed to protect the public’s confidence in the electoral process contributes to this lack of trust. This is particularly so because the agency’s purpose is to protect the integrity of elections by ensuring disclosure so that corruption can be detected. The American Progress report concluded that a concrete step such as increasing transparency was high on the list as being extremely effective in reforming campaign finance laws and encouraging greater trust.

IV. Elected Official Voter Engagement

Many citizens and members of Congress complain that the need to constantly fundraise from a small group of wealthy Americans necessarily leaves out the concerns of most people. Former New York Congressman Steve Israel said that one of the reasons he left his seat was because “‘fundraising is just a relentless regimen,’” and that “many people in his district do not feel that government is working for them.” He added that there is a need to “‘reform campaign finance that in so many respects . . . stacks the deck against those everyday Americans.’” When the donors you are talking to and dependent on are interested in issues regarding the financial markets, while the constituents are concerned about health care or just getting by, it is more difficult to appreciate the constituents’ concerns because you have little contact with them.

There are other reasons, other than the constant pressure to fundraise, for elected representatives’ failure to consider the interests of

142. Halpin et al., supra note 141. This poll also states that “[f]ifty-nine percent of voters are concerned a great deal that ‘there is too much corruption and [that] many politicians are corrupt.’” Id.

143. See id.


everyday Americans. Time pressures and a simple lack of interest exacerbate a lack of contact with people in the district, particularly when elected officials refuse to have town hall meetings with constituents.\textsuperscript{146} The failure of certain members of Congress to hold town hall meetings left many constituents frustrated that they could not discuss important legislation facing Congress with their representatives.

And the trend in campaigns has been, for some time, to micro target voters into segments so that the campaign will only make contact with; send campaign materials to; or aim cable television ads at likely voters or those who have contributed to a candidate’s campaign.\textsuperscript{147} Micro targeting was famously used in the Obama campaign in 2012 and enabled the campaign to fundraise successfully, from large and small donors.\textsuperscript{148} Micro targeting segments the voting population into groups based on past voting behavior gleaned from the voting rolls, past contributions, other demographic information, and data obtained from companies that keep track of purchasing and other consumer behavior.\textsuperscript{149} This segmenting of voters in campaigns leaves out a large swath of the population who never receive political communications at all—primarily lower income people or minorities.\textsuperscript{150} Because these groups have lower voting rates, the campaigns do not wish to expend the money to convince them to vote, and as a result, they are kept out of the political conversation.

Of course, parties don’t have an incentive to turn out all voters. Instead, for economic and strategic reasons, they focus on reliable votes. While micro targeting may be a pragmatic use of the campaign

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\textsuperscript{149} Murray & Scime, supra note 147.

\textsuperscript{150} See generally Simon Jackman & Bradley Spahn, *Politically Invisible in America* (June 28, 2018) (working paper), http://stanford.edu/~bspahn/politically-invisible-america.pdf (discussing the “politically invisible” in America or those “that are unreachable using these voter and marketing lists”).
\end{small}
treaury, it is essentially undemocratic, undermining the public interest and is a form of voter suppression.

Political campaigns are supposed to be an opportunity for people to debate, learn, and consider the candidates’ various positions. As Justice Breyer has said, electors are meant to hear various opinions and proposed policies to make informed decisions while voting. The purpose of the First Amendment is to promote political engagement and to assure the right to receive many ideas so that voters can engage in democratic deliberation. The early Republican conception of political participation included deliberative dialogue and debate and was not limited to the act of voting. If only select people are receiving information about political issues, the “marketplace of ideas” is not a reality.

Many scholars have discussed the importance of participatory democracy. The constitutional value of all citizens being able to hear and participate in the political debate has been clearly enunciated. The lack of information provided equally to all people is exacerbated by the lack of debate forums in most states and localities, including in

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large cities and states. California, for example, does not have a formal gubernatorial debate that is televised. This is especially concerning because California has the world’s fifth largest economy. Many state-level issues are of enormous economic and political importance to the country as well as the state. The decimation of local newspapers also makes it difficult to provide information to all the voters in a community. As a result, many people receive virtually no information about candidates or their views and are eliminated from discussions about political issues. This outcome is not the “fault” of individuals; rather, campaigns should be engaging the public to be part of the political community. When campaigns write off large groups of people, it only increases the likelihood that those people will be disassociated from the community.

