

Constitutional Challenges Facing Our Democracy: The Roberts Court's Wrong Turns on Campaign Finance, Gerrymandering, and Voting Rights

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Today, as we celebrate Constitution Day, it is important to discuss how, and by whom, our Constitution has been shaped in the more than two centuries since the Constitutional Convention in 1787. I am going to focus on the democracy areas that I work on at the Campaign Legal Center, the nonpartisan Washington, D.C.-based legal organization I head: campaign finance, redistricting, and voting rights.

When we speak of the “Framers” of our Constitution, there is a temptation to think of them only as the men in the room in Philadelphia in the summer of 1787. But that freeze frame historical image is dangerously inaccurate, even when brought to dazzling life on stage in *Hamilton*. Originalists and “living constitutionalists” can and frequently do disagree over what the “men in the room” in 1787 meant, but that picture leaves out all of the other “Framers,” particularly the post-Civil War “reframers” of 1865, 1868, and 1870, and then the 20th century Framers of 1913, 1920, and 1971.¹

The Constitution began as an agreement among the independent states of the American Confederation for a federated republic, and has become—232 years later—a different compact that we Americans have with each other to live in a complex democracy. Today’s document, and its interpretation by the Supreme Court, still embody tensions between the 1787 Founders’ concept of sovereign states and later Founders’ vision of national norms and more direct democracy.

Amendments to our Constitution

It is an interesting fact that the 1787 Constitution did not include an affirmative right to vote—and the 2019 one does not either.² Despite that fact, a number of amendments to the Constitution have assumed a “right to vote” in the course of dramatically extending the voting. Those amendments forbid suffrage from being “denied or abridged” to certain groups, until almost all adult citizens are covered by these provisions.

Democratic changes we have made to our system of government through constitutional amendments have included:

¹ These are the years that the 13th, 14th, 15th, 17th, 19th, and 26th amendments were ratified, respectively.

² See, e.g., Matthew Yglesias, *Americans don’t have a constitutional right to vote—it’s time for that to change*, Vox (Oct. 20, 2014), <https://www.vox.com/2014/10/20/6997315/voting-rights-amendment-affirmative-right-to-vote>.

- The abolition of slavery via the 13th amendment (in 1865, enslaved people made up more than 10% of the population).³
- The guarantee of citizenship to all persons born or naturalized in the United States, and a requirement that all citizens receive due process and equal protection of the laws (the 14th amendment).
- The guarantee that the right of American citizens to vote “shall not be denied or abridged on account of race, color, or previous condition of servitude” (the 15th amendment).
- The direct election of Senators by the people of each state in the 17th amendment (1913)—rather than by the State legislatures.
- The 19th amendment created the greatest numerical expansion of American voters one hundred years ago this year, when the Constitution was amended to ensure the right of any citizen to vote regardless of sex.
- Finally, the 26th amendment was approved in 1971, allowing 18-year-olds to vote.

Many of these amendments included provisions giving Congress “the power to enforce” the amendments’ provisions. This means that Congress has also acted over time as a “Framer” of our Constitution, not only in sending these amendments to the states but also in enacting legislation defining these rights.

For example, almost 100 years after the enactment of the 15th Amendment, in 1870, Congress in 1965 passed the Voting Rights Act to enforce minorities’ voting rights—by prohibiting discriminatory voting practices (such as literacy tests) and giving the Department of Justice and the courts tools to ensure compliance.

In this area and many others, the Justices who have served on the U.S. Supreme Court and interpreted the Constitution have also acted as Framers—for better, and also for worse.

We think of the Court “getting it wrong” in *Plessy v. Ferguson* (1896), which upheld racial segregation laws in public facilities, but then “getting it right” and correcting that error in *Brown v. Board of Education* six decades later (1954). But, as I will explain in a moment, the Court got it “wrong” again in interpreting the 15th amendment as recently as this decade, when the Court in 2013 invalidated a key section of the Voting Rights Act in the *Shelby County* case.

We think of the Court “getting it wrong” in *Dred Scott v. Sanford* (1857), which excluded African Americans from the rights of citizenship under the Constitution. It took the thirteenth and fourteenth amendments to correct this error. However, an increasingly conservative post-Civil War Court again got it wrong by taking a narrow view of these amendments, largely vitiating for many years their purpose of ensuring black citizens a full role in society and in elections.⁴

³ Specifically, the 1860 Census recorded 3.95 million slaves and a total US population of 31.44 million. See <https://www2.census.gov/library/publications/decennial/1860/population/1860a-46.pdf>.

