

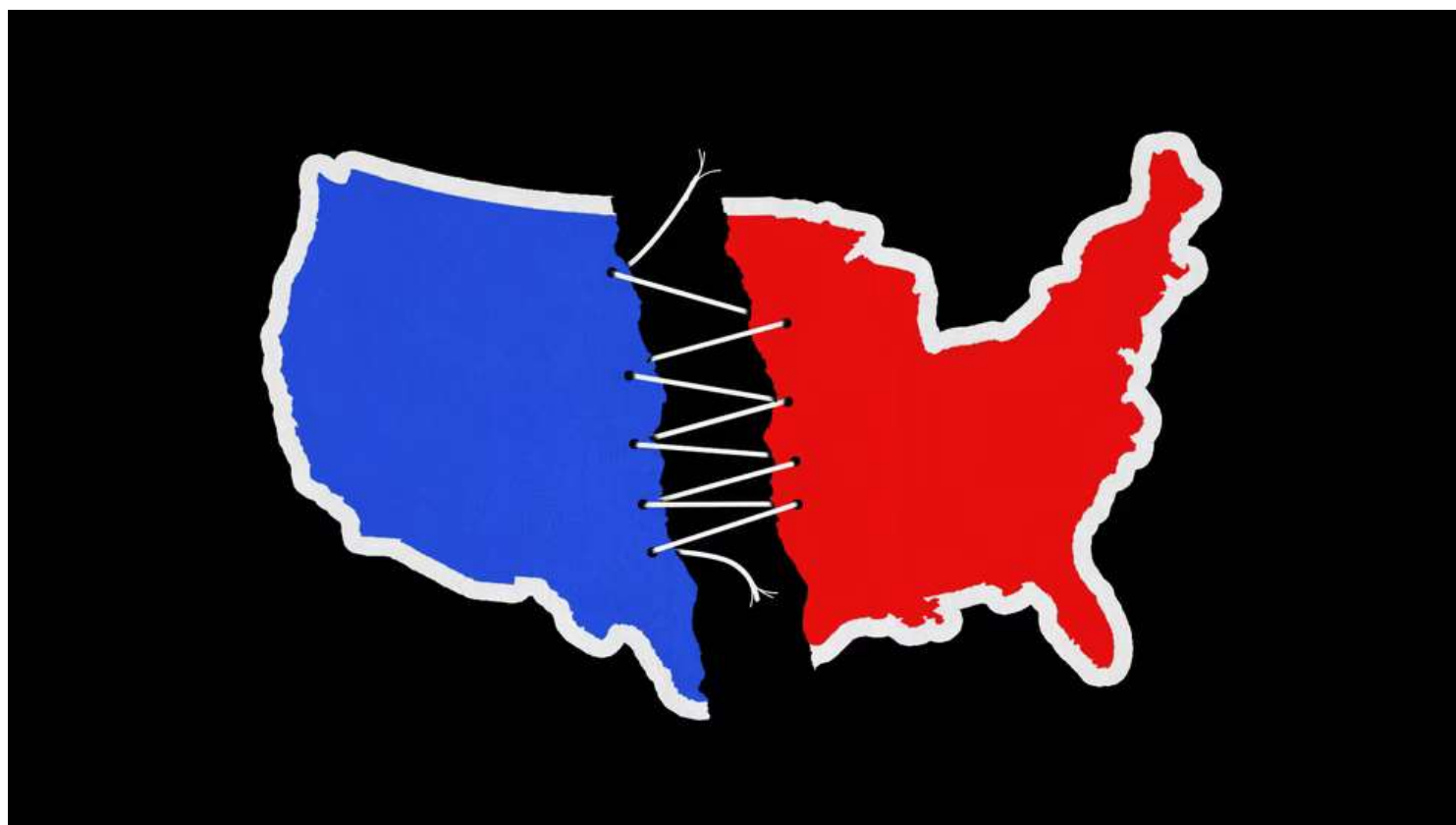


POLITICS

# The Republican Axis Reversing the Rights Revolution

We are witnessing a reordering of American life not seen in half a century.

By Ronald Brownstein



Getty; The Atlantic

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**T**HE GREAT DIVERGENCE is rapidly expanding—and President Joe Biden’s window to reverse it is narrowing.