When people do not think that they are important enough to even receive information about the campaigns, they will be less inclined to vote. Black Americans turned out to vote in lower numbers in the 2016 election than in 2012: about 765,000 Black voters stayed home. All combined, 42% of Black, Hispanic, and Asian voters did not vote in the election. Younger voter turnout increased for some

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156. Id.


159. See, e.g., Shearer & Gottfried, supra note 54 (highlighting the correlation between non-voters and people who do not learn about the election).


minority voters but decreased for Black Millennials, while “the voter turnout rate among older generations was flat.” While this Essay will later discuss other methods of voter suppression, micro targeting worsens the lack of interest of many Americans in voting. Therefore, elected officials must bear some of the responsibility for low voter turnout.

V. SOCIAL MEDIA AND ITS ROLE IN VOTER SUPPRESSION

The disinformation, sometimes inappropriately referred to as “fake news,” that spread virally on the Internet during the 2016 election cycle was actually paid political propaganda. These political advertisements and electioneering communications were made viral by bots and humans who spread them in the guise of grassroots press or social and political groups. Much of this propaganda came from Russia, but there were other homegrown and foreign sources as well.

The advertisements originating from Russian government agencies were intended to influence the election either by supporting Trump, maligning Clinton, or by suppressing the vote. The suppression efforts, directly or indirectly, attempted to convince various groups, such as Black voters and Bernie Sanders supporters, even after Sanders endorsed Clinton, to not vote at all or to vote for a different candidate.

165. See id.
167. See id.
The United States Senate Select Committee on Intelligence (“SSCI”) Research Summary augments the description of the Russian efforts to affect the outcome of the U.S. Presidential election already provided in the Mueller indictment. The Summary describes the activities of the Russians working for the Internet Research Agency (“IRA”) to intervene in the 2016 election. The Research Summary provides extensive information and documentation of several variants of suppression narratives, which were spread both on Twitter and Facebook. The Summary describes tweets designed to create confusion about voting rules and “malicious misdirection.” This included a scam telling people that they could vote by text, and other similar efforts to create confusion among voters about voting rules that were intended to suppress the vote. Many of the communications were also to redirect the vote; that is, to vote for a third party. Most often this was a plea to not vote at all, but if you want to vote, vote for Jill Stein. This effort to redirect voters to a candidate with little prospect of success is one mechanism to minimize the efficacy of the vote.

But many of the tweets and Facebook pages were more clearly intended to create turnout suppression. This continued right up to the election. In September and October 2016, Twitter removed 10,000

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169. Id. at 7–10.

170. Id. at 8.

171. See id.


173. DIRESTA ET AL., supra note 168, at 17.

automated accounts posing as Democrats to convince key demographics to stay home and not vote. A Russian troll farm in 2016 sought to disenfranchise Latinos, African Americans, youths, and the LGBTQ community from voting, with “special emphasis on provoking the anger of [B]lack Americans.” Postings on an IRA fake account “Blacktivist” on Facebook, which had more followers than the actual Black Lives Matter account, showed mistreatment of African Americans, and these posts “pushed a message that the best way to advance the cause of the African American community [is] to boycott the election.”

The Mueller indictment painstakingly describes the scope of the IRA project. The Russians working for the IRA created fake online personas from stolen American identities and facilitated payments for social media ads. In September 2016, this group of Russians, who operated like a faux news organization, had a $1.25 million budget.


180. *Id.* at 3, 19.

181. *Id.* at 7.
The effort was to pose as Americans to suppress voters with false and misleading information. They also paid Americans to aid in their efforts and to provide virility to the communications. The fake online communities that were created by the IRA included such names as “Army of Jesus,” “United Muslims of America,” “Secured Borders,” and the “Blacktivist” accounts. The project was told “to ‘use any opportunity to criticize Hillary.'” In 2016, they posted on a “Woke Blacks” site: “[A] particular hype and hatred for Trump is misleading the people and forcing Blacks to vote for Killary. We cannot resort to the lesser of two devils. Then we’d surely be better off without voting AT ALL.”

