

A RIGHT-TO-VOTE AMENDMENT TO THE CONSTITUTION :
CONFRONTING AMERICA'S STRUCTURAL DEMOCRACY DEFICIT

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"Why is George Bush in the White House? The majority of Americans did not vote for him. I tell you this morning that he's in the White House because God put him in there."

Lieutenant-General William Boykin, Deputy Undersecretary of Defense for Intelligence, United States Department of Defense

I. America's Growing Structural Democracy Deficit

Although we are running a healthy surplus today in official rhetoric about democracy, we suffer from a growing deficit in the political rights actually essential to democratic government. This democracy deficit has several causes, but none so disorienting or sobering as this: In the United States today, the people do not have a constitutional right to vote. In ways both dramatic and subtle, our missing right to vote undermines popular sovereignty over government. We face four structural problems that have not been, and almost certainly cannot be, addressed effectively without amending the Constitution to advance universal suffrage. Those of us pressing for greater democratic participation have bumped up against the ceiling and walls of our governing arrangements. Consider that:

**** The people have no constitutional right to vote in presidential elections or to control the selection of presidential electors.** As we learned from the 2000 presidential election and the Supreme Court's response to it, the people's votes in presidential elections may be disregarded at will by our state legislatures, which retain "plenary" power under the Constitution to appoint the members of the electoral college ("Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors. . ."). The Republican-controlled Florida legislature in 2000 declared that it would simply select the state's electoral college members if it considered the outcome of the popular vote still unsettled on December 12. This announcement stunned many Americans. Harvard Kennedy School of Government Professor Alexander Keyssar likened it to "a half-forgotten corpse" that "had suddenly been jarred loose from the river bottom and floated upward into view."

But the Supreme Court, in *Bush v. Gore*, emphasized that the Florida legislature was acting well within its rights. The Court held that, since the “individual citizen has no federal constitutional right to vote for electors for the President of the United States,” whenever such a right is granted by state legislators, they can always revoke it and simply “take back the power to appoint electors.” Thus, even if the people wanted to bind themselves in their state constitutions to abide by a popular vote for president, they could never restrain legislatures determined to do appoint electors of their own choosing.

The events of 2000, however freakish and extreme they seem, may prefigure the collapse of already fragile democratic norms in close presidential elections and the return of aggressive partisan tactics by politicians in state legislatures--and their lawyers in the Supreme Court and other tribunals--working to accumulate 270 electors.

Indeed, the Texas Constitution was recently amended to provide that if the popular vote seems ambiguous or difficult to count, the Texas legislature shall have the right to immediately appoint electors of its choosing. This provision is redundant, of course, given the Court’s analysis of the problem, but it is properly read as a statement of collective political intentions by a flagship Republican legislature that has also moved heaven and earth to gerrymander U.S. House districts with ferocious partisan precision over the last year. President Bush’s sinking popularity in the fall of 2003 suggests that the American electorate, especially in swing states, will be as divided in 2004 as it was in 2000--and much more polarized. If the majority of state legislatures in the hands of the governing party decide to assemble an electoral college majority by any means necessary, the people will have no recourse.

Bush’s sinking popularity in the fall of 2003 suggests that the American electorate, especially in swing states, will be as divided in 2004 as it was in 2000--and much more polarized. If the majority of state legislatures in the hands of the governing party decide to assemble an electoral college majority by any means necessary, the people will have no recourse.

Of course, as Common Cause and the League of Women Voters have been warning for years, the embarrassing obsolescence of the electoral college presents a massive challenge to democratic values and a standing invitation to political mischief. But, assuming that we are stuck with the electoral college for the time being--abolishing it will require us to climb an even taller mountain-- the electors should at least be directly chosen by the people. But the only way to strip the legislatures of their dangerous plenary power over selection of the electors and establish real popular control of each state’s electoral votes is by constitutional amendment.

**** Millions of Americans are recurrently disenfranchised in our elections by misconduct, poor technology, registration obstacles, and tactical suppression of voting.** If our votes can in theory be discarded entirely in presidential elections, in practice they are lost, miscounted, discounted, degraded, passed over, prevented and

suppressed. This fact, too, was proven dramatically by outrageous practices in Florida. Journalist Greg Palast has documented that up to 50,000 persons—half of them African American or Latino—were falsely accused of being felons and then illegally removed from the state voter registration list before the election by a private company that then-Secretary of State Katherine Harris contracted with to purge felons from the rolls. After the election, the state promised to restore the voters and not to do it again, but in the meantime an election was won and a government formed against this scandalous backdrop. Thousands more voters who actually made it into the voting booth lost their real votes to that masterpiece of design error, the Palm Beach butterfly ballot. More than 175,000 ballots were simply left uncounted when they failed to register on the punchcard tabulations and the U.S. Supreme Court ordered the Florida Supreme Court not to proceed with a manual counting. And tens of thousands more “overvote” ballots—where voters followed ambiguous instructions and checked off the name of “Al Gore,” for example, and then also wrote it in separately—were also cast aside and forgotten.

But Florida was exemplary, not aberrational, of what took place in 2000 and in our elections generally. According to the CalTech and MIT Voting Technology Project, “between four and six million presidential votes were lost in the 2000 election.” Some two million votes were simply never counted primarily because of “faulty equipment and confusing ballots”; between one-and-a-half and three million votes were lost in the maze-like vagaries of the voter registration process; and up to 1.2 million votes “because of polling place operations,” meaning technical malfunctions, problems with lines and hours, fraud, negligence, understaffing, and underfunding. Significantly, the authors of this study report that these problems are even *worse* in state elections than federal ones.

If state governments do not bring our voting systems up to a level of serious competence and accuracy, our votes have less the character of sovereign rights exercised than attempted bids for influence whose prospects are random, at best. We all become potential members of a reserve army of the disenfranchised vulnerable to official abuse. There are, no doubt, technological and systemic reforms that can markedly improve the picture and some of them have even been adopted since 2000. But the history of voting teaches that incumbent officials will remain tolerant of leaky and slippery voting practices that have benefitted them in the past. Meantime, Congressional interest in the subject waxes and wanes according to partisan whim and the push and pull of other agendas. Only a federal constitutional amendment enforceable in federal and state court can compel the states to undertake continually the reforms needed to provide voters the most trustworthy voting technologies and practices.

**** More than eight million American citizens, a majority of them racial and ethnic minorities, are still disenfranchised by law, a situation impossible or unlikely to change without amending the Constitution.** Unlike the fluid and haphazard disenfranchisement that randomly affected millions in 2000, there is a larger institutionalized disenfranchisement taking place that rarely enters the headlines. More than eight million Americans, a majority of them racial and ethnic minorities, still belong to communities that are completely or partially disenfranchised by law. This is a population of voteless persons larger than the combined populations of Wyoming,

Vermont, Alaska, North Dakota, South Dakota, Montana, Delaware, Maine and Nebraska. Its members understand in a profound way that the “right to vote” can be treated like a useful fiction by those with power. The unrepresented, who are unable or unlikely to win voting rights without an amendment, fall into three groups:

1. *There are 570,898 taxpaying, draftable U.S. citizens living in the District of Columbia who lack any voting representation in the U.S. Congress.* Although Washingtonians pay more federal taxes per capita than the residents of every state but Connecticut, are subject to military conscription and can vote in presidential elections under the terms of the Twenty-Third Amendment, they have been continually frustrated in their efforts to achieve voting representation in the United States Senate and House of Representatives. This is a double injustice since Congress acts not only as their national legislative sovereign but ultimately as their local one as well under the terms of the Constitution’s “District Clause” (Article I, Clause 8, section 17), which confers upon Congress “exclusive Legislation” over the District. District residents have only a non-voting Delegate in the House, Eleanor Holmes Norton, who has been nimble and resilient in promoting equal democracy for her constituents against the frosty indifference and myopia of most politicians.

