

Today

- Voting Rights – Vote Denial

Next Lesson

- Voting Rights – Vote Dilution

Reminders

The Centrality of the Vote

Elections in general—and voting in particular—serve four functions in a democracy

- Elects public officials
- Ensures accountability of lawmakers in office
- Give voters influence in direction of public policy
- Provide legitimacy to government

Yick Wo v. Hopkins (1886):

- The vote is a ‘fundamental right’ because its “preservative off all other rights”

Voting in Constitution

There is no affirmative right to vote in the Constitution

- *Bush v. Gore* (2000) “[t]he individual citizen has no federal constitutional right to vote for electors for the President of the United States.”

The *original* Constitution says very little about who can vote.

- “electors of members of the House of Representatives have the qualification requisite for electors of the most numerous branch of the state legislature” – Article 1, Section 2.
- “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations” – Article 1 Section 4.

Constitutional Amendments

- 15th Amendment – Prohibits withholding the franchise on the basis of race
- 19th Amendment – Prohibits withholding the franchise on the basis of sex
- 23rd Amendment - Gives residents of Washington D.C. the right to vote in presidential elections
- 24th Amendment – Bans the use of poll taxes
- 26th Amendment – Prohibits withholding the franchise on the basis of age for people over age of 18

Voting and the Property Restriction

- Attitudes about the franchise were divided between Federalists and Anti-Federalists
- In practice, states adopted voting rules following the old British colonial model
- Limited eligible voters to ‘freeholders’—i.e. white male property owners over 21 years of age
- Some states included religious restrictions as well

The Property Requirement Removed

- By early 19th century, the idea of universal white male suffrage took hold
- Some non-property owners began to gain voting rights through the payment of an alternative 'poll tax'
- Other non-property holders gained the vote through military service

Black Inclusion and then Exclusion

- By the start of the Civil War, five Northern states allowed African American suffrage
- After the war, the Republican Congress passed the Reconstruction Act of 1866, which made the enfranchisement of Blacks a condition for re-entry into the Union
- The Fifteenth Amendment later removed race as a barrier to voting in the North and the South

Black Inclusion and then Exclusion

- Throughout the 1870s, African Americans in the South exercised the vote and even held elected office
- In 1872, there were 300 Black legislators from states of the former confederacy
- Election of 1877 led to the end of Reconstruction, and the tides shifted on the African American enfranchisement

Black Inclusion and then Exclusion

- After Reconstruction, the South systematically limited black voting rights, first through violence in 1870s-1880s, then through legal restrictions beginning around 1890
- Nearly all blacks in the South kept from voting by 1900
- Tools of white oppression of black voters
 - Voter registration
 - Literacy tests
 - Poll taxes
 - White Primary

Voter Registration

- The state of Alabama passed a new state constitution in 1901 designed specifically to disenfranchise African Americans
- *Giles v. Harris* (1903):
 - Giles filed suit on behalf of himself and 5,000 others in Alabama as a violation of 15th Amendment, claiming that the entire electoral system in Alabama was illegal
- Oliver Wendell Holmes' opinion refused to grant relief:
 - "If the conspiracy exists, a name on a piece of paper will not defeat them... Unless we are prepared to supervise the voting in that state by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form."

Literacy Tests

- Between 1890 and 1908, Southern states passed as part of disenfranchisement movement
- Whites excluded from test through ‘grandfather clause’
 - Declared unconstitutional in *Guinn v. United States* (1915)
- *Lassiter v. Northampton County Board of Elections* (1959)
 - Held that the use of literacy tests are not, on their face, unconstitutional, so long as they are applied in a race-neutral fashion
- Literacy tests were banned under the Voting Rights Act (1965)

The Poll Tax

- By 1904, all southern states had adopted a poll tax.
- *Harper v. Virginia Board of Elections* (1966)
 - Overturned a poll tax using the Equal Protection Clause of the 14th Amendment
 - “Wealth, like race, creed or color, is not germane to one’s ability to participate intelligently in the political process”
- Poll taxes later made constitutionally impermissible by the passage of the 24th Amendment

The White Primary

- In the one-party South, exclusion from primaries was tantamount to exclusion from the whole electoral process due to one-party rule
- Parties considered private associations and primaries are private affairs. See *Newberry v. United States* (1921).
- *Smith v. Allwright* (1944):
 - Overturned white primary restrictions in Texas
 - White primary unconstitutional because party primaries constituted ‘state functions;’ therefore, the fourteenth and fifteenth Amendments applied.

