

RICHARD: American democracy is under threat, weakened by hyper-polarization, widespread distrust of the system, and challenged by extremists who act to weaken democratic values and institutions. Two-thirds of Americans polled recently said major reforms are needed. This is Let's Find Common Ground. I'm Richard Davies.

ASHLEY: And I'm Ashley Milne-Tyte. In this episode, we discuss ways to strengthen the democratic system with a leading constitutional law scholar, an expert on the legal aspects of the political process.

RICHARD: Rick Pildes is a professor at New York University's School of Law and author of the book *The Law of Democracy: Legal Structure of the Political Process*.

ASHLEY: Before asking about reform, let's look at the crisis we're all facing.

RICHARD: The state of our democracy today, is it weaker now than it was before the election in 2020?

RICK: On the one hand, our election process was put under the greatest stress that it's ever experienced since, I believe, the 1876 election, which was a disputed presidential election. The system, in one sense, survived all of those stresses. Election administrators, state secretaries of state, courts all performed in the way that we would like to see them perform, in a professional rule-of-law oriented way despite all of these stresses. But, at the same time, we became aware how much more easy it is to weaponize different points of vulnerability in the election process in the service of partisan self-interest.

Since the election, we now have a situation in which a significant part of the country believes the election was not fair and free, and that's a terrible danger going forward. It sets us up for challenging the legitimacy of elections that are close in our highly polarized time. On balance, even though the system held up very well under these immense stresses, I certainly feel that we are more vulnerable than we have ever been, certainly in the modern era.

RICHARD: Tell us more about those vulnerabilities and the stresses to our system.

RICK: In a democracy in which 70% of one party's supporters believe the election was rigged or fraudulent even when it wasn't, that's a very, very dangerous environment to be in. As various political actors have become aware of the points of stress on the system or the points at which you can intervene to try to manipulate the outcome in a direction in your favor, that became much more apparent.

So, for example, we are going to see much more partisan actors who seek to run for election administrative positions like the secretary of state position. We've seen that starting already. So part of the concern is not just the public attitude but the recognition by partisan actors that, "If we can control this part of the process or that

part of the process, we may be able to control things in a way we would like to see them go." I think that's a very, very significant risk going forward.

ASHLEY: Did the mayhem outside the U.S. Capitol in January weaken the guardrails of democracy?

RICK: Well, it's obviously a devastating moment in the democratic history of the United States. We, of course, have never had an effort to interrupt the counting of the electoral votes. So that's a very traumatic moment and a disturbing set of images for the world to see about American democracy. But I think the issues to be concerned about are larger than January 6th. The perceptions of fraud or manipulation or the election being fair have not diminished since January 6th. They are just as strong now based on public opinion polling. So, if we thought that after January 6th, there would be kind of a coming-together of the country and a consensus that we can't have this happen, this is intolerable, we have to repudiate this, that has not happened. I think we are in much the same position today as we were going into January 6th.

RICHARD: To be fair, the claims of a disputed election, they're not especially new, although the way that they have been discussed are. After the 2016 election, Hillary Clinton very much questioned the result of the election, and that was also something which many Democrats thought the election was stolen from her.

RICK: Well, I think the view was Russian disinformation and manipulation, the exposure of the internal emails of the Democratic National Committee and things like that affected the outcome. It's pretty hard to know with any certainty how information does and doesn't change people's preferences on voting, but we did not have Democrats at any significant level objecting to the counting of electoral votes. I don't think there was anything like 70% of the Democratic Party believing the election had been stolen or rigged. There wasn't an attack on our election officials, our election administrators. It was mainly about the Russians, what they did, how much that might've affected things, along with, by the way, I would say Jim Comey's last-minute intervention right before the election, which a number of experts think may have been the single biggest tipping factor.

ASHLEY: There have been disputed elections before.

RICK: In 2000, we have the closely contested Bush versus Gore election that ended up being resolved in the Supreme Court. Democrats were very angry at the court, and many still are, for that decision. Al Gore accepted the outcome. He actually presided over the counting of electoral votes, and there was nothing like the reaction to the 2020 election. I think you have to go back to 1876 to see anything as dangerous to the political system as the disputes that had been conjured up around the 2020 election.

RICHARD: Let's discuss some ideas around what to do with the mess we're now in. The electoral system is run by states and localities. Is there a bigger role for the federal government to play?

RICK: Well, that's an interesting question, and Congress certainly has the power for national elections, to regulate them to the extent that it sees fit. In many ways, the most important thing Congress can do is provide funding for managing the election process to state and local governments. I think this part of the 2020 election story is less well-known, but we actually ended up relying on very large infusions of money from private donors, at least \$500 million and I think more than that, to local election offices to help them actually ramp up to run the 2020 election, which, after all, of course, was run under extreme, difficult circumstances with the pandemic.

