

# HISTORY, TRADITION, AND VOTER REGISTRATION

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History and tradition are dominating the Supreme Court, which has invoked history and tradition to curtail some rights, such as abortion, while using it to elevate other rights, such as the right to bear arms. Might history and tradition also cause the Court to strike down new restrictions on the right to vote, even if doing so would cut against the current Court's narrow protection of voting rights? Disputes over voter registration restrictions will pose that very question. Many states have recently implemented onerous rules on voter registration, especially targeting third-party voter registration organizations. Congress is also debating the SAVE Act, which would force states to require documentary proof of citizenship when registering voters for federal elections. As this Article shows, the Court should strike down these rules under a faithful interpretation of the history and tradition of voter registration.

This Article first discusses the ways in which some states have imposed restrictive registration rules and made it harder for organizations to help voters register. States have enacted citizenship requirements on who may register voters, tight delivery deadlines for completed registration forms, speech mandates for third-party organizations, compensation restrictions for individuals engaged in voter registration, and rules on what voters must present to register to vote, including documentary proof of citizenship.

The Article then turns to the history of voter registration, drawing upon primary sources such as archival newspaper records to show that there is a rich history of voter registration drives that date to the beginning of voter registration. There are three significant periods of expanded voter registration through third-party organizations, including during the women's suffrage movement, the civil rights movement, and in the 1990s after Congress passed the National Voter Registration Act. Interested parties and organizations have engaged in voter registration activities for almost as long as there have been registration lists.

The Article then evaluates how courts should use this history and tradition. Specifically, because history and tradition support robust third-party voter registration activities, the Court should invalidate new voter registration restrictions as violating organizations' and voters' rights. If voter registration is considered a deeply rooted aspect of the election process, then so is the practice of third parties conducting voter registration drives and helping others register to vote.

History and tradition are now the primary focus of arguments at the Court. To win, litigants must explain why history and tradition support their

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contentions. Regarding voter registration, history and tradition demonstrate that eligible voters could easily place their names on the voter list and that organizations could assist in those efforts without hindrance. The Court should invoke this history and tradition to strike down restrictions on voter registration.

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## INTRODUCTION

History and tradition are doing a lot of work at the Supreme Court. A majority of the Justices on the Roberts Court seem to fashion themselves as legal historians as much as legal analysts. Resting on an originalist framework, the Court has indicated that the only rights it will recognize under the U.S. Constitution, beyond those explicitly stated, are rights that Americans protected in the Founding era (or when the relevant amendment, such as the Fourteenth Amendment, was ratified). In two recent high-profile cases, involving the right to abortion and the right to possess firearms, history and tradition drove the analysis. The Court

denied an individual right to abortion in *Dobbs v. Jackson Women's Health Organization*,<sup>1</sup> overturning both *Roe v. Wade*<sup>2</sup> and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>3</sup> in part by finding that history and tradition did not clearly support the right.<sup>4</sup> On the other hand, the Court used history and tradition to offer strong protection to individual gun ownership, declaring that no gun regulation is permissible unless that same restriction, or a historical analog, existed in 1791 when the states ratified the Second Amendment.<sup>5</sup> This emphasis on history and tradition has even filtered into the Court's approach to statutory analysis, as the Court used history and tradition to narrow the scope of protection under the Voting Rights Act.<sup>6</sup>

A cynic might suggest that the conservative Justices are invoking history and tradition simply to achieve particular outcomes—no recognition of abortion rights, strong recognition of gun rights, and a weaker Voting Rights Act. The question remains, then, whether the Court will use history and tradition even if doing so will result in a ruling that expands rights, such as the right to vote, that the Court has recently curtailed.

Current disputes about voter registration will present that very question. Several states, most notably Florida, have enacted new restrictions on voter registration, especially for third-party organizations that conduct voter registration drives. The laws place limits on who may register voters and how many registrations an organization can process, timing deadlines for when forms must be turned in, rules regarding what voters must show to register, and other restrictions that make it harder for eligible voters to be put on the rolls.<sup>7</sup>

Ever since states have required voter registration, however, it has been relatively easy for eligible voters to register. More specifically, third-party organizations—nongovernmental entities focused on voter engagement—have participated in voter registration practices for as long as there has been voter registration. Although there was no voter registration when the Constitution was adopted, making Founding-era history and tradition on third-party voter registration meaningless, there is a robust history of organizations helping voters register ever since voter registration began in the late 1800s and early 1900s. This history of easy access and expansive voter assistance coincides with the

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1. 142 S. Ct. 2228 (2022).
  2. 410 U.S. 113 (1973).
  3. 505 U.S. 833 (1992).
  4. *Dobbs*, 142 S. Ct. at 2242.
  5. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2126 (2022).
  6. *Brnovich v. DNC*, 141 S. Ct. 2321, 2338–39 (2021).
  7. See *infra* Part I.

ratification of the Fifteenth and Nineteenth Amendments, which significantly expanded the electorate for people of color and women. A judicial doctrine that is serious about history and tradition should counsel toward greater scrutiny of new state restrictions on voter registration—particularly as applied to third-party registration activities—as these laws are contrary to historical practice.

Part I of this Article discusses how some states are making it harder for organizations to help voters register through new restrictions on voter registration. Part II looks at the history of voter registration, drawing upon primary sources to show that there is a rich history of voter registration drives dating to the beginning of voter registration. Part III recounts the Roberts Court’s focus on history and tradition—including in its voting rights jurisprudence—to explain why the Court should use the historical record to strike down the new voter registration restrictions.

There are many reasons to criticize the Court’s history and tradition approach to individual rights, especially as the Court seems to pick and choose the history it likes best to support its rulings.<sup>8</sup> But history and tradition are now a primary focus of arguments at the Court. Litigants must therefore take the Court on its own terms and explain why history and tradition bolster their contentions. On voter registration, history and tradition support the ability of eligible voters to place their names on the voter list easily and the ability of organizations to assist in those efforts. The Court should invoke this history and tradition to strike down restrictions on voter registration.

## I. CURRENT RESTRICTIONS ON VOTER REGISTRATION PRACTICES

Voter registration activities, at least in some states, are facing new hurdles as legislatures enact restrictions, perhaps to make it harder for new voters who may vote against the entrenched politicians in power. Attacks on civic organizations that help voters are growing. Several states have passed laws in recent years that target the vital work organizations do to help voters register and request absentee ballots. Many of these laws have faced legal challenges.

New Hampshire and Wyoming have the most draconian laws on voter registration drives conducted by outside organizations: Both states prohibit the practice.<sup>9</sup> As Part III discusses, an outright prohibition on

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8. Alexandra Michalak, *Historians Wear Robes Now? Applying the History and Tradition Standard: A Practical Guide for Lower Courts*, 32 WM. & MARY BILL RTS. J. 479, 500 (2023).

9. *Restrictions on 3rd Party Voter Registration Drives*, MOVEMENT ADVANCEMENT PROJECT, [https://www.lgbtmap.org/democracy-maps/third\\_party\\_voter\\_registration\\_drives](https://www.lgbtmap.org/democracy-maps/third_party_voter_registration_drives) [https://perma.cc/QDK9-GK9P] (Feb. 22, 2025); WYO. STAT. ANN. § 22-3-104(h)(i)–(ii) (2024); FAIR ELECTIONS CTR., VOTER REGISTRATION IN NEW

third-party voter registration activities is contrary to the history of voter registration. That said, both states allow for same-day voter registration at the polls, mitigating the impact of not allowing third parties to assist voters in registering.<sup>10</sup>

Several states that have a registration deadline prior to Election Day have enacted limitations on third-party registration activities. These restrictions generally fall within five categories:

- Citizenship requirements that forbid noncitizens and nonresidents of the state or county from engaging in voter registration activities;
- Delivery requirements that mandate when an organization must deliver registration forms to election officials;
- Registration and speech requirements that force organizations to register with the state and to provide disclaimers that the state does not sanction their activities;
- Compensation restrictions for individuals engaged in voter registration; and
- Rules on what voters must present to register, which often make it harder for third-party organizations to reach various communities.

Collectively, these rules create barriers for third-party organizations to register voters. Further, states impose hefty fines on voter registration organizations that violate the rules, often pushing them out of the business of voter registration for fear of a fine that will bankrupt them. Florida, for instance, increased the maximum aggregate fines for an organization that violates the myriad registration rules from \$1,000 in 2021, to \$50,000 in 2022, to \$250,000 in 2023.<sup>11</sup> In addition, as of this writing, Congress was debating the Safeguard American Voter Eligibility (SAVE) Act, which would impose various restrictions on voter registration, including a requirement that new registrants present documentary proof of citizenship.<sup>12</sup>

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HAMPSHIRE (2021), <https://nationalvoterregistrationday.org/documents/2020/09/new-hampshire-voter-drive-rules.pdf/> [https://perma.cc/MF4W-XZ5F].

10. *Same-Day Voter Registration*, NCSL, <https://www.ncsl.org/elections-and-campaigns/same-day-voter-registration> (Oct. 25, 2024).

11. Aaron Mendelson & Ashley Lopez, *'The Restrictions Are Unbelievable': States Target Voter Registration Drives*, CTR. FOR PUB. INTEGRITY (May 16, 2024), <https://publicintegrity.org/politics/elections/who-counts/the-restrictions-are-unbelievable-states-target-voter-registration-drives/>; S.B. 7050, 2023 Leg., Reg. Sess. (Fla. 2023); FLA. STAT. § 97.0575(5)(a) (2024).

12. Safeguard American Voter Eligibility Act, H.R. 22, 119th Cong. § 2 (2025).

This Part offers details about new laws within each of the five categories. The takeaway: In some places, it has become more difficult to help people register to vote.

### *A. Citizenship or Residency Requirements*

Several states require individuals who conduct voter registration activities to be registered voters of the state, or even residents of the county, where they are engaged in helping other voters register. For example, in 2022, Missouri lawmakers enacted House Bill 1878, which imposed several rules on voter registration activities, including a ban on paid voter registration solicitation and a requirement that anyone who helps more than ten people register to vote must themselves be a registered Missouri voter.<sup>13</sup> These individuals must further register with the state as a “voter registration solicitor.”<sup>14</sup> The League of Women Voters of Missouri and the NAACP challenged the law, and a state judge issued a preliminary injunction against it, finding that the law “makes it more difficult for non-partisan, non-profit civic organizations such as Plaintiffs to engage in voter engagement and voter outreach activities they undertake to spread their pro-voter message and increase participation in elections.”<sup>15</sup> The law therefore violated the organizations’ free speech advocacy—but not before it potentially chilled voter registration in the months before the 2022 election, prior to the court’s decision. The state trial court then issued a permanent injunction against the law soon after the 2024 election, finding that voter registration activities implicate “core political speech and expressive conduct” and that the state could not satisfy strict scrutiny review.<sup>16</sup>

Texas also limits who can conduct voter registration.<sup>17</sup> The law, as amended in 2011, prohibits non-Texas residents from serving as “volunteer deputy registrar[s]” (VDRs) and says that VDRs appointed in one county cannot serve in another county.<sup>18</sup> The Fifth Circuit upheld the provisions, finding that they “merely regulate the receipt and delivery of completed voter-registration applications, two non-expressive activities.”<sup>19</sup>

Florida enacted a law in 2023 that imposes a \$50,000 fine on third-party voter registration organizations for every person working on behalf

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13. H.R. 1878, 101st Gen. Assemb., Reg. Sess. (Mo. 2022).

14. *Id.*

15. Order Granting Plaintiffs’ Motion for Preliminary Injunction at 2, *League of Women Voters of Mo. v. Missouri*, No. 20AC-CC04333 (Mo. Cir. Ct. Oct. 24, 2022).

16. Final Order & Judgment Granting Declaratory & Injunctive Relief at 52, *League of Women Voters of Mo.*, No. 20AC-CC04333 (Mo. Cir. Ct. Nov. 27, 2024).

17. TEX. ELEC. CODE ANN. § 13.031 (West 2023).

18. §§ 13.031(d)(3), .038; § 11.002(a)(5).

19. *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 391 (5th Cir. 2013).

of the organization who is not a citizen of the United States, essentially barring noncitizens from engaging in voter registration activities.<sup>20</sup> A federal district court issued a preliminary injunction against the provision, finding that it likely violated the Equal Protection Clause.<sup>21</sup> In addition, Florida law declares that anyone convicted of certain felonies may not collect or handle voter registration applications.<sup>22</sup> Violations are subject to a \$50,000 fine.<sup>23</sup> Meanwhile, Florida legislators have proposed additional restrictions on third-party voter registration organizations, such as requiring organizations to incorporate citizenship screening questions as part of the voter registration process.<sup>24</sup>

In sum, states have enacted new rules that limit who can engage in voter registration activities, despite any evidence that noncitizen or nonresident participation in registration drives has contributed to fraud or inflated voter rolls. The goal is to make it harder for third-party organizations to register voters.

### *B. Delivery Rules for Registration Forms*

Some states impose strict deadlines on organizations that register voters, specifying that the groups must turn in forms by a certain date—which can impose hardships if the deadlines are tight. As a report from the Brennan Center notes:

Although most groups can meet longer return deadlines, shorter deadlines can make drives practically impossible. Many groups conduct multi-day drives, often over weekends when election offices are closed. Also, before submitting registration forms to the appropriate elections offices, many drives gather all collected forms in a single secure location to review for completeness and follow-up with registrants if information is missing. From start to finish this process can take several days. And regardless of the length of a deadline, those enforced by heavy fines or criminal sanctions — even for innocent mistakes that may lead to delayed delivery — can have a chilling effect

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20. FLA. STAT. § 97.0575(1)(f) (2024).

21. *Hisp. Fed’n v. Byrd*, 719 F. Supp. 3d 1236, 1239 (N.D. Fla. 2024).

22. § 97.0575(1)(e); see *Forms*, FLA. DIV. ELECTIONS, <https://dos.fl.gov/elections/forms-publications/forms/> (Feb. 18, 2025) (scroll to and choose “DS-DE 119: Third-Party Registration Organization Registration Form”).

23. § 97.0575(1)(e).

24. S.B. 1602, 2024 Leg., Reg. Sess. (Fla. 2024).

on voter registration activities and recruitment of volunteers and employees.<sup>25</sup>

Even some so-called liberal states have harsh deadlines. New Mexico has the strictest rule: Organizations must deliver or mail completed voter registration applications to the Secretary of State or county clerk within forty-eight hours of receiving them.<sup>26</sup> California requires the return of county voter registration cards within three days (though the rule does not apply to registrations that use the federal form).<sup>27</sup> On the other end of the spectrum (both politically and on this issue), Louisiana has a more reasonable thirty-day deadline.<sup>28</sup> A 2012 Brennan Center report tallied “22 states [that] impose a turnaround deadline prior to book closing,” with nineteen of those states levying criminal or civil penalties for a violation.<sup>29</sup> A few of those states—Missouri (with a seven-day deadline)<sup>30</sup> and South Dakota (with a ten-day deadline)<sup>31</sup>—impose criminal sanctions even in the absence of intent.<sup>32</sup> Texas law says that any violation is a Class C misdemeanor and that an intentional violation constitutes a more severe Class A misdemeanor.<sup>33</sup>

Florida’s history of registration delivery deadlines has been particularly rocky. Florida imposed a requirement that organizations deliver all voter registration applications within ten days, but a federal district court struck down that law in 2006.<sup>34</sup> The court noted that at least one of the organizations conducted voter registration drives over several weeks and often turned in applications more than ten days after voters completed them.<sup>35</sup> In 2011, Florida enacted a requirement that a voter registration form was due within forty-eight hours of a person submitting it to an organization, but a district court issued a preliminary injunction against that law, finding it vague and explaining that “[t]he short deadline, coupled with substantial penalties for noncompliance, make

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25. DIANA KASDAN, BRENNAN CTR. FOR JUST., STATE RESTRICTIONS ON VOTER REGISTRATION DRIVES 6 (2012), <https://www.brennancenter.org/our-work/research-reports/state-restrictions-voter-registration-drives> [<https://perma.cc/F2FA-SDW5>].

