

THE RIGHT TO VOTE: IS THE AMENDMENT GAME WORTH THE CANDLE?

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The Constitution doesn't guarantee Americans the right to vote. That always comes as a surprise to non-lawyers. But you will search the Constitution in vain for any such guarantee, as the Justices of the Supreme Court cheerily reminded us in *Bush v. Gore*.¹ What the Constitution contains is a series of *thou shalt not*s. Thou shalt not deny the right to vote on account of race² or sex.³ Thou shalt not impose poll taxes.⁴ Thou shalt not prevent eighteen-year-olds from voting.⁵

It's difficult to develop a robust case law when you only know what you can't do. For this reason, several academics and reformers have proposed amending the Constitution to include a right to vote. They argue that a constitutional amendment would produce any number of progressive goodies, including an end to partisan gerrymandering, strict policing of burdens placed on the right to vote, and an expansion of the franchise.⁶

Count me as skeptical. As the Doubting Thomasina in this symposium,⁷ I should emphasize that I would be delighted if a robust right to vote were already enshrined in the Constitution. I would be just as delighted if I possessed a magic wand and could put one there. But in a world without either a textual guarantee or a ready cache of magic wands, I have substantial doubts as to whether the amendment game is worth the candle. It is unlikely that an amendment would achieve what reformers have promised it will achieve. Indeed, even when one looses one's imagination on the broader possibilities associated with amendment, it is hard to imagine we could reap benefits

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¹ See *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam).

² See U.S. CONST. amend. XV, § 1.

³ See U.S. CONST. amend. XIX.

⁴ See U.S. CONST. amend. XXIV.

⁵ See U.S. CONST. amend. XXVI.

⁶ See *infra* notes 31–35, 58 and accompanying text.

⁷ There is, however, a Doubting Thomas. See, e.g., Richard Briffault, *Three Questions for the "Right to Vote" Amendment*, 23 WM. & MARY BILL RTS. J. 27, 28 (2014). It's always a relief to be on the same side of an issue as Richard Briffault, as he is one of the wisest and most sensible members in our field. Our papers were written independently, but there are deep continuities in our analyses.

substantial enough to outweigh the extraordinary costs associated with a successful amendment campaign. The organizational muscle and resources to push for reform are in short supply, and it would be better for those limited resources to focus on reforms that are more discrete but easier to achieve.

Part I explains why I'm skeptical that a right to vote will produce enough change in the system to justify the costs involved, especially when compared to the more conventional and less costly alternatives for effecting change. If an amendment enshrining the right to vote looks anything like its cognates in the Constitution, it will be thinly described, maddeningly vague, and pushed forward by self-interested politicians. At the very least, it's unlikely to persuade judges to mandate large-scale reform. Judges are conservative creatures, at least in the Burkean sense.⁸ They are typically loathe to upend a system based on a vague textual guarantee. And a vague textual guarantee is as good as it's likely to get. Nor is it likely to matter if the amendment gives Congress more room to maneuver given that body's unwillingness to do much with the power it already possesses.

Part II attempts to break out of a cautious law professor mold and find "scope for imagination," to quote Anne Shirley.⁹ If we look past the traditional rationales for amendment, one can imagine at least two other benefits that might come from an effort to amend. The first is that a robust social movement might alter the way that all Americans, including judges, think about the right to vote. If that's the case, things will change for the better, and it won't much matter what the text of the amendment says—it might not even matter if the text of the Constitution is altered in the end. The second is the possibility that amending the Constitution might help lend some coherence to judicial doctrine in the elections arena by providing judges tools they sorely lack in election law. The first offers a substantial payoff but depends on steep odds; the second seems likely to follow from amendment but represents a modest benefit when weighed against the costs of the amending process.

I. PROMISES, PROMISES, PROMISES

A. The Costs of the Amendment Process

Before describing the benefits of constitutional amendment, it's worth briefly making a pedantic point. Amending the Constitution is a heavy lift. Even setting aside the challenges involved in getting Congress to do anything, let alone getting the requisite two-thirds vote to initiate the amendment process, there is the pesky challenge involved in getting three-quarters of the states to ratify it.¹⁰

⁸ For an exploration of the relationship between Burke and judging, see Ernest A. Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 642–86 (1994).

⁹ L. M. MONTGOMERY, *ANNE OF GREEN GABLES* 32–33 (Courage Books 1993) (1908).

¹⁰ U.S. CONST. art. V.

That task looks even more daunting when one acknowledges *why* reformers are seeking an amendment. For years reformers have tried to pass election reform through state legislatures and Congress, encountering one roadblock after another. These are, of course, the same state legislatures and the same Congress that must agree to amend the Constitution. This might lead you to think that talk of amendment is merely empty rhetoric. The usual reaction to roadblocks, after all, is not to attempt a moonshot. But reformers have a much more serious plan. They think—correctly, I suspect—that the right to vote is easier to organize around than piecemeal reform and hope that large-scale organizing will cause the usual roadblocks to fall.¹¹ Nonetheless, the basic point still stands. State legislatures and Congress are formidable barriers to reform no matter what the scale.