But the District’s effort to climb up to a level of equal membership in America has been a lonely one, and the Constitution has been effectively mobilized as an enemy to the cause of both statehood and democracy for the District. In the early 1990s, a bill to grant a petition for statehood for New Columbia failed by a 2-1 margin in the House of Representatives and never saw the light of day in the Senate. Members of Congress repeatedly invoked the District Clause as a warrant for both Congressional control and continuing disenfranchisement.

In 2000, just a few months before its decision in *Bush v. Gore*, the Supreme Court rejected a direct Equal Protection attack on Congressional disenfranchisement of the District by affirming a two-to-one decision of the United States District Court for the District of Columbia in a case called *Alexander v. Mineta*. The plaintiffs in the suit, which was brought by then-D.C. Corporation Counsel John Ferren on behalf of the District population, alleged that their disenfranchisement and non-representation in Congress violates Equal Protection and the privileges and immunities of national citizenship. Overruling the senior judge on the panel, Louis Oberdorfer, who would have granted the claim, the District Court majority found that: “The Equal Protection Clause does not protect the right of all citizens to vote, but rather the right of all *qualified* citizens to vote.” To be a “qualified” citizen for purposes of national legislative representation, you must live in a state and have the state grant you the vote. Thus, the District population, nearly 70% of which is African-American, Hispanic and Asian-American, is simply in the wrong place.

The effort that has come nearest to accomplishing voting rights in Congress for District residents was the proposed D.C. Voting Rights constitutional amendment in 1978, which would have granted the District two senators and the number of Representatives to which it would be entitled if it were a state. The proposed constitutional amendment passed by more than a two-thirds majority in both the House and Senate, with overwhelming Democratic support and substantial Republican backing as well, from Senators like Robert Dole. Yet, the absence of a strong national coalition invested in the success of the Amendment caused the drive to fail in the states.

2. There are 4,129,318 American citizens living in the federal Territories of Puerto Rico, Guam, American Samoa and the U.S. Virgin Islands who have no right to vote for president and no voting representation in the Congress. The Territories are subject to the sovereignty of Congress under the “Territorial Clause” of the Constitution, Article IV, section 3, clause 2, but several million U.S. citizens living in the Territories have no mechanism for participation in federal elections and no representation in national government. The largest Territorial population is in Puerto Rico, home to 3,808,610 people as of the 2000 census. In 1917, the Jones Act gave all Puerto Ricans U.S. citizenship and in 1952 the island gained "Commonwealth" status. But, like the District’s Eleanor Holmes Norton, the Puerto Rican “Resident Commissioner” still acts only as a non-voting Delegate in the House of Representatives. Also like residents of the District of Columbia, Territorial residents are shut out of Congress. Unlike Washingtonians, they have no voice even in presidential elections.

Citizens living in the Territories have all the responsibilities of other American citizens except that they do not pay federal taxes (unless they work for the federal government). Some people believe that this exemption justifies complete disenfranchisement, but this is certainly not the view of Puerto Ricans and other Territorial residents, who pay heavy local taxes, serve in the armed forces, are subject to the draft, and consider themselves part of the country. According to the U.S. Court of Appeals for the Second Circuit, the “exclusion of U.S. citizens residing in the territories from participating in the vote for the President of the United States is the cause of immense resentment in those territories—resentment that has been especially vocal in Puerto Rico.” As Judge Leval observes, the political exclusion of Puerto Ricans “fuels annual attacks on the United States in hearings in the United Nations, at which the United States is described as hypocritically preaching democracy to the world while practicing nineteenth-century colonialism at home.”

Yet, repeated lawsuits against the disenfranchisement of Puerto Ricans in presidential elections have failed. The Constitution presently makes no provision for Territorial residents to be represented in the national government. Without a right-to-vote amendment, the Constitutional structure necessarily reduces citizens living in Territories to colonial status. This second-class status is the central obsession of Puerto Rican politics and equally significant in other Territories. There is little sympathy for seeking independence from the U.S., which seems an ever more farfetched option. But Congress has refused to act in an effective way to grant Puerto Ricans a real choice among

statehood, independence, the status quo, and “enhanced commonwealth” status. The political rights of citizens in the Territories should not wait any longer for a choice of political forms that never emerges. A right-to-vote amendment, depending on its terms, could vindicate these rights even while the timing and mechanics of an ultimate choice over status are still being debated in Congress.

3. *There are approximately 3,900,000 citizens disenfranchised, many of them for the rest of their lives, in federal, state and local elections as a consequence of a felony criminal conviction.* According to the Sentencing Project, which has brought the issue to public attention, this vast group of people disenfranchised in their states because of criminal convictions amounts to about 2% of the country’s eligible voting population. In four states—Florida, Mississippi, Virginia, and Wyoming—citizens disenfranchised because of their criminal records constitute fully 4% of the adult population. In the 2000 elections, Texas (whose Governor Bush became president) and Florida (whose Governor Bush helped make that happen) each disenfranchised more than 600,000 people for having criminal records. The Florida Secretary of State even used its felon disenfranchisement policy to falsely purge tens of thousands of lawful voters, disproportionately people of color, whose only crime was to have names loosely similar to those of ex-felons.

Felon disenfranchisement is much less a strategy of individual rehabilitation than of mass electoral suppression. This seems especially vivid when we consider that 1.4 million *ex-offenders* are permanently disenfranchised in thirteen states, disproportionately in the Deep South. Back in Florida, 436,900 officially voteless citizens are former felons who did their time and paid their dues to society. They will never get their suffrage rights back under current law, which operates like a political death sentence. As one might expect in a period of racially-tilted law enforcement, these policies have dramatic effects on the electorate. In Florida, a shocking 31% of all African-American men are permanently disenfranchised. In Delaware and Texas, 20% of African-Americans are disenfranchised, and in Virginia and Mississippi, about 25% of the black male population—one out of four people-- has been permanently locked out of the electoral process.

In other countries, felon disenfranchisement is losing to constitutional principle. Last year, the Canadian Supreme Court in *Sauve v. Canada (Chief Electoral Officer)* struck it down, holding:

“Denial of the right to vote on the basis of attributed moral unworthiness is inconsistent with the respect for the dignity of every person that lies at the heart of Canadian democracy.”

But our Constitution creates the contrary implication. In 1974, the U.S. Supreme Court in *Richardson v. Ramirez* found that felon disenfranchisement does not violate the

requirement of “equal protection” in Section 1 because Section 2 explicitly authorizes states to disenfranchise persons convicted of “rebellion, or other crime” without losing any congressional representation. The only ray of light to pierce this gloomy reading came in 1985 in *Hunter v. Underwood*, where the Supreme Court found that Alabama’s legislature had violated Equal Protection by selectively disenfranchising persons convicted of “crimes of moral turpitude,” a state policy based on well-documented racial motivations and practices. But this holding has been closely cabined to its graphic factual record of racial bias. Most subsequent “courts have dismissed complaints on the assumption that disenfranchising felons is clearly rational, and thus that states would reach the same decision even in the absence of discrimination.”

