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THREE QUESTIONS FOR THE “RIGHT TO VOTE” AMENDMENT

Richard Briffault*

Should the United States Constitution be amended to guarantee the right to vote? To the average citizen—and probably many lawyers—this almost certainly would be taken as an absurd question. Most people probably assume that the right to vote is, at least in principle, already guaranteed by the Constitution even if our practices fall short of our ideals.¹ But, in fact, although the Constitution frequently refers to the “right . . . to vote”—and the Supreme Court’s jurisprudence has long treated voting as a fundamental right—the right to vote *per se* is nowhere guaranteed. A right-to-vote amendment would, in the words of the Reverend Jesse Jackson, “[p]ut the right to vote into the Constitution.”² Given the fundamental place of the right to vote in our thinking about democracy, that sounds like an incontestably good idea. But the issue is not as simple as that. Amending the Constitution is sufficiently onerous—requiring initial approval by two-thirds of both the House of Representatives and of the Senate, followed by ratification by the legislatures of three-fourths of the states³—that only twenty-seven amendments have been ratified in the 226 years since the Constitution came into effect, with only two amendments taking effect in the last forty-five years.⁴ Securing the passage and ratification of a right-to-vote amendment would involve a major effort of political will.⁵ Would it be worth that effort?

This Essay addresses that question by asking and sketching out answers to three further questions: Why have a right-to-vote amendment? What would it say? And how would it affect some of the most pressing current voting issues? Part I addresses

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¹ As Rep. Mark Pocan (D-Wisc.) put it in proposing a right-to-vote amendment, “this right is so fundamental that most Americans, understandably, assume it is already enshrined in the Constitution.” 159 CONG. REC. H2662 (daily ed. May 16, 2013) (statement of Rep. Pocan).

² Jesse L. Jackson, Sr., *Put the Right to Vote into the Constitution*, WASH. INFORMER (Mar. 11, 2014), <http://washingtoninformer.com/news/2014/mar/11/jesse-jackson-put-right-to-vote-constitution/>.

³ U.S. CONST. art. V. The Constitution also provides for an alternative amendment process initiated by the legislatures of two-thirds of the states calling for a constitutional convention, for proposing amendments, which, again, would take effect only if ratified by three-quarters of the states. *Id.*

⁴ U.S. CONST. amend. XXVI (ratified in 1971); U.S. CONST. amend. XXVII (ratified in 1992).

⁵ See Janai S. Nelson, *A Call for a Right-to-Vote Amendment on Constitution Day*, REUTERS (Sept. 17, 2013), <http://blogs.reuters.com/great-debate/2013/09/17/a-call-for-a-right-to-vote-amendment-on-constitution-day/>.

the case for the right-to-vote amendment. It suggests that there are three concerns that support the push for an amendment. The first is simply expressive—the sheer significance of the right to vote in our panoply of political rights requires that it be expressly guaranteed in the Constitution. The second would use the occasion of enacting an amendment to correct recent United States Supreme Court decisions that have left many observers feeling that the right to vote is, currently, inadequately protected. The third, related to the second, would use the amendment to bolster the role of the federal government in enforcing voting rights.

Part II turns to the issue of what would a right-to-vote amendment say. That turns out to be a surprisingly tricky question. Over the last decade, at least three different right-to-vote amendments have been put forward and they differ significantly in length, detail, and focus.⁶ Virtually every state constitution includes a right to vote provision, yet these, too, differ in their terms.⁷ The drafting issues reflect the fact that the right to vote is not the negative protection against government action characteristic of most of our rights but an affirmative privilege to participate in a government-created and government-structured electoral process. As a result many right-to-vote proposals specifically—and sometimes differently—address both who has the right to vote and government's authority to regulate voting.

Part III considers how an amendment could affect some of the principal current voting issues. Of course, to a considerable degree that will turn on the text of any amendment, as discussed in Part II. However, it seems doubtful that any likely amendment would address some hotly contested issues—such as minority vote dilution, partisan gerrymandering, or ballot access for third parties and independent candidates—that do not directly involve casting ballots. It is also unclear whether an amendment would enfranchise currently disenfranchised groups or directly address those controversial administrative regulations—such as photo identification or proof-of-citizenship requirements—that can make it difficult for qualified voters to vote. Much would depend on just how vigorously Congress enforces the amendment and how the Supreme Court applies the amendment and the enforcement power, much as the right to vote and federal enforcement authority under the existing voting amendments are shaped by Court decisions concerning what constitute appropriate justifications for government regulations affecting the vote, how narrowly tailored the law must be, how much evidence a government must provide to show that a regulation is warranted, and the role of the federal government in our federal system. Although a right-to-vote amendment could symbolically validate the central place of voting in our democratic order, its practical significance in actually securing the right to vote—like the right to vote today—would likely turn on the future actions of Congress and the Court.

⁶ See Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 96 n.34 (2014).

⁷ See *id.* at 89–90; see *infra* notes 86–91 and accompanying text.

I. WHY HAVE A RIGHT-TO-VOTE AMENDMENT?

A principal reason for a right-to-vote amendment is the fact—which would probably come as a great surprise to most Americans—that the Constitution does not currently provide for the right to vote in any elections, federal, state, or local. To be sure, the Constitution frequently refers to voting rights. Article I and the Seventeenth Amendment provide for the election of members of the United States House of Representatives and the Senate.⁸ Section 2 of the Fourteenth Amendment provides for the reduction in representation in the House of Representatives of any state that denies the right to vote in federal or state elections to eligible citizens (“except for participation in rebellion [] or other crime”).⁹ The Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments prohibit certain types of restrictions on voting—respectively, based on race, color or previous condition of servitude; sex; nonpayment of poll tax or any other tax (in federal elections only); or age for persons eighteen or older.¹⁰ Each of these amendments (along with the Fourteenth) provide for Congressional “power to enforce . . . by appropriate legislation.”¹¹

However, none of these measures actually affirmatively provides for a substantive right to vote. Article I, Section 2 and the Seventeenth Amendment leave the determination of the qualifications for voting for members of Congress to the states,¹² although Article I, Section 4 does give Congress the power to regulate the “Times, Places, and Manner of holding Elections for Senators and Representatives.”¹³ The Fourteenth Amendment “does not provide citizens the right to vote as an explicit liberty but instead details a potential penalty states will suffer if they deny that right.”¹⁴ And the other amendments “all speak in the passive voice,”¹⁵ providing merely that the right to vote “shall not be denied [or abridged]’ according to [one of the forbidden criteria].”¹⁶ In short, the Constitution either piggybacks the right to vote on state decisions or implies the right by negating various grounds for denying the vote, but it never explicitly grants the right to vote to anyone.

⁸ U.S. CONST. art. I; U.S. CONST. amend. XVII.

⁹ U.S. CONST. amend. XIV, § 2.

