VOTER SUPPRESSION
-AN AMERICAN TRADITION-IS THERE A LASTING SOLUTION?

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INTRODUCTION

• When did the suppression of the right to vote start?
  - Probably at the beginning of organized society with the strongest individual seizing power and then doing whatever was necessary to hold on to it.
  - As communities became more complex and multiple constituencies developed (security, farming, hunting, trade, etc.), leadership became less centralized and each group wanted representation in decision making for themselves and the larger community.
  - Sharing power among these groups became necessary to provide stability and to assure that necessary functions were carried out.
• Ultimately, with populations growing and demanding participation in the decision-making process, representative governance began to take hold.
• But entrenched decision-makers did not relinquish power easily and they imposed limitations on who could participate and to what extent. And as racial, ethnic and religious diversity increased, those in power tried even harder to assure their continued continuity.
• First absolute bars to participation by certain classes of individuals were imposed.
• Next, only the most important male leaders were allowed access to decision-making.
• Gradually, each of the important constituencies were permitted limited control over their members (i.e., guilds, security forces, religious groups).
Finally, when the demand for broader involvement became irresistible, forms of representative democracy began to appear.

Of course, this took centuries. In Britain, the king first ceded power to his dukes in 1215 with Magna Carta.

Until October 1781, the British king still held power over the American colonies.

In the ensuing six years, the Americans experimented with approaches to a representative democracy (e.g., colonial congresses, Articles of Confederation) and in 1787 presented the Constitution for ratification by the states.
The Constitution of the United States – Sources of the Right to Vote

- Nowhere in the Constitution is it provided that all citizens shall have the unimpeded right to vote or that the notion of “one person, one vote” shall prevail.
- In fact, the Constitution is quite vague about to right to vote (at least until the Civil War Amendments).
- Article 1, Section 2: The House of Representatives composed of Members chosen every second year by the People of the several states.
• Article 1, Section 3: the Senate composed of two Senators chosen by the Legislatures of each State (but see the 17th Amendment (April 1913) providing for direct election of Senators).

• Article 2, Section 1: Election of the President and Vice President indirectly by the electors selected by State legislatures (see also the 12th Amendment).

• 14th Amendment: All persons born or naturalized in the U.S. shall be citizens; due process and equal protection under the laws for all (Sect. 1). The number of Representatives in the House in each State is established by the census (Art.1, Sect. 2) shall not exceed one for every 30,000 persons.
• 15th Amendment: Black Suffrage.
• 19th Amendment: Woman’s Suffrage.
• 17th Amendment: Direct election of Senators “by the people of each State”
• 23rd Amendment: Suffrage in the District of Columbia.
• 24th Amendment: No Poll Taxes. “The right of citizens of the United States to vote … shall not be denied or abridged by the United States or any State … by failure to pay any poll tax or other tax ….”
• 26th Amendment: Suffrage for 18 year olds.
The Voting Rights Act of 1965
and Other Legislation

• The Voting Rights Act (VRA) of 1965, signed by Pres. Johnson, aimed to overcome barriers that prevented African Americans from exercising their right to vote as guaranteed under the 15th Amendment.

• Among the most important far-reaching pieces of civil rights legislation in U.S. history.

• Between the adoption of these amendments in beginning in 1870 and the VRA in 1965, there were few significant statutes passed by Congress to protect the right to vote.
The National Voter Registration Act (NVRA) and The Motor Voter Act

In 1993, Congress passed these two statutes in order to further enhance the ease with which voters could register to vote.

DOJ authorized to bring civil actions to enforce the provisions.

FEC given the responsibility to help states develop a national voter registration form and to compile reports on effectiveness.

