Session III

Non-Democratic Features of U.S. Democracy

A number of the Constitution's original provisions were anti-democratic by design. Two of these provisions have been eliminated by amendments and a third by changes enacted by the states. Many others remain.

The Three-Fifths Clause [Repealed]

Under Article I, Section 2 of the original Constitution the number of representatives sent by a state to the House of Representatives was "determined by adding to the whole Number of free Persons . . . three fifths of all other Persons." Of course, the "other persons" were slaves, which gave a white voter in a slaveholding state a greater voice in the national government than that of a similarly situated voter in a free state.

The Thirteenth Amendment, by outlawing slavery, removed the category of "other persons" from the Constitution and in addition to eliminating the horrors of the "peculiar institution", it rectified the representational imbalance that had advantaged the Southern states.

Election of Senators by State Legislatures [Repealed]

Madison, the chief architect of the new Constitution, had praised his handiwork for its "total exclusion of the people in their collective capacity from any share in [the government]." One of the aspects of that "exclusion" was Article I, §3, Clauses 1 and 2, under which senators were not directly elected by the voters of the states, but instead were chosen by state legislatures. The Seventeenth Amendment, ratified in 1913, changed this arrangement by providing: "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof. . ." By giving voters the right to elect their Senators directly, the amendment eliminated a Madisonian filter between the people and their government and deepened American democracy.

Two Senators per State Regardless of Population

Article I, Section 3 of the Constitution gives each state two senators, regardless of the number of state inhabitants. Just as the now-defunct three-fifths rule inflated the power of slave-holding states in the House, two senators for each state distorts democracy by giving citizens of a low population states a political voice in the Senate that is proportionately louder than that enjoyed by citizens of high population states.

The Electoral College

Article II, Section 1 of the Constitution provides that each state:

> shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.

This provision gives smaller population states disproportionate strength in the Electoral College. Currently, Wyoming, the least populous state with 586,107 residents, gets three electoral college votes, while California, the most populous state with 39,144,818 residents, gets 55. As a result, the vote of a Wyomingite weighs 3.6 times more in the Electoral College than the vote of a Californian. Beyond the Wyoming / California disparity, which is the most extreme, the average voting power of the residents of the 10 least populous states is 2.5 times higher than the average voting power of the residents of the 10 most populous states. This electoral distortion permits a candidate with fewer popular votes than his or her opponent to be elected president, something that has happened in 1824, 1876, 1888, 2000, and 2016. Disregarding the choice of the majority of voters makes the U.S. method of electing a president glaringly undemocratic.

Another undemocratic aspect of the Electoral College is the unfettered power given to state legislatures to choose electors. The founders' original assumption was that the states would choose distinguished citizens who would use their own personal judgment to select the president. As argued in Federalist Paper No. 68, the electors would be "men most capable of analyzing the qualities adapted to the station, and acting under circumstances favorable to deliberation . . ." In other words, the electors would be people like Madison and Hamilton - - well-educated patricians. The first presidential election in 1789 largely followed the founders' elitist inclinations, with the legislatures in a majority of states choosing presidential electors. But having granted to the states the right to decide how electors would be chosen, the Constitution left the door open for the abandonment of the original patrician preference and the embrace of a more democratic method. By 1832, the legislatures in every state had given the voters the power to choose presidential electors. And as political parties solidified, each party picked a slate of electors loyal to that party and it became standard practice for the voters to choose the entire slate rather than voting for individual electors. Today, the name of the candidate is the decisive factor - - the electors' names are not even listed on the ballot in most states.

But once a slate of presidential electors is chosen by the voters on election day, no constitutional provision or federal law requires individual electors to vote for their party's candidate. This anomaly has created the problem of "unfaithful electors" who vote for candidates other than their party's nominee. The Supreme Court has ruled that the states have the power to make electors pledge they will vote for their party's candidate and, during the 2020 presidential election, the Court decided that states can not only require electors to take the pledge, but can also make them honor their pledge. These Court rulings have not eliminated the problem, however, since only thirty-two states have any sort of faithless elector law and in just fifteen of those states does the law allow for the removal or penalization of faithless electors or the cancellation of their votes. Although the outcome of a presidential election has never been determined by the votes of faithless electors, the events of 2020 have demonstrated that weaknesses

in our electoral system, such as faithless electors, can provide a blueprint for subverting democracy by depriving the legitimate winner of the fruits of victory.