Everyone knows this, of course, most especially reformers. But we all have a bad tendency to ignore what I have described elsewhere as the “here to there” problem.¹² There’s a good deal of agreement about what’s wrong with our election system—the “here”—and we’ve got lots of ideas about how to fix it—the “there”. But academics, at least, have a bad habit of announcing their solutions as if we could just add water and produce them. When evaluating the costs and benefits of a given reform proposal, it’s all too easy to think only of the costs associated with implementation, not those associated with passage. If we are going to evaluate whether the amendment game is worth the candle, however, we must think about the resources involved in getting the amendment passed in the first place *and* assess whether those resources might be better directed elsewhere.

When one focuses on the “here to there” question, it’s hard to see why we should put our muscle behind amending the Constitution. If the benefits associated with amendment were substantial, perhaps I’d think differently. But they are not. As I explain in the next section, an amendment isn’t likely to get us much more than we’re already getting from the courts and Congress.

B. The Benefits of Amendment

To see why the benefits of amending are not as substantial as many think, keep in mind that there are, in fact, two stages to the amendment process. Stage 1 involves passing it. Stage 2 involves making good on its promise, either by enforcing its guarantees through the courts or by prodding Congress to use whatever enforcement power it’s been given to pass legislation.¹³ Given the realities associated with Stage 1, my

¹¹ For one such assessment, see ADVANCEMENT PROJECT, IN PURSUIT OF AN AFFIRMATIVE RIGHT TO VOTE: STRATEGIC REPORT JULY 2008 7–8 (2008), available at http://b.3cdn.net/advancement/ae94ee5ad8686f5760_27m6vr0j7.pdf.

¹² HEATHER K. GERKEN, THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT 6–8 (2010) [hereinafter GERKEN, DEMOCRACY INDEX].

¹³ Cf. Joshua Field, *Creating a Federal Right to Vote*, CTR. FOR AM. PROGRESS 5 (June 25, 2013), available at <http://www.americanprogress.org/wp-content/uploads/2013/06/FieldVotingRights.pdf> (acknowledging that “even if a constitutional amendment were to pass, it would not be an instant fix” because reformers would have to enforce the right through litigation).

assumption is that the right to vote will be thinly described, which means that almost every benefit associated with the amendment will *still* have to come from the courts or Congress in Stage 2. Even if these institutions were newly empowered or newly chastened by the passage of an amendment, neither is likely to be forthcoming on this front.

In order to unpack this argument, think about how Stage 1—the amending process—is likely to unfold. The right to vote has generic support among Americans, but that’s plainly not enough to guarantee passage. If shallow popular support were all we needed, we would have had an amendment a long time ago. But the amendment process requires reformers to move from polling to the polls. And that move, in turn, requires organizational muscle, financial support, and boots on the ground.

The moment one thinks about how much organizing and politicking will be necessary to pass the right to vote is the moment one wonders what role political elites will play in the process. The reason we need a right to vote in the first place, of course, is because the foxes are guarding the henhouse. The people who know the most about reform and care the most about reform are the political incumbents who mostly oppose reform. Reform generally gets passed, then, when it is in the interest of one party or another, which often means that the resulting package isn’t entitled to the honorific “reform” in the first place. Indeed, it’s precisely because reformers can’t persuade politicians to do the right thing that they are turning to the amendment process.

Perhaps a robust grassroots movement will emerge and the people will hold elected officials’ feet to the fire until the amendment process moves forward, though I doubt it for reasons discussed below.¹⁴ But the odds are that the amendment process will require the backing of political elites, whose skill at framing issues and putting them on the agenda has led one academic to call them “conversational entrepreneurs” in national debates.¹⁵ At the very least, the amendment process will require the *votes* of political elites.

So what will politicians vote *for*? They are most likely to vote for a thinly described, upsettingly vague guarantee of the right to vote—that’s presumably why most of the concrete proposals take precisely this form.¹⁶ I assume, then, that a viable amendment will include two things. The first is a guarantee of the right, enforceable by the courts. The second is a clause granting Congress discretion to enforce the right as well—the equivalent of Section Five of the Fourteenth Amendment.

¹⁴ See discussion *infra* Part II.

¹⁵ ROBERT W. BENNETT, TALKING IT THROUGH: PUZZLES OF AMERICAN DEMOCRACY 37, 168 n.6 (2003).

¹⁶ See, e.g., H.R.J. Res. 28, 108th Cong. (2003), available at <http://archive.fairvote.org/?page=214>; Jamin B. Raskin, *What’s Wrong with Bush v. Gore and Why We Need to Amend the Constitution to Ensure it Never Happens Again*, 61 MD. L. REV. 652, 694 (2002) [hereinafter Raskin, *What’s Wrong with Bush v. Gore*]; Press Release, Rep. Mark Pocan, Pocan and Ellison Announce Right to Vote Amendment (May 13, 2013), available at <http://pocan.house.gov/media-center/press-releases/pocan-and-ellison-announce-right-to-vote-amendment>.