According to the indictment, this IRA Russian influence operation began in 2014 and was also able to organize Americans, sometimes on both sides of a polarized issue, to attend rallies. There were attempts to stage rallies in New York, Florida, Pennsylvania, and North Carolina.

The IRA had 2,700 fake Twitter accounts and 80,000 Facebook posts. It had an audience of 126 million Americans on Facebook alone. This number of Americans reached is particularly large when compared to the number of people, 137 million, voting in the 2016 election. Other platforms also harbored Russian accounts. Insta-
gram had 133 fake Russian accounts, which reached 20 million people.\(^\text{191}\) Twitter had some 3,841 IRA accounts, which reached 1.4 million people but were also spread to over 50,000 bots.\(^\text{192}\) This excludes YouTube videos, podcasts, and Tumblr—all of which continued the same efforts at micro targeting advertisements to particular groups that would be susceptible to the communications.\(^\text{193}\) The effectiveness and precision of the micro targeting techniques previously used in political campaigns became even more sophisticated in the 2016 election, causing more pervasively undemocratic consequences.

In addition to the IRA, other foreign and domestic actors refined micro targeting to influence the U.S. election and the Brexit referendum in the United Kingdom.\(^\text{194}\) Both foreign and domestic actors used information operations that obtained troves of personal data obtained from voter rolls and Facebook, including data, photos, videos, friends’ information, and any data contained on any app that included a Facebook “button.”\(^\text{195}\) The campaigns also purchased commercial data through data brokers and others.\(^\text{196}\) It has been said that Facebook has more detailed data about each and every American than even the federal government.\(^\text{197}\) The micro targeting techniques utilized by Cambridge Analytica in the Brexit campaign are particularly instructive in

\(^\text{191}\) Timberg & Romm, supra note 189.
\(^\text{192}\) DiResta et al., supra note 168, at 6; Howard et al., supra note 190, at 25.
\(^\text{193}\) DiResta et al., supra note 168, at 5–6, 43; Howard et al., supra note 190, at 3, 8.
\(^\text{194}\) Brexit is a polarized election in which similar techniques were used to increase the impact of the political outcome as was used in the United States in 2016.
\(^\text{195}\) See Timberg & Romm, supra note 189.
the U.S. context as well because Cambridge Analytica worked in the 2016 election for the Trump campaign.\textsuperscript{198}

Cambridge Analytica gathered the data and employed psychologists and social scientists to review the data to segment the individuals into groups; Cambridge Analytica crafted communications with pitches that would be most effective to convince each group based on their emotional weaknesses or proclivities and their susceptibility to inflammatory or extreme advertisements.\textsuperscript{199} Cambridge Analytica then sent ads to the selected individuals to enable the refinement of the pitch based on their responses.\textsuperscript{200} These ads were then sent to a larger group of people with similar profiles.\textsuperscript{201}

In the 2016 U.S. presidential election, these ads primarily targeted individuals based on race but also based on concerns about immigration and guns. Young Mie Kim, a researcher at the University of Wisconsin-Madison, conducted a scientific analysis of the influence campaign on Facebook.\textsuperscript{202} She found that racially charged, anti-immigrant advertisements were shown in particular parts of the country to certain individuals who could sway the vote.\textsuperscript{203} Kim said, “we know the Russians targeted extremes and then came back with different negative messages that might not be aimed at converting voters, but suppressing turnout and undermining the democratic process.”\textsuperscript{204} And Kim also concluded the IRA’s paid Facebook ads in 2016 were specifically to suppress the turnout of non-white voters, especially African


\textsuperscript{200}. See Cadwalladr & Graham-Harrison, \textit{supra} note 196; Rosenberg et al., \textit{supra} note 198.

\textsuperscript{201}. See Cadwalladr & Graham-Harrison, \textit{supra} note 196; Rosenberg et al., \textit{supra} note 198.


\textsuperscript{203}. See id.

The night before Election Day she found ads appeared urging people to “boycott the election” because neither of the presidential candidates would serve Black voters. She also found that voter suppression ads targeting non-whites residing in minority counties in battleground states were seen eight times more often than that of their counterparts.

