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# Studying Social Tendencies: Is the Will of the Majority Being Replaced by the Tyranny of the Minority in the United States?

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## ABSTRACT

Constitutions are not carved in stone for a reason. They reflect the times when they were drafted; the political, social, economic, and ethical panorama in existence when they were written. However, these factors change over time, often at an increasingly faster pace. One could argue that the last decade in the U.S. reflects a period of political upheaval unparalleled in the nation's history. One crucial consequence of this is the growth in anti-democratic tendencies that some feel has already ushered in minority rule, whereby the political landscape and the country's laws no longer are in tune with the wishes of the majority. The Electoral College is the most evident "culprit" here, although it is not alone: systematic gerrymandering and voter suppression, and a Supreme Court and federal court system that for the most part reflect ultra-conservative principles, along with a strict, "originalist" interpretation of the Constitution, are conspiring to exploit the anti-democratic potential of the electoral system in the U.S. This article will consider these features in more detail.

Le costituzioni non sono scolpite nella pietra per una ragione. Riflettono i tempi in cui sono redatte, il panorama politico, sociale, economico ed etico esistente quando furono scritte. Tuttavia, questi fattori cambiano nel tempo, spesso a un ritmo sempre più veloce. Si potrebbe sostenere che l'ultimo decennio negli Stati Uniti rifletta un periodo di sconvolgimenti politici senza precedenti nella storia della Nazione. Una conseguenza cruciale di ciò è la crescita delle tendenze antidemocratiche che alcuni ritengono abbia già inaugurato il dominio delle minoranze, per cui il panorama politico e le leggi del paese non sono più in sintonia con i desideri della maggioranza. Il Collegio Elettorale è il "colpevole" più evidente qui, anche se non è il solo: i brogli sistematici e la soppressione degli elettori, una Corte Suprema e un sistema giudiziario federale che per la maggior parte riflettono principi ultra-conservatori, insieme a un'interpretazione rigorosa e "originalista" della Costituzione, cospirano nello sfruttare il potenziale antidemocratico del sistema elettorale negli Stati Uniti. Questo articolo prenderà in considerazione queste funzionalità in modo più dettagliato.

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**Keywords:** Electoral College, gerrymandering, voter suppression, originalist, elector, independent legislature theory, framers, Founding Fathers, income disparities, electoral districts, Voting Rights Act,

Electoral Count Act, majority rule, John Lewis Bill, Freedom to Vote Act

## 1 – Introduction

There is growing concern among a large segment of Americans regarding the undemocratic tendencies at work in the country. Some of these have to do with fundamental socio-cultural and demographic aspects that have always been part of the fabric of American society: for example, income inequalities, the lack of equal opportunities for blacks and other minorities that are “baked into” the system and self-perpetuated (the quality of education, the quality of public services and health access, discriminatory trends in the legal system, the undue influence of special interests, disinformation in the media, the growing polarization of society). Because of the pervasiveness of these factors, it is sometimes difficult to gauge their effect on the country’s democratic framework, although this has not stopped watchdog groups from attempting to do so.

However, there is another level that involves features that are more transparent in terms of their effects, and some that leave no room for doubt in terms of their undemocratic tendencies. Many of these aspects, though not new to the country’s political landscape, have developed in intensity recently and are seen by the harshest critics as strategies in a systematic attempt by certain political factions to disassociate government and policy from the will of the majority. This article will focus on these more transparent factors, which involve the governing system (including the judiciary) and the electoral machinery, starting with arguably the most glaring problem, one that has existed since the country’s foundation and of which many Americans are not truly aware: the electoral college.

## 2 – The Underrepresentation of the Electoral College System

When Americans vote in the Presidential elections every four years on the second Tuesday in November, they are not actually voting directly for a candidate but for an elector, meaning that the President is not directly elected by the voters. Each state is assigned two electors (for the number of Senators from each state) plus an additional amount equal to the number of House of Representative members from that state. The electoral college represented a compromise between the small and large states (13 in total) at the time: the framers of the Constitution devised this system to ensure that small states would not be disadvantaged in their influence on the choice of President.

Even though the original system still favored the larger states, the electoral college initially embodied a deliberative system not a winner-take-all one. What reassured the smaller states was that, in the event the electors could not agree on a particular candidate, the election would go to the House of Representatives, where each state would have one vote. However, this system soon broke down under the weight of local partisanship for favorite-son candidates, and by the beginning of the 19<sup>th</sup> century it had become a winner-take-all system, thereby nullifying the Founding Father’s attempt to forestall the growth of political parties, factionalism, and populism (Heather Cox Richardson, Facebook.com, 2019).

