

Constitutional Amendments and the Right to Vote

Some Reflections on History

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More amendments to the United States constitution have dealt with the right to vote than with any other single subject. The phrase “the right to vote” made its first constitutional appearance in the Fourteenth Amendment (1868), and over the next century six other amendments expanded the ability of Americans to participate in elections. The Fifteenth (1870) and Nineteenth (1920) amendments eliminated race and sex as legal barriers to enfranchisement in all elections (federal, state, and local), while the Twenty-sixth (1971) amendment specified that there could be no age restrictions on suffrage for those who were at least eighteen years old. The Seventeenth amendment (1913) provided for the popular election of senators; the Twenty-third (1961) authorized the District of Columbia to participate in presidential elections; and the Twenty-fourth (1964) eliminated the poll tax in federal elections.

That such amendments have been so numerous was, of course, a consequence of both the early date and the design of the constitution itself. Few, if any, of the late eighteenth-century framers would have supported even a white male approximation of universal suffrage, and most were inclined to view voting as a privilege rather than a right; there was no way, thus, that a “right to vote” could have been inscribed in our fundamental law, as it has been in many constitutions written in the twentieth century. Moreover, for pragmatic political reasons –having to do largely with the politics of constitutional ratification – the framers decided to let individual states define the breadth of the franchise, which the states commonly did in their own constitutions.

Change in the legal and constitutional status of the right to vote unfolded over the course of two centuries, both in the states and, later, in federal law. Most – but by no

means all – of these changes involved expansion of the franchise. (The contractions were of great significance to our political history, but are of less concern here.) And most were piecemeal, rather than wholesale, changes. The “typical” alteration in suffrage law was crafted in a state constitutional convention, with a rewriting of the suffrage provision, eliminating one or more previously existing restrictions on voting.

Why Was Anyone Else Cut in on the Deal?

Perhaps the first question that contemporary advocates of democratic reform must ask of the historical record is how suffrage rights came to be enlarged at all. To broaden the franchise, legislators and other political leaders who had gained power with a restricted electorate had to agree to expand that electorate. To be sure, not all of them did agree. Opposition to change was commonly fierce, and it took both substantive and procedural forms, such as refusing to convene state constitutional conventions in the first place. Resistance to democratic change often succeeded, at least for a while and often for a long while: it took decades for Rhode Island to get rid of its property requirement, for California to permit Chinese immigrants to vote, and for Congress to pass the Seventeenth and Nineteenth Amendments.

Yet things did change; and advocates of reform tended to be successful when at least three of the following factors were clearly present.

1. A broad ideological shift was underway recognizing some new group or groups as legitimate claimants to political rights. Such a shift may indeed have been a prerequisite for reform. Ideological changes

were highly visible when property requirements were dropped in the early nineteenth century, as well as with the passage of the 15th and 19th amendments and the many reforms pushed through in the 1960s.

2. Substantial grassroots pressure was being applied by the non-enfranchised. Such activity was probably most important in promoting the enfranchisement of women (where it went on for decades) and in the voting rights movement of the 1950s and 1960s, but it also played a role in getting rid of property and tax requirements and in the passage of the 23rd amendment.

3. Military or national defense or diplomatic considerations created pressures for expanding the suffrage. As early as the American revolution and the war of 1812, this dynamic came into play, as militiamen who could not meet the property requirements for voting agitated for their political rights. It was also significant during the rhetorical conflicts of the early Cold War (the disfranchisement of African Americans in the South was an Achilles' heel in the American claim to stand for democracy in the third world) and in the passage of the 26th amendment (which lowered the voting age to the age at which men could be drafted into compulsory military service). Notably, Woodrow Wilson urged Congress to pass the 19th amendment as a “war measure” in order to shore up popular support for American entry into World War I. A variant on this theme is that the

participation of disfranchised American citizens in military conflict substantially strengthened their claim to have a “right” to vote, contributing to later reforms. This was true in the wake of the Civil War (for African Americans) as well as after World War II (for African Americans and Native Americans).

