THE FIFTEENTH AMENDMENT AND "POLITICAL RIGHTS"

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Professor Xi Wang has offered us an altogether exemplary paper on black suffrage.[1] Rather than trying to criticize it, I shall attempt to extend it by picking up where he left off. My main text is the Fifteenth Amendment. I would like to suggest that the best interpretation of the Fifteenth Amendment would read it as encompassing a cluster of political rights; the Amendment protects not only the right to vote, but also the right to hold office, the right to be voted for, the right to vote in a legislature, the right to serve on a jury, and even the right to serve in the military.

How, you might ask, do I get such a "political rights" cluster from the words of the Amendment? Of course, we all know that the Fifteenth Amendment talks about the right to vote. But what does one do in a legislature? One *votes* in a legislature. The Amendment is not limited to voting *for* office seekers. By the same token, what do jurors do? Jurors *vote*. Historically, in America, not only have jurors voted, but ordinary voters traditionally have been jurors.

Thus far the textual argument. What about military service? I would argue that we must consider the Fifteenth Amendment and the Second Amendment in tandem. The Second Amendment addresses the right of the people to keep and bear arms and contains the phrase "the people"—a phrase that is used only twice in the original Constitution. In the Preamble, "We the people . . . do ordain and establish this Constitution." Who are *the people*? These are the *political* people, acting politically—voting, altering, and abolishing their government, and ordaining a new Constitution.

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[1] Xi Wang, *Black Suffrage and the Redefinition of American Freedom, 1860-1870*, 17 CARDOZO L. REV. 2153 (1996).

Article I, Section 2 says that "the House of Representatives shall be . . . chosen every second year by *the people*." Here again, "the people" is being used quintessentially to mean political rights holders—voters. Those are the two references in the original Constitution to "the people."

The First Amendment affirms the right of *the people* to assemble. It means, among other things, the right of the people to assemble in convention to alter or abolish the government. The Ninth and Tenth Amendments reserve the rights of *the people* collectively, conjuring up the same political people at the heart of the Preamble. The Second Amendment links the idea of *the people* to the militia. The militia is, in effect, the people in arms. In Republican theory, those who vote traditionally bear arms, and those who bear arms vote. These are just a few textual and structural points.

Now consider some rather broad historical arguments. In the American constitutional tradition, in the absence of a clear statement to the contrary, the qualifications for voting, unless otherwise specified, typically encompass the right to be voted for, the right to hold office, and the right to serve on a jury. So let's take de Tocqueville, for example:

> The jury system as understood in America, seems to me to be as direct and extreme a consequence of the . . . sovereignty of the people as universal suffrage. They are both equally powerful means of making the majority prevail. . . . [T]he jury is above all a political institution; it should be made to harmonize with other laws establishing that sovereignty. . . . [F]or society to be governed in a settled and uniform manner, it is essential that the jury lists should expand or shrink with the lists of voters.[2]

Narrowing the focus, we turn to the history of the Fifteenth Amendment itself. Early drafts of the Fifteenth Amendment in both the House and Senate versions explicitly spoke of the right to vote and to hold office. However, by the time the Amendment came out of a joint committee, all references to the "right to hold office" had been removed. This seems a bit odd, because members had specifically agreed, prior to committee, to include this right. Some have interpreted this as a narrowing of the Amendment—the Amendment, perhaps, was only about voting, and not about the right to be voted for or the right to hold office. But this interpretation does not seem entirely plausible. In fact, it is more likely

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[2] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 273 (J.P. Mayer ed., George Lawrence trans., 1969); *see also id.* at 728 (In general, in America, "all citizens who are electors have the right to be jurors.").

that the language was eliminated because it was superfluous. Not only was it unnecessary, but more importantly, it was undesirable precisely because it implied that the right to hold office needed specification above and beyond the right to vote. And Congressman Butler stated "that the right to elect [someone] to office carries with it the inalienable and indissoluble and indefeasible right to be elected to office."[3] Similarly, Senator Stewart stated that the right to be elected to the legislature was as plainly provided by the Amendment as was the right to vote.[4]

In the months preceding the adoption of the Fifteenth Amendment, a huge debate had erupted over Georgia's recent readmission to the Union. The issue was whether Georgia should be thrown back out of the Union. Georgia, which had just come back into the Union with a newly reconstructed legislature, decided to exclude blacks from holding office. This is the very same Georgia government that had just agreed not to discriminate in the vote on the basis of race. This agreement was part of the Georgia state constitution; moreover, readmission was contingent upon accepting this condition. Georgia said, in essence, "We haven't broken the deal; the deal says that we let blacks vote, and we have. But voting isn't about the right to be voted for; it's not the right to vote *in* the legislature."