But we shouldn't be in a position where we have to rely on private philanthropic contributions to run our election process. That's not a good place to be. One of the things Congress is doing is looking to update the Voting Rights Acts in response to a 2013 decision from the Supreme Court which held unconstitutional a part of that act. And obviously there's been a longstanding role for Congress in that area with the Voting Rights Act. So that's almost a traditional role since 1965 that Congress is playing to protect against racial discrimination in the voting process. In terms of other issues like requiring some number of days of early voting or requiring that absentee balloting be done in a certain way, it's very hard to imagine that Congress is going to adopt those kinds of policies simply because, despite how much Democrats would like Congress to do that, it's so deeply entrenched in the Republican party that elections should not be run at the central level.

ASHLEY: You had an op-ed in The New York Times earlier this year. In that, you wrote, "Every political reform proposal must be judged by its ability to fuel or weaken extremist candidates." Can you talk about that? Why is that important?

RICK: Yes. There are many different aspects of the voting system to worry about or to consider policy changes to, but what we have learned over the recent past is that there are very serious extremist forces within America politics. There's extreme polarization, and there's also the kind of extremism that denies the legitimacy of a fair election, and those are extremely dangerous forces. If American government or any government cannot deliver on the issues that people seem to care most about, that poses, itself, a serious risk to democracies.

At some point, people withdraw, get alienated. The distrust of government goes up, and then, in even more extreme forms, you have to worry about people becoming alienated from the democratic process itself, demanding strong leaders who will cut through all of this political process that is so dysfunctional. The issues I am most targeting are political reforms that can hopefully mitigate, to some extent, these extremist forces in our political culture and keep them cabined in more from actually penetrating into the government and the governmental process itself.

RICHARD: Then there's also America's image overseas as a strong example for democracy.

RICK: This is all happening in the context, of course, of the rise of China and the very different model it represents of a one-party, authoritarian capitalism. That poses a challenge, implicitly or explicitly, to democratic governments. If they can't seem to deliver, one concern is the attractions of those kinds of alternative models.

ASHLEY: Well, let's start to go through some of the reforms that you would like to see here in the U.S. Can you talk about the primaries first, which is, of course, the system used by the parties to pick their candidates?

RICK: Yes. I think the primary system we have is, itself, one of the most significant threats to the democratic system as it's turned out over time. The concern is that candidates who have the broadest appeal in a general election aren't able to get through the primary process and get winnowed out, and the candidates who are left in the general election are fairly extreme candidates from either side.

RICHARD: Can you explain how that happens? How is it that a candidate who ultimately would be the most popular or effective gets winnowed out in a primary, in a party primary?

RICK: Yeah. The turnout in primary elections is far, far lower than in general elections. It's about one-third of the turnout of general elections. And the people who tend to turn out for primaries are the ones who are most engaged with politics and with the party, and they tend to come from the more activist wings of each party. In order to get through the primary, you have to appeal to that kind of electorate, which is not representative of the general election electorate.

A clear example we have of a candidate who could not get through a party primary but actually was the candidate who appealed most broadly to the full electorate in their state is Lisa Murkowski in 2010. She lost the Republican primary, but Alaska allows candidates to run write-in campaigns in the general election even if they have lost in the primary. So she manages to mount a write-in candidacy in the general election, and she won the general election as a write-in candidate, not as a Republican.

RICHARD: Lisa Murkowski is one of the most moderate Republicans in the Senate. She defied Donald Trump repeatedly when he was president.

ASHLEY: We're speaking with Professor Rick Pildes, who teaches constitutional law at New York University. He specializes in legal issues concerning democracy. This is Let's Find Common Ground. I'm Ashley.

RICHARD: I'm Richard. What does it take to combat hate?

ASHLEY: That's the question being asked in a rather unusual way at a Common Ground Committee live online event. Our guests are Daryl Davis and Ryan Lo'Ree. The event is on June 14th at 7:00 p.m. Eastern time.

RICHARD: Daryl is an award-winning Black musician and race reconciliator. He's used the power of human connection to personally convince hundreds of people to leave white supremacist groups. We spoke with him about his work on Episode 5 of our podcast last year.

DARYL DAVIS: I've been looking for this answer to my question since the age of 10: how can you hate me when you don't even know me? And no book and no one had been able to provide it to me. Here, a clansman falls right into my lap. Who better to ask?

ASHLEY: Daryl Davis on Let's Find Common Ground. His fellow guest at the Zoom event will be Ryan Lo'Ree, a former White Supremacist and extremist. He's now an interventionist working to de-radicalize people who have been lured into extremism and white supremacy.

