AMERICAN CONSTITUTION SOCIETY

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# Democracy's Moment of Truth

American democracy is confronting a moment of truth, in which the danger of succumbing to autocracy must be met with efforts to forge a genuinely multiracial democracy. Over the past decade and a half, the U.S. has experienced a rise and mainstreaming of white nationalism. At the federal level, these forces have been folded into a broader effort to entrench counter-majoritarian rule by exploiting antidemocratic features within the design of the judiciary, the electoral college, the U.S. Senate, and decennial redistricting. Antidemocratic forces in state legislatures are passing new laws to disenfranchise people of color in the name of "election integrity," in what the Brennan Center for Justice describes as a siege on "multiracial democracy in America." Almost two years later, these antidemocratic forces, which inspired and underpinned the January 6, 2021 insurrection, continue to threaten this country.

Proponents of democracy and the rule of law, including the students, lawyers, and judges who make up the ACS network and the progressive legal movement, benefit from understanding the nature and legal contours of current attacks on American democracy. This Program Guide serves as a resource to achieve this goal and aid in identifying approaches to combat these threats to democracy. For those interested in meeting this moment of truth with direct action, please visit ACS's website to learn more about our Run.Vote.Work. initiative.

The Program Guide is divided into three parts. First, it examines the "Big Lie" that the 2020 presidential election was irreparably tainted by irregularities, which motivated the January 6th insurrectionists and continues to hold sway over a considerable portion of the American electorate. Second, the Program Guide delves into accountability for the January 6th insurrection,[1] including reform of the Electoral Count Act of 1887. Third, the Program Guide covers voting rights and the fight to preserve and expand democracy, including an examination of the looming threat of the so-called "independent state legislature" theory. Fourth, it considers examines international trends in democratic backsliding and threats of autocracy to provide perspective on and context for domestic developments. Finally, the Program Guide includes a

[1] As of publication, the January 6th Select Committee Hearings remain ongoing, as do concurrent investigations by the FBI and the U.S. Department of Justice.

list of scholars and advocates from across the ACS network who might be available to speak at chapter events on these topics.

# I. The Big Lie and Its Corrosive Effect on American Democracy

## A. The 2020 Presidential Election and the Aftermath

In the 2020 presidential election, President Joe Biden won a clear majority of both the Electoral College and the national popular vote. Yet his opponent, former President Donald Trump, would not concede nor publicly acknowledge the legitimacy of the election. Using a "firehose of falsehood," Trump has repeatedly claimed without evidence that widespread fraud denied him his rightful victory in the 2020 presidential election against Biden. These lies have been so persistent, ungrounded, and audacious that they have earned the moniker, "The Big Lie." Members of Trump's own administration acknowledged that the 2020 election was the most secure in the nation's history. Yet, Trump has continued to perpetuate and spread the Big Lie nearly two years into Biden's term.

In the weeks following the election, Trump encouraged his supporters to "stop the steal," and promoted and attended a rally in front of the White House as Congress convened to formally count the votes of the Electoral College. While addressing the crowd, Trump instructed his supporters to march to the Capitol, telling them "if you don't fight like hell, you're not going to have a country anymore." They did so, and for several hours an armed pro-Trump mob stormed the building. They fought with police, briefly took control of the House chamber, and ransacked offices in search of members of Congress and their staff. Several rioters erected a gallows outside the Capitol as a threat to then-Vice President Mike Pence, whom they believed did not do enough to overturn the results of the 2020 election. The insurrectionist mob dispersed only after Trump put out a video statement telling them to go home. Because it involved an attempt to violently overturn the results of the 2020 election by disrupting the election certification, the events of January 6th have been widely referred to as an insurrection.

Despite there being no evidence of widespread voter fraud, despite the legal architects of the Big Lie knowing it was false, and despite his own administration repeatedly telling him that the election was not stolen, Trump's campaign laid the groundwork for a movement that would "shatter democratic norms and upend the peaceful transfer of power" on January 6, 2021. Due to the persistence of Big Lie supporters, the threat to our democracy is ongoing.

## B. The Continuing Harm of the Big Lie

The false idea that Trump won the 2020 election has become a "tribal pose" among many of his supporters and continues to hold sway over a large number of Republican Party voters. An average of polls finds that 70% of Republican voters believe that there was widespread fraud in the 2020 election. A February 2022 CNN poll asked respondents whether they believed that U.S. elections represented the will of the people: 56% said no, driven by 75% of self-identified

conservatives and Republicans. USA Today found that one year after the January 6th insurrection, 58% of Republicans believed that Biden was not legitimately elected.

The pervasiveness of the Big Lie has endangered our elections and those who are responsible for conducting them, particularly secretaries of state and local election workers. In a majority of states, secretaries of state are the chief election officials. They help to oversee elections, give guidance to local election officials, and work with other stakeholders to ensure election security and the integrity of the vote. They work closely with local election workers, such as poll workers and boards of election members, in conducting election activities and certifying results. These officials count ballots, including mail-in and provisional ballots, and then transmit those results to the secretary of state.

Election officials at every level have been the targets of harassment and threats of physical violence from Big Lie proponents following the 2020 presidential election. Michigan Secretary of State Jocelyn Benson and Georgia Secretary of State Brad Raffensberger, who both resisted calls from Trump, his legal team, and Big Lie supporters to overturn the results of the election in their respective states, faced continued threats of violence and death long after the 2020 election ended. Georgia poll workers Ruby Freeman and her daughter, Shaye Moss, were falsely accused of election fraud by Trump and his lawyer, Rudy Giuliani. Freeman and Moss, who are both Black, then became the targets of racist abuse and threats including lynching. Freeman testified to the January 6th Committee that "there is nowhere I feel safe" following harassment and death threats from Trump supporters. The increase in threats has affected election workers throughout the country, with one-in-five indicating they may quit amid rampant intimidation from proponents of the Big Lie.

