

# Voting Rights and Democracy Forum

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Volume 1 | Issue 1

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2022

## I Hope Tilden Was Right

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### Recommended Citation

Jerry H. Goldfeder, *I Hope Tilden Was Right*, 1 FORDHAM VOTING RTS. & DEMOCRACY F. 1 (2022).  
Available at: <https://ir.lawnet.fordham.edu/vrdf/vol1/iss1/1>

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## FOREWORD

### I HOPE TILDEN WAS RIGHT

*Jerry H. Goldfeder\**

Even after an election in which voters rejected several high-profile election deniers,<sup>1</sup> the state of our union remains fraught.<sup>2</sup> Over two hundred of them were elected during the midterms,<sup>3</sup> and the former president is running once again.<sup>4</sup> As a result, the relief felt by many after the 2022 midterms has not eliminated a deep concern that the rule of law and the norms that sustain it are fragile, as well as a fear as to what would happen if the 2024 election is inconclusive;<sup>5</sup> indeed, this includes a worry about political violence.<sup>6</sup>

Former President Donald Trump is not solely responsible for the current state of affairs, of course, but his persistent attempt to delegitimize the 2020 election certainly exacerbates an underlying contentiousness in the country. And despite a feeling that

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<sup>1</sup> “Election deniers” is a characterization that does not capture the subversive nature of what is being espoused. Many of those who steadfastly claim that President Biden did not win the 2020 election also implicitly promise to reject results in future elections if not to their liking. A more direct nomenclature is required, such as “seditionists.”

<sup>2</sup> Jerry H. Goldfeder, *Reform Our Elections and Save the Republic*, N.Y. L.J. (Oct. 31, 2019, 11:45 AM), <https://www.law.com/newyorklawjournal/2019/10/31/reform-our-elections-and-save-the-republic> [<https://perma.cc/7EGB-KL3E>].

<sup>3</sup> Karen Yourish et al., *See Which 2020 Election Deniers and Skeptics Won and Lost in the Midterm Elections*, N.Y. TIMES (Nov. 10, 2022, 6:30 PM), <https://www.nytimes.com/interactive/2022/11/09/us/politics/election-misinformation-midterms-results.html> [<https://perma.cc/H6CV-ESAR>].

<sup>4</sup> Gabby Orr et al., *Former President Donald Trump Announces a White House bid for 2024*, CNN (Nov. 16, 2022, 1:25 PM), <https://www.cnn.com/2022/11/15/politics/trump-2024-presidential-bid> [<https://perma.cc/3N9N-MCG8>].

<sup>5</sup> Amy Gardener, *A Majority of the GOP Nominees Deny or Question the 2020 Election Results*, WASH. POST (Oct. 12, 2022, 9:21 AM), <https://www.washingtonpost.com/nation/2022/10/06/elections-deniers-midterm-elections-2022> [<https://perma.cc/U5DR-T87B>].

<sup>6</sup> Jerry H. Goldfeder, *Excessive Judicialization, Extralegal Interventions, and Violent Insurrection: A Snapshot of our 59th Presidential Election*, 90 FORDHAM L. REV. 335, 338 (2021) (“Notwithstanding the former president’s impeachment for inciting the insurrection and the ongoing prosecutions of participants in the January 6 attack, there is no reason to believe that the assault on the Capitol is not a prelude for what may occur in our sixtieth presidential election.”).

“democracy has been saved” by the midterms,<sup>7</sup> the issue of whether our constitutional democracy will survive remains.

Perhaps a look at history will provide perspective.

