

## NINE

### The Racial Rules of Democratic Participation

The right to vote is one of the central and most basic components of a democracy, and the expansion of the franchise has been one of the most consistent themes in U.S. political history. In fact, more than half of the constitutional amendments ratified after the Bill of Rights have dealt with voting rights.<sup>1</sup> The suffrage struggle has been central to demands of African Americans and women to be recognized as full citizens and to have comprehensive access to the rights associated with citizenship. Even after the Fifteenth Amendment extended the franchise to black Americans, it took the Civil Rights Movement and the subsequent Voting Rights Act of 1965 (VRA) for African Americans to even come close to realizing the promise of citizenship. As in other areas of life affecting black Americans, racial progress around the right to vote has been an “unsteady march” – two steps forward and one step back.<sup>2</sup> As with education, wealth, and all the other topics this book has covered, the rules around voting and political inclusion both create and reinforce racially unequal outcomes in the economy and society writ large.

For more than two-thirds of U.S. history, the majority of the domestic adult population was ineligible for full citizenship because of race, country of origin, or gender.<sup>3</sup> While we have made progress in rolling back explicit pre-Civil War exclusions, the rules of the electoral system continue to be racialized.

The history of electoral rules maps cleanly onto the history of other racial rules we have outlined throughout this book. Since the abolition of slavery, social movements and political actors have sought to expand the electorate, and with each iteration of progress there has been a corresponding backlash to fuller inclusion, including new mechanisms to suppress the vote through both explicit and implicit rules. For instance, in response to the post-Civil War Reconstruction-era Fifteenth Amendment, which extended

the franchise to black men, exclusionary Jim Crow laws emerged all across the South in the late nineteenth and twentieth centuries.<sup>4</sup> The racial rules of elections embedded in “Black Codes” and Jim Crow laws had the clear intention of excluding African American voters.

In this chapter, we first outline the rules that blocked access to voting for black Americans between the Reconstruction and Civil Rights eras. We then demonstrate how the explicitly inclusionary racial rules of the Civil Rights era opened up unprecedented access to the franchise for black Americans. Finally, we argue that under the current electoral rules, black Americans continue to have unequal access to voting due to a set of policies at both the state and federal levels that, while on their face are race-neutral, are implicitly racially exclusive.

Black voting participation in the modern era is circumscribed by three sets of racialized rules: the increased disenfranchisement of those with a criminal record, the 2013 Supreme Court decision that effectively gutted the Voting Rights Act, and the passage of implicitly exclusionary “voter suppression” laws. These contemporary voter suppression laws, enacted with increasing frequency since 2010, are a response to the expansion of the electorate after the “Second Reconstruction”: the 1965 Voting Rights Act; the Twenty-Fourth Amendment, which ended the poll tax; and the Twenty-Sixth Amendment, which expanded the franchise to eighteen-year-olds. While in some cases they are less obvious, these twenty-first century racial rules of political exclusion are no less insidious than the exclusionary rules of the previous three centuries.

## PRE-CIVIL RIGHTS EXCLUSIONARY RULES

### Racial Electoral Exclusion and Jim Crow (1877–1954)

Following passage of the Fifteenth Amendment in 1870, black Americans experienced a brief period of sharply increased political participation and representation during the Reconstruction era. During that time, only black *men* enjoyed the right to vote, as the Fifteenth Amendment only guaranteed that prohibitions against black *men* from voting were unconstitutional, as black women wouldn’t obtain that right until well into the twentieth century.<sup>5</sup> During the Reconstruction years, black Americans experienced political representation at the local as well as the national level for the first time, electing sixteen black Americans to Congress between 1870 and 1877.<sup>6</sup> These victories, however, were short lived. With whites in the South calling for “Southern Redemption” and “Restoration,” essentially the preservation of white supremacy and the revocation of black Southerners’ rights, massive

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disenfranchisement and political exclusion soon followed.<sup>7</sup> From 1890 to 1910, most southern states, in order to circumvent the Fifteenth Amendment, “creatively” enacted racially exclusionary laws that were race-neutral on their face but had the impact of disenfranchising the vast majority of southern blacks, who comprised the majority of all black Americans at that time.

