

## **The Battle Over the Vote in 2012**

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My topic for today is the battle over voting rights in 2012. I will start by telling you about one casualty of that battle—Jill Cicciarelli.

Jill Cicciarelli is a high school civics teacher in New Smyrna Beach, Florida whose job includes preparing students for civic life. Last fall, Ms. Cicciarelli was notified that her name had been forwarded to the Secretary of State for violating Florida's election laws, meaning she could face \$1000 in fines and other penalties. Her offense: setting up a voter registration table at her school that helped about 50 eligible students register to vote.

What Ms. Cicciarelli did last fall was the same thing she had been doing for years, and something I hope many of you will consider doing as well. She told the *Daytona Beach News Journal*, "I just want them to be participating in our democracy. The more participation we have, the stronger our democracy will be."

But what she didn't know was that Florida had just passed a law requiring anyone who helps others register to vote to jump through a series of hoops or face hefty fines and other legal consequences.

To comply with this new law, even *before* setting up a voter registration table in the school auditorium, Ms. Cicciarelli would have had to register online with the state as a "third party voter registration organization," and to sign an affidavit warning her about all the possible felonies involved in voter registration. She would also have had to ensure that each of the students who were helping her with the drive signed that affidavit, so that she could submit their affidavits to the state. She would then have had to wait for the state to assign her a special number. Once she got the number, that number would have had to be stamped or written on all the forms she used for her drive. At that point, she could have set up her table to help students register to vote. But that's not all. She would also have had to track the forms that she and her student volunteers handed out so that she could report to the state each month what happened to those forms, whether or not they were used for voter registration. And after helping students fill out registration forms, she would have had to ensure that each form reached state election officials within 48 hours, no matter how far in advance it was of an election. If she was even a minute late, she would face a \$50 fine per form.

This is hardly a prescription for encouraging civic activity and voting. As you might imagine, the effect of this law has been just the opposite. It has caused the Florida League of Women

Voters, which has been registering voters for over 70 years, and other groups across the state to shut down their voter registration drives completely.

And for what? What important public purpose does this law serve? The legislative history mentioned only a desire to stop groups like ACORN from submitting fake voter registrations in the name of Mickey Mouse. But it doesn't explain how that goal could be advanced in the least by the law's actual requirements. Pre-registration, reporting, and 48-hour turnaround rules in fact do nothing to stop Mickey Mouse from registering; pre-existing laws do.

Government lawyers claim that the law's reporting requirements enable election officials to track down people who turn in forms late. But they have not been able to identify a *single* instance under the old rules in which a voter was injured by a form being turned in late. In short, the new rules seem to serve no practical purpose other than to scare people away from voter registration drives.

And that is a travesty. In Florida, like in many other states, voter registration drives have played an extremely important role in getting people registered so they can vote. In both 2004 and 2008, hundreds of thousands of Florida voters registered through drives. Now many of those drives have ground to a halt and many Floridians have lost a key opportunity to sign up. African-American and Latino citizens will be especially hurt; in both Florida and nationally, they register through drives at twice the rate as whites.

This is the natural and predictable effect of Florida's new voting law.

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Florida's new law is only one of a massive wave of new laws enacted since last January that will make it harder for eligible citizens to vote.

Overall, 22 new laws and 2 executive actions restricting voting have been adopted in 17 states. And there are at least 74 more restrictive bills still pending in 24 states.

This is the biggest setback in voting rights in *decades*—and an abrupt reversal of the longstanding trend toward expanding access to the franchise.

These new laws change the landscape for the 2012 elections and all elections going forward. Millions of Americans will be affected, and some groups will be especially hard hit, including minorities, the poor, students, the elderly, and people with disabilities. This is a national phenomenon: the states that have passed restrictive voting laws so far make up 70% of the electoral votes needed to win the presidency.

In my talk today, I will tell you about these new laws and how they will affect our elections.

I will then look at this legislative movement in a broader historical context, as both a break from the historic trend of increasing access to the franchise and the maturation of a new trend of increasing politicization of election administration—in our legislatures, our administrative agencies, and our courts.

I will address what this means for our democracy, and what should be done about it.

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For the past two years, while most people were focused on the country's economic woes, state legislators across the country were pushing a different agenda—an agenda to make it harder to vote. Since the beginning of 2011, 40 states saw new legislation to restrict voting. Before anyone took notice, voting restrictions had been adopted in a dozen states, and that number has now increased to 17.

