Internship Application – Bipartisan Policy Center

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Abstract

Voting rights in the United States have a long, complicated history that is still unfolding today. At the center of the debate is the balance of federalism and what is considered a "states' right". Today, the debate has taken center-stage as millions of mostly minority voters are being effectively disenfranchised and big-money donors wield unprecedented control over elections. In this memo, I discuss the history of voting in the United States with emphasis on landmark Supreme Court cases then I recommend the Bipartisan Policy Center to lobby for two constitutional amendments to ensure access to vote and to limit money in politics.

Voting in the Constitution

In the modern United States, voting is seen as an unalienable right. However, many Americans may be surprised to learn voting rights are not mentioned once in the Constitution nor the Bill of Rights.[1] The decision to exclude the right to vote from our founding documents was a conscious one. Knowing voting rights to be sensitive subject, they chose to ignore the topic as much as possible, spending only 1% of their time on voting at the Constitutional Convention.[2] Oliver Ellsworth of Connecticut said, "The people will not readily subscribe to the Natl. Constitution, if it should subject them to be disfranchised."[3] The goal was to gain ratification of the Constitution, and in doing so, the new Republic left voting rights entirely in the hands of the states.

It was not until the passage of the Fourteenth and Fifteenth Amendments that the right to vote entered the Constitution guaranteeing the franchise to all men equally. This was further expanded in the Nineteenth (enfranchising women), Twenty-fourth (eliminating poll taxes), and Twenty-sixth (enfranchising all above the age of 18) Amendments. These amendments were necessary due to the siege on voting access driven by state legislatures and upheld by the Supreme Court.

Supreme Court Decisions

Shelby County v. Holder

In 1965, at the height of the Civil Rights movement, activists won a major legislative victory with the passage of the Voting Rights Act (VRA). The VRA enforces voting rights gained in the

Fourteenth and Fifteenth Amendments by regulating elections.[4;5] Two sections of note are Section 4b and Section 5 which defined a "coverage formula" used to determine which states (mostly former Confederate states) would be subject to gaining "preclearance" from the Department of Justice prior to changing election laws.[6]

In 2013, a landmark case, *Shelby County v. Holder*, brought a challenge to the preclearance requirement to the Supreme Court. Shelby County, Alabama charged the preclearance process was an undue burden in that it was not uniform across the states. Furthermore, they argued, Section 5 of the VRA stripped states of their constitutional right to regulate elections without federal interference.[7] The Supreme Court agreed. Chief Justice John Roberts wrote in the majority opinion the South had progressed since the Jim Crow days and the preclearance requirement was no longer necessary. Additionally, he argued Section 5 violated states' sovereignty as guaranteed by the federalist structure of the Constitution. Voting rights are a states' issue, he argued.[8]

The impact of *Shelby County* cannot be understated. The Supreme Court granted the states the power to regulate voting rights. The states have responded by restricting voting access and disenfranchising their voters, particularly voters of color. The day after the Court revealed its decision, Texas announced a voter ID requirement that had been previously blocked by preclearance. Similar laws shortly went into effect in Alabama, Mississippi, and North Carolina.[9] Pew found nearly 1,000 polling places closed in the five years following *Shelby County*, predominantly in southern Black communities.[10] This effect has continued to today with the Brennan Center for Justice estimating 361 bills in 47 states restricting voting access have been introduced to state legislatures in 2021.[11]

Buckley v. Valeo

Arguably, the first campaign finance reform law in the United States was passed by the colonial Virginia legislature in 1757 in response to candidate George Washington's purchase of $195 of food and drinks for friends before an election.[12] This aversion to money in politics persisted over the next few centuries, especially picking up steam in the Progressive era with laws such as the Tillman Act, the Smith-Connally Act, and the Taft-Hartley Act which banned unions and corporations from making nearly any type of political contribution.[13]

These efforts culminated in 1971 in the Federal Election Campaign Act (FECA). The FECA, and its 1974 set of amendments, laid the groundwork for modern campaign finance. The FECA delineated between two types of political spending: expenditures, money an individual spends to political ends, and contributions, money an individual gives directly to a campaign, and placed severe restrictions on both.[14]

Shortly after the passage of the FECA amendments, Senator James Buckley denounced the law and named it "the Incumbent Protection Act of 1974" arguing incumbents benefit from campaign finance restrictions as they carry more name recognition than challengers.[15] He challenged the law in the Supreme Court case *Buckley v. Valeo* arguing the First Amendment guarantee of free speech includes political spending. The Court agreed arguing unlimited political expenditures were constitutional given the spending party does not coordinate their spending with the candidate in a corrupt *quid pro quo* exchange for political favors.[16] This opinion opened the door for unlimited political spending given the spending party does not expressly encourage the public to vote for or against a candidate.[17]

Citizens United v. FEC

While *Buckley v. Valeo* opened the door for political campaigns to spend as much money as they please, it upheld one important part of the FECA: the restrictions on political contributions. Yale Law Professor Heather Gerken described the impact of the decision like so, "the Supreme Court created a world in which politicians' appetite for money would be limitless but their ability to get it would not."[18] This restriction, too, came down in another landmark Supreme Court case, *Citizens United v. FEC*.