As experienced election officials and workers step down, there is a grave risk that they are being replaced by proponents of the Big Lie. In 2021, former Trump advisor Steve Bannon claimed that "we're taking over all the elections." In 2022, election deniers throughout the country are running in important statewide races for governors, secretaries of state, and state attorneys general. If election deniers were to win these elections, they could be "instrumental in overturning the popular vote in their state," either by refusing to certify election results, limiting access to the ballot box through a restrictive reading of state law, or advocating for greater state legislature control over the electoral process at the expense of the voters in that state. This is particularly true for secretary of state races, given the vital role these officials play in ensuring election integrity. As law professor and former U.S. Attorney Barb McQuade noted, "[n]o elected officials will be more pivotal to protecting democracy—or subverting it—than secretaries of state."

Already, Republican state officials in Arizona, Wisconsin, Pennsylvania, Michigan, and Georgia have sought to review 2020 election results in search of fraud and malfeasance. Additionally, in 2022, several candidates for secretary of state have expressed a desire to engage in future partisan audits in the hunt for election fraud. While election audits are typically conducted by

nonpartisan professionals who are "objective, not seeking an outcome," the audits that took place in the months following the 2020 election were conducted by partisan election officials who sought to "subvert the 2020 election results on behalf of former President Donald Trump." According to a Brennan Center report, these audits "fail to satisfy basic security, accuracy, and reliability measures that should be in place for any election review." And as a report by the Brookings Institution concludes, misinformation like the Big Lie and subsequent election audits "confuse[] and overwhelm[] voters" and have "lasting implications on voters' trust in election outcomes" by "decreasing civic engagement."

In this way, the Big Lie is not simply the idea that fueled an attempted violent overthrow of the 2020 election on January 6th. It also revealed several systemic vulnerabilities that make a "legal coup" possible, where imperfections in the law can lead to a takeover and subversion of our democracy.

### Discussion Questions

*What changes at the local, state, or federal level can be made to safeguard the democratic process and protect against election subversion efforts? What can be done to protect election administrators from threats and intimidation? What action can be taken to mitigate the harm of the Big Lie and other disinformation campaigns? Who should have the power to take such action and under what oversight?*

### For More Information

Justin Hendrix, *The Big Lie is a Reality*, JUST SECURITY (Feb. 23, 2022); BRENNAN CTR. FOR JUSTICE, LOCAL ELECTION OFFICIALS SURVEY (MARCH 2022); NPR, *The Big Lie Continues to Threaten Democracy* (Jan. 4, 2022); Michael Waldman, *Focus on the Big Lie, Not the Big Liar*, BRENNAN CTR. FOR JUSTICE (June 14, 2022); Darrell M. West, *Trump is Not the Only Threat to Democracy*, BROOKINGS (July 25, 2022).

## II. Accountability for the January 6th Insurrection and Potential Reform

At a time when a majority of Americans express distrust in our institutions of government, it is of particular importance that those institutions demonstrate the ability and commitment to hold the people who attacked our democracy to account. As Professor Karen Greenberg argues, "[w]hatever virtues our institutions may have, their true value can only persist if they are accountable to the principles of democracy they were created to uphold." Likewise, columnist E.J. Dionne notes that "accountability for the events of Jan. 6 must be legal but also political." As retired Ambassador P. Michael McKinley writes, political accountability "should be about more than building court cases and establishing criminal liability" for the individuals involved. According to the nonpartisan Protect Democracy Project, accountability is a "process" to accomplish a variety of goals, including "construct[ing] a full record of wrongdoing [and] pursu[ing] deterrence through consequences for wrongdoing."

### A. Criminal Prosecutions of Insurrectionists

The criminal prosecution of those involved with the January 6th insurrection, whether present at the Capitol or not, may reflect a form of deterrence that is part of the process of accountability that the Protect Democracy Project suggests is necessary. The January 6th cases comprise the largest criminal investigation in American history. As of July 2022, nearly 850 people have been charged with crimes related to the insurrection. Defendants include far-right militia members, current and former law enforcement officers, veterans, and one two-time Olympic gold medalist. Many are like Stephen Ayres, who was "not a member of the Proud Boys or the Oath Keepers " but "went to the Capitol because Trump got everyone riled up and told them to go there" on January 6th.

Judges from across the ideological spectrum have decried the insurrection as shocking criminal conduct that represented a grave threat to our democratic norms and that "it is not patriotism, it is not standing up for America, and it is not justified to descend on the nation's capital at the direction of a disappointed candidate and threaten members of the other party." Crucially, "judges appointed by Republican presidents have shown no (or little) more sympathy to the defendants," with one Trump appointee decrying January 6th as a "shameful event." When one defendant attempted to appeal to a Ronald Reagan appointee with their mutual love of the former president, the judge was "not impressed," and compared the January 6th rioters to "a lynching mob."

A January 2022 analysis in *Slate* of the January 6th prosecutions shows that "only about half of the Jan. 6 defendants have been charged with felonies." Likewise, in June 2022, *Bloomberg* reported that federal prosecutors have "scored about 50 felony guilty pleas out of more than 800 defendants charged." In contrast, at least 235 defendants "have pleaded guilty to misdemeanor offenses such as illegal parading." Only 80 defendants have received prison time. January 6th defendants are also more likely to be "released pending trial at higher rates than average," possibly due to the fact that they are hiring private attorneys at "four times the rate of a typical defendant." The treatment of January 6th defendants also speaks to the racial inequities in our justice system. The vast majority of January 6th defendants are white, and "[w]hen it comes to pretrial release, they are getting sent home at a much higher rate than their Black and Hispanic peers."