Black Re-enfranchisement

- Black participation in World War II re-opened the national discussion on civil rights in the South
- The Voting Rights Act of 1965
 - Section 2 – Restated 15th Amendment prohibition on racial discrimination
 - Section 4 – Banned literacy tests in South—extended to whole nation in later Amendments—and provided coverage formula for who was covered under Section 5
 - Section 5 – Federal Preclearance Requirement
- *Shelby County v. Holder* (2013) struck down section 5 due to the ‘outdated’ coverage formula

Expansion of Women's Suffrage

Minor v. Happersett (1875):

- The passage of the 14th and 15th Amendment does not provide a legal basis for female suffrage.
- Based on narrow reading of the Privileges and Immunities clause

Women's suffrage became a political issue after the ruling in *Minor*

In 1890, Wyoming became first state to offer women's suffrage, followed by Colorado, Idaho, Utah, and other western states

Pro-Suffrage Posters



Anti-Suffrage Posters



Election Administration Reforms

National Voter Registration Act (1993)

- Voters can register at state motor vehicle offices
- Imposes restrictions on the way states can purge voter rolls
- Standardized by-mail registration

Help America Vote Act (2002)

- Voting equipment upgrades
- Provisional ballots
- Statewide voter database
- Voter Identification for by-mail registrants

Election Integrity and Voting Rights

- Since the 2020 Elections, Republican lawmakers in 33 states have proposed over 165 new laws limited access to the ballot
 - Limit mail voting access
 - Imposes stricter voter ID requirements
 - Slash voter registration opportunities → ending same day registration/eliminate automatic voter registration
 - Enable more aggressive voter roll purges
 - Exact signature matching requirements

Election Integrity and Voting Rights

House Resolution 1: For the People Act

- Automatic Voter registration
- No-excuse mail in balloting
- 15 days window for early voting
- Restoration of voting rights to felons who served their sentences
- Requires states to set up independent commissions for federal congressional redistricting
- Tighter campaign finance rules
- Ethics reforms
- Disclosure of Presidential Tax Returns

Prisoners and Felons

- According to Manza and Uggen, why is the question of felon disenfranchisement so important for democratic theory?
- How do racial politics correspond to the rise of the carceral state—and felon disenfranchisement? Also, how does it exacerbate racial inequality?
- What have been the practical consequence of non-incarcerated felon disenfranchisement?
- Why might re-enfranchisement help facilitate ex-felon reintegration into American society?

Equal Representation in House?

- Are voters represented equally across all Congressional districts?
- There is state-by-state variation in the number of people in each district
- Until the 1960s, there was wide variation within each state as well!

One-Person, One-Vote Doctrine

- Prior to 1960s, Court ruled malapportionment cases were non-justiciable under political question doctrine
- The Court reversed positions in *Baker v. Carr* (1962)
- Precedent set in *Baker* initiated a line of cases requiring redistricting plans to follow an equal population rule

Redistricting and Gerrymandering

- Fair districting practices speak to one's ability to cast a meaningful vote in choosing their representation
- Central to the political and legal debate over redistricting is concern over 'vote dilution.'
- In other words, do institutional rules give some people more political voice than others?