RICHARD: Register now to join them for a Zoom conversation moderated by New York Times columnist David Brooks. They discuss strategies that work to combat hate and how we can all play a part.

ASHLEY: Go to commongroundcommittee.org to get the link, find out more, and register. Now back to our interview with Rick Pildes.

RICHARD: We were talking earlier about Lisa Murkowski. Her Alaska victory in 2010 was the first time a write-in Senate candidate had won in any state in more than 50 years.

RICK: This moves us into the discussion of primary reforms. Are there things we can do to not have primaries have such a stranglehold over our politics that they fuel extremism? Is measures like the one Alaska just adopted in this last election... The voters in Alaska adopted what's called a top-four primary structure with ranked-choice voting in the general election. Everybody runs in a single primary election. You identify yourself as supporting the Democratic Party or the Republican Party or an Independent or whatever it might be, and the top four vote-getters then go on to the general election. In the general election, voters are given the choice of ranking candidates one through four.

Lisa Murkowski undoubtedly understands that in her next election, she is not going to have to survive a party primary. She will almost certainly be one of the top four vote-getters. She'll get to the general election and then, if she remains widely popular in the state, she would be likely to win that election.

RICHARD: Critics would say you're tilting the scales to moderates.

RICK: Well, the way I would respond to that is number one, we're actually looking for structures that allow the candidates who have the broadest appeal to voters to get elected, and, number two, we make a lot of choices in the design of the election system that are made with an eye towards trying to incentivize certain kinds of outcomes rather than others. Let me just take the example most people don't think about, which is that we use first-past-the-post elections, which means whoever gets the most votes gets the seat. We don't use proportional representation like most democracies in Europe.

ASHLEY: Back in 2016, Donald Trump was considered a real outsider, seemed like an outsider, and yet he emerged totally triumphant in quite a crowded Republican field. With reforms you've spoken about, would that have changed the result?

RICK: Here's the first point to understand about the way we choose our nominees for president right now, and I think this is something most Americans don't have any awareness of, understandably. One of the most radical changes we made to our political process in the last 50, 60 years was the change from the convention-based system for choosing nominees to the system we created in the 1970s which basically is these primary elections choose the delegates to the conventions, and whoever gets the majority of the delegates in the primaries gets the nomination. That has huge ramifications for the kinds of candidates who run for president and the kinds of candidates who are capable of winning the nomination.

For 170 years, we had a system of choosing the party nominees that, in one form or another, gave the party elected officials some significant weight in deciding who their nominees should be. One of the things about that system is it required candidates to have the support of local, national, state elected officials from the party, broad support within the party, as well as an appeal to the voters because there were primary elections; they just didn't control all of the votes for the delegates to the convention. It left the party with some say over who represented the party. What the modern system does kind of came to a culmination with Donald Trump's success in the nominations process in 2016.

With the reforms in the 1970s and the creation of these primary elections, we created the most populous system for any democracy for choosing party nominees for the highest office. What that meant is you didn't have to have any ties to the party. It meant lots of people would run like we see with these 21-candidate primary fields. It meant that having a lot of name recognition going into the primaries was a huge plus, and it allowed what I think of as political free agents, which is a little bit how I think of Donald Trump, who was not really a lifelong Republican. He'd been a Democrat. Then he switched. But it allows political independent free agents or entrepreneurs, if you will, to capture the party's nomination.

It also allows candidates who might get 35% of the vote in the primary, so who are factional candidates, to actually still capture the nomination. If you have 21 people running, you can win states with 30% of the vote. Another way I'd put it is before these

reforms of the 1970s, I don't think a candidate like Donald Trump would have run for the party nomination, and I don't think he would've been successful because he was such an outsider to the party. Bernie Sanders is another interesting example of this phenomenon. People forget he was an Independent. He was not a Democrat, and yet he almost managed to overtake the establishment figure in the party in the primaries for 2016, Hillary Clinton.

RICHARD: We're unlikely to go back to the era of party conventions and party bosses deciding who the candidate is, but there is ranked-choice voting.

RICK: The appeal of ranked-choice voting is that a candidate who comes in first on, let's say, 30% of the ballots but doesn't appeal at all to the other voters in the party would be much less likely to be successful than a candidate who had broad appeal in the party.

RICHARD: Yes. Just give us a 30-second primer on ranked-choice voting in case any of our very well-informed listeners doesn't know exactly how it works.