As a result of this suppression and political propaganda, an Ohio State University study has found that “fake news” depressed the support for Clinton in 2016. Four percent of Obama supporters were deterred from voting for Clinton in 2016 because they believed the disinformation on the Internet. Obama supporters believed the following false information was true, reflecting the percentage of supporters who believed the stories:

1. Clinton was in “very poor health due to a serious illness” (12 percent)
2. Pope Francis endorsed Trump (8 percent)
3. Clinton approved weapons sales to Islamic Jihadists, “including ISIS” (20 percent)

According to the study, about 25% of Obama voters believed these stories, and 45% of them voted for Clinton. In contrast, of those who did not believe the stories, 89% voted for Clinton. The conclusion is that exposure to “fake news” had a significant impact on voting decisions. The precise micro targeting of groups with fictitious photos, videos, and communications had the intended result.

205. See Kim et al., supra note 202.

206. See id.

207. See id. This Essay defines “minority counties” as counties in which the proportion of non-whites is more than 50% of the population.

208. See id.


210. See id.

211. Id.

212. Id.

213. Id.
This micro targeting of potential voters was not constrained to the 2016 election.\textsuperscript{214} Kim has also found anecdotal evidence that there were “noticeable voter suppression campaigns online, especially on Twitter” in the 2018 midterm election.\textsuperscript{215} She found that incorrect information regarding the date of the election was common.\textsuperscript{216} A #votenovember7th hashtag “with incorrect election date information, was often paired with other hashtags designed for partisan mobilization such as #bluewave or #redwave.”\textsuperscript{217} Tweets encouraged voting by text.\textsuperscript{218} Some “messages clearly targeted Latino and African American voters” to suppress the vote.\textsuperscript{219} And after the October 25 National Rifle Association’s spokesperson’s statement “that gun supporters would need to bring guns to the polls to protect themselves from left wing mobs, tweets suggesting that NRA members or Republicans need to bring guns to the polls started trending.”\textsuperscript{220} Merely having these statements in the public domain is intimidating and likely to lead to the suppression of the vote. Online political communications are clearly very impactful on elections.

VI. ELECTION MANAGEMENT

While this Essay is not specifically about direct voter suppression, it is important to recognize that there have been recent Supreme Court cases that reinforce, to certain communities, that the right to vote in America is not respected. Condonation of direct voter suppression has led to state laws that suppress voters’ rights.\textsuperscript{221} And actions by private individuals aimed at intimidating mostly minority voters create an environment that suppresses the vote by indirect means, as well.\textsuperscript{222}

\begin{itemize}
\item \textsuperscript{214} See Young Mie Kim, Voter Suppression Has Gone Digital, BRENAN CTR. FOR JUST. (Nov. 20, 2018), https://www.brennancenter.org/blog/voter-suppression-has-gone-digital.
\item \textsuperscript{215} Id.
\item \textsuperscript{216} Id.
\item \textsuperscript{217} Id.
\item \textsuperscript{218} Id.
\item \textsuperscript{219} Id.
\item \textsuperscript{220} Id.
\item \textsuperscript{221} See Newkirk, Voter Suppression Is the New Old Normal, supra note 23.
\item \textsuperscript{222} See id.
\end{itemize}
The trend to increased direct voter suppression in the last five years began with the U.S. Supreme Court decision in *Shelby County v. Holder*, which weakened the Voting Rights Act of 1965, making it easier for those states with a prior history of discrimination at the polls to make electoral changes without clearing them with the Department of Justice.\(^2\) Section 4 of the Voting Rights Act required those voting districts with a history of voting tests and low turnout to prove to the Attorney General, or to a three judge panel of the U.S. District Court in D.C., that “the change had neither ‘the purpose [nor] the effect’” of negatively impacting any individual’s right to vote based on race or minority status.\(^3\) The Supreme Court held that § 4 imposed burdens that were no longer responsive to the voting districts involved.\(^4\)

More recently, in *Husted v. A. Philip Randolph Institute*, in another 5-4 decision, the Supreme Court gave Secretaries of State the right to purge qualified voters from the voter rolls if the voter had failed to vote in one election.\(^5\) A consequence of this decision, according to Congressman Mark Pocan, a Democrat from Wisconsin, is “that more voters—especially those that are young, minority and low-income—will be turned away from the polls and not have their voices heard.”\(^6\) And, in October 2018, the Supreme Court refused without explanation to intervene in a challenge to a North Dakota voter ID law, which required North Dakota residents to provide identification that includes a residential street address to vote.\(^7\) But thousands of Native Americans in North Dakota do not have standard addresses\(^8\) and if not allowed to register to vote because of that requirement, this practice would disenfranchise them. The 2018 midterm election demonstrated

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\(^3\) Id. at 537 (citations omitted).