The framers also had a mistrust of the wisdom of the common man, wishing to entrust the selection of the President to a non-populist group of wise men (literally speaking, since women were disenfranchised at the time). The founding fathers wanted to make sure there was a way to avoid a figure antithetical to the interests of the elite members of society from becoming President (Liberation, 2016).

As has become increasingly evident in recent years, what the framers of the Constitution originally intended in the context of American society in the Revolutionary Era is no longer applicable and is now often twisted to suit specious argumentation (see, for example, the debates on the right to bear arms and abortion). If there ever were a justification for the indirect election of the President, the geographical and demographic changes, along with those related to income inequalities, that have occurred in the intervening years have turned the electoral college into a constitutional anachronism (Brookings, 2019).

In 1929, Congress put a cap on the size of the House of Representatives (at 435 members), which means that large states such as California, New York, and Florida are underrepresented compared to smaller states. And the greater income disparities in existence today only add to the risk that undue influence ends up in the hands of a small minority of the population. The 2016 race between Hillary Clinton and Donald Trump provides an example of how income inequalities and economic disparities can result in the underrepresentation of a significant segment of the American electorate. The fewer than 500 counties won by Clinton accounted for 64% of the country's output. Most of these counties are along the more prosperous East and West coasts, with some scattered throughout the rest of the country. By comparison, the 2,584 counties won by Trump were mainly in non-metropolitan hinterland areas, with a smattering of suburban and exurban metro areas, accounting for 34% of the nation's output (Muro and Liu, 2016). Jim Tankersley of the Washington Post noted that it appears to be "unprecedented in the era of modern economic statistics" for the losing candidate in a presidential election to represent such a large portion of the nation's economic base (Tankersley, 2016). Tankersley tweeted that "in really crude terms, it's high-output America vs. low-output America". (Tankersley tweet, 2016) The consequence of this divide is that it is more likely the "two parties [will talk] entirely past each other on the most important issues of economic policy" and focus more on narrower issues to secure an electoral college victory (Muro and Liu, 2016). In fact, "the prosperous parts of America include about 15 states having 30 senators while the less prosperous areas encapsulate 35 states having 70 senators" (West, 2020).

### **3 – The Peaceful Transition of Power**

Five times in the country's history a candidate has received the majority of the popular vote but lost in the electoral college. However, this has happened twice in the last 20 years (the last time before that was in 1876), and the changed electoral panorama may well mean that this will become a common occurrence under the present system, given the Democrats strength in numbers nationwide and the often-successful attempts by Republicans to introduce measures at the state level to nullify their growing disadvantage in popular support and make the electoral college system play to their advantage.

Americans, despite their often-strong political divisions, have always taken for granted there would be a peaceful transfer of power after the presidential election and the acceptance of defeat by the losing candidate. However, there is nothing specifically in the Constitution concerning a peaceful transition of power. What has ensured this over the years has been the unspoken tradition for the losing candidate to ultimately accept the result of the election. The principle was first put to the test when, in 1800, John Adams lost his re-election bid to Thomas Jefferson and quietly left office (McKeever, 2020). This principle was strengthened in 1896, when the formal concession speech became the custom after William Jennings Bryan conceded victory to William McKinley. Post-2020-election events, including the fact Donald Trump has still not

conceded the 2016 election, have shown that a principle once considered sacrosanct can no longer be taken for granted. And attempts to circumvent the will of the voters after the 2020 election have shown that even the Electoral College mechanism is not immune from attack.

A basic problem that has been raised by Republicans is who will ultimately certify the slate of electors chosen in each state. In 21 states, the electors chosen are not bound to vote based on the preference of their voters. Over the years, there have been 157 cases of the “faithless elector” (Nalewicki, J., 2016), and this possibility has become more likely now, especially after a federal court decision in 2016 in Colorado that ruled states could not penalize faithless electors (West, 2020).

Moreover, even the procedure of counting the electoral votes, which has always been considered a formality, has been placed in question beginning on January 6<sup>th</sup>, 2021. The Electoral Count Act (ECA) was passed in 1887, and on its face seemed clear enough: it spelled out how the Electoral College votes would be cast and subsequently counted, the key moments being the convening in December of the electors to cast their votes and the official counting of these votes by a joint session of Congress in January. However, the events in January 2021, with many in the Republican party, led by Donald Trump, putting pressure on Vice President Pence to reject the legitimate electoral votes, has revealed the need for an updating of the ECA due to “antiquated and ambiguous language” and its failure “to offer clear guidance on key aspects of the process of counting electoral votes and resolving related disputes”, leaving the statute “open to misunderstanding or exploitation, and [risking] the peaceful transitions of power that have been a hallmark of [American] democracy” (Protect Democracy, 2020).

