

Voting Rights and Democracy Forum

Volume 1 | Issue 1

2022

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Recommended Citation

John D. Feerick, *The Consent of the Governed and the Right to Access the Ballot*, 1 FORDHAM VOTING RTS. & DEMOCRACY F. 7 (2022).

Available at: <https://ir.lawnet.fordham.edu/vrdf/vol1/iss1/2>

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ESSAYS

THE CONSENT OF THE GOVERNED AND THE RIGHT TO ACCESS THE BALLOT

*John D. Feerick**

Leading with the statement of “We the People,” the United States Constitution is unique in anchoring itself on a principle of the people’s sovereignty.¹ It defines our democratic society by separating powers among the three branches of government, creating offices of government, acknowledging the states that were in existence before it, and providing for voting of presidents by agents called electors.² Notably, the Constitution, which was ratified in 1788 by popularly elected ratifying conventions to which delegates were chosen by a white male property-owning citizenry, did not provide for the right to vote for presidents and senators.

At the same time, the drafters’ work product was forward-looking, both in the Preamble and in the provisions for changing the Constitution through amendments.³ In the centuries that followed their leadership, amendments were added to the Constitution dealing specifically with the right to vote. For example, these amendments provided for the people to elect their senators;⁴ prohibited the denial and abridgment of the right to vote on account of sex and of citizens of the United States who are 18 years of age or older;⁵ provided for the District of Columbia to participate in the Electoral College (except for any contingent election);⁶ and prohibited the denial and abridgment of the right to vote “by reason of failure to pay any poll or other tax.”⁷

This Essay recalls the past and present of contested struggles to achieve the right to vote and broaden the franchise. Part I begins by examining the Hayes-Tilden Election of 1876, which influenced significant reform of the Electoral College system and may be a precursor of a presidential election in the future. Next, Part II examines the current status of voting rights by revisiting an earlier history of the U.S. Supreme Court’s interpretation of the right to

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¹ See U.S. CONST. pmbi.

² See U.S. CONST. art. I; *id.* art. II.

³ See U.S. CONST. pmbi.

⁴ See U.S. CONST. amend. XVII.

⁵ See U.S. CONST. amend. XXVI, XIX, XIV.

⁶ See U.S. CONST. amend. XXIII.

⁷ See U.S. CONST. amend. XXIV.

vote. Lastly, the Essay touches on issues that limit access to the ballot and decrease confidence in presidential elections.

I. THE HAYES-TILDEN ELECTION OF 1876

In a presentation to the Hellenic Lawyers Association of New York City, Nicholas G. Karambelas described why the 1876 election between Republican Rutherford B. Hayes and Democrat Samuel Tilden was considered a “constitutional crisis” by many.⁸ Tilden, the Democratic presidential nominee, received a majority of the national popular vote but was one vote short of a majority of the electoral vote required to win the presidency.⁹ Hayes, meanwhile, was twenty votes away from a majority of the electoral vote.¹⁰ Conflict arose when Tilden was denied the electoral vote in states where he had received the majority of the popular vote.¹¹ In these states, Republican-controlled election administration boards disallowed state popular votes for Tilden “by alleging that the votes had been obtained by force and intimidation to prevent newly enfranchised blacks from voting Republican.”¹²

With an absence of state laws mandating that the state submit only one slate of electors, a divide between court decisions and politically-inclined election administration boards, and a refusal to recognize electors on both sides, the ad-hoc solutions used in previous elections were not fit to solve the problem.¹³ Congress stepped in, creating an electoral commission to decide the issue, which selected the Republican slate and declared Hayes president.¹⁴

Many considered the Hayes presidency to be illegitimate.¹⁵ In fact, Karambelas states that some historians believed that “the political bargains reached to elect Hayes attenuated the objectives of the Reconstruction and led to the ‘Jim Crow’ era”¹⁶ It became evident that many were unhappy with the processes (or lack thereof) which governed the Electoral College, as the election inspired a wave of reform that ultimately led to the passage of the Electoral Count Act of 1887.¹⁷ The Act of 1887 added procedures

⁸ Nicholas G. Karambelas, Founding Partner of Sfikas & Karambelas, LLP, Election 2016 and the Electoral College, Presentation before the Hellenic Lawyers Association of New York City (Oct. 26, 2016) (on file with author), at 11.