In 2002, the Help America Vote Act transferred the FEC’s responsibilities to the Election Assistance Commission.
The NVRA provides:

- Motor Voter (when applying for or renewing a driver’s license.
- Requires the state to forward completed application to appropriate election officials.
- Opportunity to register must be provided at agencies that services the disabled.
- Citizens can register to vote by mail using mail-in forms developed by each state and the Election Assistance Commission.
- States must keep their registration lists accurate and current.
- Several states failed to take steps to comply with the law.
- DOJ and others sued successfully, and constitutionality of law was established.
The Systematic Efforts by States to Suppress the Vote

• In the immediate aftermath of the Civil War, during the Reconstruction Period, particularly in some of the Southern States, African-American citizens, most newly freed from slavery, voted and elected a wide range of representatives to State and federal office.

• But in the decades that followed, organized efforts in these same and other states were adopted to prevent, through intimidation and other means African-American and other poor citizens from voting. The Klu Klux Klan, the White Citizens Councils and other violent white supremacy groups, whose secretive members frequently included elected officials, led efforts to intimidate citizens, including persons of color, union members, Catholics and Jews.
Other Suppression Techniques

• Obstacles to Registration.
  • If intimidation (e.g., lynching’s, beatings, cross burnings, armed men at registration places, etc.), did not work to prevent citizens from registering to vote, States and local governments threw other barriers in front of registrants.
    • Language (English only).
    • Literacy Tests – Recite the Hamlet soliloquy.
    • Loyalty tests.
    • Citizenship Questions – How many members of the State Assembly; name them.
    • Nonsense questions – How many jelly beans in a jar; How many bumps on this cucumber.
If registration could not be stopped, States and local government found other ways:

- Strict Voter ID laws – Government issued photo ids (sometimes with high fees)
- Purging Voter Roles of infrequent voters, convicted felons, caged voters, voters whose id does not match exactly the voter registration records or which lack an actual street address.
- Dramatically decreasing the number of polling places in certain neighborhoods.
- Disabling voting machines.
- Restricting the number of poll workers.
- Gerrymandering.
- Like other forms of fraud, these obstacles are limited only by the imagination and creativity of the officials bent on suppression of the vote.
Voter Suppression and the Courts

• Because our courts, particularly our federal courts, have often been seen as the bulwark against the worst practices of government at all levels (see, e.g., Brown v. Board of Education – separate is not equal; Mapp v. Ohio - evidence obtained through unreasonable search and seizure not admissible in State courts; Miranda v. Arizona – Unless a defendant was told that he had a right to counsel, etc., the 5th Amendment prevents his statements made during interrogation to be used as evidence at his trial.

• In the Voter Suppression arena, our courts, especially recently, have not been reliable protectors of the rights of citizens to vote without restriction.
The Civil Rights Era Decisions That Matter Most

- *Colegrove v. Green* (1946), redistricting is a political question and is not justiciable by the courts.
- *Baker v. Carr* (1962), redistricting is not a political question but involves substantive legal rights under the Constitution and is justiciable by the courts.
- *Reynolds v. Sims* (1964) and *Wesberry v. Sanders* (1964), following the principle of one person, one vote, State legislative districts must be relatively equivalent in size.
The Biggest Legislative Achievement After The 15th and 19th Amendments
The Voting Rights Act of 1965

• On March 7, 1965, John Lewis led as many as 600 marchers across the Edmund Pettus Bridge in Selma, AL.
• On March 15, 1965, President Johnson addressed the Congress and the American people.
Lyndon Johnson’s Address to Congress – March 15, 1965
Passage of the Voting Rights Act

- The Civil Rights Act of 1964, one of the great civil rights bills ever passed by Congress and signed into law by President Johnson in July 1964, originally contained a voting rights section that was eliminated in the final bill.

- Immediately following his address to Congress eight days after Bloody Sunday, Johnson sent to Congress the first draft of the VRA.

- Introduced in the Senate by Mansfield and Dirksen on March 17, 1965.