## B. United States House Select Committee on the January 6th Attack

Alongside ongoing criminal prosecutions, congressional action highlights the value of constructing "a full record of wrongdoing" as part of the process of pursuing accountability. In June 2021, the U.S. House of Representatives created the Select Committee to Investigate the January 6th Attack on the United States Capitol. The Committee has held numerous public hearings to present its findings and has outlined Trump's "seven-part plan" to overturn the results of the 2020 election. The Committee has employed dozens of professionals, interviewed over 1000 witnesses, and laid the groundwork for Trump's personal culpability in his incitement of the riot and his inaction to stop it after it began. The Committee has also examined

the Big Lie, the fake electors plot, and profiled the members of the mob. As the Protect Democracy Project notes, "[s]uch comprehensive fact-finding and truth-telling can combat disinformation and work towards creating a more shared reality; lay[ing] the political groundwork for institutional reforms."

### 1. *Trump v. Thompson* and the Separation of Powers

The Committee's ability to obtain necessary information was put to the test early in *Trump v. Thompson*, a case in which former President Trump sought to block the release of records relating to the January 6th insurrection. In August 2021, the January 6th Committee requested from the National Archives all "documents, communications, videos, photographs, and other media generated within the White House on January 6, 2021 that relate to the [Trump] rally on the Ellipse," in addition to other presidential records from that day.[2] Congress has broad investigatory and oversight authority as part of its core legislative powers. However, the president may assert various forms of executive privilege as a part of their executive power to shield certain communications and documents from Congress. A former president may assert those privileges, as well, though these assertions are subject to a number of factors, including whether the current president supports the assertion of privilege.

In September, Trump asserted executive privilege over some of the requested documents. That same day, Biden notified the Archivist of the United States that he intended to waive executive privilege. In October, Trump sued in his capacity as a former president to block the Archivist's disclosures to the Committee as a matter of executive privilege, arguing that disclosure of the requested documents would have a chilling effect on presidential communications with staff. The D.C. District Court denied the injunction, finding that Trump's "assertion of privilege is outweighed by President Biden's decision not to uphold the privilege."

Trump appealed to the D.C. Circuit, which, in December 2021, upheld the district court's decision denying an injunction. Executive privilege allows a president to protect from disclosure "documents or other materials that reflect presidential decisionmaking and deliberations and that the President believes should remain confidential."[3] However, the privilege is not absolute, and may be overcome by "a strong showing of need by another institution of government." The privilege is also waivable, and like other Article II powers, resides only with the sitting president.[4]

The D.C. Circuit ruled against Trump. First, because, as the current president, Biden is the "principal holder and keeper of executive privilege," his waiver carries great significance. Second, the Committee's compelling showing of need for information outweighs Trump's

[2] All quotations and information taken from Trump v. Thompson, 20 F.4th 10, 19–24 (D.C. Cir. 2021).
[3] *Id*. at 25. (citing In re Sealed Case, 121 F.3d 729, 744 (D.C. Cir. 1997); United States v. Nixon, 418 U.S. 683, 705 (1974)).
[4] *Id.* at 26.

assertion that disclosure would have a general chilling effect on presidential communications.[5] Trump petitioned for certiorari with the Supreme Court, which promptly denied his request in an 8-1 decision, allowing the D.C. Circuit's decision to stand.

### 2. Insurrectionist Members of Congress, Expulsion, and the Disqualification Clause

In May 2022, the January 6th Committee subpoenaed five sitting members of Congress, including House Minority Leader Kevin McCarthy. All of these members were invited to appear voluntarily before the Committee, and all have thus far refused to comply with the subpoenas. The Committee has previously referred individuals who failed to comply with subpoenas to the Department of Justice for potential criminal prosecution but has yet to refer these members of Congress.

According to the Committee, it sought to compel testimony from these members because they "participated in meetings at the White House . . . had direct conversations with President Trump leading up to and during the attack on the Capitol, and . . . were involved in the planning and coordination of certain activities on and before January 6th."

Many progressive commentators and lawmakers have called on Congress to expel any member found to have aided the insurrection. The Constitution gives both the House and the Senate broad power to expel members. Article I, Section 5, Clause 2 states: "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member." To date, Congress has exercised that power twenty times, most recently in 2002. The vast majority of those expelled were senators who supported the Confederacy during the Civil War. The requirement of a two-thirds majority vote to expel a member from Congress, however, is "a clear obstacle to expulsion."

Current or former federal and state officeholders involved in the January 6th insurrection may also be ineligible to hold federal office under Section 3 of the Fourteenth Amendment. Section 3 provides that "No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof." This means that no person who has previously sworn an oath to support the Constitution and subsequently engaged in insurrection against the United States may serve as a senator or representative. If the evidence shows that a sitting representative "engaged in" the January 6th

[5] *Id.* at 26, 35. *See also* Nixon v. GSA, 443 U.S. 425, 449 (1977); U.S. CONST. Art. II, § 1 cl. 1 ("The executive Power shall be vested in a President of the United States of America."); Selia Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2191 (2020) (reiterating that "T]he 'executive Power'—all of it—is 'vested in a President[.]").

insurrection, they could be disqualified from office, since all members of Congress swear an oath to support the Constitution.

However, as Professor Laurence Tribe cautions, the use of the Disqualification Clause is a "very murky" area of constitutional law. It has only been used once since Reconstruction, and that member was later reinstated. It is also unclear which branch enforces the Disqualification Clause. In an 1869 circuit case, Chief Justice Salmon P. Chase concluded that the clause is not self-enforcing. Congress, therefore, may have to pass an enforcement statute under its authority in Section 5 of the Fourteenth Amendment.