Further, under the system of winner-take-all (also called first-past-the-post), whoever wins the popular vote in a state (with the exception of Maine and Nebraska) wins all that state's electoral votes. Since the Democratic and Republican parties can currently rely on specific states to consistently back their respective candidates, presidential campaigning is increasingly concentrated in a few "swing states" where presidential elections have remained competitive. As a result, the voters in swing states like Michigan, Pennsylvania, and Wisconsin are diligently courted by both parties' candidates while Republican voters in California and New York and Democratic voters in Texas (three of the four most populous states) can safely be ignored on the assumption that the electoral votes of those states will automatically belong to the Democrat or the Republican candidate.

Twelfth Amendment to the Constitution

Amendment XII provides that the electoral votes of the states shall be transmitted to "the President of the Senate" and

> The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted:
>
> The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President.
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> But in choosing the President, the votes shall be taken by states, the representation from each state having one vote.

The Twelfth Amendment in conjunction with the Electoral College creates a number of dangers to democratic government, as illustrated by a presidential election held one hundred and forty-five years ago and one held last year.

Election of 1876

The election of 1876, in which the Democrat Samuel J. Tilden won the popular vote over Republican Rutherford B. Hayes 4,301,000 to 4,036,000, demonstrates the latent danger to democracy created by the Electoral College working in tandem with the Twelfth Amendment. After a first count of the electoral votes in Congress, Tilden had won 184 to Hayes's 165, but neither candidate had a majority since 20 votes from four states were in dispute. In Florida, Louisiana, and South Carolina, both the Democratic and the Republican Parties reported their candidate had won the state, while in Oregon, one elector was replaced after being declared illegal.

Since the Constitution does not spell out how Electoral College disputes are to be resolved, Congress was forced to devise a method to settle the crisis. They did so in a

secret, extra-constitutional deal that awarded 185 electoral votes and the presidency to Republican Hayes in return for a Republican pledge to end Reconstruction and remove the remaining federal troops from the Democratic “Solid South”.

Electoral Count Act of 1887

In response to the election of 1878, Congress passed the Electoral Count Act of 1887, which was intended to place the primary responsibility for resolving election disputes on the states and minimize Congressional involvement. The Act, which is extremely complex and has been criticized as repetitious, ambiguous, and internally contradictory, specifies procedures and deadlines for the states to follow in resolving disputes, certifying results, and sending the results to Congress. If a state follows these "safe harbor" specifications and the state's governor submits one set of electoral votes, this constitutes a "final" determination of the outcome. Accordingly, Congress is relegated to resolving only a narrow class of disputes, e.g., where a governor has certified two different slates of electors or a state has failed to properly certify its results. Under the Twelfth Amendment, the Vice President opens the electoral certificates in his capacity as President of the Senate. In the disputed election of 1878, some Congressmen argued that the Vice President had unlimited discretion to approve or reject a state’s slate of electors, but the Act rejected this position by limiting the Vice President’s role to ceremonially presiding over the counting of votes. However, since the Constitution gives Congress the power to set its own procedural rules, in a future election where the same party is in control of both the Senate and House, Congress could amend or rescind the Electoral Count Act and adopt new rules that advantage that party’s presidential candidate.

Election of 2020

After Trump lost the 2020 election, he claimed massive voter fraud and attempted to overturn the outcome. The president and his allies filed 61 lawsuits aimed at reversing the election results in Arizona, Wisconsin, Michigan, Pennsylvania, and Georgia. When he began consistently losing these legal actions, Trump tried to interfere in pending cases by seeking to intimidate the judges, especially those who were Republican appointees, but this tactic failed as well. After seeing his unsuccessful judicial campaign capped by a loss in the Supreme Court, Trump then tried to intimidate Republican secretaries of state and Republican leaders in state legislatures. The leaders of Michigan and Pennsylvania's state legislatures were summoned to the White House to be bullied and reviled by Trump because they refused to decertify their states' electoral votes for Biden and appoint Trump electors instead.

Having lost in the courts and the state legislatures, Trump shifted his efforts to cancel the election to the U.S. Congress, calling directly on Republican Senators and House members to challenge the election results and threatening those who failed to do so. He then targeted Vice President Pence who, as President of the Senate, would preside over the counting of the electoral votes, asserting that Pence had the power to disallow the electoral votes disputed by Republicans. Although neither the Constitution nor

federal law, nor judicial decisions lent any support to his position, the president kept up the pressure and when Pence refused to buckle, Trump condemned him as a traitor. As a result, the mob that stormed the Capitol on January 6th was looking to lynch the Vice President. Even after the invasion and sacking of the Capitol, with the Vice President and legislators forced to flee to safety, a majority of House Republicans still chose to endorse the president's lies and voted to reject electoral votes from Arizona and Pennsylvania

Comment

As the events of January 6th vividly demonstrated, the Twelfth Amendment operating within the framework of the Electoral College system opened the door for a lawless president and a murderous mob to attempt to overturn the results of the 2020 election. These constitutional vulnerabilities have not gone away - - they continue to pose a serious threat to the rule of law and American democracy.