What do these new restrictions look like? They range from requiring certain forms of photo ID to vote, to requiring documentary proof of citizenship to register to vote, to making it otherwise harder to register to vote, to cutting back on early voting, to making it harder for people with past felony convictions to get their voting rights back, among other things.

To some, this might not sound like it's such a big deal—after all, most people can still participate under these rules—but it is. These kinds of restrictions keep people from voting. It's not a majority, but it's a sizable number—certainly significant enough to make the difference in our era of close elections. And the people these laws keep from voting are mostly those who have the least political power in our society, and for whom the vote is not only critical, but also their primary means of political expression. This is the vote—the main currency of democracy. It matters.

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So let's talk about how these laws restrict the vote.

The most common new voting law—passed in 9 states—is to require voters to show certain government-issued photo IDs to vote. Every state already has some form of voter ID requirement in place, at least for new voters and often for all. But not like these new laws.

These are not reasonable laws requiring voters to identify themselves by showing IDs that they *do* have. They are highly restrictive laws that accept only forms of ID, like driver's licenses and non-driver's IDs, that 11% of voting-age Americans do *not* have. That's 21 million people. Even if only a fraction of those people don't vote because of ID laws, that could change the

outcome of a close election. In each of our last 3 presidential elections, several key battleground states were decided by less than 1% margins of victory, in some cases by just a few hundred votes.

And who are these people without government-issued photo IDs? Largely people who don't drive, like perhaps many of your grandparents, and people with low incomes who live in dense urban areas or sparsely populated rural areas. Studies make clear that those without photo IDs are disproportionately minorities, low-income, at the top and bottom age ranges, or people with disabilities. To put some numbers on this, while 11% of voting-age Americans overall don't have the kinds of photo IDs required by these laws, for low-income voters it's 15%; for older voters it's 18%; and for African Americans, it's 25%, according to a Brennan Center study. Latinos are also far more likely than whites to lack IDs; the Department of Justice recently found that Latinos made up a disproportionate share of the more than 605,000 registered voters in Texas who don't have photo IDs.

Students won't fare well voter under ID requirements either. Texas, for example, expressly excludes state-issued student photo IDs from the list of IDs accepted for voting, along with out-of-state driver's licenses. And while it won't accept student IDs or even state employee IDs, it will accept concealed handgun licenses. This kind of cherry-picking of IDs has been a common feature of voter ID debates across the country.

Those who push ID laws claim that they are needed to prevent voter fraud. The problem is that study after study demonstrates that the only type of fraud these laws prevent—impersonating another voter at the polls—virtually never happens. Americans are more likely to get hit by lightning than to commit this kind of fraud. And for good reason: it's a felony, you can get caught, and it's an exceedingly stupid and ineffective way to try to steal an election.

And what's more, even a misguided interest in fraud prevention can't explain key features of these new laws, like why they sharply limit which government IDs can be used, why they cherry pick IDs that certain groups don't have, or why they don't include the exemptions and failsafe protections for voters without IDs that we've seen in ID laws of the past. Many of these laws have features that gratuitously lock out eligible voters.

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Voter ID laws aren't the only kind of new laws making it harder to vote, especially for minorities and the poor. I'll tell you about four more.

First, in 3 states, there are new requirements for voters to show documentary proof of citizenship—a passport, birth certificate, or naturalization papers—to register to vote. As it turns out, at least 7% of voting-age Americans, and 12% of those with low incomes, don't have these

kinds of citizenship documents available. A full third of women don't have citizenship documents with their current names.

Second, 6 states so far have passed laws otherwise making it harder to register to vote or to stay registered. I already talked about Florida's new law, which has shut down voter registration drives in communities across the state. Other new laws also target voter registration drives, eliminate the highly popular Election Day registration, and make it harder for people who move to stay registered or to vote. Anti-voter registration laws like these especially harm minorities, low-income voters, and youth, who are registered to vote at lower rates and who move more frequently than other voters.

But that's not all. Third, across the country, we have seen efforts to cut back on early voting for the first time, just as African-Americans and Latinos have starting using that method of voting in large numbers. 5 states did cut back on early voting, and some in a way that maximizes the harm to minorities. For example, Ohio and Florida both eliminated early voting on the Sunday before the election—a day on which African-American and Latino churches organized very successful pews to polls drives in 2008. A full third of citizens who voted early on the eliminated Sunday in Florida in 2008 were African-American, even though African-Americans make up only 13% of the state's citizen voting age population.

And to top things off, three states have made it much harder or impossible for people with past criminal convictions who live in our communities to get their voting rights restored. Iowa reversed a policy that restored the voting rights of 80,000 people, and Florida reversed one that re-enfranchised more than 150,000. In Florida, almost a million citizens, 1 in 4 of whom are African-American, are now essentially permanently disenfranchised.