26. N.M. STAT. ANN. § 1-4-49 (2024).

27. CAL. ELEC. CODE § 2138 (West 2024).

28. LA. STAT. ANN. § 18:1461.7 (2024).

29. KASDAN, *supra* note 25, at 7.

30. MO. REV. STAT. § 115.203(4) (2024) (seven-day deadline); § 115.203(5) (“A violation of this section is a class four election offense.”).

31. S.D. CODIFIED LAWS § 12-4-3.2 (West 2025).

32. KASDAN, *supra* note 25, at 7.

33. TEX. ELEC. CODE ANN. § 13.043 (West 2024).

34. *See League of Women Voters of Fla. v. Cobb*, 447 F. Supp. 2d 1314 (S.D. Fla. 2006).

35. *Id.* at 1319.

voter-registration drives a risky business.”<sup>36</sup> The court noted that “[i]f the goal is to discourage voter-registration drives and thus also to make it harder for new voters to register, the 48-hour deadline may succeed.”<sup>37</sup> The legislature changed the law in 2021 to require organizations to deliver voter registration forms within fourteen days of receiving them,<sup>38</sup> but then amended the law again in 2023 to reduce the deadline back to ten days.<sup>39</sup> A coalition of voting rights plaintiffs challenged various aspects of Florida’s election code, including the registration delivery deadline, and a district court enjoined some aspects of the law.<sup>40</sup> But the Eleventh Circuit reversed, upholding the law and finding that the district court “clearly erred in finding that the challenged provisions were enacted with discriminatory intent in violation of the Fourteenth and Fifteenth Amendments.”<sup>41</sup>

Texas, meanwhile, requires its VDRs to personally deliver all completed registration forms within five days of receiving them (except for high school principals, who may deliver a group of student registrations via the mail).<sup>42</sup> It also forbids those who engage in voter registration from photocopying or scanning voter registration applications, which can make it tough for organizations to follow up and encourage new registrants to vote.<sup>43</sup>

In sum, several states impose deadlines on third-party organizations that collect voter registration forms and sometimes those deadlines make it difficult for these groups to engage in voter registration drives. States enacted most of these laws in the past few decades, postdating the history discussed below of robust third-party voter registration practices. They are therefore inconsistent with that historical tradition.

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36. *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1158, 1167–68 (N.D. Fla. 2012).

37. *Id.* at 1160.

38. S.B. 90, 2021 Leg., Reg. Sess. (Fla. 2021).

39. S.B. 7050, 2023 Leg., Reg. Sess. (Fla. 2023).

40. *League of Women Voters of Fla., Inc. v. Lee*, 595 F. Supp. 3d 1042, 1042, 1180–83 (N.D. Fla. 2022).

41. *League of Women Voters of Fla. Inc. v. Fla. Sec’y of State*, 66 F.4th 905, 942 (11th Cir. 2023).

42. TEX. ELEC. CODE ANN. §§ 13.042, .046 (West 2023); *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 400 (5th Cir. 2013).

43. See *Voting for Am.*, 732 F.3d at 399 (explaining the Texas Secretary of State’s interpretation that Texas law “limits VDRs’ conduct to collecting and delivering completed applications and implicitly precludes photocopying”).

*C. Rules that Require Organizations To Register and  
that Govern Their Speech*

Several states place requirements on the operation of voter registration organizations, mandating that they register with the state and provide voters with certain information. The 2012 Brennan Center report noted that at least seven states imposed various rules on organizations, such as requiring groups to “pre-register information about their organizational structure, their plans for registration efforts, periodic disclosure of their registration activities, and tracking requirement[s] for each registration form.”<sup>44</sup> In addition, before a court struck down the provision, Florida once required voter registration agents to swear under penalty of perjury that “I understand the penalties for false registration may include a term of imprisonment up to 5 years and a fine up to \$5,000,” without defining what constituted a “false registration.”<sup>45</sup> Similarly, Kansas made it a crime to impersonate an election official, but voter registration groups worried that the language was so vague that they might inadvertently violate the law if a voter mistakes their worker for a governmental official. The Kansas Supreme Court deemed the law “constitutionally infirm” for being overbroad and potentially limiting protected speech.<sup>46</sup>

Other states have imposed similar requirements on voter registration groups in recent years. In 2019, Tennessee passed a new law that requires organizations to register with the state and mandates a government-run training for all paid registration workers.<sup>47</sup> Further, these groups must turn in all completed forms within ten days.<sup>48</sup> The state imposes liability for any organization that submits one hundred or more incomplete forms in a year, which puts groups in a difficult spot if they receive forms that are missing a name, address, date of birth, statement of eligibility, or signature.<sup>49</sup> Finally, the law requires organizations to declare that their “communication is not made in conjunction with or authorized by the

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44. KASDAN, *supra* note 25, at 6 (listing California, Colorado, Delaware, Florida, New Mexico, Nevada, and Missouri as imposing some or all of these requirements).

45. FLA. ADMIN. CODE ANN. r. 1S-2.042(1)(b) (2011) (adopting Form DS-DE 120), *invalidated by League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1164 (N.D. Fla. 2012).

46. KAN. STAT. ANN. § 25-2438 (2024); Mendelson & Lopez, *supra* note 11. After the Kansas Supreme Court’s decision in *League of Women Voters v. Schwab*, 549 P.3d 363, 369 (Kan. 2024), Kansas officials agreed not to enforce the law. *See* Stipulated Order Granting Plaintiffs’ Request for a Permanent Injunction Against Enforcement of K.S.A. 25-2438(a)(2), (a)(3) at 2, *League of Women Voters v. Schwab*, No. 2021-CV-000299 (Kan. Dist. Ct. Dec. 13, 2024).

47. H.B. 1079, 111th Gen. Assemb., Reg. Sess. (Tenn. 2019).

48. *Id.*

49. *Id.*

secretary of state,” which can undermine an organization’s legitimacy in the eyes of voters.<sup>50</sup>

Voting rights organizations in Tennessee challenged these rules, arguing that they make it “difficult or even impossible to continue their activities while complying” with the law.<sup>51</sup> The plaintiffs argued that the requirements would compel speech and infringe upon their right to association under the First Amendment.<sup>52</sup> In analyzing the First Amendment arguments, the federal district court recognized the longstanding history of voter registration drives:

Voter registration drives, as a practice, existed well before the Act, and, as the General Assembly was no doubt aware, those drives historically have involved both encouraging and facilitating registration, including, at least in many cases, by physically transporting applications. As a matter of simple behavioral fact that long pre-dates the enactments at issue here, the collection and submission of the applications gathered in a voter registration drive is intertwined with speech and association.<sup>53</sup>

The court held that the plaintiffs were likely to succeed on the merits of their claim that the law, both in its individual aspects and as a whole, was unconstitutional because it would make it exceedingly difficult for the organizations to continue their voter registration efforts.<sup>54</sup> “The plaintiffs have provided detailed information regarding their budgets and resources, and it is plain, from that information, that they and organizations like them are not equipped to operate in a regulatory environment involving either complex compliance burdens or a routine risk of penalties.”<sup>55</sup>

In 2024, Tennessee amended the registration law, prohibiting an organization from turning in an incomplete form and forbidding an individual convicted of a felony from handling the registration papers of another voter.<sup>56</sup> Florida, too, has continued to change its law amidst frequent lawsuits over its restrictions. In addition to the various rules

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50.     *Id.*

51.     *Tenn. State Conf. of the NAACP v. Hargett*, 420 F. Supp. 3d 683, 692–93 (M.D. Tenn. 2019).

52.     *Id.* at 698–99.

53.     *Id.* at 699 (cleaned up).

54.     *Id.* at 712.

55.     *Id.* at 710.

56.     S.B. 2586, 113th Gen. Assemb., Reg. Sess. (Tenn. 2024).

discussed above, Florida now requires voter registration organizations to re-register with the state after each election cycle.<sup>57</sup>

In sum, states have attacked voter registration organizations by adding administrative burdens that complicate their work. Courts have invalidated some of these rules—after lawsuits that cost these groups money and resources—but states then just enact different regulations.

#### *D. Compensation Restrictions*

Several states prohibit third-party voter registration organizations from paying their canvassers a per-registration fee. The goal is to prevent voter fraud, based on the concern that paying a per-registration fee will incentivize paid canvassers to submit false registration forms.<sup>58</sup> Pennsylvania law, for example, says that it is a misdemeanor for a person to “give, solicit or accept payment or financial incentive to obtain a voter registration if the payment or incentive is based upon the number of registrations or applications obtained.”<sup>59</sup> Texas law says that it is a misdemeanor to pay someone based on the number of voter registrations they obtain or to condition their payment or employment on a quota for voter registrations.<sup>60</sup> Nevada has a similar prohibition on paying individuals based on the number of new registrations they obtain, deeming the violation a felony.<sup>61</sup>

Both federal and state courts have generally upheld these per-registration prohibitions, saying that the laws do not violate the organizations’ First Amendment rights.<sup>62</sup> The Nevada Supreme Court, for instance, found that the organizations suffered only a minimal burden because they could pay their canvassers without conditioning the amount of payment on the number of registrations they obtain.<sup>63</sup> The court also accepted the state’s concern about the potential for election fraud through

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57. S.B. 7050, 2023 Leg., Reg. Sess. (Fla. 2023).

58. See, e.g., *Project Vote v. Kelly*, 805 F. Supp. 2d 152, 181 (W.D. Pa. 2011) (noting that the Pennsylvania law prohibiting a per-registration fee to voter registration canvassers “further[s] Pennsylvania’s interests in conducting an orderly and efficient electoral process, deterring the submission of fraudulent voter-registration applications, and eliminating an avenue of potential fraud at the time of balloting”).

59. 25 PA. CONS. STAT. § 1713 (2024). A Pennsylvania federal district court ruled that the statute does not prohibit an organization from discharging a canvasser for failing to hit a productivity goal of new registrations. *Project Vote*, 805 F. Supp. 2d at 169.

60. TEX. ELEC. CODE ANN. § 13.008 (West 2023).

61. NEV. REV. STAT. § 293.805 (2023–24).

62. E.g., *Project Vote*, 805 F. Supp. 2d at 173–76; *Busefink v. State*, 286 P.3d 599, 602–05 (Nev. 2012).

63. *Busefink*, 286 P.3d at 605 (“This minimal burden on First Amendment rights is reasonable in light of the State’s interest in preventing voter registration fraud.”).

per-registration payments.<sup>64</sup> The Fifth Circuit upheld Texas’s law, finding that the state validly sought to deter fraud and noting that the restrictions did not fully prohibit organizations from paying canvassers.<sup>65</sup>

Ohio—which already prohibits payment for voter registration on a per-registration basis<sup>66</sup>—attempted to impose further requirements only on paid canvassers, mandating that they register with the state ahead of time, participate in an online training program, and, each time they submit voter registration forms, sign an affirmation that identifies themselves and affirms that they completed the training program.<sup>67</sup> Failure to comply with these requirements would result in criminal sanction.<sup>68</sup> But the rules did not apply to unpaid volunteers for voter registration organizations. A federal district court ruled against the state’s law, finding that there was no reason for Ohio to impose these requirements only on compensated voter registration workers, that the law infringed on the voter registration organizations’ First Amendment rights, and that it violated the federal National Voter Registration Act.<sup>69</sup>

Missouri passed a law in 2022 to go even further, banning all compensation for voter registration (except for government employees).<sup>70</sup> Previously, the law required anyone who solicited more than ten voter registration applications to register with the state,<sup>71</sup> but under the new law organizations in Missouri cannot pay any of their individuals to engage in voter registration activities. The Missouri law still requires anyone who solicits more than ten voter registration applications—on a volunteer basis—to register with the state for each two-year election cycle.<sup>72</sup> A Missouri state trial court explained that the League of Women Voters of Missouri “has been forced to significantly alter how the organization functions. The LWVMO now prohibits its paid staffers from

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64. *Id.* at 604–05.

65. *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 399 (5th Cir. 2013).

66. OHIO REV. CODE ANN. § 3599.111(C) (West 2024). The Sixth Circuit found unconstitutional a different subsection of this statute that made it a felony to pay anyone for gathering signatures on election-related petitions on any basis other than the time worked. *Citizens for Tax Reform v. Deters*, 518 F.3d 375, 388 (6th Cir. 2008).

67. H.B. 3, 126th Gen. Assemb., Reg. Sess. (Ohio 2006).

68. *Id.*

69. *Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 704 (N.D. Ohio 2006) (granting preliminary injunction) (“There appears to be no rational basis for the differentiation between compensated and uncompensated voter registration workers for purposes of pre-registration, training, and affirmation.”); *Project Vote v. Blackwell*, No. 06 CV 1628, 2008 WL 397585, at \*2 (N.D. Ohio Feb. 11, 2008) (granting partial summary judgment).

70. MO. REV. STAT. § 115.205 (2024).

71. MO. REV. STAT. § 115.205 (2006), *amended by* H.B. 1878, 101st Gen. Assemb., Reg. Sess. (Mo. 2022).

72. § 115.205.

engaging in the voter registration activity that is part of their current employment duties and core to the mission of the organization.”<sup>73</sup> Because the definition of “compensation” in the law is unclear, the League “has also halted all reimbursement for volunteers’ expenses and no longer provides voter registration volunteers with tokens of appreciation.”<sup>74</sup> The court issued a preliminary injunction against the ban, finding that “[t]he Compensation Ban directly chills the speech of Plaintiffs’ paid employees and reimbursement-eligible volunteers by prohibiting their participation in voter registration activities. Paid employees, for example, are no longer . . . permitted to attend Plaintiffs’ regularly scheduled voter registration events.”<sup>75</sup>

Thus, several states have placed limits on the method by which organizations may pay their workers. Courts have upheld these rules, though they have invalidated outright prohibitions on paying individuals for their voter registration activities. Still, even when groups like the League of Women Voters ultimately secure a court order against a law, doing so takes up time and resources that would be better used registering voters.

#### *E. Rules on What Voters Must Present to Third-Party Voter Registration Organizations*

Another set of rules about voter registration do not target third-party organizations directly; they instead impact the ease of obtaining completed registrations by creating additional hurdles for voters. A 2023 Idaho law limits the kinds of identification voters must present to validly register, which includes only a current driver’s license, passport, tribal identification, or concealed-carry license.<sup>76</sup> Notably, the list does not include student IDs, hurting the efforts of the group BABE VOTE, which focuses its efforts on registering students on college campuses.<sup>77</sup> The head of the group said that the law forced it to turn away about one-third of the people it encountered who wanted to register but did not have the proper identification.<sup>78</sup> The Idaho Supreme Court upheld the law, applying rational basis review to conclude that the legislature validly enacted a rule to prevent election fraud.<sup>79</sup> The court, however, failed to explain why the elimination of student IDs as proper identification for

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73. Order Granting Plaintiffs’ Motion for Preliminary Injunction, *supra* note 15, at 7.

74. *Id.*

75. *Id.* at 27.

76. IDAHO CODE § 34-411 (2024).

77. Mendelson & Lopez, *supra* note 11.

78. *Id.*

79. *BABE VOTE v. McGrane*, 546 P.3d 694, 707, 711 (Idaho 2024).

voter registration would improve election integrity. The court simply said that “[d]etermining the appropriate forms of personal identification for registration and voting, while prohibiting some forms deemed unreliable, is rationally related to this interest” of preventing fraud.<sup>80</sup>

“Wet signature” rules, which require voters to physically sign a voter registration form, make it harder for civic organizations to assist in voter registration.<sup>81</sup> This rule eliminates online voter registration drives. It also makes it impossible for groups such as Vote.org to help voters without printer access “sign” their forms by uploading a picture to a web interface that would then let Vote.org fax the forms to state election officials.<sup>82</sup> After more than 2,400 Texas voters used this tool on Vote.org in the fall of 2018,<sup>83</sup> the Texas legislature passed a law to require registrants to submit their “original signature.”<sup>84</sup> The Fifth Circuit upheld the law, finding that “[p]hysically signing a voter registration form and thereby attesting, under penalty of perjury, that one satisfies the requirements to vote carries a solemn weight that merely submitting an electronic image of one’s signature via web application does not.”<sup>85</sup> Similarly, in 2024, the Arkansas State Board of Election Commissioners enacted a rule requiring “wet” signatures, explicitly stating that using a computer “to generate or recreate the applicant’s signature or mark is not an acceptable signature or mark of the applicant.”<sup>86</sup> An Arkansas federal district court put the law on hold in August 2024,<sup>87</sup> but two weeks later the Eighth Circuit stayed that order, allowing Arkansas to enforce the measure just a few weeks before the voter registration deadline for the 2024 election.<sup>88</sup> The Florida and Georgia wet signature laws were also

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80. *Id.* at 713.