These so-called race-neutral laws were implicitly exclusionary. Poll taxes limited voting access to those who could afford it, and many former slaves could not. Literacy tests targeted black Americans who had been forbidden from learning to read under slavery. Grandfather clauses specifically allowed white citizens to evade these restrictions.<sup>8</sup> And criminal disenfranchisement provisions disproportionately impacted blacks, whose every move was increasingly criminalized in the post-Reconstruction era. In 1890, Mississippi replaced a provision of its constitution that originally disenfranchised all citizens convicted of any crime with one that disenfranchised only those convicted of crimes that blacks were supposedly more likely than whites to commit, such as burglary, theft, and arson.<sup>9</sup> Southerners in the Democratic Party held “white primaries” in which southern blacks were excluded from voting – which effectively excluded them from voting at all, as the “Solid South” was dominated by a single party. These rules follow the trend we have identified throughout each of these chapters: in response to strides toward greater inclusion, implicitly exclusive racial rules replace the previously explicitly exclusive rules to covertly – and in some cases legally – perpetuate the same effects.

The effects of the southern Redemption disenfranchisement campaign on newly freed blacks were devastating. By the turn of the twentieth century, virtually all black Americans in southern states had lost the right to vote. The cumulative effect of all of these disenfranchisement methods was to exclude almost all blacks and a significant number of poor whites from full citizenship. But the economic and social effects of disenfranchisement were equally as significant. According to economist Suresh Naidu, as disenfranchisement policies became more common, the amount of public goods the government distributed decreased, especially spending on education for schools in black communities. This would have decades-long effects on generations of southern black children.<sup>10</sup>

## THE CIVIL RIGHTS ERA: EXPLICIT INCLUSION

### **Enforcing Racial Inclusion in Voting Rights (1955–1980)**

As we have described in earlier chapters, the beginnings of a Second Reconstruction around racial justice and full political inclusion began

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ten years before the historic *Brown v. Board of Education* Supreme Court decision effectively reversed *Plessy v. Ferguson*. The 1944 Supreme Court case *Smith v. Allwright*, which overturned the use of white primaries that arose during the First Reconstruction, was the first blow to exclusionary primaries. Subsequent blows came from the Civil Rights Movement, especially Fannie Lou Hamer and the Mississippi Freedom Democratic Party's challenge to the Democratic Party at the 1964 convention. The party was created to challenge the all-white and anti-civil rights delegation that the Mississippi Democratic Party planned on sending to the Democratic National Convention. Hamer, who was elected vice chair of the Mississippi Freedom Democratic Party, brought national light on the issues facing black Americans. This began the story of electoral realignment, where southern whites and conservative southern Democrats fled the Democratic Party for what until that point had been the "party of Lincoln."<sup>11</sup>

The 1965 Voting Rights Act (VRA), heralded by some as the most significant single piece of legislation of the Civil Rights Movement, successfully eliminated most of the structural barriers to full citizenship for African Americans erected during the Jim Crow era. The VRA increased black political empowerment for the next thirty years, and throughout the post-Civil Rights era, thousands of black elected officials took office at all levels.<sup>12</sup> Black communities in large metropolitan areas were even able to elect black mayors, but the black working class and black poor populations benefited little from this triumph of black electoral power.<sup>13</sup> Despite its limitations, the strength and heart of the VRA was in its explicitly race-conscious approach: by requiring states and jurisdictions who had a history of disenfranchising black voters to seek permission from the Justice department before making changes to their voting laws, the law placed the onus on those jurisdictions to prove they *weren't* discriminating, which proved effective in increasing black voter turnout at the polls.<sup>14</sup> The law prevented more than one thousand attempts to change local voter laws that would have had a disproportionately negative affect on black voters.<sup>15</sup>