The attempt to use Section 2 of the Voting Rights Act to undo felon disenfranchisement policies has been equally unavailing. Although the Act prohibits any voting practice or procedure that “*results* in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color,” the courts that have faced the racially skewed effects of states stripping prisoners of their suffrage rights still “have found that the Voting Rights Act does not limit any aspect of a state’s power to disenfranchise convicted felons.” The first case in which such a claim was heard, *Wesley v. Collins*, fairly reflects the attitude of the federal courts. The District Court in that 1986 decision remarked that the law disenfranchising felons “does not deny any citizen, ab initio, the equal opportunity to participate in the political process and to elect candidates of their choice. Rather, it is the commission of preascertained, proscribed acts that warrant the state to extinguish certain individuals’ right to [vote].”

As noted in the Harvard Law Review, the general “outlook for pro-prisoner litigation appears inauspicious when set against the backdrop of a judiciary largely convinced that felon disenfranchisement is rational, permissible, and socially desirable.” Indeed, the Harvard Law Review observes that even were a District Court to go out on a limb to declare that felon disenfranchisement violates Section 2 of the Voting Rights Act, a conservative appeals court or the Supreme Court could very well use such a ruling as occasion to declare that Section 2 of the Voting Rights Act, as amended in 1982 to outlaw racially discriminatory results, actually exceeds Congressional power to legislate under Section 5 of the 14th amendment. This is a worrisome and all-too-real prospect given the Court’s recent decisions striking down the civil remedies provision of the Violence Against Women Act and the Religious Freedom Restoration Act as impermissible uses of the 14th Amendment’s enforcement powers.

Nor, alas, has litigation under state constitutional principles proven to be a magic wand. Indeed, one State Supreme Court, that of New Hampshire, recently bent over backwards to avoid nullifying a felon disenfranchisement statute in a 2000 case called *Fischer v. Governor*. The plaintiffs had an excellent argument because Article 11 of the New Hampshire Constitution grants voting rights to all inhabitants 18 years old and over, excepting only persons convicted of three enumerated offenses: treason, bribery, and wilful violation of State or federal election laws. The plaintiffs asserted that the state law

disenfranchising *all* felons thus violated this language by sweeping far beyond the permissible constitutional exceptions. But the Court concluded that “while the conviction provision inserted into Article 11 in 1912 prohibited the legislature from extending the franchise to those convicted of its three enumerated offenses, it did not undermine the legislature’s authority. . .to disenfranchise those convicted of other crimes, whether or not they were incarcerated.” This decision evokes the general spirit of state constitutional decisions in the field, although there was one slender victory in 2000 when a Pennsylvania court struck down a whimsically irrational law that allowed prisoners leaving prison to vote if they were already registered before going into prison but made them wait five years to register if they had not been! But this is the exception that proves the rule for even the court in that case affirmed the doctrine that there is no problem with states stripping *all* felons of their voting rights.

When we turn from litigation to legislation, the picture is much improved, but the progress there remains slow and oscillating. A roundup of changes to state laws by Christopher Uggen and Jeff Manza in April 2003 shows that the 1990s produced many restrictive changes:

Four states disenfranchised federal offenders and Colorado additionally disenfranchised parolees. Utah passed a law for the first time, disenfranchising state prison inmates, and Pennsylvania implemented a five-year waiting period before released inmates or parolees would be enfranchised. Texas, on the other hand, eliminated its two-year waiting period, thereby restoring voting rights upon completion of sentence.

In the first years of the new century, however, several states have liberalized their laws, with Delaware and Maryland changing their laws to restore voting rights to ex-offenders after a five-year and three-year wait, respectively. Pennsylvania ended its five-year post-prison wait; Connecticut gave probationers the vote; and New Mexico stopped disenfranchising ex-offenders altogether. On the other hand, Massachusetts voters amended their state constitution in 2000 to join the other states and disenfranchise all felons currently in prison. In short, there is a see-saw struggle in the states that still leaves millions of people voteless, especially in Deep South states like Florida where there is no progress for ex-offenders, much less those still doing time.

Only a federal constitutional amendment could, in one fell swoop, enfranchise all people who have been convicted of felonies and stripped of their voting rights (3.9 million citizens) or, perhaps more likely, the sub-group of ex-offenders in thirteen states who have successfully served their time but still remain disenfranchised (1.4 million citizens). The important question of which is the more desirable or viable project—giving all felons the right to vote or only those who have served their sentences—is bracketed for the moment.

**** The Supreme Court Dismisses the Public's Interest in Political Equality When Assessing the Constitutionality of Campaign Finance Laws and Upholds Dramatic Restrictions on the Political Rights of Independents and Third Parties.**

The absence of a constitutional right to vote and participate has profoundly affected our campaign finance jurisprudence. Whenever the Court adjudicates legislative attempts to regulate the influence of corporate or private wealth in political campaigns, it dismisses or downgrades the public interest in fostering political equality. Rather, the Court classifies the political money spent by corporations and wealthy citizens as protected free speech, ignores the sharp inequalities that mark different citizens' access to this kind of speech, and finally nullifies efforts to equalize access to political communication and participation.

Thus, in the course of striking down campaign expenditure limits passed by Congress in the Federal Election Campaign Act, the Court in *Buckley v. Valeo* (1976) famously reasoned that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.” This principle is fine as far as it goes, although it surely does not explain very well the meticulously egalitarian rationing of speech in Congressional and state legislative debates nor in Supreme Court or federal and state appellate arguments nor in our intuitively compelling, albeit eroded, historic public broadcast principles like the Fairness or Equal Time Doctrines. In any event, the real issue in campaign finance today is how to *broaden* opportunities for political expression and participation for all citizens so that wealth does not unjustly dominate. This democratic imperative was specifically rejected in *Buckley* as a compelling or even rational basis for regulating the flow of money in politics.

This inegalitarian attitude shaped the Court's dubious determination in 1978 that the Massachusetts legislature violated the First Amendment when it banned private corporate spending and contributions to influence public initiative and referendum campaigns. In *First National Bank of Boston v. Bellotti*, the Court reflexively assumed that the right to spend political money attends to private business corporations:

[If] the speakers here were not corporations, no one would suggest that the state could silence their proposed speech. It is the type of speech indispensable to decision making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.

Of course, as Justice Rehnquist observed in dissent, this assertion defies centuries of jurisprudential understanding that a corporation is not a citizen but an “artificial entity” created by the state and endowed with special privileges for the purposes of economic production. On this view, a corporation should enjoy only the rights assigned to it and certainly no constitutional rights of civic political participation. As Justice White, who also dissented, cogently put it: “The state need not permit its own creation to consume it.”

Yet, the lack of any statement in the Constitution that political rights belong to the people (and not any other kind of entity) invites the Court to treat corporations as citizens and corporate political spending as protected speech.

Similarly, the lack of a constitutional right to vote has enabled the Supreme Court to traduce the political rights of citizens that challenge the two-party system. When states impose statutory mechanisms that interfere with the freedom of independent voters and outsider candidates to participate in the electoral process, the Court has repeatedly upheld discriminatory legislation of this kind.

