

Chief Justice, Justices of the Court, President Knox, friends and colleagues, thank you for having me here today. I am honored to have been invited to speak to you about American Democracy and the Rule of Law.

Let me begin with a personal anecdote that sparked my initial interest in the law of democracy. My research focuses on election law and administration. For one of my projects, in 2008, I recruited 150 undergraduates and dispatched them to several dozen polling stations to observe various operational aspects of the voting process. As part of this research, I actually went to a polling station for 4 hours inside the home garage of a local poll worker and tallied the arrival time of each voter, the number of minutes spent at the check-in desk, and the number of minutes spent in the voting booth. The purpose of the study was to determine how and when long lines form at polling stations, yet ironically, I found myself alone—with no voters—for long periods of time.

As it turns out, the vast majority of polling stations across the country sit empty for long periods of time every election day. Approximately 60% of those who are eligible to vote turnout to vote for the president every four years, 40% of eligible voters turnout to vote for Senators and Representatives during midterm years, and far fewer turnout to vote for state and local officials in off-years. For example, last year just 5% of Hartford voters turned out for the school board election. **[It makes you wonder, what would happen if we held an election and nobody showed up? JOKE: ["Elections belong to the people. It's their decision. If they decide to turn their back on the fire and burn their behinds, then they will just have to sit on their blisters." – Abraham Lincoln]** In other words, in virtually every election those who exercise their right to vote are outnumbered by those who stay home.

To many, low turnout signals a general apathy about politics and undermines the legitimacy of our elected leaders who are elected by a minority of the population. Many people point to America's low turnout as evidence that something is wrong with our electoral system. They may be right. On the other hand, the issue may be more nuanced.

Some scholars have noted that “nonvoting could be a sign of contentment [and] a satisfied electorate,” (Keyssar, p. 299). In other words, low turnout can theoretically, but not necessarily be a bad thing. In my mind, low turnout is not itself a problem. If the 40% of the population that votes is representative of the population as a whole, then the outcome of the election is both accurate and legitimate. What I would like to impress upon you today is the idea that the *number* of voters that turnout is less important than the *representativeness* of the voters that turnout. By representativeness, I mean that the choices of those who turnout represent the will of the entire eligible voting population.

In America, low turnout is problematic because those who vote are not representative of the population as a whole. As many scholars have discovered, “those with more education and higher incomes are far more likely to vote than those with less advantage. The people who are least likely to be content or satisfied – and the *most* likely to need government help – are those who are least likely to vote,” (Keyssar, p. 299).

This striking fact raises an important jurisprudential question. “How should legislators, lawyers and judges account for this deficit in electoral representation?”

Voting rights doctrine has long been dominated by a legal test that balances individual rights against the interest of legislators. The U.S. Supreme Court has said that the only cognizable harm of restrictive voting laws is their burden on the individual right to vote. This burden is tolerated if the law is closely related to the state’s justification to improve the electoral system.

But this balancing misses the forest for the trees. Let me explain why with three examples that I draw from a recent paper by a law professor at the University of Chicago.

[The following sections quote, paraphrase and draw heavily from Stephanopoulos, *Elections and Alignment*]

[From pp. 284-285]: “The uproar over photo ID laws and cutbacks to early voting has not been based on concerns about individual liberty or even turnout. The primary concern with these laws is that they disproportionately prevent certain *kinds* of people from voting – the poor, racial minorities, students, etc.” So the effect on turnout is uneven, meaning the laws could impact the outcome of an election. The fear of partisan distortion is what has fueled the controversy, not the burden on individual rights.

The same concern is central to the debate over redistricting. The case law on redistricting is also rooted in the individual rights framework. The one-person, one-vote doctrine reflects the Court’s commitment that every individual have an equal opportunity to participate in the political process. [From p. 286]: “But the most glaring problem with gerrymandering—the problem that spawned the term—is that clever configurations of electoral districts can result in legislatures that do not represent the preferences of the median voter, or a majority of citizens.” Consider that Democratic candidates for the U.S. House of Representatives in 2012 received 170,000 more votes than their Republican opponents, yet Republicans won 33 more seats in the House. [fn 12]: The same mismatch occurred in the state legislatures in Michigan, North Carolina, Pennsylvania, and Wisconsin. The controversy over gerrymandering—the injury it imposes—is ultimately less about the individual right to vote, and more about the misalignment of preferences between legislators and constituents.

Finally, the same logic applies to the regulation of campaign finance. It is undisputed that the role of money in elections is enormous. Campaigns are costly and, as a general rule, the candidate that spends the most wins the most often. The need to raise money has made candidates more reliant on wealthy donors and organized interest groups. The federal courts have recognized just one cognizable harm from spending in politics—individualized *quid pro quo* bribery. But equally troublesome, or perhaps more troublesome, is the fear that candidates will

adopt the policy preferences of their donors instead of their constituents. To the extent that these donors are not representative of the majority of voters, candidates may be elected who do not reflect the will of the majority.

[From p. 286]: In all of these cases—restrictive voting laws, redistricting, and campaign finance—one core problem is the possibility of misalignment between the preferences of all eligible voters – in other words, the collective will of *the people* – and the preferences of their elected representatives.

[End of Stephanopoulos]

My goal in raising this point today is merely to suggest that alignment should be part of the decision calculus in shaping new election reforms, and in adjudicating cases about the regulation of elections. Alignment is central to the Republican Form of Government promised in Article IV § 4 of the U.S. Constitution. Misalignment is a political harm.

There is no doubt that individual rights versus state interests balancing will remain central to judicial decisions about elections, as it should. But those who pass new laws, those who interpret these laws, and those who enforce these laws should also be thinking about their impact on alignment in determining the effectiveness, or the constitutionality of these laws.

Let me conclude where I began...sitting in an empty polling station. The polling station wasn't empty all day!

[Lots of different people came and it was inspiring].

Despite the various attacks on voting rights in recent years, the right to vote is available to nearly all adult citizens in the United States. Let's not forget this. Far more people have the right to vote now than at our country's founding. The alignment of our government to the people is much better now than at our Founding.

As we celebrate the 50th anniversary of the Civil Rights Act and the Voting Rights Act, we pause to think about the progress we've made with regards to voting rights, but also to find a renewed push to finish the task of making sure that every vote matters.

Thank you.

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#### References:

Keyssar, Alexander. The Right to Vote: The Contested History of Democracy in the United States. New York: Basic Books (2000).

Stephanopoulos, Nicholas O., "Elections and Alignment," *Columbia Law Review*, vol. 114, no. 1, pp. 283-366 (2014).