Racial inclusion as a result of the Second Reconstruction and black political empowerment at the local, state, and national levels during the Civil Rights movement actively created a new and expanded black middle class that still occupies an "ethnic niche" in public employment today, though a precarious one.<sup>16</sup> Yet black political empowerment occurred simultaneously with deindustrialization, globalization, and increased class divisions within black communities. The result has been that economic and social distress in the post-Civil Rights era has been a "countervailing force" against political

empowerment, weakening the black civic capacity that the landmark pieces of legislation from the Civil Rights era had expanded.<sup>17</sup>

## THE CURRENT RULES

### The Rise of Race-Neutral Exclusion (1980–Present)

Much like the massive disenfranchisement of blacks following Reconstruction, the voting rights of black Americans continue to be targeted, and the events in the 2000s and 2010s have demonstrated the vulnerabilities of Civil Rights era progress. Three sets of racial rules that continue to create structural barriers to civic participation have emerged despite brief extensions of the Voting Rights Act and voter access provisions. These are the growth of the prison industry and mass incarceration, leading to increased disenfranchisement of those with a criminal record; the Supreme Court's 2013 curtailment of the key provisions of the Voting Rights Act; and, since 2010, the passage of ostensibly race-neutral but in fact racially exclusionary voter suppression laws.

#### *Disenfranchisement and Incarceration Interact*

One of the major consequences of the punitive criminal justice and mass incarceration policies enacted over the past four decades is the disenfranchisement of people who have been convicted of felonies.<sup>18</sup> From the late 1990s to the early 2000s, police dramatically increased arrests for felony charges, especially for nonviolent, drug-related crimes. Up from just 1.17 million in 1976, as of 2010 5.8 million Americans, including 2.2 million black Americans, are ineligible to vote due to a felony conviction.<sup>19</sup> In other words, more than one-third of all of those disenfranchised are black even though blacks constitute only 14 percent of the population. As of 2010, one in thirteen black Americans nationwide are unable to vote because of felony convictions, and one in five are disenfranchised in Virginia (20 percent), Kentucky (22 percent), and Florida (23 percent).<sup>20</sup> According to Chris Uggen and Jeff Manza, the effects of felony disenfranchisement on potential black voters have significant political consequences, including being a decisive factor in the presidential election of 2000 and in at least seven Senate races since 1978.<sup>21</sup>

There is no national or constitutional right to vote in America; the Fifteenth Amendment merely “prohibits” efforts to prevent protected groups from voting. Thus, states’ rights reign supreme when it comes to voting. And because state laws determine voting rights for all elections,

there is great variation in voting eligibility. For instance, in forty-six states, convicted felons lose the right to vote while incarcerated; thirty-two states prohibit felons on probation or parole the right to vote; and in eleven states, anyone convicted of a felony is disenfranchised for life.<sup>22</sup> Thus, an eighteen-year-old convicted of a felony in Florida for writing a bad check is permanently disenfranchised even if she completes a two-year sentence.

The processes that are available in some states to regain the right to vote are just as varied and cumbersome as the disenfranchisement laws themselves. In Mississippi, ex-felons must either have a legislator introduce a bill on their behalf, which must be passed by a two-thirds vote, or secure an executive order from the governor. In at least sixteen states, ex-felons convicted of federal offenses are ineligible to seek state procedures for restoring their voting rights and instead must obtain a presidential pardon, which are very rare for nonviolent drug offenders (whose sentences are typically commuted rather than pardoned if granted clemency by the president).<sup>23</sup>