In 2008, Citizens United, a conservative non-profit, accepted money from for-profit enterprises to create a film, *Hillary*, which depicted presidential candidate Hillary Clinton in a negative light immediately before the Democratic primaries.[19] The FEC charged the film violated the Bipartisan Campaign Reform Act which prohibited "electioneering communication" within 30 days of a primary.[20] What was originally slated to be a relatively minor case was expanded to a much larger question of free speech by the Court. In the majority opinion, Justice Anthony Kennedy argued "The First Amendment prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech. [This rule does not change] simply because the speaker is an association that has taken on the corporate form."[21]

Since *Citizens United*, campaign spending from politically active nonprofits exploded from under $5.2 million in 2006 to over $14 billion in 2020.[22;23] Former President Obama publicly criticized the *Citizens United* decision in his 2010 State of the Union address but then went on to receive over $65 million from the Super PAC Priorities USA Action during his 2012 reelection bid.[24] Furthermore, big donors are not representative of the American populace. In the 2016 presidential election, 91% of donors were white and millionaires accounted for 42% of money raised by Clinton and 27% by Trump.[25] Daniel Weiner, an attorney at the Brennan Center summarized it as, "[*Citizens* United] has helped reinforce the growing sense that our democracy primarily serves the interests of the wealthy few, and that democratic participation for the vast majority of citizens is of relatively little value."[26]

Recommendations

The United States is facing a crisis. Voting rights for minority groups are under siege and the influence of large donors is eliminating the diverse voices of the electorate. Due to the restrictive actions taken by state legislatures and the willingness of the Supreme Court to uphold said actions under the protection of federalism, I propose Congress to begin the process to add two amendments to the Constitution to address campaign finance and voting rights. Constitutional amendments are the strongest tool the federal government and the American people have to correct the mistakes made by states and the Supreme Court.

Campaign Finance Amendment (Twenty-eigth Amendment)

The first proposed amendment would curb the corrupting influence of unlimited money in politics by giving Congress the authority to widely regulate campaign finance.[27] This would give Congress the legal framework necessary to investigate and eliminate corruption in politics, not only the explicit *quid pro quo* corruption that is illegal under today's law.[28] This proposed amendment is not without precedent. The organization American Promise has proposed this very amendment and is lobbying for its ratification.[29] American Promise claims to have bipartisan support for the proposal with 75% of Americans in support in addition to 220 House Representatives and 47 members of the Senate.[30] By arming Congress with the ability to regulate campaign finance, all voices will have a platform to speak, not only the wealthiest.

Voting Rights Amendment (Twenty-ninth Amendment)

The second proposed amendment would guarantee the right to vote by giving the FEC the power to regulate voting laws in all 50 states. This would expand upon the Fifteenth, Nineteenth, Twenty-fourth, and Twenty-sixth Amendments in ensuring all Americans have access to voting. The proposed amendment redefines voting as a federal issue, keeping the states accountable in their voting practices. A bill currently in Congress, H.R. 1 or the For the People Act, is similar to this proposal. It lays out many voting protections and gives the federal government the power to enforce them. H.R. 1 enjoys broad support as well with 56% of Republicans and 77% of Democrats in support of the bill.[31] This amendment would follow in the footsteps of previous voting rights amendments by removing the power to disenfranchise from the states and upholding the right to vote in the Constitution.

I urge the Bipartisan Policy Center to act and lobby for the passage of these two commonsense amendments in Congress and their ratification by state governments. Enshrining these rights in the Constitution is the only way to protect future voters from discrimination and corruption in politics.

Conclusion

Voting and elections in the United States are facing new, but not unprecedented challenges. State legislatures, Congress, and the Supreme Court are permitting and protecting voting restrictions and unlimited campaign spending under federalist protections. Voting rights have been altered before, namely by the passage of many amendments to the constitution. Further amendments are necessary to protect the franchise in our country's most vulnerable populations. These proposed amendments, like the voting amendments that came before them, enjoy widespread, bipartisan public support. The Bipartisan Policy Center and other lobbying organizations can do their part to protect one of our nation's most fundamental rights by working to get these amendments passed by Congress and ratified by the states.

