COVID-19, the United States and Evidence-Based Politics

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14.04.2021 doi: 10.17176/20210414-101222-0

COVID revealed the extent to which attacks on evidence-based politics are part and parcel of the right-wing populist challenge to constitutional democracy in the United States and elsewhere. Right-wing populism challenges constitutional commitments to rule of law and basic liberal freedoms, as such strongmen as Erdogan. Orban and Maduro seize control of courts and persecute dissidents. Populist responses to the pandemic in the United States raise equally important questions about the constitutional commitments to science that are as important to constitutional democracy as the rule of law.

Liberal constitutional democracy is a child of the Enlightenment. A central claim of Enlightenment thinkers was that truth was best pursued through reason and empirical investigation. Liberal constitutional democracy was grounded in beliefs that ordinary citizens had sufficient capacity to use reason and evidence to reach sound conclusions on public policy, particularly when the sense of the public was refined through representation. Liberal constitutional democracy as a child of the Enlightenment, in short, was committed to an evidence-based politics, in which political decisions were grounded in empirical investigation rather than faith, authority, partisanship, or wishful thinking.

The COVID pandemic hit the United States when Donald Trump was president and Republicans controlled the upper house of the national legislature. Trump before anyone became ill had already demonstrated an unprecedented disdain for facts and science, lying at rates never before achieved by a prominent American politician and denying uncontested evidence of climate change. That past become prologue as Americans fell sick. Trump repeatedly misrepresented the threat the virus presented to public life and disregarded the advice of leading public health officials. Abandoning liberal constitutional commitments to an evidence-based politics, Trump and the Republican party adopted policies and non-policies that left, as of this moment, more than 500,000 Americans dead.

The populist attack on evidence based-politics, the following paragraphs detail, resulted in a public policy too often based on ideology, partisanship and wishful thinking rather than on scientific consensus. Institutions that might blunt the populist challenge to evidence-based politics in the United States, are being captured. Most notably, while the Supreme Court initially placed more emphasis than the Trump administration on evidence-based public health concerns, ideology, partisanship and wishful thinking had a major say and increased influence on that tribunal after Justice Ruth Bader Ginsburg died and was replaced by Justice Amy Comey Barrett.

Polarization, Populism and the Political Attack on Evidence-Based Politics

American politics was polarized long before the COVID virus crossed the border. The Republican party captured by right-wing populists and Democrats who remained a more traditional center-left coalition, bitterly fought for control over the national government and the fifty state governments. Science was one prominent site of struggle. Democrats insisted that public policy reflect scientific consensus on such diverse matters as the human responsibility for climate change and the wide range of normal expressions of human sexuality. Republicans increasingly sought to deny evidence and expertise, preferring wishful thinking on climate change and conservative religious doctrine on human sexuality. Voting rights was a particular prominent site of struggle. Aided by

the Supreme Court, Republicans in the states had adopted numerous policies ostensibly designed to prevent voting fraud, which empirical investigation revealed did not exist (except when engaged in by Republicans), that in practice disenfranchised poor persons and persons of color who typically voted for Democrats. Religion was a third site of struggle. The conservative majority on the Supreme Court had repeatedly insisted that religious organizations be given exemptions from basic civil rights laws and that excluding religious organizations from variations benefits was unconstitutional.

The collapse of Republican commitment to an evidence-based politics structured the American response to COVID. Supported by Republicans in the federal and state governments, Trump repeatedly belittled the expert consensus on the virus. He claimed the virus was easily containable, was no more deadly than the flu, that deaths would be few, that deaths had been overestimated, and that masking and other preventions were unnecessary. He even suggested bleach as a potential prophylactic measure, later claiming that he was only kidding. Trump's supporters believed him. Republicans in the state delayed before implementing measures recommended by health law measures and abandoned those measures at any sign of recovery. Republican citizens flouted state mask mandates at every opportunity. Some Trump supporters even drank bleach. When public health experts in government questioned administration policies, they were fired or otherwise silenced. The result was a national government, a political party, and a consider portion of the public that has spent most of the pandemic in denial.

COVID and Voting

Unlike the COVID crisis, which was acute, voting rights struggles in the United States are chronic. Voting rights would have been front and center in American constitutional politics had every American citizen enjoyed perfect health during the Trump presidency. Nevertheless, the pandemic heightened the stakes in existing voting rights controversies and created new opportunities for voter suppression. The same misrepresentations that structured Republican public health policy quickly became part of an electoral strategy designed to reduce Democratic turnout.

During the twentieth-first century, Democrats and Republicans became more sharply divided on more issues than had occurred in American history, but Democrats crept ahead in popular support. The Democratic candidate for president in 1992, 1996, 2000, 2008, 2012 and 2016 gained more popular votes than the Republican candidate. More voters supported Democratic candidates for Congress than Republican candidates for Congress. Republicans nevertheless managed to compete as at least equals from 1992 to 2020 because of both hardwired and (literally) gerrymandered Republican biases in the American electoral system. The Electoral College enabled Republicans George W. Bush in 2000 and Donald Trump in 2016 to gain the presidency despite losing the popular vote. The constitutional commitment to state equality in Senate enabled low population Wyoming, which consistently elected Republicans, to enjoy the same representation in the upper house of Congress, as high population New York, which consistently elected Democrats. Gerrymandering in crucial states often enabled Republicans to win a majority of the seats in the House of Representatives, even when more Americans voted for the local Democratic candidate for Congress. Conventional wisdom in this environment regarded voting turnout as the key to the 2020 national election. The higher the voting turnout, particularly among younger voters and voters of color, the more likely a decisive victory for the Democratic candidate for president and Democrats running for Congress.