These rules, which we also described in the chapter on criminal justice, have second-order effects that contribute to limiting black Americans' right to vote. First, the laws that currently disenfranchise black citizens are vestiges of Jim Crow and other previous efforts to disenfranchise – these laws were never completely repealed. Second, the rising incarceration of black Americans has interacted with these rules to further exclude millions of ex-felons, and this population is comprised disproportionately of black men. These racialized rules not only have severe consequences for civic engagement and electoral results, but also negative implications for civic participation. According to Vesla Weaver, Americans with no criminal justice contact turn out to vote at a rate of 60 percent, while turnout drops for those who have been stopped by the police (52 percent), been arrested (44 percent), been convicted (42 percent), or served a prison sentence (38 percent).<sup>24</sup> Put simply, the harsher an individual's contact with the state, the less likely they are to either want to or be able to participate in it (Figure 9.1).

### *The Curtailing of the Voting Rights Act*

Civil rights and racial justice organizations made tremendous efforts to pass the 1982 extension of the VRA. This extension renewed the VRA for an additional twenty-five years and made permanent Section 2, which made all race-based voter discrimination illegal, regardless of whether or not the rules had been adopted with the intent to discriminate. The VRA extension faced strong resistance from President Reagan, but he eventually signed the bill.<sup>25</sup> Since the 1980s, civil rights organizations have mobilized nationally in support of legislation extending and protecting the right to

Voter participation rates decrease with severity of criminal justice contact.



Figure 9.1. Voter participation rates decrease with severity of criminal police contact. *Source:* Data courtesy of National Longitudinal Study of Adolescent Health, Black Youth Culture Survey, and Fragile Families and Child Wellbeing Survey. Based on a chart published in *Boston Review* by Weaver, Vesla (2014).

vote for black Americans and other politically excluded groups. This legislation has included the 1982 and 1992 extensions of the VRA, the 1991 Civil Rights Act, and the 1993 Motor Voter Act (which allowed the Department of Justice to bring civil actions in federal court to enforce its requirements and developed a national mail registration form),<sup>26</sup> in addition to numerous court challenges and advocacy on the local and state levels.

Despite the success of the VRA in ensuring full political inclusion for blacks long denied the right to vote and enabling thousands of black Americans to get elected to local, state, and national offices, the conservative majority on the Supreme Court has defanged some of the most important provisions of the act. In the 2013 *Shelby County v. Holder* case, the Court invalidated a key provision (Section 4) that covered voting rules in states and localities with a history of racial discrimination in voting. The Court majority argued that a new formula is necessary for assessing which voting jurisdictions require “preclearance” from the Justice Department to approve new voting rules; this essentially invalidated Section 5 of the VRA, which was one of the most important in ending racial exclusion of blacks in voting. Chief Justice Roberts wrote in the majority opinion that “[t]he conditions that originally justified these measures no longer characterize voting in the covered jurisdictions” and that the law “punish[es] the past,”<sup>27</sup> meaning that discrimination against black voters in historically exclusionary jurisdictions was no longer an issue.

The argument that racism and the racial rules are over ignored the role that the VRA itself played and continued to play in that progress at the time of the Court's ruling. As recently as 2012, the Department of Justice blocked requested electoral rule changes that they found would have had a discriminatory affect on hundreds of thousands of minority voters.<sup>28</sup> As a result of the Court's decision, black American voters in many states, particularly southern states, will have restricted voting access, and many states have subsequently enacted a range of new laws to restrict the right to vote. A mere twenty-four hours after the *Shelby County v. Holder* decision, five of the nine states that had been required to acquire preclearance from the Department of Justice before changing electoral rules introduced new voter suppression laws, some of which had already been found discriminatory by the federal government before the Court's decision.<sup>29</sup> The gutted VRA may have been one of many factors that affected the outcome of the 2016 presidential election. According to Sherrilyn Ifill, president of the NAACP Legal Defense and Education Fund, "In jurisdictions formerly covered by the Voting Rights Act, voters saw 868 polling places closed, forcing too many people to travel as far as 25 miles just to be able to vote."<sup>30</sup> Though it is impossible to measure the direct causal effects of the VRA's stripped powers on the election, it is certainly clear that the change to the law will have long-term effects on black Americans' access to the ballot box, and therefore on the very issues that impact their lives.