For example, at the most basic level, the Court has upheld sharp restrictions in the casting of the ballot itself. In *Burdick v. Takushi* (1992), the Court approved Hawaii's practice of narrowing ballot access to favor the two major parties and then *throwing away* all ballots where voters write in the names of other preferred candidates. Despite the harshness of this result, the Court candidly explained that it cast its favor upon "reasonable, politically neutral regulations that have the effect of channeling expressive activities at the polls." Like Hawaii, several other states now actually forbid write-in ballots, a rather graphic demonstration that the ballot belongs to the state, not the people. Even if write-in candidates never win, which is assuredly *not* the case, it can never be right to deny citizens the ultimate right to cast ballots for the candidates of their choice.

As with its approval of this assault on voters' rights to cast ballots of their choosing, the Court has authorized states to enforce manipulative and discriminatory rules against minor political parties and independent candidates. In *Timmons v. Twin Cities Area New Party* (1997), the Court in a 6-3 decision upheld Minnesota's "anti-fusion" law that prevented political parties from joining together to "cross-nominate" candidates, a practice that gave vibrant life to progressive third parties in the nineteenth century. Rather than begin with the fundamental right of the citizen to vote, from which would follow a collective right of groups of citizens to organize and nominate candidates of their choosing, Chief Justice Rehnquist saw the case as from the top of a pyramid, through the prism of "political stability" and the "two party system":

The Constitution permits the Minnesota legislature to decide that political stability is best served through a healthy two-party system.

Thus, the state's interests in promoting the fortunes of two political parties and their views of "stability" overcome the non-existent right of voters to make their votes effective by organizing into political parties and nominating candidates that they want. Again, with no right to vote in play, the ballot in practice belongs to the states, not the citizenry.

This doctrine was set forth originally by the Supreme Court in an ominous 1971 decision called *Jenness.v. Fortson*, where the Socialist Workers Party (SWP) of Georgia and its candidates for governor and U.S. House challenged Georgia's draconian ballot-access

regime. Under this system, candidates for any office nominated by parties that had received at least 20% of the vote in the most recent gubernatorial or presidential election received an automatic place on the general election ballot. Candidates who failed this test were forced to collect signatures equal to at least 5% of the electors who were eligible to vote in the last election. Thus, Linda Jenness, the SWP candidate for governor, had to collect an eye-popping 88,175 valid signatures, and the SWP's two House candidates had to collect more than 10,000 signatures apiece. Given the ordinary rate of invalid signatures, Jenness had to collect more than 100,000 signatures to come close to her target and the congressional candidate needed 13,000. For anyone who has tried to get office mates to sign a get-well card for a colleague or members of the same family living in different neighborhoods to sign a birthday card, you will see what an astounding thing it is to require candidates for public office to collect from tens of thousands of citizens, mostly belonging to competitor political parties, their printed names, signatures, accurate addresses, and zip codes, all for the right to appear on a ballot that "major party" candidates achieve access to on the basis of the candidate's personal autograph alone.

Yet, the Supreme Court upheld Georgia's irrational busy-work system, never explaining why forcing political parties to convince non-supporters to sign their petitions on the street is a rational way to determine whether political candidates should be able to run for office. This decision not only validated a law in Georgia that has thwarted every third party's signature bid for ****TEXT PROBLEM, *** but also constitutionalized political discrimination across the land. Ballot-access expert Richard Winger has counted 126 lower-court rulings in which minor-party and independent candidates have lost suits against statutory discrimination where the deciding court invokes the canonical power of *Jenness v. Fortson*.

With the Court's blessing, open partisan discrimination thus saturates our politics. In a shocking 6-3 decision called *Arkansas Educational Television Commission v. Forbes* (1998), the Court affirmed the exclusion of a conservative Independent candidate for Congress from a government-sponsored televised candidate debate that featured his Democratic and Republican opponents. The Court's majority approved a concocted justification of the exclusion based on the candidate's alleged lack of "viability," a wholly arbitrary bureaucratic judgment that rolled merrily over the fact that the excluded Independent candidate had won 46% of the vote as a Republican candidate for Lieutenant Governor just two years before. Yet, the government's circular and self-fulfilling prediction of the plaintiff's "viability," based on his campaign funding (which was greater than several major party candidates invited to debate in other districts) and perceptions of media commentators, completely inverts the proper relationship between citizens and government in democracy. *Voters* should determine which candidates are viable, based on their campaign statements and public debates, and they should cast their judgment on election day; it is not up to the *government* to declare who is viable in

advance and then rope off candidate debates and public dialogue on the basis of unaccountable official predictions.

But these decisions follow logically from the citizen's lack of affirmative political rights. The establishment of a constitutional right to vote would change the center of gravity for treatment of cases like the ban on write-in ballots, the ban on electoral fusion, and the exclusion of outside candidates from publicly sponsored debates. Right now the Supreme Court reasons backwards and upside-down from the imagined needs of the "two party system" or "political stability," rather than forward and ground-up from the essential political rights of the citizen, the only standpoint from which a truly open and competitive democracy can grow. If we reason from the mythical needs of the "system," rather than from the rights of the people, we will never evolve a fully free market in political ideas and programs.

II. Crossroads Democracy:

Key Issues in Reconstituting the Right to Vote

Our structural democracy deficit reflects the weakness of not having our suffrage commitments embodied in an affirmative constitutional right. In the global context, this is unacceptable and ironic: the United States was the first nation conceived in democratic insurgency against tyranny and it was our modern Civil Rights Movement, battling the political oppression of apartheid Mississippi, which produced the slogan of "one person, one vote" that swept the earth, from Poland to South Africa, at the end of the 20th century.

Yet, now our Constitution looks frail and incomplete in the face of modern universal suffrage principles visible all over the world. We are the only nation on earth that disenfranchises the people of its capital city. Our felon disenfranchisement policies are backward compared to other advanced democracies. And the world was astonished to read the Supreme Court's pronouncement that we have no constitutional right to vote for president. In the context of our own development, a right-to-vote Amendment is necessary to redeem the demoralizing chaos we experienced in the presidential election of 2000.

Whether to amend the Constitution is, by definition, a political question involving profound and interlocking issues of a substantive and process nature. On the substantive level, the question for us is whether an American right-to-vote Amendment will be sufficiently focused to address the democracy deficits we have while being sufficiently broad and universalistic to maintain its rather instantaneous popular appeal. A movement in the country and Congress will have to deal with at least seven crossroads issues, which

I flag for discussion here, only to gesture at a resolution, knowing that the hard dialogues are yet to come:

A. Should the Amendment guarantee the right of the people of each state and the District of Columbia to choose presidential electors or should it simply abolish the electoral college altogether? The latter and more ambitious course would target the undemocratic institution in its entirety and replace it with a direct majority vote in a national election, perhaps including some kind of instant run-off mechanism. This more sweeping position has the virtue of focusing debate on an obsolete institution that invites partisan and judicial mischief, regularly threatens to frustrate the popular will (as it did in 2000), radically depresses turnout in the vast majority of states that are safely in the Democratic or Republican column, and gives disproportionate voice to the racial conservatism of the Solid South, which was once the bedrock of the segregationist Dixiecrats and now the bastion of Trent Lott-style fundamentalist Republican conservatism.