Election by the House

In a presidential election where no candidate wins a majority of electoral votes (unlikely, but it did happen in 1824), an otherwise inconspicuous anti-democratic defect in the Electoral College / Twelfth Amendment presidential system becomes obvious. In that instance, the election is decided by giving each state, regardless of population, a single vote in the House of Representatives and the candidate with the votes of a majority of states wins. If the Electoral College gives low population states a disproportionately loud voice, the Twelfth Amendment can make that voice deafening.

Much of the Electoral Count Act is ambiguous and open to dispute, and its application by the courts, e.g., in the 2000 election, has been highly controversial. So, if a state's electoral votes are disputed, the Act is of limited assistance and there is no constitutional mechanism for deciding which of the competing ballots should be counted. Had Trump had been more successful in intimidating state officials in Arizona, Wisconsin, Michigan, Pennsylvania, or Georgia, an outright Trump victory in the Electoral College might have resulted. Or, if the disputed votes were not counted and neither Trump nor Biden could claim a majority of electoral votes, the election would have been decided in the House where, again, Trump would have won, since the number of states with a majority of Republican representatives outnumbered those with a majority of Democratic representatives.

Comment

After the 2020 election, many Republican-controlled states enacted laws intended to discourage voting (see comment on page 12 below). However, a more sinister threat to democracy may be posed by new state laws governing the counting and auditing of votes, the certification of electors, and the granting of authority to governors or legislatures to disregard the popular vote. Not only are non-Trump Republicans being purged from the state offices that supervise elections and Trump zealots installed in their place, but more than 200 bills modifying state election rules have been introduced

in 2021, with 24 of them having already become law. Whether or not Trump runs again, these new voting and vote counting rules, coupled with the disastrous Trump precedent of refusing to concede, will likely create bitter post-election contention in 2024, prolonging uncertainty about the election outcome and further damaging our democracy.

"Fixing" the Electoral College Problem

Polls show that 55% percent of voters want the President to be the winner of the popular vote, so the most straightforward remedy would appear to be a constitutional amendment eliminating the Electoral College, revising the Twelfth Amendment, and initiating an election system where the nationwide popular vote determines the winner. While such a change would undoubtedly be criticized across the political spectrum as destructive of our federal system, the most substantial opposition would likely come from low population states, which would see elimination of the Electoral College as harmful to their interests. Since two-thirds of each house of Congress and three-fourths of the states would have to ratify such an amendment and low-population states are likely to oppose it, another method of allowing the popular vote to determine the winning presidential candidate has been proposed.

The National Popular Vote Interstate Compact (NPVIC)

NPVIC is an agreement among a group of U.S. states and the District of Columbia to award all their electoral votes to whichever presidential candidate wins the overall popular vote in the 50 states and the District of Columbia. The compact is designed to ensure that the candidate who receives the most votes nationwide is elected president, and it would come into effect only when it would guarantee that outcome. As of May 2021, it has been adopted by fifteen states and the District of Columbia, which represent 196 electoral votes or 72.6% of the 270 votes needed to give the compact legal force. Aside from the practical problem of convincing enough states to join the compact, NPVIC has been challenged on both legal and philosophical grounds. As a compact between states, it arguably would have to be approved by Congress under Section 10 of Article I of the Constitution. And if Congressional approval were needed, lining up a filibuster-proof 60 votes in the Senate would be exceedingly difficult, since the NPVIC would be just as objectionable to low-population states as an amendment abolishing the Electoral College.

In addition, the NPVIC would not eliminate the defects in the "first past the post" system of deciding elections. Instead, it would merely transfer that system from each state to the nation as a whole. So, although NPVIC is intended to reflect the will of the American people more accurately, by disregarding the voters' choice in many states, the agreement could result in a great many people casting "wasted ballots". For example, if Californians overwhelmingly voted in favor of the Democratic candidate, but the winner of the nationwide popular vote was the Republican candidate, all of California's electoral votes would be cast for the Republican, totally neutralizing the choice made by the vast majority of California's voters. The proponents of NPVIC feel that disregarding electoral

results within a state is a small price to pay for securing the president's election by the national popular vote. But voter identification with the state where they live remains a significant factor and, in several states, it is a potent deterrent to the compact being adopting.