Gerrymandering

- A form of redistricting where congressional boundaries are purposely manipulated to benefit of one group over the other
- The practice named after Elbridge Gerry, who created a state Senate district in Massachusetts that looked like a salamander.
- Gerrymandering techniques:
 - Cracking
 - Packing
 - Stacking

Types of Gerrymandering

- Bi-partisan Gerrymandering
- Partisan Gerrymandering
- Racial Gerrymandering

Partisan Gerrymandering

The Court's position on partisan gerrymandering is mostly sound and
fury that represents nothing

Davis v. Bandemer (1986)

- Challenge to the districting of Indiana's state legislature
- Court ruled that gerrymandering claims are justiciable.
- No majority on the equal protection claim
- Plurality opinion upheld plan, but laid out standard for the adjudication of future cases—that standard never garnered majority support on Court

Partisan Gerrymandering

By 2000s, this confusion has led some constitutional scholars to conclude:

- “Far from leading to a requirement of proportional representation, the courts almost without exception have rejected partisan gerrymandering claims, setting a legal standard that extends an invitation to litigation without much prospect of redress.” –Issacharoff and Karlan (2002)

Vieth v. Jubelirer (2004) considered a Pennsylvania districting plan

- The court refused to strike down the plan
- Justice Kennedy suggested that a reasonable standard for resolving such disputed was still possible

Gill v. Whitford (2018)

This case dealt with a Republican districting plan in Wisconsin following redistricting in 2010

- Republicans won 48.6% of the statewide vote, but won 60% of the state legislative seats
- In 2014, the GOP won 52% of the vote, giving them 63 seats

Plaintiffs argued they had a test for determining an unconstitutional gerrymander known as the Efficiency Gap

- Any vote for a losing candidate or any vote beyond the bare minimum needed for a plurality victory is considered wasted
- $EG = (\text{Dem Wasted Votes} - \text{Republican Wasted Votes}) / \text{Total Votes Cast}$
- Anything over 6% considered an unconstitutional gerrymander

Gill v. Whitford (2018)

The Court ultimately punted on this case by denying William Whitford standing to sue in Court

The majority found that the plaintiffs alleged but did not prove individual harms, providing evidence instead only of statewide harms of alleged partisan gerrymandering.

In a concurring opinion, Justice Kagan suggested that future claims ought to demonstrate injury via the first Amendment's right to association



Rucho v. Common Cause (2019)

Two additional partisan gerrymandering cases were brought to the court → Consolidated into a single case

- In NC, Democrats won 47% of the statewide vote, but only won 3 of the state's 13 House seats
- In MD, Republicans won 36% of statewide vote, but only won 1 of the state's 8 House seats

Rucho v. Common Cause (2019)

In a 5-4 decision, the Court dismissed the case and declared that partisan gerrymandering claims were non-justiciable → Constituted a political question

Justice Roberts wrote:

- *We have never struck down a partisan gerrymander as unconstitutional — despite various requests over the past 45 years. The expansion of judicial authority would not be into just any area of controversy, but into one of the most intensely partisan aspects of American political life. That intervention would be unlimited in scope and duration — it would recur over and over again around the country with each new round of districting, for state as well as federal representatives.... What the appellees and dissent seek is an unprecedented expansion of judicial power.”*

Racial Gerrymandering

The Court's position on racial gerrymandering is incredibly convoluted

Tension exists between the Court's interpretation of the Voting Rights Act (1965) and the line of cases stemming from Court's decision in *Shaw v. Reno* (1993)

Recent questions also exist around whether majority-minority districts actually undermine minority voting power

Voting Rights Act (1965)

After the first wave of VRA enforcement successfully put an end to racially motivated ‘vote denial,’ a second wave of judicial cases focused on efforts to dilute minority voting strength

The centerpiece of the VRA was Section 5’s federal preclearance provision

Section 4’s preclearance coverage formula:

- 1) If as state used test or device for voting or
- 2) Fewer than 50% of state’s VAP registered to vote or voted in 1964 election.

Districting Rules and Preclearance

Do districting rules require preclearance?