Since the 1960s, Congress and federal courts have acted mostly to strengthen the floor of basic civil rights available to citizens in all 50 states, a pattern visible on issues from the dismantling of Jim Crow racial segregation to the right to abortion to the authorization of same-sex marriage. But now, offensives by red-state governments and GOP-appointed federal judges are poised to retrench those common standards across an array of issues. The result through the 2020s could be a dramatic erosion of common national rights and a widening gulf—a “great divergence”—between the liberties of Americans in blue states and those in red states.

This process is evident in the restrictive laws approved over the past year in many Republican-controlled states making it more difficult to vote and increasing opportunities for GOP partisans to influence the administration and counting of votes. It’s apparent as well in the moves by multiple red states to bar transgender young people from participating in school sports or receiving medical treatment for the transition process. The same impulse is powering the rapidly spreading red-state movement to constrain how students are taught about the nation’s racial history. Perhaps most explosively, five GOP-appointed Supreme Court justices recently signaled their willingness to overturn the national right to abortion established in the 1973 *Roe v. Wade* decision. That would immediately trigger laws on the books in most red states banning or severely restricting the procedure.

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The only lever Democrats have to resist these efforts is their unified control of the White House and Congress. In theory, this allows them to pass federal legislation establishing a new floor of nationwide rights on voting, abortion, LGBTQ issues, and other areas. In practice, that’s proved to be an empty promise.

“A creative Congress that had the political willpower could really do quite a lot to push back against what we are seeing,” Stephen Vladeck, a law professor at the University of Texas at Austin, told me. While not all efforts to legislate a new nationwide floor of rights across these various fronts would succeed because of likely opposition from the Republican majority on the Supreme Court, he said, “a lot of it would.”

The Democratic-controlled House has already passed legislation creating a new nationwide minimum of voting rights, codifying the legal right to abortion now threatened by the Court, and establishing an expanded baseline of LGBTQ civil rights. But all of those measures remain stalled in the Senate amid opposition from Republicans and the refusal of two Democratic senators, Joe Manchin of West Virginia and Kyrsten Sinema of Arizona, to accept changes in the filibuster rule that is allowing Republicans to block them.

That stalemate is raising anxiety among more Democrats, who fear that the party is sleepwalking through an escalating emergency. Most of that unease lies with the Democratic Senate. “It’s like there’s a five-alarm blaze and we don’t have the sense of urgency that we ought to have,” Julian Castro, the former 2020 Democratic presidential candidate and founder of the liberal advocacy group People First Future, told me. “*Especially* among a few folks in Washington, D.C., and I can think of two senators particularly.”

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President Joe Biden isn't immune from the criticism, either. While he has proclaimed his support for voting-rights legislation and the right to abortion, he hasn't stressed those issues or raised alarms at the escalating efforts by former President Donald Trump and his allies to seize control of election administration in multiple states. Instead, Biden has focused his public appearances and legislative attention on the kitchen-table priorities embodied in his COVID-rescue, bipartisan infrastructure, and Build Back Better bills. On questions of these eroding rights, Castro said, "what's been missing is any hard push, the expenditure of real political capital by the administration. He's not demonstrating the urgency that ought to be there."

Those around Biden say he is also deeply alarmed by the trajectory in red states, particularly on voting rights, but he has privately acknowledged that he has deferred focusing on those dangers in hope of completing congressional action on his economic agenda first. With that finish line receding, he and other top administration officials have notably escalated their warnings on voting issues in the past few days. Vice President Kamala Harris, in an interview with CBS, described the domestic threat to democracy as perhaps the greatest national-security challenge facing the country; Biden, more explicitly than ever, similarly told ABC News that he would support creating a carve-out to the filibuster rule to pass voting-rights legislation.

The darkest scenario for Democrats is that even the "great divergence" is just a way station. The conservative Court justices and a possible future Republican government could ultimately hold unified control of the White House and Congress and harmonize these rights again—but in a conservative direction. That risk, though, remains years away; the pulling-apart of the states is happening now, however, and at an accelerating pace.