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If this sounds overwhelming, that's because it is. If you want to find another period in which this many new laws were passed restricting voting, you have to go back more than a century—to the post-Reconstruction era, when Southern states passed a host of Jim Crow voting laws and Northern states targeted immigrants and the poor. There are stark differences between our time and that time, but there are similarities too, including a pile of laws adding new hurdles that a potential voter has to jump over in order to participate in elections.

This is a legislative movement of historic proportions. So, why is it happening now? What accounts for these new laws?

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The most immediate reason for this wave of new voting laws is the recent change in partisan control in statehouses.

As a general rule, Republicans tend to favor tighter restrictions on voting, and Democrats tend to oppose them. This is in part due to ideology; and it is also the case that the groups who are disproportionately harmed by these laws tend to lean Democratic. (Neither side is made up of saints; both can be expected to act in their perceived electoral self-interest.)

In the 2010 elections, Republicans picked up 675 state legislative seats across the country. They gained control of both chambers in 26 states (up from 14); and picked up 5 governorships, increasing their total to 29.

This electoral sweep put Republicans in a position where they could advance a legislative agenda to restrict voting. And that's just what they did. In 15 of the states to have passed laws making it harder to vote since last year, both houses and the governor's office have been under Republican control.

In the two states where Democrats added hurdles to the voting process, the new laws were far less restrictive. Rhode Island, for example, passed a photo ID law for voting, but it accepts any form of photo ID, whether or not it is state-issued, and if you don't have one, the state will still count your vote after checking your signature.

While Republican electoral success made a difference, it is not the whole story. After all, the Republicans swept the statehouses in 1994, winning control of both legislative chambers in 19 states and 30 governorships. They kept roughly this level of power for more than a decade, until Democrats made gains in 2006. But the Republicans' electoral success in 1994 was not accompanied by significant attempts to roll back voting rights.

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One major difference between 1994 and 2010 are the demographic changes that occurred across the country in the interim.

In the decade between 1990 and 2000, for example, the Hispanic population grew by 58%. From 2000 to 2010, it increased by another 45%, rising to 14% of the population overall.

This population growth was met with cutbacks to voting rights that disproportionately affect Hispanics. Of the 12 states identified by the Pew Hispanic Center as having had the largest Hispanic population growth over the past decade, 7 have passed (or are about to pass) laws restricting voting this past year (and one more passed a law that was vetoed). Several of those states also passed controversial anti-immigrant laws. 3 more states that have among the highest Hispanic populations in the country also passed restrictive laws (TX, FL, GA).

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There is a similar pattern with respect to black voters. Although the African-American population did not grow at a faster pace than the rest of the population, it did dramatically increase its voter participation rates, especially in the 2008 elections. The 2008 election almost eliminated the longstanding racial participation gap, with 65% of blacks participating, compared to 66% of whites. Statewide, the greatest increases were in Southern states with large black populations: both Georgia and South Carolina, for example, saw black participation increase by more than 13%.

These increased black participation rates were also met with new voting restrictions. Of the 10 states with the highest black turnout in 2008, 7 passed or are on the verge of passing restrictive voting laws since last year (and one more passed a law that was vetoed). States with a history of racial discrimination were also more likely to pass new voting restrictions that disproportionately affect African Americans. Of the 9 states that are covered by the Voting Rights Act because of a history of racial discrimination in voting, 5 saw restrictive voting laws pass this year, 1 more is about to pass such a law, and still 1 more passed restrictive laws a few years ago.

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Another major difference between 1994 and 2010 is that 2010 came after the 2000 presidential election.

Many of you may be too young to remember the neck-and-neck race between George W. Bush and Al Gore, which turned on a few hundred disputed votes in Florida. The drama of that election, its recount, and the Supreme Court decision that ultimately decided the race spawned not only movies but also a close examination of the mechanics of our election system.

And what the nation found wasn't pretty. The system was rife with administrative errors, and it was susceptible to manipulation for partisan ends. This wasn't only about vote-counting practices. For example, a faulty effort to purge the voter rolls of people with felony convictions instead removed thousands of eligible, largely African-American voters, far more than the 537 vote margin of victory in that election.

Florida revealed the messy underside of democracy, butterfly ballots, hanging chads and all. It also taught the nation that the rules of election administration can make a difference to election outcomes—especially in our era of close races—and that those rules leave a lot of room for partisan maneuvering.