4. The dynamics of party competition were such that one political party stood to gain decisively by expanding the suffrage (and had sufficient clout to enact reform by itself) or both parties were reluctant to appear to oppose an expansion. The most vivid instance of the importance of party competition was the passage of the 15th amendment, written and sponsored by the Republican party in part to provide itself with a base of voters in the South. (To be fair, the Republicans also took a risk of losing votes in the North by backing black suffrage.) Similarly, the early Democratic party knew that it would benefit by dropping property and tax restrictions. Passage of both the 19th and the 26th amendments was facilitated by the reluctance of either party (at least in the political endgame) to oppose a suffrage expansion that was likely to occur (sooner or later) anyway – since such opposition could cost votes in the future. The events of the 1960s were riddled with sometimes contradictory partisan calculations, as both parties weighed the advantages of gaining black votes and the risks of losing white votes.

5. Glitches or contradictions in existing electoral laws that simply had to be remedied in one way or another. The foremost example of this impulse to action involved the 26th amendment: the passage of federal legislation to lower the voting age led to a Supreme Court decision that invalidated the legislation insofar as it applied to state (rather than federal) elections. The nation was then confronted with the nightmarish logistical prospect of needing two different sets of voting rolls, for federal and non-federal elections: the nightmare was banished by the passage, with record speed, of the 26th amendment. Yet that was not the only instance of the phenomenon. Passage of the 17th amendment was encouraged by a long series of senatorial elections that were deadlocked in state legislatures, producing no outcome and no representation. In the early 19th century, many taxpaying requirements for voting were dropped when they became extremely difficult to administer and kicked up knotty conceptual issues (e.g. who was actually paying the tax on a farm that one man rented from another?)

6. There is one instance in which economic self interest seems to have played a clear role in suffrage expansion: in the mid-nineteenth century, numerous state legislatures and constitutional conventions decided to extend the franchise to non-citizens in order to stimulate immigration, increase the tax base, and help pay off the public debt.

Although there is no close historical analogy to the “right to vote” amendment that we are currently contemplating, it is worth noting that several of the factors mentioned above are present in contemporary political life, albeit in somewhat pallid or preliminary form. There has, in fact, been a broad ideological shift over the course of the last sixty years in favor of suffrage as a universal right: indeed, most Americans think that suffrage is already a universal right. That may create an opening for political education and mobilization. There also is some grassroots pressure (DC, Puerto Rico, and perhaps around felon disfranchisement), but it is unlikely to become a national mass movement. Furthermore, Bush v. Gore and the actions of the Florida legislature in 2000 make clear that a serious “glitch” or contradiction in electoral processes could surely occur; it is now a “potential glitch” rather than a recurrent one, but savvy political analysts do not want to see a repeat of Election 2000.

Most importantly, perhaps, there may be diplomatic or security issues to which a “right to vote” amendment could meaningfully be linked. These include: 1) avoiding a possible electoral crisis that would de-legitimize a national administration in an era of widespread international conflict; and 2) providing an expression of the United States’ commitment to democracy in a form recognized in most other nations and in international declarations and conventions of human rights.

Constitutional Amendments versus Other Strategies for Reform

As noted earlier, the first federal amendments dealing with the right to vote were passed just after the Civil War. (Amendments to abolish or alter the Electoral College began to be proposed early in the nineteenth century but, as we have noticed, they were

never passed.) Until the late 1860s, all of the action was at the state level, and the breadth of the franchise came to be regarded as one of the most zealously guarded states' rights. Indeed, much of the vocal resistance to the 15th amendment in Congress came from Democrats who claimed that it constituted an unwarranted federal usurpation of an authority that belonged in the hands of the states.

Advocates of expanded democratic rights continued to work at the state level for the rest of the nineteenth century and for much of the twentieth century as well; the decentralization of the American political order was taken as a given. Yet reformers did periodically seek change through federal constitutional amendments – for reasons that were largely strategic rather than substantive. The 15th amendment was drafted by Republicans in Congress after they had witnessed a series of defeats for state-level black suffrage amendments in the north. It was their view (hindsight suggests that they were correct) that ratifying a federal amendment would be far easier than successfully organizing a long string of state actions – particularly since “impartial suffrage” provisions could be required of the ex-confederate states as a condition for readmission to the union. The 17th amendment was also strategically inspired, coming after some states had already adopted popular voting for senators, while others balked. Advocates of women's suffrage, of course, debated state versus federal action for decades, while different organizations pursued different strategies. The eventual decision by NAWSA (the largest suffrage organization) to focus on a federal amendment stemmed primarily from the judgment that it would be easier to pass; that decision, made in 1914, followed a burst of state referenda, most of which were defeated. Notably, many white, southern

suffragists opposed the federal amendment to the end, insisting that the franchise remained a state matter.