81. *See* Caroline Sullivan, *The Little Known Rule That Makes It Harder To Register To Vote*, DEMOCRACY DOCKET (Apr. 29, 2022), <https://www.democracydocket.com/analysis/the-little-known-rule-that-makes-it-harder-to-register-to-vote/> [<https://perma.cc/MG97-U9FM>].

82. *See id.*

83. *Id.*

84. TEX. ELEC. CODE ANN. § 13.143(d-2) (West 2024) (“For a registration application submitted by telephonic facsimile machine to be effective, a copy of the original registration application containing the voter’s original signature must be submitted by personal delivery or mail and be received by the registrar not later than the fourth business day after the transmission by telephonic facsimile machine is received.”).

85. *Vote.org v. Callanen*, 89 F.4th 459, 488–89 (5th Cir. 2023), *rev’g* 609 F. Supp. 3d 515 (W.D. Tex. 2022).

86. Rule Regarding Voter Registration, 108-00-014 ARK. CODE R. § 1400(7) (LexisNexis 2024).

87. Minutes for Bench Rulings, *Get Loud Ark. v. Thurston*, No. 24-cv-05121 (W.D. Ark. Aug. 30, 2024), ECF No. 65 (granting preliminary injunction).

88. Order, *Get Loud Ark. v. Thurston*, No 24-2810 (8th Cir. Sept. 13, 2024).

subject to litigation, though courts have not invalidated either rule.<sup>89</sup> Oklahoma similarly requires a signature “in writing” and notes that no other person may sign on the applicant’s behalf.<sup>90</sup> Montana does not provide for online voter registration and its registration form requires a signature.<sup>91</sup>

Some states, such as Arizona, require voters to show documentary proof of citizenship to vote in state and local elections, which again adds another complication for both voters and third-party voter registration organizations who seek to register voters.<sup>92</sup> Civic organizations are typically the plaintiffs in cases challenging these laws, showing the effect the rules have on their voter registration activities. An Arizona federal district court upheld the state’s rule, finding that “Arizona’s interests in preventing non-citizens from voting and promoting public confidence in Arizona’s elections outweighs the limited burden voters might encounter when required to provide [documentary proof of citizenship].”<sup>93</sup> Kansas had a similar documentary proof of citizenship requirement but the Tenth Circuit invalidated it in 2020 under the Equal Protection Clause, finding that “the evidence did not demonstrate that Kansas’s interest in safeguarding voter confidence made it necessary to enact the [documentary proof of citizenship] requirement.”<sup>94</sup> That finding,

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89. See *Vote.org v. Byrd*, 700 F. Supp. 3d 1047 (N.D. Fla. 2023), *appeal docketed sub nom. Disability Rts. Fla. v. Sec’y, State of Fla.*, No. 23-13727 (11th Cir. 2023); *Vote.org v. Ga. State Election Bd.*, 22-cv-01734 (N.D. Ga.) (ongoing as of publication).

90. OKLA. STAT. ANN. tit. 26, § 4-112(B) (West 2024) (“A voter registration application shall be signed by the applicant in writing. The applicant shall personally subscribe his or her name to or make his or her mark on the application, and no agent, representative or employee of the applicant may sign or mark on the applicant’s behalf. The signature or mark must be the original, handwritten signature, autograph or mark of the applicant. No facsimile, reproduction, typewritten or other substitute signature, autograph or mark will be valid.”).

91. MONT. SEC’Y OF STATE, MONTANA VOTER REGISTRATION APPLICATION (2024), <https://sosmt.gov/elections/official-forms/> [<https://perma.cc/A9HV-ERET>] (choose “Voter Registration Application”; then choose “Montana Voter Registration Application”; then “Download”); COMM’R OF POL. PRACS., ELECTIONS IN MONTANA—QUESTIONS & ANSWERS: VOTER REGISTRATION, <https://politicalpractices.mt.gov/Education-and-Resources/Voter-Registration.pdf> [<https://perma.cc/66Q8-K2J3>].

92. ARIZ. REV. STAT. ANN. § 16-166 (2024). The Supreme Court found that the National Voter Registration Act preempted Arizona’s law, meaning that Arizona must accept the “Federal Form” that does not require documentary proof of citizenship. See *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 4–5, 20 (2013). In response, Arizona designates a voter who does not submit documentary proof citizenship as a “federal only” voter who may not vote in state and local elections. See *Voters*, ARIZ. SEC’Y ST., <https://azsos.gov/elections/voters/registering-vote/registration-requirements/proof-citizenship-requirements> (scroll to “Proof of Citizenship Requirement”; then choose the same) (last visited Feb. 18, 2025).

93. *Mi Familia Vota v. Fontes*, 719 F. Supp. 3d 929, 1011 (D. Ariz. 2024).

94. *Fish v. Schwab*, 957 F.3d 1105, 1121, 1134 (10th Cir. 2020).

however, did not deter the New Hampshire legislature from passing a similar law in 2024.<sup>95</sup> A 2021 Brennan Center study showed that laws requiring documentary proof of citizenship for voter registration resulted in tens of thousands of rejected voter registrations.<sup>96</sup>

#### *F. The Proposed Federal SAVE Act*

Republicans in Congress have proposed a new federal enactment, the SAVE Act,<sup>97</sup> which would impose various restrictions on voter registration. If passed, the law would require states to comply with new rules when registering voters, representing the next fight in the effort to make voter registration more difficult for some people.

The bill would forbid states from registering a voter for federal elections unless the voter provides documentary proof of citizenship, such as a passport or birth certificate. The law would also require states to “take affirmative steps on an ongoing basis to ensure that only United States citizens are registered to vote.”<sup>98</sup> According to the Brennan Center, “more than 9 percent of American citizens of voting age, or 21.3 million people, don’t have proof of citizenship readily available.”<sup>99</sup> The Brennan Center also worries that the law could “obliterate or upend longstanding and popular methods of voter registration for all voters, including registration by mail, voter registration drives, online voter registration, and automatic voter registration.”<sup>100</sup> The law could also make it harder for people who have legally changed their name—such as millions of married women who often change their surname—from using their birth certificate to comply with the requirement.<sup>101</sup> In short, the

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95. H.B. 1569-FN, 2024 Gen. Ct., Reg. Sess. (N.H. 2024).

96. IAN VANDEWALKER, BRENNAN CTR. FOR JUST., ANALYSIS: THE EFFECTS OF REQUIRING DOCUMENTARY PROOF OF CITIZENSHIP TO REGISTER TO VOTE (2017), <https://www.brennancenter.org/sites/default/files/2021-09/Requiring%20Citizenship%20to%20Register%20to%20Vote.pdf> [https://perma.cc/FD28-T95F].

97. Safeguard American Voter Eligibility Act, H.R. 22, 119th Cong. (2025).

98. H.R. 22 § 2(j)(3).

99. Kevin Morris & Cora Henry, *Millions of Americans Don’t Have Documents Proving Their Citizenship Readily Available*, BRENNAN CTR. FOR JUST. (June 11, 2024), <https://www.brennancenter.org/our-work/analysis-opinion/millions-americans-dont-have-documents-proving-their-citizenship-readily> [https://perma.cc/YG3Q-FYNS].

100. Wendy R. Weiser & Andrew Garber, *SAVE Act Would Undermine Voter Registration for All Americans*, BRENNAN CTR. FOR JUST. (Feb. 11, 2025), <https://www.brennancenter.org/our-work/analysis-opinion/save-act-would-undermine-voter-registration-all-americans> [https://perma.cc/PFW7-LQEL].

101. Greta Bedekovics & Sydney Bryant, *The SAVE Act: Overview and Facts*, CTR. FOR AM. PROGRESS (Jan. 31, 2025), <https://www.americanprogress.org/article/the-save-act-overview-and-facts/>; INST. FOR RESPONSIVE GOV’T, THE SAVE ACT: HOW A

problems that the various state-level restrictions already create would multiply if the SAVE Act becomes law.

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The myriad rules that states impose on third-party voter registration organizations seem to have one goal in mind: to make it harder for these groups to register voters.<sup>102</sup> They have succeeded on that front, as various organizations have ceased their activities. A report from the Center for Public Integrity highlighted this troubling trend, explaining that “[s]everal Florida groups shut down their voter registration drives after the 2023 law.”<sup>103</sup> The report quoted a representative from the League of Women Voters, which stopped collecting paper voter registration applications even though it had previously registered tens of thousands of Florida voters, noting that a \$250,000 fine “would be greater than its annual budget in recent years.”<sup>104</sup> The numbers are stark: “State data shows that in the months after the Florida law took effect in 2023, registrations through drives fell by 95%, compared with the same months four years earlier.”<sup>105</sup> The climate surrounding voter registration has also made it harder for third-party voter registration groups to engage in these activities even without formal legal restrictions; an organizer in Arizona noted that “many businesses are no longer allowing canvassers to stand outside their stores to register voters to avoid conflict.”<sup>106</sup> Studies show that the restrictions on third-party voter registration activities will disproportionately harm minority voters.<sup>107</sup>

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PROOF OF CITIZENSHIP REQUIREMENT WOULD IMPACT ELECTIONS 2 (2025), <https://responsivegov.org/wp-content/uploads/2025/01/IRGA-Memo-SAVE-Act-3-pager.pdf> [<https://perma.cc/6QNS-N3UZ>].

102. See Michael Wines, *How Some States Are Making It Harder To Register Voters*, N.Y. TIMES (July 26, 2024), <https://www.nytimes.com/2024/07/26/us/voter-registration-drive-restrictions.html>.

103. *BABE VOTE v. McGrane*, 546 P.3d 694, 705 (Idaho 2024); Mendelson & Lopez, *supra* note 11.

104. Mendelson & Lopez, *supra* note 11.

105. *Id.*

106. Astrid Galván, *Canvassing Groups Face Unprecedented Voter Registration Hurdles*, AXIOS (May 2, 2024), <https://www.axios.com/2024/05/02/hard-to-vote-states-register-canvas>.

107. *E.g.*, Mendelson & Lopez, *supra* note 11. In the expert report submitted to the court, Professor Dan Smith explained that:

[D]isclaimer and delivery restrictions placed on the activities of third party voter registration organizations, or 3PVRs, that predominantly circulate in urban and racially and ethnically diverse communities . . . are directed at a practice that has been disproportionately used to register minority voters in past elections, and will decrease the opportunities of thousands of individuals to register to vote every year, with the burdens falling most heavily on

In sum, various states are attacking the work of third-party organizations that engage in voter registration, imposing rules that make it harder for these groups to continue their vital activities. Severe laws on voter registration have become a significant voter suppression tactic, with little added benefits to election security. Instead, the rules create additional hurdles for people on the ground who are trying to register voters.

The imposition of these restrictions—many of recent vintage—is contrary to the history and tradition of voter registration. In fact, as the next Part shows, numerous organizations have a long history of assisting people register to vote.<sup>108</sup> If the Court is serious about its use of history and tradition, then it should find these increasingly burdensome restrictions invalid.

## II. THE HISTORY OF VOTER REGISTRATION AND THIRD-PARTY ORGANIZATIONS\*\*

Forty-nine of the fifty states (all besides North Dakota<sup>109</sup>) mandate voter registration before someone can cast a ballot, though twenty-three states and D.C. have enacted same-day voter registration, where a voter can register and then vote at the same time.<sup>110</sup> In addition, about half the states and D.C. have adopted automatic voter registration, where the state has the onus of putting eligible individuals on its voter registration list.<sup>111</sup>

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persons of color. Persons of color in Florida are five times more likely to rely on 3PVRs when registering to vote than white individuals. Both the academic literature and my data analysis finds that the costs of voting fall most heavily on persons of color.

Expert Report Submitted on Behalf of *Florida State Conference of NAACP v. Lee*, 4:21-cv-187-MW-MAF & *Florida Rising Together v. Lee*, 4:21-cv-201-MW-MJF at 10–11, *League of Women Voters of Fla., Inc. v. Lee*, 21-cv-186 (N.D. Fla. Jan. 24, 2022), ECF No. 458-7 (submitted by Daniel A. Smith, Ph.D.).

108. See *infra* Part II.

\*\* Most of the research and text from this Part was published initially by the Institute for Responsive Government. See JOSHUA A. DOUGLAS, INST. FOR RESPONSIVE GOV'T, A HISTORY OF THIRD-PARTY VOTER REGISTRATION DRIVES (2023), <https://responsivegov.org/wp-content/uploads/2023/05/IRG-Report-Third-Party-Registration.pdf> [<https://perma.cc/69W8-QBGZ>]. It is reprinted with permission.

109. North Dakota was one of the first states to require voter registration but repealed the practice in 1951. Instead of registering ahead of time or even on Election Day, voters simply show up to the polls, provide proper identification, and cast a ballot. See ALVIN A. JAEGER, N.D. ELECTIONS DIV., NORTH DAKOTA....THE ONLY STATE WITHOUT VOTER REGISTRATION (2004), <https://www.library.nd.gov/statedocs/SecretaryState/votereg-2.pdf> [<https://perma.cc/SH9K-WD76>].

110. *Same-Day Voter Registration*, *supra* note 10.

111. *Automatic Voter Registration*, NCSL, <https://www.ncsl.org/elections-and-campaigns/automatic-voter-registration> (Sept. 24, 2024).

States also vary in their voter registration deadlines, with some closing the voter list thirty days before the election and others allowing people to register up until and on Election Day.<sup>112</sup>

But states have not always required voter registration. Although the first registration law dates to 1800 in Massachusetts, most states did not adopt a voter registration practice until the late nineteenth and early twentieth centuries.<sup>113</sup> The history of voter registration reveals competing forces: On the one hand, the requirement to register was often used as a tool of disenfranchisement, particularly to harm minority populations. At the same time, several voting movements have embraced voter registration drives to encourage more people to participate in democracy.

As Part I recounted, many states have adopted rules to make it difficult or impossible for third-party organizations—nongovernmental entities—to engage in voter registration drives. To that end, this Part explores the long history of the voter registration efforts of third parties. The history reveals three primary time periods when third parties, which were trying to expand the electorate for particular constituencies, took the lead in registering voters: the 1920s with the women’s suffrage movement, the 1960s with the civil rights movement, and the 1990s with the federal “Motor Voter” law.

A key takeaway from this history is that for almost as long as there have been registration lists, interested parties and organizations have engaged in voter registration activities. If voter registration is considered a deeply rooted aspect of the election process, then so is the practice of third parties conducting voter registration drives and helping others register to vote.

### *A. The Earliest Voter Registration Practices*

In 1801, Massachusetts became the first state to pass a voter registration law. Most states did not follow suit until the late 1800s or early 1900s.<sup>114</sup> Voter registration was not necessary in the late 1700s and much of the 1800s because election officials often personally knew everyone in their voting wards or precincts, so there was no need for an official list. The growth of America’s cities and the influx of new citizens through immigration resulted in a surging electorate that rendered the

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112. *Voter Registration Deadlines*, NCSL, <https://www.ncsl.org/elections-and-campaigns/voter-registration-deadlines> (Oct. 10, 2024).

113. ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 52 (Basic Books rev. ed. 2009) [hereinafter KEYSSAR, *THE RIGHT TO VOTE*].