¹⁰ U.S. CONST. amend. XV; U.S. CONST. amend. XIX; U.S. CONST. amend. XXIV; U.S. CONST. amend. XXVI.

¹¹ See sources cited *supra* note 10; U.S. CONST. amend. XIV, § 5.

¹² They each provide that the Congressional electorate shall consist of the “Electors in each State [who] have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.” U.S. CONST. art. I, § 2.

¹³ U.S. CONST. art. I, § 4. Article I, Section 4 first gives the “Times, Places, and Manner” power of regulating federal elections to the legislatures of the states but then provides that “Congress may at any time by Law make or alter” such state laws. *Id.*

¹⁴ Douglas, *supra* note 6, at 96.

¹⁵ *Id.*

¹⁶ *Id.* (quoting U.S. CONST. amend. XIX).

If one role of a Constitution is to express the values that are important to a society,¹⁷ this seems a major omission. Voting is one of the principal ways “in which citizens protect their liberties from government,”¹⁸ and the right to vote has long been “understood as a manifestation of full membership” in a political community.¹⁹ A right-to-vote amendment would provide the formal, textual recognition of the centrality of voting in our democracy that the Constitution is currently missing. If the Second Amendment recognizes that a central value in our society is the right to keep and bear arms,²⁰ then surely it is appropriate for another amendment to express the importance of the right to vote. Moreover, a right-to-vote amendment would signify that the right to vote is an *American* right.²¹ Under the Constitution as written the right to vote is essentially a state-granted right, albeit with the states subject to certain non-discrimination requirements. Consistent with the state-based nature of the voting right, every state constitution recognizes the right to vote.²² A right-to-vote amendment would nationalize the right and make it an element of national citizenship, not a derivative of state citizenship.²³

Although the expressive value of an amendment would be important, that alone cannot explain the current calls for amending the Constitution. After all, although the right to vote per se is not protected by the Constitution, constitutional law has long treated the vote as a fundamental right, and modern Supreme Court jurisprudence has given the vote robust protection. As far back as 1886, the Court pronounced the “political franchise of voting” to be “a fundamental political right, because preservative of all rights.”²⁴ In the 1960s, the Court made it clear that voting is a fundamental right for the purposes of the Equal Protection Clause of the Fourteenth Amendment.²⁵ Applying strict scrutiny, the Court found that the Equal Protection Clause invalidated the poll tax,²⁶ tax payment requirements for voting on municipal bond issues²⁷

¹⁷ Cf. Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000).

¹⁸ James A. Gardner, *Liberty, Community and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*, 145 U. PA. L. REV. 893, 898 (1997).

¹⁹ *Id.*

²⁰ U.S. CONST. amend. II.

²¹ As Rep. Pocan (D-Wisc.) put it, the purpose of the right-to-vote amendment is for the Constitution to “explicitly guarantee, without a doubt, the right of the American people to vote.” 159 CONG. REC. H2662, H2663 (daily ed. May 16, 2013) (statement of Rep. Pocan).

²² See Douglas, *supra* note 6, at 89.

²³ As Jesse Jackson put it, “most Americans do have a state right to vote, but they don’t have a citizenship right to vote.” See Jackson, *supra* note 2.

²⁴ *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

²⁵ See *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966) (holding that poll taxes violate the Equal Protection Clause of the Fourteenth Amendment).

²⁶ *Id.*

²⁷ *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970); *Cipriano v. City of Houma*, 395 U.S. 701 (1969).

and in school board elections,²⁸ and durational residency requirements longer than fifty days.²⁹ The poll tax decision was particularly striking. The Twenty-Fourth Amendment banning the use of the poll tax, but only in federal elections, had just been ratified in 1964;³⁰ the Court went ahead in 1966 and found that application of a poll tax in *any* election violated the Equal Protection Clause.³¹ Going beyond the right to cast a ballot, the Court invoked the fundamental nature of the right to vote when it also held that the Equal Protection Clause requires that votes be equally weighted so that the “one person, one vote” doctrine applies to elections for state office³² and general purpose local governments.³³ The Court read a similar equality principle into Article I, Section 2 when it determined that the intrastate apportionment of Congressional districts must also satisfy “one person, one vote.”³⁴ Under the minority vote dilution doctrine, voting rules that make it unduly difficult for racial and ethnic minorities to elect candidates of their choice may violate the Equal Protection Clause.³⁵ The Court also determined that the right to vote could support successful challenges to state ballot access laws that make it too difficult for third parties and independents to win a place on a state’s ballot.³⁶ Such laws may unconstitutionally burden “the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.”³⁷

However, in recent decades, the Court has been far less protective of the right to vote. The Court has refused to use the Equal Protection Clause against partisan gerrymanders,³⁸ has sharply curtailed the use of the right to vote to challenge state laws that burden third parties and independent candidates,³⁹ and has required proof of

²⁸ *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969).

²⁹ *Burns v. Fortson*, 410 U.S. 686 (1973); *Marston v. Lewis*, 410 U.S. 679 (1973); *Dunn v. Blumstein*, 405 U.S. 330 (1972).

³⁰ U.S. CONST. amend. XXIV.

³¹ *Harper*, 383 U.S. at 663. For a critical assessment of the Court’s failure to look to the Twenty-Fourth Amendment in its poll tax decision, see Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 NW. U. L. REV. 63 (2009).

³² *Reynolds v. Sims*, 377 U.S. 533 (1964); *Gray v. Sanders*, 372 U.S. 368 (1963).

³³ See, e.g., *Bd. of Estimate v. Morris*, 489 U.S. 688 (1989); *Avery v. Midland Cnty.*, 390 U.S. 474 (1968).

³⁴ *Wesberry v. Sanders*, 376 U.S. 1 (1964).

³⁵ See *White v. Regester*, 412 U.S. 755, 765–70 (1973) (finding that multi-member districts were used invidiously to cancel out or minimize the voting strength of African Americans and Mexican Americans).

³⁶ See *Williams v. Rhodes*, 393 U.S. 23 (1968) (holding unconstitutional laws that make it virtually impossible to add third parties to the election ballot).

³⁷ *Id.* at 30 (1968); see also *Bullock v. Carter*, 405 U.S. 134, 144 (1972) (invalidating a filing fee that made it difficult for some candidates to run and, thus, “tends to deny some voters the opportunity to vote for a candidate of their choosing”).