Donald Trump was not the first incumbent to be defeated for re-election.<sup>8</sup> In fifty-nine presidential elections, no fewer than eleven incumbents lost—only he, however, attempted to subvert our Constitution to stay in power. Although Trump did ultimately leave the White House,<sup>9</sup> it was not until after he attempted and failed to circumvent peaceful succession by bullying state election officials to upend results,<sup>10</sup> concoct spurious legal theories that were rejected in over sixty court decisions,<sup>11</sup> threaten the vice president if he did not keep him in office,<sup>12</sup> incite an armed mob to stop the Electoral College certification process,<sup>13</sup> and influence 147 members of

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<sup>7</sup> John Cassidy, *An Important Victory for U.S. Democracy—and a Warning*, NEW YORKER (Nov. 11, 2022), <https://www.newyorker.com/news/our-columnists/an-important-victory-for-us-democracy-and-a-warning> [<https://perma.cc/9Q89-PTCS>].

<sup>8</sup> See Goldfeder, *supra* note 6, at 338.

<sup>9</sup> Jerry H. Goldfeder & Lincoln Mitchell, *A Donald Trump Coup If He Loses in 2020? With All the Norms He's Busted, Don't Rule It Out*, USA TODAY (Mar. 14, 2019, 5:30 AM), <https://www.usatoday.com/story/opinion/2019/03/14/donald-trump-peaceful-transition-or-coup-if-he-loses-2020-column/3141268002> [<https://perma.cc/8GWD-8A86>]; *They Predicted a Trump Coup Attempt. Hear What They Say Now*, CNN (Aug. 6, 2021), <https://currently.att.yahoo.com/att/predicted-trump-coup-attempt-hear-144535831.html> [<https://perma.cc/4BR4-MEVG>].

<sup>10</sup> Ed White et al., *Trump Summons Michigan GOP Leaders for Extraordinary Meeting*, ASSOC. PRESS (Nov. 19, 2020), <https://apnews.com/article/trump-invites-michigan-gop-white-house-6ab95edd3373ecc9607381175d6f3328> [<https://perma.cc/Y76R-F5WQ>]; William Bender & Angela Couloumbis, *President Trump Invited Pa. Lawmakers to the White House. Then Everyone Went Silent*, PHILA. INQUIRER (Nov. 26, 2020), <https://www.inquirer.com/news/president-trump-invited-pa-lawmakers-white-house-then-everyone-went-silent-20201126.html> [<https://perma.cc/P5X9-ZQ6T>]; Michael D. Shear and Stephanie Saul, *Trump, in Taped Call, Pressured Georgia Official to 'Find' Votes to Overturn Election*, N.Y. TIMES (May 26, 2021), <https://www.nytimes.com/2021/01/03/us/politics/trump-raffensperger-call-georgia.html> [<https://perma.cc/H599-U5R5>].

<sup>11</sup> See Goldfeder, *supra* note 6, at 360-66; William Cunnings et al., *By the Numbers: President Donald Trump's Failed Efforts to Overturn the Election*, USA TODAY (Jan 6, 2021, 10:50 AM), <https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001> [<https://perma.cc/X76B-LMZS>].

<sup>12</sup> Patricia Zengerle & Richard Cowan, *Trump Pressed, Threatened Pence to Overturn Election, Panel Hears*, REUTERS (June 17, 2022, 2:56 AM), <https://www.reuters.com/world/us/us-capitol-jan-6-panel-turns-attention-pence-thursdays-hearing-2022-06-16> [<https://perma.cc/G88L-URPS>].

<sup>13</sup> Kat Lonsdorf et al., *A Timeline of How the Jan. 6 Attack Unfolded—Including Who Said What and When*, NPR (June 9, 2022, 9:11 AM),

Congress to reject rightfully-cast electoral votes.<sup>14</sup> Most Americans know all of this by now, but it bears repetition—just to underscore the seditious conduct<sup>15</sup> visited upon the United States in 2020 and to focus attention on a problematic future.