⁹ See Thomas H. Lee, *Historical Antecedents of the 2020 Presidential Election*, 46 DCPE ONLINE 1315, 1321 (2021). See also Karambelas, *supra* note 8, at 9.

¹⁰ See Karambelas, *supra* note 8, at 9.

¹¹ See *id.* at 9-10.

¹² *Id.*

¹³ See *id.* at 8-11.

¹⁴ See *id.* at 11.

¹⁵ See *id.*

¹⁶ *Id.*

¹⁷ See *id.*

to govern how Congress tallies electoral votes and how the Electoral College selects the president and vice president.¹⁸

The “constitutional crisis” that was the Hayes-Tilden Election of 1876 serves now as a valuable lesson, while signifying the beginning of a long history of voting reform in the United States. Although the Act of 1887 reformed voting procedures, its efficacy is highly contested today.¹⁹

As we continue to move forward, let us be guided by the words of Dean Matthew Diller of Fordham Law School in an e-mail to the Fordham Law School community on the morning of January 7, 2021: “We must set examples for how to work through disagreements and differences with understanding, compassion and reason. We must cherish our democracy, work to address its flaws and understand that although it is resilient, it cannot be taken for granted.”²⁰

II. THE RIGHT TO VOTE TODAY

The right to vote came to be buttressed decades later by a string of Supreme Court decisions from 1962 to 1964.²¹ In this period, the Court held voting to be a fundamental right under the Equal Protection Clause of the Fourteenth Amendment.²² Shortly thereafter, the Voting Rights Act of 1965 suspended literacy tests, authorized the use of federal examiners to enroll voters, and required certain jurisdictions to receive federal approval before changing their electoral procedures.²³ These voting safeguards protected the “one-person, one-vote” principle established in *Baker v. Carr*.²⁴ Nevertheless, the discussion surrounding the right to vote has continued decades after these voting rights protections were

¹⁸ See The Electoral Count Act of 1887, Pub. L. 49-90, 24 Stat. 373 (1887) (codified as amended in scattered sections of 3 U.S.C.).

¹⁹ See Daniel I. Weiner et al., *How to Fix the 1887 Electoral Count Act*, BRENNAN CTR. FOR JUST. (June 29, 2022), <https://www.brennancenter.org/our-work/research-reports/how-fix-1887-electoral-count-act> [<https://perma.cc/A27H-WL7Y>]. See also Jack M. Beermann & Gary S. Lawson, *The Electoral Count Mess: The Electoral Count Act of 1887 Is Unconstitutional, and Other Fun Facts (Plus a Few Random Academic Speculations) about Counting Electoral Votes*, 16 FIU L. REV. 297 (2022); Edward B. Foley, *Preparing for a Disputed Presidential Election: An Exercise in Election Risk Assessment and Management*, 51 LOY. U. CHI. L. J. 309 (2020).

²⁰ E-mail from Matthew Diller, Dean, Fordham Uni. School of L. to Fordham Students and Staff (Jan. 7, 2021, 9:29 AM) (on file with author).

²¹ See generally *Baker v. Carr*, 369 U.S. 186 (1962); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964).

²² See *Baker*, 369 U.S. at 237.

²³ Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

²⁴ See generally 369 U.S. 186.

established.²⁵ Often these discussions were triggered by presidential elections and the winner-take-all features of such elections as in 1976,²⁶ 2004,²⁷ and 2016.²⁸

Recent elections and Supreme Court decisions have caused many to fear “reversals” of the progress made in expanding the right to vote. Some of these alarms involve the lack of participation in voting,²⁹ the passage of laws in almost half the states relating to registration and voting,³⁰ and the continued inability of Congress to address dangerous and anti-democratic features of the Electoral College system, including the winner-take-all system operating in all but two states.³¹

After the Supreme Court struck down Section 4 of the Voting Rights Act (“VRA”) in *Shelby County v. Holder*,³² and consequently, rendering Section 5 inoperative, many states with histories of racial discrimination in voting were able to unilaterally change their election laws without prior federal approval.³³ At first, this reversal did not open the floodgates to a torrent of state legislation changing voting laws. However, after the 2020 presidential election, things drastically changed.