The other major impetus to federal action – most important perhaps in the years between World War II and 1970 – was the desire to declare and inscribe the right to vote to be a national value. In critical respects, the voting rights revolution of the 1960s constituted a nationalization, as well as a broadening, of the right to vote. Embracing the right to vote as a national value provided a rationale for the federal government's overthrow of states' rights, an overthrow carried out through constitutional amendments, legislation (the VRA, most obviously), and litigation. The 24th amendment, thus, had only minimal consequences – it terminated the poll tax in only four states -- but it was a powerful statement of national sovereignty.

In some instances, of course, federal amendments (rather than legislation) have been necessary for purely legal or constitutional reasons. This was the case for the 23rd, 24th and 26th amendments. A constitutional route would also appear to be necessary for any matters implicating the Electoral College or the electorates of DC and Puerto Rico.

Organizations, Strategies, and Tactics: Some Lessons from the Front of History

One of the clearest implications of the historical record is that successfully passing a constitutional amendment can take a great deal of time – time measured in decades, not months or years. An early version of the 17th amendment was introduced in 1826, and numerous drafts appeared in Congress in the late 19th century, long before its passage during the Progressive era. Agitation for a women's suffrage amendment also

began before the Civil War; in the 1880s an amendment even had substantial support in Congress – yet it took another thirty-five years for the amendment to pass. The national campaign to abolish the poll tax began in the 1930s, achieving full-fledged success only in the mid-1960s; similarly, the drive for voting rights for residents of DC began many years before the partial victory of the 23rd amendment. The only amendments that were passed quickly were the 15th and the 26th, and both emerged from extremely unusual circumstances. The 15th bubbled up from the cauldron of Civil War and Reconstruction; the 26th was the offspring of the procedural mess that Congress and the Supreme Court had managed to create in the early 1970s.

It is worth noting that the critical hurdle in the amendment process appears to be gaining congressional approval rather than winning ratification in the states. All of the amendments mentioned above were ratified within a few years of being passed by congress. Ratification was not always easy (or overwhelming), but it appears that amendments approved by congress generally have sufficient support to win ratification by the states. (This may be partially the consequence of the fact that reform advocates have developed a ratification strategy prior to choosing the amendment route: the ratification plan for the 19th amendment, for example, had been mapped out in detail long before congressional passage was finally secured.) The only voting rights amendment that has been passed by congress and that failed to be ratified was the DC Voting Rights amendment of 1978.

A second – rather more murky – implication of the history is that the passage of a constitutional amendment does not necessarily require the presence of a mass movement.

The most significant instance of an amendment passed without such a movement was, of course, the 15th: there were, to be sure, African Americans and former abolitionists who actively pressed for the end of racial barriers to enfranchisement, but they were relatively few in number and had limited clout. It is likely, moreover, that a large majority of white Americans opposed black enfranchisement in the 1860s. But the political elites within the Republican party, responding to a rapidly changing and complex set of circumstances (in the South and also in northern politics), came to believe both that black enfranchisement was critical to securing some of the goals for which the Civil War had been fought and that there was a limited time window within which an amendment could be passed. This was political reform engineered from the top – largely in the senate -- and grounded in an extraordinary mix of idealism and political self interest.

In three other instances, the 17th, 23rd, and 26th amendments, change was promoted by political elites against a backdrop of political agitation that was something other than a mass movement for reform. By 1910, sentiment in favor of choosing senators through popular elections was widespread, as was a broader impulse to reform and clean up American politics; there was little in the way of a movement focused on senatorial elections, but members of Congress (and state legislatures) from both parties were alert to the popular mood. In the District of Columbia, in the 1950s, a movement for voting rights did exist, loosely tied to the civil rights movement, yet the movement was confined geographically and could easily have been resisted by legislators far from the scene. Lowering the voting age to eighteen in 1971 was stimulated by a significant mass movement, but the aim of that movement was to end the war in Viet Nam and to resist the draft, rather than to permit eighteen-year-olds to vote. In each of these cases,

organized political activity brought pressure to bear on politicians at diverse levels of government, although none of these amendments was produced primarily by large-scale grassroots organizing.