If the amendment takes this form, the benefits reformers and academics assert we'll reap are anything but automatic. Once a vague guarantee is embedded in the Constitution (Stage 1), reformers will *still* have to turn to legislators and courts to get something done (Stage 2). That's why supporters of amendment face an excruciating tactical dilemma in passing the amendment. The vaguer the text, the more likely it is to pass, but the more work there will be to do post-amendment. Making the text more concrete may make Stage 2 easier, but it will complicate efforts to pass the amendment in the first place. After all, if it were easy to enfranchise former felons or to block voter ID rules or to guarantee a well-administered election system or to end partisan gerrymandering, we would presumably have done it already.

It's possible, of course, that reformers could aim for something more than vague language, either by writing their aims explicitly into the text or creating an amendment history so robust that everyone understands what the right embodies. On this view, reformers would build a big tent of supporters by linking the amendment to lots of different reforms.¹⁷

The problem with this strategy is that it will also generate a big tent on the other side. Push for felon enfranchisement, and you'll run up against the tough-on-crime lobby. Tempt progressives with a ban on voter ID and lose the support of many Republicans. Promise to end gerrymandering and lose the support of most incumbents. That's why a vague textual guarantee is so tempting an option in Stage 1 even if it creates more work for Stage 2.¹⁸

Assuming the right to vote takes the form I suggest, it will open up—or more precisely, expand—two avenues for change: litigation and legislation. While proponents are not always clear about whether they think the courts or Congress will be our source of solace, I've grouped them in what I think are roughly the correct categories.

1. The Litigation Path

As noted above, because the foxes are guarding the henhouse, we often look to the courts to cure what ails our democracy.¹⁹ But courts have offered a fairly tepid

¹⁷ See, e.g., ADVANCEMENT PROJECT, *supra* note 11, at 7 (noting that “pro-democracy forces” working on registration requirements and felon disenfranchisement could be united and suggesting that “civil rights groups seeking stronger protection from discriminatory practices could join with other progressives who are seeking tamper-free voting machines”); Jamin Raskin, *Democratic Capital: A Voting Rights Surge in Washington Could Strengthen the Constitution for Everyone*, 23 WM. & MARY BILL RTS. J. 47, 58–59 (2014) [hereinafter Raskin, *Democratic Capital*] (offering a sample constitutional amendment that he believes will extend the vote to D.C. and the territories, roll back the Supreme Court's campaign-finance jurisprudence, and protect minor parties). Briffault is skeptical about at least one of Raskin's claims. Briffault, *supra* note 7, at 38 (questioning whether Raskin's proposed amendment will aid minor parties).

¹⁸ Richard Briffault raises a similar worry, though he frames it differently. See Briffault, *supra* note 7, at 36, 41.

¹⁹ See *supra* Part I.B.

response to reformers' demands for change. With the exception of one person, one vote, where the Court fundamentally altered the political landscape with its rulings, the Court has done as much to resist change as to facilitate it.

An amendment would change all of that, we are told, because it would force the Court to treat the right to vote as fundamental and thus subject to strict scrutiny.²⁰ Were the Court to apply a rigorous form of strict scrutiny to voting cases, the doctrine would shift in important ways. Reformers suggest, for instance, that courts would strike down voter ID laws, invalidate laws disenfranchising ex-felons, rule that the administrative burdens on voting constitute de facto disenfranchisement, and perhaps even strike down partisan gerrymanders.²¹

Those claims strike me as painfully optimistic. The Court has repeatedly termed the right to vote "fundamental" and insisted that it is entitled to rigorous protection.²² Even those cases that do not term the right "fundamental" laud its deep importance.²³ But the Court has not subjected all burdens on the right to vote to a rigorous form of strict scrutiny.²⁴ And even if the Court felt that strict scrutiny had to be applied in every voting case in the wake of an amendment, strict scrutiny's application would not be fatal in fact. To the contrary, the Court would have every temptation to be almost as passive as it is now. Either the Court would deploy a looser means/ends scrutiny than it deploys in the equality context or it would take an expansive view of what constitutes a compelling state interest.

Take the first category of goodies that progressives insist will result from an amendment—those having to do with the administrative dimensions of voting, such as voter ID and the other bureaucratic burdens placed, deliberately or incidentally, on the right to vote.²⁵ Contrary to the suggestions of those who favor amendment, the

²⁰ See, e.g., ADVANCEMENT PROJECT, *supra* note 11, at 5, 11–12.

²¹ See *infra* notes 31–35 and accompanying text.