³⁸ See *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

³⁹ See, e.g., *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997); *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986).

discriminatory intent to establish a violation of the constitutional minority vote dilution doctrine.⁴⁰ Although the Court still applies strict scrutiny to measures that place a “severe burden” on the right to vote, it employs a more relaxed and “flexible” standard of review to what it considers to be reasonable, nondiscriminatory laws or regulations even if they, too, burden the right to vote.⁴¹ The status of the core of the right to vote—the right to cast one’s ballot and have it counted—also at times seems precarious. In *Richardson v. Ramirez*,⁴² the Court relied on the Fourteenth Amendment’s exception for “participation in rebellion or other crime” to uphold state laws disenfranchising felons and ex-felons.⁴³ In *Bush v. Gore*,⁴⁴ the Court emphasized that the Constitution does not provide a right to vote for President of the United States, noting that not only does the “individual citizen” have “no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to . . . appoint [its] members of the electoral college,” but also that “[t]he State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors.”⁴⁵ In *Crawford v. Marion County Election Board*,⁴⁶ the Court upheld the power of states to require registered voters to present government-issued photo identification as a condition for being allowed to cast a ballot.⁴⁷ Last year in *Arizona v. Inter Tribal Council of Arizona*⁴⁸ the Court both underscored the states’ control over who is qualified to vote in federal elections⁴⁹ and suggested the states may also be allowed to require voters to provide the proof the states deem necessary to determine whether a voter meets those qualifications⁵⁰—a suggestion taken up by a federal district court when it held in March of this year that states can require otherwise eligible voters to provide documentary proof of citizenship in order to be allowed to register to vote in federal elections.⁵¹

Thus, a critical second purpose of a right-to-vote amendment is to “correct” some of these decisions,⁵² expand the franchise to include excluded groups, and provide more robust protection of the right to vote against a rising tide of state administrative

⁴⁰ See *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

⁴¹ See, e.g., *Burdick v. Takushi*, 504 U.S. 428, 433–34 (1992).

⁴² 418 U.S. 24 (1974).

⁴³ *Id.* at 25.

⁴⁴ 531 U.S. 98 (2000).

⁴⁵ *Id.* at 104.

⁴⁶ 553 U.S. 181 (2008).

⁴⁷ *Id.*

⁴⁸ 133 S. Ct. 2247 (2013).

⁴⁹ *Id.* at 2257–59.

⁵⁰ *Id.* at 2259–60.

⁵¹ *Kobach v. United States Election Assistance Comm’n*, No. 13-cv-4095-EFM-TJJ, 2014 WL 1094957 (D. Kan. Mar. 19, 2014).

⁵² See Nelson, *supra* note 5 (citing “the Supreme Court’s infamous *Bush v. Gore* decision,” and the claim that a “right-to-vote amendment would open the door to voting access for excluded groups, such as . . . citizens convicted of a felony”).

restrictions such as photo ID requirements, documentary proof of citizenship requirements, limits on voter registration mobilization efforts, and rollbacks in the availability of early voting.⁵³ A right-to-vote amendment could accomplish some of these goals either directly through explicit protective provisions or by providing for strict judicial review of voting regulations that burden the right to vote. As some advocates have noted, at least some state courts, applying their state right-to-vote amendments, have invalidated state administrative requirements, like photo IDs, that would likely pass federal constitutional muster.⁵⁴ A right-to-vote amendment could also address limitations on the right to vote that are built into the Constitution and cannot be addressed through the Equal Protection Clause, such as the structuring of representation of Congress and the Electoral College through the states, thereby denying elected representation in the federal government to American citizens who live outside the states in the District of Columbia, Puerto Rico, and other nonstate jurisdictions.⁵⁵

Third, a right-to-vote amendment could bolster Congressional power to protect voting rights. Beginning in the 1960s, the Supreme Court repeatedly upheld Congressional authority to vindicate and expand voting rights.⁵⁶ *South Carolina v. Katzenbach*⁵⁷ sustained Congress’s power to bar literacy tests and require federal preclearance of new voting rules in so-called “covered jurisdictions” that had a history of racial

⁵³ For discussions of current state law challenges to voting access, see *Voting Laws Roundup 2014*, BRENNAN CTR. FOR JUSTICE (June 16, 2014) <http://www.brennancenter.org/analysis/voting-laws-roundup-2014>. See also J. MIJIN CHA & LIZ KENNEDY, DEMOS, MILLIONS TO THE POLLS: PRACTICAL POLICIES TO FULFILL THE FREEDOM TO VOTE FOR ALL AMERICANS 26–27 (2014) (discussing new state laws restrict voter registration drives); *id.* at 50–52 (restrictive state voter ID laws).

⁵⁴ See 159 CONG. REC. H2662, H2663 (daily ed., May 16, 2013) (statement of Rep. Pocan) (noting that Wisconsin state courts relied on the right-to-vote provision of the state constitution to invalidate a law that would have required photo ID and reduced registration opportunities and the availability of absentee ballots); see also *Weinschenk v. State*, 203 S.W.2d 201 (Mo. 2006) (en banc) (invalidating photo ID requirement under the right-to-vote provision of the Missouri Constitution). But see *League of Women Voters of Wisc. Educ. Network, Inc. v. Walker*, 851 N.W.2d 302 (Wis. 2014) (finding photo ID requirement consistent with right-to-vote provision of Wisconsin Constitution). To be sure, most state courts simply track federal right-to-vote jurisprudence even when they interpret the right-to-vote provisions of their own state constitutions. See Douglas, *supra* note 6, at 106–10.

⁵⁵ The Twenty-Third Amendment provides for the selection of presidential electors from the District of Columbia. But apart from the effect of this Amendment, only citizens of states can participate in the election of officers of the federal government. See, e.g., *Adams v. Clinton*, 90 F. Supp. 2d 35 (D.D.C. 2000) (three-judge court) (per curiam) (dismissing claim challenging failure to provide District of Columbia representation in Congress), *aff’d*, 531 U.S. 940 (2000); *Igartua de la Rosa v. United States*, 32 F.3d 8 (1st Cir. 1994), *cert. denied*, 514 U.S. 1049 (1995); *accord* *Igartua de la Rosa v. United States*, 229 F.3d 80 (1st Cir. 2000).

⁵⁶ See generally *Ackerman & Nou*, *supra* note 31, at 63–69 (describing voting rights cases the Court began hearing in the 1960s).

⁵⁷ 383 U.S. 301 (1966); *accord* *Lopez v. Monterey Cnty.*, 525 U.S. 266 (1999); *City of Rome v. United States*, 446 U.S. 156 (1980); *Georgia v. United States*, 411 U.S. 526 (1973).

discrimination in voting.⁵⁸ The Court also subsequently upheld Congress's power to ban literacy tests nationwide⁵⁹ (even though the Court had previously held that literacy tests for voting are not unconstitutional),⁶⁰ upheld Congress's extension of the right to vote in federal elections to 18-year-olds (before the ratification of the Twenty-Sixth Amendment made 18-year-olds eligible to vote in all elections),⁶¹ and adopted a "results" test for proof of minority vote dilution under the Voting Rights Act that was less stringent than the test the Court had previously found the Constitution required.⁶² Indeed, Congress acted repeatedly under the Voting Rights Act of 1965, as amended in 1970, 1975, 1982, and 2006, to protect the voting rights of racial and language minorities.⁶³ Using its Article I, Section 4 "Times, Places, and Manner" power, Congress enacted the National Voter Registration Act of 1993,⁶⁴ which facilitated voter registration in federal elections (and indirectly in state elections as it would be costly for states to maintain two sets of registration procedures), and the Help America Vote Act (HAVA),⁶⁵ which sets minimum standards for voting systems used in elections for federal office (again, states are likely to use the same standards for their own elections), including requiring states to permit "provisional" voting by people who appear at a polling place but whose names are not on the official list of eligible voters; the ballot is "provisional" to the subsequent determination of the voter's eligibility.⁶⁶