⁴ See generally, e.g., Eric Foner, *The Lost Promise of Reconstruction*, N.Y. TIMES (Sept. 8, 2019), <https://www.nytimes.com/2019/09/07/opinion/sunday/reconstruction-trump.html>.

There are some provisions of the Constitution which have never changed. One of these is the First Amendment. What has changed is the Supreme Court's interpretation of it, most especially in its application to elections, and to the regulation of money in politics. Due to recent changes of the composition of the Court, a majority of Justices now see the First Amendment as prohibiting much regulation of money in politics, and a huge majority of Americans therefore now see the Court's decisions as allowing and encouraging corruption in elections and in legislating.

A few poll numbers illustrate public dissatisfaction with our current campaign finance laws:

- Only 20% of Americans say they are satisfied with our current campaign finance system.⁵
- 59% agree with the following statement: "The political system is broken—we need to just start over."⁶

Campaign Finance

Until the 20th century, there were no federal laws regulating the spending of money in federal elections. Starting in 1907, a series of restrictions on corporate, and later union, political contributions and spending in elections became law. These responded to the widespread perception that big corporate and labor money was buying election results and legislation. These restrictions were largely not challenged on First Amendment grounds until after the passage of the Watergate reform laws, which created limits on individual and candidate contributions, and expenditures to limit money in federal elections.

This led to the seminal campaign finance case of *Buckley v. Valeo* in 1976. There, the Supreme Court found a constitutional distinction between contributions and expenditures: the Court upheld limits on contributions to candidates and political parties. But it reasoned that direct expenditures by individuals that were independent of the candidates they supported were protected speech because there was no evidence that they would corrupt candidates. The Court also held that expenditure limits capping how much candidates can spend in elections—limits most other democracies have—unconstitutionally violate freedom of speech.

The *Buckley* opinion regarded the danger of the appearance of corruption from large contributions, and the resulting threat to public confidence, as self-evident. It recognized a governmental interest in guarding against this appearance of corruption, by limiting the size of contributions and other restrictions on money in politics.

⁵ Grace Sparks, *Very few Americans are satisfied with campaign finance laws, but most don't know a lot about them*, CNN (Apr. 4, 2019), <https://www.cnn.com/2019/04/04/politics/campaign-finance-polling/index.html>.

⁶ John McCormick, *Most agree with Trump on America's lost greatness, Bloomberg polls finds*, BLOOMBERG NEWS (Sept. 24, 2015), <https://www.chicagotribune.com/news/sns-tns-bc-campaign-poll-20150924-story.html>.

Decades later, in *McConnell v. FEC*, the legal challenge to the 2002 McCain-Feingold reform law, a 5-4 Supreme Court majority again reinforced this broad view of the government’s authority to regulate money in politics to prevent corruption and the appearance of corruption, writing: “Congress’ legitimate interest extends beyond preventing simple cash-for-votes corruption, to curbing ‘undue influence on an officeholder’s judgment, and the appearance of such influence.’”⁷

The bad news is that this decision was 5-4, and Justice O’Connor was the key vote. She was then the only Justice on the Court who had ever held elective office, and I believe her first-hand understanding of campaigns and the sausage-making of the legislative process made her more likely to defer to the judgement of Congress on this issue. She understood the corrupting potential of large sums of money in campaigns, and the corruption possible in the legislative process when legislators are raising money for themselves and their party at the same time that they are drafting and voting on laws affecting large donors. Unfortunately, Justice O’Connor then retired, to be replaced by Justice Alito, who had no comparable experience with elections and legislating, and a very different view of the Constitution. It is important to note that no Justice on the current Court has ever held elective public office, which may partially explain their campaign finance and election decisions.

In *Citizens United*, in 2010, the Court, with two new Justices, for the first time extended *Buckley’s* protection of independent spending to corporations. The *Citizens United* Court, in its 5-4 opinion authored by Justice Kennedy, held that “Ingratiation and access . . . are not corruption And the appearance of influence or access will not cause the electorate to lose faith in this democracy.”⁸

This marked a 180-degree reversal of several decades of Supreme Court precedent. As recently as 1990, the Court had rejected such a right for corporations, in *Austin v. Michigan Chamber of Commerce*.