Allen v. State Board of Elections (1969)

- State of Mississippi wanted to move from districted elections to multi-member at-large elections
- Mississippi officials argued that preclearance was only required for voting rules
- The court disagreed, arguing that the right to vote is affected by dilution as well as outright denial

Federal Preclearance Standard

The preclearance standard in the VRA used by the DOJ is whether new electoral rules have a retrogressive effect on minority representation

In other words, do the new electoral rules leave racial and ethnic minorities worse off than current law?

If answer is 'no,' preclearance is granted

The Rise of Majority-Minority Districts

New redistricting disputes over minority vote dilution after 1980 census opened the door to a new line of cases

City of Mobile v. Bolden (1980):

- Court ruled that a *constitutional* challenge to redistricting plans leading to racial vote dilution had to prove not just a discriminatory effect, but also the intention to discriminate
- In other words, reliance on the 14th and 15th Amendment required a higher evidentiary standard than VRA's Section 5

The Rise of Majority-Minority Districts

Congress passed Amendments to Section 2 of the VRA in 1982 that overruled the *Mobile* decision and required a practice of maximizing minority representation

Thornburg v. Gingles (1986):

- Legislative district lines cannot dilute minority representation

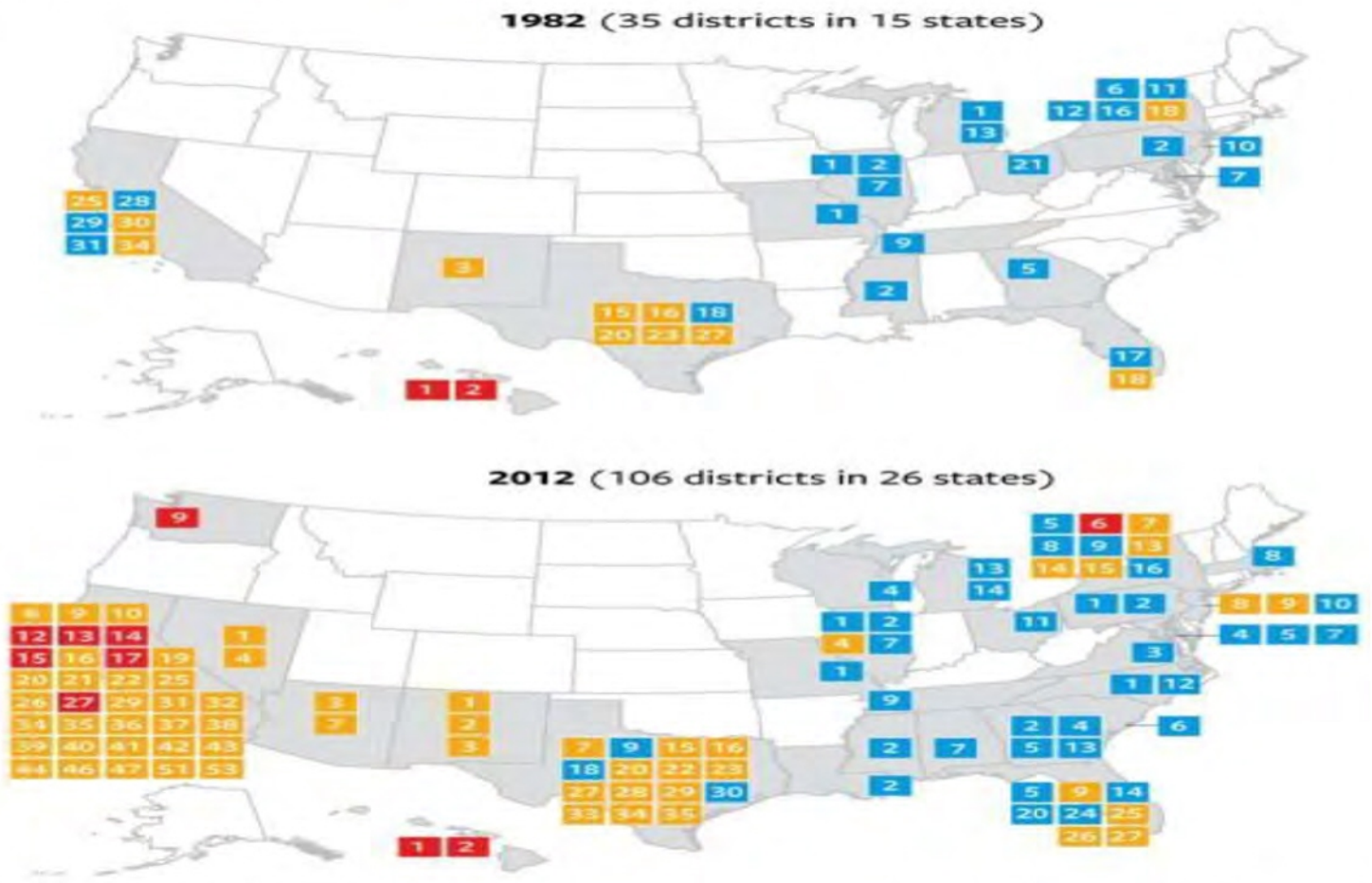
- Developed a three-pronged test for assessing vote dilution cases
 - 1) The minority group had to be sufficiently large to constitute a majority in a single-member district
 - 2) The group has to prove that its politically cohesive
 - 3) White block voting against preferred minority candidates