114. *See id.* at 122–28.

voting process more anonymous—and more open to manipulation and disorder at the polls.<sup>115</sup>

Initially, states with a voter registration requirement simply asked local government officials to create the list based on their own knowledge of who was eligible.<sup>116</sup> In many ways, then, automatic voter registration was the first form of voter registration. As populations grew, states began to mandate personal appearance to register to vote. Some states allowed for registration only on a specific day or days, making it difficult for some people to register and therefore causing disenfranchisement.<sup>117</sup> In a few states, voters did not need to apply to vote in person and instead could submit a written form.<sup>118</sup> Registration officials in some places would go door-to-door and register eligible people they encountered.<sup>119</sup> This practice permitted local registrars to simply skip over certain people they did not want to register.<sup>120</sup> It also opened the door to fraud through fake registrations.<sup>121</sup> In other states—particularly in rural areas where personal appearance would be difficult—election officials created a voter list without the voter doing anything to be put on the rolls. The theory behind this practice was that the local registrar knew all of the voters in the area, so personal appearance by each voter was unnecessary. The system did not work well, however, as the local registrars failed to update the list each year and instead used “the list of registered electors of the preceding year, and let it go at that.”<sup>122</sup>

These early registration practices also revealed the first examples of voters assisting others in registering to vote. Colorado law allowed a voter, in any city over two thousand in population, to register themselves,<sup>123</sup> other members of their household, and up to three other

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115. *Id.* at 122–23. See also JOSEPH P. HARRIS, THE BROOKINGS INST., INST. FOR GOV'T RSCH., REGISTRATION OF VOTERS IN THE UNITED STATES 4–5 (1929).

116. Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WM. & MARY BILL RTS. J. 453, 456–57 (2008); Bertrall L. Ross II & Douglas M. Spencer, *Voter Data, Democratic Inequality, and the Risk of Political Violence*, 107 CORNELL L. REV. 1011, 1021 (2022).

117. ALEXANDER KEYSSAR, INST. FOR RESPONSIVE GOV'T, VOTER REGISTRATION: A VERY SHORT HISTORY (2022), <https://responsivegoverning.org/research/voter-registration-a-very-short-history/> [https://perma.cc/9R6D-UQBQ].

118. HARRIS, *supra* note 115, at 197.

119. John Seven, *The Exclusionary History of Voter Registration Dates to 1800*, HISTORY, <https://www.history.com/news/voter-registration-elections-president-midterms> [https://perma.cc/ZDF2-4M85] (Oct. 31, 2023).

120. *Id.*

121. *Id.*

122. HARRIS, *supra* note 115, at 198.

123. Colorado granted women the right to vote in 1893. Amanda Miller, *Colorado's Legacy of Women's Suffrage*, RED (Sept. 17, 2020), <https://red.msudenver.edu/2020/colorados-legacy-of-womens-suffrage> [https://perma.cc/J52L-4MTE].

people who resided at the same address.<sup>124</sup> Indiana permitted a voter to register in front of a notary, but political parties exploited this rule by having their operatives become notaries, inflating the voter rolls in the process.<sup>125</sup> In some states, such as Connecticut, voters added to the rolls by other individuals would still eventually have to appear in person to verify their eligibility and provide a signature.<sup>126</sup> Demonstrating the use of these laws, there is scattered historical evidence of individuals, often affiliated with political parties, assisting others in registering to vote. A short article in the *Salt Lake Herald* in 1908 reported on a lawsuit stemming from an incident in October 1905 when an individual named George L. Herndon was driving voters to registration places and “ran into an embankment which, it was asserted, had no warning light on it, and was thrown from his rig.”<sup>127</sup> (The Utah Supreme Court reversed his initial \$1,445 jury verdict against the city.<sup>128</sup>)

### *B. Political Party Machines and Voter Registration*

As part of the earliest registration practices—where election officials created a voter list from people they knew or by conducting door-to-door canvasses—the political parties often sought to inflate the voter rolls by handing the precinct officers a list of supposedly qualified voters or turning in registration papers for select voters who would support the party’s candidates.<sup>129</sup> The political machines, such as Tammany Hall in New York, added fraudulent names to pad the voter rolls so the parties could then engage in voter fraud by paying “repeaters” to vote multiple times on Election Day.<sup>130</sup> “Names of persons in jail, in the hospitals, in the cemeteries or simply nonexistent were added with cavalier abandon.”<sup>131</sup> There were also reports of political bosses greeting new immigrants at the docks to “convince” them to join the party: “A New York politician recalled in an afterglow of nostalgia that when immigrants arrived, the party ward heeler ‘took them as fast they came [and] flung them into his melting pot . . . he naturalized them, registered them and voted them for Tammany Hall.’”<sup>132</sup> The political party bosses

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124. HARRIS, *supra* note 115, at 198.

125. *Id.* at 199.

126. *Id.*

127. *City Wins on Appeal*, SALT LAKE HERALD, Apr. 24, 1908, at 5.

128. *Id.*

129. HARRIS, *supra* note 115, at 198; Tokaji, *supra* note 116, at 457–58.

130. Alexander B. Callow, Jr., *Fraud! Fraud! Gone Are the Days (Aren't They?) When Dead Men and Dogs Could 'Vote' and The Boss Held Sway*, N.Y. TIMES MAG., Sept. 27, 1963, at 60.

131. *Id.*

132. MICHAEL JONES-CORREA, BETWEEN TWO NATIONS: THE POLITICAL PREDICAMENT OF LATINOS IN NEW YORK CITY 69 (1998) (alteration in original).

also employed voter registration rules as a tool for disenfranchisement: As Professor Dan Tokaji summarized, “voter registration rules were sometimes used to prevent groups of voters deemed undesirable—particularly workers and recent immigrants from southern and eastern Europe—from voting. Racist motivations and xenophobic rhetoric were not uncommon in the battles to tighten voter recommendation rules in northern cities.”<sup>133</sup> And as historian Alexander Keyssar recounted, “in most cities, the machines learned to live with and take advantage of the systems of registration that were imposed on them. They rapidly mastered techniques for insuring that their own voters were registered, and when in power, they often embraced the registration laws as a means of keeping other men and women from voting.”<sup>134</sup>

A 1929 history of the earliest registration rules by political scientist Joseph P. Harris argued that personal registration was preferable to ensure that “such a person exists and is qualified to vote.”<sup>135</sup> The author suggested that personal appearance would limit fraud and was not too much of a hardship, especially if registration was permanent. “With the prevalence of good roads and automobiles, the old argument that the requirement of personal application would work an undue hardship upon the rural voters who would have to travel long distances to register, has lost force.”<sup>136</sup> That sentiment, however, did not win the day, as many states both early in the history of voter registration and throughout the years have allowed organizations to help register voters. The political parties engaged in voter registration activities from the time states adopted registration laws, continuing to today. Other organizations that sought to attract specific constituencies have also focused their efforts on voter registration. The women’s suffrage movement—and the effort to engage women in democratic participation soon after the adoption of the Nineteenth Amendment to the U.S. Constitution—provides one of the earliest examples of sustained nonpartisan third-party voter registration efforts.

### *C. The 1920s and the Women’s Suffrage Movement*

The National American Woman Suffrage Association (NAWSA) was the primary organization behind the fight for women’s suffrage in the late 1800s and early 1900s. The organization was also the first group to engage in systematic voter education and registration efforts. The on-the-ground, grassroots activities were informed, in part, by the

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133. Tokaji, *supra* note 116, at 458 (footnote omitted).

134. KEYSSAR, *THE RIGHT TO VOTE*, *supra* note 113, at 157.

135. HARRIS, *supra* note 115, at 197.

136. *Id.* at 200.

prominence of women in the temperance movement of the late 1800s, which sought to amend the U.S. Constitution to ban the sale of alcohol.<sup>137</sup> The temperance and women's suffrage movements were intertwined, as leaders of the Woman's Christian Temperance Union convinced members that they could achieve social change through grassroots efforts if women won the right to vote.<sup>138</sup>

The earliest mentions of voter registration in the nation's newspapers reflect the NAWSA's opening efforts to engage voters through registration drives. An October 11, 1916, article in the *Spokane Daily Chronicle* announced an initiative to assist "aged and infirm women" in registering to vote.<sup>139</sup> "Plans whereby any woman or elderly man of the city, of whatever political belief, will be taken to the city hall in an automobile to register, were announced by Mrs. [Elizabeth D.] Christian," the notice read.<sup>140</sup> (Washington granted women the right to vote in 1910.<sup>141</sup>) The article further quoted Mrs. Christian: "We will not ask the political affiliation of any woman. I believe it [is] the right of every woman to register and vote, and that she should exercise this right."<sup>142</sup> In addition to offering transportation, Mrs. Christian organized thirty women to canvass the city to look for unregistered female voters and encourage them to register.<sup>143</sup>

In 1917, the Indiana General Assembly passed a law that granted women the right to vote for presidential electors as well as for some state offices and in municipal elections that year—although women were not ultimately allowed to vote that fall because the Indiana Supreme Court invalidated the new law in October 1917.<sup>144</sup> The summer of 1917 saw a flurry of activity in Indiana as women sought to embrace their new voting rights by registering. "Imagine the scene," historian Anita Morgan

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137. Ella Wagner, *Suffrage in 60 Seconds: Temperance*, NAT'L PARK SERV., [https://www.nps.gov/articles/000/suffrage60seconds\\_temperance.htm](https://www.nps.gov/articles/000/suffrage60seconds_temperance.htm) (Jan. 5, 2022).

138. *Id.*

139. *Aged and Infirm Women To Be Carried in Automobiles To Register*, SPOKANE DAILY CHRON., Oct. 11, 1916, at 2 [hereinafter SPOKANE DAILY CHRON.].

140. *Id.*

141. *Voting Rights for Women, Women's Suffrage*, WASH. SEC'Y ST., <https://www2.sos.wa.gov/elections/timeline/suffrage.htm> [<https://perma.cc/E9R8-B6DP>].

142. SPOKANE DAILY CHRON., *supra* note 132, at 2.

143. *Id.* Reviewing these century-old newspapers is a delight for the stories and advertisements they contain. This October 11, 1916, issue of the *Spokane Daily Chronicle* included the headline "Maude Potter Becomes Bride of L. L. Bakken" and an advertisement for a department store called The Crescent, which proclaimed: "These Cool Days Call for Heavier Underwear."

144. Anita Morgan, "An Act of Tardy Justice": *The Story of Women's Suffrage in Indiana*, IND. WOMEN'S SUFFRAGE CENTENNIAL (2019), <https://indianasuffrage100.org/indiana-womens-suffrage-history/> [<https://perma.cc/SHL8-6HZA>]; *Bd. of Election Comm'rs v. Knight*, 117 N.E. 565, 571 (Ind. 1917).

wrote: “Thousands of Indiana women celebrating their victories, rushing out to register to vote over the course of the summer of 1917.”<sup>145</sup> Newspaper articles from that summer promoted the various registration efforts. For example, *The Star Press* of Muncie, Indiana, announced, on July 1, 1917, a big voter registration effort planned for the following week:

Elwood women announced today that they would start their big drive next week to secure the registration of every woman in Elwood and they have made their slogan, “1,000 registered during the week.” Five women notaries will be found at the uptown registration office throughout the day and a notary will be on duty to go to any home where because of sickness a woman is unable to go to the office. Several registration offices for men will also be open and no fees will be charged for registering and filing the blanks.<sup>146</sup>

The *Indianapolis Star*, on July 8, 1917, published “State Franchise League Notes” from the Women’s Franchise League of Indiana, which touted various registration efforts around the state.<sup>147</sup> Yet another paper described the numerous elderly women who were registering, often after attending a suffrage meeting.<sup>148</sup> Mrs. Mary Ann Williams of Economy, Indiana, was ninety-four years old—meaning she was born in 1822 or 1823!—and registered to vote.<sup>149</sup> Alas, it is unclear if Mrs. Williams was ever able to exercise the franchise given that Indiana did not finally allow women to vote until 1920.<sup>150</sup>

The NAWSA eventually morphed into the League of Women Voters (LWV) after the ratification of the Nineteenth Amendment, which enfranchised women nationwide in 1920. In an address to the NAWSA convention in St. Louis, Missouri, in 1919, the president of the

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145. Morgan, *supra* note 144.

146. *A Registration Drive*, MUNCIE SUNDAY STAR (Ind.), July 1, 1917, at 8. Directly below this notice of the voter registration drive was a news story about a boy taken to the hospital after a bite from a stray dog. It is unclear how the boy fared after his hospital visit.

147. *State Franchise League Notes*, INDIANAPOLIS SUNDAY STAR, July 8, 1917, at 37.

148. *Elderly Women Register*, BLOOMINGTON EVENING WORLD, Aug. 1, 1917, at 4.

149. *Id.*

150. Morgan, *supra* note 144. The *Wisconsin Law Review* editors tracked down Census records from 1920 that showed Mrs. Williams was alive as of January 1920, meaning that she might have had the opportunity to vote later that year after the ratification of the Nineteenth Amendment. U.S. CENSUS BUREAU, FOURTEENTH CENSUS OF THE UNITED STATES: 1920—POPULATION, WAYNE COUNTY, INDIANA 4B (1920).

association, Carrie Chapman Catt, proposed the creation of a “league of women voters” to “finish the fight” and “aid in the reconstruction of the nation.”<sup>151</sup> The LWV was officially formed on February 14, 1920. One of its primary goals was to engage and educate voters, particularly newly enfranchised women.<sup>152</sup> “Providing citizens with accurate, non-partisan information about candidates, election issues, and voting procedures was a community service early established.”<sup>153</sup> A history written to celebrate the twenty-fifth anniversary of the LWV recounted that a key early desire of the organization was to “awaken the electorate,—to arouse many citizens to participate in government.”<sup>154</sup>

Significant activity on voter registration accelerated in conjunction with and after the adoption of the Nineteenth Amendment to the U.S. Constitution, which was ratified on August 18, 1920. The methods for encouraging and educating women on the voting process, including voter registration, varied throughout the country:

Without a centralized organizational structure in place, get-out-the-vote efforts fell to state and local governments, political parties and nonpartisan organizations, all of which had varying approaches to the issue at hand. Inevitably, this uneven rollout resulted in a registration process that played out differently depending on an individual’s race, ethnicity and geographic location.<sup>155</sup>

Indeed, Black women faced numerous obstacles to register and vote, particularly in Southern states, including “murder, kidnap and lynching, threats of arson against homes and businesses, and in one town, 500 warrants against black women charged with ‘registering illegally.’”<sup>156</sup> Certain states, such as Virginia, helped white women register by hiring

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151. *The League of Women Voters Through the Decades!*, LEAGUE WOMEN VOTERS (Feb. 16, 2012), <https://www.lwv.org/league-women-voters-through-decades> [https://perma.cc/5ZUH-Z2ER].

152. *A War on Voting...*, LEAGUE WOMEN VOTERS, <https://www.lwv.org/blog/war-voting> [https://perma.cc/7AZX-K6TV] (Oct. 31, 2011).

153. KATHRYN H. STONE, 25 YEARS OF A GREAT IDEA: A HISTORY OF THE NATIONAL LEAGUE OF WOMEN VOTERS, A NON-PARTISAN ORGANIZATION ESTABLISHED IN 1920 TO ENCOURAGE CITIZEN PARTICIPATION IN GOVERNMENT 8 (1946).

154. *Id.* at 6.

155. Meilan Solly, *What the First Women Voters Experienced When Registering for the 1920 Election*, SMITHSONIAN MAG. (July 30, 2020), <https://www.smithsonianmag.com/history/what-first-women-voters-experienced-when-registering-1920-election-180975435/>.

156. J. Kevin Corder & Christina Wolbrecht, *Did Women Vote Once They Had the Opportunity?*, ABA (Oct. 21, 2021), [https://www.americanbar.org/groups/public\\_education/publications/insights-on-law-and-society/volume-20/issue-1/did-women-vote-once-they-had-the-opportunity-/](https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-20/issue-1/did-women-vote-once-they-had-the-opportunity-/).

additional deputies to process their registration papers but “refused to hire even one extra deputy to work with black applicants.”<sup>157</sup>

Political parties showed particular interest in attracting these new voters. The *New York Herald* reported that in Detroit, there was an “[e]ndless chain system for getting women to register and vote being worked by 12,000 Republican women, each one pledged to get twelve other women.”<sup>158</sup> The Massachusetts Republican State Committee’s “women’s division” staged a “play election” in August 1920 to “teach” women how to register and vote.<sup>159</sup> “Wives of newly-naturalized citizens are especially invited to attend the rally.”<sup>160</sup> In Chicago, both the Democratic and Republican party organizations “work[ed] overtime” to register as many women as possible in the one day available to register before the September primary that year.<sup>161</sup> Sometimes these appeals from political parties were explicitly racist. A headline in the *Richmond Times-Dispatch* declared, “Purcell Calls on White Women to Qualify to Vote” and noted that John M. Purcell, the Democratic Chairman of the city, “declares action essential to race domination.”<sup>162</sup> That is, the political party leader was urging white women to register to combat the new registrations of Black women.