The *Citizens United* conclusion is in tension with the *Buckley* Court’s corruption rationale, and what members of Congress have admitted: That those who contribute or spend have a greater effect on legislation. A Republican Congressman from New York noted this in 2017, when he was explaining why he supported the tax cut bill: “My donors are basically saying, ‘Get it done or don’t ever call me again.’”⁹

Since *Citizens United* in 2010, the Court has continued on this new path and struck down other campaign finance laws, such as in *Arizona Free Enterprise*, the 2011 case striking down a key part of Arizona’s public funding law. This was followed by the 2014 *McCutcheon* case that

⁷ *McConnell v. FEC*, 540 U.S. 93, 150 (2003) (emphasis added).

⁸ *Citizens United v. FEC*, 558 U.S. 310, 360 (2010) (internal citation omitted).

⁹ Reihan Salam, *Campaign-Finance Reform Can Save the GOP*, THE ATLANTIC (May 27, 2018), <https://www.theatlantic.com/ideas/archive/2018/05/campaign-finance-reform-can-save-the-gop/561143/>.

struck down federal aggregate contribution limits that had been effect since the 1970s, which had restricted the overall amount an individual could give in a single election cycle.

One practice of the Court's current anti-regulatory majority is to write opinions asserting that there will be little adverse effect to their striking down laws regulating money in politics. Unfortunately, these defensive rosy predictions usually prove false.

Take, for instance, Justice Kennedy's statement in *Citizens United* that the appearance of the sale of "influence or access will not cause the electorate to lose faith in this democracy." Here is what the public thinks today:

- 82% of Americans think that government is "run by a few big interests looking out for themselves." (In 1964, when they first asked this question, only 29% felt that way.)¹⁰
- Americans believe by a nearly two-to-one margin (64% to 36%) that their "vote does not matter because of the influence that wealthy individuals and big corporations have on the electoral process."¹¹

Another prediction of the Court's that has proven spectacularly wrong is that all the new money that would pour into our election system after *Citizens United* would be fully disclosed.

People often forget that the *Citizens United* decision actually had one good part: the Court upheld and praised federal disclosure laws. In a section of the opinion joined by seven other Justices, Justice Kennedy wrote, through disclosure: "With the advent of the Internet . . . citizens can see whether elected officials are 'in the pocket' of so-called moneyed interests."¹²

However, Justice Kennedy himself later admitted at a talk at Harvard Law School that the disclosure he envisioned was, quote, "not working the way it should."¹³ Indeed, it is not.

The *Citizens United* decision, combined with the resulting creation of super PACs, and the non-disclosed funding of "social welfare" 501(c)(4) nonprofit corporations and other secret vehicles, and the legislative and regulatory lapses that followed, helped usher in a new era of so-called dark money. Non-profit 501(c) groups that don't disclose their donors have reported spending \$1 billion on federal elections since *Citizens United*.¹⁴

¹⁰ Table 5A2, American National Election Studies (2016), http://www.electionstudies.org/nesguide/toptable/tab5a_2.htm.

¹¹ Harold Meyerson, *Americans see a government of, by and for the rich*, WASH. POST (Nov. 18, 2015), https://www.washingtonpost.com/opinions/americans-see-a-government-of-by-and-for-the-rich/2015/11/18/8c8e001a-8e19-11e5-acff-673ae92ddd2b_story.html.

¹² *Citizens United v. FEC*, 558 U.S. 310, 370 (2010) (internal quotation omitted).

¹³ Paul Blumenthal, *Anthony Kennedy's Citizens United Disclosure Salve 'Not Working,'* HUFF. POST (Nov. 2, 2015), https://www.huffingtonpost.com/entry/citizens-united-anthony-kennedy_us_5637c481e4b0631799134b92.

¹⁴ Open Secrets, *Political Nonprofits (Dark Money)*, CENTER FOR RESPONSIVE POLITICS, https://www.opensecrets.org/outsidespending/nonprof_summ.php?cycle=2018&type=type&range=tot.

Another result of *Citizens United* has been a huge tidal wave of “outside spending” that is in theory “independent” of candidates and parties—but in reality is anything but.

Remember, *Citizens United* was built on the Supreme Court’s view since the 1970s that political expenditures that are “wholly” and “completely” independent of candidates and parties will not corrupt those candidates and parties. In *Citizens United*, the Court extended this protection of independent speech to corporations, with Justice Kennedy saying: “By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate.”¹⁵

Yet again, however, the theory which is the constitutional basis for the entire *Citizens United* decision is the opposite of our current reality. The Court’s majority has failed to understand the very real practical limits on enforcing the line it has drawn between “independent speech” and “coordinated speech.”