COVID, partisanship, and commitments to evidence-based politics intensified struggles over voting rights during the 2020 election cycle. Most states under Democratic control, or in which no threat existed to Republican control, took steps to prevent long lines on election day for both primary and general elections. They made absentee voting easier, in some cases, mailing ballots to all voters. They increased times and places for early voting. They recruited new poll workers for election day and took steps to make

in-person voting safe. Other states, most notably, Wisconsin, Georgia, Pennsylvania, and Texas balked. In almost all cases, states that rejected evidence-based voting policies were those in which Trump had won the popular vote in 2016, had Republican controlled state legislatures, but were thought to be possible Democratic pick-ups in 2020.

Voting rights activists enjoyed some successes in state courts and lower federal courts when they challenged state failures to ensure persons could vote safely in the primary and national elections. With important exceptions, however, the Supreme Court often insisted abstractions were more important than evidenced-based politics. If, for obvious partisan reasons, state legislatures were not going to facilitate voting in national elections, the conservative majority of the Supreme Court maintained, federal courts should not intervene in ways that would enable people with the legal right to vote to be able in practice to cast a ballot. If, for example, an absentee ballot requested in August, arrived after the election in November, that was just tough luck.

Broad agreement among the justices and legal commentators existed that state legislatures had the right to adjust voting rules in light of the pandemic. When state legislatures extended the time for absentee voting, expanded early voting sites, or otherwise took steps to prevent long lines on election day, those measures were acknowledged to be fully constitutional. The Supreme Court, which under federal law has the almost complete discretion over its docket, did not bother reviewing any of these cases. No justice even hinted that a constitutional problem existed with state legislation expanding opportunities to vote during the pandemic.

The Supreme Court have the lower federal courts no similar leeway. The Supreme Court majority insisted that federal courts had no business changing the election rules shortly before an election. If the democratically elected state legislature did not think a rule change was necessary, federal courts should ordinarily abide by that decision. Justice Neil Gorsuch maintained

> *Last-minute changes to longstanding election rules . . . invit[e] confusion and chaos and erod[e] public confidence in electoral outcomes. No one doubts that conducting a national election amid a pandemic poses serious challenges. But none of that means individual judges may improvise with their own election rules in place of those the people's representatives have adopted.*

The four more liberal justices on the court sharply disagreed. In their view, the right to vote trumped concerns about rule changes, particularly when state failures to respond to a public health crisis had no basis in evidence on the ground. Justice Elena Kagan accused the conservative majority of"refus[ing] to engage with" the undisputed evidence that "a veritable tsunami (in the form of a pandemic) has hit Wisconsin's election machinery and disrupted all its usual mail ballot operations."

State courts were also given leeway, although by a more closely divided court. The Supreme Court of Pennsylvania in a series of decisions allowed absentee votes to be counted even if they arrived after election day. Whether by hook or crook, the U.S. Postal Service, under the leadership of a person whose only qualification for the position seemed to be significant donations to the Trump campaign, had not been delivering the mail as efficiently. Pennsylvania judges insisted that postal slowdowns should prevent otherwise legal votes from being counted. The Supreme Court refused to intervene when requested to do so by the Republican Party. The crucial vote was cast by Chief Justice Roberts, who in other opinions indicated that the ban on interfering with election rules immediately before an election was for federal courts, that state courts interpreting the state constitution were freer to change the rules. "[T]the Pennsylvania applications," he wrote, "implicated the authority of state courts to apply their own constitutions to election regulations," and did not "involve[] federal intrusion on state lawmaking processes. Roberts concluded, "[d]ifferent bodies of law and different precedents govern these two situations."

The replacement of Justice Ruth Bader Ginsburg by Justice Amy Comey Barrett in 2020 has so far not changed this very delicate balance. Barrett during her rushed confirmation hearings refused to state whether and how she would rule on the election disputes that arose during the pandemic. When, however, Republicans sought to overturn the Pennsylvania election in court on the ground that the state court had unduly interfered with the state legislature, Barrett pointedly refused to join the more conservative justices on the Supreme Court who in dissent insisted that the court should adjudicate the matter.

COVID, Public Health, and Religious Freedom

Barrett made a substantial difference in the course of Supreme Court policymaking on religious freedom. During the pandemic, most states adopted rules and regulations sharply limiting public gatherings. These rules typically differentiated between different institutions. Grocery stores could remain open under certain conditions. Movie theaters can be open only on more stringent conditions.Religious services typically were placed somewhere in between. They faced more stringent limits than grocery stores, but less stringent limits than movie theaters. Some religious denominations accepted these limits. Others protested, claiming either that states could not bar religious services at all or that the rules discriminated against religious services.