Tempting though it may be, confronting the electoral college right now would probably be biting off more than we can chew. If the central right-to-vote message is subsumed under a campaign for abolition of the electoral college, we will likely alienate lots of small-state Senators—think of Joseph Biden of Delaware or Patrick Leahy and Jim Jeffords of Vermont-- who would otherwise be our strong supporters. To be sure, readers of my book *Overruling Democracy* will know that I believe the electoral college actually reduces the power of small states and amplifies the power of large swing states like Florida, but it will probably take another ten years for that lesson to sink in. Thus, the best solution may be to write a right-to-vote amendment that will unify the broadest possible coalition and also encourage a group of the more maverick and forward-thinking reform groups that have gotten out in front on abolishing the electoral college—the League of Women Voters and Common Cause—to continue to educate e around the question. The more radical proposal will bolster the fortunes of the more immediate one, and the day that we abolish the electoral college will come more quickly with actual constitutional change in the air.

B. Should the Amendment grant full congressional voting rights to U.S. citizens living in the District of Columbia and full presidential and congressional voting rights to the Territories?

The answer to the first part of the question seems perfectly clear to me: yes. If we are going to have a voting rights amendment, it must include a provision to treat the District constituting the Seat of Government as though it were a state for the purposes of congressional representation. Indeed, this precise language was actually already passed *twenty five years ago* by more than the requisite two-thirds vote in both the U.S. Senate and the U.S. House, although it subsequently found itself desperately short of national allies and failed in the states against a ferocious conservative opposition. The D.C. statehood drive is languishing badly, indeed it is quite non-existent, on Capitol Hill, and the idea of direct statutory enfranchisement, though doctrinally defensible, invites a

morass of constitutional arguments that offers the perfect alibi for politicians seeking to avoid democracy for the District.

The only strong argument for favoring a bill over a constitutional amendment—that a bill needs only a majority vote as opposed to a two-thirds vote in each chamber—slips away when we consider the actual sequence of events. If a straight voting rights bill were to pass both houses of Congress, it could still be vetoed by President Bush, which would then require a two-thirds vote in Congress to override in any event. And, even if this took place, a conservative federal judiciary would now decide the question of whether the federal district could be given two U.S. Senators without statehood and by a simple bill. The prospects seem gloomy.

The right-to-vote Amendment offers disenfranchised Washingtonians the chance to connect with a clean vehicle and a powerful national democracy movement that will not let them down when the fight is carried to the states. The real question is whether all the righteous local pro-democracy activism in the District will choose to link up with voteless constituencies that have broad national reach and large numbers but less public standing, such as ex-felons and Territorial residents.

The Territories present a more complicated problem. The 23rd Amendment, which gave District residents the opportunity to vote in their first presidential election in 1964, set a precedent for using constitutional amendments to enfranchise Washingtonians and treat them like virtual state residents; it effectively recognized them as a permanent part of the national community. There are no amendments enfranchising Territorial residents yet. While Territorial residents are also U.S. citizens, there remains the hypothetical possibility that the Territories could be surrendered and granted their independence, as with what happened with the Philippines. Thus, a serious argument can be made that seats in Congress should not be reserved for people who may still be transient members of the national community. A further problem is that, while Puerto Rico's population of more than 3.8 million people would clearly justify two U.S. Senators, it is very hard to sustain the same argument for Guam (population 154,805), the Virgin Islands (population 108,612) or American Samoa (population 57,291). And there remains the politically difficult problem of all Territorial residents being generally exempt from federal individual income taxes.

On the other hand, the disenfranchisement of millions of U.S. citizens subject to federal laws and policies is indefensible. The citizens of Puerto Rico and the other Territories have repeatedly protested their "colonial" relationship to the United States. Recent federal lawsuits insisting upon the right to vote for president make clear the depth of feeling about this problem.

Thus, one middle ground position would be to follow the path of the 23rd amendment and build language into the right-to-vote amendment granting all territorial residents of the nation the right to vote for president, specifically presidential electors equal to the number of electors to which they would be entitled if they were all part of a single state. Thus, the current Territorial residents would have the right to appoint (elect) approximately nine electors, which is the number equal to two Senators plus an estimated seven U.S. Representatives. Although this leaves the problem of congressional representation unresolved for the time being, it will give Territorial residents both the political leverage in presidential elections and the public momentum to break the impasse over their status, at least with respect to Puerto Rico. It is, obviously, far from an ideal solution but it would be a major improvement over the *status quo*. How do Puerto Ricans and other Territorial residents react to this proposal? Theirs, obviously, are the voices central to the discussion going forward.

C. *Should the right-to-vote Amendment extend the franchise to all convicted felons or just to those who have successfully completed their sentences?*

This is a vexing problem.

From a purely tactical perspective, the answer is easy: the Amendment should restore the vote to disenfranchised *ex-offenders* while leaving disenfranchised those felons still in prison or otherwise under custody. This approach constitutionalizes and nationalizes the public policy of 33 of the 50 states and thus the common sense of the people. Around 40 states automatically or gradually restore the vote to felons who have finished their sentences, but some 48 states (96%) now disenfranchise felons still in prison. Thus, a move to restore to all former offenders their voting rights more or less invites Congress and the states to extend the policy that is present in two-thirds of the states to the rest of America. Far from being unthinkably radical, extending the franchise to 1.4 million *ex-offenders* is a common-sense proposal to develop a uniform national policy based on a preexisting social consensus. The current impressive organizing by a coalition of groups on this issue seems to have focused on this proposition as well and left the enfranchisement of felons still serving time as a *sotto voce* back-burner agenda.

There is every reason to think this proposal would pass. A July 2002 Harris Interactive Poll found that fully 80% of all Americans believe that *ex-felons* who have completed their sentences should get back their right to vote. This was also the April 2001 recommendation of the National Commission on Federal Election Reform, chaired by former Presidents Carter and Ford. And 31 U.S. Senators this year cast votes for a bill introduced by Harry Reid (D-Nev.) and Arlen Specter (R-PA) to grant voting rights to *ex-offenders*.

On the other hand, when one focuses seriously on the issue, it becomes increasingly difficult to defend the categorical disenfranchisement of felons still serving time as well. We would not say that people convicted of felony crimes should lose their First

Amendment rights to speech, to press, to religious freedom or their Equal Protection rights. Why should the right to vote be any different? The vote represents a particle of public sovereignty that attaches to each citizen of the nation by virtue of his or her adult membership in society. Is that particle of sovereignty actually destroyed by virtue of a citizen committing a crime? Or is it indeed a greater and more effective form of continuing criminal punishment to insist that a felon is being punished by virtue of laws that he is himself partly an author of and an inescapable party to? The idea that the prisoner is bound by laws and practices that he has consented to may, indeed, be the only theory of criminal punishment acceptable to a democratic society.