In the first presidential election after *Citizens United*, both parties’ candidates had “their” super PACs—everyone knew which was Romney’s super PAC, and which was Obama’s. Each candidate announced them, met with their leadership and fundraisers, and thanked their donors. In 2016, we saw Carly Fiorina’s super PAC, called “CARLY for America,” to differentiate from the campaign, called “Carly for President,” setting up tables outside Fiorina’s campaign events. There, they passed out “CARLY” stickers, signs, and pro-Fiorina literature, all produced by the super PAC—to pay costs the campaign could not, using the super PAC’s funds raised in unlimited amounts.¹⁶

Jeb Bush avoided calling himself a candidate for almost the first year of his 2016 campaign, so that he could twist the law and raise funds for and control “his” super PAC, eventually installing his campaign manager in charge of its \$100 million pot of money before declaring his candidacy and going his “separate” way.

This sort of interweaving of candidates and supposedly independent super PACs with unlimited funding has now occurred in federal campaigns at every level, for Congress as well as the presidency. This renders candidate contribution limits effectively meaningless—the money is going into two different pockets of the same coat, controlled by the same candidate and her agents.

The obvious question is why is this happening—in complete violation of law, and contrary to the Supreme Court’s conditions for independence in *Citizens United*? The first answer is that the Court badly misjudged the way politics works in practice, and what conduct the American people would see as corrupt. The second answer is that the Court misjudged the capacity and appetite of the federal regulatory system to require disclosure of the sources of spending, and

¹⁵ *Citizens United v. FEC*, 558 U.S. 310, 360 (2010) (internal citations omitted).

¹⁶ Emma Roller, *When a Super PAC Acts Like a Campaign*, NATIONAL JOURNAL (Sept. 10, 2015), <https://www.theatlantic.com/politics/archive/2015/09/when-a-super-pac-acts-like-a-campaign/455679/>.

to police the distinctions the court created between coordinated and independent expenditures. In the 2003 *McConnell* decision, the Court said that coordination resulting from a “wink and a nod” would not be independent—but winks and nods turn out to be very difficult to prohibit.

The Supreme Court’s campaign finance jurisprudence relies on the Federal Election Commission (FEC) to administer its decisions—with little knowledge or concern for that agency’s limitations.

A cornerstone of the post-Watergate reforms, the FEC is tasked with administering and enforcing our nation’s campaign finance laws. But for the last 10 years, the agency has failed repeatedly to enforce the law on the books, and has failed to write new, sorely-needed rules, especially concerning transparency and bogus “independent” spending groups.

By law, the FEC cannot have more than 3 commissioners of a single party, and it needs a majority of the Commission—4 votes—to take any action. But for the last decade, it’s been mired in 3-3 deadlock—not because the Democrats only want to enforce the law against Republicans, and the Republicans only want to enforce the law against Democrats, but because the recent Republican Commissioners have been ideologically opposed to almost all of the campaign finance laws they are tasked with enforcing.

Another problem arose at the end of this August. As you may have seen, one of the remaining four Commissioners resigned, leaving the Commission with only three Commissioners and therefore no quorum. This leaves it even more unable to administer our campaign finance laws than it was before: it cannot even meet!

In sum: The First Amendment says nothing on its face about spending in federal elections, but that has not prevented some Supreme Court Justices—the majority at the moment—from reading it to severely limit Congress’s power to regulate campaign finance. Thus, the Court has effectively amended the Constitution in terms of the regulation of campaign finance, contrary to laws approved by Congress and the President, without knowledge of how campaigns and campaign funding work in practice, and in direct tension with the views of a large majority of the public, resulting in a system no one would have designed and which lacks a functioning enforcement mechanism. This is not an acceptable place for our democracy to be.

The Court’s democracy failures are not limited to campaign finance.

Gerrymandering

The Court’s current majority has recently decided to ignore judicial precedent and deny judicial relief to those suffering deprivation of their democratic rights from admittedly partisan gerrymanders.

I refer of course to *Rucho v. Common Cause*, the North Carolina redistricting case decided this June. The Campaign Legal Center represented the North Carolina League of Women Voters in that case.