The most intensive efforts for voter registration in the wake of the Nineteenth Amendment came from women’s organizations and specifically the League of Women Voters. The *New York Herald* reported on the progress of women’s suffrage throughout the nation and, for Detroit, noted that “[a] great part of the registration on the part of women is attributed to the efforts of leaders among the club women of the State and the various women’s political organizations” as well as the work of women in both the Republican and Democratic parties.<sup>163</sup> The organizational push also included instruction for women on the process of voting, sometimes using patronizing language. *The Washington Post* reported that the League of Women Voters was organizing “schools of citizenship” throughout the country, which included instruction on “practical politics, the American system of government and the

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157. Solly, *supra* note 155.

158. *Women in Every Section Anxious To Vote; Registration Heavy, Organization Strong*, N.Y. HERALD, Oct. 24, 1920 (§ 4), at 1 [hereinafter *Women in Every Section*].

159. *Play Election Devised To Teach Women How To Vote*, BOS. GLOBE, Aug. 10, 1920, at 2.

160. *Id.*

161. *Wednesday Only Day for Women To Get Votes*, CHI. DAILY TRIB., Aug. 20, 1920, at 3.

162. *Purcell Calls on White Women To Qualify To Vote*, RICHMOND TIMES-DISPATCH, Sept. 18, 1920, at 1 (cleaned up).

163. *Women in Every Section*, *supra* note 158.

machinery of elections.”<sup>164</sup> On September 11, 1920, the *Daily Gate City and Constitution-Democrat*, from Keokuk, Iowa, noted in a headline that women “Will Be Shown How to Vote.”<sup>165</sup> The planned event, with support from the Mayor, included “registration blanks” and voting booths so new voters could understand the “machinery . . . for casting ballots.”<sup>166</sup> “The new voters will be shown how to register, will be told what questions are to be answered and how they must be registered in the wards in which they live before they can be allowed to vote on election day.”<sup>167</sup> Women attending the Minnesota State Fair in September 1920 could visit the “Woman’s building,” where they would encounter “community recreation programs every afternoon, a beauty show, a hat clinic, a style show of good and bad dressing, a children’s home made style show, lessons in shopping, home conservation methods shown in a thrift exhibition,” and a “voting booth.”<sup>168</sup> That voting booth included “judges, clerks, printed ballots with fictitious names, and a regular box. Women will be shown how to register and taught the technicalities of casting the ballot.”<sup>169</sup>

The 1922 election saw further registration efforts targeted toward women. An article from August 15, 1922, in the *Sheboygan Press-Telegram* reported that the League of Women Voters had created a new organization in Wisconsin to teach women “what’s what and who’s who in this business of running the government” and that the League planned a registration drive for that October.<sup>170</sup> A September 1922 article in the *Indianapolis Star* reported that the League was compiling a list of “1,000 prominent and active women of Indiana” and that many local League chapters throughout the state were conducting voter registration drives for the upcoming election.<sup>171</sup>

These activities continued throughout the 1920s. A 1923 report in the *Baltimore Sun* promoted a voter registration drive organized by the League of Women Voters, the Democratic Women’s Club, and the Maryland Federation of Republican Women.<sup>172</sup> The League of Women Voters in Birmingham, Alabama, planned a similar effort in that state for

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164. *To Teach Women Politics*, WASH. POST, Aug. 1, 1920, at 7.

165. *Will Be Shown How To Vote*, DAILY GATE CITY & CONST.-DEMOCRAT (Iowa), Sept. 11, 1920, at 5.

166. *Id.*

167. *Id.*

168. *Women Will Learn How To Vote at Minnesota Fair*, GRAND FORKS HERALD (N.D.), Aug. 30, 1920, at 6.

169. *Id.*

170. *Women Voters’ League Plans To Register Voters*, SHEBOYGAN PRESS-TELEGRAM, Aug. 15, 1922, at 5.

171. *League To Publish Directory of 1,000 Prominent Women*, INDIANAPOLIS STAR, Sept. 22, 1922, at 7.

172. *Women Voters Plan Registration Drive*, BALT. SUN, May 5, 1923, at 12.

July 1923.<sup>173</sup> The Maryland League had become prominent enough by 1924 that the Governor spoke at its state convention at the Hotel Emerson in Baltimore—a two-day event where the League sought one hundred percent registration, using the slogan, “[i]f you are not a voter, you don’t count.”<sup>174</sup> The League had also become an organizer of other civic groups by 1924, such as in Portsmouth, Virginia, where the League had secured the support of at least eight other women’s organizations in its voter registration efforts.<sup>175</sup> A St. Louis newspaper noted that several women from the city’s League chapter had “labor[ed] unremittingly” to register voters for that primary and were taking vacations before embarking on the “most intensive work of the campaign” for the November 1924 election.<sup>176</sup> The various state Leagues even competed in 1924 for the Silver Loving Cup, which the national League awarded to the state League that showed the highest percentage gain in voting from 1920.<sup>177</sup> California won.<sup>178</sup>

Following California’s success on this front in 1924, the League chapter in San Francisco engaged in another registration drive in 1926, which included the placement of posters in streetcars to promote voter registration and sending speakers to other clubs and organizations to highlight the importance of registering and voting.<sup>179</sup> Reflecting the modernization of travel, the *Atlanta Constitution* reported in 1926 on the League of Women Voters’ “registration truck,” with a detailed schedule of the truck’s appearances around the city.<sup>180</sup> In addition, the article stated that as part of the registration truck effort, the newspaper was “cooperating with the League” to arrange for five minutes of radio airtime each afternoon to promote voting as a “patriotic duty.”<sup>181</sup>

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173. *Voters Objective of League Drive for Registration*, BIRMINGHAM AGE-HERALD, June 17, 1923, at 1.

174. *Registration Drive Planned by Women*, EVENING SUN (Md.), May 5, 1924, at 2.

175. *Women Voters Plan Aid to Registration*, VIRGINIAN-PILOT & NORFOLK LANDMARK, Mar. 19, 1924, at 13; *see also Women Voters Get Assignments for Registration Work*, VIRGINIAN-PILOT & NORFOLK LANDMARK, Mar. 7, 1924, at 8.

176. *Registration Drive Planned by League of Women Voters*, ST. LOUIS DAILY GLOBE-DEMOCRAT, Aug. 10, 1924, at 4C.

177. *Women in Drive To Get Out Vote*, RICHMOND TIMES-DISPATCH, Aug. 17, 1924, at 4.

178. LIETTE GIDLOW, *THE BIG VOTE: GENDER, CONSUMER CULTURE, AND THE POLITICS OF EXCLUSION, 1890S–1920S*, at 83 (2007).

179. *League in Registration Drive*, S.F. EXAM’R, June 3, 1926, at 16.

180. *Registration Truck Begins Tour of City*, ATLANTA CONST., May 25, 1926, at 6.

181. *Id.*

In sum, voter registration drives, especially for the suffragists, had become part of the social fabric of many places.<sup>182</sup> Third-party organizations promoting women's suffrage used voter registration as a key tactic to promote democratic participation.

#### *D. Other Voter Registration Activities in the 1920s*

Separate from the women's suffrage movement, civic organizations were involved in voter registration in numerous places in the 1920s or earlier. Organized labor, for example, sought to improve registration numbers among its supporters. The "citizens labor" party took credit for three-quarters of the new registrations in Great Falls, Montana, in 1920 thanks to a "vigorous campaign having as its objective the registration of all laboring men."<sup>183</sup> An October 1924 registration drive in Minneapolis by the Farmer-Labor Federation focused on the area's "labor districts."<sup>184</sup> "Civic workers" in Flatbush Square, a neighborhood of Brooklyn, planned a nonpartisan voter registration drive in 1926.<sup>185</sup>

Registration officials also went out into the community and appeared at public meetings to register voters. In San Francisco in the 1920s, election officials conducted a house-to-house canvass every two years to create a voter registration list: "Registration deputies are also sent upon request to all kinds of public meetings to take care of unregistered voters who may be present."<sup>186</sup> Further, "the registrar of voters gives cooperation to any organization working to increase registration"—though the historical record is not specific on which organizations were involved or what assistance they received.<sup>187</sup> Civic organizations in Kansas City and Philadelphia were also involved in the effort to convince legislatures to adopt a system of permanent voter registration so voters did not have to rejoin the registration list every year.<sup>188</sup>

Yet certain private entities were not focused on helping people register but instead sought to root out fraud within the registration system by curtailing voter registration activities. The Citizens' Association of Chicago, for instance, pushed for stricter registration laws in the 1870s. Joseph P. Harris's 1929 history of voter registration noted that "[t]he Citizens' Association of Chicago has for years acted as the chief private agency for the detection and prosecution of election frauds in that city,

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182. Solly, *supra* note 155.

183. *Third Party Claims 900 of New Voters for City Election*, GREAT FALLS DAILY TRIB., Feb. 29, 1920, at 16.

184. *Registration Drive in Labor Districts*, MINNEAPOLIS DAILY STAR, Oct. 7, 1924, at 2.

185. *Plan Registration Drive*, BROOKLYN DAILY TIMES, Sept. 23, 1926, at 8.

186. HARRIS, *supra* note 115, at 295, 298–99.

187. *Id.* at 299 (cleaned up).

188. *Id.* at 19.

and during the last ten years has unearthed an amazing amount of evidence showing the padding of registration lists, fraudulent voting and other illegal practices.”<sup>189</sup> The Union League Club in Chicago, which supported a third presidential term for Ulysses S. Grant in 1880, also pushed for “registration reform.”<sup>190</sup>

*E. Voter Registration and the Civil Rights Movement  
of the 1950s and 1960s*

The next major landmark in a sustained push for voter registration came through the civil rights movement and the goal of truly effectuating the ideals of the Fifteenth Amendment to the U.S. Constitution, which prohibits the denial of the right to vote on the basis of race or color. The activity started well before the 1960s. In 1946, for instance, the *Daily Bulletin*, which billed itself as “one of the two only Negro Dailies in the World,” promoted a statewide voter registration drive by the “North Carolina Progressive Voters league,” an organization comprised primarily of Black individuals.<sup>191</sup> They used the slogan, “vote-less people are hopeless people anywhere on earth.”<sup>192</sup> Similarly, the *Jackson Advocate*, an African-American weekly in Mississippi, touted a 1951 voter registration drive in Atlanta promoted by the Atlanta Negro Voters League.<sup>193</sup> In 1952, the *Miami Times*, “Florida’s Favorite Colored Weekly,” noted that numerous organizations and individuals had encouraged people to register to vote, including clubs, ministers, and newspapers.<sup>194</sup> Another article in the *Miami Times* detailed the various ways that groups were spreading the message: “newspaper articles, spot radio announcements, distribution of thousands of leaflets, displaying of signs at strategic locations, making personal contacts,” and “free transportation.”<sup>195</sup> In 1958, the Junior Chamber of Commerce called every listed telephone number “to spur citizens to re-register as voters.”<sup>196</sup> With a headline that could read from the modern day, but was actually from 1958—“Tighter Voting Rules Likely for Georgians”—the *Atlanta Constitution* reported that the NAACP sought to boost voter

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189. *Id.* at 350.

190. KEYSSAR, *THE RIGHT TO VOTE*, *supra* note 113, at 124.

191. *N.C. Voters League Starts State-Wide Registration Drive*, DAILY BULL. (Ohio), Feb. 8, 1946, at 1.

192. *Id.*

193. *Voters Registration Drive Off to Enthusiastic Start*, JACKSON ADVOC., Nov. 17, 1951, at 1, 5.

194. *Books Still Open*, MIA. TIMES, Oct. 4, 1952, at 4.

195. *Jaycees Conducting Registration Drive*, MIA. TIMES, Sept. 27, 1952, at 1.

196. *Cayce-WC Jaycees Continue Registration Phone Drive*, STATE (S.C.), Jan. 12, 1958, at 11-A.

registration among Black people by 300,000.<sup>197</sup> This registration drive was part of a broader effort across the South in the late 1950s and early 1960s.<sup>198</sup> After the creation of the Voter Education Project (VEP) in 1961, approximately 500,000 Black individuals registered to vote in the South between 1960 and 1964, in part thanks to the VEP's efforts in "channeling funds for local voter registration drives into the eleven southern states."<sup>199</sup> In 1962, President John F. Kennedy offered financial support for voter registration, which helped to further boost these efforts.<sup>200</sup>

The main action on voter registration, especially for Black voters, culminated in the Freedom Summer of 1964 in Mississippi. Over a thousand students from Northern states flooded Mississippi to canvass neighborhoods throughout the state and register Black people to vote.<sup>201</sup> Robert Moses, one of the organizers who began a grassroots voter registration effort in the early 1960s through the Student Nonviolent Coordinating Committee, gave a speech at Stanford University in April 1964, in which he touted the goal for that summer to register up to 400,000 people in Mississippi: "We want to register upwards of 300,000 to 400,000 Negroes around the state of Mississippi. To dispel, at least, once and for all, the argument that the reason Negroes don't register is because they're apathetic. Because there are these 400,000 people to be registered."<sup>202</sup> Young individuals went door-to-door to assist people and accompany them to go register.<sup>203</sup> Through this grassroots effort, "the nation began to realize that the times were changing in America."<sup>204</sup> As one scholar wrote about the volunteers, who faced intimidation and violence from recalcitrant segregationist whites, the volunteers "did

197. *Tighter Voting Rules Likely for Georgians*, ATLANTA CONST., Jan. 2, 1958, at 9.

198. *Negro Voter Registration Drive Slated*, ORLANDO SENTINEL, Jan. 31, 1958, at 12-A; *Negro Voter Registration Drive Starts*, BIRMINGHAM NEWS, Feb. 12, 1958, at 10.

199. John Lewis & Archie E. Allen, *Black Voter Registration Efforts in the South*, 48 NOTRE DAME LAW. 105, 111 (1972).

200. Robert P. Moses, Speech on Freedom Summer at Stanford University (Apr. 24, 1964), <https://americanradioworks.publicradio.org/features/blackspeech/bmoses.html>; see also William Sturkey, *The Quiet Courage of Bob Moses*, ATLANTIC (July 28, 2021), <https://www.theatlantic.com/ideas/archive/2021/07/remembering-bob-moses-civil-rights-leader/619579/>.

201. Stanley Fritz, *Freedom Summer: The Revolutionary Movement To Register Voters*, HUFFPOST, [https://www.huffpost.com/entry/freedom-summer-the-revolutionary-movement-to-register\\_b\\_5984b2b4e4b0bd823202974a](https://www.huffpost.com/entry/freedom-summer-the-revolutionary-movement-to-register_b_5984b2b4e4b0bd823202974a) [https://perma.cc/U9CT-XXBE] (Aug. 4, 2017).

202. Moses, *supra* note 200.

203. Jesse Hinds, *Freedom Summer: Going South for Social Justice*, 17 LEGACY, no. 1, 2017, at 41, 45.

204. *Id.* at 48.

much more than just register voters. In helping register voters, [they] gave African-Americans a political voice.”<sup>205</sup>

There are scores of newspaper articles and other reports from the time about the rallies and marches for voting rights, many noting the participation of Dr. Martin Luther King, Jr. The stories also highlighted the barriers to registration, which included harassment and violence.<sup>206</sup> Most notably, three civil rights workers—James Chaney, Andrew Goodman, and Michael Schwerner—were killed in Philadelphia, Mississippi, after they traveled to a nearby community to meet with members of a Black church that the White Knights of the Ku Klux Klan had burned down.<sup>207</sup> Churches were important to the organizational efforts for minority voter registration. Mississippi’s “freedom schools” and the newspapers they published also offered an outlet for youth social activism.<sup>208</sup> College students—including those from Northern states who went to Southern states such as Mississippi—were prominent in these registration drives, often organized by civil rights groups collectively known as the Council of Federated Organizations (COFO).<sup>209</sup> (Chaney, Goodman, and Schwerner were working with the Congress of Racial Equality (CORE), which was part of COFO.<sup>210</sup>) The Student Nonviolent Coordinating Committee, or SNCC, was also heavily involved in the registration activities.<sup>211</sup> These students often faced harassment, including arrests, from the white establishment.<sup>212</sup>

Voter registration activities became more formalized throughout the 1960s. The Voter Education Project, for instance, offered small grants to local organizations, which then conducted “intensive four-to-eight-week citizenship education and registration drives.”<sup>213</sup> These activities often faced backlash from white local registrars, who would implement

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205. *Id.* at 50.