\(^4\) See id. at 556–57.


\(^7\) See *Brakebill v. Jaeger*, 139 S. Ct. 10 (2018) (mem.).

that the consequence of disenfranchisement came to pass: there are many examples of purges throughout the country.230

According to the Brennan Center for Justice, up to 2 million more people than expected have lost their voting status because of purges after Shelby County.231 Twenty-one states made their voting laws more restrictive, including 7 of the 10 states with the highest proportion of African American voters.232 The impact of Shelby County and Husted has been notable across the country. The states have been empowered to enact voting restrictive laws knowing that the U.S. Supreme Court will uphold their efforts, having cleared the way for greater voter disenfranchisement.233

Another factor is at play in voter suppression in addition to voting ID laws, purging and rolls, and requiring an exact match of signatures: An environment that permits such laws, which result in voter suppression, has led to increased voter intimidation and harassment, dissuading minority voters from the polls.234 For example, immediately before the midterm election President Trump tweeted, “All levels of government and Law Enforcement are watching carefully for

230. See, e.g., Newkirk, Voter Suppression Is the New Old Normal, supra note 23 (noting that Brian Kemp, then the Secretary of State of Georgia, used a program called Crosscheck to match voter records to personal identification, and in 2017 purged 500,000 people from the rolls, including 100,000 who had not voted in the prior election, and in 2018, Georgia purged another 700,000 voters from the rolls).


233. See, e.g., New Voting Restrictions in America, supra note 6 (detailing the national trend toward more restrictive voting laws).

VOTER FRAUD, including during EARLY VOTING. Cheat at your own peril.”

This statement on its face could be viewed as solely a statement of the law; however, for minorities and others intimidated and harassed at the polls for no reason, it likely appeared to be an attempt by the country’s highest-ranking elected official to dissuade those voters from going to the polls. A survey conducted by The Atlantic and the Public Religion Research Institute reported that 68% of Black respondents stated that disenfranchisement is a major problem in the U.S., compared to only 27% of whites.

A history of discrimination and the effects of voter suppression, as well as fear of going to the polls even when an individual is legally entitled to vote, is intimidating and results in decisions to not vote.

Gerrymandering should also be considered as contributing to indirect suppression. Because of gerrymandering’s effect, many voters understand that their vote doesn’t matter. In extreme gerrymandered


236. See Ayala, supra note 16 (discussing threats and intimidation of Blacks at polling places, such as a North Carolina poll worker repeatedly asking Black voters to spell their names, and whites angrily confronting a Black poll worker; preventing access to the poll; flyers in Wisconsin stating falsely that Immigrations and Customs Enforcement agents will be at polling places; harassment outside of polling places in Texas; and voters being challenged outside of polling places in Colorado); Roth & Weiser, supra note 17 (discussing Trump “consistently and falsely stoking fear about illegal voters for over two years”). While these are only some examples of direct and indirect voter suppression that took place in the 2018 election, is it any wonder that minority and young voters would not want to risk enduring such vitriol in order to vote? “[O]ne in 10 Hispanics said that the last time they or someone in their household tried to vote, they were bothered at the polls.” Newkirk, Voter Suppression Is Warping Democracy, supra note 5 (quoting Dan Cox, the Public Religion Research Institute research director).