There were, of course, two significant expansions of the franchise that were generated by popular political movements. The 19th amendment, preceded by the enfranchisement of women in various states, was the culmination of seventy years of organizing, of tireless efforts to mobilize women and enlist the support of men, to lobby and arm-twist legislators, to show strength in the streets. Sometimes organizationally unified, sometimes not, the movement pursued different strategies at different times, shifted alliances, adjusted the tone of its rhetoric until it finally found a “winning plan” during and just after World War I. The issue of women’s suffrage was different in several respects from all other voting rights issues, not least because it reached directly into every state, community, and household in the nation. Not surprisingly, then, its triumph was the triumph of a national movement.

The enfranchisement of African Americans in the South in the 1950s and 1960s was the work of a movement that successfully converted a regional issue into a national cause. The civil rights movement was centered, as it had to be, in the South, but the southern movement had influential and dedicated allies elsewhere in the nation: northern blacks, liberals, organized labor, and segments of both major political parties. These allies played a critical role in translating the strength and dedication of the southern movement into effective national political power that could pressure congress (and even the White House) into action. As it became increasingly clear that southern states, left to

their own devices, would not expand the suffrage, this national political pressure was essential for the movement to succeed.

To win, popular movements for suffrage expansion had to both persuade and pressure those who held political office. All such movements began by using conventional political tactics: petitions, letters to members of congress, speeches, rallies, personal visits to the offices of legislators, soliciting the support of candidates for public office. Yet both for women and for African Americans (and the same was true earlier, at the state level, for men who did not own property), victory was achieved when these conventional methods were accompanied by more militant tactics as well. Beginning in 1914, breakaway factions from the major suffrage organization (NAWSA) committed acts of civil disobedience to call attention to their cause and to disrupt business as usual in Washington and elsewhere. Civil disobedience also, of course, became a critical tactic for the civil rights movement, with the threat of even more militant methods looming not far from public consciousness. As is often the case in political mobilizations, the presence of militant factions, and non-standard tactics, served to attract the fire of the opposition while giving mainstream organizations an aura of moderation. Civil disobedience and disruption, both in the 'teens and in the 1950s and 1960s, also provoked the controversial use of force by public authorities, creating a problem that mainstream politicians then had to solve.

Despite the role played by militant tactics, much of the progress of voting rights amendments (and analogous legal changes in the states) has depended on conventional techniques of interest-group politics: displaying strength in the "streets" (or other public

spaces) while working assiduously to convince legislators that supporting reform was the right thing to do and in their political interest. Advocates of franchise expansion have often tried to avoid purely, or even largely, partisan appeals, lest they provoke an unproductive counter-reaction and undercut the appearance of acting on principle. But politicians count votes and are responsive to voters, and nearly all voting rights movements have ended up adopting a strategy of “rewarding their friends and punishing their enemies.” This dynamic was clearly visible in the 1840s in North Carolina when the absence of a property requirement to vote for governor led to the election of a governor who supported the abolition of an existing property requirement for the state senate. NAWSA, aided by the fact that women could already vote in some key states, adopted this strategy to great effect beginning in 1916, promising to endorse candidates whose national parties supported the enfranchisement of women. (I suspect that they may have learned this lesson from the complex jockeying that went on, a few years earlier, around the 17th amendment.) This old-fashioned strategy also played a key role in the events of the late 1950s and 1960s, as the northern wing of the civil rights movement was able to sustain pressure on elected officials from both parties.

A NOTE FROM THE DUSTINBINS OF HISTORY. Thus far, this paper has tried to illumine the anatomy of successful reform efforts. But there have also been failures, and from these too we can learn. The most recent was the failed effort to ratify the DC Voting Rights Amendment, which would have given the district voting representation in Congress. The amendment was passed by Congress in 1978 and given a seven-year window to be ratified by three-quarters of the states. When that window expired in 1986, only sixteen states – far short of the thirty-eight needed – had ratified the

amendment. Only one southern state, Louisiana, approved the amendment; only two in the West (Hawaii and Oregon) did so.