206. *E.g.*, *Influential Mississippians Join Fight for Integration*, PITTSBURGH COURIER, Aug. 1, 1964, at 2; *Mississippi Vote Project Suffers Switch in Plans*, UKIAH DAILY J., July 1, 1964, at 8.

207. *Missing Trio Found*, DELTA DEMOCRAT-TIMES (Miss.), Aug. 5, 1964, at 1.

208. William Sturkey, “*I Want To Become a Part of History*”: *Freedom Summer, Freedom Schools, and the Freedom News*, 95 J. AFR. AM. HIST. 348, 354–55, 358 (2010).

209. See Elliot K. Stein, *State Civil Rights Workers Feel ‘Police State’ Pressure*, HARTFORD COURANT, July 10, 1964, at 10; *To Work in Mississippi*, ALBUQUERQUE J., June 7, 1964, at D-4.

210. *Lost Rights Volunteers Oddly Assorted Trio*, AKRON BEACON J., June 24, 1964, at 2.

211. *Negroes Happy?—Just Isn’t True*, BOS. SUNDAY GLOBE, Aug. 2, 1964, at 49.

212. Stein, *supra* note 209, at 6.

213. Lewis & Allen, *supra* note 199, at 121–22.

“regulations” to slow down registration or even close registration offices entirely.<sup>214</sup> Nevertheless, the registration activities of third-party groups persevered. In 2018, *The New York Times* profiled four individuals who had volunteered during the Mississippi Freedom Summer and returned to Mississippi over fifty years later to work with a voter registration group called Mississippi Votes.<sup>215</sup> “Young and old, two full generations apart, gathered at a Jackson church, in nearby neighborhoods, on the balcony of an Oxford bookstore to talk about the perils and stakes of voter activism, then and now.”<sup>216</sup>

Despite the countless barriers the activists faced, advocates highlighted how the voter registration drives were “paying off” with an increase in the number of racial minorities registered.<sup>217</sup> That said, the gains in voter registration were not particularly large: One report explained that “[a]lthough approximately 17,000 black residents of Mississippi attempted to register to vote in the summer of 1964, only 1,600 of the completed applications were accepted by local registrars.”<sup>218</sup> More importantly, Freedom Summer generated significant media attention to the problems happening in the South, which prompted further protests, the March in Selma, Alabama, and the eventual passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965.<sup>219</sup> Thanks in large part to these laws, as well as continued registration activities, by 1967 almost sixty percent of Mississippi’s Black voting eligible population was registered to vote, compared to a mere 6.7% in 1965 (though there was still a thirty-two point gap between white and Black registration in 1967).<sup>220</sup>

John Lewis, a civil rights icon who participated in Freedom Summer and marched over the Edmond Pettus Bridge in Selma in 1965, reflected twenty years after the voter registration drives on his involvement:

I have often been asked what it felt like to participate in such a movement. I can remember many emotions—fear, anger, and

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214. *Id.* at 122.

215. Audra D. S. Burch, *A New Class of Voting Rights Activists Picks Up the Mantle in Mississippi*, N.Y. TIMES (Sept. 25, 2018), <https://www.nytimes.com/2018/09/25/us/freedom-summer-mississippi-votes.html>.

216. *Id.*

217. *Sponsor Claims Negro Drive for Registration Paying Off*, CLARION-LEDGER (Miss.), Aug. 3, 1964, at 2.

218. *Freedom Summer*, STAN.: MARTIN LUTHER KING, JR. RSCH. & EDUC. INST., <https://kinginstitute.stanford.edu/encyclopedia/freedom-summer> [https://perma.cc/5KAX-N9CB].

219. Fritz, *supra* note 201.

220. German Lopez, *How the Voting Rights Act Transformed Black Voting Rights in the South, in One Chart*, VOX (citing U.S. COMM’N ON C.R., THE VOTING RIGHTS ACT: TEN YEARS LATER 43 (1975)), <https://www.vox.com/2015/3/6/8163229/voting-rights-act-1965> [https://perma.cc/E3KM-N4B8] (Aug. 6, 2015, 7:35 AM).

sadness, but also hope, love, and compassion. Most of all, there was an all-pervading sense that one was involved in a movement larger than oneself, almost like a Holy Crusade, an idea whose time had come.<sup>221</sup>

Stemming from the 1960s and the Mississippi Freedom Summer, voter registration drives remain important in the culture of Southern politics. A fifty-year retrospective of the Mississippi Freedom Summer noted that “[t]he ‘human’ element of activism, the aspect of relationship building and trust, was a significant factor in the favorable outcome of Freedom Summer.”<sup>222</sup> As one scholar wrote in 1985:

There is no doubt that registration drives are an emotionally charged and even revered component of southern black politics, a component that may provide organizational strength, unity, identity, and motivation far beyond any actual increases in registrants and voters. It may be that registration drives have symbolic and nonpolitical functions that reach far beyond increases in voter turnout alone.<sup>223</sup>

The efforts to register Black people continued throughout the late 1960s, 1970s, and beyond. The 1973 Black Expo in Chicago featured a voter registration drive.<sup>224</sup> Churches promoted voter registration during Harold Washington’s successful 1983 campaign to become Chicago’s first Black mayor<sup>225</sup>—though under federal tax law, all church activity must be nonpartisan to maintain their exempt status.<sup>226</sup>

One prominent black minister bluntly told his parishioners that nonregistrants were not welcome in the congregation. A voter registration card was the price of access to free food distributed by one of the major Baptist churches in the black community. Under the slogan, ‘Praise the Lord and Register,’ the black

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221. John Lewis, *Mississippi Freedom Summer—20 Years Later*, DISSENT, Winter 1985, at 14, 15.

222. Sherita L. Johnson & Cheryl D. Jenkins, “If It Ain’t Local, It Ain’t Real!” *The 50th Anniversary of Freedom Summer at Southern Miss*, S.Q., Fall 2014, at 13, 28.

223. Arnold Vedlitz, *Voter Registration Drives and Black Voting in the South*, 47 J. POL. 643, 644 (1985).

224. *Voting Rights Throughout United States History*, NAT’L GEOGRAPHIC, <https://education.nationalgeographic.org/resource/voting-rights-throughout-history/> [https://perma.cc/4J55-XKVP] (Jan. 22, 2025).

225. Dena S. Davis, *Ironic Encounter: African-Americans, American Jews, and the Church-State Relationship*, 43 CATH. U. L. REV. 109, 133–34 (1993).

226. IRS, PUB. NO. 1828, TAX GUIDE FOR CHURCHES & RELIGIOUS ORGANIZATIONS, at 11, 13 (rev. 2015).

churches committed themselves wholeheartedly to serving as registration centers.<sup>227</sup>

Of course, during this time period other groups with specific constituencies also conducted voter registration activities. The *Carlsbad Current-Argus* in New Mexico noted in 1958 that “organized labor,” led by the New Mexico AFL-CIO, was engaged in a voter registration drive and that “[o]ther groups and the political parties will follow.”<sup>228</sup> The AFL-CIO was also active in Kentucky in 1964, attempting to register voters in Louisville and northern Kentucky.<sup>229</sup> That same year, a local water conservation group in California went door-to-door to register voters ahead of a bond election to finance a new dam.<sup>230</sup> In the late 1960s, the Mexican American Federation and the United Farm Workers union spearheaded an effort to increase voter registration among Mexican-Americans in Yakima County, Washington.<sup>231</sup> The League of Women Voters also continued its voter registration activities throughout the 1960s (and beyond).<sup>232</sup>

In sum, third-party organizations were vital to the massive voter mobilization efforts of the 1960s, which was a period of significant voter registration especially for Black communities. Though there was some pushback from states, the third-party organizations persevered in their registration activities, culminating in the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965.

#### *F. The National Voter Registration Act of 1993 (“Motor Voter”)*

The third significant time period of increased voter mobilization through voter registration stemmed from Congress’s enactment of the National Voter Registration Act of 1993 (NVRA), often referred to as the “Motor Voter” law. Congress passed the NVRA to create a uniform

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227. Davis, *supra* note 225, at 134 n.126 (quoting KENNETH D. WALD, RELIGION AND POLITICS IN THE UNITED STATES 318 (2d ed. 1992)).

228. *Organized Labor Starts Voter Registration*, CARLSBAD CURRENT-ARGUS, Jan. 2, 1958, at 2.

229. *Labor Opens Registration Campaign*, COURIER-J. (Ky.), June 4, 1964 (§ 1), at 27.

230. *Voter Registration Drive Under Way by Citizens Committee*, DAILY TIMES-ADVOC. (Cal.), Jan. 2, 1964, at 8.

231. *Ballot Blocked Episode 5: Mexican American Voting Rights*, NAT’L PARK SERV., at 12:10 (Aug. 12, 2021), <https://www.nps.gov/articles/000/ballot-blocked-episode-5.htm>.

232. *L.V.W. Aids Drive for Registration*, DAILY ARGUS (N.Y.), July 10, 1964, at 3.

mechanism for voter registration across the country, replacing the “patchwork” of state laws.<sup>233</sup> The law’s explicit purposes were:

- (1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;
- (2) to make it possible for Federal, State, and local governments to implement this Act in a manner that enhances the participation of eligible citizens as voters in elections for Federal office;
- (3) to protect the integrity of the electoral process; and
- (4) to ensure that accurate and current voter registration rolls are maintained.<sup>234</sup>

The law applies to all states except for the five that, by 1994, had implemented same-day voter registration (Idaho, Minnesota, New Hampshire, Wisconsin, and Wyoming) or had no voter registration requirement at all (North Dakota).<sup>235</sup> The law requires states to offer voter registration opportunities at motor vehicle agencies when someone applies for or renews a driver’s license, which is why it is often known as the Motor Voter law.<sup>236</sup> States must also provide for voter registration at state agency offices, such as those that offer public assistance.<sup>237</sup> The law further requires states to allow voter registration through the mail,<sup>238</sup> though—pursuant to the Help America Vote Act of 2002—voters who register via mail must show some form of identification (which can include a utility bill) the first time they vote.<sup>239</sup> Federal Armed Forces recruitment offices in each state must provide voter registration services. And the NVRA requires active maintenance of the voter rolls, including a prohibition on purging someone from the rolls unless they provide written notice that they have moved or they fail to respond to a written notice from the state and then do not vote in two subsequent federal elections.<sup>240</sup>

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233. Clifford Krauss, *Senate Passes Bill To Force States To Make Voter Registration Easier*, N.Y. TIMES, May 21, 1992, at B11.

234. National Voter Registration Act of 1993, Pub. L. No. 103-31, § 2(b), 107 Stat. 77, 77 (1993).

235. § 4(b), 107 Stat. at 78; *The National Voter Registration Act of 1993 (NVRA)*, C.R. DIV., U.S. DEP’T JUST., <https://www.justice.gov/crt/national-voter-registration-act-1993-nvra> [<https://perma.cc/VY8X-5AYR>] (Nov. 1, 2024).

236. § 5, 107 Stat. at 78–79.

237. § 7, 107 Stat. at 80–82.

238. § 6, 107 Stat. at 79–80.

239. Help America Vote Act of 2002, Pub. L. No. 107-252, § 303(b), 116 Stat. 1666, 1712 (2002).

240. § 8(a)(3), (d), 107 Stat. at 82–84.

The law also mandates that states accept a “federal form” for voter registration, available in numerous languages. As Justice Samuel Alito wrote (in dissent) in a case about Arizona’s attempt to add a proof-of-citizenship requirement for voter registration, “[t]hanks to the federal form, volunteers distributing voter registration materials at a shopping mall in Yuma can give a copy of the same form to every person they meet without attempting to distinguish between residents of Arizona and California.”<sup>241</sup> The Court found that the NVRA preempted the Arizona law that required proof of citizenship.<sup>242</sup>

Of course, many third-party organizations embraced the NVRA and its simplification of the voter registration process by having a federal form for all states. The League of Women Voters engaged in a major voter registration effort in the lead up to the 1996 presidential election, the first after the enactment of the NVRA.<sup>243</sup>

The NVRA has been a huge success, at least when measuring the rates of voter registration. The law helped to ease voter registration drives, allowing groups and individuals to go into communities and bring a simple form to register voters. Voter registration increased by 1.82%, or about 3,390,000 people, in the states subject to the NVRA during the twenty-two months after it was implemented before the 1996 presidential election.<sup>244</sup> Third-party voter registration drives contributed significantly to the rise in registration. As a report by the Brennan Center for Justice recounted, “[a]vailable data from 2004, which was typical of other presidential election years, shows that large nonprofit organizations submitted at least 10 million new registrations — more than 20 percent of the total. In one Florida county, civic organizations registered 63 percent of all new voters.”<sup>245</sup> One study noted that “5 percent of voters in the 2012 election cycle reported registering with a voter registration ‘booth’, and an additional 5.5 percent reported registering at a school, hospital, or campus, which are places where drives are traditionally conducted.”<sup>246</sup> The authors further suggested that “many of the 13.1

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241. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 46 (2013) (Alito, J., dissenting).

242. *Id.* at 15.

243. Harriet Goldberg, Opinion, *Local Groups Mobilize To Spur Voters*, HERALD STATESMAN (N.Y.), May 18, 1996, at 10A; Pat Present, Letter to the Editor, *Voter Registration Drives Scheduled*, ISLAND PACKET (S.C.), Apr. 7, 1996, at 16-A.

244. FEC, THE IMPACT OF THE NATIONAL VOTER REGISTRATION ACT OF 1993 ON THE ADMINISTRATION OF ELECTIONS FOR FEDERAL OFFICE 1995–1996, at 12 (1997), [https://www.eac.gov/sites/default/files/document\\_library/files/The\\_Impact\\_of\\_the\\_National\\_Voter\\_Registration\\_Act\\_on\\_Federal\\_Elections\\_1995-1996.pdf](https://www.eac.gov/sites/default/files/document_library/files/The_Impact_of_the_National_Voter_Registration_Act_on_Federal_Elections_1995-1996.pdf) [https://perma.cc/9LGS-V8YU].

245. KASDAN, *supra* note 25, at 3 (footnote omitted).

246. STEPHEN MORTELLARO & MICHELLE KANTER COHEN, PROJECT VOTE, RESTRICTING VOTER REGISTRATION DRIVES 2 (2014) (quoting U.S. CENSUS BUREAU, REP.

percent of voters who reported registering by mail likely received a voter registration application from a voter registration organization and subsequently mailed it to their election office.”<sup>247</sup>

Third-party voter registration drives, especially after the adoption of the NVRA, have helped to break down barriers along both race and class lines. As the American Bar Association notes, the law “facilitates third parties or community organizations in conducting voter registration drives. These community-based voter registration drives often assist traditionally under-represented segments of our electorate, including those who are limited-English proficient (LEP) and communities of color, usually in a nonpartisan manner.”<sup>248</sup> Indeed, statistics reveal that registration drives are particularly helpful at reaching racial minorities and individuals of a lower socioeconomic status: In 2012, for example, “while 4.2 percent of Whites reported registering through a drive, the percentage increases to 6.4 percent for Asian Americans, 6.9 percent for Hispanics, and 8.1 percent for African Americans. A similar trend was reported for racial minorities registering on a school, hospital, or campus.”<sup>249</sup> The Brennan Center report notes that “[t]hese non-partisan efforts are especially important for registering Blacks and Hispanics, who traditionally have lower registration rates than whites. For example, Blacks and Hispanics are nearly twice as likely to register through a drive as whites.”<sup>250</sup> Another study using field experiments—going door-to-door to promote voter registration on some streets but not others—showed an increase in registration and voter turnout for those who encountered face-to-face encouragement, with the biggest impact on streets with less affluent individuals.<sup>251</sup>

In sum, the NVRA represented a significant catalyst for modernizing the voter registration system. Third-party organizations were key to the NVRA’s success in increasing voter registration.