Even if Congress passed such a statute, Professor Gerard Magliocca believes that "that the [U.S. Supreme] Court would hold that Section 3 may be enforced against a sitting member of Congress only through expulsion, largely because the two-thirds requirement for expulsion is an important safeguard against partisan abuses." Under the Court's rule in *Powell v. McCormack*, Congress may exclude a member based on eligibility requirements (like age or citizenship) on a majority vote. Otherwise, the two-thirds vote for expulsion rule applies. The Court did not take up the question of whether its decision in *Powell* applied to Section 3 of the Fourteenth Amendment.

## C. Electoral Count Act Reform

The Big Lie that Trump won the 2020 election was the driving force behind the January 6th insurrection, but it was no coincidence that it took place on the day Congress was due to certify the 2020 election results and formally certify Biden's victory, pursuant to the Electoral Count Act of 1887 (ECA). The confusion and uncertainty produced by erroneous and bad-faith interpretations of the ECA in the run up to January 6 validate calls for its reform to "better secure the peaceful transfer of power in future elections."

Under Article II of the Constitution, the president and vice president of the United States are formally elected by the Electoral College. States choose the method of selection for electors, though all states currently rely on elections in which eligible state residents may participate. After Election Day, the selected electors meet in their states to formally vote for the president and vice president. Once Congress counts the electoral votes as submitted by each state, it declares the winner of the Electoral College and the presidency.

But what happens when that system breaks down? In 1876, following a contentious election between Rutherford B. Hayes and Samuel Tilden, several Southern states sent two slates of electors, one slate for Hayes and one for Tilden. Congress ultimately created an ad hoc election commission that gave Hayes the presidency. Over a decade later, the ECA was passed to avoid this outcome by establishing a process for Congress to count electoral votes and allow for consideration of objections to those votes with the support of one Senator and one Representative. While the vice president presides over the counting session held each January 6th following a presidential election, the ECA "provides little detail about the extent of their

duties." Nevertheless, the ECA was "initially a success and enabled more than a century of smooth electoral counts," according to a report by the U.S. House Committee on House Administration.

However, as the National Task Force on Election Crises concludes, the ECA as written "is severely flawed and can no longer be relied upon to ensure a peaceful conclusion to presidential elections." In 2021, Trumpist partisans in and outside of Congress used the ECA's vagueness regarding the vice president's role as a vehicle to give the Big Lie continued life, by claiming that Pence could unilaterally rejected Biden electors from states Trump claimed to have won. Trump and many of his supporters pressured Pence to take advantage of this bad-faith interpretation of the ECA. Absent reform, the ECA could allow members of Congress to overturn the results of the 2024 election, regardless of who the people choose to elect, and succeed where the 2021 effort failed. In one scenario put forth by Professor Matthew Seligman, a state legislature or governor could certify a slate of electors in spite of the outcome of the popular vote in the state "on a fake pretext of election fraud," and a Congress controlled by the same party could count those electors.

In January 2021, the Trump campaign and legal team attempted such a "fake electors" scheme. Trump campaign staffers and lawyers forwarded names of uncertified Trump electors as alternates for either Pence or Republican congressional leaders to select on January 6th, 2021. While the effort was "slapdash," and key participants were aware of its "dubious legality," the plan shows how serious those around Trump were pushing slates of fake electors. Absent congressional action to reform the ECA, Professor Rick Hasen asserts that all it would take for such a scheme to succeed in 2025 would be for a Republican Congress to "try to count the votes from the state legislature rather than votes reflecting the people's will."

In July 2022, a bipartisan group of senators announced a proposal to reform the Electoral Count Act to avoid the risk that partisans might exploit the ECA to subvert future election outcomes. The proposed reform would clarify that the vice president's role in the process is "purely ceremonial." It would also raise the threshold for any challenges to the electoral slates. The proposal includes:

1. Mandating that electors be appointed in a manner consistent with state law as it reads on Election Day;

2. Setting a deadline after which the legislature cannot appoint any new electors;

3. Requiring the governor to also certify the electors before the deadline; and

4. Allowing a three-judge panel to select a slate of electors on appeal by one of the candidates, which must be the slate that Congress certifies.

These reforms are similar to those proposed by some legal scholars and a cross-partisan group of more than fifty experts in election law, election administration, national security,

cybersecurity, voting rights, civil rights, technology, media, public health, and emergency response. Seligman believes the proposed Electoral Count Act reform "would go a long way towards preventing a stolen presidential election in 2024 and beyond."

### Discussion Questions

*If it is proven that Trump, members of his administration, and/or members of Congress did conspire to overturn the 2020 election, how should they be held accountable? What is the proper balance between executive privilege and congressional investigatory powers? Has the Court struck the right balance in* Trump v. Thompson*? Are there further reforms to the Electoral Count Act that can be made to eliminate weaknesses in the certification process for presidential elections?*

### For More Information

CONG. RESEARCH SERV., R45078, EXPULSION OF MEMBERS OF CONGRESS: LEGAL AUTHORITY AND HISTORICAL PRACTICE (2018); Gerard Magliocca, *The 14th Amendment's Disqualification Provision and the Events of January 6th*, LAWFARE (Jan. 19, 2021); Thomas Berry & Genevieve Nadeau, *Here's What Electoral Count Act Reform Should Look Like*, LAWFARE (Apr. 4, 2022). CONG. RESEARCH SERV., R47102, EXECUTIVE PRIVILEGE AND PRESIDENTIAL COMMUNICATIONS: JUDICIAL PRINCIPLES (2022).

