



Congress

Why are Democrats and Republicans so divided over voting rights legislation?

What's the story?

On 13th January 2022, the House of Representatives passed an omnibus voting rights bill in a party line vote. The bill includes the Freedom to Vote Act and the John Lewis Voting Rights Act. It aims to restore and strengthen the 1965 Voting Rights Act, which has been impacted by recent Supreme Court rulings. With Senate Republicans vowing to filibuster the bill, Democratic leaders hoped to use their party's slim control of the Senate to amend the chamber's rules and pass the bill with a simple majority. However, on 19th January, centrist Democratic Senators Joe Manchin and Kyrsten Sinema joined Republicans to vote against filibuster reforms in a 48-52 vote, leaving it very unlikely that the bill will now pass.

What does the Freedom to Vote Act do?

Democrats argue that with states having passed hundreds of new 'voter suppression' laws, which make it harder for citizens to register and cast a ballot, new federal laws are required to establish national standards, and protect the right to vote. The bill covers a wide range of areas, including:

- 1) Voting access – Firstly, the bill introduces a number of new national standards for voting access. The bill would make Election Day a new legal public holiday, making it easier for voters to find the time to cast an in-person vote. It requires all states to offer early voting for at least two weeks before Election Day, for at least 10 hours per day, and to allow all voters to be able to apply for a postal vote, without a reason. All states would be required to allow voters to return their ballot by mail, or in person at a polling place or drop box. Any posted votes sent on Election Day, that arrive within seven days, would have to be counted and states would be banned from discarding postal votes for minor errors. The bill would set a new national standard for states that require voters to show a form of identification. Many states would have to accept a much wider range of identification, such as utility bills or bank statements, rather than a limited range of photo ID that some voters do not possess. Finally, states would be required to ensure that voters with disabilities have the same voting access as others.
- 2) Voter suppression - The bill also targets 'voter suppression' – state laws that block access to the vote. For example, the law: increases the penalties for voter intimidation; restores federal voting rights to incarcerated citizens upon their release; requires states to ensure that voting lines last no longer than 30 minutes; and lifts bans that prevent the donation of food and water to voters waiting in lines.
- 3) Electoral sabotage - The bill has measures to prevent various forms of 'electoral sabotage'. For example, the bill prevents local election officials from being removed for partisan or political reasons, and increases the penalties for destroying or altering ballots and other records after the election.
- 4) Redistricting – The bill includes a ban on gerrymandering – the redrawing of electoral districts for partisan gain, and creates new ways for gerrymandered election maps to be challenged in court.
- 5) Voter registration - The bill modernises the voter registration system. It would allow citizens to be automatically registered to vote when they provide relevant information to a particular government agency – for example, when applying for a driver's license. The bill would also require states to offer same-day registration, and online registration, allowing those who discover they are unregistered to still easily vote. States would also be required to contact any individual who is removed from a voter registration list, explaining the reason for their removal, and how they can contest the decision.
- 6) Campaign finance – The bill bans undisclosed 'dark money' donations by requiring any entity that spends more than \$10k on an election to reveal its donors. It requires campaign finance laws to be more firmly enforced by the FEC, particularly bans on 'super PACs' and other outside campaign groups from coordinating with candidates. Finally, it also creates a public funding programme for House elections.
- 7) Promoting election security – Finally, the bill requires states to conduct more transparent post-election audits, and to use voting systems that are more secure, with more transparent records.



What does the John Lewis Voting Rights Act do?

The John Lewis Voting Rights Act is primarily designed to restore and strengthen the 1965 Voting Rights Act, which has been weakened by a series of landmark Supreme Court decisions.

In the decades following the ratification of the 15th Amendment in 1870, which prohibited federal and state governments from restricting voting rights on the basis of race, many southern states began to use a variety of techniques, including poll taxes and literacy tests, that disproportionately disenfranchised African-Americans. In 1965, Congress attempted to end this discrimination with the Voting Rights Act. Firstly, Section 5 of the Voting Rights Act gave the Department of Justice the power to review all new voting rules proposed by states and local governments with a history of discrimination. The federal government could then block any rules it believed would have a discriminatory effect. Section 4(b) of the Act included a 'formula', to establish which jurisdictions would require this federal 'preclearance'. Under Section 4(b), any jurisdiction that, as of November 1964, had used a "test or device" to restrict voting, *and* where less than half of eligible citizens were registered to vote, would have to first prove that their proposed reforms would not harm minority voters. This formula and preclearance provision was set to expire after five years, but the Act was repeatedly re-authorised. However, the dates specified in the Section 4(b) formula were last amended in the 70s. When Congress re-authorised the Act for another 25 years in 2006, it left states to be assessed based on election practices and turnout from decades earlier.

In *Shelby County v. Holder (2013)*, the Supreme Court ruled 5-4 that the Section 4(b) formula was unconstitutional because it was "based on 40-year-old facts" that had "no logical relationship to the present day." Chief Justice John Roberts said that if Congress was to continue to single out particular states, it had to be "on a basis that makes sense in light of current conditions." With Section 4(b) struck down, the federal government was effectively left unable to use its Section 5 powers to block new voting laws that might have a discriminatory effect. In response, the John Lewis Voting Rights Act seeks to introduce a new, updated, 'preclearance' formula. Under the bill, federal approval for voting reforms would be needed in: any state that has had 15 or more voting rights violations in the last 25 years; any state that has 10 or more voting rights violations, with at least one committed by state rather than local government; any local government that has had 3 or more voting rights violations in the last 25 years.