One alternative to "winner-take-all" is proportional voting. Maine and Nebraska have already gone a short distance down this path with the way they allocate electoral votes in presidential elections. Each of these states has four electoral votes and each assign two to the candidate who gets the most votes in the state as a whole and one vote to the candidate who is the winner in each of their congressional districts. Another proposal is to distribute the electoral votes by the percentage of the vote each candidate receives statewide. But because every state has two senators and a minimum of one representative regardless of size, apportioning electoral votes by either method still would not result in every voter's ballot having an equal weight. And according to opponents of apportionment, it would not stop most campaigning being carried out in "swing states" or eliminate the possibility of victory by the candidate with fewer popular votes. Further, apportioning electoral votes on a national scale would create much closer vote counts in the Electoral College making post-election challenges more likely.

Filibuster

The filibuster, which allows a minority of Senators to block legislation supported by the majority, is not part of the Constitution. Instead it is a creation of the Senate, currently incorporated into Rule 22 of the Senate Standing Rules. A creature of inadvertence, the filibuster was made possible by an 1806 reform intended merely to declutter the Senate rulebook but which unintentionally eliminated the rule allowing debate to be cut off by a simple majority. By removing the means to end debate, the change created the opportunity for opponents of legislation who did not have sufficient votes to reject it, to simply "talk it to death" by speaking endlessly and preventing the Senate from attending to its other business. A vote to end debate, called "cloture", was theoretically available, but since such a vote required unanimity, it was impossible to achieve in practice.

Rarely used before the Civil War and seldom in the post-war period, the filibuster came into its own in the Twentieth and Twenty-First Centuries, initially in response to the Civil Rights Movement when it became the most common tool wielded by white supremacist southern Senators to oppose Civil Rights legislation, including anti-lynching laws and the Civil Rights Act of 1957.

Historically the filibuster worked by stopping the Senate from moving on to other legislative matters. But in 1970, the Senate put a "two-track system" into place that allows the majority leader - - with unanimous consent or the agreement of the minority leader - - to have more than one main motion pending on the floor as unfinished business. Under this system, the Senate can have two or more pieces of legislation or nominations pending on the floor simultaneously by designating specific periods during the day when each one will be considered. By no longer bringing Senate business to a complete halt, it became politically easier for the minority to sustain filibusters on particular motions.

In 1975, the Senate revised its cloture rule so that three-fifths of sworn senators (60 votes out of 100) could limit debate. However, by returning to an absolute number of all Senators (60) rather than a proportion of those present and voting, the change also made filibusters easier to sustain on the floor by a small number of senators from the minority party without requiring the presence of their minority colleagues. This further reduced the majority's ability to end debate.

The elimination or permanent modification of the filibuster would necessitate an amendment to Senate Rule 22, requiring two-thirds of those senators present and voting in favor of the amendment (i.e., 67 Senators). Nevertheless, a simple majority of senators can limit the applicability of the filibuster and the removal or substantial limitation of the filibuster by a simple majority, rather than by a rule change. This has been termed “the nuclear option.” In 2013, the then-Democratic-controlled Senate exercised the nuclear option to require only a majority vote to end a filibuster of all executive and judicial nominees, excluding Supreme Court nominees. In 2017, the Republican-controlled Senate returned the favor, voting to require only a majority vote to end a filibuster of Supreme Court nominees.

Over time, the filibuster, once a rare and difficult to execute parliamentary maneuver, has become standard Senate practice. A supermajority is now needed to pass any legislation, with no practical requirement that the minority party actually hold the floor or extend debate. The filibuster has been defended as encouraging bipartisanship, although there is scant historical evidence that it does so and in the current state of scorched-earth politics its ability to foster bipartisanship looks negligible. Another justification for the filibuster is that it protects the rights of the minority. However, in the Senate where Senatorial terms extend for six years and low-population states already have an outsized voice, the minority scarcely needs the filibuster to protect its interests. More important, as Madison argued, the essential element in a representative democracy is allowing the majority to rule, not protecting the minority:

> It has been said that more than a majority ought to have been required for a quorum; and in particular cases, if not in all, more than a majority of a quorum for a decision. That some advantages might have resulted from such a precaution, cannot be denied. It might have been an additional shield to some particular interests, and another obstacle generally to hasty and partial measures. But these considerations are outweighed by the inconveniences in the opposite scale. In all cases where justice or the general good might require new laws to be passed, or active measures to be pursued, the fundamental principle of free government would be reversed. It would be no longer the majority that would rule: the power would be transferred to the minority. Were the defensive privilege limited to particular cases, an interested minority might take advantage of it to screen themselves from equitable sacrifices to the general weal, or, in particular emergencies, to extort unreasonable indulgences. F*ederalist Paper No. 58*

And Hamilton was of the same mind:

> What at first sight may seem a remedy, is, in reality, a poison. To give a minority a negative upon the majority (which is always the case where more than a majority is requisite to a decision), is, in its tendency, to subject the sense of the

> greater number to that of the lesser.… Hence, tedious delays; continual negotiation and intrigue; contemptible compromises of the public good. *Federalist Paper No. 22*

Comment

The filibuster gives the minority party in the Senate the ability to thwart the will of the majority and has been used by both the Democrats and the Republicans whenever they are in the minority position. And because the filibuster alternately benefits both parties, neither party has sufficient appetite to eliminate it, despite its profoundly anti-democratic nature. Leery of disturbing the status quo, today's politicians continue to ignore the cautionary words of the Founders and the United States remains the only major democracy where ordinary legislation requires a super-majority to be enacted.

