PART IV

Democracy and Civil Liberties

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Voting Rights and the Third Reconstruction

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At the signing ceremony for the Voting Rights Act of 1965, President Lyndon B. Johnson called the act "one of the most monumental laws in the entire history of American freedom."[1] The act is rightly celebrated as the cornerstone of the Second Reconstruction: Within two years of its passage, more African Americans had been added to voting rolls in the South than had managed to register in the entire preceding century. As a result of the original act and its amendments, politics in jurisdictions with significant numbers of black, Latino, and Native American voters has been significantly transformed, and the number of minority elected officials has skyrocketed. But that we *needed* a Second Reconstruction is a disquieting fact about U.S. history: The First Reconstruction, which at one point saw levels of voter turnout and black electoral success that would be the envy of any state today, ended with cynical political compromises, concerted vote suppression, and judicial indifference. It took the civil rights movement of the 1950s and 1960s to resuscitate the Fourteenth and Fifteenth amendments' promise of political integration.

In a number of unfortunate ways, the twenty-first century has seen a reprise of cynical political compromises, concerted vote suppression,

and judicial indifference to voting rights that has undermined some of the promise of the Second Reconstruction. In Georgia, for example, Democratic incumbents of both races agreed to a redistricting plan that decreased the number of districts from which black voters could elect the representatives of their choice in an ultimately fruitless attempt to retain Democratic control of the state legislature. (Indeed, some of the white Democratic legislators whose reelection depended on black support actually switched parties after the election.) In many states, an ostensible concern with fraud has led to the imposition of draconian voter identification requirements that make it difficult for poor, elderly, disabled, and urban voters, who often do not have the requisite documents, to cast their ballots. Despite the conceded lack of any evidence of in-person vote fraud, in 2008 the Supreme Court upheld an Indiana law, finding that it protected public confidence in the election system and downplaying the burdens it imposed. The United States remains the only country in the Western world to disenfranchise millions of its citizens on the basis of criminal convictions, and the courts have repeatedly rejected challenges to this punitive practice, despite public opinion surveys finding that over 80 percent of Americans support allowing offenders to regain their right to vote and that more than 40 percent of the public would also allow offenders on probation or parole to vote.[2]

So, we need a Third Reconstruction. And this time around, two goals must be to transform the constitutional conception of the right to vote and to recognize that voting—while it expresses a critical recognition of individual dignity and full membership in the community—is also a fundamental structural element of our constitutional democracy. While a Third Reconstruction must achieve the full enfranchisement that has so far eluded us, it needs also to look beyond voting as an atomistic, individual act. It needs to consider political structure as well in order to provide fair, effective, and responsive representation after Election Day is over.

The Constitution is honeycombed with provisions regarding political participation; most of the amendments ratified since the original Bill of Rights deal with elections or voting in one way or another. But the most explicit protections of the franchise are phrased in the negative—that is, as prohibitions on particular forms of disenfranchisement. The Fifteenth Amendment, for example, forbids denial of the right to vote "on account of race"; the Nineteenth, "on account of sex"; and the Twenty-Fourth, "by reason of failure to pay any poll tax." Still other constitutional provisions simply bootstrap off of states' decisions about the franchise; for example, the right to vote in congressional elections is

protected for individuals who have "the qualifications requisite for electors of the most numerous branch of the State legislatures."[3] In light of this phraseology, the Supreme Court long ago expressed itself "unanimously of the opinion that the Constitution of the United States does not confer the right of suffrage upon any one."[4] And it reinforced this view in the notorious *Bush v. Gore* decision, with its almost offhanded declaration that "[t]he individual citizen has 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 implement its power to appoint members of the Electoral College."[5]

That the right to vote is expressed in negative terms is not entirely surprising. The entire Constitution is characterized by negative rights. Even the Fourteenth Amendment, the centerpiece of the First Reconstruction, largely acts to restrict government action: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." This conception can work well enough when the right at issue can fairly be framed as a right to be left alone: The right to privacy, for example, can be vindicated in large part simply by telling the government to stay out of our bedrooms, away from our e-mail, and off our property. But a negative conception doesn't work nearly so well when the ability to exercise a right depends on governmental action. A citizen who is handed an official ballot written in a language she does not understand is effectively denied the right to vote. A citizen who lives in a county that uses antiquated voting machines that frequently break down may effectively be prevented from voting by the press of other responsibilities that make it impossible for him to wait in line for hours to cast a ballot.

Moreover, the right to vote, while it is an important symbol of an individual's full membership in our political community, should not be seen as solely an individual right. Voting gets much of its meaning from the way individual votes are aggregated to determine election outcomes. If punitive offender disenfranchisement statutes bar over 1 million black men from voting, their disenfranchisement is not just their own business: It deprives the black community as a whole of political power and can skew election results sharply to the right, creating legislative bodies hostile to civil rights and economic justice for the franchised and disenfranchised alike. If four-hour lines to vote in urban precincts in Ohio deter voters there from casting their ballots, their absence can swing a presidential election, thus impairing the political interests of voters across the country. Although we stand by ourselves in the voting booth casting a secret ballot, no one really votes alone.