## III. The Roberts Court's Hostility to Voting Rights

### A. The Voting Rights Act and *Shelby County*

The Voting Rights Act of 1965 (VRA) was a landmark piece of legislation that "sought to deliver on the promise of the 14th and 15th Amendments that every citizen is entitled to an equal opportunity to participate in our democracy." Among its key provisions: Section 2 bans racial discrimination in voting; Section 4 bans literacy tests as a requirement to register to vote as well as lays out the formula for determining covered jurisdictions subject to "preclearance" because of a history of racial discrimination in voting; and Section 5 requires covered jurisdictions to "preclear" any changes in their election law with either the U.S. Department of Justice or the U.S. District Court for the District of Columbia. An analysis by economist Desmond Ang found that the VRA increased voter turnout in preclearance states by four to eight percentage points, largely due to "lasting gains in minority participation." Congress reauthorized the VRA with wide bipartisan support five times, most recently in 2006. But conservative activists, with support from conservative members of the judiciary, have long been hostile to the VRA and have engaged in years of litigation to dismantle it. Among the members of the judiciary who have supported these efforts is Chief Justice John Roberts, who as a young Justice Department lawyer wrote that the VRA was "constitutionally suspect" and "contrary to the most fundamental tenants [*sic*] of the legislative process on which the laws of this country are based."

Over thirty years later, Chief Justice Roberts wrote for the majority in *Shelby County v. Holder* in which the Court held that the preclearance formula of Section 4(b) was unconstitutional, rendering Section 5 inoperable. The majority held that the VRA's "extraordinary measures,

including its disparate treatment of the States" imposed current burdens and were not justified by current needs. Chief Justice Roberts wrote that improvements in racial minority turnout and registration had been made "in large part *because* of the Voting Rights Act" and the coverage formula did not reflect these advancements. The Chief Justice reasoned that the VRA was so successful that it was no longer needed. As Justice Ruth Bader Ginsburg noted in her dissent, "[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."[6]

Immediately after the decision, several states enacted stringent voter ID laws, limited early voting periods, closed polling places, and removed voters from their rolls through a process referred to as "purging." The end of preclearence and subsequent voter suppression tactics have had a disproportionate effect on minority voters.

## B. Voter Suppression Laws Passed in Response to the 2020 Election

The 2020 election saw a massive increase in voter turnout, due in part to the increased use of mail-in ballots across the country. Yet the ongoing rhetoric around "election integrity" and the Big Lie led several states to pass a raft of new, restrictive voting laws in 2021. These include limiting early and mail-in voting, requiring identification with mail-in ballots, and reassigning certain powers over elections from the secretary of state to the state legislature.

Three states in the Deep South provide examples of this new wave of voter suppression. In Florida, a new law now requires voters who wish to vote by mail-in ballots to provide either an ID or Social Security Number to request a ballot; the law also limits voter's access to ballot drop boxes to certain designated periods during the day. In 2020, ballot drop boxes grew in popularity as an easy and convenient method of voting amid the COVID-19 pandemic. States that have all vote-by-mail elections, like Utah and Washington, have used drop boxes for decades without incident. After 2020, Republican legislators have attacked drop boxes simply because they make it "easier to vote," disregarding the fact that they remain "safe, convenient, and popular."

Georgia has limited drop boxes to a maximum of one for every 100,000 voters, which reduced the number of boxes in the metro Atlanta area from 111 to just 23. The recent voting restrictions have also targeted Black voters with an almost "uncanny accuracy," according to the Brennan Center's Michael Waldman. For example, the state criminalized giving water or food to people in line to vote. As Waldman notes, these laws will disproportionately affect people of color, because "hours-long lines to vote are more often in Black and brown communities" thanks to a reduction in polling places and a surge in minority voting.

In Texas, overnight early voting and drive-through voting are now banned and local election officials face jail time if they proactively distribute mail-in ballots to members of the

[6] Shelby County v. Holder, 570 U.S. 529. 544, 554 (2013); *Id.* at 590 (Ginsburg, J., dissenting).

community, many of whom are elderly or people with disabilities. In 2020, the measures now banned in Texas made it easier to vote and brought "the highest voter turnout that Texas has seen in 30 years," a notable accomplishment in the state in light of a study of elections between 1996 and 2016 that found "it is harder to vote in Texas than literally any other state in the country." Similar to the measures passed in Georgia, Texas's restrictions on overnight early voting and drive-through voting disproportionately affect minority voters. An analysis by the Texas Civil Rights Project found that people of color made up 56% of late night voters and 53% of drive-through voters in Houston and surrounding Harris County, despite being only 38% of the overall electorate.

Until about a decade ago, federal law would have prevented many of these discriminatory voting restrictions from coming into force. Section 5 of the Voting Rights Act of 1965 (VRA) was "enacted to freeze changes in election practices or procedures in covered jurisdictions until the new procedures have been determined . . . . to have neither discriminatory purpose or effect." Under Section 5, Georgia and Texas would have had to obtain this permission, called "preclearance," from either the U.S. Department of Justice or the District Court for the District of Columbia before any changes in their voting law could go into effect. The effects of *Shelby County* are still being felt almost a decade later.

### C. *Brnovich* and the Continued Evisceration of the Voting Rights Act

After *Shelby County*, voting rights plaintiffs brought an increased number of challenges to voter suppression laws under Section 2 of the VRA, which prohibits discriminatory voting practices on the basis of race. But in 2021, the VRA was dealt a further blow when the Supreme Court took aim at Section 2 in *Brnovich v. Democratic National Committee*. At issue was whether Arizona's policy to not count provisional ballots cast in the wrong precinct and its law criminalizing anyone other than the voter from holding their mail ballot violated Section 2 of the VRA. Plaintiffs argued that both were motivated by intentional racial discrimination. While the lower appellate court ruled for the plaintiffs, the Supreme Court reversed, holding that the lower court had applied the wrong standard for Section 2 cases.

Prior to *Brnovich*, multiple circuits had adopted a two-part test to determine a Section 2 violation: Whether the challenged practice "imposes a discriminatory burden on members of a protected class;" and whether "the burden is in part caused or linked to social and historical factors that have or currently produce discrimination against members of the protected class." The second part endorsed several factors laid out in a U.S. Senate report to the 1982 VRA amendments.[7] These "Senate Factors" asked courts to examine the history of voting discrimination in the state or political subdivision; the extent to which elections are racially polarized; and the use of overt or subtle racial appeals in political campaigns, among other factors.