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NO. P20-568, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2012, at tbl.12 (2013)), <https://www.projectvote.org/wp-content/uploads/2015/06/RESTRICTING-VR-DRIVES-POLICY-PAPER-SEPT-2014.pdf> [<https://perma.cc/9TRK-JW4V>].

247. *Id.*

248. Terry Ao Minnis & Niyati Shah, *Voter Registration in Today’s Democracy: Barriers and Opportunities*, ABA (Feb. 9, 2020), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/voting-rights/-use-it-or-lose-it--the-problem-of-purges-from-the-registration/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-rights/-use-it-or-lose-it--the-problem-of-purges-from-the-registration/).

249. MORTELLARO & COHEN, *supra* note 246, at 2.

250. KASDAN, *supra* note 25, at 3.

251. David W. Nickerson, *Do Voter Registration Drives Increase Participation? For Whom and When?*, 77 J. POL. 88, 98 (2015).

Third-party voter registration drives have a venerated history, from the earliest days of voter registration laws to the present. The nation's newspapers are full of reports about individuals, political parties, and other organizations helping to engage voters and ensure they are on the registration rolls. As the above analysis reveals, the most significant and sustained pushes for voter registration correlate with three major inflection points in the history of democratic expansion: the women's suffrage movement of the 1920s, the civil rights movement of the 1960s, and the modernization and expansion of voter registration after Congress passed the National Voter Registration Act of 1993.

The history and tradition of organized voter registration from the late 1800s and early 1900s to today is robust. Third-party voter registration activities are deeply rooted in the nation's history and tradition. The next Part applies this story to today's current regime, explaining the Court's approach to history and tradition and why that method requires the invalidation of the new voter registration restrictions that states have adopted.

### III. INVOKING HISTORY AND TRADITION TO ANALYZE TODAY'S VOTER REGISTRATION HURDLES

To win at the Supreme Court today, litigants must harness arguments involving history and tradition. The Roberts Court has departed from the approach of the Warren Court in the 1960s and rejected "living constitutionalism" as a theory of constitutional interpretation.<sup>252</sup> The story, however, is more complicated than a simple embrace of originalism to reject the recognition of constitutional rights that did not exist at the time of an amendment's ratification. Although often invoked to reject claims of individual rights, history and tradition are also relevant to the acknowledgement of longstanding activities and the protection of individual rights.

This Part sets out, in broad strokes, the Court's approach to history and tradition. It then shows how litigants can use the Court's focus on history and tradition to seek further rights protection against state laws that encroach upon a well-established procedure. Finally, it explains that the current laws that curtail voter registration, discussed in Part I, violate the longstanding history of robust voter registration activities, especially those that third-party organizations facilitate. The Court should therefore strike down the new voter registration restrictions.

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252. See Alex Tobin, Comment, *The Warren Court and Living Constitutionalism*, 10 IND. J.L. & SOC. EQUAL. 221, 223 (2022).

*A. History and Tradition at the Roberts Court*

The Court has long relied upon history and tradition in its constitutional cases. Some scholars point to decisions from the early 1900s as the start of the Court's focus on history and tradition to analyze constitutional rights.<sup>253</sup> For example, in 1908 in *Twining v. New Jersey*,<sup>254</sup> the Court referenced the Magna Carta to explain the scope of the Fourteenth Amendment's Due Process Clause.<sup>255</sup> Similarly, in 1923 the Court in *Meyer v. Nebraska*<sup>256</sup> noted that due process includes "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."<sup>257</sup> The Court's consideration of history and tradition is therefore nothing new. But, as Professor Erwin Chemerinsky pointed out in 1993, "[a]lthough history long has been a part of Supreme Court opinions, in the past decade there appears to have been a much greater reliance on history and tradition as a method of constitutional interpretation."<sup>258</sup> That reliance has grown remarkably in the Roberts Court era.<sup>259</sup>

Although the Court has never explicitly rejected history and tradition as a valuable interpretive tool, the Court in the 1950s and 1960s was much more interested in a different approach, living constitutionalism, to construe individual rights.<sup>260</sup> *Brown v. Board of Education*<sup>261</sup> is perhaps the most paradigmatic example:

[W]e cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be

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253. See Dov Fox & Mary Ziegler, *The Lost History of "History and Tradition,"* 98 S. CAL. L. REV. 1, 13 (2025); Felipe Jiménez, *Tradition in Constitutional Adjudication*, YALE J.L. & HUMANS. (forthcoming 2025) (manuscript at 43–44) (on file with author); Erwin Chemerinsky, *History, Tradition, the Supreme Court, and the First Amendment*, 44 HASTINGS L.J. 901, 902–03 (1993).

254. 211 U.S. 78 (1908).

255. *Id.* at 100 (construing the words "due process of law" in the Fourteenth Amendment as "equivalent in meaning to the words 'law of the land,' contained in that chapter of Magna Carta").

256. 262 U.S. 390 (1923).

257. *Id.* at 399.

258. Chemerinsky, *supra* note 253, at 903.

259. See generally Fox & Ziegler, *supra* note 253.

260. Tobin, *supra* note 252, at 222–23.

261. 347 U.S. 483 (1954).

determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.<sup>262</sup>

In writing this statement, the Court rejected the arguments of various Southern states, which had pointed out in their briefs that many places had segregated schools at the time of the Fourteenth Amendment's ratification.<sup>263</sup> Similarly, the Court famously said in *Griswold v. Connecticut*<sup>264</sup> that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."<sup>265</sup> The 1960s was thus the high-water mark for living constitutionalism.<sup>266</sup>

The later Burger Court laid the foundation for today's extreme reliance on history and tradition.<sup>267</sup> For example, in *Marsh v. Chambers*,<sup>268</sup> the Court looked at colonial-era practices to reject a First Amendment challenge to the Nebraska Legislature opening a legislative session with a prayer.<sup>269</sup> In *Moore v. City of East Cleveland*,<sup>270</sup> a plurality opinion noted that the scope of substantive due process lay within the "teachings of history."<sup>271</sup> Justice Powell asserted "that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."<sup>272</sup> Notably, the Court invoked history and tradition to reject government action and give stronger rights to the family unit, however the family defined it. In *Burnham v. Superior Court*,<sup>273</sup> the plurality rested on the history of personal jurisdiction practice at the time of the Fourteenth Amendment's adoption to reaffirm that "tradition" is the key standard.<sup>274</sup>

The 1990s saw increased reliance on history and tradition. One scholar noted that the word "tradition" itself appeared in eighty-three different Supreme Court cases in the 1990 and 1991 Terms, compared with 216 total cases that included the word "tradition" in the previous

262. *Id.* at 492–93.

263. Reva B. Siegel, *The History of History and Tradition: The Roots of Dobbs's Method (and Originalism) in the Defense of Segregation*, 133 YALE L.J.F. 99, 116–17 (2023).

264. 381 U.S. 479 (1965).

265. *Id.* at 484.

266. See Tobin, *supra* note 252, at 222–23.

267. Fox & Ziegler, *supra* note 253 (manuscript at 133–34); Chemerinsky, *supra* note 253, at 903–04.

268. 463 U.S. 783 (1983).

269. *Id.* at 784, 786.

270. 431 U.S. 494 (1977).

271. *Id.* at 503 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring)).

272. *Id.*

273. 495 U.S. 604 (1990).

274. *Id.* at 619.

ten Terms.<sup>275</sup> The Court often used history and tradition to reject the recognition of unenumerated rights. In *Michael H. v. Gerald D.*,<sup>276</sup> the Court refused to acknowledge a biological father's interest in establishing legal parental recognition, instead elevating the "historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family."<sup>277</sup> In *Washington v. Glucksberg*,<sup>278</sup> the Court rejected the claim that the Due Process Clause includes a liberty interest in ending one's life through physician-assisted suicide, resting on "our Nation's history, legal traditions, and practices."<sup>279</sup>

The Supreme Court's reliance on history and tradition as a primary mode of constitutional analysis has increased significantly under Chief Justice John Roberts.<sup>280</sup> Professor Louis Virelli found that, in the first five years of the Roberts Court, traditionalist reasoning appeared in the Court's constitutional law opinions forty-four percent of the time.<sup>281</sup> More recently, the Roberts Court has engaged in a project to remake constitutional law through the guise of history and tradition: As two scholars write, "the Court's appeal to history and tradition has upended decades of settled law across the constitutional landscape, with a raft of new occasions on the horizon."<sup>282</sup>

Consider recent cases in which the Roberts Court has rested on history and tradition from the time period when a particular amendment was ratified—sometimes referred to as entrenched traditionalism.<sup>283</sup> In *Dobbs v. Jackson Women's Health Organization*, the Court overturned *Roe v. Wade* and *Planned Parenthood v. Casey*, which had recognized a right to abortion early in a pregnancy within the Due Process Clause, by claiming that "history and tradition . . . does not protect the right to an abortion."<sup>284</sup> In *Kennedy v. Bremerton School District*,<sup>285</sup> the Court elevated the free exercise rights of a public high school football coach to

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275. Rebecca L. Brown, *Tradition and Insight*, 103 YALE L.J. 177, 209 n.173 (1993).

276. 491 U.S. 110 (1989).

277. *Id.* at 123.

278. 521 U.S. 702 (1997).

279. *Id.* at 710.

280. See Marc O. DeGirolami, *Traditionalism Rising*, 24 J. CONTEMP. LEGAL ISSUES 9, 10–11 (2023).

281. Louis J. Virelli III, *Constitutional Traditionalism in the Roberts Court*, 73 U. PITT. L. REV. 1, 39 (2011).

282. Fox & Ziegler, *supra* note 253 (manuscript at 105).

283. See *id.* (manuscript at 104 n.5, 136–40).

284. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2248 (2022); see also Reva B. Siegel, *How "History and Tradition" Perpetuates Inequality: Dobbs on Abortion's Nineteenth-Century Criminalization*, 60 HOUS. L. REV. 901, 906 (2023).

285. 142 S. Ct. 2407 (2022).

pray on the field, saying that “‘the line’ that courts and governments ‘must draw between the permissible and the impermissible’ has to ‘accord with history and faithfully reflect the understanding of the Founding Fathers.’”<sup>286</sup> And in perhaps the most extreme example, the Court in *New York State Rifle & Pistol Ass’n v. Bruen*<sup>287</sup> construed the Second Amendment to prohibit any gun regulations unless there is a “historical analog” for the regulation from the Founding era.<sup>288</sup> Departing from traditional constitutional balancing, in which a government can assert a sufficient reason for a law that might infringe on a right, the Court in *Bruen* declared that “[t]o justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation’s historical tradition of firearm regulation.”<sup>289</sup> The Court therefore declared the Second Amendment right to bear arms as essentially a super-right that the government can regulate only by reference to history and tradition. In this way, history and tradition served to support stronger individual rights in this particular area. Even in upholding a gun law that prohibits those with a domestic violence restraining order from possessing a firearm, the Court said that “[s]ince the founding, our Nation’s firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms.”<sup>290</sup> Thus, an analysis of history and tradition drove the decisions on the Second Amendment in both expanding the right and defining its narrow limits.

### *B. History and Tradition on the Right To Vote*

The Court has used history and tradition in its voting rights jurisprudence, often to reject claims that seek to expand voting rights.

The U.S. Constitution does not explicitly confer the right to vote; it instead says that states may not deny the right to vote on the basis of certain characteristics, including race, sex, inability to pay a poll tax, and age over eighteen.<sup>291</sup> In the 1960s, however, the Court recognized the right to vote under the Equal Protection Clause of the Fourteenth

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286. *Id.* at 2428 (cleaned up) (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 577 (2014)).

287. 142 S. Ct. 2111 (2022).

288. *Id.* at 2131–32; *see also* Eric J. Segall, *Originalism, Bruen, and Constitutional Insanity*, 51 FORDHAM URB. L.J. ONLINE 1, 2 (2023) (“The Court’s exclusive focus on history in *Bruen* is a radical departure from the method the Court has traditionally used to decide constitutional law cases.”).

289. *Bruen*, 142 S. Ct. at 2126.

290. *United States v. Rahimi*, 144 S. Ct. 1889, 1896 (2024).

291. U.S. CONST. amends. XV, XIX, XXIV, XXVI.

Amendment.<sup>292</sup> Thus, on the most fundamental right in a democracy, the Court today generally does not look at Founding-era sources or even the views of 1868, when the Fourteenth Amendment was ratified. Instead, the Court has rested on cases from the 1960s for the foundational principle underpinning the constitutional right to vote,<sup>293</sup> though the Court's more recent cases have curtailed that right.<sup>294</sup> Yet, as Professor Susan Bitensky has shown, "the Constitution is rich with doctrinal foundations" for the Court to recognize a "right to vote per se."<sup>295</sup> Thus, while the Court's identification of the constitutional right to vote was not necessarily originalist in nature, especially as it came about in the 1960s during the height of living constitutionalism, a focus on history and tradition need not doom the precedents that acknowledged voting as a fundamental right.<sup>296</sup>

The Court's current jurisprudence, however, has used history and tradition to suggest that courts should not question the voting rules that states pass, instead deferring to state governments in how they want to administer an election.<sup>297</sup> There are numerous examples. In *Rucho v. Common Cause*,<sup>298</sup> the Court held that claims of partisan gerrymandering are nonjusticiable in federal court, resting in part on Founding-era understanding in its analysis: "[T]he history is not irrelevant. The Framers were aware of electoral districting problems and considered what to do about them. They settled on a characteristic approach, assigning the issue to the state legislatures, expressly checked and

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292. *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969).

293. See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964).

294. See JOSHUA A. DOUGLAS, *THE COURT V. THE VOTERS: THE TROUBLING STORY OF HOW THE SUPREME COURT HAS UNDERMINED VOTING RIGHTS* (2024) (discussing *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992); and *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008)).

295. Susan H. Bitensky, *Advancing America's Emblematic Right: Doctrinal Bases for the Fundamental Constitutional Right To Vote Per Se*, 77 U. MIA. L. REV. 613, 636 (2023).

296. An originalist justification for the recognition of the right to vote within the U.S. Constitution is left for another day. Cf. Jonathan F. Mitchell, *Textualism and the Fourteenth Amendment*, 69 STAN. L. REV. 1237, 1251–52 (2017) (arguing that textualism can justify the Court's Equal Protection Clause precedents by noting that "the Supreme Court's racial-equality pronouncements have a firm textual foundation in congressional civil rights statutes"); Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 3, 76 (2011) (arguing that "the application of originalist interpretive methods" justifies the Court's sex discrimination cases and relying on the historical debates to show that "the Fifteenth and Nineteenth Amendments should be read to guarantee full political rights").

297. Joshua A. Douglas, *Undue Deference to States in the 2020 Election Litigation*, 30 WM. & MARY BILL RTS. J. 59, 85 (2021).

298. 139 S. Ct. 2484 (2019).

balanced by the Federal Congress.”<sup>299</sup> In a case seeking to change the meaning of “one-person, one-vote” in redistricting, the Court recounted “constitutional history” of both the Founding era and the debates surrounding the Fourteenth Amendment to uphold Texas’s use of total population when ensuring equality in districts, as opposed to counting only citizens.<sup>300</sup> On racial gerrymandering, Justice Samuel Alito began his analysis by noting that “[r]edistricting constitutes a traditional domain of state legislative authority” before crafting a test that makes it harder for plaintiffs to challenge a state’s map.<sup>301</sup> Justice Neil Gorsuch criticized a district court’s decision to intervene in the election process during the COVID-19 pandemic, suggesting that the lower court’s decision “scuttle[d] . . . long-settled tradition” of deferring to state governments to “play an active role in structuring elections.”<sup>302</sup> The Court also invoked the tradition of judicial review to reject the so-called independent state legislature theory, which would have taken state courts out of the business of ruling on election cases, noting that “[s]ince early in our Nation’s history, courts have recognized their duty to evaluate the constitutionality of legislative acts.”<sup>303</sup>

The Court’s narrow focus on history and tradition has also animated its analysis of the Voting Rights Act. In *Brnovich v. DNC*,<sup>304</sup> a case about section 2 of that groundbreaking law, the majority essentially made up a new test for plaintiffs to satisfy to bring a successful claim of vote denial on the basis of race.<sup>305</sup> Justice Alito, for the majority, identified five “guideposts” that should govern section 2 cases.<sup>306</sup> The second “guidepost” infuses history and tradition into the statutory analysis: “[T]he degree to which a voting rule departs from what was standard practice when section 2 was amended in 1982 is a relevant consideration.”<sup>307</sup> The Court went on to state that “the degree to which a challenged rule has a long pedigree or is in widespread use in the United States is a circumstance that must be taken into account.”<sup>308</sup> There is nothing in the text of the Voting Rights Act, however, that supports a history and tradition approach to statutory analysis. Not surprisingly, each of the five guideposts that Justice Alito introduces—including the

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299. *Id.* at 2496.