²² See, e.g., Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979); Dunn v. Blumstein, 405 U.S. 330, 342 (1972); Oregon v. Mitchell, 400 U.S. 112, 112 (1970); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 627 (1969); Harper v. Va. Bd. of Elections, 383 U.S. 663, 667, 670 (1966); Reynolds v. Sims, 377 U.S. 533, 561–62, 581 (1964).

²³ See, e.g., Burdick v. Takushi, 504 U.S. 428, 433 (1992); Anderson v. Celebrezze, 460 U.S. 780, 786–88 (1983); William v. Rhodes, 393 U.S. 23, 30–31 (1968).

²⁴ See *Burdick*, 504 U.S. at 428; Lassiter v. Northampton Cnty. Bd. of Elections, 360 U.S. 45 (1959); Crawford v. Marion Cnty. Elections Bd., 553 U.S. 181, 189–90 (2008). Richard Briffault's paper offers a helpful survey of the ways in which the Court's doctrine has become less protective of the right to vote rather than more during the last few decades. Briffault, *supra* note 7, at 30–31.

²⁵ Supporters of amendment routinely invoke these problems when making the case for a right to vote. See, e.g., ADVANCEMENT PROJECT, *supra* note 11, at 3–6, 11; Field, *supra* note 13, at 3–4; Jamin B. Raskin, *A Right-to-Vote Amendment for the U.S. Constitution: Confronting America's Structural Democracy Deficit*, 3 ELECTION L.J. 559, 560, 562–63 (2004) [hereinafter Raskin, *A Right-to-Vote Amendment*]; Raskin, *What's Wrong with Bush v. Gore*, *supra* note 16, at 695.

Court cannot realistically subject every administrative decision burdening the franchise to strict scrutiny. Some administrative rules are clearly being manipulated to make it harder for one group or another to vote.²⁶ But almost *every* administrative decision ends up helping some voters and harming others, if only because every administrative decision allocates scarce resources to one place and away from another.²⁷ Given this stubborn bureaucratic fact, the Court will be forced to do what it does in any other administrative context—balance the interests of the state against the interests of voters.²⁸ In such a context, it's unrealistic to think that the Court will apply a robust form of strict scrutiny. When the Court applies strict scrutiny in the race context, it does so because it is highly skeptical of the state's motives. In the context of election administration, however, there will almost always be serious interests on the state's side, even if they are merely conventional bureaucratic interests. As the Court noted in *Burdick v. Takushi*:

[T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently. Accordingly, the mere fact that a State's system "creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny."²⁹

Balancing, then, will be the courts' *modus operandi* after amendment, just as it is now.

That's not to say that you can't eke out wins from the courts. To the contrary, the recent spate of judicial rulings invalidating voter ID schemes confirms this. But note that those wins didn't come from the sudden introduction of a robust right to vote into our Constitution or even an important change in the law. As best we can tell, those victories were won by smart litigating and smart politicking. Inside the courtroom,

²⁶ One need not look past partisan gerrymandering for proof, but examples abound in election administration as well. Perhaps the most egregious example occurred when Ohio's then-Secretary of State, Kenneth Blackwell, insisted that voter registration applications be printed on 80-pound card stock (the type of paper used for wedding invitations). There could be no other justification for this rule save partisan manipulation.

GERKEN, DEMOCRACY INDEX, *supra* note 12, at 17.

²⁷ Richard Briffault raises another challenging wrinkle: the role state and local administrators play in running elections, something that raises additional hurdles to vindicating a robust right to vote. Briffault, *supra* note 7, at 36–37.

²⁸ While the Justices often debate precisely how to strike that balance—as is made clear from the majority, concurring, and dissenting opinions in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008)—no one seriously disputes the necessity of a balancing test in this context.

²⁹ *Burdick*, 504 U.S. at 433–34 (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)) (citations omitted).

advocates offered more and better evidence than was offered in *Crawford*. Outside the courtroom, advocates worked to reframe voter ID as a partisan fight rather than a fight over fraud, thereby pushing judges to evaluate the state's proffered interests with more skepticism. What moved judges, then, was better evidence and better public relations, not better text or better precedent. Both can be attained with targeted campaigns rather than a giant grassroots movement to enshrine the right to vote in the Constitution.

Moreover, to the extent that much disenfranchisement stems from benign neglect—a lack of professionalism, a lack of resources—rather than nefarious discrimination,³⁰ even robust judicial review is unlikely to be of much help. Judges are not well suited to deal with large-scale institutional problems of this sort, as they can't put election systems into receivership. These are bureaucratic problems, and they require bureaucratic solutions. We often think that voting reform comes from outside of the election system—from rules imposed by legislators or oversight imposed by reformers. But the most important levers of change are often election administrators themselves. If election administrators have a strong set of professional norms, agreed-upon best practices, and the technical capacity and resources to anticipate and fix problems in advance, there will be a lot less for legislators and reform groups to do. If you want to spend your resources on reform, it's better to focus on improving the state of election administration than on igniting a large-scale social movement.