Again, however, the Supreme Court has recently called into question the scope of the federal enforcement power under the existing Constitution. In 2013, the Court in *Shelby County v. Holder*⁶⁷ invalidated on federalism grounds the provision in the 2006 Voting Rights Reauthorization and Amendments Act continuing the original Voting Rights Act's formula—previously sustained under the enforcement authority provided by the Fourteenth and Fifteenth Amendments—for determining what constitutes a covered jurisdiction for purposes of the law's preclearance requirement, thereby effectively undoing the preclearance provision, which is arguably the heart of the Act.⁶⁸ Just one week before *Shelby County*, the Court in *Inter Tribal* called into question the scope of Congressional authority to regulate *federal* elections under Article I, Section 4 when it noted that the state's constitutional authority to determine the qualifications for voting in federal elections means that "it would raise

⁵⁸ *Katzenbach*, 383 U.S. at 302–05.

⁵⁹ *Oregon v. Mitchell*, 400 U.S. 112 (1970).

⁶⁰ *Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45 (1959).

⁶¹ *Mitchell*, 400 U.S. at 112.

⁶² *Thornburg v. Gingles*, 478 U.S. 30 (1986).

⁶³ See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013); *Thornburg*, 478 U.S. at 34; *Mitchell*, 400 U.S. at 112.

⁶⁴ 42 U.S.C. § 1973gg (2006).

⁶⁵ 42 U.S.C. § 15301 et seq. (2006).

⁶⁶ *Id.*

⁶⁷ 133 S. Ct. at 2615–17.

⁶⁸ *Id.*

serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications,⁶⁹ including requiring a government-issued photograph to prove identity or government-issued documents to prove citizenship.⁷⁰ The Court also mentioned, but did not address, the argument that registration is itself a “qualification” for voting within the meaning of Article I, Section 2 and, thus, entirely within the control of the states.⁷¹ With much of the current threat to voting rights coming from state rules and regulations dealing with the registration process, proof of eligibility to vote, and access to early voting, absentee voting, and provisional ballots, federal preclearance of changes that affect covered jurisdictions and federal power to regulate the voting process in federal elections are critical bulwarks for protecting the right to vote and undoing state restrictions. The Supreme Court’s erosion of federal enforcement authority offers another justification for a right-to-vote amendment which could provide new support for Congressional action to protect voting rights jeopardized by state legislation.⁷²

Of course whether a right-to-vote amendment would either extend the right to vote of its own force or provide the basis for Congressional enforcement action turns on what such an amendment actually provides. That is the subject of the next section.

II. WHAT WOULD A RIGHT-TO-VOTE AMENDMENT SAY?

One problem with discussing a right-to-vote amendment is that multiple versions, with very different provisions, have been proposed over the past dozen years.⁷³ In 2003, Representative Jesse Jackson, Jr., proposed a multisection amendment⁷⁴ that

⁶⁹ *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2258–59 (2013).

⁷⁰ *Id.* at 2259. The Court also took a swipe at the 1970 decision in *Oregon v. Mitchell*, 422 U.S. 112 (1970), which upheld Congress’s power to lower the voting age for federal elections. The Court dismissed *Mitchell* as “of minimal precedential value” because no rationale for that decision commanded the votes of five justices. *Inter Tribal*, 133 S. Ct. at 2258 n.8.

⁷¹ *Id.* at 2259 n.9.

⁷² *See, e.g.*, Nelson, *supra* note 5 (invoking *Shelby County* in making the case for a right-to-vote amendment); Jackson, *supra* note 2 (same).

⁷³ Some right-to-vote amendment proposals long predate the current discussion of such an amendment. During the course of the debate within the Johnson Administration in 1964–65 over how to vindicate the voting rights of African Americans, then–Deputy Attorney General Nicholas Katzenbach sent President Johnson a memo regarding an amendment that would have prohibited the denial or abridgement of the right to vote, of any citizen, other than for (1) the inability to meet a residency requirement of less than sixty days or minimum age requirements set by state law; (2) a conviction of a felony for which no pardon or amnesty has been granted; (3) imprisonment at the time of registration or election; or (4) mental incompetency. *See Ackerman & Nou, supra* note 31, at 91–92 n.153. The measure, like all other right-to-vote proposals, would have given Congress the power to enforce by appropriate legislation. *See id.* The memo, however, apparently never led to a formal amendment proposal. *See id.* at 92–98.

⁷⁴ H.R.J. Res. 28, 108th Cong. (2003).

would: (1) guarantee the right of a citizen eighteen years of age and older to “vote in any public election held in the jurisdiction in which the citizen resides”; (2) subject all federal or state voting regulations that deny or abridge the vote to the requirement that they be “narrowly tailored to produce efficient and honest elections”; (3) require states to administer their elections “in accordance with election performance standards established by the Congress”; (4) require states to adopt same-day voter registration; (5) eliminate the so-called faithless elector problem by requiring presidential electors to vote for the winner of the presidential election in the state from which they are appointed; and (6) give Congress the power to enforce by appropriate legislation.⁷⁵ The amendment had forty-seven cosponsors but never got out of committee.⁷⁶ Representative Jackson subsequently proposed the same amendment in 2005,⁷⁷ 2007,⁷⁸ 2009,⁷⁹ and 2011.⁸⁰ The versions after 2004 dropped the faithless elector provision but otherwise remained the same. The 2005 version obtained the most cosponsors—fifty-five—but no version ever got out of committee.⁸¹

A second alternative right-to-vote amendment is the one proposed by Professor Jamin Raskin in 2004.⁸² His proposal would: (1) guarantee popular election of presidential electors; (2) provide for the election of presidential electors by the territories and Congressional representation of the District of Columbia; (3) provide that all citizens at least eighteen years of age have both the right to vote and to be candidates for state executive and legislative offices and “where applicable” for Congress; (4) provide that nothing in the amendment “shall be construed to deny the power of Congress or the States to expand voting rights to other disenfranchised persons”; and (5) give Congress the power to enforce by appropriate legislation.⁸³ Unlike the Jackson proposal after the faithless elector provision was dropped, this measure combined a broad recognition of the right to vote with measures aimed at extending participation in federal elections to nonstate citizens and expanding the rights of candidacy. On the other hand, unlike the Jackson measure, the Raskin measure did not address voter registration and the administration of elections or set a standard for reviewing administrative requirements.