What would it mean to develop an affirmative conception of the right to vote, one in which the government has an obligation to facilitate citizens' exercise of the franchise? One concrete context involves voter registration. It's a bedrock principle of the Fourteenth Amendment with respect to other government-recognized or -created entitlements that the kind of notice the government must give someone before it deprives her of life, liberty, or property should be the sort that "one desirous of actually informing" the individual "might reasonably adopt." A "mere gesture" is not enough.[6]

What would happen if we applied this view to voting and treated the right to vote as a kind of liberty or property that was inherent in the very notion of citizenship? When the government really cares about whether a citizen fulfills an obligation—ranging from registering for the draft to staying clean on parole to showing up for jury duty—it acts quite differently than it does with respect to political participation. It makes affirmative efforts to ensure that citizens are informed about their obligations. For example, the government mails jury summonses to individuals' homes with prepaid mailers for returning the forms, and it follows up with individuals who do not respond. It makes the forms for Selective Service registration available at every post office, and it conditions eligibility for government programs, such as student loans, on individuals' registration. By contrast, when it comes to voting, the government relies largely on individual initiative. And some states have created a series of hurdles that make registration difficult and time consuming. For example, one out of six individuals who tried to register to vote in Maricopa County, Arizona (the state's most populous county), had his registration papers rejected for failure to comply with the state's restrictive new voter identification bill.

If we treated voting as an affirmative right of citizenship, this could also help to reframe the way courts, legislatures, and the public think about the relationship between voter participation and vote fraud. Conservatives often claim that there is an inevitable tradeoff between making it easier for citizens to vote and increasing the likelihood of fraud. And the Supreme Court in its opinions seems to see a related tradeoff between government-imposed barriers that preclude some citizens from casting ballots and a sort of disillusionment effect in which qualified voters stay away from the polls because they think their votes are being canceled out by ballots cast by unqualified individuals.[7] While, as a theoretical matter, these tradeoffs might exist, the available evidence suggests that the number of qualified citizens who are barred from the polls by so-called voter integrity measures exceeds many times

over whatever fraud is actually prevented,[8] and there is no evidence whatsoever that voters stay away from the polls because they believe unqualified individuals are voting. (Indeed, there is a far more structural explanation for low turnout: Many voters believe, with a fair amount of justification, that the present system is rigged, through gerrymandering and other incumbent-protective devices, to produce foreordained outcomes. The available evidence shows that turnout is significantly higher in competitive races.)

Just as important as the evidence, though, is the way the potential tradeoff is discussed. In the criminal justice system, where individuals' freedom is at stake, the public understands that protections such as the requirement that a defendant be proven guilty beyond a reasonable doubt before he is convicted may occasionally result in acquitting guilty people. But our system is willing to bear that risk in order to protect the innocent—hence the phrase "better a hundred guilty men go free than that one innocent person be convicted." By recognizing that voting, like physical freedom, is a fundamental constitutional right, perhaps we can move toward a similar perspective with respect to the franchise.

Beyond easier registration, recognizing that voting is an affirmative right and that the government must therefore provide individuals with the means to exercise their right could also serve as a springboard for attacking, both politically and through litigation, states' failure to construct efficient, fair, and reliable voting systems. The "reforms" instituted in the wake of the 2000 election often fail to deliver on this promise. For example, the Help America Vote Act (almost as euphemistic a moniker as the USA PATRIOT Act) requires states to provide provisional ballots to individuals who appear at a polling place only to find that their names are somehow missing from the rolls, but it says nothing about whether states must ultimately count those ballots, and many elections officials have refused to count such ballots even if the voter was entirely qualified to vote but simply showed up at the wrong polling station. Similarly, the electronic voting machines that many jurisdictions adopted in the wake of the butterfly ballot/hanging chad disasters can be difficult for elderly and disabled voters to use and may lack audit trails that allow the public to be confident that votes are being accurately counted.

Finally, remaining mindful that the right to vote is not only an affirmative right but is also a collective right offers at least a starting point for rethinking fundamental questions about who deserves representation and how our representative institutions should be constructed. The Second Reconstruction embraced a commitment to ensuring that members of traditionally excluded racial and ethnic minority groups, such as