[7] *Id.* at 19 (citing collected cases from the Fourth, Fifth, Sixth, and Nineth Circuit Courts of Appeal).

In *Brnovich*, the Court explicitly rejected that approach. Justice Samuel Alito wrote for the six justices of the Court's conservative supermajority, holding that courts should instead utilize a "totality of the circumstances" test and offering several "guideposts" for courts to consider when determining a Section 2 violation. One of these guideposts is whether a voting rights restriction existed at the time of the 1982 amendments.[8] As election law professor Rick Hasen points out, the effect of this interpretation is that it tells "states that they can roll back voting restrictions to a time [1982] when registration was onerous, and early and absentee voting rare."

Justice Alito argues that "the burdens associated with the rules in widespread use when [Section] 2 was adopted [in 1982] are therefore useful" in determining whether a state voting law violates the VRA.[9] But as Linda Greenhouse points out, the "obvious implication" of Justice Alito's invocation of 1982 is that recent efforts to restrict mail-in voting "are presumptively entitled to a free pass because widespread use of mail-in ballots is a post-1982 development." Davin Rosborough concludes that "the Court's benchmark of common practices in 1982. . . . will undermine the project of Section 2 to dismantle discriminatory voting systems."

Congress could overrule the Court by passing a new reauthorization of the VRA. One such proposal, the John Lewis Voting Rights Advancement Act, would effectively overrule both *Shelby County* and *Brnovich* by providing a new formula for preclearance and codifying the Senate Factors. Unfortunately, the bill does not have the necessary support in the Senate to reach the sixty vote threshold needed to overcome the filibuster nor is there sufficient support for the elimination of the filibuster. As a result, the Voting Rights Advancement Act is unlikely to become law in the foreseeable future.

### D. Inconsistent Application of the *Purcell* "Principle"

In a per curiam decision in *Purcell v. Gonzalez*, the Supreme Court held that the Ninth Circuit had improperly enjoined a law requiring photo ID for voter registration from going into effect.[10] *Purcell* has since come to stand for the presumption that "courts should not change election rules during the period of time just prior to an election because doing so could confuse voters and create problems for officials administering the election."

On the surface, this makes a certain amount of sense. As David Gans writes, "*Purcell* rests on a germ of truth: courts must take account of how its [*sic*] rulings will affect an upcoming election." Yet the way in which the Court has applied *Purcell* "prevents courts from stopping late-breaking acts of voter suppression," which "harms our democracy."

The Court has been inconsistent with what counts as "too close" to an election to change the electoral map. In February, the Court allowed Alabama's congressional map to remain in effect for the 2022 election cycle despite challenges brought under Section 2 of the VRA. The order

[8] Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2337-41 (2021).
[9] *Id.* at 2338.
[10] Purcell v. Gonzalez, 549 U.S. 1, 4-5 (2006).

was issued through the shadow docket, with no opinion from the Court; however, experts have deduced from Justice Brett Kavanaugh's concurrence that the Court relied on *Purcell* to reach this result. The lower courts had unanimously held that the state had diluted the Black vote and denied Black voters a second majority-minority congressional district in violation of the VRA. But the Court overruled them, reasoning that any changes to the map would be too close to the Alabama primaries. Its decision was issued in February, which would have given the state legislature time to draw a new map by the May 24th candidate filing deadline and the June 21 primaries. Although the Court agreed to hear the case next term, its decision means that the map will be in effect for the 2022 midterms.

While the Court concluded in the Alabama case that several months would be too soon before an election to intervene, it has had no problem intervening to change a mail-in ballot deadline a day before an election. In a 2020 shadow docket decision involving Wisconsin, the state had changed its mail-in ballot deadline from April 7 to April 13, 2020. The District Court had ruled on April 2nd ruled that absentee ballots mailed and postmarked after the original April 7th Election Day deadline should be counted. On April 6th, a mere one day before the deadline, the Supreme Court stayed the lower court's decision. In so doing, it relied on *Purcell* and chastised the lower court for not heeding its "wisdom" in getting involved too close to the election on April 7th.

Yet as Justice Ginsburg's dissent put it, "[t]his Court's intervention is thus ill advised, especially so at this late hour," citing to *Purcell*. Furthermore, she noted that election officials "have spent the past few days establishing procedures and informing voters in accordance with the District Court's deadline." Justice Ginsburg concluded that "[f]or this Court to upend the [process—a day before the April 7 postmark deadline—is sure to confound election officials and voters." Thus, both sides in this case relied on *Purcell* to reach dramatically different results.

The inconsistent application of a neutral "principle" like *Purcell* leads to outcomes that are not neutral. David Gans warns that this is "a dangerous development that encourages partisan tampering with the electoral process" and "invites the manipulation of democracy by state actors." And as Professor Rick Hasen noted after the Wisconsin decision, the use of *Purcell* in that case shows that the Court "is increasingly willingly to go out on a limb to fully implement the justices' legal and political preferences without it being tempered by concern about perceptions and legitimacy."

### E. *Rucho* and State Constitutions as Last Line of Defense

In 2019's *Rucho v. Common Cause*, the Court further eroded federal protections of voting rights, finding that the issue of partisan gerrymandering is a "political question" beyond the Court's competence and jurisdiction. In her dissent, Justice Elana Kagan noted the inevitable result of the Court's abdication: "politicians can cherry-pick voters to ensure their reelection." Chief Justice Roberts, once again writing for the majority, conceded that "[p]rovisions in state statutes

and state constitutions can provide standards and guidance for state courts to apply" to challenges to legislative maps.[11]

With its *Rucho* decision, combined with *Citizens United*, *Shelby County*, and an increasing reliance on the "shadow docket" to reject voters' claims, the Roberts Court has opened the door to elections filled with unlimited dark money, unfiltered voting restrictions, and unchecked partisan interest in setting the boundaries and rules of the contest. And as the Court weighs the future of what remains of the protections found in Section 2 of the VRA in this term's *Moore v. Harper*, voting rights advocates have begun taking a different tack: looking to state constitutions and state courts to vindicate voters' rights.