A third, and much briefer, alternative proposal emerged in 2013. With Jesse Jackson, Jr.’s departure from Congress in late 2012,⁸⁴ Representatives Mark Pocan

⁷⁵ *Id.* The proposal would have applied the same requirement to electors chosen from the District of Columbia. *Id.*

⁷⁶ Bill Tracking, H.R.J. Res. 28, 108th Cong. (Lexis 2003).

⁷⁷ H.R.J. Res. 28, 109th Cong. (2005).

⁷⁸ H.R.J. Res. 28, 110th Cong. (2007).

⁷⁹ H.R.J. Res. 28, 111th Cong. (2009).

⁸⁰ H.R.J. Res. 28, 112th Cong. (2011).

⁸¹ H.R.J. Res. 28, 109th Cong. (2005).

⁸² Jamin Raskin, *A Right-to-Vote Amendment for the U.S. Constitution: Confronting America’s Structural Democracy Deficit*, 3 ELEC. L.J. 559, 573 (2004).

⁸³ *Id.*

⁸⁴ While under federal investigation for financial improprieties in the fall of 2012, Jackson resigned from Congress citing health considerations. Michael S. Schmidt, *Jesse Jackson Jr.*

(D.-Wisc.) and Keith Ellison (D.-Minn.) took up the cause. Their proposal—which is the only one currently before Congress—concisely, indeed tersely, provides: “Every citizen of the United States, who is of legal voting age, shall have the fundamental right to vote in any public election held in the jurisdiction in which the citizen resides” and that Congress shall have the power to enforce by appropriate legislation.⁸⁵

It could also be instructive to look at the right-to-vote provisions of state constitutions, as those have often been suggested as a model for federal action. Few, if any, are as simple as the Pocan-Ellison measure. New York, for example, guarantees the right to vote to citizens who are eighteen years of age or older, satisfy a thirty-day residency requirement, and have not been convicted of bribery, “any infamous crime,” or election fraud.⁸⁶ The provision also goes on to, *inter alia*, define residence, authorize absentee voting, require the legislature to establish a voter registration system and voter identification by signatures, and mandate that the registration and election system be administered by a bipartisan board.⁸⁷ The California Constitution begins with a simple Pocan-Ellison-like declaration that “[a] United States citizen eighteen years of age and resident in this State may vote,” but then goes on to provide, *inter alia*, that the “Legislature shall define residence and provide for registration,” prohibit “improper practices that affect elections,” and “provide for the disqualification of electors while mentally incompetent or imprisoned or on parole for the conviction of a felony.”⁸⁸ Even the constitutions of states whose courts have gone beyond the Supreme Court in policing restrictive identification requirements do not simply guarantee a right to vote. The Missouri Constitution provides that “[a]ll citizens of the United States . . . over the age of eighteen who are residents of this state and of the political subdivision in which they offer to vote are entitled to vote in all elections by the people,” but then goes on to authorize a voter registration system and conditions eligibility to vote on being registered, denies the vote to the mentally incompetent, and authorizes the denial of the vote to persons convicted of a felony or of a “crime connected with . . . the right of suffrage.”⁸⁹ Similarly, the Wisconsin Constitution, after also providing that “[e]very United States citizen age eighteen or older who is a resident of an election district in this state is a qualified elector of that district,” authorizes

Pleads Guilty: ‘I Lived Off My Campaign,’ N.Y. TIMES (Feb. 20, 2013), <http://www.nytimes.com/2013/02/21/us/politics/jesse-l-jackson-jr-pleads-guilty-to-wire-and-mail-fraud.html>. Jackson subsequently admitted to the improper use of campaign funds for personal purposes and ultimately pled guilty to federal mail and wire fraud. See Amanda Becker, *Ex-Rep. Jackson Reported to Admit to Campaign Finance Violations in Plea Deal*, ROLL CALL (Feb. 8, 2013, 1:01 PM), http://www.rollcall.com/news/ex_rep_jackson_reported_to_admit_to_campaign_finance_violations_in_plea-222278-1.html.

⁸⁵ H.R.J. Res. 44, 113th Cong. (2013). This measure was recently endorsed by Rev. Jesse Jackson. See Jackson, *supra* note 2.

⁸⁶ N.Y. CONST. art. II, §§ 1–9.

⁸⁷ *Id.*

⁸⁸ CAL. CONST. art. II, §§ 2–4.

⁸⁹ MO. CONST. art. VIII, § 2.

the legislature to enact laws defining residency, providing for voter registration, and excluding from the suffrage persons convicted of a felony unless restored to civil rights or adjudged incompetent.⁹⁰ However, Wisconsin, similar to the Raskin proposal, would permit the extension of the vote to “additional classes” subject to the approval of the voters at a general election.⁹¹

It is difficult to decide whether a right-to-vote amendment is a good idea or worth the political effort necessary to get it ratified without knowing what the new constitutional text would say; as this brief review of some amendment proposals and state constitutional provisions indicates, there is no agreement on either the scope or content of such amendment. Indeed, these proposals and provisions raise three issues that any right-to-vote amendment would have to address and resolve. First, who would qualify to have the right to vote? The right to vote differs from other rights which are protections from government in that it is a right to participate in a government-created political process. No provision or proposal—not even the concise Pocan-Ellison measures—provides for a universal right to vote. All define a category of qualified voters. All begin by limiting the vote to eighteen-year-old resident citizens, with different degrees of attention to the meaning of resident. At the state level, some further narrow—or permit the legislature to further narrow—the protected class of voters by excluding or permitting the exclusion of convicted felons and the mentally incompetent. Some of these measures—the Raskin proposal and the Wisconsin constitution—would permit the expansion of the electorate beyond those whose rights are constitutionally protected. The others leave open the possibility that the guarantee of the right to vote for some denies it to those not in the protected category—at least not without another amendment.

Second and relatedly, voting entails the voter’s engagement with a government-run administrative process. As the Supreme Court has noted,

[c]ommon sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; ‘as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.’⁹²

Certainly, there must be some process for determining that voters meet the qualifications set or authorized by the constitution. Many of the state constitutions address this by expressly providing for voter registration or directing or authorizing the legislature

⁹⁰ WIS. CONST. art III, §§ 1–2.

⁹¹ See *id.*; Raskin, *supra* note 82.