This opened the door to the politicization, the strategic manipulation of election rules. After all, in America, unlike in other democracies, the rules of the game are largely set by partisans—by legislators who write and run under state election laws, and by chief election officials, most of whom are also elected, who administer those laws. And when it comes to a close national election, it only takes one state to throw things off.

Once that cat is out of the bag, it is very hard to put it back in.

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The potential for mischief did not immediately result in widespread changes to election rules. That took time.

First, state legislators who were focused on different issues needed an impetus to play with election rules. For many, that came in the form of an act of Congress in 2002. In response to the Florida 2000 election fiasco, Congress passed the Help America Vote Act to upgrade our election technology and to help ensure that eligible voters are no longer cut out because of administrative errors.

To comply with this new federal law, every state legislature in the country had to revise its own election laws in the run up to both the 2004 and 2006 elections. What this meant in practical terms was that the rules of election administration in every state were now on the table, part of the legislative agenda. When state legislatures opened up their election codes to scrutiny, they found places where those codes could be tweaked to advance partisan agendas. Ironically, a law that was intended to prevent voter disenfranchisement also provided an opportunity for partisans to try to accomplish just the opposite.

And so we started seeing state legislative and administrative efforts to restrict voting well before 2011. In the run up to the 2006 election, for example, more than half the states introduced photo ID requirements for voting, and three passed laws, though one was struck down in court. Another state imposed a proof of citizenship requirement for registering to vote, and a handful more put in place technical hurdles that made it harder for new voters to get on the rolls. The debates over these efforts took on a sharply partisan tone, with both Democrats and Republicans accusing the others of trying to undermine the integrity of our elections. Only a few of these efforts resulted in new laws, and only a few of those new laws stood up in court. But the movement to restrict voting was clearly already underway.

In a significant respect, then, the recent movement to restrict voting is the realization of the lesson learned from Florida, and the maturation of the decade-long trend of increasing politicization of the rules of election administration.

This politicization didn't only infect state legislatures and election administrators. It also infected the highest ranks of law enforcement—the U.S. Department of Justice. The 2007 scandal over the firing of 9 U.S. Attorneys, which ultimately led to the resignation of the Attorney General, revolved around the Attorneys' refusal to bring baseless, politically motivated prosecutions for voter fraud. That scandal also exposed other ways in which the Department of



Justice's voting rights enforcement arm had become improperly politicized and used to restrict voting.

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While the movement to restrict voting was simmering across the country by 2006, a few factors brought this simmer to a boil. I have already discussed the changing demographics that were so starkly visible in the 2008 elections, as well as the Republican state electoral victories in 2010.

Another factor is the Supreme Court.

Until recently, the courts provided a strong deterrent to laws and policies that restrict voting. The Supreme Court has long held that the Constitution protects the fundamental right to vote, even if it is not explicitly mentioned in the Constitution. And courts also enforce a variety of federal statutes that protect voters, the most important of which is the Voting Rights Act of 1965. Those legal protections have long been presumed to put significant constraints on how much states could regulate access to the ballot box.

But three fairly recent court decisions have undermined that presumption.

The first is the Supreme Court's 2000 decision in *Bush v. Gore* to stop Florida's recount and effectively call the election for George Bush. As a technical matter, the decision was actually an affirmation of voters' rights to equal treatment. But the decision was highly unusual—so much so that the Court took the unprecedented step of saying that the principles it was using to decide the case applied only to that case and could not be cited in any other decision. As a result, the decision fueled the belief—at least among Gore supporters—that the Court too would put partisan politics above judicial principle.

But while *Bush v. Gore* may have sowed cynicism and mistrust in the Court, it did not weaken voting rights. The case that did that was a 2007 case called *Crawford v. Marion County Election Board*. In *Crawford*, the Supreme Court upheld Indiana's new photo ID requirement for voting against a constitutional attack. As a technical matter, the decision was pretty narrow. But it included sweeping statements that made clear that the Court was not interested in second-guessing the states' efforts to prevent voter fraud, even if the fraud was non-existent. This was the first time since 1974 that the Supreme Court had considered a law making it harder to vote, and a significant shift in its approach to these issues. The decision sent a strong signal that the Constitution would not be a major obstacle to laws restricting voting.

And in fact, ever since then, states have used this decision to try to justify a range of new voting regulations—certainly photo ID requirements, even ones far more restrictive than Indiana's, but also others, like laws cracking down on voter registration drives.

