The Washington Post
Democracy Dies in Darkness

Think the Constitution protects your right to vote? That's not really true — but it should.

Opinion by **Edward B. Foley**

Oct. 19, 2020 at 12:10 p.m. EDT

Many Americans believe the Constitution protects a basic right to vote, but that's not really true — and a lot of litigants this year might learn that the hard way.

A torrent of election-related litigation making its way to the Supreme Court is premised on the assumption that this constitutional guarantee exists, and that the federal courts will therefore oversee the fairness of elections. Yet the decades-old precedents underlying these lawsuits might not sit well with the court's current, and presumably soon-to-be-bolstered, conservative majority. Even if it keeps the precedents in place, the majority is unlikely to be inclined to apply them aggressively.

Going into 2020, the scope of constitutional protection for voting rights was already a contested issue: Democrats were seeking to build on precedent to remove what they saw as inappropriate impediments to casting a ballot — especially in the form of voting by mail. Republicans were suspicious of relaxing the rules as sought by Democrats, particularly the practice of what they call "ballot harvesting," which permits political operatives to collect ballots from voters in bulk.

Those high stakes were raised even further by the complexity of conducting the election in the midst of a pandemic and disputes over whether states have done enough to accommodate voters who fear the health risks of showing up in person.

Several emergency petitions that raise this issue, including from the presidential battleground states of Pennsylvania and Wisconsin, are pending at the Supreme Court, and more are surely on the way.

In the Pennsylvania case, Republicans are asking the justices to block a ruling from the state Supreme Court that granted a three-day extension for counting ballots mailed by Election Day. The court has been asked to intervene in a similar dispute from Wisconsin, involving a six-day extension.

A federal appeals court last week overturned a lower court order blocking Texas Gov. Greg Abbott's (R) plan to restrict drop-off ballot boxes to a single location in each county. The plaintiffs argued that this limitation imposed an excessive burden on voting, weighed against the governor's claimed justifications of uniformity and security. The panel, composed of three Trump appointees, questioned whether the Constitution requires balancing the burdens and benefits of the governor's decree. For argument's sake, the judges went ahead — but still found nothing wrong. "One strains to see how it burdens voting at all," wrote Judge Stuart Kyle Duncan, joined by Judges Don Willett and James Ho.

This case is the harbinger: The plaintiffs were resting their claims on a foundation that might no longer exist.

The progressive Warren court of the 1960s authored the constitutional principle of one-person-one-vote and, with it, the idea of vigilant judicial protection of voting rights. But the Warren court was also candid that its vision of constitutionally safeguarded voting rights was not at all rooted in an originalist theory of constitutional interpretation. It couldn't be.

The Warren court affixed its one-person-one-vote principle to the 14th Amendment's equal protection clause, initially in the context of ensuring fair apportionment of legislative districts, because that was the best available option. But the equal protection clause was not originally intended to protect voting rights.

We know this for two simple reasons. First, the 14th Amendment itself authorized states to deny voting rights, even to "male" citizens, setting forth the limited consequence for this deprivation. Second, the 15th Amendment was specifically added two years later to prohibit the denial of voting rights based on race — and the 19th Amendment in 1920 was necessary to extend the suffrage to women.

But the Constitution was never amended to guarantee all adult citizens a basic right to vote. Notwithstanding this, the Warren court decided to constitutionalize the democratic ideal of equal voting rights for all, in the interest of promoting what it termed the "legitimacy of representative government."

Since the 1960s, federal courts have expanded on the one-person-one-vote principle to make clear that the greater the burden imposed on voting rights, the more justification a state may have. First poll taxes and property qualifications were invalidated, and then a whole range of electoral regulations reviewed (some surviving, others not). The Supreme Court applied this balancing test in upholding Indiana's photo-identification law in 2008. It is this doctrine on which the current litigation depends, and it all derives from the Warren court interpretation.

But that philosophy no longer prevails. It lost its majority on the Supreme Court when Justice Brett M. Kavanaugh replaced Justice Anthony M. Kennedy. As the confirmation hearings for Judge Amy Coney Barrett have demonstrated, the philosophy of textualism-plus-originalism will soon have one more adherent in the court's new majority.

Ultimately, it will be necessary to add to the Constitution a new Voting Rights Amendment. That's the only way to assure that the supreme law of the land actually protects democracy in the way we have come to expect.

Otherwise, the constitutional law of voting rights is likely to become the dead letter signaled by the Texas case, with a Trump-populated judiciary confining the Constitution to its bare text and original meaning, unwilling to carry forward the democracy-promoting legacy of the Warren court.

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