⁹² *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

to require registration.⁹³ Some state constitutions also address the rules for balloting, either expressly or by empowering the legislature to act.⁹⁴ Of course, registration and other administrative aspects of voting such as the rules governing the availability of absentee ballots or early voting, the location and number of polling places, or the selection and maintenance of voting machinery can have a direct impact on the right to vote in practice. “Election laws will invariably impose some burden upon individual voters. Each provision of a code, ‘whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual’s right to vote. . . .’”⁹⁵ A federal right-to-vote amendment will likely piggyback on state and local administrative rules, procedures, and structures, as the states and local governments will almost certainly continue their historic role of actually running elections, including elections for federal office. With 186,000 precincts, 8,000 local election offices, approximately 200 million registered voters, and a long tradition of decentralized administration due at least in part to our huge number of local elections,⁹⁶ it is hard to imagine how it could be otherwise. The different federal amendment proposals address the issue of the impact of state administration on the rights of qualified voters differently. The Raskin and Pocan-Ellison proposals do not address it at all, except perhaps by implication in authorizing Congress to enforce the article by appropriate legislation. The Jackson Amendment would have dealt with state and local administration in three ways—in addition to generally authorizing Congressional voting rights enforcement—by mandating same-day registration, explicitly requiring states to abide by Congressionally prescribed election performance standards, and setting a “narrowly tailored to produce efficient and honest elections” standard for federal and state regulations that affect voting rights.⁹⁷ These would effect major changes in registration, the uniformity of election practices, and the judicial review of voting laws.

Third, some of these proposals address very specific issues in addition to the more abstract concept of the right to vote. Much of the Raskin measure deals with voting in federal elections by American citizens who do not reside in states and with the right of candidacy, which is distinct from, albeit related to, the right to vote.⁹⁸ Both the Raskin and the initial version of the Jackson amendment dealt with the selection of and voting by presidential electors.⁹⁹ The Jackson proposal, as just noted, gives relatively detailed attention to election administration as well as to the qualifications for

⁹³ See, e.g., MO. CONST. art. VIII, § 5; N.Y. CONST. art. II, §§ 5–6.

⁹⁴ See, e.g., CAL. CONST. art. II, § 5.

⁹⁵ *Burdick*, 504 U.S. at 433 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)).

⁹⁶ See, e.g., THE AMERICAN VOTING EXPERIENCE: REPORT AND RECOMMENDATIONS OF THE PRESIDENTIAL COMMISSION ON ELECTION ADMINISTRATION 1, 22 (Jan. 2014), available at <http://www.supportthevoter.gov/files/2014/01/Amer-Voting-Exper-final-draft-01-09-14-508.pdf>.

⁹⁷ H.R.J. Res. 28, 108th Cong. (2003).

⁹⁸ See Raskin, *supra* note 82, at 564–66.

⁹⁹ See *id.* at 566, 573; see also H.R.J. Res 28, 108th Cong. (2003).

voting.¹⁰⁰ So, too, many of the state constitutional texts address such issues as absentee ballots, voter registration, and the definition of residency. At the federal level, only the very recent Pocan-Ellison proposal limits itself to simply declaring a right to vote, without more. This might be a strength as it obviates such controversial issues as whether residents of Puerto Rico, Guam, American Samoa, and the Virgin Islands get to vote for President and have voting representation in Congress, as provided by the Raskin proposal¹⁰¹ or whether same-day registration, currently the rule only in thirteen states and the District of Columbia, should be mandatory nationwide.¹⁰² Those provisions make it less likely that such an amendment would be passed by Congress or be ratified by the requisite three-fourths of the states. On the other hand, the Pocan-Ellison Amendment's very succinct approach makes it much less clear what it would accomplish of its own force and raises the prospect that it would be primarily "expressive" without actually expanding the availability of the franchise. Under Pocan-Ellison, most significant enhancements in voting rights would require subsequent Congressional action.

III. HOW WOULD A RIGHT-TO-VOTE AMENDMENT ADDRESS THE PRINCIPAL CURRENT VOTING RIGHTS ISSUES?

The test of whether a right-to-vote amendment is worth the political effort likely to be needed to get it adopted is whether and to what extent it would address our principal current voting rights issues. That would, of course, turn on exactly what the amendment says and, as I have just indicated, recent amendment proposals say very different things. Still, a few general points can be made.

First, it seems very unlikely that an amendment would have an impact on issues that arguably fall within the domain of voting rights¹⁰³ but do not actually involve the rules and procedures for an individual being able to cast a ballot and have it counted in a public election. Partisan gerrymandering, the impact of at-large elections and multi-member districts on minority vote dilution, and the *Shaw v. Reno*¹⁰⁴ doctrine's holding that race-conscious districting is unconstitutional even if intended to promote minority representation¹⁰⁵ would all be unaffected by any of the proposed versions of the amendment. Similarly, Supreme Court decisions that sustained onerous rules that

¹⁰⁰ H.R.J. Res. 28, 108th Cong (2003).

¹⁰¹ See Raskin, *supra* note 82, at 564–67.

¹⁰² See CHA & KENNEDY, *supra* note 53, at 7–9. Notably, the amendment would also prohibit a state which has adopted same-day registration from repealing it, as North Carolina recently did. *Id.*

¹⁰³ See Gardner, *supra* note 18, at 895 (describing the broad scope of claims asserted under the right to vote, including the drawing of district lines, use of single-member districts, and ballot access issues).

¹⁰⁴ 509 U.S. 630 (1993).

¹⁰⁵ See *id.*; see also *Shaw v. Hunt*, 517 U.S. 899 (1996); *Bush v. Vera*, 517 U.S. 952 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995).

make it difficult for independent candidates or minor parties to get on the general election ballot,¹⁰⁶ bar them from cross-nominating major party candidates,¹⁰⁷ or prevent them from challenging a party machine in the election of judicial nominees would also probably be unaffected.¹⁰⁸ Although Professor Raskin has argued that his amendment would make it easier for minor party and independent candidates to get on the ballot,¹⁰⁹ all his amendment does is provide that citizens eighteen years or older are qualified in the jurisdiction in which they reside. That might have the effect of preempting state laws that set different qualifications such as an older minimum age requirement for officeholders. But it does nothing to undermine the authority of the states, upheld by the Supreme Court, to require that candidates or parties demonstrate that they enjoy a significant modicum of support before they can be listed on the ballot;¹¹⁰ to preclude “sore loser” candidates who have run and lost in a party primary from being placed on the general election ballot and bar voters who voted in a party primary from signing the nominating petition of an independent general election candidate;¹¹¹ or to bar a minor party from engaging in “fusion” with a major party by also nominating the major party’s candidate.¹¹² Those laws do not limit eligibility to be a candidate but instead, by regulating the state’s control over the general election ballot, advance what the Court has determined are legitimate state interests. These include: the “important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization’s candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election”;¹¹³ the use of party primaries “to winnow out” candidates¹¹⁴ and thereby narrow the general election field to a smaller number of major contenders; and securing the “stability of their political systems,” including the enactment of “reasonable election regulations that may, in practice, favor the traditional two-party system . . . and that temper the destabilizing effects of party splintering and excessive factionalism.”¹¹⁵ Nothing in any of these proposals, including the Raskin amendment, challenges these decisions or calls into question the Court’s justifications for state regulation.