The third decision to undermine voting right protections came in 2009, in a case commonly called *NAMUDNO*. That case challenged the constitutionality of a central provision of the Voting Rights Act of 1965, a law that is widely acknowledged as the most successful piece of civil rights legislation in U.S. history. The provision at issue—called the preclearance provision—has been extraordinarily successful in dismantling Jim Crow and preventing discriminatory voting laws in states with a demonstrated history of racial discrimination in voting. In the 2009 *NAMUDNO* case, the Supreme Court upheld that core provision, at least temporarily, but it also suggested that the provision would not fare as well in the future.

And so, while the Indiana case signaled that the Constitution might not stand as a barrier to laws that burdened voting rights, the *NAMUDNO* case signaled that the Voting Rights Act might no longer be a barrier to voting laws that detrimentally affect minorities.

The upshot is that states have become much bolder in passing laws restricting voting, including laws that disproportionately harm minorities.

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Another result is that states covered by the Voting Rights Act have launched an all-out legal attack against that Act. Over the past two years, while states across the country were passing laws making it harder to vote, six states and localities brought cases to invalidate the core requirement of the Voting Rights Act, one of the few tools citizens have to fight back against discriminatory voting laws.

To get a sense of what a radical change this is, only six years ago, in 2006, Congress voted by overwhelming bipartisan majorities to renew the Voting Rights Act for 25 more years, saying that the law was still needed to prevent discrimination in the voting system. The vote was unanimous in the Senate, and 290-33 in the House, and President George W. Bush signed the Act into law.

But the discourse on voting has dramatically deteriorated since 2006. It is deteriorated so quickly that even though the state of Arizona wrote a brief in 2009 urging the Supreme Court to uphold the Voting Rights Act, only two years later, it filed a lawsuit urging the courts to strike it down. (Arizona recently dropped this suit, but other states press on.)

The discourse has deteriorated so much that Texas Governor Rick Perry was able to draw applause at a presidential primary debate on Martin Luther King Day when he praised South Carolina for going to “war with the federal government” by threatening to sue to block the Voting Rights Act.

And the law that previously seemed inviolate—the Voting Rights Act—now appears to stand on shaky legal ground. If it is invalidated, that could be the big historic legacy of this movement.

We are marching backward from Selma in more ways than one.

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So what will be the historic legacy of this moment? Will this be an era of contracting voting rights, a triumph of vote suppression?

I don't think so.

Americans are taking notice, and they are starting to fight back with whatever tools they have. Citizens in Maine passed a ballot initiative this past November to repeal their legislature's attempt to eliminate Election Day registration. Citizens in Ohio have mobilized to repeal their state's controversial new omnibus voting law this coming November. And citizens across the country—from New York to Pitzer College—are speaking out against vote suppression.

The Department of Justice is also pushing back. It has denied approval to discriminatory voting laws from Florida, Texas, and South Carolina, under the still-standing Voting Rights Act. Those states have now gone to court, but their discriminatory laws cannot yet go into effect.

The courts too are starting to push back. Two state courts in Wisconsin blocked that state's restrictive voter ID law, and a state court in Missouri blocked a misleading voter ID ballot initiative. Even more recently, the Ninth Circuit court of appeals voted 9-2 to strike down an Arizona law requiring proof of citizenship to register to vote—in a decision written by a Bush appointee and joined by other conservative judges. Cases challenging new voting restrictions are now pending in at least 9 federal and state courts. And the courts are taking notice that these new laws are not reasonable election regulations; they are vote suppression measures. Maybe the Supreme Court will also notice that this time the states have gone too far.

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The problem with our democracy is not too much participation. It is too little.

Only 65% of Americans participate even in our highest turnout elections. And while other major democracies boast voter registration rates of 90-95%, in America only 70-75% of eligible citizens are registered to vote. Voter confidence in the system has plummeted not only as a result of perceived partisan manipulation of the rules of elections but also because of the rising tide of special interest money flooding our elections. Americans are concerned that their voices are being drowned out.

We can and should do better. Instead of making it harder for Americans to vote, we should be strengthening our election system so that every eligible citizen can participate and have

confidence in the system. And to counter the flood of special interest money, we need a flood of voters.

One reform that will go a long way toward accomplishing those ends, a reform that elicits bipartisan support, is to modernize our ramshackle voter registration system. That could bring as many as 65 million voters into the system, reduce errors, prevent fraud and manipulation, and save millions of dollars.

To meet the challenge raised by this wave of restrictive voting laws, we need strong national protections for voting—both from the Courts and from Congress. And to ensure that we get these protections, we need every American to stand up for their right to vote.

As Jill Cicciarella, the high school civics teacher in Florida so aptly said, “the more participation we have, the stronger our democracy will be.”