districts, it is only the primary that determines the election, as the general election is a foregone conclusion.\(^{240}\) Primary structure is increasingly controlled by the respective state legislatures, while the results of the primary and the delegates awarded to a specific candidate are organized by the parties, not by the government.\(^{241}\) Consequently, they often have rules that prevent many people from being able to participate—such as party registration requirements and different dates for the primary, which are barriers to voting.\(^{242}\) Wisconsin exemplifies this practice. When the Republican party took control of the state government in 2010, the legislative maps were redrawn.\(^{243}\) The results have been called by some as the most extreme gerrymandering in U.S. history.\(^{244}\) At the same time, Wisconsin has passed laws making it harder to vote.\(^{245}\) And, to Lisa Graves, a senior fellow at the Center for Media and Democracy in Madison, “the state has become the ‘Wild West of

\begin{footnotes}
\footnotetext[240]{Cf. Ingraham, supra note 238 (discussing how gerrymandering is meant to minimize competitiveness in electoral districts).}
\footnotetext[243]{See generally Joel McNally, Wisconsin’s Corrupt Gerrymandering Wins, For Now, SHEPHERD EXPRESS (June 26, 2016, 4:23 PM), https://shepherdexpress.com/news/taking-liberties/wisconsins-corrupt-gerrymandering-wins/#/questions/ (describing the gerrymandering as “one of the most distorted partisan state voting maps in U.S. history”).}
\footnotetext[244]{Id.}
\end{footnotes}
Former Attorney General Eric Holder commented that “[a]ll three of these things have to be seen as part of a whole. Unregulated dark money combined with these voter ID laws combined with gerrymandering is inconsistent with how our nation’s system is supposed to be set up.” Meanwhile, the U.S. Supreme Court has not found a state’s redistricting map based on political gerrymandering to be a violation of the Constitution. The Supreme Court has, however, granted certiorari for two gerrymandering cases.

VII. WHAT CAN BE DONE?

Reforms that have already been advanced throughout the country pave the way for states to make changes that can remedy direct and indirect voter suppression. In the 2018 election, Florida voters overwhelmingly passed Amendment 4, which restores voting rights to over 1.4 million former felons. Despite attempts to thwart the implementation, the law has gone into effect. Michigan created an independent redistricting commission, similar to the one created in California in 2008, which was extended to U.S. Congressional boundaries in

247. Id.
248. Id.
249. Gerrymandering at the Supreme Court, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/gerrymandering-scotus (last visited Apr. 10, 2019) (discussing one arising in Maryland, where the districts were drawn by Democrats, and the other in North Carolina, where they were drawn by Republicans).
252. See Rapoport & Hines, supra note 250.
Missouri, Colorado, Utah, and Ohio passed redistricting reform. Michigan voters also approved an initiative enacting same-day voter registration, automatic registration, a required post-election audit, and greater voting rights for overseas voters and the military. Automatic voter registration also passed in Nevada, and same-day registration passed in Maryland. Automatic voter registration is promoted as augmenting rather than diminishing voter participation. These reforms would remedy the political gerrymandering that excludes many voters from having a say in the political process.

States and local entities are now enacting legislation to address digital political intervention in elections, including Maryland and California, and several states continue to approve small donor match programs for campaigns. While “democracy” reforms to remedy the campaign finance system, gerrymandering and election security are much more difficult to pass on the federal level. Nonetheless, on the first day that Congress convened in 2019, the Majority Leader of the


254. See Rapoport & Hines, supra note 250.

255. Id.

256. Id.


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House, Nancy Pelosi, introduced HR1 to accomplish just those reforms.\textsuperscript{260} HR1 addresses dark money, foreign interference in the elections, the stalemate at the FEC, gerrymandering, and more.\textsuperscript{261} These proposals are a comprehensive response to the policies that have had the effect of discouraging public participation in the electoral process. Even if HR1 does not pass in the Senate, this bill is a marker for similar legislation to be enacted across the country at the state and local levels.

VIII. CONCLUSION

We should not consider our country’s low voter turnout rate to be a problem of voter apathy. Instead, non-voters are making decisions not to vote because of distrust in our electoral process, our government, and many governmental institutions. This lack of trust emanates from our political and judicial systems’ choices that have resulted in many people believing that their vote does not matter. Understanding that election integrity, access to the vote, campaign finance laws, and politics are intertwined creates an opportunity for our country to remedy these problems and to put us on the path to rebuilding trust and accountability for our citizens.


\textsuperscript{261} For the People Act of 2019, H.R. 1, 116th Cong. (2019).