As experts have noted, Justice Kagan made the most of her *Rucho* dissent, creating a roadmap for a North Carolina state court to deliver relief to that state's voters by striking down an extremely gerrymandered map under the state's constitutional protections after the U.S. Supreme Court refused to do so.

According to Professor Josh Douglas, "[v]irtually every state constitution confers the right to vote to its citizens in explicit terms" but until recently, "state courts, much like federal courts, have largely underenforced the right to vote because they have too closely followed federal court voting-rights jurisprudence." Many state constitutions go beyond the federal Constitution in guaranteeing a right to "free," "equal" or "open" elections. Thirty states have such clauses, and many have been used to strike down partisan gerrymanders in states like Pennsylvania, North Carolina, and New York.

Previously the U.S. Supreme Court allowed state supreme court-imposed congressional maps to stand in North Carolina and Pennsylvania. But at least four justices seemed to endorse a new legal theory, the Independent State Legislature Theory, which could neuter every state supreme court's ability to interpret and apply election law to federal elections.

## F. The Independent State Legislature Theory

The modern roots of the independent state legislature theory can be traced to Chief Justice William Rehnquist's concurrence in *Bush v. Gore*, in which the Court's conservative majority ended the electoral recount in Florida and essentially "handed the 2000 election" to George W. Bush. The Florida Supreme Court had ordered a recount under applicable state election law, but the U.S. Supreme Court intervened to stop the recount. In his concurrence, Chief Justice Rehnquist acknowledged that although the Supreme Court typically defers to state supreme courts on interpretations of state law as a matter of federalism and "comity," here that principle was superseded by the state legislature's constitutional duties under Article II, Section 1. This provides that "'[e]ach State shall appoint, in such Manner as the *Legislature* thereof may direct,'

[11] Rucho v. Common Cause, 139 S. Ct. 2484, 2507 (2019).

electors for President and Vice President."[12] Thus, because the Florida Legislature had already assigned its presidential electors to Bush, that should take precedence over the Florida Supreme Court's subsequent recount order.

Both the Presidential Electors Clause and the Elections Clause refer to the powers of the state legislature over federal elections. The latter allows state legislatures to choose "The Times, Places and Manner of holding Elections for Senators and Representatives," but gives Congress the power "by Law [to] make or alter such Regulations" at any time. Traditionally, the Supreme Court has interpreted the term "legislature" expansively to include not just a state's lawmaking body, but its legislative process more generally. That legislative process may include other actors, like the governor, or a ballot measure, as allowed by the statutes and constitution of that particular state.

As recently as 2015, the Supreme Court dismissed the independent state legislature theory by upholding an Arizona independent redistricting committee that was created by a statewide ballot measure. In a majority opinion written by Justice Ginsburg, it reaffirmed that, per the Arizona Constitution, "initiatives adopted by the voters legislate for the State just as measures passed by the representative body do." Furthermore, "it is characteristic of our federal system that States retain autonomy to establish their own governmental processes." Justice Ginsburg explained that to hold that the Elections Clause unduly constrains those processes would not only violate principles of federalism but would also go against the historical purpose of the Elections Clause, namely "to act as a safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate."[13] The Clause does this by giving Congress the power to overrule the legislatures.

Since that 2015 decision, the membership of the Court has changed significantly. In a statement accompanying a 2020 order, Justice Alito, joined by Justices Neil Gorsuch and Clarence Thomas, noted the "important constitutional issue" raised by whether the Pennsylvania Supreme Court could "squarely alter" a statute passed pursuant to the Pennsylvania state legislature's power to regulate elections under the federal Constitution. Justice Brett Kavanaugh has also expressed interest in a case involving whether a lower federal court could extend Wisconsin's mail-in ballot deadline. Citing Chief Justice Rehnquist's concurrence in *Bush v. Gore*, Kavanaugh wrote that"[t]he text of Article II means that the 'clearly expressed intent of the legislature must prevail'" and that "a state court may not depart from the state election code enacted by the legislature."

However, if conservatives follow their originalist principles, they will not find much support for the independent state legislature theory. Professors Vikram Amar & Akhil Amar conclude that

[12] Bush v. Gore, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring) (quoting U.S. CONST. Art. 1, Sec. 1, cl. 2).
[13] Arizona State Legislature v. Arizona Independent Redistricting Comm'n, 576 U.S. 787, 814, 815, 817 (2015).

at the Founding, "the public meaning of state 'legislature' was clear and well accepted . . . : A state 'legislature' was . . . an entity created and constrained by its state constitution." Likewise, Hayward Smith notes that in the decade after the ratification of the federal Constitution, every state but one enacted state constitutional provisions regarding elections. Similarly, Founding-era state legislatures routinely delegated election authority to other state actors, like local election officials. An examination of that history by Mark Krass shows that officials as diverse as Virginia sheriffs and New England town meetings exercised those powers during that era. The independent state legislature theory is not supported by text, history, or Supreme Court precedent dating back more than a century.

Taken to its logical endpoint, the independent state legislature theory could allow for the kind of coup that was narrowly avoided on January 6th, 2021. It has been suggested that if the state legislature has the sole power to control elections, then it arguably could override the will of the voters after an election by sending its own slate of presidential electors or even congressional representatives, irrespective of who the voters choose.