Gerrymandering dates back to the early 19th century, when Governor Eldridge Gerry of Massachusetts and the state legislature drew new districts for the state Senate. A cartoonist depicted one of the districts as a salamander, or “Gerrymander.” It was attacked as wrong then, but today’s gerrymandering is worse by an order of magnitude due to two forces: the power of computers (and detailed available voter and consumer data), and the hyper-partisanship of many states. Back in 1812, Governor Gerry drew his map with a quill pen and possessed only general information about the overlap between towns and voting patterns. Today’s gerrymanderers have access to huge computing power and big data to the point that they know how almost every household on a block votes, and can draw lines with great precision.

Gerrymandering should not be a partisan subject—it is not unique to one party or another. Republicans have gerrymandered districts in Wisconsin, North Carolina, and Pennsylvania; Democrats have gerrymandered districts in Maryland, Illinois, and Massachusetts.

In Wisconsin in 2011, Republican lawmakers gerrymandered the legislature so successfully that the next year (2012) Republicans “lost” the election with only 49% of the statewide vote to the Democrats’ 51% but won 61% of the seats in the legislature.

This was the subject of *Gill v. Whitford*, the gerrymandering case that CLC’s Paul Smith argued in 2017 in the U.S. Supreme Court. The hope was that Justice Kennedy would agree that the Wisconsin legislature’s actions were unconstitutional.

Justice Kennedy had been the swing vote in the Court’s earlier “Vieth” case (2004), agreeing that overly partisan gerrymandering was unconstitutional, but stating that a gerrymander could not be declared invalid by the Courts until there was an objective standard to separate permissible redistricting from purely partisan redistricting.

But by a 5-4 vote, the Wisconsin case was returned without decision to the lower court, to determine first whether the plaintiffs had standing. Days after this punt, Justice Kennedy announced his retirement, and Justice Kavanaugh ended up sitting on the Court in his stead.

Then, this past term, two more redistricting cases reached the Supreme Court. One involved a Republican gerrymander in North Carolina, and the other a Democratic gerrymander in Maryland. In both cases, lower courts had found that the lines drawn were unconstitutional because they were extreme partisan gerrymanders.

In both cases, the facts were largely undisputed by the time the Supreme Court heard argument: No one seriously questioned that these were partisan gerrymanders. Here, for example, is what one of the Republicans leading the backroom effort in North Carolina admitted on the record what the motivations were: Answering the question, “*Why did you*

decide to draw a map with 10 Republican districts and three Democratic ones?," the head of the legislature's redistricting committee said, quote, "because I do not believe it's possible to draw a map with 11 Republicans and 2 Democrats."¹⁷

In Maryland, Republican plaintiffs were challenging a single district they argued was unconstitutionally gerrymandered by Democrats to defeat an incumbent Republican congressman. Democratic lawmakers and consultants created the state's congressional map behind closed doors, conceding that their express goal was to draw the map in a way that maximized the number of Democratic districts. In the next election, they succeeded in their goal. One of the state's two Republican members of Congress was defeated in his new district, into which the map makers had put tens of thousands of new Democratic voters.

Thus, the question squarely before the Court last spring was whether these two admittedly partisan gerrymanders were so egregious that they violated the U.S. Constitution, as the lower Courts had found.

Unfortunately, the Court this summer not only refused to rule the extreme Maryland and North Carolina maps unconstitutional—but it also changed its constitutional jurisprudence and said that partisan gerrymandering could never be challenged in the federal courts, no matter the facts of the case.

I believe that Justice Kagan was right in her dissent when she said that this result was "tragically wrong."¹⁸ It removed the possibility of federal judicial review and with it a key line of defense against extreme, out-of-control gerrymandering that in all likelihood will now only get worse.

The majority opinion, authored by Chief Justice John Roberts, claimed that there was no justiciable standard by which federal courts could evaluate when map-drawing had gone too far—despite all the evidence before the Court to the contrary, and despite the multiple federal court decisions over the last few years that had identified such standards and methodically applied them.

Again taking a rosy view while delivering this blow to democracy, the Court's opinion pointed to action by state legislatures or citizen initiatives as a possible fix for overly partisan gerrymanders. These are indeed still tools in some states, although only about half the states provide a legal avenue for such initiatives. CLC is now working with organizations in several of those states to draft ballot initiatives to create independent redistricting commissions. The problem is that after 2020 it is likely that almost every state that can adopt an independent Commission through a ballot initiative will have done so, or decided not to. The Court also

¹⁷ Ella Nilsen, *North Carolina's extreme gerrymandering could save the House Republican majority*, Vox (May 8, 2018), <https://www.vox.com/policy-and-politics/2018/5/8/17271766/north-carolina-gerrymandering-2018-midterms-partisan-redistricting>.