### *Nonracial Electoral Rules with Racial Consequences*

There are also nonracial electoral rules with significant racial consequences that structure how our democracy operates. From Congress to state and city legislatures, most citizens must vote for their elected representatives in a geography-based "winner-take-all" system. In this system, the winner only needs 51 percent of the electorate in a given district to be elected as legislative representative, which means that up to 49 percent of voters are not represented based on their vote choice.<sup>31</sup> Gerrymandering – the manipulation of electoral boundaries – is another "nonracial rule" that has significant racial consequences. By selecting the boundaries around an electoral constituency, politicians functionally choose their voters, not the other way around. "Racial gerrymandering" refers to drawing legislative districts in a race-conscious way to either advance black or Latino representation in legislatures, or to strategically "pack" black voters into a few concentrated districts to expand the representation of white voters in surrounding districts, a practice that became more common after the Voting Rights Act of 1965. This combination of electoral rules – winner-take-all geographic districts

and political and racial gerrymandering – has undercut the political voice of blacks and other racially marginalized groups.<sup>32</sup>

Between 2010 and 2014, twenty-two states planned to enact new voting restrictions. In all but four, the rules passed entirely through GOP-controlled bodies.<sup>33</sup> Seventeen of these states enacted new restrictions after the 2012 presidential election.<sup>34</sup> In 2016, fourteen states put in place voting restrictions ranging from photo ID requirements to curtailing early voting.<sup>35</sup> The majority of these voter restriction efforts are voter ID laws, which make it more difficult to register and vote because of the limited types of identification allowed, and research has demonstrated that voter ID laws have the direct effect of suppressing minority votes.<sup>36</sup> Proponents argue that these laws are necessary to combat fraud,<sup>37</sup> but there is no evidence of significant electoral fraud, and many of the conservative elected officials advancing these efforts have stated the real intention behind them: advancing their own partisan interests. In 2012, for example, Pennsylvania House Majority Leader Mike Turzai was quoted as saying, “We are focused on making sure that we meet our obligations that we’ve talked about for years. Voter ID, which is gonna allow Governor Romney to win the state of Pennsylvania, done.”<sup>38</sup> As several voting rights advocates have noted, in 2016 it was easier to register and obtain a gun than it was to vote in many states. Other voter restrictions include cutbacks or elimination of early and weekend voting and same-day registration. Fewer options for voting early or on weekends make it harder for black voters to get to the polls, where research from the Brennan Center shows they face lines that are twice as long as those in majority-white areas due to underresourced poll workers and fewer voting machines (Figure 9.2).<sup>39</sup>

While the letter of these laws is racially neutral, the effect of these efforts is to restrict the rights and participation of black Americans, other voters of color, students, and constituencies that traditionally lean Democratic.<sup>40</sup> Recent empirical studies show the disproportionate effect of these laws on black voters and other voters of color. Zoltan Hajnal and coauthors find that “strict voter ID laws double or triple the gap in turnout between whites and nonwhites.”<sup>41</sup> Similarly, a report from the Government Accountability Office shows that voter ID laws have a disproportionate impact on black Americans, who are less likely to have the required identification.<sup>42</sup> In Texas, which has one of the nation’s strictest voter ID laws, it is estimated that six hundred thousand voters – disproportionately black and Latino – lack the required ID.<sup>43</sup> Another study illustrated that voter turnout rates among Latino and black voters were lower in states that had voter ID laws.<sup>44</sup>