Reformers believe that an amendment will not only mitigate burdens on the exercise of the franchise, but also lift restrictions on who may exercise the franchise in the first place.³¹ A robust right to vote, we are told, will ensure that many people who cannot cast a ballot for a congressional representative today will be able to do so in the future, including felons,³² noncitizens,³³ residents of Puerto Rico and other U.S. territories,³⁴ and—most relevant to this symposium—residents of D.C.³⁵

As to the last two groups, a generic right to vote isn't going to help.³⁶ The reason that residents of D.C., Guam, Puerto Rico, et al. can't vote has to do with something *already* in the Constitution's text: the word *state*.³⁷ Rightly or wrongly, most read the

³⁰ See generally GERKEN, *DEMOCRACY INDEX*, *supra* note 12.

³¹ See ADVANCEMENT PROJECT, *supra* note 11, at 11.

³² See *id.* at 14 (“The goal of any movement should push further by expanding the franchise to persons who are incarcerated or serving sentences . . .”); Raskin, *A Right-to-Vote Amendment*, *supra* note 25, at 564; Raskin, *What's Wrong with Bush v. Gore*, *supra* note 16, at 695.

³³ See ADVANCEMENT PROJECT, *supra* note 11, at 12–13.

³⁴ See *id.* at 17; Raskin, *A Right-to-Vote Amendment*, *supra* note 25, at 565–66; Raskin, *What's Wrong with Bush v. Gore*, *supra* note 16, at 695.

³⁵ See ADVANCEMENT PROJECT, *supra* note 11, at 16–17; Raskin, *What's Wrong with Bush v. Gore*, *supra* note 16, at 695.

³⁶ Reformers, much to their credit, explicitly acknowledge this fact and note that either a “maximalist” amendment, to use the Advancement Project's term, or a second amendment would be necessary to achieve this goal. ADVANCEMENT PROJECT, *supra* note 11, at 14, 16–17.

³⁷ For a discussion of this constitutional question, see Raskin, *Democratic Capital*, *supra* note 17, at 51–52.

text to preclude U.S. citizens residing in D.C. or the territories from voting for members of Congress. A generic amendment wouldn't fix that problem.

Nor is it clear that these two groups are well served by tying their fates to a generic right-to-vote campaign in the hope of passing two amendments rather than one. Much depends on whether you think, like most political scientists, that discrete and concentrated interests do better in politics than broad, diffuse interests.³⁸ Moreover, it is not clear that a stirring campaign on the right to vote is going to lend greater moral weight to the claims of U.S. citizens in the territories or D.C. Take the DC Vote movement for example.³⁹ The claims of D.C. voters *already* have a great deal of moral weight; they are United States citizens deprived of representation simply because they live in the nation's capital. What's stopping D.C. residents from voting at this point is a political calculus, not a moral one.⁴⁰

As to other groups—felons and noncitizens—it's just as hard to imagine a generic amendment changing the Court's view on whether these groups may be properly excluded from voting.⁴¹ There are serious arguments for greater inclusion. But until the Court changes its views on ex-felons and noncitizens, these categories will be intuitive enough for the Justices to think that states should have discretion to exclude these two groups from the ballot. Judges already believe that the right to vote is important. If you want judges to invalidate restrictions on ex-felons' voting, you need to change their mind about ex-felons. If you want judges to invalidate restrictions on noncitizen voting, you need to change their minds about noncitizens. Here again, a campaign lauding a generic right to vote seems like an indirect method for addressing the real source of judges' hesitation to do what reformers want them to do.

Finally, some think that a right to vote will push the courts to end partisan gerrymandering.⁴² Here again, the solution is pretty indirect. The source of the Court's hesitation to regulate partisan gerrymanders isn't the absence of a textual guarantee; it's the absence of a manageable standard. Even in the days when the Court believed it

³⁸ For an important assessment of this work and its relationship to constitutional theory, see Bruce Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985).

³⁹ *About DC Vote*, DCVOTE, <https://www.dcvote.org/about-dc-vote> (last visited Oct. 23, 2014) (describing the movement's efforts to secure voting representation in Congress for U.S. citizens in the District of Columbia).

⁴⁰ Many believe, probably correctly, that D.C. is likely to elect two Democrats to the Senate and one to the House—something that might well affect the balance of power between the parties. A desire to maintain balance of political power is largely why, as Jamin Raskin notes in his contribution to this symposium, “Most states have entered the Union as part of a bipartisan and sectional deal, roughly in pairs, like animals boarding Noah’s ark.” Raskin, *Democratic Capital*, *supra* note 17, at 49.

⁴¹ Richard Briffault is of the same view. See Briffault, *supra* note 7, at 42–43.