The Republicans in Congress were outraged. From their viewpoint, ordinary voters are, in effect, disenfranchised when they are told that they cannot vote for candidates in their first choice. So, indeed, Georgia was again thrown out of the Union and excluded from Congress on the explicit theory that the right to vote encompassed the right to be voted for.

So, in fact, the narrower history of the Fifteenth Amendment does support the idea that voting is understood to encompass the right to be voted for and to serve on office. This congeals with a broader understanding of the distinction at the time between civil and political rights. The Fourteenth Amendment is about civil rights, and the Fifteenth Amendment is about political rights. Where does this key distinction come from? What is the origin of the idea of the political rights cluster of voting, holding office, jury service, and militia service? The cluster is derived, in part, from a constitutional tradition under Article IV—the Comity Clause—which addresses privileges and immunities of citizens in several

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[3] CONG. GLOBE 40th Cong., 3d Sess. 1426 (1869).

[4] *See* Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 229 n.141 (1995).

states. For example, a Massachusetts man is entitled not to be treated as an alien in South Carolina. This means that the Massachusetts man should be treated as a fellow citizen and should be allowed to own real property, a right that aliens lacked in South Carolina. But a Massachusetts man with many "civil" rights in South Carolina cannot participate in four specific activities: (1) voting in South Carolina elections; (2) holding office in the South Carolina legislature; (3) serving on a South Carolina jury; or (4) serving in a South Carolina militia.

Here is another way of viewing the key nineteenth century distinction between civil and political rights. Let's take the category of women. Women are paradigmatic citizens. Unlike free blacks after the *Dred Scott*[5] case, women could sue and be sued in diversity jurisdiction. And if unmarried, they had the right to own real property in their own names, make contracts, speak freely, and so on. But they did not have the right to vote, to hold office, to serve on a jury, or to serve in a militia. Part of the justification for excluding women from the Fifteenth Amendment—under the theory that it was "the black man's hour"—was precisely that women had not served in the Union army. We now begin to see an interesting link in Section 2 of the Fourteenth Amendment between the presumptive militia—male citizens over twenty-one years of age residing in the state—and presumptive voters.

Thus far, I have made some textual points, some broad historical arguments from the founding period, and some narrow historical arguments about the legislative history of the Fifteenth Amendment. Finally, let me close with some post-enactment historical and doctrinal arguments.

The Civil Rights Act of 1875 banned discrimination in jury service on the basis of race, color, or previous condition of servitude. In short, blacks could not be excluded from jury service. This Act is hard to justify on the basis of the Thirteenth Amendment, because in the antebellum era there were free states in which free blacks were nonetheless barred from jury service. And women were free, but not able to serve as jurors. It is also hard to justify this 1875 Act on the basis of the Fourteenth Amendment because *that* Amendment addressed civil, not political, rights. Indeed, the language used in the 1875 Act—"race, color, or previous condition of servitude"[6]—derives directly from *Fifteenth* Amendment language.

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[5] *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

[6] Act of March 1, 1875, ch. 114, 18 Stat. 335 (1875), *codified at* 18 U.S.C. § 243.

The famous *Strauder v. West Virginia*[7] case talks about blacks serving on juries in cases where blacks were the defendants. The Supreme Court has since made clear that, regardless of the parties involved in the case, blacks cannot be discriminated against in jury service. The defendants in the Rodney King case were not black, and discrimination on the basis of race in jury selection was still unacceptable. I suggest that the only way to account for the century of cases, beginning with *Strauder* and ending with cases this decade,[8] is with a *Fifteenth* Amendment theory.

This theory has radical implications for other subsequent constitutional amendments, which extended the right to vote to women in the Nineteenth Amendment, the poor in the Twenty-fourth Amendment, and the young in the Twenty-sixth Amendment. As voting rights have extended to these groups, their rights to serve on juries, to serve in the legislature, to run for office, and to serve in the military must be taken seriously. Women in the draft and women in jury service are both Nineteenth Amendment issues, on this account. And so the story that Xi Wang began continues on today, with remarkably broad implications.

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7 100 U.S. 303 (1879).

8 *See, e.g.*, Georgia v. McCollum, 112 S. Ct. 2348 (1992); Powers v. Ohio, 499 U.S. 400 (1991); Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).