#### **4 – The Independent State Legislature Theory and Originalism**

Apart from the intrinsic negative effects of the Electoral College system, there is also a strong threat to democracy in the U.S. from the various components of the ultra-conservative movement, even encompassing the Supreme Court, and the movement’s agenda. The forces at work represent in many respects a seismic shift in the political playing field and could have worrisome consequences for majority rule in the U.S.

The efforts of this movement to advance their policy objectives began well before the 2020 election and includes a systematic strategy involving the appointment of staunchly conservative federal and Supreme Court justices, the gerrymandering of electoral districts, and the suppression of voting rights, with particular focus on the segment of the population that does not vote Republican. In moving this agenda forward, ultra-conservatives have sought legal cover from what is known as “originalism”. This doctrine began in the 1970s as an obscure legal theory; today it is at the center of the debate about recent Supreme Court decisions. “Adherents believe that the Constitution has a fixed meaning and that it should be interpreted as it would’ve been back in the 1700s. Critics have made many compelling arguments against originalism, noting that it lends itself to a selective reading of history and that determining the Founders’ intent is nearly impossible” (Chermerinsky, E., *The Atlantic*, 2022). Among recent conservative court decisions based on this doctrine are the ruling by the Supreme Court that there is no constitutional right to abortion, the decision in a New York case that there is a broad constitutional right to have concealed weapons in public, a constitutional requirement for the government to subsidize religious schools, and a ruling finding constitutional justification for the right of high school coaches to lead prayers at school football games (Chermerinsky, E., *LA Times*, 2022). Many fear this is just the beginning, and that after the Supreme Court decision on

abortion, same-sex marriages and the use of contraception, even the right of consenting adults to engage in private consensual sexual activity, among other measures, will be targeted.

The problem many have with this ultra-conservative change in direction in the country is that it does not represent the will of the majority. During the Trump Administration, more than 200 strongly conservative federal judges were appointed along with three conservative Supreme Court Justices (Samuel Alito, Brett Kavanaugh, and Amy Coney Barrett). Nevertheless, there is a disconnect between the tenor of court decisions and mainstream America. For example, as regards the abortion debate, even a majority of Republican voters are against removing the constitutional right to an abortion, as indicated by the recent referendum in strongly Republican Kansas. Critics point out that these conservative judges were appointed by an Administration that did not even win a majority of the popular vote. Jesse Wegman, author of *Let the People Pick the President*, writes: "You have a counter-majoritarian institution chosen by people who were picked by a minority of the citizens. That's not a sustainable model for a representative democracy" (Liasson, M., 2021).

As regards the electoral system, originalism is tied to the Independent State Legislature (ISL) doctrine, which may have far-reaching repercussions on who can ultimately certify the electoral votes in a state, and therefore could lead to nullifying the will of the majority. An ominous harbinger is the recent decision by the Supreme Court to consider a North Carolina case, *Moore v. Harper*, which would overturn 200 years of election law and allow the state legislature to redraw the electoral districts under the ISL theory, which holds that "the federal Constitution gives state legislatures the power to regulate federal elections without checks from other state officials or constraints from the state's constitution" (White, H., 2022). Though the *Moore* case concerns redistricting, the ISL doctrine would have far-reaching consequences for a much broader range of federal election issues, above all who is the ultimate arbiter-certifier of the electoral vote. Simply put, the ISL argument hinges on the interpretation of the term "legislatures" in the Elections and Electors Clauses of the Constitution. ISL advocates view the Constitution as granting the state legislatures sole authority in determining the election outcome, even denying the state courts or election officials any authority (White, H., 2022). At the moment, it is the secretaries of state that certify the election results. As the aftermath of the 2020 election showed, even this was put to the test: for example, in Georgia, where Donald Trump telephoned the secretary of state to pressure him into finding additional votes to win the state and, as a result, the general election.

## 5 – Gerrymandering and Voting Rights

Gerrymandering has been a constant feature of American politics, but like other political tendencies in the U.S., it has intensified recently to the point where it has given a decidedly undemocratic bent to electoral outcomes. Gerrymandering is where the party in power redraws the electoral districts in a partisan manner to gain electoral advantage. According to Michael Li of the Brennan Center for Justice at New York University, more than simply creating "safe seats" for the party in power, "it allows one party to draw district lines that secure its grip on the state legislature – such as Wisconsin", where the electoral map was drawn so that the Republicans would likely receive 60% of the seats even with a lower popular vote total state-wide (Liasson, M., 2021).

Gerrymandering not only occurs in federal elections but state elections as well, and here the ramifications are potentially game-changing since, in the event no candidate gets a majority of

the electoral votes, the election is determined in the House of Representative, where each state delegation has one vote.