⁴² See Field, *supra* note 13, at 5 (stating that a “constitutionally guaranteed right to vote” would put “an end to gerrymandering of legislative and congressional districts”). Jamie Raskin also suggests that the amendment and the movement behind it will mitigate discrimination against third parties and independents. Raskin, *A Right-to-Vote Amendment*, *supra* note 25, at 570–72; Raskin, *What’s Wrong with Bush v. Gore*, *supra* note 16, at 695.

was constitutionally authorized to regulate partisan gerrymanders, it gave us nothing but a watered-down, majoritarian standard that was all but impossible to satisfy in practice.⁴³ The Court has been reluctant to go further, however, for prudential reasons. As Justice Kennedy explained in his remarkably forthright concurrence in *Vieth v. Jubelirer*,⁴⁴ “[b]ecause there are yet no agreed upon substantive principles of fairness in districting, we have no basis on which to define clear, manageable, and politically neutral standards” for adjudicating such claims.⁴⁵

As I’ve written elsewhere,⁴⁶ the Court can’t adjudicate partisan gerrymandering claims unless it does what it has always been loathe to do, at least explicitly: choose a theory of democracy. That’s because any assessment of fairness in redistricting requires a yardstick—an account of how much power ought to be accorded to members of a group in a democracy. Here again, a generic right-to-vote campaign won’t provide the Court with that needed yardstick.

An amendment, then, seems unlikely to produce the cures for the problems that reformers have identified. In each of the areas described above, the Court’s reluctance to provide robust protections for the right to vote have stemmed not from the absence of a textual commitment, but from the concerns that will plague the courts even after an amendment is in place. Judges worry about imposing their own conception of democracy on our democracy. They worry about leaving the state adequate discretion to carry out its duties in administering elections. They have strongly held intuitions about who should be included in our political community. Writing something new into the Constitution will not erase those prudential considerations or eliminate those human intuitions. The danger, then, as Richard Briffault pointed out at the symposium, was that litigation in the wake of amendment will simply reproduce the same problems that have always inhered in these cases.⁴⁷

This is not to say that everything will remain the same. I presume that the Court will be a little more skeptical of states’ asserted interests, will scrutinize exclusionary categories a little more closely, and will be a little bolder in thinking through partisan gerrymandering. The question, though, is whether these changes will be enough to justify the substantial amount of time and effort needed to amend the Constitution, or whether, as has already been done with voter ID, it is better to work on changing perceptions issue-by-issue, category-by-category. I would not describe the amendment

⁴³ See, e.g., *Davis v. Bandemer*, 478 U.S. 109, 124 (1986).

⁴⁴ 541 U.S. 267 (2003).

⁴⁵ *Id.* at 307–08 (Kennedy, J., concurring).

⁴⁶ Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503 (2004).

⁴⁷ Richard Briffault, Professor of Law at Columbia Law School, Remarks at the William & Mary Bill of Rights Journal Symposium: Privacy, Democracy, & Elections (Oct. 22, 2010).

process as a blunderbuss to kill a flea. The game that reformers are stalking is big game. But the right to vote may not be the right weapon for the fights reformers want to have.

2. Goodies that Come from Congress

The courts are not the only source of solace for reformers if the Constitution is amended, of course. As I note above, an amendment would almost certainly grant the Congress the power to enforce the right, and some think that such a provision will do much to improve our democracy.⁴⁸

Here again, I have my doubts. Even setting aside *City of Boerne v. Flores*,⁴⁹ which has placed important limits on Congress's enforcement powers,⁵⁰ there is little evidence that Congress's passivity in this arena stems from a concern about a lack of constitutional authority. At the very least, Congress enjoys substantial authority to regulate *federal* elections,⁵¹ which means that Congress enjoys *de facto* authority to regulate state elections, since states can't afford to run parallel processes. Moreover, states are absolutely starved for funds to run their elections, something that gives Congress substantial leverage under the Spending Clause.⁵² Despite this fact, we've seen precious little from Congress outside the civil-rights arena. Even *Bush v. Gore*—a fiasco of sufficient magnitude that it prompted Fidel Castro to offer to send election monitors to Florida⁵³—only prodded Congress to pass the toothless Help America Vote Act.⁵⁴ Congress's failure to regulate thus far stems from a lack of political will, not constitutional power. And here again, it seems likely that targeted mobilization efforts will achieve more reform than a diffuse campaign to push for a generic right to vote.

II. WHAT IF . . .

To evaluate the best case for amendment, however, we have to acknowledge that the courts' and Congress's failure to regulate occurs in *this* political environment. Perhaps the amendment process itself would fundamentally alter the regulatory terrain,

⁴⁸ See, e.g., Raskin, *A Right-to-Vote Amendment*, *supra* note 25, at 563–64.

⁴⁹ 521 U.S. 507 (1996).

⁵⁰ *Id.* at 536. In the wake of *Boerne*, Congress can only enforce a right that the Court is willing to recognize. While it can, to be sure, engage in remedial or prophylactic regulation, enforcement powers will matter less in the future than they have in the past.