300. *Evenwel v. Abbott*, 578 U.S. 54, 59, 64 (2016).

301. *Alexander v. S.C. State Conf. of the NAACP*, 144 S. Ct. 1221, 1233 (2024).

302. *DNC v. Wis. State Legislature*, 141 S. Ct. 28, 28 (2020) (Gorsuch, J., concurring in denial of application to vacate stay) (quoting *Burdick v. Takushi*, 504 U.S. 428, 433 (1992)).

303. *Moore v. Harper*, 143 S. Ct. 2065, 2079 (2023).

304. 141 S. Ct. 2321 (2021).

305. *Id.*

306. *Id.* at 2336, 2338–40.

307. *Id.* at 2338.

308. *Id.* at 2339.

second guidepost’s entrenched traditionalism that looks at voting rules at the time Congress amended the Act—make it harder for voting rights plaintiffs to challenge election rules.<sup>309</sup>

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This discussion of history and tradition in the Court’s current approach to rights recognition is necessarily short, as entire articles and books are devoted to the subject.<sup>310</sup> It is also not meant to offer a robust critique, though scholars have made compelling arguments on why the myopic history and tradition analysis is misguided.<sup>311</sup> The reality is that history and tradition drive the current Court’s analysis of important rights, including the right to vote. For present purposes, the discussion demonstrates a core tenet: Any time a plaintiff seeks to have the Court strike down a government action or recognize a right, the plaintiff will have to grapple with how its argument fits into the Court’s focus on history and tradition. Indeed, history and tradition played a key role in the Court’s strong recognition of an individual right under the Second Amendment and in the enlargement of the free exercise right within the First Amendment, meaning that litigants can use history and tradition to strengthen rights.<sup>312</sup> However, the Court’s approach has also resulted in the failure to recognize various rights, as occurred for abortion in *Dobbs*.

On the right to vote, advocates must navigate the fact that the U.S. Constitution does not explicitly confer the right to vote and the reality that only white male property owners could vote in the Founding era.<sup>313</sup> In addition, the Constitution says that states may regulate the “times, places, and manner” of federal elections,<sup>314</sup> and the Court has unduly deferred to state legislatures on their election rules.<sup>315</sup> At the same time, suffrage has continually expanded through constitutional amendments,<sup>316</sup>

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309. See DOUGLAS, *supra* note 294, at 126.

310. See generally Fox & Ziegler, *supra* note 253; DeGirolami, *supra* note 280; R. George Wright, *On the Logic of History and Tradition in Constitutional Rights Cases*, 32 S. CAL. INTERDISC. L.J. 1 (2022); Randy E. Barnett & Lawrence B. Solum, *Originalism After Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118 NW. U. L. REV. 433 (2023); MADIBA K. DENNIE, *THE ORIGINALISM TRAP: HOW EXTREMISTS STOLE THE CONSTITUTION AND HOW WE THE PEOPLE CAN TAKE IT BACK* (2024); ERIC J. SEGALL, *ORIGINALISM AS FAITH* (2018).

311. See, e.g., Segall, *supra* note 288, at 2; Fox & Ziegler, *supra* note 253 (manuscript at 107–09).

312. See *supra* notes 285–96 and accompanying text.

313. KEYSSAR, *THE RIGHT TO VOTE*, *supra* note 113, at xx–xxi.

314. U.S. CONST. art. I, § 4 (cleaned up).

315. Douglas, *supra* note 297, at 85.

316. U.S. CONST. amends. XV, XIX, XXIV, XXVI.

statutory rules,<sup>317</sup> and evolving practices.<sup>318</sup> As the previous Part demonstrated, the history and tradition of voter registration shows that, for as long as states have required registration, third-party organizations have assisted voters in satisfying this administrative hurdle. Therefore, a faithful application of history and tradition should find that modern curtailments of third-party voter registration activities violate the historical practices and traditional notions of how voter registration has always taken place.

*C. History and Tradition Support Striking Down Today's  
Voter Registration Restrictions*

We now come to the crux of the question: Do the recent spate of restrictions, particularly on third-party organizations that seek to register voters, violate the history and tradition of voter registration? How should a court consider that history in its analysis when plaintiffs challenge these laws?

The previous discussion demonstrated that many states are placing new restrictions on voter registration drives, that the early history of voter registration included open access for individuals and groups to help others register, and that the Supreme Court has focused on history and tradition as a general matter. Putting the analysis together reveals a simple syllogism: If the Court is serious about its adherence to history and tradition, then it should strike down the current limitations on voter registration. These restrictions violate the Fourteenth Amendment's Equal Protection Clause as well as the First Amendment by infringing upon the right to vote and the right of association. Further, they are contrary to the expansion of voting rights that occurred in the late 1800s and early 1900s through constitutional amendments, which was also when states began to require voter registration.

The Court's voting rights jurisprudence under the Equal Protection Clause, the Fifteenth Amendment's mandate that states may not deny the right to vote on the basis of race, and the Nineteenth Amendment's provision for women's suffrage all serve as useful constitutional frameworks given that those amendments were ratified in 1868, 1870, and 1920—around the same time that third-party voter registration activities began. That is, third parties could engage in robust voter registration during the same time period that the Constitution was expanded to include stronger voting rights protection. There is nothing

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317. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 52 U.S.C. § 10101); National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 (codified as amended at 52 U.S.C. §§ 20501-11).

318. See generally Joshua S. Sellers & Justin Weinstein-Tull, *Constructing the Right To Vote*, 96 N.Y.U. L. REV. 1127 (2021).

in the historical record to suggest that these organizations faced the same kinds of restrictions—such as a requirement of citizen-only canvassers, delivery deadlines, or speech limitations—that states impose today.<sup>319</sup> Third-party voter registration and more expansive constitutional protection for the right to vote go hand-in-hand. Therefore, rules that impose barriers to voter registration violate the constitutional norms that undergird these provisions.

Moreover, a core component of voter registration involves the First Amendment rights of speech and association. A district court in Ohio found that voter registration participation “implicates a number of both expressive and associational rights which are protected by the First Amendment. These rights belong to—and may be invoked by—not just the voters seeking to register, but by third parties who encourage participation in the political process through increasing voter registration rolls.”<sup>320</sup> Similarly, a New Mexico district court noted that voter registration “implicates expressive conduct,” involves “incidental speech,” and “implicates expressive association.”<sup>321</sup> A Florida district court declared that the “collection and submission of voter registration drives is intertwined with speech and association.”<sup>322</sup> The longstanding history of these practices, which began at the outset of state-mandated registration lists, is relevant to this First Amendment inquiry.

Of course, there was no voter registration at the Founding and therefore no third-party voter registration at that time, which perhaps suggests that history and tradition do not protect the practice at all. But that formulation creates a self-defeating tautology that epitomizes the wrong way to think about the issue. History and tradition does not mean only what the Founding era recognized, especially if there is no historical analog.<sup>323</sup> If history and tradition must drive the analysis, then the inquiry should instead focus on the origins of a particular practice and the ways in which society recognized the scope of that practice.<sup>324</sup> That is, when

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319. See *supra* Part I.

320. *Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 700 (N.D. Ohio 2006).

321. *Am. Ass’n of People with Disabilities v. Herrera*, 690 F. Supp. 2d 1183, 1215, 1217 (D.N.M. 2010).

322. *League of Women Voters of Fla. v. Cobb*, 447 F. Supp. 2d 1314, 1334 (S.D. Fla. 2006). There are many additional cases involving restrictions on voter registration—too many to list in this Article. For just a small snippet, see *Voting Section Litigation*, U.S. DEP’T JUST., <https://www.justice.gov/crt/voting-section-litigation> [https://perma.cc/2RFJ-NP3Z] (Jan. 23, 2025).

323. See Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 99 (2023) (criticizing the Court’s invocation of history and tradition in *Bruen* and noting that “the Court did not choose the time period within which governments would have to adduce history to defend their laws”).

324. Fox & Ziegler, *supra* note 253 (manuscript at 146–49).

considering whether a voter restriction violates a constitutional provision, both the history and tradition underpinning the constitutional text as well as the history and tradition of the practice itself are relevant.

In this vein, Professors Randy Barnett and Lawrence Solum explain that “historical narratives” can offer a useful tool for interpreting the meaning of the Constitution.<sup>325</sup> They define historical narratives (one of several interpretive approaches they identify) as referring to the “construction of stories that recount the origins, purposes, development, or consequences of constitutional actions and events—and any combination of these.”<sup>326</sup> The history of voting rights within the Constitution provides a historical narrative of expanded ballot access. Several of these enhancements, including the Fifteenth and Nineteenth Amendment’s prohibition of denying the right to vote on the basis of race or sex and the Fourteenth Amendment’s Equal Protection Clause (which the Court later invoked as protecting voters), occurred around the same time period as the introduction of voter registration. Thus, the history of voter registration coincides with an enlargement of the eligible electorate.

Tradition is also relevant to the Court’s analysis, and here traditionalism supports robust voting rights through easy voter registration. Professor Marc DeGirolami defines “traditionalism” to include “two key elements”:

- (1) [C]oncrete practices, rather than principles, ideas, judicial precedents, and so on, as the determinants of constitutional meaning and law; and (2) the endurance of those practices as a composite of their age, longevity, and density, evidence for which includes the practice’s use before, during, and after enactment of a constitutional provision.<sup>327</sup>

Traditionalism therefore focuses on “the practices of the political organs of government, including state and local governments; and the practices of individual citizens or groups of citizens” to determine the meaning of the law.<sup>328</sup> Similarly, Professor Sherif Girgis highlights how the Court often looks at “the existence of certain practices well after ratification of the constitutional text at issue” to inform its originalism

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325. Barnett & Solum, *supra* note 310, at 440–41. The article points to three distinct uses of history in constitutional law: (1) historical practice; (2) historical doctrine; and (3) historical narratives. The historical narrative framework applies most directly to the discussion of third-party voter registration practices.

326. *Id.* (“For example, a historical narrative might situate Section One of the Fourteenth Amendment in the context of Reconstruction, identify the purposes for which its provisions were drafted, and discuss the development of constitutional doctrines associated with its specific provisions.” (footnote omitted)).

327. DeGirolami, *supra* note 280, at 14.

328. *Id.*

approach in what he terms “living traditionalism.”<sup>329</sup> Professors Dov Fox and Mary Ziegler point to “evolving traditionalism” as the relevant and appropriate inquiry, which focuses less on a specific time period (a method they call “entrenched traditionalism”) and instead highlights those practices that have a “longstanding pedigree and [are] deeply embedded into the fabric of the American life” to inform constitutional meaning.<sup>330</sup>

The tradition of voter registration fits precisely within this ideal. When governments began requiring voters to register, officials both took it upon themselves to put eligible people on the list and opened the door to third-party organizations to engage in voter registration drives.<sup>331</sup> Under Professor DeGirolami’s formulation, the “concrete practice” from the same time period as the voting-related constitutional amendments was robust voter registration assistance from outside organizations and the “endurance of those practices” continues to the modern era. Voter registration activity among both governmental actors and third-party organizations from the beginning to today also comports with Professor Girgis’s concept of living traditionalism. And the longstanding system of robust voter registration that continues to this day is the precise kind of “evolving traditionalism” that Professors Fox and Ziegler envision as requiring constitutional recognition.

This analysis also supports a court striking down the SAVE Act, should it become law. There is no history or tradition of requiring documentary proof of citizenship. In fact, the history and tradition of voter registration demonstrates the exact opposite, as voters did not need to provide documentation when states began to have voter registration rolls. The SAVE Act would make it more difficult, if not impossible, for many people to register to vote, so the law violates the constitutional protection for voting rights within the Equal Protection Clause. The history and tradition analysis bolsters the claim, as the government cannot justify the law under a history and tradition analysis.

Of course, voter registration rules—from their inception to today—have dual purposes: to minimize potential fraud in the system and to make it easy for eligible individuals to register. So, the argument is not that states cannot impose any reasonable rules on voter registration; the regulations must still ensure that only eligible individuals are registered. That said, voting is a constitutional right, which means that voters

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329. Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. 1477, 1487 (2023).

330. Fox & Ziegler, *supra* note 253 (manuscript at 109, 146–48).

331. See *supra* Part II.

themselves are constitutional actors.<sup>332</sup> Facilitating the ability of voters to engage in that constitutional exercise is also itself a constitutional act. The fact that voter registration practices were robust even during the origins of voter registration offers a constitutionally significant narrative about the importance of these activities. Put differently, while official registration lists helped to clean up the rolls and improve election integrity, historical practice simultaneously allowed easy access to the ballot for eligible voters. It follows that modern curtailment of that activity violates the history, tradition, and original purpose of voter registration. More concretely, a court should consider whether a new rule on voter registration actually achieves the goal of preventing or reducing fraud within the context of the history and tradition of more robust third-party voter registration practices.

Similarly, the history and tradition inquiry on voter registration is relevant to claims under section 2 of the Voting Rights Act. In *Brnovich v. DNC*, the Court created five “guideposts” for plaintiffs to satisfy to bring a claim of vote denial on the basis of race.<sup>333</sup> One of those guideposts looks at the law in 1982, when Congress amended section 2 of the Voting Rights Act: “[T]he degree to which a voting rule departs from what was standard practice when section 2 was amended in 1982 is a relevant consideration.”<sup>334</sup> The Court explained that “[b]ecause every voting rule imposes a burden of some sort, it is useful to have benchmarks with which the burdens imposed by a challenged rule can be compared.”<sup>335</sup> Although this inquiry is not grounded in the text of the VRA and is otherwise problematic, as it insulates practices if they existed in 1982 even if they cause disenfranchisement today, plaintiffs can flip this guidepost on its head. The history of third-party voter registration can apply to the section 2 vote denial analysis given that a law that places new burdens on voter registration targeted toward minority individuals goes contrary to standard practice from 1982, when there were generally fewer legal constraints on helping others register. To be sure, voting has become easier overall since 1982, but third-party voter registration practices have a long pedigree, so the history and tradition test should call into question the new restrictions that states are imposing.

This Article is not meant to cover all theories of constitutional interpretation or to advocate for any specific formulation of the history and tradition test. The point is much simpler: Regardless of the precise

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332. See Sellers & Weinstein-Tull, *supra* note 318, at 1128 (noting that the right to vote is “foundational to our democracy,” “the core of democratic governance, the fulcrum on which other rights rest, and the paradigmatic form of civic participation”); Joshua A. Douglas, *The Power of the Electorate Under State Constitutions*, 76 FLA. L. REV. 1679 (2024) (describing the electorate as a quasi-branch of government).

333. *Brnovich v. DNC*, 141 S. Ct. 2321, 2326, 2338–40 (2021).

334. *Id.* at 2338.

335. *Id.*

contours of the analysis, any consideration of history and tradition on voter registration should recognize the longstanding practice of easy access and, in particular, the ability of third-party organizations to assist voters in the registration process. The Court should use this history and tradition to strike down onerous restrictions on voter registration.

#### CONCLUSION

Voting is a fundamental right of our democracy. In every state but North Dakota, voters must register to cast a ballot. Ever since states have required voter registration, organizations have helped voters with the process. That is, the history of voter registration includes, as an important component, easy access for voters and few barriers for organizations engaged in voter registration drives. But today, several states are imposing new restrictions on voter registration, such as requirements for who may register voters or onerous timing deadlines, that effectively prevent these organizations from engaging in their democracy-building activities. If the Court is serious about using history and tradition, it should recognize the longstanding practice of robust voter registration and strike down these rules.



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