Minority Districts Multiply

Since 1982, the number of congressional districts in which a majority of residents are nonwhite has tripled. In 2012, for the first time, a majority of states hold at least one minority-majority congressional district.

Congressional districts with a nonwhite majority, by leading race or ethnicity

■ African-American ■ Asian ■ Latino



Graphic by PETER BELL and DAVID WASSERMAN

Sources: *The Cook Political Report*; Census Bureau

Challenges to Minority-Majority Districts

Shaw v. Reno (1993)

- The case dealt with the redistricting in North Carolina, which was required to create two majority-minority districts by the DOJ
- Plaintiffs argued that it strict reliance on race violated the Equal Protection Clause
- The Court agreed:
 - “[North Carolina’s 12th District] is so extremely irregular on its face that it can only be viewed as an effort to segregate the races for purposed of voting, without regard for traditional district principles and without sufficiently compelling justification. . . . The district bears an uncomfortable resemblance to political apartheid.”

Racial Gerrymandering Post-*Shaw*

- Is second 2's results test unconstitutional? → *Brnovich v. Democratic Central Committee* (2021)
- How does one prove racial gerrymandering now that partisan gerrymandering is non-justiciable?
- Do majority-minority districts actually dilute the substantive representation of minorities?

Redistricting with Independent Commissions

What are the authors trying to accomplish with this paper? In other words, what is their research question (frame it as a why question with only the DV)?

What are the authors key findings? What are some of the implications of these findings for electoral politics?

Is there a difference between partisan gerrymandering and bi-partisan incumbency protection? Does this difference matter?