African Americans, Latinos, and Native Americans, achieve representation on elective bodies. That representation has been accomplished largely through the use of geographic districts, making lemonade out of the sorry fact that the United States remains deeply residentially segregated. But the use of geographic districts does nothing to enhance the electoral prospects of female candidates or candidates representing numerical minorities who do not live in discrete communities. Moreover, it can make it more difficult for liberal, progressive, and moderate white voters to elect candidates. One of the striking facts about the emergence of democracies in the former Soviet bloc, in South Africa, and in the developing world is that, while all these nations have adopted features of the U.S. Constitution such as a bill of rights and judicial review, *none* has adopted our system of winner-take-all single-member districts as the sole means of electing national and provincial legislatures. Instead, they have all adopted systems that are more explicitly proportional. By their nature, these systems are more democratic, since they leave to voters, rather than to those who draw the districts, the decision about how to affiliate themselves. There's a traditional Korean saying that one should never let one's skill exceed one's virtue. One of the lessons we have learned since the reapportionment revolution that occurred during the Second Reconstruction is that the gerrymanderers' technical skill in manipulating district lines now exceeds the power of our current legal doctrine to assure fair elections. Part of the task of the Third Reconstruction must be to develop new principles that can constrain the blatant manipulation of elections, which has replaced elections where the people choose their rulers with redistricting processes in which the rulers choose their constituents.

While some activists and legislators have suggested the need for a new constitutional amendment recognizing the affirmative right to vote, my own view is that the existing constitutional provisions are sufficient. A better tactic, it seems to me, lies in reviving—as conservatives have done for their own ends—Charles Black's approach to constitutional reasoning from the structure and relationship of constitutional provisions.[9] The federalism revolution of the later Rehnquist Court relied on this approach in using the language in the Tenth and Eleventh amendments to expand state sovereignty and to constrain congressional power to vindicate civil rights. It is time for liberals and progressives to make similar arguments with respect to the contours of the right to vote. The entire Constitution presupposes free and fair elections in which all qualified citizens can participate. The individual amendments that have expanded the electorate should be read to express a more

general principle. The decision in the Seventeenth Amendment to take the selection of U.S. senators away from the state legislatures should be seen as fundamentally inconsistent with a decision to turn the selection of U.S. representatives into the province of the state legislatures, as the current hands-off approach to redistricting has done. The decision in the Twenty-Fourth Amendment to abolish poll taxes should be seen as reflecting a fundamental commitment to eliminating barriers to registration and to ensuring that wealth plays less of a role in our politics.

And even beyond our politics, arguing for an affirmative conception of the right to vote can perhaps serve as an opening wedge in arguing for affirmative conceptions of other rights. In part, if we can persuade the public that the government has a responsibility to enable all citizens, including poor people, people with disabilities, and members of minority groups, to participate fully in the electoral process, then perhaps we can also persuade them that the government has a responsibility to provide all individuals with the tools necessary to participate fully in other arenas of American life. But there is a more concrete way in which voting can contribute to a more affirmative politics. The politics we have is itself a function of who votes. That was the point of Dr. Martin Luther King's great Give Us the Ballot speech in 1957. Once the U.S. electorate is more representative of all its people, the people themselves will push for legislation that more fully serves their needs. One of the great victories of the Second Reconstruction was the way in which the Voting Rights Act of 1965 transformed black Americans' lives. The act's ambition separated it from preceding civil rights laws: It sought to transform black southerners into active participants in the governance process rather than simply recipients of congressionally or judicially conferred fair treatment in some discrete arena.[10] The aim of the Third Reconstruction must be both to preserve the gains the Second Reconstruction produced for racial minority groups and to expand those gains to reach other communities as well.

Notes

1. David J. Garrow, *Protest at Selma: Martin Luther King, Jr., and the Voting Rights Act of 1965*, 132 (1978).

2. See Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 Stan. L. Rev. 1147 (2004); Brian Pinaire, Milton Heumann, and Laura Bilotta, *Public Attitudes toward the Disenfranchisement of Felons*, 30 Fordham Urb. L.J. 1519, 1540 (2003); Jeff Manza, Clem Brooks, and Christopher Uggen, *"Civil Death" or Civil Rights? Public Attitudes towards Felon Disfranchisement in the United States* 21–23 (2003), available at http://www.socsci.umn.edu/~uggen/POQ8.pdf.

3. U.S. Const. amend. XVII; see also U.S. Const. Art. I, § 2, cl. 1.

4. *Minor v. Happersett*, 88 U.S. 162, 178 (1875).

5. 531 U.S. 98, 104 (2000) (per curiam).

6. *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 315 (1950).

7. See *Purcell v. Gonzalez*, 549 U.S. 1 (2006); see also *Crawford v. Marion County*, 128 S. Ct. 1610 (2008).

8. See, e.g., Spencer Overton, *Stealing Democracy: The New Politics of Voter Suppression* (2006).

9. See Charles L. Black, Jr., *Structure and Relationship in Constitutional Law* (1969).

10. See Samuel Issacharoff and Pamela S. Karlan, *Groups, Politics, and the Equal Protection Clause*, 58 Miami L. Rev. 35 (2003); Karlan, *Loss and Redemption: Voting Rights at the Turn of a Century*, 50 Vand. L. Rev. 291, 316 (1997); Karlan, *The Rights to Vote: Some Realism about Formalism*, 71 Tex. L. Rev. 1705, 1719 (1993).