The movement toward more uniform national rights has hardly proceeded in a straight line, particularly since appointments by Republican presidents have established a conservative Court majority since the 1970s. But the expansion of rights has been the general movement of federal policy since at least the height of the civil-rights era. That trajectory included the landmark civil-rights and voting-rights acts of the mid-1960s; the approval of Title IX barring sex discrimination in higher education; and the Court decisions invalidating state bans on contraception, interracial marriage, and abortion, as well as the Court's rulings establishing the principle of "one person, one vote" in redistricting. "The civil-rights movement underscored the idea that there is a baseline of rights that should be available to everybody in every state," Noah Feldman, a constitutional scholar at Harvard Law School, told me.

Such sweeping expansions of nationally guaranteed rights for new groups became more rare after the 1970s, and reversals became more common (like the conservative uprising that blocked ratification of the Equal Rights Amendment for women, or the spate of state constitutional amendments temporarily banning gay marriage that President George W. Bush promoted in the early 2000s). But the underlying movement toward nationalizing more rights for more groups continued in actions such as the congressional approval of the Americans with Disabilities Act in 1990; the 2015 Supreme Court *Obergefell* decision, legalizing same-sex marriage in every state; and the Court's 2020 *Bostock* ruling, incorporating sexual orientation and sexual preference into federal protections against discrimination on the basis of sex.

[Read: Gay marriage in the U.S., after \*Obergefell v. Hodges\*](#)

These moves, obviously, didn't erase the policy differences among the states on a wide range of issues, from taxes to the environment to access to guns. But they strengthened the floor of civil rights and liberties available in every state. What's happening now is that red-state governments and Republican-appointed federal judges are growing more aggressive about ripping up those floor boards.

The most dramatic example is the threat to the national legal right to abortion. During the recent oral arguments over a Mississippi law that would ban abortion after 15 weeks, five of the GOP-appointed justices signaled that they were open to overturning *Roe*. As Feldman noted, that would be a regression of civil liberties without exact modern precedent. “On abortion, the Supreme Court is changing its interpretation of what the baseline right is,” he said. “That’s a massive, epochal deviation. The Supreme Court has not done anything like this in living memory: It has not rolled back a fundamental constitutional right by saying, ‘We were wrong, that right never existed.’”

If the conservative Court majority overturns *Roe* in the decision expected next June, a huge chasm over access to abortion would immediately open among the states. Twenty-one states already have laws on the books that would automatically ban or severely restrict abortion if the Court allows it, according to the Guttmacher Institute; another five seem likely to quickly follow. As Kristin Ford, vice president for communications and research at NARAL Pro-Choice America, told me, this would mean that “long-held constitutional rights may no longer apply in half of the states, and millions of Americans will have to leave their state to actually exercise their rights in the case of abortion.”

Feldman said he doesn’t see the Court majority poised to roll back “any other rights right now,” although some other legal analysts worry that the conservative justices’ focus on preserving “religious liberty” could sanction unequal treatment in other areas. Whatever the Court does, however, state governments in Republican-controlled states are moving aggressively to pull back rights on other fronts.

The most consequential advance is the widespread adoption of laws in red states, including Florida, Georgia, Texas, Arizona, and Iowa, that have made it more difficult to vote; in several cases, GOP legislatures and governors have also adopted provisions making it easier to challenge the eligibility of voters and increasing partisan control over election administration (such as the Georgia statute allowing GOP-controlled state institutions to seize control of local election boards). One definitive tally says 19 states this year have passed 34 laws making it more difficult to vote. “The big lie is

growing bigger, the threats to democracy are intensifying, and I think American democracy has back-slided,” Jena Griswold, the Democratic secretary of state in Colorado, told me.

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Nine Republican-controlled states have also barred transgender kids from participating in school sports (either through legislation or executive order), and Arkansas has barred young people under the age of 18 from receiving medical treatment for transition. Several red states have also pushed against First Amendment rights, either by stiffening criminal penalties for disruptive public protests or by imposing new limits on how public-school teachers can discuss race relations in their classes. Some 15 states have constrained the discussion of race in classrooms either through legislation or executive-branch action, Jonathan Friedman, the director of free expression and education at PEN America, told me.

Republican governors in Texas and South Carolina have also issued directives this year pressuring districts to remove controversial books in public-school libraries. “The thing that is most comparable to this are the bills passed in the 1920s preventing the teaching of evolution,” Friedman said. “We have not seen a governmental body delineating what you can and cannot say at this explicit level in recent memory.”