⁵¹ Pamela S. Karlan & Daniel R. Ortiz, *Congressional Authority to Regulate Elections*, in NAT'L COMM'N ON ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS 235, 235 (2002).

⁵² U.S. CONST. art. I, § 8, cl. 1.

⁵³ Richard Lacayo, *In the Eye of the Storm*, TIME (Nov. 20, 2000), <http://content.time.com/time/world/article/0,8599,2047379,00.html>.

⁵⁴ Help America Vote Act, Pub. L. No. 107-252, 116 Stat. 1673 (2002) (codified as amended at 42 U.S.C. §§ 15301–15485 (2002)).

either by changing how we, as a society, think about the right to vote—something that should affect both the courts and Congress—or by giving courts better tools with which to decide election cases.

As to the first, a robust social movement in favor of amendment would obviously matter.⁵⁵ Indeed, it might matter even if the movement doesn't ultimately succeed in amending the text of the Constitution. Reva Siegel's important work on the Equal Rights Amendment suggests that even though the amendment itself failed, the movement behind it succeeded in changing the minds of the American people, including American judges.⁵⁶ As a result, judges were willing to move a fair way toward gender equality through case-by-case decisions even without the benefit of an amendment. Think, too, about the social movement for gay rights and same-sex marriage today. The Constitution's text hasn't changed, but the law has.

My worry is that a right-to-vote movement isn't the kind of movement likely to induce a sea of change in American politics. The politics of (mis)recognition fueled the social movements described above. In each instance, a group demanded equality, and the law eventually began to cede it to them. The right to vote certainly resonates for such movements, as Judith Shklar's evocative work makes clear.⁵⁷ People fought and died for the Voting Rights Act, and with good reason. But that movement was part of a larger movement for equality, not just a movement for the right to vote.

The trouble with a push for a right to vote today is that most Americans already possess it. In the 1960s, denying the vote to African-Americans was part and parcel of denying their standing in American society. Some forms of disenfranchisement—notably, restrictions on voting by ex-felons and noncitizens—take a similar form in the eyes of many. But reformers' "patchwork of grievances"⁵⁸ includes many harms that are more diffuse and less personal. You may think it's outrageous that legislators draw their own districts or that burdensome registration requirements make it harder for many to vote or that someone asks for your ID at the polls, but it's often hard to claim that those regulations are aimed at reducing your standing in society. And when such a claim *can* be made, we see people energized and ready to fight the good fight.

Moreover, for most Americans, the problems with our election system seem one step removed from their everyday concerns, like the economy or health care or the education of their kids. And while I believe fervently that process shapes substance—that

⁵⁵ That's why Jamie Raskin, one of the right-to-vote amendment's most ardent and able defenders, is careful to base his claims on both "the amendment and the movement behind it." Raskin, *What's Wrong with Bush v. Gore*, *supra* note 16, at 695; *see also* Raskin, *Democratic Capital*, *supra* note 17, at 59–61. For a description of what such a movement might look like, *see* ADVANCEMENT PROJECT, *supra* note 11, at 18–20.

⁵⁶ Reva Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CALIF. L. REV. 1323, 1323–24 (2006).

⁵⁷ *See generally* JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* (1991).

⁵⁸ I borrow the term from Jamie Raskin. Raskin, *What's Wrong with Bush v. Gore*, *supra* note 16, at 695.

our political structures shape policy outcomes—I'm well aware of how hard it is to make that point to people who aren't immersed in this area. Second-order reform is simply harder than first-order reform.

Again, none of this is meant to suggest that a grass-roots movement is doomed to fail. But at the very least, it will encounter the same organizational challenges that reformers in other areas encounter when they want to fix harms that seem abstract or fall diffusely on the American people. Ask environmental reformers how tough it's been to get climate change legislation through Congress. Ask human-rights advocates how hard it's been to push the United States to join international treaties.

Moreover, even if there were enough grass roots energy behind a generic right to vote to get an amendment passed, I wonder whether that energy will extend to the full "patchwork of grievances" that animate reformers' efforts on this front. I noted above that if you want judges to strike down restrictions on voting by ex-felons or noncitizens, you have to change their minds about ex-felons and noncitizens, not about the right to vote. The same may be true of everyday Americans. Believing more strongly in the importance of the vote won't necessarily translate into a push to extend the right to other groups. It's quite possible that more targeted campaigns might better serve these groups. So, too, it may be that these issues will get resolved not when they are folded into a broader discussion about the right to vote, but when they are folded into a broader discussion about criminal justice or immigration. In either case, in a world with limited resources, it's not clear that people who care about these issues would be wise to spend their political capital on amending the Constitution.