While sections 4 and 5 of the Voting Rights Act were designed to tackle *new* forms of discrimination, Section 2 was drafted to address discriminatory voting laws that were already on state statute books. As amended in 1982, Section 2(a) prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure" that "results in a denial or abridgement" of voting rights "on account of race or colour". Section 2(b) states that section 2(a) is only violated if, after considering the "totality of circumstances", it is demonstrated that election procedures are "not equally open to participation" by members of certain races, with some having "less opportunity" to participate in the process than others.

However, in *Brnovich v. DNC (2021)*, the Supreme Court ruled 6-3 that, when deciding whether a challenged state voting law unlawfully discriminates, judges must consider five 'guideposts': 1) the size of the burden the rule places on voters; 2) the disparity of the rule's impact on minority voters; 3) whether there are other less-burdensome methods of voting available in the state; 4) whether the rule departs from "standard practice" when the Voting Rights Act was last amended in 1982; 5) the strength of the state's interest in the rule, i.e. the need to prevent fraud. (For more detail, see our January 2022 case study '[Has the US Supreme Court given a green light to new forms of voter suppression?](#)').

Democrats argue that the guideposts set out in the *Brnovich* decision will make it too difficult for voters to sue and block discriminatory voting laws. As a result, the John Lewis Voting Rights Act would require judges to consider alternative factors, including the history of discrimination in a jurisdiction. The bill also states that a discriminatory voting practice can be struck down even if it is used in other states, and even if there are alternative ways for impacted citizens to vote. The bill would also make it insufficient for states to simply *claim* that an election rule is necessary to prevent election fraud – the state would have to provide evidence that fraud is actually occurring.



How does this fit into your exams?

Congress – How well does Congress perform its main functions?

The defeat of the omnibus voting bill raises a number of arguments that are useful when considering how well Congress performs its main functions. Unlike the House, the Senate's rules allow for unlimited debate. Unless there is unanimous consent to limit debate, senators are free to discuss an issue for as long as they like. This gives senators the opportunity to filibuster legislation they oppose - deliberately dragging out debates to prevent a final vote. The Senate's 'Cloture' rule allows Senators to end a debate, and defeat a filibuster, with a supermajority vote of 60 Senators. However, cloture has proven increasingly unattainable as the Senate has become more partisan and divided. Equally significant is the fact that *talking* filibusters, in which senators deliver lengthy speeches, are now very rare. Instead, senators today simply declare their intention to filibuster, and, unless the majority party can find 60 votes, the chamber moves on to other business. The cloture rules have been slightly adjusted in recent years. In 2013, Senate Democrats voted to exempt all executive and non-Supreme Court judicial nominations from filibusters. In 2017, Republicans then also excluded Supreme Court nominations.

On 19th January 2022, the Democrats held a vote on ending the debate on its omnibus elections bill. However, all 50 Republican Senators voted 'no', filibustering the bill. The Democrats then held a vote to temporarily change the chamber's procedures, for *just* this omnibus elections bill, to require Republicans to mount a talking filibuster, and allow a simple majority vote once each Senator had finished speaking. However, Democratic Senators Joe Manchin and Kyrsten Sinema were not prepared to amend the filibuster, even to pass legislation they support. Manchin believes that if the filibuster is eliminated, a "new and dangerous precedent will be set to pass sweeping, partisan legislation that changes the direction of our nation every time there is a change in political control." The other 48 Senate Democrats, and their supporters, disagree. Some argue that any risks associated with ending the filibuster, such as the possibility that the Democrats will lose congressional control in the 2022 mid-term elections, are outweighed by a growing democratic crisis. They claim that the Supreme Court's 2013 *Shelby County* decision has resulted in a new wave of voter suppression. States that previously needed 'preclearance' before making changes to their election laws quickly introduced rule changes that Democrats claim disproportionately impact minority voters. Democrats argue that there are so few registered cases of voter fraud, that the only explanation for wanting to make it harder for people to exercise their right to vote is gain an unfair advantage. Other Democrats focus on the barriers that they believe the filibuster raises to more effective representation, and a more efficient legislative process. The current Senate's 50 Democrats represent over 41.5 million more people than the 50 Republican Senators. This is because each state elects two senators, regardless of population size, and Republicans have won more seats in smaller states. The filibuster amplifies the power of this minority even further, by providing a veto that may well be used to block President Biden's entire legislative agenda until the mid-terms.

In response, Republican Senators point out that Democrats have previously championed the filibuster when in the minority. In 2005, when Republicans were considering procedural changes, then-Senator Joe Biden described filibuster reform as a "power grab" that would "eviscerate the Senate". They argue that Democrats have equally partisan motivations, as the party stands to gain from loosening voting laws. In response to the charge that there are few reported cases of fraud, Republicans argue that it is difficult to know how many fraudulent votes have been cast in US elections, because, until recently, voters have not had to prove who they are when voting. Republicans argue that they are not filibustering simply to be obstructive, but because this omnibus election bill is not an honest attempt at bipartisan reform, but rather a Democratic-wish list of policies that would vastly expand federal power and infringe on states' rights. They also disagree with claims that the new election laws passed by Republican states are voter suppression, arguing that turnout has increased in recent years, and that the 2020 election saw minority voters register and vote in record numbers. Lastly, they argue that many contested state laws are popular even with many Democrat voters. A 2021 Monmouth poll found that 80% of Americans support voter ID requirements. Ultimately, depending on your view, the filibuster is either preventing or enhancing the Senate's ability to ensure that legislation best represents the views of the people.