Gerrymandering sets off a vicious cycle: it gives control to Republicans, thereby allowing them to control the 10-year redistricting process, which then further consolidates their control of the state legislature (Pilkington, E., 2021). As examples of how partisan redistricting creates a disconnect between the popular vote and actual party representation in the legislatures, official data show that five times between 2000 and 2020, the Democrats were underrepresented in the House of Representatives with respect to their popular vote totals. In 2016, for example, the Republicans gained 55% of House seats with only 48% of the popular vote. At the state level, as a result of Republican gerrymandering, the party won 10 of the 13 congressional districts in North Carolina in 2020, in a state where the Democrats always win considerably more than 23% of the vote (Liasson, M, 2021).

A final aspect to consider is voter suppression, which appears to be a systematic attempt by some Republican states to overcome the “physiological” predominance of Democrats regarding the popular vote. Donald Trump once remarked that if it were easier to vote “you’d never have a Republican elected in this country again” (Levine, S. 2020). According to the Brennan Center for Justice, 19 mainly Republican states have passed 34 laws making voting harder. The insidious nature of these laws can be seen by the fact they often make it “harder just for a subset of the electorate to vote – and that tends to disproportionately be voters of color” (Timm, J., December 2021). In recent years, “more than 400 anti-voter bills have been introduced in 48 states”, creating obstacles to voters regarding voter registration laws, mail-in voting, stricter voter ID laws, limits to early voting, mass purges of voter rolls, even voting in person (ACLU, 2021); in the latter case, for example, by restricting voting hours, thereby creating long lines outside polling centers, and even prohibiting people from being given water while they wait on line.

These restrictions are possible in large part due to decisions by the Supreme Court in 2013 and 2021 limiting the Voting Rights Act of 1965, in particular by ruling that states no longer have to seek “preclearance” for voting changes (Justice.gov, 2022). In the past, the Justice Department was able to block discriminatory voting laws before they went into effect. The only way available now for Democrats to oppose such laws is through federal voting legislation. However, attempts by Democrats in the House to update the law by passing the John Lewis Bill and the Freedom to Vote act have so far been unsuccessful.

The U.S. is not alone regarding the trend toward voter suppression but is one of a growing list of countries that are revealing an “authoritarian creep” in what were once considered stable liberal democracies. This democratic regression includes Israel, India, Turkey, Poland, Hungary, The Philippines, Slovenia, even the UK. The Elections Bill passed in the UK includes a mandatory requirement for voters to show a photo ID, something that some 2 million voters do not have, most of whom are low-income voters belonging to minority groups. Similar to what is occurring in the U.S., the Bill also includes gerrymandering that benefits the Conservative Party and measures impacting the Electoral Commission that are not party-neutral (Ogden, C., 2022).

Contributing in no small way to this global trend toward the authoritarian end of the political continuum is what Chris Ogden terms a “moribund civil society”, one of the characteristics of authoritarian regimes or even of once staunchly democratic societies “backsliding” toward illiberal democracies, or pseudo-democracies (Ogden, C., 2022). Such societies are characterized by growing apathy, in particular among their younger elements,

toward political causes and social inequalities, examples of which can be seen in the generally low voter turnout among young people in U.S. elections and, at the other end of the authoritarian spectrum, in the *tangping* (literally “lying flat”) movement among Chinese youth that represents a choice of lifestyle characterized by an overarching sense of resignation among young Chinese regarding the social pressures of contemporary society and, by extension, any interest in social activism (Ponzini, A., 2022).

## 6 – Conclusion

According to the National Archives, over the last 200 years, more than 700 constitutional amendments have been proposed to eliminate or abolish the Electoral College, thus showing the depth of dissatisfaction with this system. Demographics have long ago rendered the electoral system devised by the nation’s Founders anachronistic. “The Electoral College remains a vestige of the country’s slave-owning past and anti-populist founding” (Nalewicki, 2016).

Other anti-democratic forces have been at work whose “effectiveness” comes from the opportunities offered by the electoral system set out in the Constitution. The upshot of this mix of elements is that the composition of the government respects increasingly less the will of the majority as expressed in the popular vote, leading to what many fear is becoming a “tyranny of the minority”. While anti-democratic in their own right, gerrymandering, voting suppression, state legislatures seen as the ultimate arbiter of the electoral vote, and an increasingly ultra-conservative Supreme Court and federal judgeships produce dangerously “leveraged” effects when they play out through the current electoral system.

Because of partisan redistricting, the vast majority of states have become non-competitive in an electoral sense, leaving a handful of so-called “battleground states” – in particular, Arizona, Georgia, Michigan, Nevada, Pennsylvania, and Wisconsin – to ultimately decide who will be the country’s next president. It is ironic that the electoral mechanism the Founding Fathers devised to ensure all the then-13 states were not irrelevant in determining the country’s leader has become, over 230 years later, one that has made literally only a handful of states, and thereby voters, relevant.

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