Of course, this theory does not *require* that felons serving time maintain their voting rights since it may also be said that they hypothetically consent to laws that disenfranchise people in their situation. We are thus forced to consider the issue in a morally and politically pragmatic way. Of how much importance is voting rights to people serving time as compared to other possible agendas such as prison conditions, job training and health care? Is voting rights a distraction or a unifying agenda? Would voting rights assist in rehabilitation and reintegration? Would they undermine law and order (are felons indeed less “tough” on crime than others)? Would they establish effective counterweight to entrenched political pressure from private correctional corporations, guards’ unions and other forces that promote incarceration and prison construction? And, in the most hardheaded political calculus, do democracy advocates prefer a much *greater* chance of restoring voting rights to the *smaller* population of 1.4 million ex-offenders or a much *smaller* chance of restoring voting rights to the *greater* population of 3.9 million? Shall we proceed in steps here or try to sprint the distance? It is hard to know, but the logic of proceeding in steps would argue for language that enfranchises former offenders only while the logic of universal suffrage militates towards the more expansive approach.

D. *Should the Right-to-Vote Amendment extend voting rights to non-U.S. citizens in local elections?*

There is a brewing movement to grant voting rights in local elections to non-citizens, a seemingly radical departure that is actually a return to a very common practice in the 18th and 19th centuries. When this nation of immigrants (other than Indians) came into being, most municipalities allowed aliens to vote and to run for office—that is, so long as they were white male property holders over the age of 21. As the nation spread to the west in the 19th century, new states vying for population extended the vote immediately to all “declarant aliens,” meaning immigrants who declared their intention to become naturalized citizens. The alien vote grew so important that noncitizen voting became a divisive sectional issue prior to the Civil War, and Article I of the Confederate Constitution explicitly banned the practice. After the Civil War, alien suffrage flourished again, with the Supreme Court repeatedly affirming the constitutionality of states and localities choosing to extend the franchise in this way. Those interested in greater historical detail can consult my article, *Legal Aliens, Local Citizens: The Historical,*

Constitutional and Theoretical Meanings of Alien Suffrage, 141 Univ. Pennsylvania Law Review 1391 (1991).

Today, non-citizen voting is practiced in school board elections in New York and Chicago and in city council and mayoral elections in smaller municipalities, such as Takoma Park, Maryland, which enacted the policy in a celebrated referendum and charter change in 1991. But the idea has begun to take hold in the movement for immigrant rights and strong efforts are surfacing in New York, Massachusetts, California and Washington, D.C., where Advisory Neighborhood Commission 1-D has adopted a resolution calling for voting rights for non-citizens in all local elections and the Voting Rights for All Coalition has been actively organizing a citywide campaign.

With more than ten million permanent residents lawfully present in the U.S. today, the argument for local alien suffrage is obviously compelling. It is not simply that permanent resident immigrants work, pay all kinds of taxes and shoulder other public responsibilities, such as military service when drafted. Nor is it just that reciprocal noncitizen voting in local elections is now the law in the European Union or that many Americans enjoy this right living abroad. The point is that we are all better off when the inhabitants of cities and towns, regardless of their passport, participate and invest in the public life of their communities.

As demonstrated historically, and as recently as the Takoma Park experience, there is nothing of a federal constitutional nature stopping states and localities from extending the vote to aliens. On the contrary, the Supreme Court has resisted every invitation to invalidate the practice. Thus, no constitutional amendment is required. On the other hand, while many states leave the issue up to the localities themselves, many have forbidden alien voting by imposing a citizenship requirement on suffrage qualifications statewide. Thus, theoretically, a federal constitutional amendment could require states to leave the issue to the localities, but such an amendment would be seen as a massive assault on state sovereignty. Indeed, since any successful effort to enfranchise at the local level will require popular organizing and movement anyway, it makes more sense, I would think, to mobilize people to change their state laws first, if necessary, and then to amend local home rule charters or laws.

Having said this, a *national* movement for a right-to-vote for *citizens* could give great support and visibility to *local* movements for a right-to-vote for *non-citizens*. The significant presence at this conference of people focused on that project attests to the synergy of these purposes.

E. *Should we use the opportunity of a constitutional voting rights amendment to lower the voting age to 17?*

There are surprisingly powerful arguments for reducing the voting age to 17. The most persuasive to my mind is that millions of young people graduate from high school every year before they turn 18 and we thus lose the opportunity to register them to vote and educate them about the traditions and possibilities of voting. By going to 17, we would be able to create a far more effective culture of political attention and participation while students are in school. Young people, furthermore, have distinctive political interests--relating to work, the minimum wage, summer jobs, the military draft, college tuition, sexuality, censorship, the criminal justice process, and so on--that are systematically discounted and overridden in the political process. A movement to enfranchise more teenagers could catalyze political action among the young.

On the other hand, there appears to be no pervasive sense of injustice about the current age of political majority, much less a strong organized movement to change it. The only time a constitutional amendment targeted the voting age was with the 26th Amendment in 1971, which created the 18-year old threshold and marked the culmination of nearly a decade of broad youth struggle for civil rights and expressive freedom and against the military draft and the war in Vietnam. Central to this constitutional moment was the organizing principle of “old enough to fight, old enough to vote,” which highlighted the injustice of drafting young men to fight at age 18 but denying them the right to vote until 21. Today, we have no corresponding set of dramatic generational political experiences, grievances and movements for the young. And while the 60's generation of young Baby Boomers was a demographic tidal wave, the young today comprise a much smaller minority in a nation where the Baby Boomers are preparing for retirement.

This issue is worth serious consideration.

F. *In the final analysis, does a Right-to-Vote amendment bolster and galvanize the various urgent democratic reform agendas of the 21st century or are democracy advocates better off pursuing their individual agendas separately and legislatively? Is the whole bigger than the sum of the parts?*

I want to argue that the Right-to-Vote Amendment will give us what Bob Moses and Charles Cobb called in their book *Radical Equations* a “principle of common conceptual cohesion,” a way to transform our diverse concerns into common-sense political solidarity. It would provide an overarching *moral coherence* to disparate voting causes; it would give *organizational synergy* to diverse efforts at the national, state and local levels; and it would provide us all a framework for *democratic movement* at every level.

With a constitutional campaign in motion and an amendment in place, below-the-radar voting issues like proportional representation, instant run-off voting, same-day registration, provisional voting, an election holiday, and mail-in voting would all collect greater public attention and activist commitment. Some of them, such as same-day registration, may even be implied by a strong right to vote.

This promising November conference of diverse voting rights advocates from across the country illustrates what we can hope for when we reconstitute common ground. Once it is passed, the right-to-vote Amendment would be the center of gravity for a new jurisprudence, a galvanized legal community and emboldened activism in service of democracy and voting rights.

The claim that we will be better off with a constitutional amendment drive taking place can be challenged from two perspectives. One perspective is that of any individual voting cause. Thus, it might be said that Territorial residents or Washingtonians or ex-offenders or third party advocates or people who want to be sure that their votes get counted or those who want to promote instant run-off voting or same-day registration are each better off working alone for legislative changes. Don't weigh down more popular causes with less popular ones (even if we disagree about which is which)!

We should carefully consider each of these possibilities separately but it is hard for me to see the force of any particular objection. As discussed above, most of our strongest voting rights grievances today have hit a brick wall in the absence of constitutional change. Thus, there may be no choice substantively. As for the politics of the matter, it is hard not to believe that we will be much stronger standing together than standing alone.

The other perspective from which to challenge the idea of an Amendment is to say that *any* constitutional politics is intrinsically dangerous and distracting and should be avoided at all costs by democrats. This becomes the final issue we must confront.