¹⁸ *Rucho v. Common Cause*, 139 U.S. 2484, 2509 (2019) (Kagan, J., dissenting).

noted the possibility of challenges under state constitutions, and Congressional legislation under the elections clause of the Constitution.

You may have seen earlier this month that the North Carolina Supreme Court has struck down the state legislative maps, finding them extreme partisan gerrymanders under the state constitution. Most other challenges to gerrymanderers under state constitutions will have to wait until after the 2020 census and resulting redistricting.

CLC and other dedicated organizations will continue fighting gerrymandering wherever we can—a goal which poll after poll shows that the overwhelming majority of Americans support. But the Supreme Court’s misguided decision this summer means that it will be a much more challenging fight than it should be.

Voting Rights

Finally, another challenge, and another threat to our democracy, is the intensified attack across the country on voting rights. We at the Campaign Legal Center believe that the government should facilitate citizens’ voting, from easy registration, through to casting their ballots. Unfortunately, there’s another increasingly vocal camp that believes the opposite: that voting is a restricted privilege which should be made difficult so that only the “right” citizens will be able to jump through hoops to reach the ballot box. In each of these battles, the prevailing camp becomes a framer, too, but to very different effects: whether to continue to expand the franchise, or to restrict it.

Martin Luther King, Jr., famously said that “the arc of the moral universe is long, but it bends toward justice.” In the voting rights context, we assume this means more people get to vote as we move along that arc. For a while, this is what was happening, with voting by persons of color, then direct citizen voting for Senators, then votes for women, and voting rights for 18 year olds. But, today, some politicians are trying to restrict the voting pool to their partisan advantage, and to do so are working to exclude eligible voters from voting.

This was greatly facilitated by the Supreme Court in 2013, when it ruled 5-4 in its *Shelby County* decision that federal preclearance of changes in voting laws in states with histories of discriminatory voting practices is now unconstitutional. Preclearance was a key provision of the Voting Rights Act of 1965, reauthorized by Congress several times since that year. Most recently it was reauthorized in 2006, after numerous hearings. Like *Citizens United* in the campaign finance context and *Rucho* in the redistricting context, the *Shelby County* decision is one that I believe the Court got gravely wrong.

This is what the 15th amendment says: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. The Congress shall have power to enforce this article by appropriate legislation.” Please note the second provision of that Amendment: an unambiguous grant of power to Congress to “enforce this article by appropriate legislation.”

The 15th Amendment was ratified in 1870, but Congress had to pass the Voting Rights Act in 1965 to enforce it, in the face of the history of severely discriminatory laws and practices that prevented African Americans from voting in the post-Civil War Jim Crow segregationist South.

In the 1965 Voting Rights Act, Congress created a whole legal fabric to ensure African Americans could vote. As Justice Ginsburg put it in her *Shelby County* dissent, “the Voting Rights Act became one of the most consequential, efficacious, and amply justified exercises of federal legislative power in our Nation’s history.”¹⁹

I believe this history is critical to understanding how very wrong the Court got it in *Shelby County*, when Chief Justice Roberts wrote this: “Not only do States retain sovereignty under the Constitution, there is also a ‘fundamental principle of equal sovereignty’ among the States.”²⁰

References to state “sovereignty” recall the language of the 1787 Framers, and to the secessionists of 1861. Such language would appear peculiar to the Framers of the amendments of the 1860s, who had just fought and won a terribly bloody civil war to vindicate the proposition that states were not “sovereign entities” able to withdraw from the union. The 15th amendment was adopted at a time when Southern states were still occupied by federal troops required to enforce the rights of African Americans newly freed from slavery.

During oral argument, Justice Scalia said that the overwhelming majorities by which Congress passed VRA’s reauthorization in 2006 appeared to be “attributable . . . to a perpetuation of racial entitlement.”²¹

These statements were extraordinary in light of the history of the 15th Amendment and the Voting Rights Act. The Court criticized Congress’s fact-finding of continued threats to minority voting rights in covered jurisdictions—all while giving no deference to the 15th amendment’s provision that specifically gives Congress the authority to enact legislation such as the Voting Rights Act.