Indeed, just because the midterm elections went smoothly does not mean, unfortunately, that the grave threat the former president posed is behind us. He and some supporters continue to infect the body politic in what Representative Jamie Raskin refers to as a “clear and present danger”<sup>16</sup>—with vitriolic lies and defamatory speeches, coupled with insidious threats about 2024.<sup>17</sup>

Yet history teaches that Trump is an anomaly. Three examples stand out. In 2000, when Al Gore’s chance of victory was snatched away by a questionable decision of the United States Supreme Court,<sup>18</sup> he accepted it as a lawful determination and conceded. He was roundly hailed for having done so.<sup>19</sup> When Richard Nixon concluded in 1960 that he could not prove that Illinois and Texas vote totals were fraudulent,<sup>20</sup> he acknowledged

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npr.org/2022/01/05/1069977469/a-timeline-of-how-the-jan-6-attack-unfolded-including-who-said-what-and-when [https://perma.cc/ND5K-9NS9].

<sup>14</sup> Karen Yourish et al., *The 147 Republicans Who Voted to Overturn Election Results*, N.Y. TIMES (Jan. 7, 2021), https://www.nytimes.com/interactive/2021/01/07/us/elections/electoral-college-biden-objectors.html [https://perma.cc/2VU9-X2ZG].

<sup>15</sup> The Editorial Board, *Donald Trump Is Not Above the Law*, N.Y. TIMES (Aug. 26, 2022), https://www.nytimes.com/2022/08/26/opinion/trump-documents-jan-6-prosecute.html [https://perma.cc/4BCM-7DE9].

<sup>16</sup> Rep. Jamie Raskin (@RepRaskin), TWITTER (Jan. 8, 2021, 4:27 PM), https://twitter.com/repraskin/status/1347656091879026693 [https://perma.cc/Z65Z-FSDU]. See also Nicholas Wu & Kyle Cheney, *Jan. 6 Committee to Subpoena Trump*, POLITICO (Oct. 13, 2022, 5:08 PM), https://www.politico.com/news/2022/10/13/jan-6-committee-trump-threat-00061454 [https://perma.cc/MZE9-5YL3].

<sup>17</sup> See David Gilbert, *The GOP Just Tested Its ‘Scary’ Plan to Steal the 2024 Election*, VICE (JUNE 16, 2022, 11:31 AM), https://www.vice.com/en/article/4axyxg/who-is-david-clements [https://perma.cc/XG23-YCER]; Richard L. Hasen, Opinion, *No One Is Coming to Save Us From the ‘Dagger at the Throat of America,’* N.Y. TIMES (Jan. 7, 2022), https://www.nytimes.com/2022/01/07/opinion/trump-democracy-voting-jan-6.html [https://perma.cc/5QWG-YBKZ].

<sup>18</sup> *Bush v. Gore*, 531 U.S. 98, 111 (2000). See generally Mark S. Boudin, *Bush v. Gore: The Worst (or at least second-to-the-worst) Supreme Court Decision Ever*, 12 NEV. L. J. 563 (2012).

<sup>19</sup> See, e.g., Thomas E. Mann, Opinion, *Gore’s Dignity – and Rightful Disagreement*, BROOKINGS INST. (Dec. 14, 2000), https://www.brookings.edu/opinions/gores-dignity-and-rightful-disagreement [https://perma.cc/K5RJ-YLFD].

<sup>20</sup> David Greenberg, *The Time Nixon’s Cronies Tried to Overturn a Presidential Election*, POLITICO (Oct. 10, 2020, 7:00 AM), https://www.politico.com/news/magazine/2020/10/10/the-time-nixons-cronies-tried-to-overturn-a-presidential-election-428318 [https://perma.cc/Z9RB-YJNE].

John Kennedy as the president-elect. As it turned out, both Gore and Nixon, serving as vice president presiding over Congress when the electoral votes were ratified on the following January 6th, each fulfilled their constitutional duty by announcing the victory of their opponents.<sup>21</sup>

If there were ever a doubt about our nation's robust constitutional democracy, such peaceful successions, first displayed by President John Adams in 1800 when he lost re-election to Vice President Thomas Jefferson,<sup>22</sup> certainly demonstrate our nation's historical respect for the law.