Since the conclusion of the 2020 election, a number of states, several of which were previously covered under Section 5 of the VRA,³⁴ have enacted new election laws in response to real or perceived threats to election security and integrity.³⁵ The laws

²⁵ See *Evenwel v. Abbot*, 578 U.S. 54 (2016); *Bush v. Gore*, 531 U.S. 98 (2000); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

²⁶ See Letter from Jimmy Carter, U.S. President, Election Reform Message to Congress (Mar. 27, 1977) reprinted in Am. Presidency Project, U.C. Santa Barbara, <https://www.presidency.ucsb.edu/documents/election-reform-message-to-congress> [https://perma.cc/UGF5-F97T] (last visited Oct. 20, 2022).

²⁷ See John D. Feerick, *The Electoral College: Time for a Change?*, 90 *FORDHAM L. REV.* 395, 406 (2021).

²⁸ See *id.* at 406, 416.

²⁹ See *infra* note 35.

³⁰ See *id.*

³¹ See David Schultz, *Voting Rights and the Unconstitutionality of the Electoral College Winner-Take-All Allocation*, 66 *S.D. L. REV.* 457, 458 (2021) (claiming that the winner-take-all allocation disenfranchises voters because it “discriminates on the basis of partisanship or party preference, arbitrarily classifies individuals, and constitutes an impermissible viewpoint or content-based form of expression.”). See generally Feerick, *supra* note 27.

³² 570 U.S. 529 (2013).

³³ *Jurisdictions Previously Covered by Section 5*, U.S. DEP’T. OF JUST. (Sept. 11, 2020), <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5> [https://perma.cc/BW8N-66ME].

³⁴ See 52 U.S.C. § 10304 (federal pre-approval required for jurisdictions, with a history of state-sponsored discriminatory election law, before implementing changes to voting rights).

³⁵ *Voting Laws Roundup: December, 2021*, BRENNAN CTR. FOR JUST. (Jan. 12, 2022), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2021> [https://perma.cc/9F6F-VKVJ] [hereinafter *Voting*

passed in these states vary in terms of severity and impact, and there remains some debate as to whether they truly impede the rights of voters, or merely shore up the integrity of their respective states' elections.³⁶ Notable new restrictions include requiring photo identification to vote, eliminating polling locations, prohibiting mail-in ballot collection, restricting help to voters with disabilities, tightening signature matching requirements for mail-in ballots, ending same-day voter registration, shortening early voting periods, banning the unsolicited mailing of absentee applications/ballots, and purging inactive voters from the rolls.³⁷

Despite the debate surrounding the necessity of many of these laws, several undoubtedly curtail the ease of voting, especially among low-income and marginalized individuals.³⁸ For example, states including Arkansas and Georgia passed provisions banning nonvoters from being near voting locations and giving out food and water to voters waiting in long lines.³⁹ While this may seem neutral on its face, recent research shows that longer voting lines are more prevalent in poorer, less white neighborhoods.⁴⁰ This could lead to

Laws Roundup]. These states include Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Montana, New Hampshire, Nevada, North Dakota, Oklahoma, Texas, and Wyoming. *Id.*

³⁶ *See id.*

³⁷ *See* STATES UNITED DEMOCRACY CTR. ET AL., A DEMOCRACY CRISIS IN THE MAKING: HOW STATE LEGISLATURES ARE POLITICIZING, CRIMINALIZING, AND INTERFERING WITH ELECTION ADMINISTRATION (2021), <https://statesuniteddemocracy.org/wp-content/uploads/2021/04/FINAL-Democracy-Crisis-Report-April-21.pdf>; WILL WILDER ET AL., THE ELECTION SABOTAGE SCHEME AND HOW CONGRESS CAN STOP IT, BRENNAN CTR. FOR JUST. (2021), https://www.brennancenter.org/sites/default/files/2021-11/2021_11_ElectionSabotage.pdf (categorizing 2021 election sabotage schemes by state legislatures into four categories). *See also* Morgan Watkins, *Kentucky Lawmakers Pass Key Election Reforms, Including Early Voting*, LOUISVILLE COURIER J. (Mar. 30, 2021, 6:10 AM), <https://www.courier-journal.com/story/news/politics/ky-general-assembly/2021/03/29/kentucky-house-passes-bill-allow-three-days-early-voting-pass/7045488002> [<https://perma.cc/2U8K-T8VJ>]; Elizabeth Sweren-Becker, *Florida Enacts Sweeping Voter Suppression Law*, BRENNAN CTR. FOR JUST. (May 6, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/florida-enacts-sweeping-voter-suppression-law> [<https://perma.cc/XDF4-27PV>]; John Moritz, *Toughened Voter ID Plan Sent to House; Signature at Polling Place Would No Longer be Enough*, ARK. DEMOCRAT GAZETTE (Feb. 2, 2021), <https://www.arkansasonline.com/news/2021/feb/02/a-toughened-voter-id-plan-sent-to-house/> [<https://perma.cc/KZV9-GKYV>]; *Montana Enacts New Ballot Collection Restrictions*, DEMOCRACY DOCKET (May 14, 2021), <https://www.democracydocket.com/news-alerts/montana-enacts-new-ballot-collection-restrictions> [<https://perma.cc/5UUR-39BA>].