Gerrymandering

Historical Background

Gerrymandering - - drawing the maps of electoral districts to favor a particular segment of a state's population or a particular political party - - has been part of American politics since the nation's earliest days. The name itself is derived from Elbridge Gerry, a Democratic Republican governor of Massachusetts, who in 1812 approved a new map with a district so oddly shaped that the opposition Federalists claimed it looked like a salamander and attacked it as a "Gerrymander". Until the landmark decision of *Baker v Carr* (1962), the Supreme Court had ruled that any lawsuit challenging a redistricting plan raised a "political question", which was beyond the Court's power to decide. After *Baker v. Carr,* the Court permitted challenges to electoral maps in which districts contained substantially unequal numbers of voters (residential gerrymandering), as well as challenges to maps that effectuated racial discrimination (racial gerrymandering). In 2019, the Court decided that politically based gerrymandering was not unconstitutional.

The Supreme Court's decision in *Rucho v. Common Cause (2019,* dealt with two cases, one in which plaintiffs challenged partisan political gerrymandering favoring the Republican Party in North Carolina and the other *Lamone v. Benisek,* in which plaintiffs challenged partisan political gerrymandering favoring the Democratic Party in Maryland.

In recent history, North Carolina has had a nearly equal number of Republican and Democratic voters and the two political parties, backed by wealthy donors on both sides, have repeatedly used partisan gerrymandering in their fight to control the state. Prior to 2011, seven of the state's thirteen districts favored Democrats, the rest Republicans. A court challenge led to the map being revised in 2016, at which time Republicans controlled the legislature and Republican State Representative Lewis was quoted as saying "I propose that we draw the maps to give a partisan advantage to 10 Republicans and three Democrats, because I do not believe it's possible to draw a map with 11 Republicans and two Democrats."

In Maryland, the Democratic party has been predominant for a long time and a map drawn without partisan gerrymandering would likely result in four to six Democratic

districts out of eight, and two to four either favoring Republicans or remaining competitive. In 2011, when the Democrats controlled six districts, they redrew the map to "flip" Maryland's 6th district, which historically favored Republicans so that Democrats would control that district and seven of eight districts statewide. In each state, there was no question but that the district maps were intentionally redrawn to provide the dominant political party with an even more unassailable electoral advantage.

Decision

In a 5-4 decision, the Court ruled that, despite partisan political gerrymandering being "incompatible with democratic principles", the Court was powerless to intervene because the issue before it was a non-justiciable "political question". The Court based its conclusion on the following: a) it could not articulate a workable legal standard to apply in determining at what point a redistricting became an impermissible gerrymander; b) it could not involve itself in speculation about what "fair" redistricting would look like; c) it found that the methods of determining an impermissible political gerrymander used by the lower courts were mere predictions which the courts had no expertise in making.

Acknowledging that partisan political gerrymandering, where "the representatives choose their voters rather than where the voters choose their representatives" is incompatible with democratic principles, the Majority took comfort in the fact that this type of gerrymandering has been around since the founding of the republic, that it was within Congress's power to pass remedial legislation if they chose to do so, and that voters could initiate reforms, if they chose to do so. Although a number of the Court's decisions since 2000 had disallowed claims based on partisan political gerrymandering, the Court had always held open the possibility, especially in Justice Kennedy's concurrences, that a workable way to determine whether a particular map embodied a constitutionally impermissible gerrymander could be found. With Kennedy having been replaced by Justice Kavanaugh, the Rucho Court was able to slam the door shut on that possibility.