Indeed, the one presidential election that came closest to having been actually stolen, in 1876, also revealed the patriotism of the purported loser as stronger than his disappointment or anger. In that race, Samuel J. Tilden "lost" the presidency (most scholars and commentators believe he won)<sup>23</sup> as a result of corrupt election administrators, an extra-constitutional commission, and a political deal that eliminated post-Civil War Reconstruction. Yet, several months after Congress ratified the election of Rutherford B. Hayes,<sup>24</sup> Tilden spoke optimistically about our nation's prospects. In a speech to a civic group in Manhattan, Tilden said:

Everybody knows that, after the recent election, the men who were elected by the people as President and Vice President were counted out; and the men who were not elected were counted in and seated. If my voice could reach throughout our country and be heard in its remotest hamlet, I would say: Be of good cheer. *The Republic will live. The institutions of our fathers are not to expire in shame. The sovereignty of the people shall be rescued from this peril and re-established.*<sup>25</sup>

Although each had good reason to reject the results of a flawed presidential election, Tilden, Nixon, and Gore each chose to accept the outcome of the legal and political process at the time. Denied the power of the presidency, they nevertheless played a

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<sup>21</sup> U.S. CONST. amend. XII.

<sup>22</sup> THOMAS H. NEALE, CONG. RSCH. SERV. R40504, CONTINGENT ELECTION OF THE PRESIDENT AND VICE PRESIDENT BY CONGRESS: PERSPECTIVES AND CONTEMPORARY ANALYSIS 1, 2-4 (2020).

<sup>23</sup> See, e.g., WILLIAM H. REHNQUIST, CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876 (2005); Goldfeder, *supra* note 6, at 978-82.

<sup>24</sup> It became common for opponents of this corrupt bargain to refer to President Hayes as "Rutherfordfraud." See Goldfeder, *supra* note 6, at 969 n. 102.

<sup>25</sup> *Id.* at 991 (emphasis added).

pivotal role in preserving the republic by embracing one of its central features, the peaceful succession of power. Even after a fraudulent election, Tilden explicitly chose to believe in America's future.

I have always chosen to believe Samuel Tilden was right, and feel it more strongly after the 2022 elections. Of course, optimism is necessary but not sufficient – especially in the face of legal obstacles such as restrictive voting laws,<sup>26</sup> hyper-partisan gerrymanders,<sup>27</sup> and a judiciary that sometimes appears too partisan.<sup>28</sup>

Yet Americans can do no other<sup>29</sup> than to embrace Tilden's view and act accordingly.

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Fordham University School of Law's Law establishment of the Voting Rights and Democracy Project<sup>30</sup> is a vote of confidence in the future. Its mission is to train the next generation of voting rights lawyers and scholars, and to foster among future lawyers an appreciation of their critical role in preserving the rule of law and our constitutional democracy. Of course, Fordham Law is not alone

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<sup>26</sup> *Voting Laws Roundup: October 2022*, BRENNAN CTR. FOR JUST. (October 6, 2022), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2022> [<https://perma.cc/5SV8-XDPH>].

<sup>27</sup> *What Redistricting Looks Like in Every State*, FIVETHIRTYEIGHT (last visited Oct. 14, 2022), <https://projects.fivethirtyeight.com/redistricting-2022-maps> [<https://perma.cc/2ZT8-K9VF>].

<sup>28</sup> *See, e.g.,* Brnovich v. Democratic National Committee, 141 S. Ct. 2321 (2021); James A. Gardener, *The Illiberalization of American Election Law: A Study in Democratic Deconsolidation*, 90 FORDHAM L. REV. 423 (2021).

<sup>29</sup> W. Thomas Smith, Jr., “*Here I Stand; I Can Do No Other*,” COLUMBIA METROP. (last visited Nov. 16, 2022),

<https://columbiometro.com/article/here-i-stand-i-can-do-no-other> [<https://perma.cc/F8MZ-GQ83>].