G. *Should democracy reform advocates engage in constitutional politics at all?*

The people and organizations who have gathered this weekend to strengthen and extend democracy are the conscious political heirs to democratic movements of the American past: the movements that fought for the 14th and 15th amendments that set the framework for enfranchising African-American citizens, the 17th amendment providing for popular election of U.S. Senators, the 19th amendment passing woman suffrage, the 23rd amendment writing the people of Washington, D.C. into presidential elections, the 24th amendment getting rid of poll taxes in the states, and the 26th amendment extending the vote to 18-year olds. This is the historical context of our meeting.

But we no longer know how to talk the sweeping democratic language of constitutional politics, and truth be told, we are quite afraid of it. Several colleagues in constitutional law have asked me whether professors should even be talking about changes to the Constitution as opposed to our presumed exclusive task of just interpreting the existing language. Many American professors of constitutional law are delighted to travel abroad

to assist in the revision of other nations' constitutions but are terrified even to talk about changes at home, where we are supposed to be commentators and not citizens.

To be sure, there are good reasons to fear constitutional change. The most compelling is that reactionary forces in our country are constantly pressing an agenda for illiberal constitutional change. In the last few months and years, we have been treated to the introduction of constitutional amendments that would: define marriage as for heterosexuals only and make it impossible for states to open up marriage to gays and lesbians; authorize Congress to make it a felony crime to "desecrate" a flag of the United States; restore organized prayer sessions in public school classrooms; allow for the posting of certain versions of the Ten Commandments in public places; and require balanced budgets, though admittedly we have not heard much about this one recently.

The instinctive reaction of defenders of liberal democracy has been to screech: "don't touch the Constitution!" Liberal professors and commentators have become strong constitutional conservatives, not simply refuting each of these terrible proposals on their own terms—which is surely the Lord's work—but suddenly denouncing the whole idea of even thinking of amending the Constitution. Kathleen Sullivan of Stanford Law School has warned us against the "bad and unintended structural consequences" of amending the Constitution as well as of "mutiny against the Supreme Court." Of course, if America is a ship, the Supreme Court is not our captain: here, the people will steer. Today's democrats need to worry far more about the Court's mutiny against the people than vice versa. After all, if we oppose bad constitutional proposals by ignoring serious constitutional problems, we will condemn ourselves to playing perpetual defense, which is neither a good offensive strategy nor the best defensive one.

The current reactive posture, though understandable, betrays both the constitutional understandings of the Founders and our unfolding constitutional history. The democratic Founders rolled their eyes at the "sanctimonious reverence" with which some men regarded the original Constitution, as Jefferson put it. He insisted that future generations of Americans "avail ourselves of our reason and experience to correct the crude essays of our first and inexperienced councils." The Framers devoted a whole section of the Constitution to the procedures for amending it and then set about quickly doing so. What would our Constitution be without the first ten amendments that were added to check the conservative and anti-democratic temper of the structural constitution? The people's Bill of Rights against power set the pattern for future amendments, which have been in large part suffrage-expanding and democracy-deepening. Many amendments extended the franchise to those who had been excluded from it; many reworked the mechanics of our elections; all of them tried to deepen and perfect the practice of democratic inclusion and equality, except for the repressive Prohibition Amendment, which was a disaster and promptly repealed.

So it is time for us to live up to our own historical responsibilities and overcome our nervousness about constitutional politics. We have the strength to refute the polarizing

proposals for amendments that set Americans against one another—those about gay marriage and flag desecration, for example—while making the positive argument for an amendment that will bring all Americans together on a platform of universal democracy and equal liberty. Indeed, the forward-looking project reinforces the defensive one, for how can anyone make a serious argument for any other constitutional change when the most basic right of all—“the right preservative of all rights,” as the Court in a different period put it—remains unprotected in our social covenant? The right-to-vote amendment must take logical priority over everything else.

III. The Right-to-Vote Amendment; Can we win? Is it worth the fight?

Consider the following language as a first draft of an amendment that America’s pro-democracy forces might put into play:

Section 1. All citizens of the United States of at least eighteen [seventeen?] years of age have the right to vote in elections for President and Vice President and for electors for President and Vice President. All citizens, natural born and naturalized, have a right to become candidates for President and Vice President.

Section 2. Territories of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the Territories would be entitled if their populations were combined into a single State; they shall be in addition to those appointed by the States and the District constituting the Seat of Government of the United States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the largest Territory and perform such duties as provided by the twelfth article of amendment.

Section 3. All citizens of the United States of at least eighteen [seventeen?] years of age have the right to vote in elections for executive and legislative officers of their states and, where applicable, in elections for their United States Representatives and Senators. The District constituting the Seat of Government of the United States shall elect United States Senators and Representatives in such number and such manner as to which it would entitled if it were a State.

Section 4. The right of citizens of at least eighteen [seventeen] years of age to vote, participate and run for office on an equal basis shall not be denied or abridged by the United States or by any State.

Section 5. The Congress shall have power to enforce this article by appropriate legislation. Nothing in this Article shall be construed to deny the power of States to expand further the electorate.

Does America's pro-democracy civil society have the political, financial, organizational, and tactical resources needed to win a fight for this Amendment? Happily, this is not my topic but Steve Cobble's. I would just venture to say that the cause is red-white-and-blue and irresistibly appealing. It will be a precious difficult task for conservative politicians, much less liberals, to take to the floor of Congress to oppose the idea of guaranteeing voting rights in our Constitution.

In a larger sense, we are likely entering a period of revived constitutional debate. Beyond even the right-wing constitutional agenda that is afoot, there are serious centrist proposals for constitutional amendments floating right now to deal with lingering problems in succession to executive and legislative office in the event of national crises like 9/11. One can only assume that, with my Canadian-born law school classmate Jennifer Granholm as Governor of Michigan and Austrian-born Arnold Schwarzenegger as Governor of California, there will be serious efforts within the next few years to amend the Constitution to allow naturalized citizens to run for president. None of these agendas should supplant the right to vote agenda, but I can see some of them acting in a complementary way.

For example, wouldn't serious advocates of the right to vote agree to back language (embodied above) granting naturalized U.S. citizens like Granholm and Schwarzenegger the right to run for president? Surely it makes sense as a matter of principle: why should we not be able to choose to vote for U.S. citizens who can presently serve as Governor (in two of our largest states!) or as Secretary of State (Madeleine Albright or Henry Kissinger) also for president? As a matter of strategy, one can foresee a multipartisan movement arising to establish the right to vote and to change this provision. Moreover, the implicitly progressive statement being made about the political capacities and contributions of people not born in the U.S. could give further help to the movement for non-citizen voting rights in local elections.

It seems to me, venturing into the realm of the tactical, that the upcoming unprecedented occasion of the District of Columbia January 10, 2004 presidential primary as the first in the nation could become a referendum on the right to vote and the state of American democracy. We could make the presidential primary election in the nation's capital America's *democracy primary* if the groups at this conference organize to force candidates of all parties to pay attention.

But is a right-to-vote amendment worth all the trouble, one fairly asks, even if we win? Surely it is--so long as we don't give everything away on the way there. It will be a

magnificent achievement to guarantee the right of all citizens to vote in presidential elections and all other relevant federal, state and local elections; to bring into the political community disenfranchised populations; to change the dynamics of judicial treatment of our political process to place voting rights at the center of our framework; and to revive progressive constitutional politics.