Dissent

Justice Kagan's dissent argued that the vast amount of demographic data and its level of detail as well as the advanced computer analytics being used by the parties to draw maps that disadvantaged the other side could be turned around and used to determine when the dilution of the disadvantaged party's votes was so extreme as to be violative of the First and Fourteenth Amendments. She found that a method of determining whether extreme partisan gerrymandering exists - - running various redistricting scenarios using the state's own districting criteria - - e.g., contiguity of districts, geographic features, density of voting populations, etc. - - without any partisan manipulation. Once that was done, those outcomes could be compared with the redistricting the legislature had actually implemented. The farther the divergence, the greater the dilution and the greater the likelihood that the partisan political gerrymandering was unconstitutional. The Majority's suggestion that state and federal legislators could reduce or eliminate partisan gerrymandering was dismissed by Kagan as unrealistic since, as incumbents, they benefit from the status quo and could not

reasonably be expected to vote against their interests. Likewise, voters in fewer than half the states have the ability to initiate reforms of the redistricting process. And even where voter initiatives succeed, their impact is often negated by legislatures jealous of their own power. In short, allowing the political parties to entrench themselves through gerrymandering is not only undemocratic in itself, but it effectively forecloses reform of the system by disenfranchising the majority.

Civil Death

Twenty-seven U.S. states deny voting rights to felony probationers, and 30 states disenfranchise people on parole. In the most extreme cases, 11 states continue to deny voting rights to some or all of the individuals who have successfully fulfilled their prison, parole, or probation sentences.

Voter Suppression: Evisceration of the Voting Rights Act of 1965

During the Civil Rights Revolution of the 1960s, legal actions to enforce the voting rights of Black citizens in the South enjoyed some success in stopping specific discriminatory practices in specific locations. However, the white supremacists in power were ever creative in implementing new ways of preventing Blacks from voting and, since lawsuits to vindicate minority rights were time consuming and injunctions issued by the courts limited in scope, remedying race-based wrongs became a game of whack-a-mole, where justice was continually a day late and a dollar short.

To address this problem, Section 5 of the Voting Rights Act of 1965 (VRA) instituted a system of preclearance that prohibited covered jurisdictions from implementing changes to their voting procedures without, first, submitting the proposed changes to the U.S. Attorney General (or the U.S. District Court for the District of Columbia) and, second, receiving approval based on a finding that the changes were not discriminatory. The original preclearance states - - Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and most of North Carolina - - had rebelled against the United States in the Civil War to protect the institution of slavery and had a long and continuing history of anti-Black suppression and violence.

Shelby County v. Holder (2013)

In this case, the Supreme Court's ruled, in essence, that Section 5 of the VRA had worked so well that it was no longer needed. Therefore, the Court concluded, continuing the preclearance process for the designated states violated the principle of "equal sovereignty" (all the states should be afforded equal treatment), which made the VRA unconstitutional. The Court accepted the plaintiff's argument that, since Black and white voter registration rates in the preclearance jurisdictions approached parity, blatantly discriminatory evasions of federal decrees were rare, and minority candidates held office at record levels, the problem of racially motivated voter discrimination had been solved.

The dissent pointed out the obvious - - that the progress in minority voting and office that the majority relied on was the result of the VRA and could be maintained and continued only if VRA preclearance continued to exist. As Justice Ginsburg memorably put it, throwing out preclearance was like “throwing away your umbrella in a rainstorm because you are not getting wet.” Although the majority asserted that preclearance coverage was based “on decades old data and eradicated practices”, the dissent cited the Congressional record compiled before the VRA was overwhelmingly reauthorized in 2006, which demonstrated that between 1982 and 2006: a) there were more DOJ preclearance objections than between 1965 and 1982; b) the DOJ blocked 700 voting changes found to be discriminatory; c) private plaintiffs brought over 100 successful lawsuits to enforce preclearance; d) more than 800 proposed changes were altered or withdrawn without the need for formal DOJ rejection; and e) 56% of successful VRA enforcement actions took place in the covered jurisdictions, although they account for only 25% of the country’s population.

Although white supremacists no longer used such Jim Crow tactics as literacy tests, the Congressional record showed a number of “second generation” discriminatory techniques had been invented to suppress minority voting. These new practices included: creating at-large city or county districts to negate minority voting, canceling elections, postponing elections, purging voter registries, and restricting early voting. The Majority dismissed concerns about such “second generation barriers”, asserting they “are not impediments to the casting of ballots” but merely, “electoral arrangements that affect the weight of minority votes.” But the record cited by the dissent, describing a 2010 federal criminal proceeding in Alabama (home of Shelby County), demonstrated that the reality on the ground was more threatening to Black voters than the Court was willing to acknowledge. In that case, the State Senators who were defendants referred to African Americans as “aborigines” and conspired to keep a referendum off the ballot for fear that its presence would increase Black turnout and “every black, every illiterate would be bused to the polls.” Faced with this record, the District Judge observed:

> To some extent, things have changed in the South. Certain things, however, remain stubbornly the same. In an era when the "degree of racially polarized voting in the South is increasing, not decreasing," Alabama remains vulnerable to politicians setting an agenda that exploits racial differences.