<sup>30</sup> *Voting Rights and Democracy Project*, FORDHAM L. (last visited Oct 20, 2022), [https://www.fordham.edu/info/30758/voting\\_rights\\_and\\_democracy\\_project](https://www.fordham.edu/info/30758/voting_rights_and_democracy_project).

in this work. Many bar associations,<sup>31</sup> other law schools,<sup>32</sup> and legal groups<sup>33</sup> are working vigorously to ensure that the rule of law is sustained. And the United States Congress is poised to revise the Electoral Count Act to buttress the legal guard rails of fair and accurate presidential elections.<sup>34</sup>

We are hopeful that the Project's work provides a valuable contribution to the discussion of our nation's challenges, and, ultimately, helps prove that Samuel Tilden was right.<sup>35</sup>

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<sup>31</sup> See, e.g., Susan DeSantis, *New York State Bar Association Votes to Protect Voting Rights*, N.Y. STATE BAR ASSOC. (Jan. 14, 2022), <https://nysba.org/new-york-state-bar-association-votes-to-protect-voting-rights> [<https://perma.cc/5DBZ-TUTZ>]; *America's Lawyers on Voting and the Rule of Law: City Bar Appeals to All Lawyers and Law Students to Sign on to Nine Principles*, N.Y.C. BAR ASSOC. (Feb. 16, 2022), <https://www.nycbar.org/media-listing/media/detail/nine-principles-pledge-americas-lawyers-on-voting-rights-and-the-rule-of-law> [<https://perma.cc/22T2-7E7V>]; *ABA Vows to Fight Challenges to Free and Fair Elections*, AMER. BAR ASSOC. J. (Feb. 14, 2022, 7:28 PM), <https://www.abajournal.com/news/article/ABA-vows-to-fight-challenges-to-free-and-fair-elections> [<https://perma.cc/7URW-9XXB>].

<sup>32</sup> See, e.g., *Safeguarding Democracy Project*, UCLA SCH. OF L., <https://law.ucla.edu/academics/centers/safeguarding-democracy-project> [<https://perma.cc/4CXX-YHCN>] (last visited Oct. 20, 2022); *Karsh Center for Law and Democracy*, U. OF VIRG. SCH. OF L., <https://www.law.virginia.edu/karsh> [<https://perma.cc/V7Y9-6RR3>] (last visited Oct. 20, 2022).

<sup>33</sup> See, e.g., *Voting Rights*, LAWS.' COMM. FOR C.R. UNDER L., <https://www.lawyerscommittee.org/project/voting-rights-project> [<https://perma.cc/LW2F-A5HT>] (last visited Oct 20, 2022); *Voting Rights*, AMER. C.L. UNION, <https://www.aclu.org/issues/voting-rights> [<https://perma.cc/8L4Q-AK6F>] (last visited Oct. 20, 2022); NAT'L DEMOCRATIC REDISTRICTING COMM., <https://democraticredistricting.com> [<https://perma.cc/EP2Q-GUVT>] (last visited Oct. 20, 2022); ELECTION OFF. LEGAL DEF. NETWORK, <https://eoldn.org> [<https://perma.cc/3BQR-WSS5>] (last visited Oct. 20, 2022).

<sup>34</sup> See generally *Electoral Count Reform and Presidential Transition Improvement Act of 2022*, S. 4573, 117th Cong. (2022).

<sup>35</sup> As Representative Raskin contends, one need not possess "insanely ridiculous optimism" to adopt a positive outlook for the future. See Jerry H. Goldfeder, *A Window into a Unique Public Official*, N.Y.L.J. (Feb. 4, 2022), <https://www.law.com/newyorklawjournal/2022/02/03/a-window-into-a-unique-public-official> [<https://perma.cc/QG7F-JPTB>] (reviewing JAMIE RASKIN, *UNTHINKABLE: TRAUMA, TRUTH, AND THE TRIALS OF AMERICAN DEMOCRACY* (2022)). As in so many areas of life, it is preferable to choose to be positive and act accordingly. Insofar as we are addressing the preservation of our 233-year-old constitutional democracy, as imperfect as it may be, there can be no other course.