There were, to be sure, numerous reasons for this failure, but, according to contemporaries, two stand out. The first was that the DC Voting Rights Amendment was, from the outset, viewed through a partisan lens that also had a racial tint. As longtime civil rights lawyer and activist Joseph Rauh, Jr., put it, the district was seen as likely to send two “black, liberal, urban Democrats” to the Senate and one to the House; that prospect did not warm the hearts of Republicans who otherwise had little interest in the fate of the district. No Republican-majority branch of any state legislature approved the amendment. The second source of failure was a lack of funding that could be utilized by supporters to make the case for passage in distant states. Most citizens (in contrast to political elites) didn’t really care much about the amendment, and the resources were not available to convince them that they should.

Further back in our history, one can find a long series of efforts to reform or abolish the Electoral College. Scores of amendments designed to do so were introduced into congress in the nineteenth century, and the rate slowed only slightly in the twentieth century. Some of these measures called for direct popular election of the president, others for a pro-rating of electoral votes within each state, still others for apportioning electoral votes according to house seats alone (eliminating the “senatorial” add on which mocks the principle of “one person, one vote.”) Most of these proposed amendments got nowhere, although several did muster substantial support within congress, and many political analysts, from the 1840s to the 1940s, were convinced that the days of the

Electoral College were numbered. No full explanation of this long record of failure is possible here (indeed I don't think that one exists), and I suspect that the reasons for failure changed over time. But there can be no doubt that individual congressional delegations to congress, again and again, reacted to these proposals not from a consideration of which electoral system would best serve the nation but rather from a calculus (sometimes irrational) of the self-interest of their state and party. One congressional speech in 1949 favored abolition of the electoral college as a way of reducing the influence of communists who allegedly played a key role in the politics of New York state and thus (via the Electoral College) in the selection of presidents.

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This rapid dash through the historical record suggests that we should envision the “right to vote” amendment that we are now contemplating with both optimism and a long time horizon. The proposed amendment is unlikely to be passed quickly, yet that fact should not discourage us: very few democratic reforms have been passed quickly. Advancing this amendment will require a mix of strategies and organizing techniques, flexibly adjusted over time. This amendment is unlikely to galvanize an enormous mass movement – like the movements for women’s suffrage and black suffrage – but such a movement is not a prerequisite for success. Interest in this amendment should not be regionally limited; and since levels of formal enfranchisement are high, conventional methods of political mobilization hold substantial promise. Importantly, the case has to be made that this amendment will have no discernible or predictable partisan

consequences – that the benefits of having it and the risks of living without it will be similar for all political organizations. The key perhaps is to build a strong enough network of support and mobilization – in and out of Congress – to be able to rapidly seize the moment when some future event, now unforeseeable in its details, will open the door to success.

The Virtues and Vices of Compromise

One compelling and difficult strategic issue that we confront today is whether or not – and when and how – to compromise in the wording of our proposed amendment, in order to make it more politically palatable and more likely to gain passage. Not surprisingly, this is not the first time that such an issue has arisen, and the history is enlightening – even if it does fail to offer very specific guidance.

The voting rights amendment that occasioned the greatest debates about wording and details was the 15th, the amendment that, in the end, said simply that “the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” One of the first issues that advocates of black suffrage had to confront was whether or not to endorse women’s suffrage at the same time. (This came up originally in discussions of the Fourteenth amendment, which included the word “male.”) Many abolitionists were also supporters of women’s suffrage, and the leaders of the women’s movement fully expected that blacks and women would be enfranchised together. But whatever their convictions, the Republican (and abolitionist) leadership decided to sever the issues in the 1860s, in order to enhance the chances of gaining suffrage for African Americans. “One

question at a time,” declared Wendell Phillips. “This hour belongs to the Negro.” That decision is difficult to second guess, since incorporating women’s suffrage into the 14th and 15th amendments would surely have significantly reduced the odds of ratification. But Elizabeth Cady Stanton was not too far off when she warned that “if that word ‘male’ be inserted, it will take us a century at least to get it out.”