Constitutional amendments that have expanded and deepened American democracy, such as the 15th, 17th, 19th or 23rd Amendments, have generally been sustained by strong nationwide political movements. These movements have themselves changed the character of our public life in ways that go beyond the text of the amendments. The political journey is thus part of the constitutional destination. A movement for a universal right to vote will not only bring us into line with the rest of the civilized world but galvanize pro-democracy forces at home in a way that will make our movement much greater than the sum of its individual parts. Placing the democratic project at the center of our constitutional discussion is especially critical at a time when a number of regressive and illiberal constitutional proposals are in play.

Is it worth it even if we lose? Surely it is, if our movement lifts up other voting causes along the way and restores political participation to the heart of constitutional thought. Consider the Equal Rights Amendment, often invoked to show the counter-productive futility of constitutional amendment. But the drive for the ERA mobilized feminists across America to change the consciousness of the country in a way that helped produce not only countless state and federal statutory and regulatory changes in favor of gender equality and thousands of new women elected officials, but also an Equal Protection jurisprudence on the Supreme Court that is not much different from what the ERA would have effectuated. Under today's 14th Amendment, laws that discriminate on the basis of gender trigger automatic heightened scrutiny and require an "exceedingly persuasive justification" by the government. The ERA could not have done much better itself if it had been enacted, and the movement for the ERA clearly plowed the ground for the new doctrine. Those who say the ERA was a wasted effort ignore how radically the movement for it transformed our nation's political and legal consciousness.

It is always hard to know what the precise effects of a constitutional change will be or indeed the effects of a failed drive for a constitutional change. Sometimes simple amendments experience many different generations of interpretation. The 14th Amendment principle of Equal Protection, for example, came to life briefly after it was enacted in 1868 but was then quickly put to sleep for many decades by a reactionary Supreme Court. It was then revived and given meaning by the Warren Court, but has since become an effective weapon for racial conservatism in the Rehnquist Court, which used it to launch its astounding jurisprudence targeting majority-African American and Hispanic districts for destruction. Other times, limited amendments can have more positive effects than originally foreseen, and even things left out of the text of amendments can ride their spirit. When the 24th Amendment in 1964 banned poll taxes only in federal elections and not state elections, it was thought that the amendment

undermined the movement against state poll taxes. But just two years later, the Court in *Harper v. Virginia Board of Elections* found that state election poll taxes violated the Equal Protection clause. “Notions of what treatment for the purposes of Equal Protection *do* change,” wrote Justice Douglas for the Court. The intervention of the 24th amendment changed the Court’s understanding of the 14th. The addition of progressive principles to the Constitution has repeatedly opened up dynamics of interpretive change in favor of democratic inclusion.

Thus, while we can never know in advance the exact consequences of taking a new constitutional path or the exact consequences of just leaving things as they are, surely the safest course today is to act on principle and fight for an explicit constitutional right to vote.

* * * * *

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. In the United States today, the right *not* to vote is safe. About half the population--tens of millions of people--routinely abstain from voting in presidential elections. In off-year congressional, state and local elections, tens of millions more do not vote and the picture is even bleaker in primaries. Nor is there any serious move afoot to make voting compulsory, an idea with generally weak prospects since the right to avoid voting is not only well-established but arguably grounded in the citizen’s protected due process liberty interests. Indeed, many Americans feel strongly about having a right not to vote given the routine absence of electoral choices produced by “winner take all” elections in which incumbents employ computer-assisted gerrymanders to deprive citizens of choice and special-interest legislation to corner the market in special-interest campaign contributions. In any event, it seems fanciful to ask politicians to legislate a *duty* to vote when our Constitution does not yet protect the *right* to vote.

. U.S. Const., Article II, Section I.

. Alexander Keyssar, “Shoring Up the Right to Vote for President: A Modest Proposal,” *Political Science Quarterly* (Summer 2003) 181, 181. Professor Keyssar ends up with a modest proposal far more modest than mine. It would deal only with what I am calling the first democracy deficit and perhaps the second.

. 531 U.S. 9, 104 (2000).

. “Voting: What Is, What Could Be,” CaltechMIT Voting Technology Project, 8 (July 2001).

. *Id.*

. *Alexander v. Mineta*, 90 F.Supp. 2d 35 (D.D.C. 2000), *aff’d* by 531 U.S. 941.

. *Id.* at 66.

. *Xavier Romeu v. Cohen*, 265 F.3d 118, 127 (2001) (citing *Igarta II*, 229 F. 3d at 85-90 (Torruela, J., concurring)).

. *Id.*

. *Losing the Vote: The Impact of Felony Disenfranchisement*, The Sentencing Project and Human Rights Watch, <http://www.hrw.org/reports98/vote/usvot98o-01.htm>. All statistics cited in this essay come from this fine report.

. Texas, in a significant victory, recently repealed its two-year waiting period for voting rights after completion of a sentence.

. 418 U.S. 24, 56 (1974).

. 471 U.S. 222

. *One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 *Harvard Law Review* 1939, 1951 (2002).

. 42 U.S.C. section 1973(b)(emphasis added).

. *Ibid.* at 1954.

. 605 F. Supp. 802, 804 (M.D. Tenn. 1985), *aff’d*, 791 F.2d 1255 (6th Cir. 1986).

. *Id.* (Quoted in *One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 *Harvard Law Review* 1939, 1952 (2002)).

. *Id.* at 1956.

. 145 N.H. 28 (2000).

. *Id.* at 326.

. *Mixon v. Commonwealth*, 759 A. 2d 442 (Pa. Commw. Ct. 2000).

. 424 U.S. 1, 48-49 (1976).

. 435 U.S. 765, 776-77 (1978).

. Id. at 809-10 (White, J., dissenting).

. 504 U.S. 428, 438 (1992).

. 520 U.S. 351, 366-67 (1997)

. 403 U.S. 431 (1971).

. 118 S. Ct. 1633 (1988).

. For those interested in the argument, please see Jamin Raskin, *Overruling Democracy* . . .

. The proposed amendment provided: “For purposes of representation in the Congress, election of the President and Vice President, and article V of this Constitution, the District constituting the seat of government of the United States shall be treated as though it were a State.” H.R.J. Res. 554, 95th Cong., 2d Sess., 92 Stat. 3795 (1978).

. Kathleen M. Sullivan, “What’s wrong with Constitutional Amendments?” in *Readings for American Government: Power and Purpose* 14, ed. David T. Canon, John J. Coleman and Kenneth R. Mayer (W.W. Norton, 2002).

. Judith N. Shklar, *Redeeming American Political Theory* 175, Stanley Hoffmann and Dennis Thompson eds. (U. Of C hi. Press 1998) (quoting Thomas Jefferson).

. *See* U.S. v. Virginia, 518 U.S. 515, 524 (1996) (articulating the Court’s understanding that government actors trying to defend gender classifications must demonstrate an “exceedingly persuasive justification” for them that reveals a substantial relationship between the government’s means and important state objectives); *see also* JEB v. Alabama ex rel. T.B., 511 U.S. 127, 136 (1994).

29. 383 U.S. 663, 669 (1966).

. Harper v. Virginia Board of Elections, 383 U.S. 663, 669 (1966).