Comment

The District Court’s opinion more accurately describes the continuing potency of racial animus in the United States than anything contained in the opinion of the *Shelby* majority and Mississippian William Faulkner’s profound insight still pertains: “The past is never dead. It’s not even past.” *Shelby* judicially repealed Section 5 of the VRA, which had been called “the crown jewel of the Civil Rights Revolution” and, in doing so, seriously eroded the foundational element of American democracy - - the right of the people to have free and equal access to the polls. But just as disturbing as the Supreme Court’s opinion is their refusal to acknowledge that white supremacy did not expire in the 1960s and, in fact, was alive and very active at the time of their decision in 2013.

Since then, unfortunately, it appears to have grown even more powerful. Chief Justice Roberts and his colleagues could hardly have been unaware of what would happen after they judicially repealed the VRA, all of which was clearly predictable from the facts recited in Justice Ginsburg's dissent. Although pure Jim Crow practices like literacy tests have not been resurrected, polling places have been moved out of minority neighborhoods, voter registries have been purged, voting by mail has been restricted, early voting has been restricted or eliminated, and voter ID laws have been enacted - - practices that would not have survived preclearance under the VRA. And as of May 14, 2021, fourteen states had enacted twenty-two laws restricting voting and in eighteen other states restrictive laws have made substantial progress in their legislatures. Republicans have introduced virtually all the vote-restricting bills.

Brnovich v. Democratic National Committee (2021)

Eight years after *Shelby County* effectively excised Section 5 preclearance from the VRA, leaving individual lawsuits under Section 2 as only means to attack discriminatory voting rules, the Supreme Court's decision in *Brnovich* dealt a disabling blow to that provision. The plaintiff in the case, the Democratic National Committee (DNC), had challenged two Arizona laws: the first, on the books since 1970, threw out votes cast outside the voter's assigned voting precinct; and the second, passed after the ruling in *Holder*, made "ballot collection" a felony offense, unless the collecting was done by the specific categories of people named in the law. The DNC sued under Section 2, claiming that both laws had an adverse and disparate effect on Native American, Hispanic, and African American citizens.

The Majority

The Court ruled 6-3 against the DNC, finding that the burden imposed by the two laws was "modest", especially considering the multiple ways Arizona provides for casting a ballot: a) voting early by mail or by depositing your ballot in a ballot drop box or by delivering your ballot to an election official; b) voting early in person in an early voting center; c) voting in person on election day. Although the law requiring the discarding of out-of-precinct ballots resulted in the disallowance of 1% of the votes of Hispanics, African Americans, and Native Americans, but only .5% of the ballots of non-minority voters, the Court concluded that, since the size of the burden was a critical factor, a .5% discrepancy wasn't sufficient to demonstrate a disproportionate burden on the named minorities. Concerning the new law criminalizing ballot collection, the Court, noting that ballots could still be legally collected by a) postal workers; b) election officials; c) voters' caregivers; d) voters' family members; and e) voters' household members, found the DNC had not showed the law disproportionately burdened minorities. The Court then went on to state that even if such a disproportionate burden had been proved, Arizona's "compelling interest" in preventing voter fraud would preclude liability under Section 2.

In rejecting the DNC's claims, the Court made a number of observations about voting in general and the VRA in particular, including the following: all voting requires some inconvenience; preventing voting fraud is a critical state interest; the degree a voting

rule departs from what was standard practice when Section 2 was last amended in 1982 is a relevant consideration; and the disparate impact model employed by Title VII and Fair Housing Act is not useful, since employing it under Section 2 would effectively transfer to the federal courts the states' authority to set voting rules.

The Dissent

Justice Kagan argued that until *Brnovich* the Court had judged whether a voting rule with a discriminatory impact was legal by asking whether there was a less discriminatory way to achieving the state's legitimate purpose. But the Majority had now rejected that standard and substituted one which does not appear in the text of the VRA - - whether a rule imposes "unusual burdens" on voting. And another rule recently minted by the Majority asks only whether a discriminatory law "reasonably pursues important state interests", a standard so easily satisfied that it opens the door to voter suppression. Further, the Majority's concern about transferring power over voting from state officials to the federal courts is misplaced - - the VRA and 15th Amendment were intended to do just that. Neither the voting rules that pertained in 1982 nor the "long pedigree" of a voting rule should be a "relevant consideration" in assessing a voting rule's legality under Section 2.