Jake Grumbach, a University of Washington political scientist and the author of an upcoming book on the widening polarization of state policy, says the red-state efforts to restrict previously common national rights are intensifying for two reasons. One is that local Republicans are more confident that conservative federal judges will provide them greater leeway to deviate from previously accepted national baselines. The other, he says, is that GOP state legislatures and governors have been more integrated than in the past into the policy agenda and political strategy of the national Republican Party at a time when the GOP has been on what he calls a “radicalizing trajectory.” With national groups such as the American Legislative Exchange Council, Heritage Action, and the National Rifle Association pushing copycat bills through multiple

legislatures, state-level action has become part of “a unified front at all levels of government through the Republican Party,” Grumbach told me.

On paper, he noted, the same opportunity is available to Democrats in blue states. Several, in fact, over recent years have taken steps to expand rights. But Grumbach, like Feldman, believes that the policy divergence among the states “will shift asymmetrically on the conservative side.” That’s because the Supreme Court majority, while likely blessing most of the red-state efforts, might block more initiatives to shape the rights landscape in blue states, like the New York State limits on gun ownership the Court appears poised to strike down in this session. “We are going to have more variety [across the states] with respect to the rights that liberals like,” Feldman said, “and you are going to have less variation with respect to the rights that conservatives want.”

Compounding the frustration among Democrats has been the success of the same axis in stopping several of Biden’s national policies. Republican-appointed federal judges, responding to suits brought by GOP state attorneys general, have imposed nationwide injunctions blocking Biden from changing key aspects of immigration policy and imposing his coronavirus-vaccine mandates on employers, health-care workers, and federal contractors. (Last week, another federal appellate court allowed a vaccine mandate on employers to proceed, setting up a Supreme Court showdown.) Republican state officials have found an especially powerful pathway in combining suits filed by the Texas attorney general before right-leaning federal district-court judges in the state that then advance through the staunchly conservative Fifth Circuit Court of Appeals. “We’re at a point where the Fifth Circuit is where Democratic policies go to die,” Vladeck said.

The repeated refusal of five Republican Supreme Court justices to block the unique Texas law empowering private citizens to bring suits to enforce the state’s six-week ban on abortion is only adding to the anxiety about an erosion of rights in red states. Florida Republican Governor Ron DeSantis has already proposed using the same mechanism to authorize suits against school districts teaching the history of race relations in a manner some parents oppose.



Only limited tools are available to Democrats and civil-rights groups to reverse these trends. Biden's Justice Department has sued Georgia and Texas over their restrictive voting laws and joined litigation brought by others on legal abortion, Texas's bounty system, and the rights of transgender youth. The American Civil Liberties Union and groups representing minority students there are suing Oklahoma in a test case over state restrictions on teaching race-related topics. (The ACLU also sued New Hampshire over a similar statute this week.) But all of those suits face steep odds with the current Court, as could California Governor Gavin Newsom's threat to apply the Texas bounty strategy to enforce his state's ban on assault weapons.

Another force that might reverse this red-state rights regression would be a backlash among local voters. But as Grumbach noted, that's made less likely by the laws restricting access to voting, and even more so by the extreme partisan gerrymanders most of these states have adopted for their state legislatures. "The expansion of gerrymandering and voter suppression enhancing heavily rural, preponderantly white [constituencies] in these states really [does] enable these unpopular extreme restrictions on civil rights and civil liberties, such as the restrictions on abortion rights," he said. The GOP Court majority has played a critical role in this process, too, first in 2013 by effectively eliminating the Justice Department's pre-clearance authority to approve electoral changes (including state legislative and congressional redistricting maps) in many of these states, and then in 2019 by ruling that federal courts cannot intervene to overturn even extreme partisan gerrymanders.

With the courts and local action both unlikely pathways, the principal tool for combating the great divergence remains new federal legislation reaffirming nationwide rights. That possibility has been discussed most often in terms of voting rights and abortion. In March, the House of Representatives passed a bill providing minimum standards of ballot access in every state, including guaranteed early voting, voting by mail, and automatic and same-day voter registration. In August, House Democrats also approved a new version of the Voting Rights Act that restored pre-clearance. Similarly, the House in September approved legislation codifying *Roe*.