The Supreme Court while Justice Ginsburg lived deferred to state legislatures. Such legislation, judicial opinions pointed out, was rooted in medical expertise. Grocery stores were not as much hotspots as churches in part because persons shopping for groceries tend to be spend limited ten inside part because grocery stores are not sites for the singing and chanting that routinely takes place in religious services. Evidence indicated that many outbreaks of COVID were strongly associated with attendance at religious services. The four most conservative justices dissenting. They insisted that the differences in stringency discriminated against religion.

Justice Barrett's appointment converted a 5-4 majority in favor of deference into a 5-4 majority in favor of religious freedom, or religious freedom as defined by the most conservative members of the Supreme Court. A commitment to evidence-based politics was at the root of the difference. The conservatives in the majority speculated that some permitted activities might have been as risky as the religious activities that were prohibited. Justice Neil Gorsuch observed, "no one is barred from lingering in shopping malls, salons, or bus terminals" without asking whether people in fact linger in these places and whether such lingering is statistically associated with COVID outbreaks. Justice Kagan's call for evidence rather than speculation fell on deaf ears, in an opinion which cited medical testimony explaining the particular treatment of religious institutions, she declared,

> *the Court displaces the judgments of experts about how to respond to a raging pandemic. The Court orders California to weaken its restrictions on public gatherings by making a special exception for worship services. The majority does so even though the State's policies treat worship just as favorably as secular activities (including political assemblies) that, according to medical evidence, pose the same risk of COVID transmission.*

The Past and Future of COVID and Evidence-Based Politics

The main event in the constitutional politics over the past year is the invasion of the Capitol by Trump supporters on January 6, 2021. The connections between that event and public health policy during the pandemic are unclear. On the one hand, Trump supporters have been frustrated by legislative regulations requiring wearing masks in public (most protestors flouted that regulation), limiting businesses and religious services. On the other hand, Trump is a notorious sore loser, who no doubt claimed cheating when he lost at card games as a toddler. So a fair case can be made that something like January 6th would have occurred in American politics even if COVID had never occurred. In this vein, one might note that COVID had surprising little impact on voting choices during the election. Voting choices tended to reflect preexisting

partisanship rather than blame or credit for handling the pandemic.

The January 6 insurrection nevertheless highlighted the continued weakening of evidence-based politics that played a major role in the pandemic and American political affairs. Basic facts about the world have played less and less a role in American political life as the threats played by those facts have multiplied. Nearly twenty years ago, the United States invaded Iraq in part because of fears about missiles that turned out not to exist. Still, at least some evidence suggested that Iraq was developing a more dangerous nuclear stockpile than proved to be the case. The Trump administration in crucial matters discarded evidence altogether. Trump smashed the lie barrier for political officials, making false claims and claims made on no evidence at unprecedented rates. His administrated denied the climate changes that all environmentalists acknowledge are taking place, even is disagreements exist on the details. Trump claimed an election was stolen even as Republicans in office and on the courts could not find evidence of malfeasance. At least one aspect of Trump's practice was evidence based. No evidence existed that Trump's lies and disregard for basic facts was politically costly. The 45% of the people who supported him insisted that while Trump exaggerated, he was far more to be trusted than the so-called experts who insisted that climate change was real, immigrants posed no threat to the economy, and the election was not stolen.

Former Vice President Joe Biden's triumph in the 2020 presidential election and the return of the Senate to (bare) Democratic control has increased the immediate impact of evidence-based politics on public policy in the United States, both with respect to COVID and other matters. Unlike the Trump Administration, the Biden Administration developed a plan for distributing the vaccine that was based on institutional capacity rather than wishful thinking and political advantage. Distribution appears to be taking place faster than expected. Divisions exist over the proper forms of relief, but the plans preferred by progressive Democrats, centrist Democrats and the most moderate of the very conservative Republicans are rooted in evidence about how the virus has affected individuals and the economy. To use a phrase coined to describe Hillary Clinton by never-Trumpers, if persons within the range from the democratic socialist Representative Alexandria Ocasio-Cortez of New York and Senator Rob Portman of Ohio are wrong, they are wrong within the normal parameters of democratic politics.

Nevertheless, COVID has accelerated activities outside the parameters of normal democratic politics and evidence-based politics. Texas and Mississippi are ending mask mandates even though experts agree such policies will increase the spread of the virus and lead to more deaths. Republicans in state legislatures are busy finding ways of increasing minority control by further restricting voting and gerrymandering. The Trump family has vowed to return to politics, even as evidence continues to mount that they bear a greater resemblance to the crime families of motion pictures than the Bush and Kennedy dynasties. A superficial glimpse of COVID numbers and the Biden administration may suggest the clouds are clearing, but the better view may be the United States is in the eye of the storm.

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SUGGESTED CITATION

Graber, Mark A.: COVID-19, the United States and Evidence-Based Politics, Verfassungsblog, 14.04.2021, doi: 10.17176/20210414-101222-0.

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