Kagan observed that textually neutral "inconveniences" have historically been used as a pretext to suppress minority voting and the Court should have closely examined the particular circumstances of the case. For example, with respect to vote-collecting a) only 18% of Native Americans in rural areas receive home mail delivery (vs. 86% of rural white voters) and many Native Americans have to travel hours to get to nearest mailbox or Post Office; b) substantial numbers of Native Americans lack a mailing address; c) historically clan members served as ballot collectors, but they're disqualified under the new law; d) a version of the anti-collection law that had been proposed earlier was withdrawn when it didn't pass muster under Section 5, but after *Holder*, Arizona enacted a new, stricter version; and e) no case of fraud in ballot collection has ever been reported.

And with respect to out-of-precinct voting a) Arizona moves polling places around more than any other state; b) voters whose polling places have been moved were much more likely to vote in the wrong precinct; c) Native American, Hispanic, and African American voters cast more out-of-precinct ballots than non-minority voters; and d) Biden won Arizona by 10,457 votes, which is fewer than the number of ballots discarded under the out-of-precinct law in two of three preceding presidential elections

Comment:

The voting restrictions challenged in *Brnovitch* were far from draconian, which may explain why the Biden Administration in a letter to the Supreme Court in February 2021, essentially agreed with the Trump Administration that the Arizona laws did not violate Section 2.

What is troubling is not so much the fate of the two Arizona laws, but the Court's off-hand, almost dismissive, attitude toward the foundational right of American democracy -- voting. Justice Alito, after reiterating that, like almost all human activities, voting involves some inconvenience, ruled that "mere inconvenience cannot be enough to demonstrate a violation of Section 2." He then went on to weaken the standards used to determine when a voting rule has gone beyond inconvenience to illegality by, for example, referring to state voting laws as they existed in 1982 as a kind of baseline for determining current illegality. Making the constricted approach to voting that was prevalent forty years ago a relevant standard for what is or is not permissible today is bound to incentivize the enactment of laws that discourage voting by restricting or eliminating practices that did not exist in 1982, such as ballot-by-mail, early voting, the use of voting drop boxes, etc.,

Alito's downplaying the importance of voting and voting rights is epitomized by his comparing voters who find it hard to vote, or have had their ballots discarded, to urban museum goers who fail to see an exhibit "open to everyone free of charge every day of the week for several months" due to difficulty parking, crowds, or other everyday inconveniences. The Court's analogy not only trivializes the actual difficulties encountered by minority voters in Arizona, but it also trivializes the suffrage itself by treating voting or not voting as no more consequential than missing or not missing a museum exhibit.

The Unrestricted Influence of Money on Elections

In *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), the Supreme Court ruled 5-4 that the longstanding prohibition on independent expenditures by corporations violated the First Amendment. ("Independent expenditures" are those presumably not made directly to or coordinated with a candidate's election campaign.) With its decision, the court allowed corporations, including nonprofits, and labor unions to spend unlimited sums to support or oppose political candidates. The majority concluded that political spending from independent actors, even from powerful corporations, was not a corrupting influence on those in office.

The decade that followed *Citizen United* was by far the most expensive in the history of U.S. elections. Independent groups spent billions to influence crucial races, supplanting political parties and morphing into extensions of candidate campaigns. Wealthy donors flexed their strengthened political muscle by injecting unprecedented sums into elections. And transparency eroded as "dark money" groups, keeping their sources of funding secret, emerged as political powerhouses. In July 2021, the Supreme Court's decision in *Americans for Prosperity Foundation v. Bonta*, struck down on First Amendment grounds a California law requiring the disclosure of donors. The plaintiff in the case was a foundation founded by the Koch Brothers and the ruling will make it

even harder to track the source on political contributions, enlarging the role of dark money.

Comment

Although *Citizens United* has received a great deal of well-deserved criticism, the constitutional groundwork for the decision was laid years before in *Buckley v. Valeo* (1976) where the Court held that limiting independent expenditures by individuals unconstitutionally abridged freedom of speech under the First Amendment. By striking down restrictions on corporate spending intended to influence the outcome of elections of candidates, *Citizens United* extended and reinforced the judicial dogma that, for First Amendment purposes, money equals speech. This equation dramatically increased the already vast power of the rich to induce the government to adopt policies that favor them. In this regard, Richard Posner, a libertarian member of Milton Friedman's free-market Chicago School of economics and until recently a federal appeals court judge, poured scorn on the *Citizens United* decision, viewing it as a declaration by the Supreme Court that: "There's no such thing as spending too much money to support a political candidate, because your money is actually speech. That's all nonsense." Nonsense, Posner went on to say, that turned members of Congress into "slaves to donors. They own you. That's the real corruption, the ownership of Congress by the rich."

The "evidence-free" conclusion of the *Citizens United* court that giving individuals and corporations free reign to spend on political candidates will not create the appearance of corruption or cause the average voter to become disaffected with the democratic political process is fatuously at odds with experience and common sense.