RICK: Well, I've been an advocate of ranked-choice voting for 25 years or so now, and it's actually gaining tremendous momentum just in the last decade or so, I would say. So, in ranked-choice voting, instead of just voting for one candidate, you rank the candidates in order. When the vote tallying starts, you look to see if any candidate has gotten more than 50% of the votes as a first-choice preference, and if that candidate has, they get elected. But, if not, then you start eliminating candidates at the bottom and looking to see who their voters supported for their second choice, and you give those votes to that candidate. This encourages the election of candidates who can appeal broadly.

ASHLEY: So the argument is, with ranked-choice voting, a factional or extremist candidate is less likely to get elected?

RICK: Part of the argument for it, also, is it encourages a different kind of campaigning. In our current system, candidates are incentivized to be very hostile and antagonistic to their opponent because it's a zero-sum game. With ranked-choice voting, you want to appeal to the supporters of other candidates.

ASHLEY: What about gerrymandering. I know you think gerrymandering should be reformed, but how?

RICK: We are the only country that allows self-interested political actors to draw election districts that will affect their own elections or those of their partisan allies. I think that we should take the power out of the hands of the most self-interested actors and put it into various kinds of commissions of either bipartisan or independent who are at least one remove from direct partisan politics.

Then the second issue is what are the substantive goals or criteria for a fair map, and how should maps be designed? In my view, we should give much more emphasis to creating competitive districts to the extent we can consistent with various legal constraints like the Voting Rights Act. Because competitive districts force candidates to respond to the center of the electorate, it makes members of Congress more responsive to changes in voter preferences or policy views. So most candidates are elected from safe seats today. Only about 17% of districts are competitive.

RICHARD: Safe seats held by Republicans and Democrats rarely change hands.

RICK: Again, what you're worried about in safe seats is not losing a primary. You're not worried about the general election because it's incredibly unlikely that you're going to lose the election. So I would like to see districting be done by independent commissions, not by self-interested state legislatures, and the substantive criteria they use should give considerable weight to competitiveness of the districts as well as to try and ensure that they produce reasonably fair partisan outcomes or are likely to do so given the preferences of voters.

ASHLEY: Our show is called Let's Find Common Ground. Do you think there are some areas of election reform where people with different perspectives could actually agree?

RICK: We, right now, are in such a toxic political culture that it's very hard to have reasonable, evidence-based discussion about these issues. There are some states that have achieved bipartisan reform on election processes. Kentucky actually is one of the very good examples of this. A Republican secretary of state and a Democratic governor actually managed to form a compromised deal for how to structure their elections in 2020, which went through and then went very smoothly.

I think that there may be tradeoffs possible between promoting more convenient voting, increasing access to voting while also protecting the integrity of the process. There may be ways of putting together deals that give one side some of what they want, give the other side some of what they want. Pennsylvania actually, in 2019, before this election, had their most significant election reform in 70 years or so through a bipartisan package of voting reforms. But since 2020, all that's become more difficult. I think most reform will have to take place at the state level. I think the barriers to it at the national level are just very, very high right now.

RICHARD: A final question, and I am going to attempt to put words in your mouth, Rick. But it seems like a lot of the reforms that you want are reforms that help the center, that help more moderate voters or at least Independent voters as opposed to the dogmatic extremes of our politics. Is that fair?

RICK: I think that is fair. I would put it slightly differently, although it has that effect. These are reforms that are designed to support candidates who have the broadest appeal to the electorate and to try to mitigate the way our current structures incentivize

and reward more factional candidates. It's a way of restoring majority rule if you want to think about it in those terms. We want the candidates in the general election who represent the majority of voters to be there and to be successful. That's basic majority rule, and the current structure of primaries, I think, interferes with the ability of candidates to get to the general election who would, in fact, have the broadest appeal, who would win in a true majority vote kind of structure.

RICHARD: Rick Pildes, thank you very much for joining us on Let's Find Common Ground.

RICK: Thank you. It's been a lot of fun to talk about all of these important issues.

ASHLEY: Rick Pildes on ways to reform our democracy. We have more episodes about the workings of government and how the process could work better at commongroundcommittee.org. This is Let's Find Common Ground. I'm Ashley.

RICHARD: I'm Richard. Thanks for listening.

ASHLEY: Now a word about another fine podcast from The Democracy Group, the podcast network we're a part of.

RICHARD: Out of Order is a German Marshall Fund podcast about how our world was, is, and will be ordered.

ASHLEY: From the way the pandemic is shaping geopolitics to the dark side of tech for democracy to political movements, elections, and uprisings changing global governance, Out of Order brings together international experts to help us understand our disordered world.

RICHARD: Find out more about Out of Order and our podcast at democracygroup.org.

ANNOUNCER: This podcast is part of The Democracy Group.