But the same opportunity is available to congressional Democrats on other contested fronts. Sarah Warbelow, legal director for the Human Rights Campaign, notes that

the LGBTQ rights act passed last February by the House “would provide a remedy to most if not all of the legislation we are seeing introduced and unfortunately passed in states targeting transgender students.” Congressional Republicans, including Senator Tom Cotton of Arkansas, have already introduced bills limiting how K–12 schools or colleges that receive federal funds can teach issues of racial equity. Democrats could reverse that approach by denying federal funds to states that  *censor* how schools address race. Vladeck suggested that Congress could even push back against the strategy of GOP state attorneys general shopping for sympathetic Republican-appointed federal judges by passing legislation requiring any suit seeking to impose a nationwide injunction on an executive-branch policy begin in the D.C. Circuit.

Few observers discount the possibility that even if Congress passes legislation codifying new rights on any of these fronts, the Supreme Court majority would block some of those laws, too. But the Court would struggle to justify impeding all of them: Congress’s authority to set the rules for congressional elections, for instance, is clearly stated in Article I of the Constitution.

The more immediate obstacle, of course, is that Democrats cannot pass any of these measures unless they agree to eliminate the filibuster, which provides the 50 Republican senators “the power to block” any federal “resistance to what they are doing in the states,” David Axelrod, the former senior White House political adviser to Barack Obama, told me. “We are in a constitutional straitjacket that empowers red-state politicians and Trump to undermine the Constitution.”

Across these many choices, the Senate’s decision on voting rights remains the pivotal one. As negotiations have intensified in recent days, voting-reform advocates are expressing guarded optimism that Manchin will accept some change to the filibuster that would allow the Senate to pass voting-rights legislation, but no one knows whether Sinema would also agree to support it. The schedule for action remains entirely uncertain, especially after the opposition Manchin declared again Sunday to the party’s sweeping budget bill sharpened tensions between him and virtually every other Democrat in Congress.

Failing to pass a federal floor of voting rights would allow red-state Republicans to entrench their control over their own states. But the goal of the restrictions isn't just to solidify Republican control *within* states such as Florida, Georgia, Texas, and Arizona; it's also to tilt enough states toward the GOP to shift the *national* balance of power to the party in both Congress and the Electoral College. The same intent underlies the campaigns launched by Trump acolytes for election-administration positions and the proliferating threats of violence against local election officials. "These GOP efforts on the state level are creating an existential urgency for action on federal voting-rights legislation," Griswold said. "There will be some people saying, 'Oh, states' rights, states' rights.' A state does not have a right to abridge American citizens' constitutional rights ... period. The Senate could act; so could the Department of Justice; so could local prosecutors. The question to me is: Does Washington understand what is happening in the states?"

In some ways, the country faces a turning point much like the critical juncture during Reconstruction. The Fourteenth and Fifteenth Amendments, approved in Congress on party-line votes by the Lincoln-era Republican Party after the war, were meant to create "a basic homogenized citizenship in which there is equal protection of the laws" in every state, Eric Foner, a professor at Columbia University and the country's preeminent historian on Reconstruction, told me. "And there is no longer one set of laws for Black people and one set of laws for white people," he said.

But fierce and violent opposition from white southerners wore down the determination of the Republicans who controlled the federal government to enforce those guarantees. In 1876, in a deal to win southern support during a disputed presidential election, Republican Rutherford B. Hayes agreed to withdraw federal troops from the region, abandoning the freed slaves and effectively returning control of the South to white people. Through the remainder of the 19th century, a conservative Supreme Court performed the mop-up operation, "abrogating most of the substance" of the Fourteenth and Fifteenth Amendments, as Foner put it. That process culminated in the 1896 *Plessy v. Ferguson* decision authorizing "separate but equal" state-sponsored segregation.

States won't split as sharply over the provision of basic rights in the coming years as they did in the decades of Jim Crow segregation. But all signs indicate that the divide could grow much wider than at any time since the 1960s.

The clock is ticking on that outcome. Given the nearly unbroken trend of the president's party losing seats in midterm elections, Democrats face long odds of holding unified control of Congress after 2022. That could make the next 12 months their last opportunity for years to combat the great divergence in rights now gathering momentum. It's not 1876, and Biden isn't Hayes, but if Biden can't persuade Senate Democrats to act, his presidency might be remembered for another fundamental retreat from the ideal of common national rights available to Americans in every state.

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