Yet the decision to leave women out of the equation was only the beginning of a long – and often inspiring – debate. Within Congress, there were many advocates of the 15th amendment who wanted that amendment to be far broader in scope than a ban on racial restrictions on voting. They sought to take down not just racial barriers but all other extant barriers to voting (except sex): education, property, taxpaying, literacy, nativity. Their rationale was twofold. First, they believed that the same principles that justified enfranchising African Americans supported the enfranchisement of all male citizens: if voting was a right, then it ought not be restricted by an individual’s ability to read or pay taxes. Second, they believed that in the absence of a broad amendment of this type, white southerners would end up disfranchising blacks by using superficially non-racial devices, such as literacy tests or taxpaying requirements.

The broadly worded amendment (often called the Wilson amendment after its sponsor, Senator Henry Wilson) was actually passed by the Senate and, at one point in a very complex legislative history, a version of it was passed by the House as well. But a conference committee, to the surprise of many, reported out the narrow version of the 15th amendment. This left many of the most fervent advocates of democratic rights faced with the unenviable choice of supporting a narrow amendment that they believed to be

inadequate or having no amendment at all. Most accepted the compromise, agreeing to take “half a loaf.” A few did not: Charles Sumner, one of the Senate’s foremost advocates of suffrage for African Americans, declined to vote for the 15th amendment.

History’s verdict on this compromise can only be mixed. Perhaps the Wilson amendment could have been ratified by the states, as its advocates claimed; but ratification was never a sure thing for any version of the amendment, and the broader the measure the greater the opposition it might have provoked. (As it was, California, for example, voted not to ratify the amendment because its legislators feared it would enfranchise the Chinese.) Wilson and his allies, however, were prescient in their vision of what would happen in the late nineteenth-century South, where blacks were indeed disfranchised, despite the 15th amendment, through mechanisms such as taxpaying requirements and literacy tests. Had the Wilson amendment become law, much of the history of the south (and parts of the north) over the next century would have unfolded differently. On the other hand, if the 15th amendment in its narrow form had not been ratified in the late 1860s, it is not clear that a ban on racial discrimination in voting would ever have been incorporated into the constitution. Once fully readmitted to the Union, the states of the ex-confederacy could easily have blocked such an amendment, with consequences that would still be reverberating today.

Conclusion: A Note on Rhetoric

For the last two hundred years and more, advocates of democratic rights – and of granting those rights to new groups and more individuals – have been fueled and sustained by the conviction that their cause was just. Henry Wilson, in the 1860s,

acknowledged that black suffrage was unpopular, even in the north, but he insisted that it was “right, absolutely right.” Given the difficulty of gaining passage of a constitutional amendment, that conviction has to be strong.

That conviction – expressed without righteousness – also must be at the heart of the rhetoric put forward to support this amendment. Every successful movement for the expansion of the franchise in the United States has, in the end, made the same fundamental argument: that laws have to be changed in order to make the reality of political life in our nation conform with our professed values and principles. The historical record strongly suggests that people can, in fact, be persuaded to make changes on that basis and for that reason. The core of the amendment that we are contemplating here asks for nothing more – or less – than inscribing in our constitution a principle to which the vast majority of Americans already adhere: that voting is a right and that universal suffrage is the only legitimate basis for selecting our leaders. This is not a position that many will want to oppose (at least publicly). To the extent that the amendment implies enfranchising those who now cannot vote, it will be up to us to make the case – as our predecessors have many times before – that these “outsiders” too have rights and that the health of the nation is better served by inclusion than by disfranchisement. Pointing to examples from our own history may even help the cause.

A note on sources: the great bulk of the material for this essay is taken from my book, *The Right to Vote: the Contested History of Democracy in the United States*. Other sources (particularly on DC, the electoral college amendments, and the 17th amendment) are available by request.

One notable, if unsuccessful, effort to enlist the federal government in the cause of an expanded suffrage was the lawsuit filed by reformers in the 1840s, in the wake of the Dorr War in Rhode Island. The reformers sought to enlist Washington into the struggle for a broader franchise by invoking Article IV of the constitution (“the United States shall guarantee to every State in this Union a Republican Form of Government”). The case, Luther v. Borden, went to the Supreme Court, which deflected the claims of the reformers.

Lowering the voting age through the 26th amendment was also, as discussed earlier, a purely strategic decision.