

The Right to Vote¹

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Our story begins in 1787 right here in Philadelphia, a city forever linked with the idea of popular sovereignty—the once-radical notion that people should have a voice in who governs them. During the summer of that year, our nation’s Founding Fathers, men such as James Madison, Alexander Hamilton, and our own founder, Benjamin Franklin, gathered just across the street to draft a blueprint for self-governance. When the Constitutional Convention ended, a woman asked Franklin, “Well, Doctor, what have we got—a Republic or a Monarchy?” Franklin responded, “A Republic, if you can keep it.”

At the time, the Founders had no idea whether our fragile Republic on the edge of the world would survive. Versed in the history of city-state democracies, they knew that earlier republics had all succumbed to factionalism, tyranny, or both. So like many in this room, the Founders designed a bold experiment. They created a democratic system of government they hoped would stand the test of time.

But by modern standards, our early Republic was not much of a democracy. The Constitution had little to say about voting. It left voter qualifications to the states, although it guaranteed that those eligible to vote for the “most numerous branch” of their state legislature could also vote for the federal House of Representatives. It left the “times, places, and manner of holding elections” to the states, although it also empowered Congress to “make or alter” such rules. And it required every state to have a “Republican form of government.” But that’s it. Only one directly elected federal office and no affirmative right to vote.

The limited role that popular elections played in our new Republic flowed from the Founders’ deep fear of popular sovereignty—what Madison called the “over-bearing majority.” By confining direct elections to the House of Representatives, the Founders ensured that

1 Read on 15 November 2013, as part of a symposium on the right to vote.

majority rule could go only so far. State legislatures, not voters, chose senators, and the Electoral College chose the president. And even though citizens could vote for the House of Representatives, the Constitution, reflecting the federalism principles at the heart of our Republic, left it to each state to determine who could vote and how.

So who did the thirteen original states believe were qualified to vote? I suppose the picture that comes to mind is a drawing room full of property-owning white men with puffy shirts and powdered wigs. That's largely accurate. Ten states conditioned the franchise on owning property. Most blacks were excluded from the polls, and slaves were treated as three-fifths of a person for determining the number of representatives each state could send to Congress. Women were prohibited from voting in every state except New Jersey. Jews were denied the right to vote in four states, and Catholics in New York were required to take a loyalty oath.

So how did states actually run their elections? Voting was a public spectacle. Some states used *viva voce*, or voice voting, which meant that voters assembled in a public place and announced their votes out loud. Election officials then dutifully recorded the votes in a public ledger. If we were there, we might hear: "Clyde Barker votes for Thomas Fitzsimons." Some states used paper ballots, but not the secret ballots we know today. Because of high illiteracy rates, ballots did not list all candidates. Instead, party officials, not election officials, printed and distributed their respective party slates. Then, in full view of the public, voters submitted these slates as their ballots. And because they were printed on different colored paper, everyone knew who everyone else voted for.

Public voting often led to raucous and corrupt elections. Employers marched their workers to the polls and watched how they voted. Partisans stood right next to the ballot box and cheered when someone voted for their candidate. It was only the secret ballot—not adopted anywhere in the nation until the 1880s—that eventually helped curb voter intimidation and election fraud.

Fortunately, our eighteenth-century Constitution was not the last word on voting. The Fourteenth Amendment, adopted during post-Civil War Reconstruction, guaranteed "equal protection" of the law, a phrase the Supreme Court would later interpret to protect the right to vote, thus filling a significant gap left in the original Constitution. The Fifteenth Amendment expressly prohibited racial discrimination in voting. The Nineteenth Amendment extended the franchise to women, the Twenty-Fourth eliminated the poll tax, and the Twenty-Sixth lowered the national voting age to 18.

In addition to expanding the electorate, these amendments shared another critical feature: They empowered Congress to enforce their mandates by “appropriate legislation,” thus dramatically shifting power from states to the national government. Congress most prominently exercised this new authority when, following nearly a century of Jim Crow and pervasive suppression of the black vote, it relied on its Fifteenth Amendment enforcement authority to pass the Voting Rights Act of 1965. Considered one of the most effective pieces of civil rights legislation ever enacted, the statute enfranchised the vast majority of African-Americans living in the South.

Emerging alongside this rapid expansion of ballot access was a similarly rapid increase in the value of the vote. The Seventeenth Amendment provided for the direct election of senators, which not only further empowered voters but continued to shift authority toward the federal government and away from the states. Then in a series of decisions, including *Baker v. Carr* and *Reynolds v. Sims*, the Supreme Court required that legislative districts have roughly equal populations—one person, one vote. The Court put it this way: “To the extent that a citizen’s right to vote is debased, he is that much less a citizen.”

So, Dr. Franklin, we’ve not only kept our Republic—we’ve also vastly improved upon it. Just look at the 2012 election. More than 129 million Americans voted not just for the House of Representatives, but also for the Senate and, although still not entirely directly, for president. Women, minorities, and other previously disenfranchised groups flexed their electoral muscles like never before. For the first time in our nation’s history, African-Americans voted at a higher rate than whites.

But despite this progress, our Republic is still far from perfect. When you combine spending by the candidates, political parties, and outside groups, the 2012 presidential race cost more than \$6 billion. Professor Gerken will have much to say about this and its consequences. Partisan gerrymandering was so effective that even though Democratic congressional candidates received over 1 million more votes than their Republican opponents, Republicans won 33 more seats in the House of Representatives. Many states adopted new voter ID requirements and restricted early and absentee voting. Moreover, the Supreme Court recently declared unconstitutional a key provision of the Voting Rights Act, the government’s primary tool for combatting these and other kinds of racial discrimination in voting. We will learn more about this decision and its implications from Professor Pildes. And then, as we will hear from Bob Bauer and Ben Ginsburg, there were the long lines and other Election Day obstacles. In Florida,

more than 200,000 citizens walked away without voting. No wonder President Obama declared in his victory speech: “We need to fix that.”

Two final points. First, when I told Loren Graham about this panel, he responded, “Interesting, but can these problems really be fixed?” I hope our panelists will keep Loren’s question in mind, as I think it reflects a fairly widespread skepticism about the capacity of our political system to solve problems. Second, as we learn from our distinguished speakers about many fascinating and technical questions of election law, we must always keep in mind what is at stake here. If citizens face an ever-expanding set of hurdles to exercise the franchise, if citizens come to believe that money matters more than their votes or that political parties have rigged the game—indeed, if citizens lose faith in the very integrity of the electoral process—then, Dr. Franklin, we will have failed to keep our Republic.