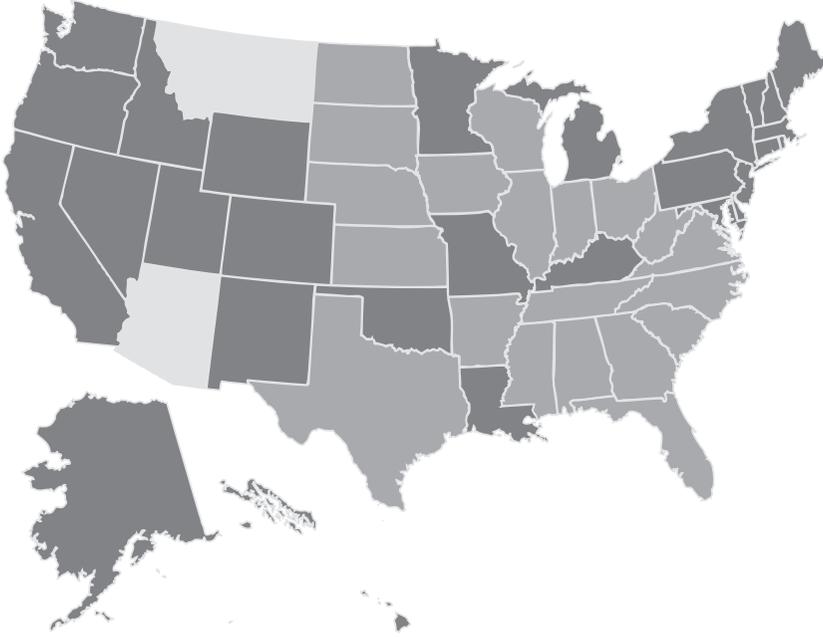


Figure 9.2. States with new voting restrictions since 2010 elections.

Source: Map based on data and maps originally published by the Brennan Center for Justice by Weiser, Wendy R. and Erik Opsal (2014).

### IMPLICATIONS FOR RACIAL INEQUALITY

The clear implication of structural biases against black Americans is that political and economic elites – those who make the rules – fear expansive and inclusive electoral democracy. This fear is directly related to the overall distribution of income and wealth. One theory, the “redistribution thesis,” suggests that if the majority of “eligible voters” in an electorate are poor, working class, or middle class, and everyone has an equal vote, then that majority will use the vote to demand downward redistribution by the state.<sup>45</sup> Elites in the status quo have clear incentives to discourage this kind of redistributive politics. As political theorist Ian Shapiro argues, “Democracy offers the possibility of downwardly redistributive politics, but there are no guarantees that it will happen, and many cards are stacked against it, particularly in the American system.”<sup>46</sup> T. H. Marshall’s thesis – that the continual expansion of civil, political, and social rights was an inevitable trend among advanced democracies and would empower citizens to make successful demands on nation-states to address inequality – has also been particularly influential.<sup>47</sup>

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Scholars and political actors alike have long believed that increased inclusion in, and democratization of, American institutions would challenge racial, economic, and gender inequalities. In other words, fairer rules for the political game would lead to fairer economic rules and more equitable outcomes. In practice, inclusive democratic participation (whether peaceful or disruptive) has led to enduring structural and institutional changes. In many counties in the Deep South, for instance, blacks saw increased redistribution through social welfare benefits as a direct result of enfranchisement by the 1965 VRA.<sup>48</sup> However, the overall empirical reality of the post-Civil Rights era poses serious problems for this assumption, particularly as increased black inclusion in American society has coincided with increased economic inequality.

### CONCLUSION

This chapter has explored the racialized rules that prevent black Americans from exercising their constitutional right to vote. Of course, voter participation is also linked to the range of socioeconomic factors described in previous chapters: wealth, income, education, health, and criminal justice. The unequal outcomes for black Americans in each of these areas compound with implicit exclusions to further curtail civic participation. This creates a vicious cycle in which limited political power and limited economic power feed upon each other. However, as our next chapter will illustrate, we can take concrete steps to rewrite the rules that implicitly exclude black Americans from full participation. In doing so, we can eliminate the legal strictures that serve as modern-day poll taxes preventing electoral outcomes that lead toward equity.