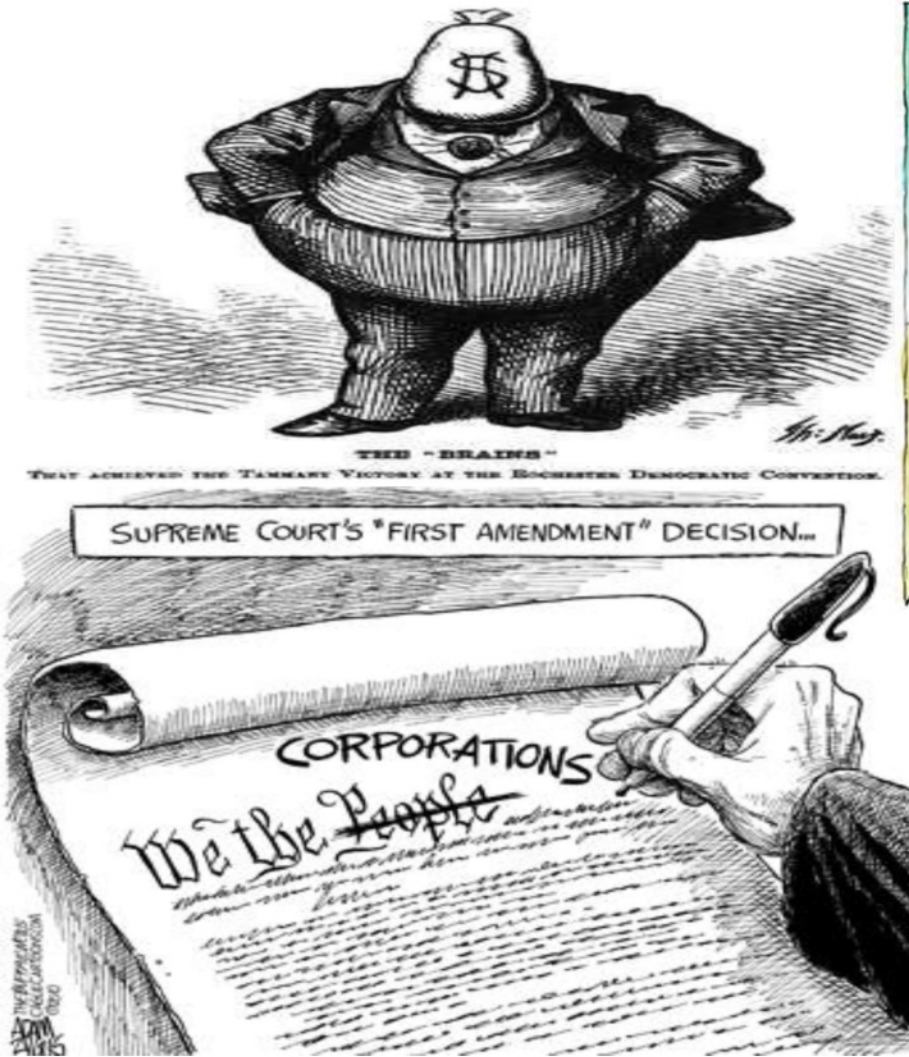
Why Do We Care About the Influence of Money in Politics?

Conflict over campaign finance is fundamentally a conflict between political equality and political liberty.

Supporters of political equality often tie their criticism to the perception of corruption in politics



“MO’ MONEY, MO’ PROBLEMS” – NOTORIOUS B.I.G.



Origins of Campaign Finance

- Initial attempts at regulating the flow of money into elections go back to the Progressive Era
- The Tillman Act (1907) – A complete ban on all corporate contributions. Later amendments required disclosure requirements and set spending limits on congressional campaigns
- Taft-Hartley Act (1947) - Placed permanent ban on all labor union contributions

Federal Election Campaign Act (1971/1974)

- Placed aggregate limits on all candidate expenditure and restricted contributions by candidates to their own campaigns
- Limited independent, third-party expenditures
- Set contribution limits for citizens
- Disclosure requirements on fundraising and expenditures
- Federal Election Commission to monitor new financing system

Buckley v. Valeo (1976)

- Every major component of FECA was challenged in Court, namely as a violation of the 1st Amendment's right to free speech
- The Court rejected argument that campaign finance was merely regulating conduct. Instead, it ruled that money is equivalent to speech in political campaigns
- Limits on campaign finance has implications for political speech rights and associational rights. The regulation of those rights face strict legal scrutiny
- Justice Department argued that the compelling state interest was to 'prevent corruption or the appearance thereof'

Buckley v. Valeo (1976)

- Limits on direct contributions are constitutional because they present the potential for bribery or undue influence—i.e. quid pro quo
- Limits on the following all unconstitutional:
 - Candidate spending (Expenditures)
 - Self-Financing
 - Independent Expenditures
- Disclosure requirements constitutional
- Public financing constitutional as long as it is voluntary

Buckley v. Valeo (1976)

The Court rejected the argument that the promotion of political equality justified limiting campaign money.

- “the concept that government may restrict the speech of some elements of society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”

Supporters of reform are henceforth forced to rely on mitigation of corruption argument to justify future regulation