In doing so, Chief Justice Roberts effectively put himself in the shoes of the Framers of 1787—while completely ignoring the new constitutional balance between the federal government and the states in the area of voting created by the 15th amendment. He wrote as if our Constitution’s only Framers were those of 1787. In order to get around the 15th amendment, he chooses to replace Congress’s overwhelming reauthorization of the VRA with the Supreme Court’s 5-4 judgement against it—as if the 15th Amendment said, “Congress shall have the power to enforce this article, provided it adopts the same legislation that a majority of the Supreme Court would favor were they in Congress.”

¹⁹ *Shelby County, Ala. v. Holder*, 570 U.S. 529, 562 (2013) (Ginsburg, J., dissenting).

²⁰ *Shelby County, Ala. v. Holder*, 570 U.S. 529, 544 (2013) (internal citations omitted).

²¹ See Amy Davidson Sorkin, *In Voting Rights, Scalia Sees a ‘Racial Entitlement,’* NEW YORKER (Feb. 28, 2013), <https://www.newyorker.com/news/amy-davidson/in-voting-rights-scalia-sees-a-racial-entitlement>.

Since *Shelby County*, there has been a wave of state actions in the South designed to diminish minority votes. Examples have included:

- the elimination of early Sunday voting in North Carolina—a day thought to promote minority participation;
- the closure of at least 868 polling locations in minority communities in Southern counties previously covered by Section 5 of the VRA, according to the Leadership Conference Education Fund (as of 2016);²²
- discriminatory photo ID laws in states such as Texas (a law which had previously been blocked by the Department of Justice and which recognized photo IDs for concealed weapons permits but not student IDs issued by state universities); and
- In Georgia, shortly before the 2018 election, the Secretary of State—who was also the Republican candidate for governor, running against an African American woman—abruptly placing more than 50,000 voter registrations on hold, 70 percent of which belonged to African Americans.²³

All of these could have been prevented if Section 5 of the VRA was still in force.

In conclusion—two much appreciated words—today’s unfortunate reality is that this country has become increasingly polarized politically. This of course makes it exceedingly hard to amend the Constitution by the required 2/3 majorities in Congress, and ratification by 3/4 of the states. This means that when the Court gets it wrong, as in *Dred Scott* and *Plessy*, and I would argue in *Citizens United* and *Shelby County* and *Rucho*, new constitutional amendments are unlikely. Instead, we have to rely on Congress to work around those decisions, or future new majorities on the Supreme Court to recognize the error and reverse the Court’s decisions.

The good news is that there is more energy around democracy issues than we’ve seen in a long time, and in poll after poll, voters overwhelmingly say they want reform. And there are more organizations and lawyers, like the Campaign Legal Center, whose missions are to protect and improve our democracy.

Of course, Congress could step up and use its power as a “Framer.” Earlier this year, we had a concrete example of the legislation that the recent energy on democracy issues can translate into: the democracy reform package introduced the first week of the new Congress, H.R. 1. A sweeping package, this legislation would go a long way toward addressing the problems I have discussed today. It addresses campaign finance disclosure, coordination, and the FEC’s structure. It creates a new section 5 of the Voting Rights Act, to meet the Supreme Court’s

²² Press Release, The Leadership Conference on Civil & Human Rights, New Report Documents 868 Polling Place Closures in Former VRA Preclearance States (Nov. 4, 2016), <https://civilrights.org/2016/11/04/new-report-documents-868-polling-place-closures-in-former-vra-preclearance-states/>.

²³ See Eugene Scott, *Georgia’s held-up voter registrations reinforce black Americans’ fears about voting rights*, WASH. POST (Oct. 12, 2018), <https://www.washingtonpost.com/politics/2018/10/12/georgia-voter-registrations-being-held-reinforces-black-americans-fears-about-voting-rights/>.

objections. And it requires states to adopt independent redistricting commissions. But H.R. 1 was drafted by the House Democratic leadership without Republican involvement. While I support the substance of each of those proposals, I think it is important to recognize that sustainable long term reform will require bipartisan action. CLC and other organizations will therefore be working to obtain bipartisan support for proposals such as these.

There is no one answer—no silver bullet. But many dedicated individuals and organizations are working to improve American democracy consistent with the goals of all of our Constitution’s Founders. I hope all of you, especially those of you who are lawyers and aspiring lawyers, will do so as well—our democracy needs your help!