- Reported out of Conference Committee and agreed to by House and Senate on August 3 and 4, 1965 and signed by Johnson on August 6, 1965.
Effects of the Voting Rights Act

• Banned use of literacy tests.
• Federal oversight of voter registration in areas where less than 50% of the non-white population had not registered to vote.
• Authorized the Attorney Genera to investigate the use of poll taxes in state and local elections.
• In 1964, the 24th Amendment made poll taxes illegal in federal elections; poll taxes in state elections were banned by the Supreme Court in 1966.
Practical Effects of VRA

• In 1965, at the time of the passage of VRA, there were six African Americans among the 435 members of the House of Representatives and no blacks in the Senate.
• By 1971, there were 13 black members of the House and 1 black Senator.
• Southern state and local governments did not make serious attempts to enforce the law.
• But the VRA gave black voters the means to challenge voter restrictions and vastly improve voter turnout. In Mississippi alone, registration among African-American voters increased from 6% in 1964 to 59% in 1969.
The More Things Change, The More They Remain The Same

- Following the passage of the VRA, minority voter registration throughout the U.S. enjoyed a period of meaningful increase.
- But voter suppression and the strengthening of conservative control of Southern and some Western states legislatures and state houses have become more acceptable and sophisticated.
- From Nixon’s election in 1968 through Trump’s presidency to date, appointments to the federal and state courts have been increasingly “conservative,” affecting outcomes in many legal issues that influence our elections (e.g., *Citizen’s United* (campaign finance); *District of Columbia v. Heller* (citizens can have guns in home for self-defense); *Shelby County v. Holder* (declaring section 4 of the VRA to be unconstitutional).
Shelby County v. Holder

• The VRA was enacted to address entrenched racial discrimination in voting, declaring it to be “an insidious and pervasive evil which had been perpetrated in certain parts of our country through unremitting and ingenious defiance of the Constitution.”

• Section 5 of the Act contained a preclearance requirement forcing certain states and local governments to obtain approval from the U.S. Attorney General or a three judge panel of the D.C. District Court of any changes to their voting laws or practices.

• These states are Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas and Virginia. Dozens of counties and municipalities in other states including California, Florida, Michigan, New Hampshire, New York and North and South Dakota were also covered.

• VRA is among the most successful legislative acts in our history. In the 20 years following the law’s passage, the disparity between black and white registration rates nearly dropped 30 percentage points in the early 60’s to 8% just ten years later.

• The VRA has been reauthorized multiple times; most recently in 2006 with a unanimous vote in the Senate and near unanimity in the House.
• In 2013, in its 5 to 4 decision in *Shelby*, the Court struck down the coverage formula in section 4(b) of the VRA, reasoning that the formula was “out of date,” despite having been reauthorized in 2006.

• This ruling rendered the Section 5 preclearance system virtually inoperable.

• The effects of the decision were immediate. Within 24 hours, Texas announced a strict photo ID law. Mississippi and Alabama began to enforce previously enacted photo ID laws that had been barred because of the preclearance requirement.

• The Brennan Center for Justice has consistently found that states previously covered by the preclearance requirement, have engaged in recent significant efforts to disenfranchise voters. These states have purged voters off their rolls at a significantly higher rate than non-covered jurisdictions.
Eric Holder’s Comments re the decision in *Shelby*
What Has Happened Since *Shelby*?

- Voter suppression efforts are back with a vengeance. Within two months of the decision, North Carolina enacted a pernicious voting bill. The law started out as a voter ID law, but became much worse in light of the decision. It instituted a strict ID rule, curtailed early voting, eliminated same day registration, restricted pre-registration, ended annual voter registration drives, and eliminated the authority of county boards of election to keep polls open for an extra hour.

- Lawsuits brought immediately and in 2016, the 4th Circuit Court of Appeals struck down the law finding that it targeted “African Americans with almost surgical precision.” The Supreme Court denied certiorari.
Other Court Decisions

• There have been several decisions of the federal courts during the years following the VRA that support and clarify the basic promise that all citizens should have the unrestricted right to vote. Some are subtle.

• *Evenwel v. Abbott (2016)*, the Supreme Court ruled that “one person, one vote” means that districts can be drawn using total population rather than population of eligible voters.