Notes

[1] Lichtman, Allan J. "The Embattled Vote in America," n.d., 90.
[2] Ibid

[3] Max Farrand, Records of the Federal Convention of 1787 (New Haven, CT: Yale University Press, 1911), 2:201.
[4] "Introduction To Federal Voting Rights Laws," August 6, 2015. https://www.justice.gov/crt/introduction-federal-voting-rights-laws-0.
[5] "History Of Federal Voting Rights Laws," August 6, 2015. https://www.justice.gov/crt/history-federal-voting-rights-laws.
[6] "Our Documents - Transcript of Voting Rights Act (1965)." Accessed April 2, 2021. https://www.ourdocuments.gov/doc.php?flash=false&doc=100&page=transcript.
[7] "Shelby County v. Holder | Brennan Center for Justice." Accessed April 2, 2021. https://www.brennancenter.org/our-work/court-cases/shelby-county-v-holder.
[8] Tribe, Laurence & Matz, Joshua. "Uncertain Justice." Henry Holt and Company, June 9, 2015.
[9] "Voting Rights in America, Six Years after Shelby v. Holder | Brennan Center for Justice." Accessed April 2, 2021. https://www.brennancenter.org/our-work/analysis-opinion/voting-rights-america-six-years-after-shelby-v-holder.
[10] "Polling Places Remain a Target Ahead of November Elections." Accessed April 2, 2021. https://pew.org/2MCsiBT.
[11] "Voting Laws Roundup: March 2021 | Brennan Center for Justice." Accessed April 2, 2021. https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-march-2021.
[12] "Campaign Finance Laws: An Overview." Accessed April 1, 2021. https://www.ncsl.org/research/elections-and-campaigns/campaign-finance-an-overview.aspx.
[13] Ballotpedia. "History of Campaign Finance Regulation." Accessed April 1, 2021. https://ballotpedia.org/History_of_campaign_finance_regulation.
[14] "[USC02] 52 USC Ch. 301: FEDERAL ELECTION CAMPAIGNS." Accessed April 1, 2021. https://uscode.house.gov/view.xhtml?path=/prelim@title52/subtitle3/chapter301&edition=prelim.
[15] Tribe, Laurence & Matz, Joshua. "Uncertain Justice." Henry Holt and Company, June 9, 2015.
[16] SCOTUSblog. "Symposium: The Distinction between Contribution Limits and Expenditure Limits," August 12, 2013. https://www.scotusblog.com/2013/08/symposium-the-distinction-between-contribution-limits-and-expenditure-limits/.
[17] Tribe, Laurence & Matz, Joshua. "Uncertain Justice." Henry Holt and Company, June 9, 2015.
[18] Gerken, Heather. "Keynote Address to the American Philosophical Society." Philadelphia, November 15, 2013.
[19] Tribe, Laurence & Matz, Joshua. "Uncertain Justice." Henry Holt and Company, June 9, 2015.
[20] Shays, Christopher. "H.R.2356 - 107th Congress (2001-2002): Bipartisan Campaign Reform Act of 2002." Webpage, March 27, 2002. 2001/2002. https://www.congress.gov/bill/107th-congress/house-bill/2356.
[21] "08-205 Citizens United v. Federal Election Comm'n (01/21/10)," 2010, 183.
[22] "Political Nonprofits (Dark Money) | OpenSecrets." Accessed April 1, 2021. https://www.opensecrets.org/outsidespending/nonprof_summ.php.
[23] A 501tax-exempt, The Center for Responsive Politics, charitable organization 1300 L. St NW, and Suite 200 Washington. "2020 Election to Cost $14 Billion, Blowing Away Spending Records." OpenSecrets News, October 28, 2020. https://www.opensecrets.org/news/2020/10/cost-of-2020-election-14billion-update/.
[24] "Political Nonprofits (Dark Money) | OpenSecrets." Accessed April 1, 2021. https://www.opensecrets.org/outsidespending/nonprof_summ.php.
[25] Demos. "New Data Shows Donor Class Does Not Accurately Represent Diversity and Policy Views of American Voters." Accessed April 4, 2021. https://www.demos.org/press-release/new-data-shows-donor-class-does-not-accurately-represent-diversity-and-policy-views.
[26] 179. "Citizens United Explained | Brennan Center for Justice." Accessed April 4, 2021. https://www.brennancenter.org/our-work/research-reports/citizens-united-explained.
[27] American Promise. "Keep the Promise: America 250," September 17, 2020. https://americanpromise.net/wp-content/uploads/2020/09/Keep-the-Promise-America250.pdf.
[28] Ibid.
[29] American Promise. "The 28th Amendment." Accessed April 2, 2021. https://americanpromise.net/who-we-are/the-28th-amendment/.
[30] American Promise. "Keep the Promise: America 250," September 17, 2020. https://americanpromise.net/wp-content/uploads/2020/09/Keep-the-Promise-America250.pdf.
[31] Data For Progress. "67% of Americans Support HR.1 For The People Act." Accessed April 2, 2021. https://www.dataforprogress.org/blog/2021/1/22/majority-support-hr1-democracy-reforms.