³⁸ *See* Voting Laws Roundup, *supra* note 35.

³⁹ *Id.*

⁴⁰ Kevin Quealy & Alicia Parlapiano, *Election Day Voting in 2020 Took Longer in America's Poorest Neighborhoods*, N.Y. TIMES (Jan. 4, 2021),

an outcome where lower-income people who are forced to wait in hours-long lines to vote do not even have access to water.

Furthermore, legislative action to limit and prohibit ballot drop boxes (as was enacted in Florida, Indiana, and Iowa)⁴¹ may considerably reduce opportunities for voters with multiple jobs, irregular work schedules, or significant family obligations to cast their votes.⁴² Again, this will likely have an outsized impact on lower-income Americans who can ill afford to wait in long lines at polling stations.⁴³ These are just a handful of illustrations of the effects that legislation to restrict voting will have on our society, and the unfortunately disproportionate impact that poorer and more marginalized communities will be forced to bear.

Beyond the state law changes, an even greater challenge to the integrity of presidential elections may be the state-by-state integrity of the management of voting by those chosen to set up voting machines and administer the count of the vote, including poll watchers.⁴⁴ I leave for another day a discussion of this subject other than to refer the reader to the Report issued in 2005 by an impressive commission of dedicated individuals co-chaired by former President Carter and former Secretary of State James Baker, entitled “Building Confidence in U.S. Elections.”⁴⁵

III. MOVING FORWARD

In a magnificent account of the right to vote, Alexander Keyssar stated:

The history of the right to vote is a record of the slow and fitful progress of the democratic project, of progress that was hard won and often subject to reverses. The gains so far achieved need to be protected while a vision of a more democratic society can inspire both our hopes and our actions.⁴⁶

<https://www.nytimes.com/interactive/2021/01/04/upshot/votingwait-times.html>
[<https://perma.cc/2ZZH-UAYW>].

⁴¹ See Voting Laws Roundup, *supra* note 35.

⁴² See WILDER ET AL., *supra* note 37, at 6-8.

⁴³ See Quealy & Parlapiano, *supra* note 40.

⁴⁴ See Ned Parker et. al., ‘*Stop the Steal*’ Supporters Train Thousands of U.S. Poll Observers, REUTERS (Oct. 13, 2022, 6:07 AM), <https://www.reuters.com/world/us/stop-steal-supporters-train-thousands-us-poll-observers-2022-10-13/> [<https://perma.cc/GGN9-AVNU>].

⁴⁵ BUILDING CONFIDENCE IN U.S ELECTIONS, REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM (Sept. 2005).

⁴⁶ ALEXANDER KEYSSAR, WHY DO WE STILL HAVE THE ELECTORAL COLLEGE? 289 (2020).

At a time when partisanship and polarization grips America, it may be asked whether the recognition of the merits of a national popular vote for president and vice president—where everyone has the same equal vote regardless of state boundary—might be just what we need to lift our spirits, individually and collectively, and to bring us together as a people.

There is an opportunity to move forward to where every American is entitled to be recognized with dignity, whether poor, rich, old, or young. As the late Congressman John Lewis of Georgia put it:

That every person's vote should count the same is one of the fundamental principles which is bedrock in this country. Having won the long and difficult and dangerous struggle to win the right to vote, we cannot now accept the proposition that any one person's vote can count more than another.⁴⁷

Former Senator Birch Bayh put it this way: “In the United States . . . [o]ne person, one vote is more than a clever phrase, it's the cornerstone of justice and equality.”⁴⁸

⁴⁷ *Id.*

⁴⁸ Birch Bayh, *Foreword* to JOHN R. KOZA ET AL., *EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE* xxxi (4th ed. 2013).