Similarly, despite the invocation of *Shelby County* as an impetus for an amendment that would provide for stronger federal protection of the right to vote, it does not appear that any of the proposed versions of the amendment would address the issues

¹⁰⁶ See, e.g., *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986); *Storer v. Brown*, 415 U.S. 724 (1974); *Jenness v. Fortson*, 403 U.S. 431 (1971).

¹⁰⁷ *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997).

¹⁰⁸ *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196 (2008).

¹⁰⁹ Raskin, *supra* note 82, at 570–72.

¹¹⁰ *Munro*, 479 U.S. at 189; *Jenness*, 403 U.S. at 431.

¹¹¹ *Am. Party of Tex. v. White*, 415 U.S. 767 (1974); *Storer*, 415 U.S. at 724.

¹¹² *Timmons*, 520 U.S. at 351.

¹¹³ *Jenness*, 403 U.S. at 431, 442.

¹¹⁴ *Storer*, 415 U.S. at 735.

¹¹⁵ *Timmons*, 520 U.S. at 366–67.

at stake in *Shelby County*—the scope of Congress’s authority to define those jurisdictions that could be subject to federal preclearance of voting rules changes, and the preclearance requirement itself.¹¹⁶ *Shelby County* is rooted in federalism concerns about the “equal sovereignty of the states”¹¹⁷ and denying the federal government a “general right to review and veto state enactments before they go into effect.”¹¹⁸ Before *Shelby County*, Congress’s power to require preclearance and define the covered jurisdictions had been rooted in the enforcement sections of the Fourteenth and Fifteenth Amendments.¹¹⁹ In the absence of a provision specifically addressing *Shelby County*’s reasoning, however, it is not clear what the enforcement power of a right-to-vote amendment would add with respect to Congressional power to require preclearance and define covered jurisdictions that these prior grants of Congressional enforcement authority do not currently provide.

Turning to the impact of an amendment on laws that limit the availability of the franchise, none of these versions of an amendment would aid one of the largest groups of people currently denied the vote—resident aliens—and it is unclear what they would do for another large group of the disenfranchised—persons convicted of a felony. In 2012, there were 13.3 million legal permanent residents living in the United States.¹²⁰ Also known as “green card” holders, these are immigrants who have been granted lawful permanent residence in the United States.¹²¹ The vast majority of these legal residents are of voting age.¹²² Like other residents, resident aliens are subject to state and local regulation, taxation, and law enforcement, and depend on states and localities for basic public services, like public safety, sanitation, and public schools for their children.¹²³ Although in the nineteenth century as many as sixteen states authorized aliens to vote, today, with the exception of a handful of school districts that allow alien parents who have children in the local schools, few communities and no states allow

¹¹⁶ See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

¹¹⁷ *Id.* at 2623.

¹¹⁸ *Id.*

¹¹⁹ See *PF Feb. 2014—Voting Rights Act Section 4—Con Position*, EVERYDAY DEBATE (Jan. 26, 2014), http://everydaydebate.blogspot.com/2014_01_01_archive.html.

¹²⁰ See NANCY RYTINA, DEP’T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, ESTIMATES OF THE LEGAL PERMANENT RESIDENT POPULATION IN 2012 (2013), available at <http://www.dhs.gov/publication/estimates-legal-permanent-resident-population-2012>.

¹²¹ *Id.*

¹²² The Census Bureau estimates that twenty-six percent of all noncitizens in the United States are under age thirty-five, and that just twenty percent of that group is under the age of eighteen. In other words, nearly ninety-five percent of noncitizens in the United States are eighteen or older. See YESENIA D. ACOSTA, ET AL., NONCITIZENS UNDER AGE 35: 2010–2012, UNITED STATES CENSUS BUREAU (2014), available at <http://www.census.gov/prod/2014pubs/acsbr12-06.pdf>. While many noncitizens are not legal resident aliens, there is no reason to assume that the age distributions within the two groups differ substantially.

¹²³ See Richard Briffault, *The Contested Right to Vote*, 100 MICH. L. REV. 1506, 1525–26 (2002).

resident aliens to vote.¹²⁴ The right-to-vote amendment proposals would do nothing to change that. Indeed, by consistently defining the right to vote as a right of citizens, the amendments would harden the exclusion of noncitizens by codifying it in the Constitution. To be sure, the Raskin proposal would allow Congress or the states to extend the vote to disenfranchised groups, but neither of the two versions of the amendment introduced in Congress would do so. Indeed, such a right-to-vote amendment could arguably be used as a weapon against the enfranchisement of resident aliens as expanding the vote beyond the groups that enjoy the constitutional guarantee could be treated as “diluting” the votes of the constitutionally protected electorate.¹²⁵

The disenfranchisement of persons convicted of a felony has been a major sore spot in current discussions of voting rights and a frequent target of reform efforts. A “striking” 5.85 million Americans are prohibited from voting due to state laws that disenfranchise citizens convicted of felony charges.¹²⁶ In eleven states, disenfranchisement extends to individuals who have completed their prison sentences and are no longer on probation or parole; these individuals constitute forty-five percent of the entire population denied the vote by felon disenfranchisement laws.¹²⁷ These laws have a disproportionate impact on men and people of color. One in thirteen African Americans of voting age is disenfranchised, and in three states more than twenty percent of Black adults are denied the franchise by these laws.¹²⁸ As previously noted, in *Richardson v. Ramirez*¹²⁹ the Supreme Court rejected the argument that such laws violate the Fourteenth Amendment’s Equal Protection Clause, finding that the language in the Amendment’s “reduction in representation” section—which would reduce representation in the House of Representatives for states that deny the vote to otherwise eligible citizens—excepting from application of the reduction rule laws

¹²⁴ *Id.*

¹²⁵ A version of this issue has come up in the United States in some situations where localities have enfranchised nonresidents or city residents have been allowed to vote in the school board elections of the county in which the city is located even though city children attend city, not county, schools. See Richard Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments*, 60 U. CHI. L. REV. 339, 396–401 (1993). Germany’s highest court has held that state laws granting the suffrage to certain aliens violated the constitutional requirement of rule by “the people” and that “popular sovereignty means rule by citizens alone.” See Gerald L. Neuman, “*We Are The People*”: *Alien Suffrage in German and American Perspective*, 13 MICH. J. INT’L L. 259, 287–88 (1992).

¹²⁶ See JEAN CHUNG, FELONY DISENFRANCHISEMENT: A PRIMER 1 (2013), available at http://www.sentencingproject.org/doc/publications/fd_Felony%20Disenfranchisement%20Primer.pdf.

¹²⁷ *Id.*

¹²⁸ *Id.* at 2. Claims that felon disenfranchisement laws violate the Voting Rights Act have been rejected. See, e.g., *Farrakhan v. Gregoire*, 623 F.3d 990 (9th Cir. 2010) (en banc); *Simmons v. Galvin*, 575 F.3d 24, 41 (1st Cir. 2009); *Hayden v. Pataki*, 449 F.3d 305, 323 (2d Cir. 2006) (en banc); *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1234 (11th Cir. 2005) (en banc).