I can think of one other reason to enshrine the right to vote in the Constitution, but this has more to do with the health of the courts than with the health of our democracy. While I'm skeptical that an amendment would result in the many goodies that reformers have promised, I do think an amendment would do something—it would help the courts do a better job of doing what they are doing now.⁵⁹ For better or for worse—and probably for worse—the courts have become the *de facto* referees of election disputes. It's the Star Wars problem. Like Obi-Wan Kenobi, they are our only hope—the only ones, outside of self-interested politicians, who can step in. But while courts inevitably must resolve these cases, they lack the tools to do so. Just take a look at one of the Court's most revered lines of cases—the one person, one vote doctrine. The early cases are largely unmoored from conventional legal analysis. I sometimes joke with my students that the only law in these cases is in the dissents.

That's not surprising given the contents of judges' doctrinal toolboxes. In deciding constitutional cases, judges typically look to the text, history, doctrine, and the structure of the Constitution to guide their decisions. Those tools aren't generally

⁵⁹ Jamie Raskin does not develop the point in this fashion, but he at least insists that a textual commitment would have prevented, or at least mitigated, what he considers to be the fiasco of *Bush v. Gore*. Raskin, *What's Wrong with Bush v. Gore*, *supra* note 16, at 679 (“[T]he constitutional language [on which the Court relied was] so pliable that the *Bush* majority could arrive at the astonishing resolution [that it did.]”).

available to judges in elections cases. We don't have much in terms of constitutional text save a series of *thou shalt not* amendments—the Constitution does not even mention political parties, the engines of any democratic system. Our history, needless to say, is sullied by a pattern of exclusion. There's not a lot of doctrine yet developed. And constitutional structure is also of little help; it does not even tell us who is supposed to decide certain basic questions about our democracy, let alone how they should decide them. It's hard to adhere to the dictates of legal craft when the basic tools of the trade are unavailable. Little wonder, then, that in reading these cases, one sometimes has the feeling that the judges are winging it.

If there's a time when it is important for courts to pay attention to craft, it's when they intervene in politics. The courts can't avoid making decisions that will change political outcomes. When they do so, however, their opinions should measure up to the highest standards. *Bush v. Gore* is just the most prominent example of what happens when judges offer a badly reasoned decision that aligns with their own political preferences. But smaller examples abound. Elections cases—even cases within the same doctrinal line—are rife with contradictions and poor reasoning.⁶⁰

What the courts really need is what David Strauss brilliantly describes as “common law constitutionalism.”⁶¹ In many other areas of constitutional law, courts have begun with a vague constitutional guarantee—the right to free speech, equal protection—and gradually built up a long line of precedent. It doesn't constrain judges entirely, far from it. But it does give their decisions shape and form. Over time, judicial wisdom is layered onto a thin constitutional text. A well-developed case law, in short, helps ensure that judges adhere to the dictates of craft.

For the doctrine to develop, though, we need a starting point, and we don't have one. Without a right to vote enshrined in the Constitution, the courts inevitably look to the First and Fourteenth Amendments. But these amendments capture only a part of what matters in voting. As I've written elsewhere, “[t]oo often courts witlessly apply the case law without thinking about what makes elections distinctive.”⁶² As a result, the case law is a mess—unruly, incoherent, and often ad hoc. Adding a right to vote to the Constitution wouldn't guarantee better elections, but it might well get us better elections *decisions*. Whether or not this value is enough to justify all the organizing and politicking necessary to amend the Constitution, at the very least there is a good chance of a payoff.

⁶⁰ For one set of examples, see Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases: Baker v. Carr and Its Progeny*, 80 N.C. L. REV. 1411, 1434–36 (2002).

⁶¹ David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 884–91 (1996). Strauss, of course, doesn't think common law constitutionalism depends on a text. I'm not insisting here that a text is necessary. My point is simply that an amendment—even a vaguely defined, under-specified amendment—would help jumpstart the process for creating the common law constitutionalism that the Court requires to adjudicate election law cases properly.

⁶² Heather Gerken, *The Missing Right to Vote*, SLATE (June 13, 2012, 10:48 PM), <http://hive.slate.com/hive/how-can-we-fix-constitution/article/the-missing-right-to-vote>.

CONCLUSION

This Essay takes the position that one can favor a right-to-vote amendment without favoring amending the Constitution to add a right to vote. It would be wonderful if the Constitution included a robust right to vote. But given how few resources we have to fight the good fight, I would rather see them directed toward discrete projects with concrete payoffs. The costs of the amendment process are high, and most of the promised benefits seem unlikely to accrue. Even when we look beyond the reformers' wish lists, it's still hard to come up with a good reason to invest the resources necessary to enshrine the right to vote in the Constitution. Targeted litigating and politicking seem more likely to bring about the desired results than a full-fledged social movement. The amendment process might produce a robust shift in how we view the right to vote, and an amendment might produce a welcome improvement in the Court's doctrine. The first involves a big payoff but steep odds; the second involves a small payoff but reasonable odds. If you were in front of the political roulette wheel, is that where you'd place your bet?