• *Fish v. Kobach (2016)*, The 10th Circuit ruled that the National Voter Registration Act preempted the Kansas law requiring proof of U.S. citizenship for voter registration, so long as the more limited requirements of the NVRA were met.
The Trump Affect
Dirty Tricks and Falsehoods
That Could Undermine The Election

- At this point, we leave our history lesson and enter the present.
- Many of the recent mischief making efforts have been tried before with inconsistent success (e.g., Nixon’s dirty tricks, ballots cast by deceased voters in Chicago in 1968).
- But since 2016, these efforts have been ramped up and are well financed by Trump’s supporters as well, as we have seen in the last weeks, by the government itself.
- We know that there are several things that will affect the election: Covid 19, voter machine breakdowns caused by wear and tear or by intentional sabotage, and foreign interference.
Nine Lies and Falsities

*Claim:* There is widespread voting by ineligible individuals.

*The Truth:* This type of fraud is extremely rare. And is similarly rare with mail-in ballots.

*The Claim:* Noncitizens are voting in droves.

*The Truth:* Noncitizen voting is extremely rare.

*The Claim:* The machines malfunctioned – They flipped votes from one candidate to the other.

*The Truth:* Malfunctions are most likely the result of wear and tear.
• **The Claim:** People can’t help people vote.

  *The Truth:* Voter assistance is not evidence of fraud. This is not to be confused with “ballot harvesting.”

• **The Claim:** Aggressive voter purges are needed to get rid of ineligible voters

• **The Truth:** This claim is completely overstated. It is used to justify illegal “caging,” purging of infrequent voters and people who have changed their address.
The Claim: Something’s fishy, the results are taking too long.

The Truth: In a close election, getting the right result can take time.

The Claim: Mail-in voting is inherently vulnerable to fraud.

The Truth: Simply untrue. There is no substantive difference between mail-in ballots and absentee ballots, each of which have been used for years without any material problem.
Is It Hopeless? What Shall We Do?

The Courts

- The Courts have proven incapable of consistently resolving issues that are uniquely political in nature.
- During the Republican administrations of Reagan, Bush 41 and Trump, a concerted and successful effort has been sustained to fill every vacancy in the federal judiciary with judges approved by the Federalist Society, a long-time politically potent and legally conservative organization.
- The Democratic presidents, Carter, Clinton and Obama were far less rigorous in filling judicial vacancies. At the end of the Obama administration, there were 88 district court 17 court of appeals vacancies and 1 Supreme Court vacancy. Currently, there are 70 district court vacancies and no court of appeals vacancies. Consequently, the appellate courts of the U.S. are politically weighted in favor of conservatives.
- Decisions of the Supreme Court have favored the conservative positions on most cases that have a political thrust.
The Congress

- With the Senate and the House in the control of different political parties, and with partisan politics as ferocious as it has ever been, it is unlikely that Congress can be relied upon to act together to end the Trump administration campaign to limit voter turnout.

State Legislatures and State Houses

- 26 states have Republican governors and 24 states have Democratic governors.
- 21 States have Republican control of the governorship and both houses of the state legislature. 15 states have Democrats with such control.
So What Can We Do?

• Our anxiety about an unfair outcome to the election is rational.
• For more than a century, civic participation in our elections has been abysmal.
• To assure a good outcome in 2020, it will take more than a “business as usual” point of view.
• The good news is that since 2017, with the advent of the Trump administration, large segments of the population have become aroused and are showing their interest by increasing participation in the electoral process – both running for office and voting.
First and foremost, we need to get off our collective backsides, ignore the polls that the media rely on to persuade us what will happen and prepare to vote as early as possible; if by mail, send it in immediately; and if in person going to the polls as early as possible and waiting as long as it takes to cast your vote. If you can, volunteer to be a poll worker or an observer, get trained and do it.

Next, as suggested on Sunday by David Plouffe, the House and Senate have convened special sessions and will hold hearings next week at which the Post-Master General and others will be testifying. Visit local post offices with cameras – show people what is happening. This weekend, there are going to be demonstrations at post offices across the U.S., including the Berkshires. Call your representatives in federal and state government.