¹²⁹ 418 U.S. 24 (1974).

that deny the franchise for “participation in rebellion, or other crime,” implicitly authorized disfranchisement for conviction of a crime.¹³⁰ Proponents of a right-to-vote amendment appear to assume that such an amendment would invalidate felon disenfranchisement laws, either of its own force or by empowering Congress to do so.¹³¹ But there is no reason to assume that. None of these proposals addresses felon disenfranchisement. The text of the Fourteenth Amendment, *Richardson*, and the many state constitutional right-to-vote provisions that either expressly disenfranchise persons convicted of a felony or direct or permit their legislatures to do so suggest that within our constitutional culture,¹³² felon disenfranchisement is considered to be consistent with the right to vote. Without a provision expressly addressing the rights of felons, it is quite possible if not likely that a right-to-vote amendment would be construed by the Supreme Court to harmonize with the “participation in rebellion, or other crime” provision of the Fourteenth Amendment and with the *Richardson* decision.

Although it does nothing for resident aliens or persons convicted of a felony, the Raskin version would add some new voters: residents of the District of Columbia would obtain representation in Congress, and Puerto Rico, American Samoa, Guam, the Northern Marianas Islands, and the Virgin Islands would be entitled to participate in the selection of presidential electors.¹³³ That would add roughly 4.4 million people to the population represented in the Electoral College¹³⁴ and almost 600,000 to those with voting representatives in Congress.¹³⁵ In a sense this does not add to the right to vote—presumably voting age citizens in these jurisdictions could already vote in local or jurisdiction-wide elections—but it would provide new representation in the federal government for those otherwise qualified to vote. The Jackson and Pocan-Ellison amendments do not address the question of whether additional nonstate jurisdictions ought to have voting participation in the federal government.

Apart from the Raskin amendment’s attention to the role of nonstate citizens in federal elections, the principal impact of the various right-to-vote proposals would be in addressing the cumbersome and increasingly onerous registration and voting regulations imposed by many states. These rules and procedures—photo identification requirements, proof-of-citizenship requirements, in-person registration requirements or extra rules for mail-in or online registration, limits on volunteer voter registration drives, registration list purges, re-registration requirements for those who move,

¹³⁰ *Id.*

¹³¹ *See, e.g.,* Raskin, *supra* note 82, at 567–70; Nelson, *supra* note 5.

¹³² By contrast, the Supreme Court of Canada has held that the provision of the Canadian Charter of Rights and Freedoms protecting the right to vote required the invalidation of a law denying the franchise to individuals incarcerated in a penal institution for a sentence of two years or more. *See Sauvé v. Canada*, [2002] 3 S.C.R. 519 (Can.).

¹³³ *See* Raskin, *supra* note 82, at 565–67, 573.

¹³⁴ *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012 817 tbl.1313, available at <https://www.census.gov/compendia/statab/2012/tables/12s1313.pdf>.

¹³⁵ *See* Raskin, *supra* note 82, at 564.

limits on the availability of absentee ballots, even antiquated or error-prone voting machinery—all make it more difficult for qualified voters to exercise their right to vote. The Jackson proposal went furthest in tackling these administrative restrictions on voting in mandating same-day registration, expressly empowering Congress to set election performance standards, and directing that all federal and state voting regulations be “narrowly tailored to produce efficient and honest elections.”¹³⁶ That would liberalize the registration process nationwide, authorize Congress to regulate all elections and not just elections for federal office, and require the Supreme Court to scrutinize voting rules more strictly than the current, relatively deferential *Burdick v. Takushi* balancing test that the Court employs for voting rules which impose less than “severe” restrictions on the franchise.¹³⁷

The Raskin and Pocan-Ellison amendment proposals do not directly address the burdens on the vote imposed by state election administration. Neither on its own terms modifies any administrative practices or codifies a more stringent standard of judicial review. But each does include an “enforce-by-appropriate-legislation” section¹³⁸ which would arguably empower Congress to address and displace state and local administrative practices that deny or abridge the right to vote, even in state and local elections. Along with the Jackson proposal, these other right-to-vote amendments would provide support for the argument that voting ought to be seen as a national right, and that, even though elections would likely still be administered at the state and local level, Congress would have the power to regulate the “Time, Place, and Manner” of state as well as federal elections.

That would be a significant step, particularly in light of the Court’s federalism-based endorsement of state control of elections as recently seen in *Shelby County* and *Inter Tribal*. It would provide an important foundation for direct federal regulation of the electoral process and for the preemption of restrictive state laws, rather than limiting Congress to the incentive effects of tying administrative improvement requirements to federal funding or regulating elections for federal office and hoping the states will abide by the same rules for state and local office to avoid the costs of two separate sets of election rules. However, to be effective in reforming state election rules, the Raskin and Pocan-Ellison measures—and even to some extent the Jackson proposal—would depend on subsequent action by Congress. Given the paralyzing effect of the increasingly intense political polarization within Congress, and the likelihood that measures to impose federal voting rules that would displace more restrictive state regulations would trigger conflicting partisan responses, getting Congress to enact such an election administration law might entail almost as strenuous a political effort as getting a right-to-vote amendment passed in the first place.

One irony of this is that the more specific an amendment is—whether in giving the District of Columbia representation in Congress, mandating same-day registration,

¹³⁶ H.R.J. Res. 28, 108th Cong. (2003).

¹³⁷ *Burdick v. Takushi*, 504 U.S. 428, 433–34 (1992).

¹³⁸ See H.R.J. Res. 44, 113th Cong. (2013); Raskin, *supra* note 82, at 573.

or barring disenfranchisement for conviction for a felony—the more likely it will succeed in its intended purpose if ratified; however, those very specifics may be more likely to draw opposition to the measure and prevent its ratification. Conversely, a relatively anodyne measure that simply enshrines the right to vote in the Constitution might be more likely to pass—it is hard to see what the argument on the merits against it would be—but it is likely to accomplish little of its own force and will instead punt the battle over the protection of voting rights against restrictive regulation to Congress or the Supreme Court. Such a right-to-vote amendment would surely and appropriately express the central value of voting in our democracy. But in practice it would do little to “correct” the constitutional gaps, restrictive regulations, and Court decisions that provide much of the current impetus for a right-to-vote amendment. Such an amendment would leave the right to vote close to where it is today—in the hands of state legislatures, Congress, and the courts. If that is the case, one might applaud the idea of such an amendment but be uncertain about putting a lot of effort into getting it passed, and might instead choose to focus on subconstitutional measures—federal, state and local laws and administrative reforms¹³⁹—that could provide voters and potential voters greater benefits in the short term and without the need to amend the constitution.

¹³⁹ See, e.g., CHA & KENNEDY, *supra* note 53 (discussing other methods of voting reform); THE AMERICAN VOTING EXPERIENCE, *supra* note 96 (same).