This hypothetical has generated much debate among legal scholars. Hasen concludes the independent state legislature theory "could fundamentally alter the balance of power in setting election rules in the states and provide a path for great threats to elections" by allowing state legislatures to "flip" election results. He is joined by retired Judge Michael Luttig who sees the independent state legislature theory as the "cornerstone" of a potential plan to overturn the 2024 election results, which can only be stopped if the Supreme Court rejects the theory. However, Professor Michael Morley, a proponent of the theory, argues that "[f]ederal law . . . constrains a legislature's ability to directly appoint electors"." Likewise, Geneveive Nadeau and Helen White conclude that "[e]ven a maximalist version of the [independent state legislature] theory would not empower state legislatures to defy the federal constitution or disregard federal statutes."

Next term, the Supreme Court will address the independent state legislature theory in *Moore v. Harper*. The Court will decide whether the North Carolina Supreme Court may strike down a gerrymandered congressional map and order a state trial court to adopt a new map drawn by court-appointed experts.

## Discussion Questions

*How does the Court's interpretive methodology differ between* Shelby County *and* Brnovich*, and what does the difference imply about the Court's posture toward voting rights laws in future cases? Should the Court preserve the* Purcell *principle, and if so, how close is to too close to an election for the Court not to get involved? What more could be done utilizing state constitutional provisions to expand ballot access and political representation for racial minorities, people with disabilities, and other marginalized communities? What can be done to protect against the dangers posed by the Independent State Legislature Theory?*

### For More Information

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## IV. An International Perspective: Legal Coups Abroad and the Fight for Democracy at Home

The United States is not the only nation where democracy is in retreat. Each year, the nonprofit Freedom House publishes a report on the state of freedom and democracy in the world. In its 2021 report, Freedom House found that "democracy's defenders sustained heavy new losses in their struggle against authoritarian foes, shifting the international balance in favor of tyranny." And the United States did not escape criticism. Citing the "parlous state" of American democracy, particularly in light of January 6th, Freedom House's concerns only deepened in its 2022 report. There, it found that in an era of rising authoritarianism around the world, the same antidemocratic forces that led to the insurrection "continue to exert significant influence over the U.S. political system." More specifically, the Big Lie, intimidation of election officials by Trump supporters, and legislation restricting ballot access in the name of election integrity were all named as threats to our democracy.

As more nations drop "the pretense of competitive elections," and as coups became "more common in 2021 than in any of the previous 10 years," what can the U.S. learn from other nations around the world that are further down the path towards authoritarianism? Such coups have occurred recently in several nations across Europe, like Hungary, which may provide a preview of could happen in the United States if we do not strengthen our democracy now. Right-wing authoritarians in the United States have increasingly looked to Hungary and its Prime Minister Viktor Orban as models. Tucker Carlson has hosted his popular Fox News program from the country. In 2022, a special edition of the Conservative Political Action Conference (CPAC) was held in Hungary, with Orban as its keynote speaker.

Orban's brand of autocracy has been characterized as "soft." He is nominally elected, yet he has "so thoroughly rigged the system that his grip on power is virtually assured." Institutions in Hungary like the courts, universities, and the electoral system have been "delegitimized" and "hollowed out." Professor Kim Lane Schepple notes that Orban has succeeded by manipulating existing law rather than simply breaking it, in what she calls a "constitutional coup." She explains, "First, he changes the laws to give himself permission to do what he wants, and then he does it." As Vox reporter Zack Beauchamp concludes, Orban's Hungary has "a political

system that aims to stamp out dissent and seize control of every major aspect of a country's political and social life, without needing to resort to 'hard' measures like banning elections and building up a police state."

Elsewhere in Eastern Europe, Poland has also been backsliding on democracy under its ruling Law and Justice Party (PiS). PiS consolidated its hold on political power through changes to the judiciary. For decades, the judiciary was appointed by an independent council of judges, free from political interference. In 2017, President Andrzej Duda enacted legislation giving the PiS-controlled Parliament the power to appoint more than half of the council, giving the party control over all judicial nominations. This includes the Polish Supreme Court, which certifies election results. The Supreme Court voted to certify Duda's 2020 reelection, despite accusations of fraud.[14] By taking control of the judiciary President Duda and PiS have been free to enact other measures, including consolidation of the media under state control, an abortion ban, and a crackdown down on vulnerable LGBTQ+ Poles.

As Steven Levitsky and Daniel Ziblatt note in their book *How Democracies Die*, most modern democratic breakdowns "have been caused not by generals and soldiers but by elected governments themselves." Levitsky and Ziblatt assert that through the subversion of democratic institutions, "democratic backsliding today begins at the ballot box, "as it did in Hungary and Poland. Likewise, the rise of authoritarianism is not strictly a European issue. Brazil, Turkey, and India are all democracies that have fallen sway to more authoritarian regimes in the 21st century. Similarly, Tunisia and Senegal are examples of democratic backsliding in Africa, where leaders have engaged in constitutional coups to retain power.

In of the context of this "global expansion of authoritarian rule," Freedom House warns that "the United States has fallen below its traditional peers on key democratic indicators." And as Thomas Wright noted days after the January 6th insurrection, "it is precisely because American democracy is under pressure at home that the U.S. government ought to stand up for it overseas" as "[o]ur situation shows that the United States has a real stake in the struggle."

## Discussion Questions

*What steps could the United States take to prevent a "legal coup" from happening at home? What are the What lessons can be learned from other countries who have faced similar authoritarian threats? What balance should the U.S government strike in advocating for democratic reforms abroad while addressing ongoing threats at home?*

## For More Information

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[14] The European Union has withheld funds after Poland refused to abide by an E.U. Court of Justice ruling which found that its system of disciplining judges is against the bloc's rules.

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## About the American Constitution Society

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